



Anonymity in third party reproduction: an old dilemma in new packaging?

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In *Gamete Donor Anonymity and Limits of Numbers of Offspring: The Views of Three Stakeholders*,¹ Margaret K. Nelson, Rosanna Hertz, and Wendy Kramer, present empirical data on the attitudes of gamete donors,² intended parents,³ and donor-conceived persons toward both donor anonymity and limits on the number of children produced using gametes from any one donor. Consistent with the assisted reproductive technologies (ART) market as a whole, there is no national regulation regarding either of these issues.⁴

Nelson, Hertz, and Kramer identify anonymity and limits on offspring as two issues currently important in third-party reproduction that are debated by ‘ethicists, legal scholars, and social scientists’.⁵ Those opposed to anonymity, the authors explain, argue that knowledge of one’s genetic heritage is a right for donor-conceived individuals, especially when concerning access to health information but also as an important identity issue. Opponents to anonymity also express concern about accidental incest that may occur between those who unknowingly share genetic material. The authors cite concerns about ‘inadvertent incest’, ‘the spread of genetic malformations’, and ‘the emotional distress for all parties (parents, donors, and offspring) of knowing that there

1 Margaret K. Nelson, Rosanna Hertz & Wendy Kramer, *Gamete Donor Anonymity and Limits on Numbers of Offspring: The Views of Three Stakeholders*, J. L. & BIOSCI. (2016), <http://jlb.oxfordjournals.org/content/3/1/39.full.pdf+html> (accessed Mar. 31, 2016).

2 While the term ‘donor’ is typically used, gamete donors are usually paid for their services.

3 The term ‘intended parents’ is typically used to designate those using ART to achieve parenthood.

4 See NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION (2009); HEATHER JACOBSON, LABOR OF LOVE: GESTATIONAL SURROGACY AND THE WORK OF MAKING BABIES (2016); and DEBORAH SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006) on the lack of regulation in assisted reproduction.

5 Nelson, Hertz & Kramer, *supra* note 1, at 2.

are numerous people with shared genes' as reasons articulated for setting limits on the use of a single donor's gametes.⁶

According to the authors, those who support anonymity see mandatory identification of donors as 'constrain[ing] the range of possibilities for reproduction by limiting who provides gametes and excluding intending parents who might not be willing to reproduce if donor identity were mandated'.⁷ They 'express concern about the donors' rights to privacy, the donors' status as "non-parents", and the human right of intended parents to form a family without excessive state intervention; they also express concern about whether there will be a sufficient number of donors if donors are required to register'.⁸

The data Nelson, Hertz, and Kramer analyse come from online surveys with gamete donors, intended parents, and donor-conceived individuals. These third-party reproduction participants were asked to rate how strongly they agreed with limiting the number of offspring and with anonymity. The authors found, of the three stakeholder groups they surveyed, intended parents 'tend somewhat more toward an interest in preserving the right of donors to remain anonymous should they so choose'.⁹ This was especially the case, the authors found, for coupled heterosexual intended parents for whom 'the absence of anonymity is most likely to challenge directly a male non-biological parent'.¹⁰ While heterosexual coupled parents are the most wedded to concealing non-biological kinship, donor-conceived persons, the authors found, were 'the stakeholders who express the strongest opposition to anonymity'.¹¹ Their research is unique in that they provide welcomed data across these three groups on these two important issues.

In reading the article by Nelson, Hertz, and Kramer, I was struck by the familiarity of their findings and the dilemmas over secrecy and disclosure—not in the context of assisted reproduction and donor-conceived families but rather in the context of other, older forms of family formation and expansion. Due to the advanced medical procedures utilized, assisted reproduction is often presented as a new world creating new dilemmas for practitioners, intended parents, and society as a whole. In this framing, a dichotomy is implied, with pre-ART conception and family building conceptualized as natural and dilemma-free and assisted reproduction as unnatural and dilemma-laden. Nelson, Hertz, and Kramer do not assert such a conceptualization in their research. Their article actually reminded me of the ways the dilemmas arising in ART are embedded in larger practices of reproduction and family-building.

The dilemma of anonymity in donor-conception is essentially a debate about secrecy and disclosure. Who should have access to what information, when, how, and by what means? What might secrecy or disclosure mean for those involved? How might it alter relations between parties? This issue of managing information between biological, legal, and social kin is not a new dilemma within the world of reproduction but is, rather, a much familiar one.

In this paper, I consider how anonymity in donor-conception maps onto similar concerns and histories found within an older form of family expansion, namely, adoption.

6 *Id.* at 5.

7 *Id.* at 3.

8 *Id.* at 4.

9 *Id.* at 18.

10 *Id.* at 18.

11 *Id.* at 26.

Others, especially Naomi Cahn, have compared donor-conception with adoption.¹² Doing so is a fruitful endeavor, one I would like to revisit here, as it helps to embed ART into larger practices of reproduction, enabling a nuanced look at common dilemmas arising in family formation itself.

SECURITY IN ADOPTION

Secrecy in adoption in the United States became codified (at the state level) as the field of formal stranger adoption, increasingly overseen by social workers and a professionally developed ethic, began to solidify in the first half of the 20th century. Historians of adoption have detailed the ways in which, as child placement moved from a system to deal with poor, indigent children to a family formation strategy for infertile couples, secrecy was desired by both birth parents and adoptive parents.¹³ The historian Barbara Melosh posits ‘birth mothers and adopters alike had long sought the safety of secrecy. Relinquishing mothers wanted to escape the stigma of pregnancies outside of marriage; adopters feared interference from adopted children’s birth relatives, and some hoped to conceal adoption altogether’.¹⁴ Birth fathers also had ‘ample reason’ to remain anonymous—‘fear of paternity suites, marital discord, and community censure’.¹⁵ According to E. Wayne Carp, adoption professionals therefore ‘began to view secrecy as a professional attribute that provided them with a competitive edge over unlicensed private adoptions’.¹⁶

Secrecy was slow to come to adoption, but once it did, a whole host of practices, including sealed records, amended birth certificates, and closed adoptions, were introduced which facilitated concealment.¹⁷ Given ideologies about the family as a racialized unit, in which parents and children share phenotypical characteristics, in order for adoption to be concealed, children were often matched—phenotypically, ethnically, religiously, and even by temperament—to adoptive parents as a strategy for adoption to mirror as closely as possible that which was understood to represent a biological kinship.¹⁸ These various practices, eventually utilized in most states, allowed for a ‘clean slate’ for all, enabling a seemingly smooth transfer of ‘as-if-begotten’ parental status.¹⁹

Secrecy was seen by adoption professionals as psychologically best for all involved. Birth parents were told ‘that it was better never to see or hold their newborns; they were told that they should grieve, put the experience behind them, and get on with their lives as if the birth never occurred’.²⁰ Some adoptive parents were counseled to tell their

12 See NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* (2013) and I. Glenn Cohen, *Rethinking Sperm-Donor Anonymity: Of Changed Selves, Non-Identity, and One-Night Stands*, 100 *GEO. L.J.* 431 (2012).

13 See BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* (2002); E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998); and JUDITH MODELL, *KINSHIP WITH STRANGER ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE* (1994).

14 Melosh, *id.* at 202.

15 *Id.* at 207.

16 Carp, *supra* note 13, at 112.

17 See Melosh, *supra* note 13, and Modell, *supra* note 13.

18 HEATHER JACOBSON, *CULTURE KEEPING: WHITE MOTHERS, INTERNATIONAL ADOPTION AND THE NEGOTIATION OF FAMILY DIFFERENCE* (2008).

19 Modell, *supra* note 13 at 2.

20 Deborah H. Siegel, *Open Adoption and Family Boundaries*, in *ADOPTIVE FAMILIES IN A DIVERSE SOCIETY* 180 (Katarina Weegar ed., 2006).

children that their birth parents had died. Even as these ideas began to loosen, adoption professionals continued to counsel against ‘early and repeated disclosure of adoption’ as it was seen by psychologists to harm ‘children’s self-esteem and sense of identity’.²¹ Through the 1970s, experts continued to counsel that while disclosure within the immediate family was necessary (i.e. children should be told they were adopted), adoption should not play a large role in the family culture or child’s identity and disclosure to those outside the family was strictly on a ‘need-to-know basis’.²²

In the 1970s, adult adoptees and birth mothers began to mobilize against secrecy.²³ This led to an ‘adoption rights movement’ and, over the course of the next several decades, changes in the organization and practice of formal adoption. Sealed records were legally challenged and birth and adoptee searches commenced. The adoption rights movement was coupled with changing expert opinions about the role of adoption in the child’s life. As Barbara Melosh writes, ‘the new conventional wisdom of the 1980s...held that “adoption is a life-long process”, one in which ‘adopted children were themselves at risk’ due to their ‘separation from blood kin’ which ‘rendered adopted children vulnerable to a formidable list of disorders’.²⁴ Parents were now encouraged to disclose adopted status early, to all people important in the child’s life. Secrecy was reframed from a practice beneficial to all to that which harmed those involved in adoption, especially adoptees, and ‘some form of openness [became] the norm’.²⁵

ADOPTION, ART, AND THE PRIMACY OF GENETIC KIN

Undergirding both the adoption rights movement and changes in expert opinion on adoption disclosure were ideas about both the primacy of genetic relations over those established legally and the potential negative consequences due to separation from genetic kin. It was increasingly seen as important for adoptees to have access to information about and the people with whom they share genetic ties. This idea directly challenges the basic premise of American adoption, that love and the law can transform people unknown to each other into primary kin and that those new parental relationships can replace relationships with birth parents. The practice of formal stranger adoption is meant to transform a relationship created in law to one ‘as-if’ created in nature: with adoptive parents treating their adopted children ‘as-if’ they are biological kin.²⁶ Secrecy enabled the formal transfer of children and the creation of ‘as-if-begotten’ kinship within a society in which non-biological kinship was (and some would argue remains) viewed as second-best and therefore, increasingly stigmatized.²⁷ The idea that genetics remain and that they remain central to ones’ identity and to ones’ understanding of oneself disrupts this dominant adoption narrative popularized through the 20th century.

Intended parents who utilize donated sperm, eggs, or embryos, or who hire the services of a surrogate, are also to conceptualize and treat children born via these

21 Melosh, *supra* note 10, at 228, 234.

22 *Id.* at 236.

23 *Id.* at 237; also see Carp, *supra* note 13, Modell, *supra* note 13, and Siegel, *supra* note 20.

24 Melosh, *supra* note 13, at 236, 237.

25 Siegel, *supra* note 20, at 177.

26 Modell, *supra* note 13, at 2.

27 Cahn, *supra* note 13, at 2. See also KATARINA WEGAR, *ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS* (1997).

methods as if they are biological kin, with the same rights and privileges as genetically related children created via non-assisted reproduction.²⁸ The idea of the primacy of genetics, however, culturally articulated through the adoption rights movement and the popularity of adoption searches and reunions, makes disclosure and anonymity issues for donor-conceived families today. These same issues—a push and pull in the managing of information and contact between genetic and legal/social kin—are central to the growing ‘donor-conception movement’ in the early 21st century. The same basic arguments are being used to support disclosure for donor-conceived persons as were used for adoptees. Should we, therefore, consider donor-conceived persons similar to adoptees, with the same rights to information on genetic kin? Is the struggle for access to information by donor-conceived individuals analogous to the adoption-rights movement? Naomi Cahn²⁹ has made such an argument and others, including I. Glenn Cohen,³⁰ have examined this relationship.

Though the history of secrecy of adoption can inform the current debate on anonymity in third party reproduction, as Cahn³¹ shows it does not map precisely onto donor-conception. There are important differences including variations in regulation, organization, and in cultural edicts about transparency. Adoption is regulated by the state and adoptive parents must adhere to these regulations in order to be granted adoptive status. There is no corresponding regulation, one that includes evaluations of parenting fitness and the need for approval via social workers, of ART in the United States.³² The unregulated reproductive market caters to clients, therefore, in ways the adoption market does not.³³ Formal adoptive parents, the majority of whom are white and middle-class in the United States, are also constrained by the finite number of children—especially healthy, white, infants—available on the ‘adoption market’.³⁴ Intended parents via ART in the United States are only limited by their ability to pay for the various reproductive services available.³⁵ Adoptive parents are counseled on the importance of processing adoption with their child and on disclosing adoptive status. Some believe that they would not be approved for adoption should they admit to planning to conceal adoption from their child.³⁶ ART clients, on the other hand, though counseled to disclose to their children,³⁷ are not required to do so in order to utilize ART services. Parents via donor-conception have much more leeway, therefore, to self-determine if and how they allow others (including their child born via donation) to know about the fact that they do not share a genetic connection with their child or that they utilized donor gametes.

28 Jacobson, *supra* note 4.

29 Cahn, *supra* note 12.

30 Cohen, *supra* note 12.

31 Cahn, *supra* note 12, at 108, 110.

32 See Jacobson, *supra* note 18, on evaluations of prospective adoptive parents, and Jacobson, *supra* note 4, on lack of similar evaluations for parents utilizing ART.

33 Though certain states may have regulations that limit access to certain services for certain clients, most services are available for most clients—if not in one state, then in another. See Jacobson, *supra* note 4 at 18–20, for example, on variations in access to surrogacy services by state.

34 Jacobson, *supra* note 18.

35 See Jacobson, *supra* note 4 at 16, 19, for a discussion on cost and regulation in ART.

36 Jacobson, *supra* note 18, at 159.

37 Nelson, Hertz & Kramer, *supra* note 1, at 2.

The organizational, market, and cultural differences between adoption and ART shape the experiences people have becoming parents and raising their children. Though these differences exist, I would argue that both the basic ideas undergirding anonymity in ART and secrecy in adoption and the corresponding protests against such arrangements are similar. The driving force behind secrecy and anonymity is an ideology of the family as a genetic, bounded-unit containing only two primary parents.³⁸ Those who do not share a genetic kinship with their children, whose parenting status is created via legal or social procedures, often must contend with that ideology.³⁹

CONCLUSION

There is a well-documented expansion in the social acceptance and openness toward disclosure of various family forms in the United States.⁴⁰ While what constitutes ‘family’ is becoming more fluid, there is a cultural deepening of the presumed importance of genetics⁴¹ and genetic ties. Biology is being reified as all-determining at the same time ideas about the family are expanding to include non-biological forms of kinship. Third-party reproduction meets at the crossroads of these two cultural shifts. Given this, it should not be surprising that donor-conceived families are both expanding to include relations with donors and donor-siblings, those outside of the legal and social definition of family, and that genetic ties with donors and donor-siblings are seen as increasingly important and familial. Adoption, too, met at these crossroads.

In the early to mid-20th century, adoptive parents and birth parents sought secrecy to obscure genetic connections. Change did not occur in adoption until the late 20th century when the protests of adoptees and birth mothers against such practices gained legal and cultural traction. The adoption rights movement began at a time when the culture of adoption discouraged early and open disclosure of adoptive status. Legal changes were spurred by and helped to spur profound changes in adoption culture. The same may be said to be occurring for donor-conception. The expanding literature on anonymity in donor-conception, exemplified by the piece by Nelson, Hertz, and Kramer, is evidence that a cultural dialog is occurring.

Anonymity being an issue in ART has only become such as children born via donor-conception have aged and have begun to protest. Challenges to adoption secrecy emerged in much the same way, as adoptees and birth parents began to speak out about such arrangements and to craft changes. Adoptive parents are now socialized early in the adoption process to understand the importance of disclosure and to honor ties (in a variety of ways) to birth parents. We can already see similar changes beginning in donor-conception. What form openness might take both legally and for the culture of ART—mandatory identification, more extensive mutual voluntary registers, state regulation, regular contact, the creation of new kinship terms—will be interesting to witness.

38 See Jacobson, *supra* note 18, at 87, 88; Weagar, *supra* note 27; and Dorothy Smith, *The Standard North American Family: SNAF as an Ideological Code*, 14 J. FAM. ISSUES 50 (1993).

39 See Jacobson, *supra* note 18, on the ways in which adoptive parents contend with this ideology of the family.

40 See, for example, STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992); JOSHUA GAMSON, *MODERN KINSHIP: STORIES OF EXTRAORDINARY JOURNEYS TO KINSHIP* (2015); ROSANNA HERTZ, *SINGLE BY CHANGE, MOTHERS BY CHOICE: HOW WOMEN ARE CHOOSING PARENTHOOD WITHOUT MARRIAGE AND CREATING THE NEW AMERICAN FAMILY* (2006).

41 Peter Conrad & Jonathon Gabe, *Introduction: Sociological Perspectives on the New Genetics: an Overview*, 21 SOCIOLOGICAL HEALTH & ILLNESS 505 (1999).