

Reproductive Dreams and Nightmares: Sperm Donation in the Age of At-Home Genetic Testing

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Recent technological developments surrounding genetic testing pose new challenges to well-established reproductive practices. One current example is the fertility industry's struggle to maintain gamete donor anonymity against the growing use of direct-to-consumer DNA tests. Consider the widely covered story of Danielle Teuscher, who in 2019 accidentally discovered the identity of her daughter's anonymous sperm donor after using a 23andMe DNA test. Danielle's attempt to reach out to the newfound family member was followed by a cease and desist letter from the sperm bank for violating their agreement. In addition, the sperm bank refused to give Danielle the four vials of sperm from the same donor, which she had reserved for future use, thus thwarting her reproductive plans to have genetic siblings for her daughter.

The Teuscher case introduces a type of reproductive dispute that United States courts have not yet resolved. This Article considers several of the new legal questions produced by this set of novel circumstances, about the legal framework through which the dispute should be adjudicated, the nature of the rights at stake, and the harms imposed by forced or confounded procreation. It argues that in the social context of anonymous sperm donation, the contractual approach is a more appropriate—if insufficient—legal prism through which a dispute over the use of donated sperm should be resolved. The context of sperm donation also demands a nuanced treatment of the rights at stake—one that distinguishes, for example, between the right not to be a genetic parent and the right not to be a parent in the legal sense. Furthermore, properly articulating the interests of the parties requires a reassessment of the harm that forced procreation will impose on a person who at least at some point in time agreed to father a child they

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would not know or care for, as well as the harm imposed on a person denied a child carrying a particular genetic constituency.

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INTRODUCTION

Danielle Teuscher, a thirty-year-old nanny from Portland, Oregon, took a 23andMe DNA test that she bought as a Christmas gift for her family and friends.¹ Her five-year-old daughter, Zoe, had been conceived through the use of an anonymous sperm donation from Northwest Cryobank in Spokane, Washington.² Danielle decided to get another 23andMe test for Zoe in order to learn about her ancestry and medical background.³ This commonly used consumer DNA test, however,

1. Jacqueline Mroz, *A Mother Learns the Identity of Her Child's Grandmother. A Sperm Bank Threatens to Sue*, N.Y. TIMES (Feb. 16, 2019), www.nytimes.com/2019/02/16/health/sperm-donation-dna-testing.html [<https://perma.cc/KMD6-ST8D>].

2. *Id.*

3. *Id.*

revealed more than Danielle ever hoped it would: The test results identified the mother of the donor—that is, Zoe’s grandmother. “Excited and curious” about these findings, Danielle reached out to the newly found family member, saying that she would be open for contact with either her or her son.⁴ The grandmother responded: “I don’t understand.”⁵ This laconic response was followed by a cease-and-desist letter from the sperm bank, threatening Danielle with penalties of \$20,000 for violating the agreement she had signed with the bank by trying to contact the donor or seek his identity.⁶ The letter further stated that if she continued this “course of action,” the bank would seek a restraining order or injunction.⁷ Danielle was devastated.

This widely covered story brought to the fore an ongoing legal and ethical debate over gamete donation,⁸ and the challenges direct-to-consumer DNA tests pose to the fertility industry’s efforts to secure donor anonymity.⁹ In the US, despite calls to revise and regulate gamete donation, this aspect of the reproductive market remains largely unregulated, leaving unanswered many questions that technological developments give rise to.¹⁰ In Teuscher’s case, for example, legal experts questioned whether Zoe could be constrained by a contract that her mother had signed before she was even born, and whether a provision limiting a child’s ability to find her genetic origins could be enforced.¹¹

But Danielle’s pursuit of her daughter’s genetic origins had another grave consequence for her reproductive life: She was denied access to four vials of sperm from the same donor, which she had reserved for future use.¹² In response to her plea, the sperm bank agreed to refund the

4. *Id.*

5. *Woman Uses DNA Test, Finds Sperm Donor—and Pays a “Devastating” Price*, CBS NEWS (Jan. 31, 2019), <https://www.cbsnews.com/news/woman-finds-sperm-donor-after-using-dna-test-raising-questions-about-donor-anonymity/> [<https://perma.cc/N28L-N9BA>]; see also Mroz, *supra* note 1 (offering yet another account of Teuscher’s story).

6. Mroz, *supra* note 1.

7. *Id.*

8. See, e.g., *id.*; CBS NEWS, *supra* note 5; Jacqueline Mroz, *DNA Testing Opens a Window into Sperm Banks*, HERALD-TRIB. (Feb. 26, 2019), <https://www.heraldtribune.com/entertainmentlife/20190226/dna-testing-opens-window-into-sperm-banks> [<https://perma.cc/5UV8-PUTU>]; Natalie Rahhal, *Sperm Bank PUNISHES Mother for Accidentally Finding Her Donor Through 23AndMe*, DAILY MAIL (Jan. 31, 2019), <https://www.dailymail.co.uk/health/article-6653943/sperm-bank-punishes-mother-accidentally-finding-donor-23andme.html> [<https://perma.cc/KF7E-VKB5>].

9. Susan Dominus, *Sperm Donors Can’t Stay Secret Anymore. Here’s What That Means*, N.Y. TIMES MAG. (June 26, 2019), <https://www.nytimes.com/2019/06/26/magazine/sperm-donor-questions.html> [<https://perma.cc/DM29-V8C6>].

10. See generally Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4 LAWS 352, 353–57 (2015).

11. Mroz, *supra* note 1.

12. CBS NEWS, *supra* note 5.

amount she paid for the vials, but stood by its refusal to return the vials to her—a decision Danielle decided to fight.¹³

This case introduces a set of circumstances that US courts have yet to encounter. While reproductive disputes have become prevalent over the years along with the growing use of assisted reproductive technologies (ARTs), none of the publicly available cases involve a conflict between an *anonymous* gamete donor, a recipient, and a reproductive services provider.¹⁴ Teuscher's case thus raises a set of new legal and ethical questions lying at the intersection of family law, constitutional law, and contracts, which are the focus of this article.

The first question regards the legal framework that should be applied to such a case. At least two frameworks have been applied in reproductive disputes involving ARTs: a contractual approach, where decisions are based on the agreements that the donor and recipient entered into with the sperm bank and/or with one another; and a balancing-of-interests test, where the rights and interests of the parties are weighed against one another. Developed in the context of pre-embryo disposition disputes, arguments in favor of and against each framework assume a familial relationship between the parties. This Article shows that, because of this difference, the balancing-of-interests approach will be of limited value in the social context of anonymous sperm donation and that the contractual approach is a more appropriate—if insufficient—legal prism through which disputes should be resolved.

A second interrelated question raised by this case regards the nature of the rights at stake. The prevailing framework would place the recipient's right to be a parent against the donor's right not to be a parent. Yet the context of sperm donation demands a more nuanced treatment—one that goes beyond a “monolithic” concept of the right not to be a parent.¹⁵ For example, it is important to make a distinction between the right not to be

13. Mroz, *supra* note 1. In June, Teuscher first filed suit against the sperm bank in a federal court in the Eastern District of Washington for injunctive relief and damages in the amount of \$100,000. For the most recent version of her complaint, see Second Amended Complaint, Teuscher v. CCB-NWB, LLC, 19-cv-00204 (E.D. Wash. Nov. 12, 2019), *available at* https://www.donorsiblingregistry.com/sites/default/files/files/AmendedComplaint_11_13_19.pdf [<https://perma.cc/YLB9-WYHZ>]. Danielle recently started a GoFundMe campaign to help her cover the cost of her legal battle against the bank. Danielle Teuscher, *Help Danielle and Zoe Fight NW Cryobank*, GOFUNDME (Jan. 8, 2020), <https://www.gofundme.com/f/9f8nm5-tbd> [<https://perma.cc/VY6K-YZYN>].

14. Though it is unclear whether the donor in this case explicitly withdrew his consent to any further use of his sperm vials, or otherwise contributed to the sperm bank's reaching its decision to deny Danielle access to the sperm, the analysis proposed in this Article assumes that the once-anonymous donor objects to its use.

15. See generally I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008) [hereinafter Cohen, *Genetic Parent*].

a genetic parent and the right not to be a parent in the social or legal sense, because these different rights may warrant different levels of protection.

The third question relates to the harms that ruling either in favor of or against each party will entail. This part of the analysis tends to focus on the life circumstances of both parties in evaluating the types of harms that unwanted or deprived procreation may impose on them. There is some consistency in the way these financial, physical, and psychological harms have been conceptualized over the years. However, the case of an anonymous sperm donor requires a reassessment of, for example, the harm that forced procreation will impose on a person who at least at some point in time agreed to father a child he would not know or care for; as well as the harm imposed on a person denied a child carrying some particular genetic constituency that the recipient has dreamed of and hoped for.

In engaging such questions, this Article draws on cases involving pre-embryo disposition disputes between couples, the most common type of reproductive disputes to have reached American courts thus far. It also draws on a case that came before the Israeli Supreme Court in 2013, *Doe v. Ministry of Health*,¹⁶ in which the underlying facts were akin to those Teuscher faced. In *Doe*, the Court had to decide between a sperm donor who had a change of heart about his prior decision to grant use of his sperm, and Doe, a woman who had already used the donor's sperm to conceive her first child and wished to use the same donor's sperm for her second child.

The analysis proposed in this Article highlights the unique characteristics of cases involving an anonymous gamete donation compared to other reproductive disputes courts have encountered thus far. It also considers how the emergence of new reproductive practices, such as at-home DNA tests, may challenge long-standing practices and the ideologies underlying them about the family and familial relations. It may thus inform courts' future decisions by pointing to some of the pitfalls of applying the legal tools they currently have at their disposal to resolve these types of disputes.

The Article begins in Part I with the legal and normative background of the practice of sperm donation in the United States, where it is largely unregulated, yet prevalent and relatively uncontroversial. Part II describes the *Doe* decision's factual basis and provides an overview of the Israeli Supreme Court's analysis. It also describes the regulation of

16. See generally H CJ 4077/12 *Doe v. Ministry of Health* (Feb. 5, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter *The Doe Case*], available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Doe%20v.%20Ministry%20of%20Health.pdf> [<https://perma.cc/C3G5-GMCT>].

sperm donation in Israel, where it is controlled by a relatively comprehensive apparatus, thus providing necessary context to the decision in *Doe*. Part III outlines the two principal frameworks that US courts have employed for the resolution of pre-embryo disputes over the past two and a half decades. Part IV discusses the nature of the right to procreate and the right not to procreate, first in general, then in the case of disputes over anonymous sperm donation. Part V considers the harms that a ruling in favor of or against the recipient and the donor may impose, and compares these harms to those commonly evaluated by courts in reproductive disputes. Part VI discusses the principal arguments against the contractual approach, and considers to what extent these arguments apply in the context of anonymous sperm donation. It then applies the contractual framework to Teuscher's case. This part ends with a brief discussion of possible steps reproductive service providers may take to ease the task of enforcing sperm donation agreements.

I. THE CURRENT LEGAL LANDSCAPE

Different regulations address several different aspects of sperm donation as a reproductive practice. First, they may address the act of donation itself, including restrictions on the eligibility criteria for becoming a sperm donor, what monetary compensation it may entail, and guidelines for record keeping of donor information. Second, they may address the rights of gamete donors in relation to any resulting children. Third, they may address the rights of donor-conceived children—both in relation to the donor, and in relation to their half-siblings (i.e. children born from a mutual gamete donor). These different aspects of the practice may be governed by several areas of law that “converge in the donor world,”¹⁷ including family law, constitutional law, privacy law, health law, and contract law.

A. Regulating Donation

Gamete donation is “an outright, and undoubtedly thriving, commercial activity” generating “billions of dollars per year,”¹⁸ but, like many other reproductive practices in the United States, it is largely unregulated.¹⁹ In the United States Food and Drug Administration's (FDA) eligibility requirements for donors, the regulatory threshold for gamete donation is low,²⁰ requiring a review of the donor's medical

17. NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* 91 (2013) [hereinafter CAHN, *THE NEW KINSHIP*].

18. Sabatello, *supra* note 10, at 354.

19. *Id.* at 353.

20. *Id.*

records, and imposing “screening of donated gametes for predominantly communicable and infectious diseases (e.g., HIV, Hepatitis C), including six months quarantine and retesting before use of anonymous donations.”²¹ There is no “centralized system” that documents gamete donations or the children born from specific sperm; donors may thus donate several times, even in multiple locations.²² “The regulation of private fertility clinics and gamete banks by individual states is also often lacking, and among those that have crafted regulations—there is great variation as to the collection, preservation, and release of donors’ information.”²³

Over the years many scholars have raised concerns over the risks this lack of regulatory oversight poses to the health and safety of donors and of donor-conceived children.²⁴ This includes the risk of incest, as these children will have no way of knowing whether half-siblings exist, much less have any way to identify them.²⁵ Such criticism is often followed by recommendations for improving the standard of genetic testing performed on donors,²⁶ creating a central registry of children born through sperm donation, and limiting the number of children born through an individual donor’s gametes.²⁷ Other calls for further regulation are grounded in the rights of donor-conceived children, and the “welfare-related” harms that may occur when these children are denied information about their genetic origin.²⁸

In the absence of regulatory guidance, sperm banks, fertility clinics, and other institutions providing reproductive services may develop their own policies and guidelines for carrying out sperm donations.²⁹ As illustrated by Teuscher’s case, agreements with such service providers attempt to regulate and control the ability of donors and recipients to exchange information. These institutions may also decide to limit a recipient’s access to sperm vials under certain circumstances or to allow sperm donors to withdraw consent to the future use of their gametes.

21. *Id.*

22. *Id.* at 354.

23. *Id.* at 353.

24. CAHN, THE NEW KINSHIP, *supra* note 17, at 151.

25. See generally Naomi Cahn, *Accidental Incest: Drawing the Line—Or the Curtain?—For Reproductive Technology*, 32 HARV. J.L. & GENDER 59 (2009).

26. Charles A. Sims et al., *Genetic Testing of Sperm Donors: Survey of Current Practices*, 94 FERTILITY & STERILITY 126, 129 (2010).

27. See CAHN, THE NEW KINSHIP, *supra* note 17, at 151–60 (discussing the promotion of donor health and safety); see generally Sabatello, *supra* note 10.

28. Sabatello, *supra* note 10, at 357–58.

29. See generally Katherine M. Johnson, *Making Families: Organizational Boundary Work in U.S. Egg and Sperm Donation*, 99 SOC. SCI. & MED. 64 (2013).

B. Rights of Gamete Donors

Similarly, no unified framework governs the rights of donors in relation to their prospective offspring. There is no federal legislation that determines parentage, but rather a set of “jumbled, incomplete” state laws that address different scenarios involving sperm donation.³⁰ The most common scenario addressed in these state laws involve situations in which a married woman uses Artificial Insemination (AI) to become a parent, using either a known or unknown sperm donor.³¹ In this scenario, in order for her husband to become the child’s legal parent, “a doctor must supervise the insemination, the husband must consent in writing to the insemination, and the physician must file the husband’s consent with the state health department.”³² Only after these requirements have been satisfied will the donor’s legal rights in relation to the child be terminated.³³

The picture is more complicated in cases involving single women. The Uniform Parentage Act (UPA), originally silent about this scenario, now states more broadly that “[a] donor is not a parent of a child conceived by assisted reproduction.”³⁴ While only a minority of states adopted the 2017 UPA, it appears that most do terminate the parental rights of *unknown* sperm donors.³⁵ When it comes to *known* sperm donors, however, states approach legal parentage in a variety of ways that reflect their attitudes as to whether biology, intent, marriage, and contract might constitute the appropriate source of family identity.³⁶ The cases that arise under this type of regulation usually involve agreements that set out to determine the level of involvement, if any, the sperm donor will have in the child’s life. Whether these contracts are enforceable depends on “state laws concerning how artificial insemination must be performed and whether there is explicit statutory recognition of these contracts.”³⁷

C. Rights of Donor-Conceived Children

As one scholar noted in this particular context, “the U.S. legal system makes only little room for children’s rights.”³⁸ Indeed, the “U.S. neither ratified the United Nations Convention on the Rights of the Child nor

30. NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 88–89 (2009) [hereinafter CAHN, TEST TUBE FAMILIES].

31. *Id.* at 88–90.

32. *Id.* at 90.

33. *Id.*

34. UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM’N 2017).

35. CAHN, TEST TUBE FAMILIES, *supra* note 30, at 87–90.

36. *Id.* at 95.

37. *Id.* at 92.

38. Sabatello, *supra* note 10, at 357–58.

includes any mention of children as subjects of rights in its Constitution.”³⁹ Parental prerogative, on the other hand, has been granted constitutional protection through a series of Supreme Court decisions recognizing parents’ right to the “care, custody and control” of their children.⁴⁰ This characteristic of the legal system begins to explain the hold that donor anonymity continues to have in the American reproductive market, since “asserting a separate right on behalf of the minor child, such as the right to know a donor . . . [,] realistically requires the willingness to recognize tensions with established parental decision-making rights.”⁴¹ This is also true for the right to contact a half-sibling, which is a relatively new development in the conceptualization of donor-conceived children’s rights. Both rights underlie calls to regulate gamete donation in ways that recognize the relationships formed within what law professor Naomi Cahn refers to as “donor-conceived family communities” or “donor kin families or networks.”⁴²

These and other calls for additional regulatory oversight of sperm donation intensify as the use of at-home DNA tests and online sibling registries become more and more prevalent, allowing for the discovery of these genetic relations and the formation of new kinds of families.⁴³ These developments are undermining some long-held principles, such as donor anonymity,⁴⁴ but also give rise to real, emotionally-laden conflicts between the parties involved in this practice, be it donors, recipients, donor-conceived children, or service providers.

II. *DOE V. MINISTRY OF HEALTH*

A. *Background: The Israeli Legal Framework*

Unlike the United States, Israel’s reproductive practices and related services operate under greater oversight and control.⁴⁵ Sperm donation in particular is regulated through public health regulations and circulars

39. *Id.* at 358.

40. CAHN, *THE NEW KINSHIP*, *supra* note 17, at 96–97.

41. *Id.* at 97; Sabatello, *supra* note 10, at 357–58.

42. CAHN, *THE NEW KINSHIP*, *supra* note 17, at 3.

43. *See, e.g.*, Ariana Eunjung Cha, *44 Siblings and Counting*, WASH. POST (Sept. 12, 2018), https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/?utm_term=.17086994aa32 [<https://perma.cc/XK5B-ZVVJ>] (discussing the government’s attempts to regulate the growing number of donor-conceived births and the problems they impose).

44. *See, e.g.*, Guido Pennings, *Genetic Databases and the Future of Donor Anonymity*, 34 *HUM. REPROD.* 786, 786 (2019) (discussing how genetic databases increase the risk of donor anonymity and threaten the long-held principle of privacy in gamete donation).

45. *See, e.g.*, Daphna Birenbaum-Carmeli, *Thirty-Five Years of Assisted Reproductive Technologies in Israel*, 2 *REPROD. BIOMEDICINE & SOC’Y ONLINE* 16, 17 (2016) (outlining how, since 1982, the Israeli government has exercised great control over establishing reproductive technologies and guidelines).

issued by Israel's Health Ministry Director-General,⁴⁶ the last of which was circulated in 2007.⁴⁷ These and other public health regulations set the general framework for the establishment of sperm banks and operation of artificial insemination and in vitro fertilization.⁴⁸

According to the regulations, sperm banks require the approval of the Health Ministry Director General; and such approval is given only to sperm banks operating in and as a part of hospitals.⁴⁹ Artificial insemination may be performed only in such hospitals and only with sperm units received from that particular bank.⁵⁰

Eligible donors must be single men (not widowed or divorced), preferably between the ages of eighteen to thirty, who have not previously donated sperm.⁵¹ Donors are financially compensated directly by the sperm bank.⁵² Candidates must undergo genetic testing for several genetically transmitted diseases as part of the process of becoming sperm donors.⁵³ This process also entails several interviews in which the candidate is asked about his medical history, social background, and education.⁵⁴ The donor then signs a "donor card,"⁵⁵ which includes his physical examination test results and a description of his appearance; he also signs a personal statement and confidentiality agreement, stating that he consents to the use of his sperm and renounces access to any details about the recipient.⁵⁶ These forms do not address the possibility of a

46. People's Health Regulations (Sperm Bank), 5739–1979, KT 3996 p. 1448 (Isr.) [hereinafter Sperm Bank Regulations]. The Circulars of the Director General of the Ministry of Health are issued thereunder.

47. AVI ISRAELI, MINISTRY OF HEALTH, RULES REGARDING THE MANAGEMENT OF A SPERM BANK AND INSTRUCTIONS FOR PERFORMING ARTIFICIAL INSEMINATION (2007) [hereinafter CIRCULAR ON SPERM BANKS].

48. People's Health Regulations (IVF), 5747–1987, KT 5035 p. 987 (Isr.) [hereinafter IVF Regulations]. Pursuant to these regulations, two circulars have been distributed setting the rules under which in vitro fertilization using the sperm from a non-anonymous sperm donor can be performed.

49. Sperm Bank Regulations, *supra* note 46, at § 2.

50. *Id.*

51. *Sperm Donation—Sperm Banks*, MINISTRY HEALTH, <https://www.health.gov.il/English/Topics/fertility/Pages/sperm-bank.aspx> [<https://perma.cc/2F8W-EZ2N>].

52. *Id.* These payments may vary, depending on the attractiveness of the donor in terms of, for example, education and physical characteristics. However, these generally range between \$100–\$2000 per donation.

53. *Id.* The donor must also agree "to let his DNA be retained for future tests, if these may be necessary." *Id.*

54. *Id.*

55. CIRCULAR ON SPERM BANKS, *supra* note 47, at § 9(a).

56. *Id.* at § 9(b).

donor withdrawing his consent. Sperm donors are barred from making any additional donations in another bank.⁵⁷

Eligible recipients are women, whether single or married, who want to become parents through an anonymous sperm donation.⁵⁸ Each recipient must sign a “recipient card,” which includes details of her familial situation, any preference she and her spouse (if there is one) might have about the donor’s appearance,⁵⁹ and a consent form for artificial insemination using a donor’s sperm.⁶⁰ Recipients are also able to purchase additional units of sperm from the same donor for future use, which are kept at the sperm bank for an annual fee.⁶¹

To resolve legal paternity, in cases where the sperm recipient is married, the husband must sign an affidavit declaring that he will be considered the father of the future child “for all intents and purposes,” including inheritance and alimony.⁶² In practice, however, “the husband is registered as the child’s father, and the donation is usually a secret shared by the couple and kept from the offspring themselves as well as from all other parties.”⁶³ In the case of a known sperm donor, the circular states that both parties must enter into an agreement where the donor consents to the process and acknowledges his duties toward any resulting child, regardless of what he and the recipient may have agreed to separately.⁶⁴

Over the years since this practice became legally available, the Israeli reproductive regulators received calls to reverse its mandated anonymity

57. *Sperm Donation—Sperm Banks*, *supra* note 51. To control this aspect of the practice, a national registry run by the health ministry documents only the donors’ information. CIRCULAR ON SPERM BANKS, *supra* note 47, at § 13.

58. At first, the regulatory framework differentiated between married and single women by requiring unmarried women to be evaluated by a psychiatrist and a social worker to determine their eligibility for sperm donation. The case was settled after the state agreed to nullify these rules. *See generally* Judy Siegel-Itzkovich, *Israeli Court Overturns IVF Treatment Rules*, 314 *BMJ* 538 (1997).

59. CIRCULAR ON SPERM BANKS, *supra* note 47, at § 9(c).

60. *Id.* at § 23(a)–(b).

61. This possibility is also constructed through a form signed by the recipient and the sperm bank titled “Sperm Reservation Form.”

62. CIRCULAR ON SPERM BANKS, *supra* note 47, at § 23(a)–(b). In 1980, the Israeli Supreme Court had to decide a case on a question not covered by the regulations, namely whether a husband who had given his consent to insemination procedures was liable for child support for the child conceived by sperm donation from a stranger. The Court ruled on contractual grounds that the husband was liable, without ever ruling on the question of fatherhood. As a principled solution for this matter, the above-mentioned consent forms for spouses were changed to include explicit undertaking of full legal responsibility over a child by the male spouse. *See generally* CA 449/79 Salameh v. Salameh 34(2) PD 779 (1980) (Isr.).

63. M. Wygoda, *The Influence of Jewish Law on Israeli Regulation of Sperm Banks*, 5 *ETHICS, MED. & PUB. HEALTH* 116, 118 (2018). In cases of children born to a single woman, there is no official registration of their paternal biological origin. *Id.*

64. CIRCULAR ON SPERM BANKS, *supra* note 47, at § 31.

in sperm donation. These calls were similarly grounded in a concern for donor-conceived children's rights to know their genetic origin.⁶⁵ Vardit Ravitsky, a proponent of disclosure, recently argued that "novel technologies such as mitochondrial replacement and even gene editing raise new concerns in this area and may expand the scope of such a right."⁶⁶ Such calls have not materialized into legislative action to date, even though the Israeli legal system has come to recognize children as holding rights of their own,⁶⁷ for example, by endorsing the United Nations Convention on the Rights of the Child.⁶⁸

Finally, while the Israeli framework is rather comprehensive, especially when compared to its American counterpart, it is nonetheless based on administrative rules rather than primary legislation. This affects the validity of those regulations, if challenged. More importantly, without the formal deliberation process that characterizes primary legislation, these regulations leave unattended many issues that arise in this reproductive context, as illustrated by the case below.⁶⁹

B. The Case

In 2010, forty-three-year-old Doe, a single mother living in Florida, gave birth to her first-born daughter conceived through an anonymous sperm donation.⁷⁰ Following the birth of her daughter, Doe purchased the option to use five additional sperm units from the same donor, to be kept at the Rambam Medical Center in Haifa, Israel, for an annual fee.⁷¹ On December 1, 2011, the sperm bank received a letter from the donor stating

65. Ruth Zafran, "Secrets And Lies"—*The Right of AID Offspring to Seek Out Their Biological Fathers*, 35 MISHPATIM [HEBREW U. L.J.] 519, 532 (2005); Vardit Ravitsky, *The Right to Know One's Genetic Origins and Cross-Border Medically Assisted Reproduction*, 6 ISR. J. HEALTH POL'Y RES. 1, 1 (2017).

66. Ravitsky, *supra* note 65, at 1.

67. See generally Tamar Morag, *Children's Rights in Israeli Case Law: A Spiral Progression*, 28 ISR. STUD. REV. 282 (2013) (discussing how the Israeli Supreme Court worked to develop children's rights following the United Nations Convention on the Rights of the Child in the early 1990s).

68. See generally G.A. Res. 44/25, Convention on the Rights of the Child (Sept. 2, 1990), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [<https://perma.cc/6AQW-FNQY>] (outlining the rights of children ratified by the United Nations in the early 1990s).

69. The growing popularity of artificial insemination from a donor in Israel and the ethical questions this reproductive practice raises have made pressing the need for unified and exhaustive legislation. In 2016, a proposed bill titled "Sperm Banks Law" was distributed by the Ministry of Health addressing several aspects of sperm donation that are left unresolved by the circulars, such as the number of women that may use the same donor, the disposition of sperm after the donor has died, and the establishment of a national database for children born through sperm donation. To date, however, the bill has not been made into law. Wygoda, *supra* note 63, at 122–23.

70. *The Doe Case*, *supra* note 16, at 6.

71. *Id.* Doe held both Israeli and American citizenships and had been a resident of the United States for seventeen years when filing her petition.

that he wished to discontinue any further use of his past sperm donations, because, among other reasons, he had become a *ba'al teshuva* (i.e., he had embraced the religious ultra-orthodox lifestyle).⁷² Shortly after receiving the letter, the bank notified Doe that she would no longer be able to use the additional sperm units she had reserved.⁷³ Doe requested that the donation not be destroyed, and that she be allowed to exhaust other legal avenues.⁷⁴ Doe then filed a petition with the Israeli Supreme Court against the respondents—The Health Ministry and The Sperm Bank—challenging the sperm bank's decision to deny her access to the additional sperm units.⁷⁵

Very early on in the proceedings, the Israeli Supreme Court framed *Doe* as a case that could be decided through both a public and a private prism.⁷⁶ The Court noted that the case raised questions touching on numerous juridical fields such as contract, property, and administrative law.⁷⁷ Specifically, it saw that the legal issue in question could be resolved through both a contractual analysis and a rights-based (or balancing-of-interests) analysis.⁷⁸

The litigating parties included elements of both of these approaches in their claims and arguments. Doe's claims, for example, focused on the infringement of her right to parenthood,⁷⁹ but also on the contractual relationships established between the parties—a relationship that was based in principle on the consent forms both she and the donor had signed with the sperm bank.⁸⁰

All three residing Justices offered analyses that differed to some degree, but all were at least willing to recognize the forms signed by the litigating parties—the sperm bank, the donor, and Doe—as establishing some form of a valid contractual relationship among them. Writing the opinion of the Court, Justice Elyakim Rubinstein nevertheless found that “the most appropriate and correct perspective for a ruling on the issue” was through an analysis of the conflicting rights and interests that were

72. *Id.*

73. *Id.* at 7.

74. *Id.* at 6.

75. *Id.* at 10. The petition was initially filed against the Ministry of Health and the Sperm Bank. Later, the Court joined the donor as a respondent and requested that he respond to the petition.

76. *Id.* at 11 (“As we have noted at the outset, this case raises questions of numerous fields of law. The issue may be looked at through the prism of contract law, property law, and, naturally, from the angle of administrative law. Each one of these perspectives may serve as fruitful grounds for a rich and innovative discussion.”).

77. *Id.*

78. *Id.* at 11–12, 31.

79. *Id.* at 7.

80. *Id.* at 8.

at stake for both the donor and the recipient.⁸¹ He then balanced the donor's wish not to be a father against Doe's interest in conceiving children who share the same genetic constitution,⁸² eventually finding that "precedence should be afforded to the donor's position and to his personal autonomy."⁸³

The Israeli Court's reasoning will be discussed below in greater detail. However, note that by drawing on *Doe* the purpose here is not to suggest that the Israeli Supreme Court's analysis should be applied in Teuscher's case, as these arise in different legal contexts. What is more, the circumstances that led the Washington sperm bank to deny Danielle Teuscher access to her reserved vials differ from those in the Israeli example in that the recipient, and not the donor, is the one to have breached the contract she had entered with the bank. Rather, in the following paragraphs I use the Israeli example in order to identify some of the questions this novel type of reproductive dispute involving an anonymous sperm donation may give rise to. I then consider how these questions might be answered in the American legal context.

III. POSSIBLE LEGAL FRAMEWORKS

Over the past two decades, two prevailing approaches for resolving reproductive disputes have gained a foothold, both of them introduced and developed in the context of frozen pre-embryo disposition disputes. The most famous among those is the 1992 case, *Davis v. Davis*.⁸⁴ This Part provides a general description of each approach and how it applies to a dispute over an anonymous donor's sperm vials.

A. *The Contractual Approach*

After exhausting several other paths to parenthood, Junior Lewis Davis and Mary Sue Davis decided to undergo in vitro fertilization (IVF) treatments in order to conceive a child.⁸⁵ Several attempts at IVF over a period of three years did not result in a pregnancy.⁸⁶ Before another transfer could be attempted, but after the couple opted to cryogenically preserve four pre-embryos, Junior Davis filed for divorce.⁸⁷ During the divorce proceedings it became clear that the couple disagreed over the

81. *Id.* at 11.

82. *Id.* at 26.

83. *Id.* at 4.

84. See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (discussing which divorced spouse should have custody of the frozen embryos), *aff'd on reh'g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

85. *Id.* at 591.

86. *Id.* at 591-92.

87. *Id.* at 592.

disposition of their pre-embryos: Mary Sue sought to donate the pre-embryos to a childless couple (at least at that point in time), while Junior Davis wanted them to be discarded. In its decision, the Supreme Court of Tennessee discussed two alternative paths for the resolution of the dispute before it, the “Enforceability of Contract”⁸⁸ and “Balancing the Parties’ Interests.”⁸⁹

Under a contractual approach, the court will examine the agreements the parties have entered into, either with one another or with a fertility clinic in which the pre-embryos, or gametes, are in storage. More specifically, the court will look to honor any agreement that manifests the parties’ intentions regarding the disposition of the pre-embryos. Ideally, there would be an independent dispositional agreement, drafted and signed by the parties, in which they both explicitly expressed their dispositional choices in the event of divorce or other contingencies. In reality, however, service providers (e.g. fertility clinics) “require couples undergoing IVF to sign a cryopreservation consent or agreement. . . . These documents vary in their particulars, but typically ask patients to choose from a number of options for disposition under a variety of contingencies, such as death, divorce, or abandonment of the embryos.”⁹⁰ Courts have also considered whether an oral or an implied agreement can mandate a certain dispositional choice.⁹¹

In the context of anonymous sperm donation, a contractual analysis is similarly likely to be based on the consent forms the donor and recipient have each signed with the sperm bank.⁹² These forms may or may not include provisions detailing the circumstances under which donors may withdraw consent for the use of their gametes at a later date.⁹³ This is true for both the form or agreement signed by the donor and that signed by the recipient upon receiving the donation and/or reserving additional vials for future use. More often than not, however, “[m]en who donate sperm through a sperm bank typically relinquish their rights without time limits. Nor are they offered the opportunity to revoke consent to use of the sperm at a later date, though clinics have on occasion honored a request by the

88. *Id.* at 597.

89. *Id.* at 603.

90. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAWS. 57, 58–59 (2011) [hereinafter Forman, *Clinic Consent Forms*].

91. *See generally* Szafranski v. Dunston, 34 N.E.3d 1132, 1147–53 (Ill. App. Ct. 2015); Davis, 842 S.W.2d 588.

92. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 396 (2013) [hereinafter Forman, *Enforceability*].

93. *Id.* at 401.

donor to no longer sell the sperm.”⁹⁴ This seems odd considering how changes in one’s personal circumstances may affect their decision to act as an anonymous sperm donor.⁹⁵ Indeed, some countries have long protected a donors’ right to withdraw consent to the use of their gametes, including the United Kingdom, which has done so since 1991.⁹⁶

In a contractual analysis of anonymous sperm donation, courts must also consider the lack of a direct contractual relationship between the donors and recipients. As illustrated both in Teuscher’s case and in *Doe*, there is no “contractual adversary” between the donor and the recipient.⁹⁷ At least in the latter case, *Doe* did try to argue that she was a third party to the contract entered into by the donor and sperm bank;⁹⁸ however, the Court rejected this claim.⁹⁹

B. The Balancing Test Approach

The court in *Davis v. Davis* decided to resolve the case by balancing the various rights at stake for Mary Sue Davis and for Junior Davis. In doing so, the court considered “the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”¹⁰⁰

In that particular instance, while the case was moving through the lower courts, Mary Sue had intended to use the pre-embryos herself; but by the time the Supreme Court of Tennessee was considering the case, she had changed her mind, instead asking to donate them to a childless couple.¹⁰¹ Junior was “adamantly opposed to such donation” and wanted the frozen pre-embryos discarded.¹⁰² The court weighed the couple’s competing interests under each of these scenarios, and found that in both instances Junior’s right not to procreate would prevail.¹⁰³

Most reproductive disputes, and certainly that in Teuscher’s case, present the court with a similar task of balancing different aspects of

94. *Id.* This is also true for procedures such as the “cryopreservation (freezing) of gametes and embryos to provide treatment options for excess reproductive tissues and to aid with fertility preservation.” Cynthia E. Fruchtmann, *Withdrawal of Cryopreserved Sperm, Eggs, and Embryos*, 48 FAM. L.Q. 197, 197 (2014).

95. Guido Pennings & Veerle Provoost, *The Attitude of Female Students Towards Sperm Donation by Their Partner*, 36 J. ASSISTED REPROD. & GENETICS 1431, 1432 (2019).

96. Peter D. Sozou et al., *Withdrawal of Consent by Sperm Donors*, 339 BMJ 975, 975 (2009).

97. *The Doe Case*, *supra* note 16, at 54.

98. *Id.* at 8.

99. *Id.* at 31.

100. See *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992) (quoting the discussion in the balancing the parties’ interests), *aff’d on reh’g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

101. *Id.* at 590.

102. *Id.*

103. *Id.* at 604.

procreative autonomy.¹⁰⁴ In *Doe*, the fact that procreative rights were at stake was central to the Israeli Court's decision to choose the balancing test approach over the contractual one. It found that "intimate questions of human life" deserve a constitutional analysis of the rights at stake,¹⁰⁵ and rejected the proposition that the "case of sperm donation attests to a choice to follow a . . . 'businesslike' or 'financial'" path to parenthood, "of the type that grants security that is not extant in an intimate set of understandings."¹⁰⁶

These determinations about the centrality of procreative decisions to the lives of individuals allude to some principal arguments against the application of the contractual approach to resolve reproductive disputes, which will be discussed below. For now, note that applying the balancing test requires answering at least two more questions: first, about the rights each party to the reproductive dispute has at stake; and second, about the harms that may flow from infringing upon these rights. These two questions will be discussed in turn.

IV. THE RIGHTS AT STAKE

It follows from the overview of the balancing test approach, that before such a test can be used to weigh the conflicting rights at stake, these rights need to be identified. Even more fundamental, understanding the nature of the rights at stake may be an integral part of deciding which of the approaches is the best approach to apply to begin with. As discussed later on, classifying the right not to become a parent as inalienable, for example, may lead a court to reject the contractual approach and to employ the balancing test instead.¹⁰⁷ This section looks at several ways in which the rights of the parties may be framed, in each case possibly leading to considerably different results.

A. *The Right Not to Procreate*

In a series of Supreme Court cases dating back to 1942, procreative liberty has been constitutionally recognized through case law identifying marriage and procreation as fundamental rights.¹⁰⁸ A "zone of privacy

104. See, e.g., Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 518 (2018) (exploring the history of the balancing test in the context of abortion law).

105. *The Doe Case*, *supra* note 16, at 27.

106. *Id.* at 19.

107. *Id.*

108. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that sterilization as punishment for stealing was unconstitutional); see generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

created by several fundamental constitutional guarantees,”¹⁰⁹ the Court explained, provides individuals with a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹⁰ Developed primarily through cases addressing the use of contraceptives, this zone is generally understood to encompass both the right to procreate and the right not to procreate.

Following this basic premise, at least in the context of pre-embryo disputes, “courts and commentators have invoked a monolithic ‘right not to procreate.’”¹¹¹ For example in *Reber v. Reiss*, the Pennsylvania Superior Court had to decide who should receive the thirteen pre-embryos Bret Reber and Andrea Reiss created after the latter was diagnosed with breast cancer.¹¹² The couple separated and then divorced, but could not agree over the disposition of the pre-embryos.¹¹³ In ruling for the wife (who otherwise could not have become a genetic parent), the court analyzed the husband’s interest in “avoiding unwanted procreation.”¹¹⁴ In response to the husband’s concerns about the financial responsibility he may bear toward the resulting child and the level of involvement he may have in the child’s life, the court explained that he would be relieved of any financial obligation and could choose whether to be part of their life or not.¹¹⁵ Nevertheless, it did not consider how these different scenarios might interfere with different aspects of his procreational liberty. Indeed, in most of these cases state courts have ruled in favor of the party claiming the right not to procreate, relying on the abovementioned Supreme Court cases.¹¹⁶

Critical of this monolithic view of the right not to procreate, Professor I. Glenn Cohen developed a competing framework that identifies “a bundle of rights having multiple possible sticks, consisting of a right not to be a gestational, legal, and genetic parent.”¹¹⁷ According to this framework, pre-embryo disposition disputes typically present a conflict between “her right to be a genetic, gestational, and legal parent” and “his

109. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

110. *Eisenstadt*, 405 U.S. at 453.

111. Cohen, *Genetic Parent*, *supra* note 15, at 1118; *see also* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1136–37 (2008) (arguing that authorities “err by relying on a monolithic conception of the right not to procreate”) [hereinafter Cohen, *The Constitution*].

112. *Reber v. Reiss*, 42 A.3d 1131, 1132–33 (Pa. Super. Ct. 2012).

113. *Id.*

114. *Id.* at 1140.

115. *Id.* at 1140–42.

116. I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 14 (2016); Cohen, *The Constitution*, *supra* note 111, at 1137–38.

117. Cohen, *Genetic Parent*, *supra* note 15, at 1121.

right not to be a genetic (and possibly legal) parent.”¹¹⁸ Following the same logic, a case of anonymous sperm donation would likely present a conflict between the right to be a genetic, gestational, and legal parent and the right not to be a genetic parent.¹¹⁹

In *Doe*, which involved an anonymous sperm donor, the Israeli Court similarly considered the different possible “fatherly contexts,” noting that under a regime of anonymity, “the donor owes no financial, social or other duty to the infant.”¹²⁰ In fact, the Court explained, “it is not at all clear if and how the donor would know that he became a father, since, as aforesaid, this is subject to the success of the medical procedure, and without an inquiry on his part he will not learn about it.”¹²¹ But even though the Court held that it was not the “core” right not to be a parent that was at stake, it nonetheless found the “genetic element of parenthood” to be constitutionally protected under Israeli law by the right of autonomy.¹²²

In the United States, it is still unclear whether the “naked” right not to be a genetic parent should be granted the status of a constitutionally protected right. At least according to Cohen, the answer is no. Supreme Court decisions on access to contraception and abortion, he posits, should not be seen as recognizing a fundamental constitutional right not to be a genetic parent.¹²³ Instead, they should be viewed as “establishing a fundamental right against state interference with the collective decision of both parties to prevent procreation but not a right by one party *as against the other party* to prevent procreation.”¹²⁴ According to Cohen, neither does abortion jurisprudence recognize an overarching right not to be a genetic parent, since it is concerned with the right not to be a *gestational* parent and with freedom against bodily intrusion.¹²⁵ This line of reasoning suggests that “an individual does not violate the Constitution

118. Cohen, *The Constitution*, *supra* note 111, at 1144.

119. This characterization of the conflicting rights assumes, first, that the sperm recipient intends on gestating the pregnancy herself rather than use a surrogate. And second, that the state regulatory framework governing parentage allows for sperm donors to be relinquished of their parental obligations. As discussed in Part I above, at least when it comes to single persons using an anonymous donation, most states do terminate the parental rights of the *donors*.

120. *The Doe Case*, *supra* note 16, at 22.

121. *Id.*

122. *Id.*

123. Cohen, *The Constitution*, *supra* note 111, at 1154.

124. *Id.* This argument raises several questions that I do not discuss in this article, concerned with the type of actions procreative rights protect individuals from, such as private or state actions. According to Cohen, “enforcement of agreements to become a genetic parent, such as . . . agreements to provide sperm or egg, over contemporaneous objection, does not constitute state action raising a constitutional issue.” *Id.* at 1174. This is another argument Cohen makes against treating the right not to be a genetic parent as a fundamental right.

125. *Id.* at 1154–65.

by making another individual a genetic (but only genetic) parent against his or her will.”¹²⁶ Therefore, a court might be able to compel, for example, Danielle Teuscher’s sperm donor to become a genetic parent even though he later withdrew consent to the use of his sperm.

Whether courts decide to embrace this framework or not, an important first step is to recognize and differentiate among the elements of parental rights that are at stake, and only then turn to the process of balancing them against the other. This is especially true in the context of sperm donation, which relies on the law’s ability to acknowledge models of parenthood other than that of genetic parenthood.

B. *The Right to Procreate*

When considering the right to procreate, in the context of sperm donation, the question is which procreative right a recipient would exercise when attempting to use a specific donor’s sperm. One answer to this question is that all elements of the right to procreate are at stake, since in most cases recipients wish to become genetic, legal, and gestational parents.¹²⁷ Thus, denying them access to the sperm of their choice interferes with each of these rights. Another way to answer this question is to consider whether the recipient could possibly become a genetic, legal, and/or gestational parent through means other than the disputed sperm.

Although most courts resolving pre-embryo disputes have opted for the latter,¹²⁸ distinguishing these answers highlights the difficulty of determining the scope of the right to procreate. This is due in part to the development of reproductive technologies that provide novel ways to exercise this right.¹²⁹ As one scholar noted in this context, “[i]n a pre-ART world, procreation was fundamentally (perhaps irrevocably) linked to sexual activity.”¹³⁰ Despite the prevalence of assisted reproduction as an accepted form of procreation, “courts and legislatures have continued to shy away from explicit consideration of the nature of the right to procreate with technological assistance.”¹³¹ This area is also relatively undertheorized within scholarly writing.¹³²

126. *Id.* at 1167.

127. For male recipients, the rights at stake are limited to the first two.

128. *See, e.g.,* Findley v. Lee, No. FDI-13-780539, at 61–65 (Cal. Super. Ct. Jan. 11, 2016), (considering that the Respondent has not established that she is infertile at the age of forty-six but she has established that she has between a 0 to 5 percent chance of a live birth).

129. *See generally* Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER, L. & JUST. 22 (2015).

130. *Id.* at 56.

131. *Id.* at 24–25.

132. *See, e.g., id.*; Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. J. 1 (2007).

While a discussion over the meaning of the right to procreate is beyond the scope of this article, one basic question that has yet to be thoroughly answered is whether procreative liberty extends to donor-assisted reproduction. According to Professor John Robertson,¹³³ the answer is yes.

The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present. Both coital and noncoital conception enable the couple to unite egg and sperm and thus acquire a child of their genes and gestation for rearing. . . . The use of noncoital techniques such as IVF or artificial insemination to unite egg and husband's sperm, made necessary by the couple's infertility, should then also be protected.¹³⁴

Such an extensive view of procreative liberty has been criticized for reading too much into the US Supreme Court decision in *Skinner v. Oklahoma*; as some suggest, recognizing a negative right to procreate "does not imply a positive right to call upon the apparatus of the state for assistance in procreation."¹³⁵ Furthermore,

even if *Skinner* does create a constitutional right to be free from state interference with the use of reproductive technology, it does not follow that the state possesses an affirmative obligation to assure the exercise of procreative choice by placing its prestige and power behind the enforcement of preconception contracts.¹³⁶

Even assuming that the right to procreate extends to assisted reproduction, a further question is whether that right encompasses the right to procreate using the gametes of a specific donor. As suggested above, if cases that involve pre-embryo disputes are any indication, analysis of the right to procreate has been concerned with the general

133. Of the scholars that did grapple with this question over the years, John A. Robertson has been particularly prolific, repeatedly arguing that the protected right to procreate includes the right to use assisted reproduction. See, e.g., John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 914 (1996) ("Since an infertile couple or individual has the same interest in bearing and rearing offspring as a fertile couple does, their right to use noncoital techniques to treat infertility should have equivalent respect."); see John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 328 (2004) ("If coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use noncoital means of reproduction to combine their gametes, such as artificial insemination (AI), *in vitro* fertilization (IVF), and related techniques."); see also John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 956 n.53 (1986) [hereinafter Robertson, *Embryos, Families*] ("Thus, persons desiring to reproduce may have a right to receive gametes and gestation from others, even if the others have no independent right to provide those services.").

134. Robertson, *Embryos, Families*, *supra* note 133, at 960.

135. Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1485 (1995) (reviewing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994)).

136. *Id.*

ability to become a parent, by any means, not with the choice of some particular sperm. Indeed, in *Davis*, the Tennessee Supreme Court noted that Mary Sue Davis could “achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing” through IVF.¹³⁷ The court suggested that it would have been a closer call if she was seeking to use the pre-embryos herself, but only if she could not become a parent by any means other than the disputed pre-embryos.¹³⁸ Put differently, the court might have weighed her right to procreate differently in relation to Junior’s interest in avoiding parenthood if it would implicate her ability to become a parent at all. The court did not, however, confront the specific question of whether the right to assisted procreation is constitutionally protected in the context of pre-embryo disputes.¹³⁹

Similar reasoning runs through the *Doe* decision, where the Israeli Supreme Court expressed reservations about a broad interpretation of the right to procreate.¹⁴⁰ Specifically, the Court posited that Doe’s “core” right to parenthood was not at stake, since her overall ability to become a parent was still available; Doe was “healthy and fit to bring a child into this world and is not bound . . . to the Donor in the case at bar. She is able to act soon to receive another sperm donation at her preferred timing for undergoing additional insemination treatments.”¹⁴¹ Against her claim that “impingement upon the ability to choose with whom to bring children into this world is sufficient in order to be sheltered by the legal right to parenthood,” the Court reiterated that “at most” her interest in using the sperm of this particular anonymous donor is protected by her right to autonomy, though it was “highly doubtful.”¹⁴² Framing the right she claimed as a “right to a child having a specific genetic constitution,” the Court held that in these circumstances, her interest “is not recognized by law and is not protectable.”¹⁴³

137. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), *aff’d on reh’g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

138. *Id.*

139. Another differentiation that I do not make here is between negative and positive rights. In the context of assisted conception, a negative right would protect against interference with accessing reproductive practices such as sperm donation or surrogacy, while a positive right would require the state or other individuals to provide the means, such as funding, needed in order to engage with them. *See, e.g.*, Robertson, *Embryos, Families*, *supra* note 133, at 966 n.83 (“[P]rocreative liberty is (like most constitutional rights) a negative—not a positive—right.”).

140. Again, to be clear, the purpose here is not to suggest that the Israeli Supreme Court’s framing of the right should be employed in the American context as well. Rather, it is to get a sense of the nuances and unique considerations the case of sperm donation brings to the discussion over the right to procreate.

141. *The Doe Case*, *supra* note 16, at 18.

142. *Id.*

143. *Id.* at 18–19, 26.

In the American context, where one's reproductive decisions are protected by a zone of privacy, there is perhaps more merit to the claim that Danielle Teuscher's fundamental reproductive liberty is at stake; because she had already used the sperm once to conceive a child, denying her access to the reserved vials does amount to interfering with her reproductive plans. Still, in a more recent case, the Colorado Court of Appeals found that the wife's interest in having a fourth child who carried the same genetic constituency as her other children was outweighed by the husband's "corresponding and equal rights . . . to determine that he does not want to have additional children who are joint genetic offspring of husband and wife."¹⁴⁴ This decision was later reversed and remanded by the Colorado Supreme Court. While the court did not directly address the interest of having children who are "full siblings," it did find that while weighing the parties interests at stake "the sheer number of a party's existing children, standing alone," may not be a reason to deny the requesting party the preservation or use of the pre-embryos.¹⁴⁵ At the same time, the court made clear that courts should consider "a party's demonstrated ability, or inability, to become a genetic parent through means other than the use of the pre-embryos," but may not consider "whether the party seeking to become a genetic parent using the pre-embryos could instead adopt a child or otherwise parent non-biological children."¹⁴⁶

V. REPRODUCTIVE HARMS

Whichever formulation courts decide to use when analyzing the rights at stake in sperm donation disputes, it is important to also consider how these rights weigh against one other. In *Davis*, the court suggested that as a rule "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question."¹⁴⁷ In practice, courts have tended to conduct "a fact-intensive inquiry into each party's interest in using or preventing the use of the pre-embryos."¹⁴⁸

Such case-by-case inquiries are meant to elucidate the harms that would be imposed on each party to the reproductive dispute, in the

144. *In re Marriage of Rooks*, 2016 WL 6123561, at *7 (Colo. App. Oct. 20, 2016), *rev'd*, 429 P.3d 579 (Colo. 2018).

145. *In re Marriage of Rooks*, 429 P.3d 579, 581 (Colo. 2018).

146. *Id.* at 595.

147. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), *aff'd on reh'g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

148. *Szafranski v. Dunston*, 34 N.E.3d 1132, 1162 (Ill. App. Ct. 2015); *see also* Cohen, *Genetic Parent*, *supra* note 15, at 1144 (suggesting that one mechanism to resolve these conflicts is a "balancing device," not at the categorical level, but at the level of a particular case taking into account idiosyncratic facts that might determine whose interest we should favor).

context of their life circumstances.¹⁴⁹ As such, this discussion can be understood as part of the balancing-of-interests analysis. However, comparing the burdens “that unwanted reproduction . . . would cause the objecting party, and the burdens that refusing to enforce the agreement” would cause to the party wishing to use the gametes, is also part of evaluating the desirability of enforcing such agreements.¹⁵⁰ Separating this part from the categorical discussion of the conflicting interests gives rise to several practical insights into the reproductive harms entailed in Teuscher’s and similar cases.

A. Harm to the Donor

Discussing the harm that would be imposed on the donor if he became a genetic parent against his wish, the Israeli Supreme Court found that the

harm to a man, as a result of his feeling . . . that a child who is the fruit of his loins “walks about the world,” and he is unable or unwilling, whether on religious grounds or in terms of the resources of time and emotion, to dedicate his love and attention to him—is inevitable, and touches upon his subjective moral conscience.¹⁵¹

These findings were grounded, in part, in a letter the donor addressed to the Court in which he explained that sperm donation “is presently incompatible with my world view . . . I am not interested in having a child born by me, without me being able to give him love, and without me loving his mother.”¹⁵²

Although the Israeli Court framed the harm as particularly grave considering the donor’s religious lifestyle, quite similar conceptualizations of the harms that forced genetic parenthood might impose on individuals are also found in pre-embryo disposition cases in the US. In *Davis*, for example, the court explained that “[t]he impact that this unwanted parenthood would have on Junior Davis can only be

149. While I do not discuss here the interests of children born to a sperm donor in having full genetic siblings, an argument can be made that having children from the same sperm donor will benefit the existing child and any future child, rather than having another donor brought into the family unit. See, e.g., Lucy Frith & Eric Blyth, *The Point of No Return: Up to What Point Should We Be Allowed to Withdraw Consent to the Storage and Use of Embryos and Gametes?*, 33 *BIOETHICS* 637, 640 (2019); Eric Blyth, Steve Lui & Lucy Frith, *Relationships and Boundaries Between Provider and Recipient Families Following Embryo Adoption*, 8 *FAM. RELATIONSHIPS & SOC’YS* 267 (2017).

150. John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 *EMORY L.J.* 989, 1019 (2001) [hereinafter Robertson, *Precommitment Strategies*].

151. *The Doe Case*, *supra* note 16, at 23–24. Statements of this sort feature throughout the decision, for example: “[I]t is hard for [the donor] to feel that the children to be born by his donation will not be his children, nor will they have the benefit of his affection, nor will they be the fruit of his love.” *Id.* at 24.

152. *Id.* at 23.

understood by considering his particular circumstances.”¹⁵³ Fifth youngest of six children, Junior’s parents divorced when he was five years old. After his mother had a nervous break-down, “he and three of his brothers went to live at a home for boys run by the Lutheran Church. From that day forward, he had monthly visits with his mother but saw his father only three more times before he died in 1976.”¹⁵⁴ These “boyhood experiences” led the court to conclude that Junior would “face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.”¹⁵⁵

In both instances, the potential psychological or emotional harms proved consequential to the courts’ final rulings in favor of the sperm provider. Similar concerns regarding the consequences of genetic parenthood are contemplated in arguments against employing the contractual approach in reproductive disputes, which will be discussed below. Yet this type of harm can also be conceptualized in general terms, without reference to one’s particular life circumstances. In the same article where he offers to unbundle the right not to be a parent into three separate rights, Professor Cohen also conceives the idea of “attributional parenthood.”¹⁵⁶ This term refers to a “residual social category of parenthood” that persists regardless of any financial and care responsibilities this title may entail.¹⁵⁷ In pre-embryo disputes, Cohen argues, “three categories of people might nonetheless attribute parenthood writ large to an individual because of his or her genetic parenthood of the child: those outside the relationship, the resulting child, and the individual himself.”¹⁵⁸ This type of emotional distress damage rests on the convention that connects genetic parenthood and attributional parenthood.¹⁵⁹

In the context of sperm donation, the extent of the harm attributional parenthood may impose on the donor may vary from one case to another. The extent of harm depends on whether, for example, the sperm recipient decides to disclose the identity of the donor to the future child or other third parties such as friends and family:

[I]n a regime where one is told whether one’s sperm has been used to successfully produce a child, but not given the child’s identity (and vice versa), the sperm provider may perceive himself to be the father of a

153. *Davis v. Davis*, 842 S.W.2d 588, 603–04 (Tenn. 1992), *aff’d on reh’g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

154. *Id.*

155. *Id.* at 604.

156. Cohen, *Genetic Parent*, *supra* note 15, at 1134–45.

157. *Id.* at 1135.

158. *Id.* at 1136.

159. *Id.* at 1140–41.

genetic child he never wanted . . . but he is not forced to confront the perception by the child or third parties that he is the father.¹⁶⁰

There is, however, room to question the existence of such harm for anonymous sperm donors, or at least its severity. The decision to become a donor in the first place means that at some point in their lives, sperm donors were unbothered by the idea that they would have genetically related children with whom they would have no relationship or contact. Indeed, in arguing in favor of “uncoupling” biological and psychological parenthood in frozen pre-embryo disputes, Professor Ellen Waldman draws on data about sperm donors to show that “biological ties can exist absent psychological attachment.”¹⁶¹ But as Cohen rightly notes, these studies do not account for cases like *Teuscher* and *Doe*, where donors wished to discontinue further use of their sperm, have knowledge of the actual past and future use of their sperm, and have lost their anonymity.

Still, recognizing that people have different views about the burden or obligation that may result from genetic reproduction (and that these views may change throughout a person’s life), requires careful consideration of the meaning genetic parenthood in each particular case, rather than basing decisions on preconceived ideas.

Other harms courts considered in reproductive disputes are financial in nature. In *Findley v. Lee*, the California Supreme Court weighed Findley’s right not to procreate against his ex-wife Lee’s right to procreate.¹⁶² According to Findley, the only reason Lee wanted to have these children was to “blackmail and extort money from him in the future.”¹⁶³ Even though the court eventually ruled in favor of Findley, it rejected this claim because California’s child support system would make it “highly unlikely” that Lee would be able to extort more money from him.¹⁶⁴ In the context of sperm donation, this harm is unlikely to carry much weight either because most states release anonymous sperm donors from any financial liability toward the resulting child.¹⁶⁵

Becoming a genetic parent, even if it does not carry any legal or financial liability, may also affect gamete providers’ current or future relationships. In *Szafranski v. Dunston*, Jacob Szafranski, the party asking to discard the pre-embryos that he had created with his ex-girlfriend, Karla Dunston, grounded his objection in the impact that using them

160. *Id.* at 1140.

161. Ellen Waldman, *The Parent Trap: Uncovering the Myth of Coerced Parenthood in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004).

162. *Findley v. Lee*, No. FDI-13-780539, 2016 WL 270083, at *2 (Cal. Super. Jan. 11, 2016).

163. *Id.* at *33.

164. *Id.* at *36.

165. *See supra* Part I.

would have on his other relationships.¹⁶⁶ Although the couple had no plans to get married, when Karla was diagnosed with cancer and was about to lose her fertility, Jacob agreed to provide her with his sperm in order to create pre-embryos.¹⁶⁷ After the couple separated, Karla wished to use the pre-embryos, but Jacob objected.¹⁶⁸ In his testimony, Jacob explained that he already lost one “love interest” because of this legal dispute and that he was “worried that no one will want to have a relationship with him knowing that he has fathered a child” under such circumstances.¹⁶⁹

This concern over the effect of unwanted genetic parenthood on the donor’s intimate relationships is especially relevant in the context of anonymous sperm donation, since donors often do not disclose to their partners the fact that they have donated sperm. One study examining attitudes about sperm donation found that while the majority of its respondents would inform and involve their partner in the decision to donate, “future partners would less often be informed than current partners.”¹⁷⁰ That same study found that “[a]lmost 40% of the respondents feared that the donation might have a negative impact on their current or future relationship.”¹⁷¹

Indeed, in *Doe* the donor explained that in the time since he had provided the donation he got married and had a son, and that he was “not interested in adding injury to his wife . . . by adding a terrible uncertainty to their lives.”¹⁷² Still, the Court did not take this particular harm into account in its decision. In *Szafranski*, the Illinois Appellate Court held that Jacob’s concerns are “risks that both parties faced and knowingly accepted in agreeing to undergo IVF.”¹⁷³ The same may be argued with regard to parties who agreed to donate sperm.

B. Harm to the Recipient

In pre-embryo disposition disputes, the discussion over potential harms to the party attempting to exercise his or her right to procreate usually centers on whether that party is able to achieve parenthood through some means other than the disputed pre-embryos. As explained

166. *Szafranski v. Dunston*, 34 N.E.3d 1132, 1162 (Ill. App. Ct. 2015).

167. *Id.* at 1137–38.

168. *Id.* at 1136.

169. *Id.* at 1162.

170. Veerle Provoost, Florence van Rompuy & Guido Pennings, *Non-Donors’ Attitudes Towards Sperm Donation and Their Willingness to Donate*, 35 J. ASSISTED REPROD. GENETICS 107, 115 (2018).

171. *Id.* at 112; *see also* Pennings & Provoost, *supra* note 95.

172. *The Doe Case*, *supra* note 16, at 10.

173. *Szafranski*, 34 N.E.3d at 1162.

above, this harm has been considered most severe if a ruling in favor of the other party meant that the requesting party would not be able to have genetic children at all. In *Findley v. Lee*, discussed above, the California Supreme Court dedicated most of its analysis of the interests at stake for Lee to the question whether she “suffers from age-related infertility.”¹⁷⁴ After engaging with several studies and with testimony from fertility doctors, the court concluded that “Lee is unable to establish that she is now infertile per se. . . . However, the evidence did establish that at best she has between a 0 to 5 percent chance of a live birth.”¹⁷⁵ In contrast, where sperm recipients are requesting the use of reserved vials, unless they were already fertilized, the recipient’s chance of becoming a genetic parent would not be affected by either granting or denying access to the reserved sperm. The question of infertility is thus unlikely to arise.

Yet another set of harms concern the health risks that harvesting eggs and IVF impose on women in particular.¹⁷⁶ While these are irrelevant if recipients opt to conceive through artificial insemination, they may nonetheless apply if, for example, a recipient freezes her eggs and reserves additional sperm vials with the hope of using both of the stored gametes to produce children in the future.

Sperm donation also does not require the same level of financial investment that IVF does. “A single vial of sperm can cost \$700, and, depending on insurance coverage, each round of AI performed by a doctor can cost over \$1000, with women typically needing to undergo numerous rounds of insemination before it is successful.”¹⁷⁷ In comparison, in 2016, the minimum price of an IVF cycle in the United States ranged from \$12,000 to \$15,000.¹⁷⁸ Additional procedures and tests, including assisted hatching, embryo freezing, and preimplantation genetic diagnosis can add another \$5000 to \$15,000 to that price.¹⁷⁹ The cost of the sperm vials themselves, in addition to the costs associated with browsing, freezing, and storing may nonetheless amount to thousands of dollars.¹⁸⁰

174. *Findley v. Lee*, No. FDI-13-780539, 2016 WL 270083, at *62 (Cal. Super. Jan. 11, 2016).

175. *Id.* at *65.

176. Cohen, *Genetic Parent*, *supra* note 15, at 1166–69; *see also* *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), *aff’d on reh’g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

177. Lauren Gill, *Who’s Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1725–27 (2013).

178. HENRY T. GREELY, *THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION* 57–58 (2016).

179. *Id.*

180. Gill, *supra* note 177; *see also* Brittany Malooly, *Why Is Sperm So Damn Expensive?*, VICE (Jan. 10, 2016), https://www.vice.com/en_us/article/53nvex/why-is-sperm-so-damn-expensive [<https://perma.cc/DL3G-YGY2>] (describing the expenses associated with freezing and storing sperm).

Notwithstanding the health risks and financial investment sperm donation may entail, another category of harms centers on intangible or psychological harms possibly inflicted on sperm recipients if access to the gametes they reserved is denied. There is, for example, the emotional investment the recipient made in choosing the donor, which “is often a stressful and time-consuming process and is usually not a quick or casual decision.”¹⁸¹ Although scholarship on people’s experience with choosing a sperm donor is limited, existing writing points out the complexity of such decision and the importance some perspective parents attribute to it.¹⁸² Many women even describe having felt some sense of connection to a specific donor, which guided them in choosing a donor.¹⁸³

To better understand the harms to the sperm recipient, it is perhaps helpful to consider the harms resulting from what Professor Dov Fox has called “confounded procreation.”¹⁸⁴ Developed in the context of reproductive negligence, i.e. the negligent supply of reproductive services by medical professionals, this term encompasses cases where plaintiffs ended up with a child having different genetic traits than they wished for.¹⁸⁵ It happens “when reproductive professionals fertilize patients with the wrong sperm, implant another couple’s embryos, misrepresent donor information, or misdiagnose fetuses.”¹⁸⁶ These “mishaps” result in injury “to reasonable expectations of control over the selection of offspring particulars that people project would make the parenting experience more worthwhile for them.”¹⁸⁷ According to Fox this is particularly true about genetic trait preferences pertaining to the biological relationships of children to parents,¹⁸⁸ yet it may also be relevant to the biological relationship between siblings. The existence and severity of the harm depends on how it may impair their life “from the perspective of their own (not illegitimate) values and circumstances.”¹⁸⁹

In the case of sperm donation, there appears to be a preference among parents and aspiring parents toward using the same sperm donor for their

181. Frith & Blyth, *supra* note 149, at 639.

182. See, e.g., Sophie Zadeh, Susan Imrie & Andrea M. Braverman, ‘Choosing’ a Donor: Parents’ Perspectives on Current and Future Donor Information Provision in Clinically Assisted Reproduction, in REGULATING REPRODUCTIVE DONATION 311 (Susan Golombok et al. eds., 2016); see also Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at 46 (describing the process women go through when selecting sperm).

183. Egan, *supra* note 182 (explaining the emotional aspect of choosing a sperm donor).

184. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 200 (2017).

185. *Id.*

186. *Id.* at 201.

187. *Id.* at 185.

188. *Id.* at 181.

189. *Id.* at 226.

children. Some parents reason that “children with physical resemblances made it visible to society that the children were siblings and thus that they were part of the same family.”¹⁹⁰ According to such view, genetic relatedness is as an indicator of familial relationships.¹⁹¹ Paradoxically, “while gamete donation allows for detachment of social parenthood from biological relatedness,” it also seems to reaffirm biological notions of kinship.¹⁹² Others want to use the same sperm donor because they believe that genetic relatedness leads to positive sibling relations.¹⁹³ Parents also cited medical reasons, explaining that children who are full genetic siblings could donate organs to each other if necessary.¹⁹⁴ These justifications, however, are not indisputable. For example, there is doubt whether genetic relatedness does contribute to better sibling relations, or “that genetic siblings are equally prone (or even more prone) to argue with each other than non-genetically related siblings.”¹⁹⁵

Lastly, this account of the harm Teuscher may bear as a result of the sperm bank’s decision will not be complete without considering its gendered dimensions. As professor Carol Sanger explains in her critical response to Fox’s article, “many men and women experience procreation disruptions differently,” and “the measure of disappointment is not gender neutral.”¹⁹⁶ For example, women struggling with infertility are “more likely than men to report depression and anxiety symptoms . . . , and respond more poorly following treatment failure.”¹⁹⁷ In the case at hand, accounting for such gendered harms means considering why Danielle, and other similarly situated women, sought motherhood through sperm donation, and what choosing this reproductive route has meant for them. It may also mean considering the social context in which the choice of becoming a single mother via sperm donation is made. One recent study exploring the narratives of single women contemplating becoming mothers through sperm donation in the United Kingdom found that this decision “provoked much anxiety and ambivalence for the participants . . . , with solo motherhood perceived as a ‘risk’ to the

190. Sara Somers et al., *The Last Vial. What it Means to (Aspiring) Parents to Use the Same Sperm Donor for Siblings*, 41 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 62, 66 (2019).

191. *Id.*; see also Petra Nordqvist, ‘I Don’t Want Us to Stand Out More than We Already Do’: Lesbian Couples Negotiating Family Connections in Donor Conception, 15 SEXUALITIES 644, 652 (2012) (highlighting how genetic relatedness affects perceptions about siblings’ relatedness).

192. *Id.* at 62.

193. Somers et al., *supra* note 190, at 66.

194. *Id.*

195. *Id.*

196. Carol Sanger, *The Lopsided Harms of Reproductive Negligence*, 118 COLUM. L. REV. 29, 40 (2017).

197. Brennan Peterson et al., *An Introduction to Infertility Counseling: A Guide for Mental Health and Medical Professionals*, 29 J. ASSISTED REPROD. & GENETICS 243, 245 (2012).

construct of a ‘good mother.’”¹⁹⁸ Single women “considered, negotiated and accounted for the ‘risks’ solo motherhood may pose for their child: namely, being raised in a family departing from the nuclear family and not knowing their ‘genetic origins.’”¹⁹⁹ Such narratives elucidate just how much may be at stake for women who pursue motherhood via sperm donation, and in turn how much may be lost if it is denied.

VI. CHOOSING A LEGAL FRAMEWORK

While both the contractual and balancing test frameworks may be used to resolve disputes over the disposition of pre-embryos, the Tennessee Supreme Court in *Davis* posited that the balancing test should only come into play when no prior agreement exists.²⁰⁰ The court found that agreements regarding disposition of pre-embryos in the event of contingencies such as death or divorce, should be presumed valid and enforced between the parties, reasoning that “the progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision-making authority as to their disposition.”²⁰¹ It further recognized that such agreements may be modified at a later stage but only by an agreement.²⁰² The court nevertheless found no agreement between Mary Sue and Junior Davis over the disposition of their frozen pre-embryos and therefore resorted to the balancing test to resolve the dispute at hand.

In several of the cases that followed *Davis*, involving similar facts, courts have tried to follow the scheme laid out by this decision.²⁰³ In others, as well as in the Israeli *Doe* case, courts decided against using the contractual framework to resolve reproductive disputes. While the analysis provided thus far highlighted the advantages and pitfalls of each framework, in the following sections I address directly some principal arguments for choosing one framework over the other. I then consider their applicability to Teuscher’s case and the context of sperm donation.

198. Susanna Graham, *Being a ‘Good’ Parent: Single Women Reflecting Upon ‘Selfishness’ and ‘Risk’ When Pursuing Motherhood Through Sperm Donation*, 35 ANTHROPOLOGY & MED. 249, 260 (2017).

199. *Id.*

200. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), *aff’d on reh’g*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

201. *Id.* at 597.

202. *Id.*

203. Forman, *Enforceability*, *supra* note 92, at 384 n.27. *See also* Cohen & Adashi, *supra* note 116, at 14 (providing an overview of “Major Embryo Disposition Cases in the United States”).

A. In Favor of Contractual Enforcement

In *Kass v. Kass*, the New York Court of Appeals held that cryopreservation agreements should be presumed valid and enforceable,²⁰⁴ and that in this particular instance, “the informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program.”²⁰⁵ After five years of marriage and three years of fertility treatments which resulted in five cryopreserved fertilized eggs, Maureen and Steven Kass divorced. Three weeks prior to their decision to dissolve the marriage, the couple signed four consent forms detailing the above-mentioned choice of disposition in case of disagreement.²⁰⁶ The court highlighted how these agreements “minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.”²⁰⁷

Professor John Robertson, one of the strongest proponents of the contractual approach, argues that such disposition agreements “should be enforced when they have been knowingly and intelligently made, and the parties have relied on them in undergoing IVF.”²⁰⁸ Robertson provides a number of reasons the parties’ reliance interest should be granted such strong protection. Among them is the proposition that pre-determined dispositional choices, guaranteed by agreements of this kind, may have been integral to a party’s decision to undertake IVF in the first place.²⁰⁹ More specifically, the certainty provided by agreements in which they commit to a particular future disposition may be essential to their decision to engage with IVF.²¹⁰ Moreover, since it is the parties’ reproductive freedom that is at stake, nonenforcement leads to the frustration of the “freedom they gain by entering into those agreements.”²¹¹ It also leads to the court’s judgment regarding intimate life decisions replacing that of the parties.²¹²

In the case of anonymous sperm donation, the contractual approach may lead courts to enforce donation agreements signed by donors in which they relinquished their rights in the sperm. This approach may also

204. *Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998).

205. *Id.* at 567.

206. *Id.* at 558–60.

207. *Id.* at 565.

208. Robertson, *Precommitment Strategies*, *supra* note 150, at 995.

209. *Id.* at 1024–25.

210. *Id.* at 1017–18.

211. *Id.* at 1027.

212. *Id.*

lead courts to enforce agreements that grant sperm recipients full control over the sperm vials they had reserved for future use. Although these provisions lack the detail of those that command one particular course of action over another, they are nonetheless part of the parties' reproductive choices. Enforcing such provisions protects their reliance interest and their reproductive freedom. This is especially true with regard to sperm recipients like Teuscher and Doe, who both imagined a reproductive future in which their children would carry and share a particular genetic constitution.²¹³ Knowing in advance that they would not be able to use the same sperm donor may have affected their decision, and that of others in their position, to use this reproductive practice to conceive in the first place.

Indeed, the Israeli Supreme Court was at least willing to recognize that Doe's reliance interest had been violated, alongside "additional public considerations and interests (such as the lateral effects and the need to preserve the stability of the Sperm Bank)."²¹⁴ It nonetheless found her reliance interest to be insufficient, noting that "the law . . . avoids coercion with respect to the intimate questions of human life in the absence of weighty considerations."²¹⁵

There is, however, an argument to be made that employing the contractual framework in the context of sperm donation protects not only the interests of recipients, but also those of *donors*. The latter made a reproductive decision—a "waiver by contract of the right not to be a genetic parent."²¹⁶ As Professor Cohen explains in his analysis of this right, "allowing individuals to contractually waive their right not to be a genetic parent, notwithstanding that they may later regret that decision, is a necessary part of respecting them as persons."²¹⁷ In making this argument, Cohen, like Robertson, highlights the particular value individuals attach to procreative autonomy that makes freedom of contract "especially important" in this context.²¹⁸

In discussing the benefits of using the contractual approach for pre-embryo disposition agreements, Cohen also considers the "actual reliance" interest that supports strong enforcement of dispositional agreements.²¹⁹ His framing of the argument, however, focuses on the "harm to those who have actually relied on contracts promising access to

213. Mroz, *supra* note 1; *The Doe Case*, *supra* note 16, at 12.

214. *The Doe Case*, *supra* note 16, at 27.

215. *Id.* at 27–28.

216. Cohen, *Genetic Parent*, *supra* note 15, at 1161.

217. *Id.* at 1163.

218. *Id.*

219. *Id.* at 1167.

cryopreserved pre-embryos.”²²⁰ For women, “the relationship between age and fertility . . . may make successful healthy reproduction less likely, and more costly even if successful since more attempts at IVF will be needed.”²²¹ This is in addition to the “discomfort, pain, and health risks” women incur in the process of harvesting eggs, and the emotional and financial investments IVF procedures entail.²²² Sperm donation usually requires less medical intervention and a smaller financial investment, but, as earlier discussed, the emotional harms may be significant. Despite the difference between the harms imposed in each scenario, the recipients’ reliance interest—and the arguments in favor of enforcement that rest on it—may nonetheless be as strong in the context of sperm donation as in that of pre-embryo disputes.

Proponents of contractual enforcement also point to the broader context of family contracting, where the enforceability of surrogacy, co-parenting contracts, and premarital and postmarital agreements is now “well established.”²²³ These include gamete donation agreements, where donors waive both the “control over the gametes and his or her parental rights and obligations over any child conceived.”²²⁴ Indeed, being “the most well-established and least controversial method of assisted reproduction,”²²⁵ “neither current United States practice nor case law suggests that sperm donations of unlimited duration are or should be impermissible.”²²⁶

B. Against Contractual Enforcement

Even those who support the application of a contractual approach, in principle, recognize that there are problems with these agreements, both in the process through which individuals enter them and in their content.²²⁷ Indeed, some courts were reluctant to enforce dispositional agreements, even when, like the *Davis* court, they considered them desirable vehicles for resolving these disputes.²²⁸ One principal difficulty is the fact that these agreements are found in consent forms provided by fertility clinics or by sperm banks. These lengthy documents cover

220. *Id.*

221. *Id.*

222. *Id.*

223. Forman, *Enforceability*, *supra* note 92, at 395 (arguing that sperm donation is the most common and least controversial method of assisted reproduction).

224. *Id.*

225. *Id.*

226. *Id.* at 401.

227. Robertson, *Precommitment Strategies*, *supra* note 150, at 1016–18; Cohen, *Genetic Parent*, *supra* note 15, at 1179–85; Forman, *Enforceability*, *supra* note 92, at 432–42.

228. See Ziegler, *supra* note 104, at 529 n.106 (highlighting court’s reluctance to enforce dispositional agreements).

several issues unrelated to dispositional choices, such as “medical risks and benefits of the procedure, storage limits and payment terms.”²²⁹ They often “us[e] highly technical language in densely packed, single-spaced documents, that may not even clearly delineate the different topics.”²³⁰ Further, patients may sign these forms without even reading them.²³¹ As the underlying facts of these cases suggest, at times only one of the parties actually read the form before signing it.²³²

On the other hand, it is not clear that the same difficulties arise in the context of anonymous sperm donation. Unlike IVF and pre-embryo storage procedures, sperm donation consent forms govern a simpler interaction between the sperm bank, the donor, and the recipient. Both donating and purchasing sperm are rather simple processes that do not involve medical procedures, unlike those in the creation and storage of pre-embryos. This allows for shorter, more manageable forms, as illustrated in *Doe*, where the consent forms signed by both parties were no longer than three pages.²³³ Importantly, these forms govern only the relation between each party and the sperm bank. They do not govern or constitute a direct contractual relationship between the donor and recipient. Lastly, there is a difference in the “social context” of the two reproductive practices; as two scholars recently noted, “[f]rom a donor’s perspective, the donation of sperm or oocytes is usually a choice that they are able to make without any time pressure, with no urgent medical indication and, in the case of sperm donors, without undergoing an arduous and stressful medical procedure.”²³⁴ According to them, under circumstances where recipients “successfully used the donor gametes to have a child,” or even had simply “chosen a donor and made plans and assumptions about future treatment on this basis,” the donor should not be able to be withdraw consent.²³⁵

Other critics challenge the contractual approach as a matter of principle. They find it inherently inappropriate to use contract law to decide reproductive disputes, given either the nature of the relationship it concerns or the parties’ interests that are at stake. *Doe* echoed these arguments, where the Israeli Court was reluctant to apply a contractual framework given the procreational interests at stake. Such an approach, it is argued, would insufficiently protect individual and societal

229. Forman, *Clinic Consent Forms*, *supra* note 90, at 67.

230. *Id.*

231. *Id.* at 75–76.

232. *Id.*

233. *The Doe Case*, *supra* note 16, at 5–6.

234. Frith & Blyth, *supra* note 149, at 638.

235. *Id.* at 639–40.

interests.²³⁶ According to this line of reasoning, certain areas of human activity involve rights that should be considered inalienable, “meaning that promises to relinquish these rights are not enforceable if the person who made the promise changes her mind.”²³⁷ Inalienable rights “generally relate to deeply personal decisions that are central to most people’s identity and sense of self.”²³⁸ These include decisions about marriage and having children as part of a relationship. As Professor Carl Coleman has argued in the context of pre-embryo disputes, “[m]aking the right to control these decisions inalienable ensures that, as a person’s identity changes over time, she will not be forced to live with the consequences of prior decisions that are no longer consistent with the values and preferences of the person she has become.”²³⁹ This argument raises again the question of harm, but focuses on that which will be imposed on donors rather than recipients, when the agreements they had signed with the sperm bank are enforced.

Some justify the conclusion that the right not be a parent—in this case a genetic parent—is inalienable because of the emotional nature of reproductive decisions such as the decision to become a surrogate mother. This characteristic of reproductive decisions, alongside the difficulty of predicting one’s response to life-altering experiences such as parenthood or infertility, may lead to the conclusion that it is “impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised.”²⁴⁰ Moreover, both Coleman²⁴¹ and the

236. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88 (1999).

237. *Id.* at 92.

238. *Id.* at 95.

239. *Id.* at 96.

240. *Id.* at 98.

241. Coleman set out to offer an alternative path for the resolution of pre-embryo disposition disputes. According to the proposed model, which is based on the idea of mutual consent and is sometimes referred to as “The Contemporaneous Consent Approach,” decisions regarding the disposition of frozen pre-embryos will not be contractually binding. Parties may therefore change their mind about dispositional decision at a later point in time, in such case “the mutual consent principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out.” *Id.* at 111. Without delving into the details of this approach, I will note that it has been employed by courts in several states across the United States that rejected the contractual approach as appropriate to resolve the disputes before them. *See, e.g., A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (holding an IVF clinic consent form signed by the parties to the divorce case unenforceable and stipulating the wife receive the couple’s pre-embryos in the event of their separation); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (holding that a former husband and wife had never entered into a separate, binding contract that specified disposition of pre-embryos, that the former wife could not be forced to allow a surrogate mother to bear a child from the wife’s pre-embryos, and that contracts entered at the time IVF is begun are enforceable, except that either party may change its mind—up to a point—regarding the disposition of pre-embryos); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (finding, with regard to pre-embryo contracts, that enforcing prior agreements about

Doe court similarly ground their objection to the contractual approach in societal values and “conceptions about the nature of family relationships and the strength of genetic ties,”²⁴² as well as in concerns about the commodification of children and reproduction.²⁴³

Yet this type of public policy concern should not necessarily lead to rejecting the contractual approach all at once. As Professor Cohen argues in response to Coleman, some individuals may end up regretting their contractual choices about genetic parenthood.²⁴⁴ This is true even if service providers such as sperm banks or fertility clinic take steps to better the conditions under which people consent to undergo IVF treatments or donate gametes.²⁴⁵ In this sense, the context of reproduction is not different than other areas of life where contracts are held valid even though errors people have made in entering them may have significant consequences for their personal welfare.²⁴⁶ Furthermore, classifying reproductive rights as inalienable ignores the fact that “some individuals are unbothered by the notion that they may have genetic children in existence with whom they have no relationship, expressing a reluctance to view them as anything other than ‘other people’s children.’”²⁴⁷

Importantly, such arguments against contractual enforcement have limited bearing in the context of anonymous sperm donation. Agreements governing the use of sperm donations do not concern “intrafamilial” promises. Unlike couples undergoing fertility treatments, the relationship between donors and recipients is not a familial one. The social context in which they make the decision to become a sperm donor or recipient is different from the intimate setting in which infertile couples decide to undergo IVF treatments and may deserve to be treated more like a business transaction.

Undoubtedly, assisted reproductive technologies have become a lucrative industry provided through what many describe as a market for

pre-embryos would violate public policy where a party had changed its mind, that agreements entered at the time IVF is begun are enforceable, and that if donors cannot reach a common decision on pre-embryo disposition then no disposition of any kind can be made without the signed authorization of both donors). While it is offered as an alternative to the contractual approach, it may also be regarded as another, albeit narrower, version of it. As Deborah Forman explains, courts employing this approach “presume that cryopreservation contracts should be enforceable, but only to a point;” thus “a court following this approach would enforce the agreement in a dispute between the couple and the clinic.” Forman, *Enforceability*, *supra* note 92, at 385.

242. Coleman, *supra* note 236, at 104.

243. *Id.*

244. Cohen, *Genetic Parent*, *supra* note 15, at 1181.

245. *Id.*

246. *Id.*

247. *Id.* at 1182.

reproductive services.²⁴⁸ This reality has been the subject of extensive criticism over the development of such market and the desired role the law should play in regulating it.²⁴⁹ At the same time, and as law Professor Martha Ertman argues with regard to gamete markets, “market mechanisms provide unique opportunities for law and culture to recognize that people form families in different ways.”²⁵⁰ The mechanisms of supply and demand operate to subvert a majoritarian morality that may otherwise prevent single women like Danielle and Doe from forming families that break from the traditional model.²⁵¹ Rejecting the contractual approach because it undermines certain societal conceptions regarding the “strength of genetic ties” can itself be understood as an expression of majoritarian bias toward the genetic model of parenthood.²⁵² The genetic model is based in traditional conservative notions of family and fails to recognize alternative modes of parenting that are not necessarily based on biological parenthood. In this sense, contracts facilitate the variety of kinship models through which singles or couples, married or unmarried, and people of the same or different sexes, can become parents and start a family.²⁵³ With such contracts, “[i]nstead of talking about ‘the’ family as one kind of relationship honored above all others by Nature or God—marriage, heterosexuality, genetic kinship,” we can “let people decide for themselves when, whether, how and with whom to form their most intimate relationships.”²⁵⁴

C. Application: Anonymous Sperm Donation Agreements

For reasons discussed thus far, I argue that in the context of anonymous sperm donation, the contractual approach is a more appropriate legal prism through which disputes should be resolved. In Teuscher’s case, this means turning to the separate agreements signed by the donor and Danielle with the sperm bank to decide whether Danielle should regain access to her reserved sperm vials.

248. See generally *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* (Michelle Bratcher Goodwin ed., 2010) [hereinafter *BABY MARKETS*].

249. Martha Ertman, *The Upside of Baby Markets*, in *BABY MARKETS*, *supra* note 248, at 23, 26–27.

250. *Id.* at 23.

251. *Id.*

252. Coleman, *supra* note 236, at 104.

253. See Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 40–41 (2003) (discussing the theoretical benefits of an alternative insemination market, including supplementation of societal notions about family structure).

254. MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES*, at xii (2015).

Starting with the donor, a court may look for provisions that explicitly deny donors the possibility to revoke their consent to use of their sperm. As noted earlier, in most cases sperm donors relinquish their rights without time limits and are not offered the opportunity to revoke consent to use of the sperm at a later date. But even assuming such a provision is found in the agreement, a court might find it difficult to enforce it if the agreement does not contemplate the possibility of the donor losing his anonymity, if anonymity has been guaranteed.

Similar difficulties may arise with regard to the agreement Danielle, as a recipient, signed with the bank. Ideally, such an agreement includes provisions that detail under which circumstances the bank can deny her access to sperm vials she had reserved. For example, it may include a provision providing that violating the contract she had signed with the bank by seeking the identity of the donor may result in losing her rights in the reserved vials. Some direction can also be found in provisions that consider the possibility of the donor having a change of heart.

If both agreements are silent about the circumstances presented in Teuscher's case, a court may resort to the balancing approach for resolution. In the pre-embryo disposition agreements context for example, despite most courts' preference for a contract-based approach, in many instances courts have had to employ the balancing test when an existing agreement was silent with regard to all or certain contingencies, or when the agreement left it to the court to decide.²⁵⁵

The question of remedies also arises when courts choose the contractual approach. In considering this question I set aside Danielle's breach of the contract and the consequences which may flow from it. Assuming that the contracts signed by both parties provide that Danielle could use the additional vials, what will a court do if the donor or the sperm bank insist on denying her access to these vials? Will the court order to release the vials to Danielle or will it be limited to awarding damages?

In the context of pre-embryos disputes, one scholar noted that "[t]he very factor that might lead us instinctively to reject the option of specific performance—that the embryos are unique to both parties—in fact provides the basis for it."²⁵⁶ While specific performance is typically available when damages are not an adequate remedy, given the unique subject matter, courts would generally refuse to award this remedy because of concerns over judicial supervision and other practical difficulties. According to Cohen, however, "[c]ontracts relating to frozen pre-embryos seem like the paradigmatic case where specific performance

255. Ziegler, *supra* note 104, at 529.

256. Forman, *Enforceability*, *supra* note 92, at 439.

is appropriate.”²⁵⁷ Contracts that compel genetic parenthood, he explains, do not require judicial supervision: “the pre-embryo which has been cryopreserved is already in the custody of the clinic and the party now objecting to the contractual arrangement need not do anything for the contract to be enforced.”²⁵⁸

For contracts relating to anonymous sperm donation, such arguments against awarding specific performance seem to apply even less. Not only that the donor is not required to take any steps, but the context of sperm donation also operates to eliminate concerns over forcing familial relationships or legal parenthood and the supervision difficulties that these in turn give rise to. But the fact that only one party is the genetic progenitor of the disputed gametes may make a monetary award an adequate compensation for Danielle, who could use the money to purchase other sperm vials. Yet that Danielle already brought one child to the world using the sperm vials may carry the same weight as embryos created with both parties’ gametes. In any case, this brief discussion shows why courts are better off deciding the appropriateness of the remedy on a case by case basis, instead of opting for a “damages-only regime.”²⁵⁹

D. Drafting Recommendations

Applying the contractual framework to the case at-hand illustrates how choosing this approach will only prove fruitful when agreements for anonymously donating and purchasing sperm anticipate a variety of circumstances and possibilities that these relationships may entail.

One way to increase the chances of enforcement is for reproductive service providers to draft better contracts. Sperm donor agreements should include detailed provisions that contemplate the possibility of removed anonymity and its consequences for both donors and recipients. These provisions should account for different scenarios under which anonymity may be lost, including if the identity of the donor was discovered intentionally or accidentally. Another scenario to consider is one where the child born through sperm donation seeks the identity of the donor, rather than the sperm recipient.

The possibility of donors revoking their consent to any further use of their sperm vials should also be explicitly regarded. Losing anonymity is one reason for the donor to have a change of heart. Yet the *Doe* case demonstrates that there are other weighty reasons, such as embracing new religious beliefs, worth considering here. The point is that blanket

257. Cohen, *Genetic Parent*, *supra* note 15, at 1186.

258. *Id.* at 1171.

259. *Id.* at 1185.

provisions in which donors relinquish their rights in their sperm may be harder to enforce under certain sets of relatively novel circumstances, such as those found in Teuscher's case.

Clearly, the task of predicting the various issues removed anonymity may give rise to in the context of sperm donation is not an easy one. Yet another way to simplify agreements that regulate sperm donation is perhaps to relinquish anonymity all at once. The Teuscher case well illustrates the difficulty of maintaining donor anonymity these days, considering the ease with which one can find his or her genetic progeny. The donor sibling registry—a website connecting donor-conceived children with one another as well as with gamete donors that now has over sixty thousand members—is one example of the elusive nature of donor anonymity nowadays. The donor movement, led by donor offspring advocating for more disclosure within the gamete industry and a “child's right to know,” make this task even harder.²⁶⁰ One scholar even described the ability of sperm banks and egg agencies to promise anonymity in this age as “fraudulent.”²⁶¹

Responding to these changes, a growing number of countries have reversed their long-held policies protecting gamete donors' anonymity, by collecting donors' identifying information and requiring their consent to be contacted in the future by any resulting offspring.²⁶² The US did not join this trend as of yet, although some think the field of sperm donation “is on the verge of a major transition.”²⁶³

The question of donor anonymity and the reasons why different stakeholders in this practice, including donors, recipients, and children, may want to maintain or abolish it are beyond the scope of this article. The point here is that at-home DNA kits, as well as online registries, may soon turn the question of whether donor anonymity is desirable, into whether donor anonymity is feasible.

CONCLUSION

Reproductive disputes are infamously known for being emotionally charged and difficult to resolve. At the same time, technological developments give rise to new types of legal disputes surrounding the use of even well-established reproductive practices such as sperm donation. The Teuscher case discussed throughout this article provides a valuable

260. See generally SONIA ALLAN, DONOR CONCEPTION AND THE SEARCH FOR INFORMATION: FROM SECRECY AND ANONYMITY TO OPENNESS (Shelia A.M. McLean ed., 2017).

261. Naomi Cahn, *The New “Art” of Family: Connecting Assisted Reproductive Technologies & Identity Rights*, 2018 U. ILL. L. REV. 1443, 1446 (2018).

262. See generally Sabatello, *supra* note 10.

263. Peter G. McGovern & William D. Schlaff, *Sperm Donor Anonymity: A Concept Rendered Obsolete by Modern Technology*, 109 FERTILITY & STERILITY 230 (2018).

opportunity to contemplate the legal tools available for those deciding a dispute between sperm recipients' interest in having a child with the sperm they chose, and sperm donors' interest in avoiding genetic parenthood.

Analyzing this case against the backdrop of pre-embryo disposition disputes shows that the context of sperm donation necessitates careful consideration of the rights at stake. One that recognizes that there are different models of parenthood besides genetic parenthood. Realizing the unique characteristics of this type of dispute allows us to question the harm unwanted genetic procreation may actually impose, and to consider new types of harm that confounded procreation may entail. The nuanced analysis provided in this article demonstrates that the contractual approach is the more appropriate legal prism to adjudicate such reproductive disputes, considering the non-familial context in which they occur. It nevertheless acknowledges that this approach has its shortcomings, proposing that reproductive services providers draft contracts that are better equipped to govern their long-term relationship with donors and recipients.

As more people begin to learn, intentionally or not, about their genetic origins, the more the fertility market's long-held dedication to donor anonymity is undermined. This article intends to ease the task of resolving conflicts between these individuals' reproductive futures.