A Balancing Act? The Rights of Donor-conceived Children to know their Biological Origins

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Abstract

Internationally, donor-conceived children’s rights to know their biological origins have been recognised to some extent by the jurisprudence of the European Court of Human Rights (ECHR). With the drafting of the Article 7 (1) of the United Nations Convention on the Rights of the Child (UNCRC), as supplemented by Article 8, such children’s rights to know their biological origins whilst they are children, and not only later as adults, were acknowledged for the first time, though not explicitly.

Anonymous sperm donation is now banned in eleven jurisdictions, including Sweden and England and Wales. By contrast, France still does not expressly protect the right to know, and grants mothers, who have given birth anonymously, the right not to consent to the later release of identifying data, whereas the Federal Government of the United States adopts a non-regulatory approach to this issue with both anonymous and open sperm donation available in the clinics and sperm banks.

This paper focuses on the extent to which arguments in favour of and against the recognition and the scope of this right differ from or accord with international and constitutional legal norms, examining specifically the position of children conceived by the contribution of donor sperm. The paper supports its argument by reference to the approach of comparative and differing legislatures to this issue, in particular, the jurisprudence of the European Court of Human Rights and that of France, Sweden, England and the United States.

After analysing various factors affecting this right from the various perspectives of the parties involved, the paper concludes that this right should be recognised only after careful balancing of competing rights of the would-be parents, the donor and the child. Although the research on open adoption is appealing, some scepticism is called for, not only of the merits of a transfer of the lessons from adoption policy to the position of donor-conceived children, but also of arguments grounded on disclosure as being in the best interests of children, on which topic there has been inadequate research.

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1. **INTRODUCTION**

Donor assisted conception with the use of donated gametes, especially donated sperm,\(^1\) has been in use for a long time, and increasing numbers of children are conceived in this way. It is one of the most ancient forms of fertility treatment,\(^2\) with a tradition of secrecy, and used most commonly to redress problems of a husband’s infertility through the use of donated semen. However, the unabated advance of medical science (exemplified in this case by the development of DNA testing) altered the tradition of secrecy.\(^3\) The relative ease with which it is now possible to discover the identity of a person’s genetic parents, the open policy with regard to adoption, and the development of genetic testing for disorders have all dramatically influenced the development of jurisprudence in favour of the child’s right to know the truth about his or her genetic make-up.\(^4\) Knowledge of one’s biological

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\(^1\) Egg donation is not as successful or as simple a process.

\(^2\) The procedure itself dates from 1884 for the first reported donor insemination case (see Deirdre Madden ‘Legal Issues in Artificial Insemination’ (1996) *Medico-Legal Journal of Ireland* 1).

\(^3\) Since 1985, 11 jurisdictions (all developed countries with democratic governments) have formally prohibited anonymous gamete donation and have established various systems to assist donor-conceived people and even children in discovering the identity of their donors (Eric Blyth and Lucy Frith ‘Donor-conceived people’s Access to Genetic and Biographical History: an Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity’ (2009) *International Journal of Law, Policy and the Family* 174 at 175.) The countries comprise the UK, Austria, Sweden, Switzerland, Norway, Finland, The Netherlands, New South Wales, Victoria and Western Australia (the Australian states) and New Zealand. Generally access to identifying information is limited to offspring only. Austria is the only country which allows children as young as 14 to have access to this information – generally the age is 16 or above, although some countries provide for exception in certain cases such as when a donor-conceived child is born with congenital disability.

\(^4\) T. Freeman and M Richards ‘DNA Testing and Kinship: Paternity, Genealogy and the search for the “Truth” of our Genetic Origins’ in F Ebtehaj, B Lindley...
origins has increasingly come to be regarded as a determinant of identity and kinship relationships⁵ and there is a growing body of research, largely conducted in the adoption field, which supports the argument that knowledge of one’s genetic background is crucial to the development of a sense of identity or self.⁶ The use of rights-based arguments to justify claims that donor offspring should have access to information identifying their gamete donor has become increasingly widespread.⁷ The analogy of adoption has been somewhat controversially⁸ applied to donor conception.

The ability of donor-conceived children to access information about their genetic origins is entirely dependent on their awareness of the nature of their conception. Such children will, in the normal course of life, assume that their ‘social’ fathers are their genetic parents, unless

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and M Richards Kinship Matters (Hart Publishing) (2006) at p 75; see too G Hewitt ‘Missing links: Identity issues of donor-conceived people’ (2002) 9 (3) Journal of Fertility Counselling 14-20. In this study of 47 donor-conceived people who took part in this study, only 3 had not experienced identity issues, which they identified as being a result of their conception through anonymous donor sperm.


⁹ The term ‘social parent’ may be used to describe a genetically unrelated parent but it can also refer more functionally to a person who assumes the care and responsibilities usually associated with parenthood (Leanne Smith ‘Is three a crowd? Lesbian Mothers’ Perspective on Parental Status in Law’ (2006) Child and Family Law Quarterly 231.) Smith describes how parent/child relationships operating within a social family defined by marriage in English law in the past centuries took precedence over genetic ties and it was only in cases where a marriage had already broken down that the courts were prepared to countenance interfering in the presumption of legitimacy in pursuit of the truth
informed otherwise. The onus of revealing the manner of conception will rest on the parents who bring them up, unless such information is included on the child’s birth certificate, or otherwise disclosed by the state. Concerns have been expressed about low levels of parental disclosure. In 2002 research in England indicated that only 5% of parents of donor-conceived children had told their near-adolescent children about their conception origins. In addition, reported disclosure rates are likely to be over-estimates, because some non-respondents do not participate due to privacy issues and fears of revealing their use of donor conception.

Judicial arguments in England and Wales now acknowledge such claims under Article 8 of the European Convention on Human Rights. Furthermore, the United Nations Committee on the Rights of the Child has about parenthood. By contrast, the English judiciary in the twenty first century has generally become a champion for the case of genetic parenthood.

10 The English Government has not followed up on suggestions that ‘by donation’ be added to the birth certificate of donor-conceived children. The Joint Committee in their recommendations on the draft Human Tissue and Embryos Bill expressed deep concern at this omission, commenting that the authorities “may be colluding in a deception” (Recommendation 28 Department of Health (2007) [19], [69]). Whilst acknowledging the importance of donor-conceived children having access to information about their genetic background, the English Government argued that it was preferable that parents were educated about the benefits of telling children that they were donor-conceived rather than forcing the issue through the annotation of birth certificates. However, it has agreed to keep the issue under review (para [70]).


12 Lucy Owen and Susan Golombok ‘Families created by assisted reproduction: Parent–child relationships in late adolescence’ (2009) 32(4) Journal of Adolescence 835-848. An earlier study suggested that few (4%) planned to tell and a further 16% were undecided.


14 Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority [2002] 2 FLR 962 at para [47].
put increasing pressure on national systems which withhold information about the biological identity of the donors from children born by donor conception. However, although legislative changes removing donor anonymity may play a part in facilitating parental disclosure, a parental decision not to reveal the truth to their donor-conceived children is difficult to regulate. Furthermore, such intervention could well constitute a breach of Article 8 rights to privacy of the would-be parents.

This paper, after examining the various perspectives on this issue, argues that, although the data on open adoption appears promising, policy makers should be wary of a wholesale transfer of the analogy of lessons from adoption policy to the world of donor insemination. Before embracing a change in legal policies, there should be some assessment of the adoption analogy and examination of empirical evidence about children born through gamete donation. A balancing approach is recommended which gives adequate weighting to the collective family picture that contributes to the child’s welfare and not just one vista or aspect of it.

II. INTERNATIONAL JURISPRUDENCE: CHILD’S BEST INTERESTS?

Among the international bodies concerned with the enforcement of the


18 C.f. Elizabeth Siberry Chestney 'The Right to Know One's Genetic Origin: Can, Should or Must a State that Extends this Right to Adoptees Extend an Analogous Right to Children Conceived with Donor Gametes?' (2001) 80 Texas Law Review 365. This article describes how recent Tennessee and Oregon statutes granting adoptees right to know their genetic parents have withstood challenges under state and federal constitutions and questions whether a similar right should be granted to children conceived by donated genetic material, arguing that a child's best interest analysis supports the right to discover the identity of their genitors. She asserts that such statutes would withstand constitutional attack in the United States.
international right to know one's origins and the need to produce guidelines are the United Nations Committee on the Rights of the Child (CRC) in charge of monitoring the enforcement of the United Nations Convention on the Rights of the Child and the European Court of Human Rights, in charge of reviewing national decisions based on the ECHR. The paper focuses on the jurisprudence surrounding the interpretation of the CRC and the ECHR and how it has influenced European developments.

1. Interpretation of the United Nations Convention on the Rights of the Child (CRC)

None of the Articles in the Convention specifically promote a child’s right to knowledge of his origins, but the United Nations Committee on the Rights of the Child has interpreted Article 7 as granting such a right. The Committee has consistently criticized nations which do not allow for such a right or allow mothers to give birth anonymously as in France19 and has, on many occasions, made recommendations regarding incomplete national enforcement of the child’s right to know her origins to contracting States Parties.20 However, the Committee does not have enforcement powers and there is no mechanism for individual petition under the CRC. As a result, national authorities have a fair degree of discretion, provided they do not give absolute priority to the parents’ rights, and do not diverge in their interpretations of the scope and degree of the duties

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imposed by the CRC.  

Article 7 states that children should have, “as far as possible”, the right to know and be cared for by their parents. What does the reference to ‘parent’ mean? In the context of the right to know, it would appear to indicate the right to know one’s biological parents. Article 7 should arguably be interpreted broadly; the term ‘parents’ is said to include not only one's social or legal parents, but also one's biological or genetic parents together with one's birth parents.

If Article 7 is read in the light of the rest of the Convention and in particular of Articles 9 and 18 CRC, it would appear to guarantee the child’s right to have a relationship with her parents. What does the right to know and be cared for by one’s parents entail? Does the right to know one’s biological parents imply a right to contact with them as well? Should there be legislation to impose this obligation on family relationships based on a model of scientifically derived genetic truth? Or

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22 According to Article 7:
1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.
is the ‘right to know one’s origins’ simply a fashionable idea fuelled by advances in bio-medical sciences? In such cases, clearly the biological model of parenthood cannot rank as highly as other types of parenthood, such as those arising from active caring, nurturing and love.\(^\text{25}\) Like the right to know, the right to be cared for by one’s biological parents, besides one's social parents, is qualified by the words ‘as far as possible’.\(^\text{26}\)

Article 8 asserts that States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations, as recognised by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. At first, in the drafting process of the CRC, many countries opposed this renewed emphasis on the child’s identity. In terms of a further guarantee of identity rights to children, the adoption of Article 8 was the result of a proposal to deal with the abuses committed by the military regime in Argentina in the 1970s and 1980s during which babies were abducted from their mother at birth, before their births had been registered and were illegally given to couples associated with the armed forces and the police.\(^\text{27}\) Article 8 is clearly inconsistent with secret adoption and protecting the identity of gamete donors. As a result, a political compromise was reached. The provision was retained with the addition of a few provisos such as ‘without lawful interference’, ‘illegally’ or ‘as

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\(^{26}\) Article 7 guarantees both the positive right to registration at birth and the positive right to preservation of these data for later consultation. When the father is unknown, state authorities have a duty to seek his identification.

recognized by law’. ‘Lawful’ is understood to encompass national as well as international legal norms, so that national legal restrictions will not be permitted to contradict international obligations.

Article 8 does not define the concept of identity. It gives three examples of what it includes: nationality, name and family relations. Knowledge of one’s family relations is usually interpreted as going beyond knowing one’s legal parents and extending to biological and birth parents.28 Article 8 implies duties to register and then to preserve the data and make them accessible to the child; it emphasizes positive duties of assistance and refers to states ‘undertaking to preserve’ the child’s identity and calls for appropriate’ measures to re-establish the child’s identity.

Neither Article 7 nor Article 8 settles the issue of which among the child’s interests should prevail in case of conflict between her interest to know her origins and her other interests. Nor do they provide any criteria as to how to balance the child’s interests with those of others in case of conflict. Thus the provisions of the UNCRC relating specifically to the child’s identity do not explicitly protect the child’s individualized identity.29 Moreover, the preamble to the Convention appears to envisage a social family, which nurtures the child’s psychological wellbeing.30 It refers to the fact that member states have accepted the obligations in the UNCRC to take ‘due account of the importance of the traditions and cultural


values of each people for the protection and harmonious development of the child’. Furthermore, Article 20 states that, when considering solutions for children temporarily or permanently deprived of their family environment, or whose best interests demand that they cannot be allowed to remain in that environment, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child’s ethnic, religious, cultural and linguistic background. Finally, Article 5 of the UNCRC states that State Parties shall respect the responsibilities, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom to provide appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention.

Another guiding principle may be found in Article 3 of the Convention on the Rights of the Child (CRC) which makes the child's best interests a primary consideration, imposing limits on the right to know in cases where the information would be blatantly contrary to the child’s best interests. The United Nations Committee on Rights of the Child appears to interpret the CRC as bestowing a clear right to donor-conceived children to knowledge of their genetic identity. If children have a right to know their genetic origins, then from a Hohfeldian perspective, a corresponding duty should rest on the parent or the state to inform the child. That specific right appears to be lacking in the framework of the UNCRC and nor has any convincing research been done to indicate that that the enforcement of such a right is as beneficial for donor-conceived children as it is for adopted children.32

31 Wesley Newcomb Hohfeld Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (1919).

It would appear that, despite the overall interpretation of the United Nations Committee on the Rights of the Children, the formulation of the United Nations Convention on the Rights of the Child (CRC) is open-ended so as to accommodate interpretations which include a child’s socio-legal parentage, religious and cultural identities and further substantive provisions of the UNCRC and other general human rights documents in the United Nations framework fulfill that role.  

2. European Court of Human Rights: A Holistic Approach?

It is arguable that the more balanced approach of the European Court of Human rights is more in keeping with the original intention of the drafters of the Convention in recognising the importance to the child of his or her cultural and social inheritance and the need to preserve the stability of the family. Article 8 para 2 of the European Convention on Human Rights expressly recognises the possibility of restricting the right to know one’s origins when it conflicts with other rights. It also provides the conditions that need to be respected and hence some balancing guidelines. In its

33 Richard J Blauwhoff Foundational Facts, Relative Truths: A Comparative Law Study on Children’s Right to know their Genetic Origins Intersentia (2009) (Antwerp) pp 58. See too the White Paper on Principles concerning the establishment of the legal Consequences of Parentage of the Council of Europe’s Committee of Experts in Family Law (Malta 1997). This White Paper reflects a balance between the biological truth relating primarily to biological and genetic parentage and the social parenthood, reflecting with whom the child is living and who is taking care of him or her (Exception to Principle 7 of the White Paper on Principles concerning the Establishment and Legal Consequences of Parentage (1997). The Commentary specifically states that, in certain situations, the best interests of the child may justify withholding from the child such information or parts of it. The Report on Human Artificial Procreation of the Ad hoc Committee of Expert on Progress in the Biomedical Sciences, affirms that donor anonymity should be maintained (Principle 28) The health of the child is mentioned as a factor that could require a waiver of donor anonymity, but there is no indication of who should disclose the identifying information to the child in these circumstances,
case law, the European Court of Human Rights has confirmed that the child’s right to know his or her identity is not absolute. The determination of the extent of the state's positive duties resulting from the right to know one's origins requires balancing that right with others' rights. When balancing rights, the Court respects the state's margin of appreciation. The latter is particularly broad in matters pertaining to private life and identity. Private life and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. For a long time, the Court respected the national margin of appreciation in the case of violations of the right to know one's origins.\[34\]

The European Court of Human Rights has rejected the claim that the absolute birth secrecy granted in some European countries like France violates Article 8 ECHR.\[35\] In 2003, the French practice was challenged under Article 8 ECHR in the Odièvre decision.\[36\] The Court considered that the possibility that the claimant born ‘under X’ might be provided with non-identifying data, together with the provisions of the legislation of 2002 which authorise an independent council to waive confidentiality with the mother’s consent, were sufficient evidence of France’s efforts to seek a balance and to ensure sufficient proportion between competing

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\[34\] This flexible approach to balancing was evident in 2002 in Mikulic v Croatia [2002] 1 FCR 720. In this case, the mother of a five-year old girl claimed on her daughter’s behalf that the fact that her daughter had no means of forcing a putative father to submit himself to DNA testing violated her right to private life under article 8 of the ECHR since there was no independent authority to which she could submit her claim to have her paternity established. The European Court held that the right to private life should include the determination of the legal relationship between an extra-marital child and her natural father. Croatia needed to put in place procedures to allow her without unnecessary delay to obtain certain knowledge of her personal identity. But the Court stressed that in each case it was important to strike a balance, recognising that the father also has a right to privacy which entitles him not to be forced into DNA testing.


\[36\] Odièvre v France [2003] 1 FCR 621. In that case, Ms Odièvre argued that the French practice of anonymous (‘under X’) birth, and the fact that her mother had been allowed to keep her daughter’s biological identity from her, infringed Article 8 ECHR.
interests.

However, there was criticism expressed within the European Court of Human Rights by the dissenting judges in the Odièvre\(^{37}\) case, who regarded the right to know as entirely sidestepped. The most recent Etcher’s case law on the issue, and in particular Jäggi v Switzerland\(^{38}\) has incorporated the dissenting judges’ approach, was adopted and the court emphasized the importance of the balancing of all rights in presence without any absolute and abstract priority being given to any of them. It would appear that Odièvre\(^{39}\) would no longer be decided along the same lines today and that French law will most probably have to be amended accordingly. The criticism of the United Nations’ Committee on the Rights of the Child has prompted a need to revise this French legal position on accouchement sous X.\(^{40}\)

In Jorgen Nylund v Finland,\(^{41}\) the European Court of Human Rights held that, since it had been the wish of the mother and her husband not to have their family relationship disturbed by a paternity test, it was fully justifiable for the courts of Finland to give more weight to the interest of the child and the family unit than to the interests of the applicant in

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37 [2003] 1 FCR 621. According to the dissenting judges in the case, the contracting parties' margin of appreciation should not be regarded as exempting the Court from its duty to review the way in which the rights had been balanced as it did. Moreover, the problem in the decision lay in the fact that French law, by giving absolute priority to the right of the mother, who retains the right to decide on releasing her information even under the legislation of 2002, precludes any balancing of the interests at stake. As a result, and without acknowledging it, the Court gave the mother's right absolute priority and hence violated the child's right's inner core.

38 Application No 58757/00.


41 Appl No 27110/95, 29 June 1999.
establishing the biological truth, which (he claimed) would be in the
child’s best interest. The European Court of Human Rights suggested that
the child could when aged 15, decide for herself whether or not she
wished to institute paternity proceedings. This case indicates that ten
years ago, the European Court of Human Rights recognised that a child’s
interest may be promoted by legal certainty and the continuity of a stable
family unit, and indicates some doubts about the establishment of the
biological truth of paternity where the child is very young and the search
for paternity emanating from a third party.  

If knowledge of a child’s origins destabilises the child’s family life, which
of the child’s interests takes precedence and must be protected? How is
the interest to be balanced with other interests protected by rights such
as the right to state intervention on the child’s behalf or the right to
parental guidance, both of which may safeguard the child’s emotional
wellbeing? To what extent will the interest of knowing one’s parents be
protected? No answers to these questions are provided in either the
wording of the ECHR or in the interpretation of the UNCRC offered by the
jurisprudence of the European Court. Explicit referrals to identity in these
key international legal documents do not provide a legal framework which
may permit the assertion of an absolute child-constructed right to
identity.  

III. COMPARATIVE LAW POSITION: CONTRASTING APPROACHES


Some examination of comparative law in various jurisdictions is needed to throw further light on the position. France, Sweden, England,\(^{44}\) and the United States have been selected for special examination since they all adopt very different approaches to the issue. The vastly differing legal approaches to the issue of anonymous donation in these countries are integrated into the arguments in favour and against mandatory disclosure and anonymous sperm donation. France has been selected for examination because of its framework that draws on the doctrine of anonymity, respected as an absolute necessity by the French medical profession in accordance with its general duty to maintain secrecy.\(^{45}\) By contrast, Sweden, as the first nation to ban donor anonymity has been selected because of the evidence of a growing culture of openness there.

English\(^{46}\) law has also given adult children conceived by donor-conception the right to acquire the identity of the donor and children over the age of 16 can acquire knowledge of the manner of their birth origins.\(^{47}\) In

\(^{44}\) In England, prior to 1980s there was thus little awareness of donor conception and semen donation was performed without central record keeping or regulation. Until 1977 children born through donor insemination were considered illegitimate and would-be parents had to legally adopt the child. Parents were recommended to tell the child that he or she was adopted rather than conceived through donor insemination and clinicians endorsed this view. The donor was the legal father rather than mother’s husband, but the husband was often recorded as the father on the birth certificate, which was technically a crime (Carol Smart ‘Law and the regulation of family secrets’ (2010) International Journal of Law, Policy and the Family 397). Prior to the medical development of DNA testing to prove genetic parentage conclusively, scientific blood testing had limited ability fully to determine paternity. Even the availability of DNA tests hardly changed the situation since a mother could refuse permission for a blood sample to be taken from her child.


\(^{46}\) Including Welsh law. Wherever English law is referred to, this will include references to Welsh law.

\(^{47}\) s 31ZA of HFEA 1990. Donor-conceived people in England are also currently entitled to information about people who share the same donor: changes under the Human Fertilisation and Embryology Act 2008 grant them the right to
January 2004 those donating eggs, sperm or embryos lost the right to anonymity from 1 April 2005.\textsuperscript{48} Conversely, in the United States, there is no legislation, either at state or federal level that either prohibits or enforces anonymous sperm donation.\textsuperscript{49} The matter is regulated by professional guidelines. These Guidelines formerly recommended that gamete donors remain anonymous,\textsuperscript{50} but, since 2004, the American Society for Reproductive

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ascertain the existence, number, sex and year of birth, and, by mutual agreement, the identity of other individuals sharing the same donor. Donor conceived children aged 16 have the right to know (with the specified person’s consent) whether or not they may be related to a specified person with whom they intend to: (i) enter into a marriage; (ii) enter into a civil partnership; (iii) engage in an intimate physical relationship (s31ZB of HFEA 1990). When aged eighteen, donor-conceived children have the right to obtain identifying information about any donor-conceived genetic siblings who are also aged 18 and who have agreed to identifying information being released to a genetically related sibling requesting such information (s31ZE). Donors also have the right to access non-identifying information about children (including number, sex and dates of birth) conceived through the use of their gametes (s31ZD). The UK’s voluntary register, ‘UK Donor Link’, maintained by a UK charitable body, but with government funding, has operated since April 2004. UK Donor Link uses DNA profiling to confirm matching.
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\textsuperscript{49} The approach of the court taken in Johnson v Superior Court 95 California Report 2d 867 (California District Court Appeal 2000), acknowledged that California possessed a compelling interest in protecting the health and welfare of children conceived by artificial insemination and that at times it becomes necessary for those using artificial insemination to obtain biological and genetic information about their child’s donor. In such cases, the court held that parents of donor-conceived children must have some avenue to uncover the otherwise confidential documentation regarding artificial insemination and ordered the disclosure of information that was necessary and relevant to the litigation to the intended who sought the information.

\textsuperscript{50} American Society for Reproductive Medicine, 1998 as cited by Lucy Frith ‘Gamete Donation and Anonymity: the Ethical and Legal Debate’ (2001) 16 Human Reproduction 818 at 819. Some sperm banks offer a known donor service (J Critser ‘Current Status of Sperm Banks in the United States’ (1998) 13 (Suppl 2) Human Reproduction 55-67). Clinics such as the California Sperm Bank offer a choice of anonymous or open donors and both the donor and the
Medical Ethics Committee endorsed disclosure by parents to their children and encouraged the disclosure to the offspring of the use of donor gametes. 51

The different approaches of these legislatures to this issue will be briefly outlined in this section and then evidence from these four jurisdictions used to support arguments in favour of and against the acknowledgement of an absolute right of the child to know his or her origins.

1. **France: Anonymity rules**

French traditional ‘respect for life’ arguments for the maintenance of accouchement sous X have joined with feminist ‘pro-choice’ arguments in an ‘anti-biological’ opposition to ‘right to origins’, portraying the parent-child relation as a ‘purely social construction’. Historically, in France, maternity and motherhood were regarded as clearly separate and women have had the right to give birth anonymously (accouchement sous X) since the Revolution. 52 Anyone who discloses the identity of a donor registered in France is, in principle, liable to criminal prosecution. 53 The French law does provides for the collection of non-identifying data about couple have the right of choice and are matched accordingly (B Ruby ‘Secrecy and Openness in Donor Insemination: a New Paradigm’ (1993) 2 Politics and the Life Sciences 191-2.)


53 Article L 673-7 French Public Health Code (Code de La Santa Publique). Donors may not gain any financial profit from their donation and anonymity is imposed on both the donor and the child.-(Article L 1211- 5 Code de la Santa Publique (French Public Health code).)

In France, the state has relied on a set of public aims as the legislation seeks to protect the health of the mother and the child at the birth and to prevent abortions, in particular illegal abortions and protect children who might otherwise be abandoned (Richard J Blauhoff Foundational Facts, Relative Truths: A Comparative Law Study of a Child’s Right Know their Genetic Origins Page 394 (2009) (Intersentia) (Antwerp /Oxford/ Portugal).
birth mothers asking for anonymity, and states that these birth mothers may end their anonymity at any time. However, mothers who demand and maintain their anonymity are able to deny access by adopted children to their birth documents. Nonetheless, the French legislature rejected a reform proposal to repeal the laws on secrecy of birth and open records of anonymous birth to all children upon reaching the age of maturity. Children still have no right to access documents revealing the biological mother’s name. Medical professionals are required to document the medical history of the anonymous donor in the prevention of hereditary diseases, but the possibility of establishing any bond between the donor and the donor-conceived child is generally prohibited. However, since the United Nations Convention on the Rights of the Child came into force and under general pressure in Europe, secret birth can be lifted on request of the child and with the assent of the mother. Other non-identifying data have also been made more readily accessible through independent authorities.

2. Sweden and England: banning anonymity but no absolute right

Both Sweden and England are two of the countries that have banned anonymous sperm donation. However, neither country and none of the nine other jurisdictions that have removed donor anonymity have formalised a system for informing the child. Where the child does not suspect his or her circumstances of conception, and no information is provided by the state, no question of tracing one’s genetic origins

54 See the ‘loi Matthéi.’

55 Art.311-19 of the French Code Civil.


57 Art.311-19 of the French Code Civil.

exists. There are thus two steps to disclosure – the parents’ revelation to the children of the manner of their conception and the child’s ability to ascertain the donor’s identity. In 1984 Sweden was the first country to remove the anonymity of sperm donors. A child born in Sweden as a result of donor insemination has the right (but only when ‘sufficiently mature’) to receive information both about the donor insemination and the identity of the donor.

Two decades after the introduction of this legislation, a nationwide Swedish multicentre study on the psychosocial consequences of this legislation for recipients and donors of gametes was initiated in 2005 to investigate recipient couples’ attitudes and behavior regarding disclosure to offspring and others, attitudes towards genetic parenthood and perceptions of information regarding parenthood after donation. With regard to disclosure rates, in 2000, 89% of Swedish parents had not informed their children about the origin of their donor conception. The average age of the children was around 3 and a half at the age the study

59 Openness and truthfulness in family relationships and respect for the child’s autonomy are ethical demands, almost impossible to convert into legal obligations.

was conducted. 41% of the parents intended to tell them at some stage.\textsuperscript{63} However, in a follow up study in 2007, 61% of would-be legal parents were willing to tell their children about the nature of their conception.\textsuperscript{64} The average age of the children at that time was 7 years old. The reasons which parents furnished for the increased openness were the avoidance of an accidental discovery by the child, a general desire for openness and a recognition of the child’s fundamental right to know.\textsuperscript{65} Thus, in Sweden, the rates of disclosure have improved significantly and this may indicate how the removal of anonymity and counselling would appear to have facilitated disclosure.\textsuperscript{66} Further studies are required to follow-up on the parents’ actual disclosure behaviour to their donor-conceived offspring.\textsuperscript{67}

Similarly, in England, donor-conceived adults are also able from 1 April 2005 to obtain identifying information from the Human Embryology and

\textsuperscript{63} See Claes Gottlieb, Othon Lalos and Frank Lindblad ‘ Disclosure of donor insemination to the child: the impact of Swedish legislation on couples’ attitudes’ (2000) Vol 15(1) Human Reproduction pp 2052 -2056. The mean age of the children who had been told was 5.5 and those who might be told in the future was 3.5.


\textsuperscript{65} Parents who had not told their children feared public attitudes and considered AI a private matter. In a Swedish study for 2006, 75% of parents were found to have disclosed or to be intending to disclose the nature of the conception.

\textsuperscript{66} About 90% of participants (in couples receiving anonymous donated gametes) supported disclosure and openness to the offspring concerning his/her genetic origin. Only 6\% of all participants had not told other people about their donation treatment. Between 26 and 40\% of participants wanted additional information.

\textsuperscript{144} A Swedish study found that counseling may help some couples to find the right ‘scripts’ to inform their child about their conception, for example, by referring to the donor as ‘kind man’ who was eager to assist to them in overcoming their problems (A Lalos, C.Gottlieb and O.Lalos ‘Legislated right for donor-inseminated children to know their genetic origins: a study of parental thinking’ (2007) 22 Human Reproduction 1759.)
Fertility Authority from its register supplied to clinics.\textsuperscript{68} From 1 April 2005 clinics have been able to obtain identifying information from all donors.\textsuperscript{69} It will not be until 2023 that the first 18-year-old donor-conceived adults will have the right to establish the identity of their sperm donors.\textsuperscript{70} The inconsistency of information provided by donors in the past is likely to pose problems. Clinics were advised to encourage donors to record as much non-identifying information as they can, but studies done earlier suggested that the information provided on the forms was sparse and most donors prefer not to complete any of the optional parts before the banning of donor anonymity.\textsuperscript{71} English law has increasingly become a champion for the right to know one’s origins and the importance of the

\textsuperscript{68} Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations SI 2004/1511, reg. 2(3).

\textsuperscript{69} T. Freeman, V. Jadva, W. Kramer and S. Golombok ‘Gamete donation: parents’ experiences of searching for their child’s donor siblings and donor’ (2009) 24 (3) Human Reproduction 505-516. This study investigates the new phenomenon of parents of donor offspring searching for and contacting their child’s ‘donor siblings’ (i.e. donor offspring conceived by the same donor) and donor. Online questionnaires were completed by 791 parents recruited via the Donor Sibling Registry; a US-based international registry that facilitates contact between donor conception families who share the same donor. Data were collected on parents’ reasons for searching for their child’s donor siblings and/or donor, the outcome of these searches and parents’ and their child’s experiences of any resulting contact. Parents’ principal motivation for searching for their child’s donor siblings was curiosity and for their donor, it was to enhance their child’s sense of identity. Some parents discovered large numbers of donor siblings. Most parents reported positive experiences of contacting and meeting their child’s donor siblings and donor. This study highlights that having access to information about a child’s donor origins is important for some parents and has potentially positive consequences. These findings have wider implications because the removal of donor anonymity in the UK and elsewhere means that increasing numbers of donor offspring are likely to seek contact with their donor relations in the future.

\textsuperscript{70} Human Fertilisation Embryology Authority 1990, s31ZA-31ZB. Department of Health 2007 CM 7209 Government Response to the Report from the Joint Committee on the Human Tissue and Embryology (Draft) Bill, TSO.

\textsuperscript{71} Since 1991, the HFEA has collected personal information about the donor such as the donor’s name at the time of donation, name at time of birth, place of birth and whether or not the donor has children and some physical characteristics. However, with regard to children conceived after 2004, most of the information is compulsory, unlike before 2005.
Adoptive parents are now encouraged to allow adopted children to know about their biological parents and even to have contact if it is in their best interests and also, after divorce, there is strong encouragement for children to remain in contact with their non-resident fathers.\textsuperscript{72}

Both English and Swedish law still allow an infertile couple, who has used donor conception to conceive, to pass the child off as entirely their own biological child. One research study\textsuperscript{73} indicated that as many as 46\% of donor-conceived children in England grow up assuming that their legal parents are also their biological parents, unless the biological truth evidenced in the appearance of the children is too marked to go unnoticed.\textsuperscript{74}

3. United States: no Federal legislative regulation

The minimal presence of state or federal regulation of the sperm donor industry in the United States has resulted in a patchwork of non-binding professional guidelines and individual clinical discretion.\textsuperscript{75} Clinics such as

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\textsuperscript{74} As in Leeds Teaching Hospital NHS Trust v A [2003] 1 FLR 1091.
\textsuperscript{75} Some states have enacted legislation proclaiming that the donor and child acknowledge that each has no rights or duties with regard to the other (see e.g. Connecticut General Statues s 35A-775; Florida Statute Ann. s742.14; Oregon Rev Stat. Ann. s 109.239; Virginia Code Ann. S 32.1-257). Some states establish that the sperm donor has no rights as father and if the woman is married, her husband this the legal father (see e.g. Ark. Code Ann. s 9-10-201; Illinois Statute Ann. 40/2; New York Domestic Relations Law s 73. Nine States, for example Alaska, Texas, Utah, Washington and Wyoming have enacted the Uniform Parentage Act of 2000 which allows agencies which maintain birth records to release such information to donors, state and federal agencies and courts only (see e.g. Ala. Code ss26-17-101.) Twelve states have adopted the 1973 Uniform Parentage Act calling for confidential donor information, with the records subject to inspection upon a showing of good cause by the court (see
the California Sperm Bank offer a choice of anonymous or open donors and both the donor and the couple have the right of choice and are matched accordingly.\textsuperscript{76} Almost all fertility clinics in the United States now offer detailed, non-identifying information about the potential donor’s characteristics and medical history. An increasing number of clinics offer recipients the choice of gametes from donors who agree to be identified and, in most of these arrangements, the donor signs a contract which allows the clinic to release identifying information to resulting children at a later date, if the child requests it.\textsuperscript{77} However, many fertility clinics routinely destroy documentation once the insemination procedure is complete. The voluntary guidelines implemented by organizations such as the American Fertility Society and the American Association of Tissue Banks do not carry the binding force that strict, mandatory guidelines would impose. The problem with these guidelines and recommendations lies in their voluntary nature and inability to create uniformity within the industry. While most banks tended to comply with professional guidelines, the inconsistencies among sperm banks nationally still exist. Guidelines implemented by professional medical organizations lack the teeth of a penalty for noncompliance.

**IV. JUSTIFICATIONS FOR NON-DISCLOSURE**

A policy of non-disclosure may be perceived as a way of ensuring that, firstly, the non-genetic parent feels connected to the child; secondly, the child develops a strong bond with the one genetic parent; thirdly, the

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appearance of a 'normal' family is maintained; fourthly, the child’s distress and/or disruption of the child’s stability is avoided, and finally, to allow the non-genetic parent’s infertility (a condition that may still carry a negative stigma in some societies) to remain unknown to others. This 'non-disclosure model' weighs up the interests of the would-be parents, the child’s need for stability and normality and the privacy rights of the sperm donor.

1. Focusing on the Would-be Parents
   a) Deliberate Deception or Legitimate Failure to Disclose?
   The failure of parents to inform a donor-conceived child of the method of his conception could be perceived as deliberately deceptive behaviour, especially if children have a fundamental right to know about their genetic origins and to information about essential aspects of their personal history. However, for some parents, secrecy may be considered to be necessary if their society or environment would ostracize them because of their fertility problem or even disapprove of the method of conception of their children. A New Zealand study of attitudes of would-be parents indicated that in the 1970s donors did not

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78 Andrew Bainham ‘Arguments about Parentage’ (2008) 67 Cambridge Law Journal 322 at 335-6 who argues that the law should oblige parents to inform their children that they are donor conceived. He raised this argument before the Joint Committee on the Human Tissue and Embryology (Draft) Bill (2007 at Para 272. The government has undertaken to keep this issue under review. (Department of Health (2007) Government Response to the report from the Joint Committee on the Human Tissue and Embryology (Draft) Bill, TSO.)


80 R. Rowland ' The Social and Psychological Consequences of Secrecy in DI by Donor Programmes (1985) 4 Social Science Medicine 391 at 393.

exist as persons for these parents in their construction of their family: for these couples, the connection of genes to parentage had been artificially constructed by society. For many of them, the act of sperm donation was perceived as nothing more than an altruistic gift or a marketable service such as a blood or organ donation.\textsuperscript{82}

\textbf{b) Parents’ reasons for non-disclosure}

A study of would-be parents’ perceptions of the role of the donor reflected a number of tensions: a gratitude towards the donor, the desire never to encounter the donor, the fear that the child might consider the donor to be the ‘real’ father, a sense of the donor as a kind person, on the one hand, and yet as a constant reminder to the male partner of his infertility and the possible shame associated with it. \textsuperscript{83} In this study, focus on the views of the intended parents indicated that, for many parents, their views were in a sense, ambivalent, dominated by a focus both on their own role as parents and their desire to act in their children’s best interest. Their reasons for not informing their child differed widely.

In other studies, the main reason why mothers have been found to be against disclosure or unsure about telling the truth was because they wished to protect the child and were fearful that other family members might view the child differently if true genetic parentage was widely known. \textsuperscript{84}

\begin{footnotesize}


\textsuperscript{84} Re D (Paternity) [2006] ECHC 3545 (Fam), [2007] 1 FLR 1145.
\end{footnotesize}
damage complex kinship relationships and parents are often afraid of the consequences of such knowledge in the interests of the family. and that it may be a disservice to them to imagine that such sensibilities arise from dubious moral motives rather than a desire to care for and protect their children. Where parents did decide to tell their children about their genetic origins, it was often not from any particular moral code but due to the fact that other family members already knew about the details of the child’s conception. Would-be parents of donor-conceived children are concerned about effects of disclosure on child and many believe that knowing truth has an adverse effect on child. Do we all have a categorical duty to tell the truth? Are we bound up in Kantian philosophy and the stringent theory of morality which allowed for no exceptions to the fact that telling a lie, even a white lie, was a violation of one’s own dignity.

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Smart’s empirical research explores the complex area of family secrets, querying the idea that there is a simple ‘physical’ truth.89 Smart examines the reasons why genetic parentage become so significant as opposed to the way people actually live their lives, indicating that there certain secrets which have always existed in family life.90 Kinship depends upon relationships which are lived and meaningful.91 In the world of natural conception, as well as donor-conceived conception, the reality of family life may be harsh and complex. Revealing to a husband that a child was conceived from a passing affair could mean divorce and poverty for both mother and child: that child may then live a life in the full knowledge of her paternity, but s/he may be materially impoverished and destabilized.92 The interests of truth may have to be sacrificed at times.

89 Carol Smart ‘Law and the regulation of family secrets’ (2010) International Journal of Law, Policy and the Family 397. She points out that there may be other truths, which may be just as or more significant in family life and particularly for a child


91 Dena Shehab, Julia Duff, Lauri A. Pasch, Kirstin Mac Dougall, Joanna E. Scheib and Robert D. Nachtigall ‘How parents whose children have been conceived with donor gametes make their disclosure decision: contexts, influences, and couple dynamics’ (Available online 6 August 2007). Participants were recruited from 11 medical infertility practices and 1 sperm bank in Northern California: one hundred forty-one married couples who had conceived a child using donor gametes (62 with donor sperm, 79 with donor oocytes). Ninety-five percent of couples came to a united disclosure decision, some “intuitively,” but most after discussions influenced by the couples’ local sociopolitical environment, professional opinion, counseling, religious and cultural background, family relationships, and individual personal, psychological, and ethical beliefs. Couples who were not initially in agreement ultimately came to a decision after one partner deferred to the wishes or opinions of the other. Deferral could reflect the result of a prior agreement, one partner’s recognition of the other’s experiential or emotional expertise, or direct persuasion. In disclosing couples, men frequently deferred to their wives, whereas, in non-disclosing couples, women always deferred to their husbands. Although the majority of couples were in initial agreement about disclosure, for many the disclosure decision was a complex, negotiated process reflecting a wide range of influences and contexts.

92 Carol Smart ‘Family Secrets: Law and Understandings of Openness in Everyday Relationships’ (2009) 38 Journal of Social Policy 551. Adoptive parents are now encouraged to view adoption as a way of looking after someone else’s child rather than as a way of acquiring their ‘own’ child. There is also a clear policy in favour of allowing an adopted child to know about their bio-parent(s)
for family stability and security in the interests of the child: legal truth (founded exclusively on genetic testing) can cut through and disrupt these relationships.\textsuperscript{93}

c) Overlooking the Views of ‘Social’ Parents

The potential impact of the disclosure policy on would-be parents was largely ignored during the anonymity debate leading up to the English legislation banning donor anonymity.\textsuperscript{94} These parents may believe that maintaining secrecy, or limiting information about the child’s conception is the safest way to protect the child, themselves, and the extended family. They prefer to tell their child that they were assisted in the conception process rather than that the child’s genetic parents can be identified.

d) Discrimination Against ‘Social’ Parents

For many parents gestating, breast feeding, rearing or nurturing a baby is a biological process of far greater importance than a purely genetic relationship. If the law were to impose a legal obligation on such parents to inform their children of the nature of their conception or ensure that the child is informed by means of information on the birth certificate or a letter when the child reaches a certain age, would this not constitute an unjustifiable invasion of the privacy rights of would-be parents, especially since \textit{fertile parents have been deceiving their child about their conception and even to have contact if it is suitable and feasible. Equally, after divorce in most western societies there is strong encouragement for children to remain in contact with their biological fathers and, where possible, to live with both parents, thus creating a situation where the child may have sets of parents in different households.}

\textsuperscript{93} For example, the wish not to reveal paternity of a child may arise from a mother’s need to protect a child rather than simply to preserve her own reputation (L Turney, ‘Paternity secrets: why women don’t tell’ (2005) 11 \textit{Journal of Family Studies} 227–48.)

for generations?\textsuperscript{95} Would it not be discriminatory to such social as compared with biological parents? This might discourage such couples from seeking assistance by conceiving with the use of donor sperm and lead to a diminution of the number of couples being able to conceive in such a way and deprive of them of a family. It will only be with the gradual acceptance over time of this method of conception and the greater openness generally surrounding such procedures, that such a legal obligation could be created.

2. Focusing on the Donor
a) Protection of the Donor
Gamete donors may intend only to help out sterile couples and hence have a fundamental interest in their own privacy.\textsuperscript{96} Anonymity for the donor may be perceived as a reassurance that his genetic parentage will not be able to be established and protect the donor from possibly disruptive effects on his own marriage or family life – interruptions which he could not have foreseen or ever desired by an offspring eager to know his or her genetic origins.\textsuperscript{97} In countries such as France, the adherence to donor anonymity has not been considered objectionable by French scholar because the gourds, firstly because that secrecy prevents the inevitable drop in the number of donors and resulting increase in reproductive tourism.

The effect of the Internet on this area of the law is profound. The


\textsuperscript{97} K R Daniels and K Taylor K ‘Secrecy and Openness in Donor Insemination’ (1993) 12 Political and the Life Sciences 155 at page 158. The French adherence to donor anonymity has not been considered objectionable by French scholar because the gourds, firstly because that secrecy prevents the inevitable drop in the number of donors and resulting increase in reproductive tourism.
Internet has enabled donor-conceived person to acquire much more direct control over many aspects of information regarding their involvement in the donor gamete process. The Internet and the availability of ‘Direct-to-consumer’ provides the means for the donor-conceived person to find out their genetic heritage and their identity once they are informed of the donor status. The donor is no longer an impassive component of the process. K Donors are now perceived as possibly playing an ongoing role in the donor-conceived person’s life. However, there are dangers with unlimited Internet access without information verification and oversight. This aspect needs to be carefully regulated before the banning of donor anonymity: a system in which the provided information proves to be accurate and easily availability may furnish the best pathway to meeting the needs of all the family, but this needs regulation. Easily accessed information on the Internet has usurped the previous limited information provided about the donor. The information provided on the Internet and social networks is often based on certain biases and may not be what the donor-conceived person wishes to know and may be either too much or insufficient. The donor also may change through time in terms of his personality, interest and capabilities.

b) Detrimental Effects of Removal of Donor Anonymity

In England, the main consequence of legislation requiring donor identity has been an acute shortage of sperm donors and eggs. Donors are reluctant to donate; English clinics cannot meet the demand for

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gametes. There are long waiting lists for patients who wish to get treatment, and increasing use of international travel to avoid the law. The negative impact of the removal of donor anonymity on recruitment of gamete donors has led to pressure to accept donors with suboptimal characteristics and the age profile of the average donor has increased. It has also led to the development of a semen market on the Internet often utilising unscreened semen, which has driven the system underground and to an increase in reproductive tourism with a movement to countries where anonymity still permitted.

Those who oppose disclosure have argued that the fertility industry in the United States would crumble with any changes toward openness in donor information: the desire to sustain a continuous supply of donors is a frequent argument in support of the existing legal position in the United States. Britain's disclosure law did not come into effect

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101 IVF donor sperm shortage revealed’ BBC, 13.08.2006. Available at: http://news.bbc.co.uk/1/hi/health/5341982.stm

102 Two of Scotland’s four NHS clinics suspended services because of a lack of donors. In one clinic, the waiting time for egg donation treatment more than doubled after donor anonymity was removed, from 2 years to at least 5 years. Another clinic had no new donations since the law was introduced and there were between 30 and 40 patients that the clinic was unable to treat. One clinic reported that for the first time they had to start a waiting list for treatment using donor sperm at the end of last year and they were no longer able to offer any treatment until supplies became available. Available at ‘Figures from Scotland’s IVF clinics’, BBC 10.06.2006: http://news.bbc.co.uk/1/hi/scotland/5065050.stm. The total number of sperm donors in the Netherlands decreased from 900 to 300, sperm banks have decreased by half, and the waiting time for treatment surpassed two years in a ten year span.

103 The HFEA register shows that while in 1994-1995 the most common age group for sperm donors was 18-24 years, the figure changed to 36-40 years in 2004-2005. In September 2005, the HFEA issued a report ‘Who are the Donors?’ which showed that modern sperm donors were typically family men aged between 36-40 years, rather than the stereotype of a medical student in their teens or early 20s. Who Are the Donors? An HFEA Analysis of Donor Registrations and Use of Donor Gametes over the Last 10 years. Available at: http://www.hfea.gov.uk/en/1109.html.


105 Pino D’Orazio ‘Half of the Family Tree: A Call for Access to a Full Genetic
until 2005 - anticipation of the legislation contributed to the drop in the number of donors. However, it does seem that attitudes amongst donors are shifting and there is a move towards older, more magnanimously-motivated donors, which will mean that the amount of sperm may plateau out at an acceptable rate - years after the legislation, as happened in Sweden and appears to be happening in England.


106 The Newcastle Fertility Centre reported a drop of 175 donor applicants in 1994 to only 25 applicants in 2003. In 1998 – 9 when confidentiality was assured under England law there were more than 10 00 donor insemination treatments performed; but 2003 when public debate over donor children’s informational rights was in full swing, that number had fallen to little more than 600 (see ‘British Sperm Banks Near Empty’ News 24, September 25 2006, http://www.News24.com/News24/World/News/0,,2-10-1462_2003416,00.html as cited by Ellen Waldman in ‘What do we Tell the children?’ (2006-7) 35 Capital University Law Review 517 at 555. It was reported that the number of donors diminished to less than 100 in the first six months of 2005 after the legislation (see Ed Boyle ‘Supply and Demand CBS News, August 4 2006, http://www.cbsnews.com/stories/2006/08/04/uttm/main1864678.shtml?CMP=LC-SearchStories. However, representatives for the HFEA disputed these figures and pointed out that supply still continues to outstrip demand in some areas of the UK (see ‘Sperm Donor Law ‘Not a Deterrent’ BBC News June 8 2006 at http://news.bbc.co.uk/1/hi/england/5054910.stm.)


108 Ellen Waldman ‘What do We Tell the Children?’ (2006-7) 35 Capital University Law Review 517 at 553, 555. See too the Australian report that the state of Victoria managed to keep the sperm centre operational by focusing on older more altruistic donors, but in New South Wales, there was such a shortage of donors that one clinic apparently flew Canadian student to Australia for complementary vacations, in return for three or four sperm donations a week. (Paul Beauchamp’ Canadians Answer Sperm Call’ Australian July 9 2004. http://www.canadian/crc.com/articles/The_Australian_Canadian_sperm_Donors_09JUL04.htm.)
3. Focusing on the Child

a) Child’s Right to Autonomy

The complex psychology of donor conception requires the child to differentiate between the ‘social’ and the ‘biological’ aspects of parenthood. Historically, there was never this schism, leaving language unprepared for it. While assessing what is best for the child, attention should always need to be directed towards ascertaining the mature child’s viewpoint. A self-constructed identity is the product of the child’s experience rather than an adult imposition or a general approximation of children’s experiences, wishes and feelings. An over-emphasis on genes fails to give full recognition to the bonds that are created by nurture and love from the child’s actual caretakers. It may also lead to a desire to

109 Gillick v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security [1985] 3 All ER 402.


111 In Re J (Paternity) [2007] 2 FLR 26, the 10 year old child believed that mother’s long-term partner was his father. The mother wanted child to be told truth when 16 years old. The psychiatric report - mother a vulnerable woman who would become anxious and upset by telling child and might be precipitated into mental illness by need to tell child. The court held that the impact that the process was likely to have on mother and family outweighed the advantage to the child of learning the truth. However, the longer the child remained ignorant the greater the risk that he would learn truth from someone else which could potentially be very damaging forTelling child after puberty might increase adverse impact ‘Sooner rather than later’ may be better option In Re D (Paternity) [2007] 2 FLR 26other consistently identified certain man as father. Shortly after child’s birth he was placed with woman thought to be the paternal grandmother and RO madeWhen child 10 another man presented himself as child’s real father and made application for Residence, contact and PR ordersChild adamant applicant not his father and refused to participate in scientific testing.Residence application withdrawn but applicant still sought to establish his paternity by scientific testing under s20 of FLR Act 1969.Held scientific testing to be done to establish paternity but staying order in relation to child without limit of time but with liberty to restore.Sufficient grounds to warrant investigation by scientific testing,Child not Gillick competent but able to understand what testing meant and what its conclusion might be. Application challenged emotional security of childS21 – only if in child’s best interests.Court directed applicant provide sampled to be stored Child’s best interest to know truth about paternity and sooner rather than later. But not in his best interest to raise the issue then given turbulence in his life and his resistance to testing.
establish a relationship with donors at the expense of valuable bond of the child’s extended family. There is also the danger that a donor-conceived child might wish to establish a relationship with the donor and be rejected.

What of a child who states that she/he does not wish to know? Should such a child be obliged to know for his or her own long-term good? Finally, at what stage should the child be told? Who determines the age at which it is best to tell a child that she/he was conceived through donation? The argument in favour of disclosure is generally based on the assumption that disclosure is in the best interest of all donor offspring but there is no clear evidence that knowledge of identifying information is required for the well being of donor offspring, or that it is always beneficial. From the viewpoint of some psychologists, a genetic relationship is not essential for good social parenting or the satisfactory and emotional development of children and research has supported this.

b) The Child’s Right To Life

Finally, the value of a right to openness for a child is questionable when a child is never conceived because of the reluctance of gamete donors to

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114 See Re D (Paternity) [2006] ECHC 3545 (Fam), [2007] 1 FLR 1145.

115 Re D (Paternity) [2006] ECHC 3545 (Fam), [2007] 1 FLR 1145.


take on a long-term commitment from which they may reasonably only expect to derive emotional costs rather than benefits.

c) The Analogy of Adoption

The literature on adoption over the past 30 years has emphasized the argument that children have the right to know of their biological origins and, that this knowledge is pivotal to a child’s identity formation and should not be withheld. Those who draw analogies between adoption and donor-conception favour openness and believe that children have a right to and medical need for information about their origins. However, an adopted child’s relationship with her social or legal parents is distinct from a donor-conceived child’s relationship with her birth parents. In adoption proceedings, the state is involved because adoption is, generally in western countries, a state–created and state-controlled procedure: thus the state has an interest in revealing identifying information in adoption cases. By contrast, the medical profession, rather than the state, is generally engaged in the procedure of anonymous artificial insemination. Adoption involves the creation of a family around an

118 Baroness Warnock, Chair of the 1984 Warnock Committee of Enquiry into Fertilisation and Embryology, stated that she supported the view that donor-conceived people should have the same ‘right to know’ as adopted people (Cmdn. 9314, 1984).


122 E Blyth ‘Donor anonymity and secrecy versus openness concerning the genetic origins of the offspring: International Perspectives’ (2006) Jewish
already existing individual, but donor–conception is a form of procreation
where the one parent is already biologically related to the child and the
child’s conception is greatly desired.\footnote{123} The English government’s
insistence on the comparability between adopted and donor-conceived
children is questionable. In this instance, a rights-based approach should
not trump one based on the evidence of would-be parents and
researchers into the welfare of such children.\footnote{124} Although research on
adopted children indicates that such children need information about their
birth from as early as possible, there has been no convincing research to
indicate that it is in the best interests of donor-conceived children to
receive such information and research indicates that children who have
not been told are well-adjusted and generally stable.\footnote{125}

d) Child’s welfare and knowledge of genetic origins

Although findings from research and clinical experience tend to support
the child’s need for openness about factual circumstances,\footnote{126} when it
comes to access to identity, a far more complex picture emerges.
Knowledge of the identity of birth parents can contribute to the child’s

\footnotesize\textit{Medical Ethics} pp 2 at 4. The opposition of the medical profession to openness
may explain why secrecy has been maintained in artificial insemination for much
longer than adoption.

\footnote{123} Jane Fortin \textit{Children’s Rights and the Developing Law} (3\textsuperscript{rd} Edition)
(Cambridge University Press) 473.

\footnote{124} Ilke Turkmendag, Robert Dingwall and Therese Murphy 'The Removal of
Donor Anonymity in the UK: Silencing of Claims by Would–Be Parents' (2008)

\footnote{125} Ilke Turkmendag, Robert Dingwall and Therese Murphy 'The Removal of Donor
Anonymity in the UK: Silencing of Claims by Would–Be Parents' (2008) 22
\textit{International Journal of Law Policy and the Family} 290; Jane Fortin \textit{Children’s
p 473.

\footnote{126} S Maclean and M Maclean 'Keeping secrets in assisted reproduction - The
tension between donor anonymity and the need of the child for information’;
inner development but does not seem to be essential.\textsuperscript{127} from an American DI programme, and indeed may be the first planned releases in the world. As such, it was necessary to develop an identity-release protocol. (Note that the DI youth and donors also participated in the study, but here we present results from the parents only.) This study will be of special interest to DI programmes with an open-identity option and those considering whether or not to offer the option, as well as providing insight into the extent of disclosure among different types of DI recipients (i.e. heterosexual couples, lesbian couples, and single women) and its perceived impact on family relationships. There does not appear to be clear data that non-disclosure to donor-conceived children has been exacting a psychological cost on such children.\textsuperscript{128} A small study was done by psychologists in the United States who examined how donor-conceived children felt about the secrecy surrounding their conception, their problems in obtaining information and efforts to make contact with

\textsuperscript{127} It has been argued that lack of knowledge of one’s origins can be harmful to children (H J Sants ‘Genealogical Bewilderment in Children with Substitute Parents’ (1964) 37 \textit{British Journal of Medical Psychology} 133. Sants considered the psycho-dynamics of genealogical bewilderment in relation to the self-image and the Oedipus complex. He related the bewilderment of the adopted child to the child’s relationship with the mother and the triangular relationship with his or her father and mother and concluded that no child can be severed completely from his roots in the natural family, and that no child should be kept from knowing his or her natural origins.) Although the argument was first raised in connection with adopted children, this was transferred to donor-conceived children (A McWhinnie ‘Families following assisted conception: What do we tell our children” Department of Social work, University of Dundee, Dundee as cited by Lucy Frith ‘Gamete Donation and Anonymity: HT ethical and Legal Debate’ (2001) 16 \textit{Human Reproduction} 818 at 820.) However, since Sants’ research, it has been argued that adoptees in secure home may be eager to know about their ancestor but are not necessarily harmed mentally by not knowing. (Humphrey M and Humphrey H ‘A Fresh Look at Genealogical Bewilderment’ (1986) 59 \textit{British Journal of Medical Psychology} 133-140). It is by no means certain that lack of knowledge of one’s conception or the identity of one’s donor can cause any psychological problems (K R Daniels and K Taylor K ‘Secrecy and Openness in Donor Insemination’ (1993) 12 \textit{Political and the Life Sciences} 155). The recent arguments in favour of greater openness are not based on the best

\textsuperscript{128} Ellen Waldman ‘What do We Tell the children?’ (2006) 35 \textit{Capital University Law Review} 517 at 519-520.
the genetic parent. This study concluded that, since such children felt alienated from their families, anonymous donation had a very negative effect on the donor offspring and there was a need to move towards openness in this area of the law. However, only disenchanted donor-conceived children were contacted, rather than a random sample and only sixteen people completed the study. More useful are the controlled studies done in Europe. Overall, family relationships within such

129 A J Turner and A Coyle ‘What does it mean to be a Donor Offspring? The identity Experience of Adults conceived by Donor Reproduction’ (2000) 15 Human Reproduction 2041. In this study, participants were recruited from donor conception support networks in the United Kingdom, United States, Canada and Australia. The participants were required to complete a questionnaire, which reported feelings of rejection by and distance from their would-be father. The participants reported that the discovery of their donor offspring status was horrifying to them and a blow to their sense of self; they felt a powerful desire to know more about their biological donors and a feeling of loss that they did not know their genetic father.


132 See S Golombok et al ‘The European Study of Assisted Reproduction Families: Family Functioning and Child Development ’ (1996) 11 Human Reproduction 2324 at 2324. Initially this study was based in the United Kingdom where a total of 184 families participate including all donor-conceived children whether by egg or sperm and adoptive children. The study then expanded to include families from the Netherlands, Spain and Italy. Which doubled the size of the investigation of which 111 were children from donor insemination. The parents of children conceived via donor insemination obtained higher ratings for maternal and paternal warmth and emotional involvement with their child than did parents of children conceived naturally. Furthermore, the quality of the relationship between donor insemination father and their children was not affected by the lack of a genetic tie. These children had high self-esteem and strong emotional attachment towards their would-be parents. There was no evidence of psychological disorder and their perceptions of their relationship with their parents were similar to those of naturally conceived and adopted children, but c.f. Institute for American Values, ‘Daddy’s Name is Donor: a New Study of Young Adults Conceived through Sperm Donation’ (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf which found that young adults conceived through sperm donation are ‘hurting more, are more confused and feel more isolated from their families (at page 7). It was significant that over half of these children were not born into married heterosexual couples.
donor-conceived families were found to be stronger than those within naturally conceived families and their mental health and development of the donor-conceived children to be no different from that of their peers in natural families. 133 Such children were reassessed in adolescence. 134 In this group, nearly 70% of parents had decided not to inform their children about their origins. Research compared the socio-emotional function and the quality of the parental relationship with donor-conceived children who had been told and those who had not been told of their donor status. Children in both groups were doing equally well in term of school performance, confidence and peer relationships, but the groups who had been told about the use of a donor reported fewer child-mother disputes than those who had not been told. 135 However, donor-conceived children who had not been told were still doing well emotionally and socially and did not appear to be at all damaged by the nature of their origins, although not as well as those who had been told in terms of their relationship with their mother. 136 This set of results was a little

Research done on donor-conceived children born into such families finds them to be generally well-adjusted (see Susan Golombok et al 'Families with Children Conceived by Donor Insemination: a Follow up at Age Twelve' (2002) 73 Child Development 952 at 962.)

133 See Ellen Waldman in 'What do We Tell the Children?' (2006-7) 35 Capital University Law Review 517 at 541.


136 See Emma Lycett et al ‘Offspring Created as a Result of Donor Insemination: A study of Family Relationships, Child Adjustment and Disclosure’ (2004) 82 Fertility and Sterility 172. In this study in the United Kingdom, 18 families were inclined towards disclosure (p 173). This study did disclose that non-disclosing mothers reported more conflict and less confidence with their children (p 175-6.) But this was not evidence of any sort of dysfunctionality in the family, which was generally well adjusted. In non-disclosure families the relationship between children and parents was found to be still within a functional and normal range.
unreliable, as only 8 sets of families had informed their children. Another study to examine whether disclosure of the identity of the donor affected parental bonding found that among 184 families, there was no evidence that non-disclosure was harmful for family relationship or a symptom of family problems.\textsuperscript{137} What this research indicates is that donor-conceived children, who are unaware of their donor status, are flourishing within their families and there is no reason to be concerned for their welfare.

Legislatures need to assess carefully the risk of compulsory disclosure on such families. **SEE ENGLISH CASES?** The next section of this paper aims to assess fully the nature of the child’s right to know his or her biological origins and the advantages of openness and disclosure to such a child.

V. JUSTIFICATIONS FOR DISCLOSURE

1. The Importance of Genes

Advances in decoding the human genome have increased the accessibility of comprehensive genetic testing. Donated gametes, particularly in the United States, are usually screened for a great variety of hereditary diseases and characteristics.\textsuperscript{138} Accurate medical history is often important in preventative and diagnostic treatment.\textsuperscript{139} Specific


\textsuperscript{138} See Michelle Dennison 'Revealing your Sources: the Cases for Non-Anonymous Gamete Donation (2007/8) 21 *Journal of Law and Health* page 1 at page 14. A number of countries, including those that still allow anonymous donation, have maintained national registries of donors that serve as a mechanism for tracking a donor should the child inherit a disease and the United Kingdom has maintained a national registry since 1991 although donor anonymity was only removed in 2005.

\textsuperscript{139} However, in the United States many fertility clinics routinely destroy documentation once the insemination procedure is complete. The voluntary guidelines implemented by organizations such as the American Fertility Society and the American Association of Tissue Banks do not carry the binding force that
information brings a degree of certainty about future ill health or even the mode and manner of one's own death and access to donor information may provide the donor child with a complete genetic and medical history to make health decisions.\textsuperscript{140} It has been argued that donor anonymity has ignored the need for genetic information and has not focused on the personal and psychological issues of the child.\textsuperscript{141} It is also argued that the lack of mandatory testing and screening of donors and the lack of general regulation and control of this process at the Federal level in the United States has led to the position where the assisted reproduction industry has shown that it is incapable of tackling the issues of donor anonymity and access to genetic information through self-regulation.\textsuperscript{142}

Although some states have enacted legislation that will permit donor-conceived children to obtain gamete donor information on court order, based on satisfactory showing of “good cause” or a similar standard,\textsuperscript{143} strict, mandatory guidelines would impose. The problem with said guidelines and recommendations lie in their voluntary nature and inability to create uniformity within the industry. While most banks tended to comply with professional guidelines, the inconsistencies among sperm banks nationally still exist. Guidelines implemented by professional medical organizations lack the teeth of a penalty for noncompliance.\textsuperscript{140} In the United States, clinics are required to screen for several communicable diseases but are otherwise largely unregulated. The government’s apparent lack of interest in the industry has allowed individual clinics to impose their own regulations for screening standards, the number of donations per donor, recipient age limits and price. Five of the largest sperm banks in the World are based in the United States and rely on voluntary guidelines. Regulations require screening of cell and tissue donors for risk factors for, and clinical evidence of, relevant communicable diseases.\textsuperscript{141} Pino D’Orazio ‘Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination’ (2006) 2 Journal of Health & Biomedical Law (2006): 249-276 at 250.\textsuperscript{142} Pino D’Orazio ‘Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination’ (2006) 2 Journal of Health & Biomedical Law (2006): 249-276 at 250.

it is arguable that the strides that continue to be made in genetic science demand a system where an individual should not have to wait for an illness to have access to a proper genetic history. According to this view, states should address the rights of the growing population of donor offspring, and implement provisions to guarantee the documentation, preservation, and disclosure of donor information and implement some means of informing such children that they were conceived by sperm, embryo, or egg donation, even though their parents may not intend to do so. It is also arguable that the benefits of mapping the human genome depend not only on people's individual genotypes and raw genetic data, but also on the characteristics that genes produce. For example, it may be necessary to know not only that a person has a certain gene makeup, but that their father also had this genetic makeup, and developed bowel cancer at 50. This line of argument maintains that, unless donors' anonymity is lifted, it may be impossible for descendants to acquire this knowledge.

2. Lack of regulation leads to dangerous ‘free for all’?

The United States Federal Government’s apparent lack of regulation of the industry has allowed individual clinics to impose their own regulations for screening standards, the number of donations per donor, recipient age limits and price. No state or federal law limits the number of donations that must assess the interest of the parties to decide what metes the “good cause” standard, which would require disclosure and determine what information should be disclosed.


145 In the United States, federal regulation of assisted reproduction has been at best inactive. No statutory attention has been focused on the health of the donor or a donor offspring’s rights to obtain information about the donor. About eighteen states provide donor offspring with the right to access donor information through a showing of good cause. The “good cause” standard was codified in the Uniform Parentage Act.

per donor, though some clinics do so voluntarily. There is no legislation to impose age or health qualifications on recipients, regulate advertisement, limit the price for donations, or constrain the grounds on which recipients can choose donors. Only a handful of private and government studies have actually analysed the artificial insemination industry, and these studies have exposed difficulties in the areas of genetic screening and medical record keeping. Fertility clinics do test for genetic defects in donor samples despite the absence of mandatory national screening standards, but, while most sperm banks tend to comply with professional guidelines, inconsistencies among sperm banks nationally still exist, although most physicians favour the implementation of national standards for donor screening and some sperm donation agencies require donors to be between the ages of 21 and 40, and require sperm donors to undergo screening.

A major drawback of the United States’ lack of regulation is that there is no way of knowing exactly how many children are born as a result of one

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147 The voluntary guidelines implemented by organizations such as the American Fertility Society and the American Association of Tissue Banks do not carry the binding force that strict, mandatory guidelines would impose. The American Fertility Society recommends genetic screening for high-risk donors and recommends access to a donor’s non-identifying genetic information upon the request of the donor child. Additionally, the Ethics Committee of the American Society for Reproductive Medicine has advised sperm clinics to take steps in anticipation that donor children will seek information about their donors in the future. The American Association of Tissue Banks recommends screening donors for certain medical conditions that “present contraindications for donation.

148 80% of the world’s largest sperm banks are based in the United States and rely on voluntary guidelines. The Federal Government has passed regulations requiring screening of cell and tissue donors for “risk factors for, and clinical evidence of, relevant communicable disease agents and diseases. (See Informing Offspring of Their Conception by Gamete Donation: Report by Ethics Committee of the American Society for Reproductive Medicine, 81 Fertility and Sterility no.4, 527, at 527-31 (March 2004)).

149 Clinics in North America generally screen for HIV and STDs, and genetic disorders.

particular person's sperm donation. A sperm sample from the more attractive and appealing donors may be used to inseminate a greater number of offspring.\textsuperscript{151} The number of donees potentially affected by an undetected genetic disorder of one donor could be quickly compounded,\textsuperscript{152} since one donor could produce as many as twenty-five children or even more in some cases.\textsuperscript{153} Beyond voluntary services such as the Donor Sibling Registry, it is impossible for donor-conceived children in the United States to know how many of them share the same biological sperm donor.\textsuperscript{154}

Although donors are generally required to provide detailed medical information for at least two generations of family members and undergo a blood analysis and a physical examination testing for sexually transmitted diseases and provide a sperm sample, the American Fertility Society's (AFS) guidelines indicate that compliance with the recommendations is voluntary. The regulation of the fertility industry is largely self-imposed and limited to ensuring that donated gametes are free from

\textsuperscript{151} Sperm banks in the United States are not required to limit the sales of their most popular donor sperm. By contrast, other countries restrict the number of children one sperm donor can produce: Denmark limits 25 live births per donor, England limits ten, and France limits five.

\textsuperscript{152} In the United States, where there is very little federal or state regulation in the industry and so the clinics regulate themselves. Would-be parents have the right to select certain criteria and one gamete donation can be divided up and sold to a number of recipients.

\textsuperscript{153} On particular donor on the Donor Sibling Registry is the biological father of at least 36 children born in 5 years and these are only the social parents who have registered on the site. See Michelle Dennison 'Revealing your Sources: the Cases for Non-Anonymous Gamete Donation (2007/8) 21 Journal of Law and Health page 1 at page 15-6.

\textsuperscript{154} This is sometimes raised as a compelling reason why donor anonymity should be abolished in the United States (Michelle Dennison 'Revealing your Sources: the Cases for Non-Anonymous Gamete Donation (2007/8) 21 Journal of Law and Health page 1 at page 16.)
communicable diseases and easily detectible genetic disorders.\textsuperscript{155} In \textit{Johnson v. Superior Court of Los Angeles County}\textsuperscript{156} the court held that, in an action against an artificial insemination clinic, the state had a compelling interest in requiring a party to comply with the discovery request to disclose the sperm donor’s identity and may open the door to a less anonymous future for sperm donors.\textsuperscript{157} It would appear that some enforcement of the regulatory practice in the United States is required and some monitoring of clinics to ensure uniform standards with penalties for non-compliance on certain issues such as the number of children a donor may father.

3. Focusing on the Child

a) ‘Genealogical bewilderment’ and the Movement from Welfare to Rights

During the 1980s, a public debate about ‘genealogical bewilderment’\textsuperscript{158} emerged. The concept arose initially in the context of the rights of adopted children. The central tenet of the argument is that a

\textsuperscript{155} Statutes tend to avoid issues concerning the donor offspring's future potential harm in not knowing his biological background or medical history, although individual states such as Idaho and Oregon require donors to satisfy certain medical standards.

\textsuperscript{156} 95 Cal.Rptr.2d 865, 875, 877 (Cal. Ct. App.2000). In \textit{Johnson}, a donor disclosed his family medical history to the sperm bank, including the possibility that autosomal dominant polycystic kidney disease was present in his family. The Johnsons signed a confidentiality agreement that provided for the donor to remain anonymous and reserved the right of the sperm bank to destroy all information pertaining the donor's identity. Despite assurances from the bank that the sperm was healthy, the child was diagnosed six years later with autosomal dominant polycystic kidney disease. The court concluded that it would not protect the anonymity of the donor if it found that the interests of the donor offspring were more compelling than the interest of the donor in maintaining his or her anonymity.


\textsuperscript{158} The term ‘genealogical bewilderment’ was first used by Sants in ‘Genealogical Bewilderment in Children with Substitute Parents’ (1964) 37 \textit{British Journal of Medical Psychology} 133.
‘genealogically bewildered’ child could be found in any family where one of the ‘natural’ parents was unknown. The argument against anonymity for donors of sperm is based on the premise that a child’s sense of identity is inextricably linked to making sense of their ‘origins’, as symbolized in the meeting of egg and sperm.159 Opponents of secrecy and anonymity (and sometimes of donor insemination itself) build heavily on the claim that biologically correct information about one’s genetic parents is a sufficient or necessary condition for a person to build self-esteem and a positive self-image.160

Where children do not suspect any differences in the circumstances of their conception, no question of tracing their genetic origins exists. Openness and truthfulness in family relationships and respect for the child’s autonomy are ethical demands, almost impossible to convert into a legal obligation.161 However, from 1969, the English court acquired the power to direct paternity testing on a child, if it considered that it would be in the child’s best interest for the sample to be given, irrespective of

159 This viewpoint currently informs infertility treatment policy in Australia in the state of Victoria. Donors of gametes to reproductive medicine clinics in Victoria must agree to enter their name and contact details in a register, in order that any offspring who wish to can have access to this information in the future (Infertility Treatment Act, 1995 (Vic), Part 7, s 68).

160 One study documented the experiences of parents who chose to disclose, and those who intended to disclose to their children, information about the donor involvement, and children’s responses when they received this information. Of the 181 parents who responded, 30% gave their children information about their conception. There appeared to be an advantage in giving children this information at a young age, at which the information was processed in a factual, non-emotional way. Of the parents who had not told their children, 77% intended to disclose information in the future. This group gave their child’s age and inability to understand as their main reasons for choosing to wait. Some 17% of parents (who had not told) chose not to disclose. There were no significant differences between the responses of mothers and fathers (Anna Rumball and Vivienne Adair ‘Telling the story: parents’ scripts for donor offspring’ (1999) 14 (5) Human Reproduction 1392-1399).

161 Iceland passed a law in 1996 giving donors the choice between anonymity and disclosure of identifying information. The Netherlands passed a law in 2000 obliging all sperm clinics to recruit non-anonymous donors. Anonymity for semen donors has been abolished in England, Austria, Germany, and Switzerland.
the mother or other carer’s refusal to consent.\(^{162}\) It was increasingly argued that, in the past, the medical underpinning of assisted procreation had led to the prioritisation of the interests of the prospective parent at the expense of the child and that secrecy arose from a concern to protect male pride in concealing male infertility.\(^{163}\) The English judges and some academics increasingly began to view the revelation of genetic truths as benefiting the welfare of the child.\(^{164}\) Increasingly, knowing the truth came to be perceived as (almost) unequivocally good for children.\(^{165}\) This welfare criterion\(^{166}\) became linked to a rights-based argument: it should be a child’s right to know his or her genetic parentage.\(^{167}\) It was argued that this recognition of children’s rights offered children protection against adult manipulations of truth and also gave relatively powerless children a commensurate legal standing with parents in these complex cases.\(^{168}\)

This argument is not based on subjective and changing normative values around the standard of the child’s welfare, but a more universal claim to justice for each new generation based on the alignment of legal and ‘physical’ truth. It claims to powerfully defend children’s rights as against webs of deceit and it would appear at first blush that this

\(^{162}\) Family Law Reform Act 1969 s.21 (3)(b) as amended.


\(^{166}\) Re D (Paternity) [2006] EWHC 3545 (Fam), [2007] 2 FLR 26.

\(^{167}\) Re H (Paternity: Blood Test) [1996] 2 FLR 65 at 80.

argument is irreproachable: children were being treated unjustly if denied the truth of their genetic inception.

In England, the passage of the Human Rights Act 1998 further influenced the law in favour of the right to know under Article 8. Prior to this, in 1984, the Commission of Inquiry into Human Fertilisation and Embryology, chaired by Baroness Warnock, recommended that donor-conceived children should be defined as legitimate and donors should have no parental rights or duties. Although the Warnock Committee was concerned about the family secrecy surrounding the child’s conception, donor anonymity was still entrenched in the Human Fertilisation and Embryology Act 1990. In terms of the Human Fertilisation and Embryology Act 1990, if, at the time of the artificial insemination of the sperm, the woman was married and the creation of the embryo carried by her was not brought up with the sperm of her husband, he is treated as the father of the child, unless it is shown that he did not consent to the insertion of the sperm into her. Even in the absence of consent, the common law presumption of legitimacy applies and the child will be regarded as the legitimate child of the mother’s husband unless this is refuted through DNA tests. However, in Rose v Secretary of State of for Health and Human Fertilisation and Embryology Authority, Scott Baker J upheld the claims of a donor-conceived woman to knowledge of the identity of her father. These arguments influenced the heated debates that led to the legislation, which ended the

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170 S28 (2).
171 S28 (5)(a) of the Human Fertilisation Act 1990.
172 [2002] 2 FLR 692 R Pr [47].
anonymity of sperm donors who donate to clinics in England.\textsuperscript{174}

c) Disclosure of Identity by Lesbian Couples to their Donor-Inseminated Children

Lesbian couples are intentionally setting up families that do not include men as partners or fathers and to date, there is no conclusive evidence of any kind that children raised from birth with lesbian parents unduly suffer developmental or emotional problems without conventional fathers.\textsuperscript{175} Many lesbian couples aspire to a version of lesbian family in which two equally co-parenting mothers demonstrate they have their child's best interests at heart by not making an irreversible decision about donor anonymity on behalf of that child and by allowing a 'donor relationship' to form.\textsuperscript{176} Problematically, the biological father may perceive sperm contribution as the means to form a relationship with a child, not solely contingent, as was apparent for the co-parent and the mother, on fulfilling the demands of 'children's right to know'.\textsuperscript{177}

As the genetic, gestational and psychological mother, the biological mother's contribution has been found to be unique by the House of Lords.

\textsuperscript{174} Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (S1 2004/1511.) Baroness Warnock, who had chaired the 1984 Committee of Enquiry into Fertilisation and Embryology stated that she now supported the view that donor-conceived persons should have the same 'right to know' as adopted people. She based her argument on the greater awareness and increasing sensitivity to genetic inheritance. This issue of donor anonymity was one of the most controversial in the parliamentary debates leading to the removal of donor anonymity. (Department of Health (2001) Donor Information consultation – Providing Information about Gamete or Embryo Donors at www.dh.gov.uk/assetRoot/04/01/87/74/0401877.4.pdf Para [1.15]).


\textsuperscript{176} Leanne Smith 'Is Three a Crowd? Lesbian Mothers’ Perspectives on Parental Status in Law' (2006) 18 Child and Family Law Quarterly 231. The mother may assume that having lesbian parents automatically excludes a child from the right to have contact with his or her biological father.

\textsuperscript{177} Leanne Smith 'Is Three a Crowd? Lesbian Mothers’ Perspectives on Parental Status in Law' (2006) 18 Child and Family Law Quarterly 231.
which has denied the her (other lesbian partner) the right of primary caretaker.\textsuperscript{178} Legislatively, the position of the lesbian partner has been improved in England. If, prior to the child’s birth, the lesbian partner becomes the biological mother’s civil partner, she can then apply for a parental responsibility order\textsuperscript{PRO} as stepparent. If however the services of licensed clinics are used to conceive, all lesbian partners are normally treated as the children’s legal parents, whether or not they have become civil partners.\textsuperscript{179} A sperm donor is barred from applying for a Parental Responsibility Order in cases where the biological mother’s lesbian partner is treated as a legal parent.\textsuperscript{180}

However, if a sperm donor donates sperm under an informal arrangement not involving a licensed clinic, the sperm donor may obtain a Parental Responsibility Order,\textsuperscript{181} although in some cases, the courts may refuse him parental responsibility on the grounds that he would undermine the autonomy of the lesbian family unit.\textsuperscript{182}

\textsuperscript{178} Re G (Children) (Residence: Same Sex Partner) [2006] UKHL 43, [2006] 4 All ER 241.

\textsuperscript{179} Human Fertilisation and Embryology Act 2008 s 43.

\textsuperscript{180} Human Fertilisation and EA 2008 s 54 (1). Although this remains speculative, a desire to be a ‘father’ rather than a ‘donor’ to children may well be more widespread among gay men now than it was during the 1970s and 1980s. Under the Child Support Act 1991, donors may also be liable for maintenance for any children born as a result of a known donor arrangement.

\textsuperscript{181} Re D (Contact and Parental Responsibility: Lesbian Mother and Known Fathers [2006] 1 FCR 556.

\textsuperscript{182} Re B (Role of Biological Father [2008] 1 FLR 1015.
their 'mothers'. Most lesbian couples do not intend that a known donor should have a relationship of fatherhood or parent with the donor-conceived child, since they regard themselves as parents, although they acknowledge the child’s right to know. Such couples do not face male infertility and the possible reluctance to discuss issues associated with it, but whereas they will have to answer their children’s questions about the absence of a male parent. Thus among these parents, rates of disclosure to their children, or plans for it, tend to be almost 100%.

VI. CONCLUSION

There is undoubtedly a growing trend towards openness in this field.

183 See Re Patrick Family Court of Australia (2002) 28 Family Law 579; FLC 93-096. This case was the first time an Australian court was required to give judgment on the kinship status of a child of a homosexual who had contribute his sperm on a lesbian biological mother by Donor insemination outside a clinical setting. It is also indicated that lesbian and homosexuals may have very different concepts of such a relationships. See to Deborah Dempsey 'Donor, Father or Parent? Conceiving paternity in the Australian Family Court (2004) 18 International Journal of Law, Policy and the Family 76. The father could not conceive of himself as a known donor but only as a father.


185 In Australia, the Victorian model of clinical donor insemination, in its requirement that sperm donors supply identifying information that can be made available to adult offspring on request, satisfies the desire for the autonomous two parent ‘homo-nuclear’ family that many lesbians prefer as well as the strong belief many prospective lesbian parents display in support of the principle of children’s ‘right to know’.

186 See too Johnson v Superior Ct., 80 Cal App. 4th 1050 (Ct App.2000). It is argued that recipient parents and donor-conceived children may benefit from having increased access to donor’s health information and avoid potential incest of ‘genealogical bewilderment. It could also be argued that an anonymous donation would enable donors to make an informed decision before donating
There are now websites\(^\text{187}\) that make it possible for children born from sperm donation to find out the identity of their genetic/donor parents and arguments are already being formulated that children not only should know about, but also should have relationships with donor kin on the basis of the analogy of adoption.\(^\text{188}\) Even in cases of anonymous donation, it is still possible for curious older children to discover the identity of a donor parent.\(^\text{189}\) Fundamentally, it is arguable that the right to know underlies the principle of decisional privacy, which is the basis of the right to private life.\(^\text{190}\) Biological parentage may be considered be an aspect of person’s fixed identity and an immutable quality. The notion of decisional privacy suggests that people should, in principle, have a free choice interpreting their fixed identity – a right to informational self-determination. Arguably, the existence of such a right to know is not a matter based on concern for individual emotional welfare since there is because it is almost impossible to guarantee total anonymity. But of course this is all dependent on the willingness of would-be parents to tell their children the nature of their conception.


\(^{188}\) Re D (Paternity) [2007] 2 FLR 26 at 32; J Wallbank 'Too many mothers? Surrogacy, kinship and the welfare of the child’ (2002) 10 Medical Law Review 271-94. Wallbank argues this in relation to surrogacy on the grounds that the gestational mother in a surrogacy arrangement should be regarded as just as much a mother as the commissioning mother and it is likely to be harmful to the child to be denied contact with the gestational mother.

\(^{189}\) Alison Motluk 'Anonymous sperm donor traced on Internet', Newsscientist.com, November 3 2005. In 2005, a teenager tracked down his biological father using a mail-order DNA kit and online search engines. In this case the donor concerned had contracted with the fertility clinic to remain anonymous. So the teenager had very little access to information, except the date and place of the man’s birth. The teenager took a swab of the inside of his cheek and mailed it to an online genealogy DNA-testing service. Having acquired the date and place of the donor’s birth, the teenager managed to trace his biological father.

\(^{190}\) See Mikulic v Croatia (app No53176/99, ECHR) (2002) at para 54: "The court has held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality."
not enough evidence available as to whether it conduces to an individual’s welfare to have such knowledge. It is based on the proposition that no one has the right to decide on the other person’s behalf whether that other person should or should not be able to know about their own history. Even if this informational self-determination is considered to be partially socially constructed and only pressing as a result of the adoption movement and bio-medical developments, it defies historical interpretation and is immutable.

However, arguments opposing the blunt assertion of such a right take into account that, there is a social father and a recognised family unit, which appears, in the case of the heterosexual family to all intents and purposes ‘normal’ and stable, ready to embrace a much longed-for child and anxious not to disturb that stability. The donor-conceived child’s right to know in such cases conflicts with the right to autonomy and privacy of the mother, the ‘social’ father, and the gamete donor. Furthermore, given the adherence of the European Court of Human Rights to the margin of appreciation doctrine in this sphere, greater focus on parental responsibility for disclosure could constitute not only an invasion of the privacy rights of the parents, but also be moralising and possibly oblivious to the parents’ situation at the time of conception (bearing in mind that the parents may risk social ostracism in some societies if they disclose the information surrounding their child’s birth.) Furthermore, the source of this ‘right to know’ is debatable, given the fact that the United Convention on the Rights of the Child was not drafted with sperm donation in mind.

As the nature/nurture debate continues, it seem increasingly impossible

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191 Human Tissue and Embryos (Draft) Bill, Volume II, EV44 House of Lords Page 169.

for the donor-conceived child to conceptualize a genetic donor in terms of biological inheritance and yet in no sense as a social father. It would also seem that a social father in the donor-conceived child’s life has more than simply a psychological role and that biology does, in some sense, become involved. More research is needed before firm conclusions can be made about donor-conceived families who have access to the identity of donors. The removal of donor anonymity in England has caused some frustration and despair, and social parents may become more hesitant about using this method of conception and the pool of regulated sperm donors may diminish.

Infertility success rates continue to rise as medical technologies advance. Donor-conceived children enrich the lives of many who would, in another age, have been infertile, giving such parents the opportunity to raise much-desired children, who are genetically related to one parent. It is suggested that legislation mandating disclosure of donor status is not the solution, but rather a balancing test should be formulated in this sensitive area involving competing interests. A holistic approach is required which takes into account what is best for all the family, rather than a focus merely on fulfilling the rights of donor-conceived children to access identity information about donors, which may not benefit any of the parties in the long run. As part of this holistic approach, account

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should be taken of the psychological complexities of donor conception,\textsuperscript{197} and the fact that, mandatory donor identification statutes do not lead immediately to greater disclosure by parents, but rather to dramatic dips in sperm supplies leading to the escalation of undesirable ‘reproductive tourism.’

It is therefore suggested that a gradual process of ‘normative nudging’ towards greater transparency is more desirable in this area. This movement toward greater openness would be facilitated by the removal of the stigma of infertility and a greater sensitivity by donor parents to the needs of their offspring. This will bring about disclosure which conduces to the welfare of children and stability of all the families involved. The blunt instrument of legislative enforcement of the disclosure of genetic origins of donor-conceived persons is not recommended in this area nor is necessitated by the jurisprudence of the European Court of Human Rights or a careful interpretation of the United Nations Convention on the Rights of the Child.\textsuperscript{198}

\textsuperscript{197} Ellen Waldman ‘What do we tell the children?’ (2006-7) 35 Capital University Law Review 517 at 555.

\textsuperscript{198} Despite the interpretation of the United Nations Convention on the Rights of the Child by the United Nations committee. These interpretations should be contrasted with the Report on Human Artificial Procreation of the Ad hoc Committee of Experts on Progress in the Biomedical Sciences, which states that donor anonymity should be maintained (Principle 28) although the health of the child is mentioned as a factor that could require a waiver of donor anonymity.