THE CASE FOR REGULATING COLLABORATIVE REPRODUCTION: A CHILDREN’S RIGHTS PERSPECTIVE

Helen M. Alvaré,
George Mason University School of Law


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ARTICLE

THE CASE FOR REGULATING COLLABORATIVE REPRODUCTION: A CHILDREN’S RIGHTS PERSPECTIVE

HELEN M. ALVARE*

There is little regulation of collaborative reproduction—the use of the eggs, sperm, or embryos of a third party to create a child biologically unrelated to at least one intending parent. This Article argues that the dearth of regulation should be assessed from a children’s rights perspective and accordingly adjusted. After examining the effects of the experimental reproductive technologies, it concludes that traditional family law preferences and policies are undercut by the deliberate creation of collaboratively reproduced children. The lack of regulation might stem from constitutional protection afforded parents in the right of privacy and substantive due process cases. The author, however, contends that collaborative reproduction implicates the rights of children and requires a separate balancing of rights not contemplated in the other cases. Collaborative reproduction also requires regulation because of its spillover effects on the acceptability of cloning. The Article concludes by offering several possible regulatory responses to the problems posed by collaborative reproduction.

Trying to draw the line where we are trying to draw it, between carelessness and brutality, is like insisting that falling is flying—until you hit the ground—and then trying to outlaw hitting the ground.1

While some people contend that cloning-to-produce-children would not take us much further down a path we have already been traveling, we would emphasize that the precedent of treating children as projects cuts two ways in the moral argument. Instead of using this precedent to justify taking the next step of cloning, the next step might rather serve as a warning and a mir-

* Associate Professor of Law, Catholic University of America Columbus School of Law; B.S., Villanova University; J.D., Cornell University; M.A., Catholic University. I would like to thank Yvette Brown and Patrick Petit, reference librarians, for their tremendous assistance, as well as my research assistants Richard Mazzio and Megan Wilson. I would also like to thank my husband and children for their gifts of inspiration and time. This project was made possible by a grant from the summer research grant program of the Catholic University of America Columbus School of Law.

1 WENDELL BERRY, SEX, ECONOMY, FREEDOM AND COMMUNITY 141 (1993).
ror in which we may discover reasons to reconsider what we are already doing.²

INTRODUCTION

Use of new reproductive technologies, including those requiring donated eggs, sperm, or embryos, has become a part of the American landscape. Radio traffic reports are sponsored by the "Genetics and IVF Institute of Virginia. Have a baby or your money back! Guaranteed!"³ Amidst the crime reports and high school graduation announcements in local weekly newspapers, increasingly there appear solicitations to "donate"⁴ eggs to a "loving, infertile couple." In this saturated context, it takes fairly dramatic news to provoke real concerns about the future: the offer of $50,000 for the eggs of a beautiful woman with a privileged education;⁵ baby girl Jaycee⁶ with five potential—though no legally certain—parents; or progress in developing an artificial womb.⁷

Provocative stories such as these have the power to provoke public discussion and invite examination of conscience because they appear to contradict, both implicitly and explicitly, preferences and sentiments about family life present in the fabric of American culture. Specifically, there is the feeling—which is also always a hope—that every person should be embraced within a loving, accepting family. Included also is the hope that, in and through the family as a school of love, each member might learn over time how to give love to other family members as well as to persons in the wider world.⁸ Procreation stories featuring financial

⁴ Critics note with irony the use of the language of "donation." Donors are paid. See Kenneth Weiss, Growing Market for 'Perfect' Human Eggs, NEWSDAY, June 19, 2001, at C6, available at 2001 WL 9237338 (quoting Arthur Caplan, director of the University of Pennsylvania Center for Bioethics as stating "[t]here is all this talk of donation, helping another couple... But clearly it's a business, selling the best available stock that money can buy").
⁵ See Weiss, supra note 4, at C6.
⁶ In re Buzzanca, 61 Cal. App. 4th 1410 (Ct. App. 1998) (reversing the decision of the trial court that Jaycee had no legally recognized parents among the five persons involved in her conception: the sperm donor, the egg donor, the surrogate mother, and the formerly married couple who had arranged for her conception).
⁷ Gareth Cook, Man-made Artificial Womb Could Someday Allow Fetuses to Develop Outside Human Body, but Thorny Issues are Sure to Follow, BOSTON GLOBE, Mar. 31, 2002 (Magazine), at 5.
⁸ See, e.g., Katharine Bartlett, Re-expressing Parenthood, 98 YALE L.J. 293, 295 (1988) ("T]he law should focus on parental responsibility... and express a view of parenthood based upon the cycle of gift..."); H.R. REP No. 103-8, pt.1, at 38 (1993) (testimony of Dr. Eleanor S. Szanton) ("Babies, for their part, who have already begun the process of learning to love and trust their parents are better able to form and to use trusting, warm relationships with other adults."). The Supreme Court "has recognized that natural
incentives, rejection of children, and technological substitutes for mothers challenge those hopes and feelings.

Family law is charged with supporting this vision through discrete preference and policy choices. In the arena of parent-child relations, family law adopts a set of presumptions judged to create a promising environment for children. These include presumptions about the desirability of maintaining the tie between children and their natural parents, the benefits of two-parent households, and some degree of respect for the human embryo.9

It appears, however, that even the less sensational uses of artificial reproductive technologies ("ART"s) can contradict the presumptions and policy choices found in family law. This is the case with the set of practices that are the focus of this Article, sometimes called collaborative reproduction: the use of the eggs, sperm, or embryos of a third party to create a child to be reared by one or more persons biologically unrelated to the child ("the intending parents").10 With collaborative reproduction, the child may be conceived specifically to be raised by one or two intending parents, who may be married or unmarried. The intending parent(s) will attempt to select the child's characteristics by choosing a donor or donors with desired traits to be the source of the eggs, sperm, or embryos used to create the child.

There is little doubt that there are children created collaboratively who, like adopted children, experience and stimulate loving family relationships. There is also little doubt about the depth of longing for healthy relationships felt by intending parents. Nevertheless, this Article questions how families created by means so different from natural procreation challenge or alter family life and existing family law preferences. It further considers how unregulated collaborative reproduction creates a slippery slope towards the acceptance of cloning. Indeed, cloning supporters agree that collaborative reproduction has challenged foundational ideas about how families can appropriately be created to the point where cloning becomes simply a step, not a leap, from acceptable social mores.11 In fact, cloning supporters have argued that cloning is superior to collaborative reproduction because it does not involve the potentially messy web of relationships among donors, recipients, and children inherent in collaborative reproduction.12

9See infra Part III.A.
11See infra Part IV.
12See N.Y. State Task Force on Life & the Law, Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy 395-96 (1998). This task force was created by executive order in 1985 to make recommendations regarding
Nevertheless, even though collaborative reproduction contradicts many of family law’s extant preferences, and even though it paves the way for cloning, collaborative reproduction is subject to minimal regulation in the United States.\textsuperscript{13} Perhaps this comes as no surprise given our “rights-based” political culture,\textsuperscript{14} in conjunction with the traditional judicial affirmation of “the private realm of family life which the state cannot enter.”\textsuperscript{15} Such generalities, however, cannot be the final word in an area of law so fraught with consequences for children. There has been an unfortunate history of vaulting adults’ interests over the needs and vulnerabilities of children in the areas of family law critical to the well-being of children. Family law historians have chronicled this phenomenon, for example, in custody\textsuperscript{16} and adoption\textsuperscript{17} law. Collaborative reproduction also intimately affects children’s well-being: it affects children’s genetic identities, as well as their physical and emotional health. Expert observers of collaborative reproduction, even those generally favoring use of ARTs, have concluded that existing law and practices are driven primarily by adult desires rather than children’s needs. An ethicist has succinctly observed that “[i]n most infertility clinics, desire and money serve as surrogates for child welfare.”\textsuperscript{18} The lack of regulation is additionally troubling given an industry reaping tremendous profits from “species urge.”\textsuperscript{19}
This Article will explore the need for appropriate regulatory responses to collaborative reproduction. Part I will describe the processes of collaborative reproduction. It will pay particular attention to the steps between the formation of an intent to collaboratively reproduce, and the birth of the child, especially those steps that affect the family relationships eventually formed. It will consider how donor gametes and embryos are obtained, how they are selected by intending parents, and how they are fertilized and implanted in a woman. It will also consider the background choices and inherent risks assumed or imposed by participants in collaborative reproduction processes.

Part II will set forth the types and extent of federal and state laws presently regulating collaborative reproduction. It will attempt to characterize the concerns evidenced by the regulations. There are relatively few regulations of collaborative reproduction, considering the risks to the parties involved, the size of the industry, the vulnerabilities of its clients, the large monetary sums transacted, and the potential effects on the adults and especially the children involved. Part II will suggest possible reasons for this relative dearth of laws, attending in greatest detail to the claim that collaborative reproduction might enjoy constitutional protection.

Part III will discuss the family law preferences that collaborative reproduction implicates and appears to contradict. These include the preferences for married, two-parent households; the maintenance of relationships between parents and their biologically related children; and some degree of respect for the human embryo. It will also reveal that collaborative reproduction threatens a paradigm of the parent-child relationship deeply embedded in American family law. It will then consider some objections to regulation and demonstrate the weak or erroneous nature of those objections.

Part IV will demonstrate how the laissez-faire approach to collaborative reproduction appears to be encouraging proponents of human cloning, a fact that has not escaped the President’s Council on Bioethics. It will set forth the reasons proffered by a strong majority opposition to cloning in the United States—the same reasons which also counsel against collaborative reproduction. Based on the findings of Parts III and IV, Part V will propose several types of legislation that will better account for the interests of children conceived by means of collaborative reproduction.

I. THE PROCESSES OF COLLABORATIVE REPRODUCTION

Collaborative reproduction, for the purposes of this Article, includes the various processes by which “intending parent(s)” use the embryos or

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20 See President’s Council on Bioethics, supra note 2, at § 5.
gametes (sperm or eggs), of one or more donors to conceive a child that the intending parents will legally rear.\textsuperscript{21} A child born through collaborative reproduction is not the biological offspring of both intending parents, though he may be the biological child of one intending parent. In the case of a person who intends to single-parent a child born of collaborative reproduction, the child may be related to that intending parent, but at least one donor gamete will have been used. Whether it is a single person or a couple seeking collaborative reproduction, it is possible that the intending parent(s) are wholly biologically unrelated to the child. Without listing every possible combination, collaborative reproduction can involve as few as one person in addition to the intending parent(s), to as many as three with a surrogate.

Scientific\textsuperscript{22} and legal\textsuperscript{23} literature provide many straightforward, clinical descriptions of the medical processes necessary to bring about collaborative reproduction. This Article, too, will provide brief descriptions of these processes as necessary to understand their basic mechanisms. It will also attend to matters not discussed in much detail in other sources, namely, the physical and personal choices and interactions required in the many steps of collaborative reproduction. These matters include the recruitment of "donors,"\textsuperscript{24} donation procedures, donor selection, fertilization methods, pre-implantation screening, embryo disposition, and "selective reduction," the terminating of one or more fetuses growing in a woman's uterus to reduce the number of live births.\textsuperscript{25} By examining the choices and implications of the scientific processes, rather than their mechanisms alone, the description will contribute to an understanding of how collaborative reproduction affects the family relationships it creates. The steps of the collaborative reproduction process—spanning weeks, months, or even years—involves intimate bodily functions and deeply felt emotional longings about oneself and children. It is apparent that the steps will have immediate and even long-term effects on familial relations. It should be noted here that while some of the processes to be considered in this Article—fertilization, pre-implantation screening, embryo

\textsuperscript{21} The definition of collaborative reproduction might also describe surrogate motherhood, which is the gestation of a child in the womb of a woman who will not be the legal parent. See Lori B. Andrews, Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood, 81 VA. L. REV. 2305 (1995). In order to attend thoroughly to one topic, however, and due to the large scope of and ongoing attention paid to the surrogacy question, surrogacy will not be treated in this Article.

\textsuperscript{22} See generally ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES (Annette Burfoot ed., 1999).


\textsuperscript{24} See supra note 4 and accompanying text.

\textsuperscript{25} See generally Stacey Pinchuck, A Difficult Choice in a Different Voice: Multiple Births, Selective Reduction and Abortion, 7 DUKE J. GENDER L. & POL'Y 29 (2000).
disposition, and selective reduction—may arise even when a couple employs their own gametes, their frequent and regular use in collaborative reproduction suggests that the total effect of collaborative reproduction cannot be understood apart from them.

A. Collaborative Reproduction as a Response to Infertility

Collaborative reproduction in the United States can be understood as a response to a significant amount of infertility. Infertility is described by the Centers for Disease Control and Prevention ("CDC") as an inability to become pregnant for twelve months or more.26 The American Society for Reproductive Medicine ("ASRM"), a leading medical society in this area, estimates that infertility affects ten percent of Americans of reproductive age (ages fifteen to forty-five), totaling six million Americans.27 Despite the infertility rate, centralized or comprehensive record keeping about collaborative reproduction does not exist. Data reported by the CDC show, however, the number of "cycles"28 of ARTs performed annually and the percentage of total births in the United States today caused by ARTs.29 In 1996, the first year when the CDC published full data, more than 64,000 cycles of ART were undertaken in the United States.30 As of 1999, the most recently measured year, ARTs caused 0.08% of all births, and 86,822 cycles of ARTs were performed; ten percent of these cycles involved the use of donor eggs or embryos for a total of 8132 donor eggs or embryos in 9066 cycles.31 Interestingly, the subject of the use of donor sperm is not examined by the CDC's reports on ARTs. An older but comprehensive study of the matter, however, estimated that as of 1979, at least 7000–10,000 children each year were born as a result of artificial insemination by donor ("AID").32 A 1988 paper estimated that


28 A “cycle,” according to the CDC, is the series of assisted reproductive processes beginning with egg donation and ending either with a pregnancy and delivery of a child, or, unsuccessfully, at a point before these events. See 1999 ART REPORT, supra note 27, at 6.

29 Id.


31 See 1999 ART REPORT, supra note 27, at 3.

32 See M. Curie-Cohen et al., Current Practice of Artificial Insemination in the United
“approximately 500,000 people in the United States today were born and are alive as a result of AID.”

B. Sperm Donation

The artificial insemination of donor sperm into the uterus of a woman, or AID, has been occurring in the United States long before the last several decades’ explosion in newer ARTs. Its frequency is unknown because of the privacy observed by doctors and their patients. According to the most recent CDC survey, of the 232 reporting laboratories performing procedures on human eggs, sperm or embryos in connection with an ART, 51.3% offered services in connection with sperm donation. Figures in this area, however, are incomplete: doctors are not required to report these procedures to either federal or state authorities in most cases, and women may obtain donor sperm without resort to a doctor, clinic, or laboratory.

Sperm donation is often sought by married couples in which the husband is infertile, but its use is not limited to such situations. It might be used, for example, because a man fears passing on a genetic defect. AID is also regularly used by single women who wish to bear a child without benefit of a husband or other partner. In 1999, eighty-three percent of fertility clinics reported that they would inseminate single women. No extant law in the United States requires fertility clinics to distinguish between single and married women for AID services. In addition, a woman who orders sperm on the Internet—with no requirement to indicate marital status and no state laws reserving AID to married women—does not become dependent on the services of a local fertility clinic or doctor who may choose to restrict services to married women.

1. Donor Recruitment and Selection

Donor sperm may be obtained from a personal acquaintance or from a doctor, fertility clinic, or sperm bank. Information on such purely private transactions is largely hidden from public view. Therefore, this Part

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36 See infra Part II.B.

37 Achilles, supra note 34, at 151.

38 See 1999 ART REPORT, supra note 27, at 57.

39 See infra Part II.
will consider the more transparent transactions in which donor sperm is received from a fertility clinic or doctor.\footnote{40} Facilities that offer donor sperm for sale to the public must first solicit donors to establish a stable and plentiful supply. Sperm donors are recruited regularly on the campuses of colleges and universities, particularly medical schools.\footnote{41} One sophisticated Web site presentation claims that

Our donors are recruited from the school campuses of western Montana and eastern Washington. All of our donors were either currently involved with or had finished their higher education at the time of their participation in our donor program. All donors are between 18 and 35 years of age in order to minimize genetic abnormalities.\footnote{42}

Another Web site seeking to attract donors announces: “We have a minimum height requirement of 5’11” with weight needing to be proportionate to height. Our donors must be between 18 and 37 years of age. Additionally, they must have graduated from, or be currently attending a 4-year college or university.”\footnote{43} Some donors undergo a preliminary telephone interview, which includes multiple questions about their own health and the health of their families. If provisionally accepted, they are asked to come to a laboratory and give many sperm samples over the course of several days. Their sperm may then be tested for genetic and infectious diseases, its “fresh semen quality,” and its ability to successfully survive freezing for later use.\footnote{44} A complete physical exam may also be required, involving further donations of blood, urine, and semen.\footnote{45} Often, a long questionnaire containing several hundred questions is then administered. Donors are asked about matters including their health; the health of their parents, grandparents, or siblings; their reproductive history; their own and their parents’ and siblings’ occupations and education; and their skills and personality traits.\footnote{46} They may also be asked about their character, their hobbies and club involvement, their use of alcohol, drugs, or psychiatric treatment, their college grades, and their

\footnote{40} Stories and information about the practice of obtaining sperm from banks or fertility clinics have attracted a good deal of media and academic interest. There are also many Web sites containing abundant information about donating and ordering sperm. See infra notes 42–49.
\footnote{41} See Lori B. Andrews, Clone Age 80 (1999).
\footnote{43} Zygen Laboratory, Becoming an Anonymous Semen Donor, at http://www.zygen.com/coinfo2.htm (last visited Sept. 28, 2002).
\footnote{44} Id.
\footnote{45} Fairfax Cryobank, Fairfax Cryobank Prospective Donors, at http://www.fairfaxcryobank.com/cryo/prospect_donor.cfm (last visited Nov. 14, 2002).
\footnote{46} See id.
willingness to take an IQ test.\textsuperscript{47} Finally, applications may inquire into the donor’s sexual orientation, religious identification, and reasons for donating.\textsuperscript{48} Not surprisingly, what finds its way into print and is offered to intending parents is superficially appealing: “My wife is currently pregnant. I figured I’m fertile enough to donate . . . I figured [this] is a good way to make some extra money to buy the things I will need for my new baby.”\textsuperscript{49} A sample online profile provided from another sperm bank reads

I am not in a relationship currently and I would like to help those that need help with starting their own loving family. I have friends who have been in the position of wanting children, but couldn’t. I felt for them. Last year, it occurred to me to call OPTIONS.\textsuperscript{50}

If a donor is selected after review of his laboratory results and questionnaire, he is usually asked to make a six-month to one-year commitment to the laboratory, providing samples two to three times per week, and appearing for a blood test months after the donor relationship is over in order to continue testing for disease.\textsuperscript{51}

It is difficult to find information about the conditions under which donations are given. According to a recognized expert in reproduction policy, Professor Lori Andrews, donors at medical facilities will be taken to private masturbatoriums, “softly lit rooms filled with Playboy and Penthouse magazines,”\textsuperscript{52} and will be told to masturbate, ejaculating their semen into a sterilized cup.\textsuperscript{53} There is very little written about this step, and nothing available regarding its possible emotional or other impact on the offspring created. After ejaculation, the donor will give the cup to an employee of the facility who will mark it with identifying information and possibly forward it to a laboratory for a variety of tests, including the screening for infectious diseases.

Results of the CDC’s 1999 questionnaire for “embryo laboratories,” asking about infectious disease testing, show that 59\% of 232 labs reported that they tested sperm for syphilis; nearly 50\% percent tested for Hepatitis B; 44\% and 29\%, respectively, tested for HIV I and HIV II;

\begin{footnotesize}
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  \item[\textsuperscript{47}] See id.
  \item[\textsuperscript{48}] See, e.g., Fertility Options, \textit{Sperm Donor Profile (Sample)}, at http://www.fertilityoptions.com/html_pub/z0003.htm (last visited Nov. 14, 2002).
  \item[\textsuperscript{50}] Fertility Options, \textit{supra} note 48.
  \item[\textsuperscript{51}] See Zygen Laboratory, \textit{supra} note 43.
  \item[\textsuperscript{52}] \textit{ANDREWS, supra} note 41, at 35.
  \item[\textsuperscript{53}] See Sharon Krum, \textit{American Beauty, Here is Lauren Bush, This Year’s Model. Americans Want Her Looks, Her Figure, Even Her Brains. But Most of All, They Want Her Eggs}, INDEP. (London), June 17, 2001, at 1.
\end{itemize}
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41% tested for Hepatitis C; and 27% to as few as 11% reported testing for diseases such as chlamydia, gonorrhea, herpes, and rubella.54

It appears that donors receive, on average, fifty dollars per sample,55 with some clinics voluntarily limiting the number of times any one donor can donate.56 The Northwest Andrology and Cryobank Company, without giving precise figures, advertises that: “All donors are frozen in very limited quantities, in order to guarantee that the number of pregnancies created from any one donor are limited.”57

Donors are regularly required to sign an agreement disclaiming all parental rights in any child created with their sperm. As will be discussed in Part II, legislation in this area is neither ubiquitous nor consistent. Thus, despite contractual agreements, a variety of conflicts can arise regarding the rights of and obligations to children created through collaborative reproduction.

Once a bank or fertility clinic has a stable and plentiful supply, it will advertise its products and services both to physicians and directly to the public. The Internet has become a common source of this information.58

2. Recipients Choosing Among Donors

Intending parents have the opportunity to review the “donor profiles” that are compiled from the information provided by donors. In some cases, sperm banks categorize their profiles according to educational attainment. A fee schedule from the Fairfax Cryobank of Virginia indicates that the cost to recipients of sperm from a man with a college degree is approximately $200, from a man with a doctoral degree, about $300, and from a donor with minimal available information, $135.59 Other sources refuse to provide this type of information. As the director of one fertility clinic noted, “[i]f we enabled them to search for PhDs, that would be the only donors they would look at.”60

The fees for the recipient vary according to location and to the provision of any additional services. For mail-order customers, Fertility Options estimates a cost of $4,160 for the first cycle of insemination.61 Costs

55 Andrews, supra note 41, at 80. See also Zygen Laboratory, supra note 43 (reporting an income to sperm donors of $400.00 per month for two weekly donations).
56 Andrews, supra note 41, at 81.
57 Northwest Andrology & Cryobank, supra note 42.
for sperm range from $200 for pre-washed frozen semen to $410 for “sex-selected frozen semen.” Customers may order a variety of shipping methods, from an overnight delivery of a liquid nitrogen tank at a cost of $210, to a $15 “cup with dry ice” that lasts for two hours and is available only to locals. The differing pricing schemes for sperm donation, aside from commodification issues discussed later in the Article, show the profit potential motivating the industry and counsel for regulation.

C. Egg Donation

Conceiving babies from eggs donated by a woman who does not intend to rear any resulting child is a relatively recent practice. The first reported case of a child conceived using a donor egg was in 1983. Today, the practice is increasingly common: eighty-four percent of the clinics responding to the CDC’s 1999 survey of fertility clinics offered donor eggs, totaling, in one year, over 9000 cycles using donor eggs. Twenty-nine hundred children were born from donor eggs in 1999. A 2001 Los Angeles Times investigative report estimated that there are 7000 egg donations per year. It further reported that professionals in the egg donation business believe that these numbers have and will continue to double every three to four years.

Egg donations may come about in one of two ways: an individual or couple seeking an egg donor may recruit a relative or acquaintance, or, more commonly, may select an unknown donor through an established clinic or private broker. In the early days of egg donation, women undergoing fertility treatments who produced more eggs than they could use were asked to donate their excess eggs. After the development of egg freezing, or “cryopreservation,” however, women more often saved their eggs for their own possible later use. Still, half of in vitro fertilization (“IVF”) clinics use patients as egg donors, even offering IVF at a reduced price if patients make their extra eggs available to other women.

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62 Id.
64 Id.
66 See 1999 ART REPORT, supra note 27, at 57.
67 Id.
70 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 243.
71 See ANDREWS, supra note 41, at 97–98.
Stories concerning the recruitment of stranger egg donors have attracted a substantial amount of news coverage. One widely covered story involved wealthy intending parents advertising for the eggs of beautiful, intelligent, tall, and athletic women. Literally hundreds of media outlets reported on the 1999 advertisement placed by broker Darlene Pinkerton in the newspapers of some of the nation’s most prestigious universities:

Pay your tuition with eggs. Egg Donor Needed. Intelligent, athletic egg donor needed for loving family. You must be at least 5'10." Have a 1400+ SAT score. Possess no major family medical issues. $50,000. Free medical screening. All Expenses Paid.72

Another California agency advertised in the Stanford Daily a $100,000 payment for the eggs of a Caucasian woman under thirty “with proven college-level athletic ability preferred.”73 A now infamous, and still extant, Web site offers viewers paying a monthly fee the opportunity to view pornographic pictures of female models and bid at auction on their eggs.74 Also occurring, though less publicly, are searches by fertility clinics for Jewish and Asian egg donors, the scarcity of which has made them “so sought after that many agencies will pay them higher fees even if they’ve never donated before.”75

Egg donors, like sperm donors, are also regularly recruited on the Internet. One Internet outlet, Options National Fertility Registry, claims to receive calls from over two hundred prospective donors daily.76 A woman wishing to be an egg donor must ordinarily fill out a lengthy questionnaire. A sample donor history form used by the Northwest Andrology and Cryobank Company is sixteen single-spaced pages long and requests information, including physical characteristics, sexual history, medical history, family medical history, personal philosophy, personality, childhood memories, degree of religious fervor, and musical and athletic abilities.77 Another clinic tells donors that they should “range from at-
tractive to strikingly beautiful.” It further expresses a preference for donors who already have children of their own as proof of fertility as well as a hedge against future feelings of regret, and requests photos of existing children for potential recipients to view.79

Monetary inducements are used to lure donors. It is a “simple fact that most donors are not as economically well-off as most recipients.”80 Some donors say that money is their primary objective: “It was the dollar figure that attracted me,” said Rachel . . . “I opened it up and saw that it was $50,000 and said, “all right.’’”81 Others claim altruistic motives: “I thought it would be a wonderful experience to help an infertile couple.’’82 Aside from the most widely publicized cases involving large sums of money used to attract beautiful, intelligent women with privileged educations, the reports of the average payments made to egg donors do not vary widely. A network television investigation series estimated that donors are paid approximately $2,000 per retrieval, increased in increments of $500 for each subsequent donation up to a maximum of nearly $4,000.83 Egg Donation, Incorporated offers $5,000 per donation.84

1. Donor Testing, Fertilization, and Implantation

Once the potential recipient selects a willing donor for further inquiry, the donor is asked to undergo a series of tests measuring physical, possibly psychological, and genetic traits.85 If she is selected, the processes of egg retrieval and the various methods of fertilization follow. Laboratory tests of egg donations might screen for HIV, hepatitis, syphilis, gonorrhea, and chlamydia, among other diseases.86 An egg donor will also meet personally with a physician for a full physical exam. If, after this testing, the donor is selected, her ovaries will be hyperstimulated with hormonal drugs daily for about two weeks in an often painful process designed to produce the “superovulation” of fifteen to twenty eggs.87 While waiting for her eggs, the donor is carefully monitored.88 Finally,

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79 See Daum, supra note 74, at 227.
80 Id. at 225.
81 Kenneth Weiss, Big Money Offers to Egg Donors Fuel Ethical Debate, Plain Dealer, June 13, 2001, at 3E.
82 Frase-Blunt, supra note 60, at F2.
83 See Daum, supra note 74, at 222; ABC World News Saturday: Future Shock, supra note 72.
84 See The Egg Donor Prog. & the Surrogacy Prog., supra note 78.
85 Debra Melani, Sacrificing for a Dream: Aunt and Niece Endure Exams and Shots for Surrogate Pregnancy, Rocky Mountain News, July 19, 2001, at 1D.
86 See 1999 ART REPORT, supra note 27, at 1.
87 Daum, supra note 74, at 227 (noting that a woman’s ordinary monthly cycle produces one).
88 See, e.g., Damario, supra note 65, at 791.
the eggs are removed either surgically, with some anesthesia, or trans-
vaginally.99 Despite the frequency of egg donations, retrieval procedures
are still regarded as onerous and even dangerous to donors.90

The eggs may then be transferred immediately from the donor to the
card, in which case the recipient, too, has been preparing her body
hormonally.91 A recipient of “fresh” eggs will ordinarily have three or
four inserted into her uterus, at which point the recipient may have sexual
intercourse with her husband or another male partner, or receive sperm
from a known or unknown male via artificial insemination.92 The eggs
may also be transferred to a petri dish for ex-utero fertilization using one
of the means discussed below in Part I.E. In recent years, women also
have the option to freeze their eggs for later use. Like sperm donors, egg
donors will sign an agreement waiving all parental rights and responsi-
bilities with respect to any child conceived from their eggs. ASRM
Guidelines specifically advise: “Donors and recipients and their partners
should execute documents that define or limit their rights and duties with
regard to any offspring.”93

2. Donor Selection by Intending Parent(s)

Even the more ordinary cases of egg donation require an intending
parent to judge the desirability of numerous characteristics of the poten-
tial donor. The Internet has become a common place to look for donor
profiles. A sample donor profile available to potential donors at the Web
site of Eggdonation.com shows a stunning young blond woman named
“Angel,” posed as a model, along with a claim that the donors are “ex-
traordinarily bright and attractive as well as kind-hearted.”94 Pictures of
donors are regularly included alongside the information provided in do-
nors’ applications.95 Interestingly, one does not see fee schedules explic-
itly pricing eggs according to the educational accomplishments of their
donors, although this could be changing.96

Reports vary concerning the ways that intending parents subjectively
assess donor profiles, with some evidence that parents are influenced

99 See id.
90 See Ethics Comm. of the Am. Soc’y for Reprod. Med., Financial Incentives in the
Recruitment of Oocyte Donors, 74 FERTILITY & STERILITY 216, 217 (2000) (discussing
“mortality risks,” risks of impaired fertility, and psychological consequences).
91 See id.
92 See id.
STERILITY S6, S8 (Supp. V 2002).
94 See Egg Donor Prog. & Surrogacy Prog., supra note 78.
95 See id.
96 “Conceptual Options in San Diego breaks its list into two groups, ‘donors’ and
higher priced ‘extraordinary donors.’ One of those on the extraordinary list is Valerie a
stunning brunet (sic), a third-year medical student, 5 feet 8, a . . . professional ballerina,
considerably by external appearance and other evidence that parents minimize the importance of aesthetic beauty. The standard information sheet for the Center for Reproductive Health states that

Physical characteristics of the . . . donor such as skin color, eye color, hair color and body build are matched as closely as possible to the characteristics of the intended recipient couple . . . . Many ethnic groups will desire donors with a specific belief. The clinic does its best to meet the patient's wishes. However, this requires a large and constant supply of donors. Although the Center for Reproductive Health has a very large source of donor oocytes [eggs], the probability of meeting every recipient's wishes cannot be guaranteed.97

One reporter looking at four hundred donor profiles concluded that most of the women were "ordinary looking."98 On the other hand, medical personnel involved in donor selection regularly report that prospective parents are strongly influenced by the appearance as well as the accomplishments of donors: "agencies report a steady stream of would-be parents smitten by the human tendency to want to improve on nature. For recipient couples, beauty often plays as large a role as any other characteristic."99 According to the director of a very large egg donation program in California, he

... can show pictures of a number of donors to a couple, and the husband in particular, will always choose the prettiest, even if she looks nothing like his wife . . . . [O]thers want children who might grow up to be ballet dancers or geniuses. They might quiz the donor about her tennis game or measure her shoulders.100

Fertility centers further report that parents increasingly are going well beyond health inquiries in the search for other intangible desired qualities.101

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98 Daum, supra note 74, at 227.
100 Krum, supra note 53, at 1.
3. Newer Developments in Donor Eggs

a. Cryopreservation

The CDC’s 1999 ART Report found that the American embryology labs began performing “oocyte cryopreservation” in 1994, the same year the first frozen egg birth occurred in the United States. Successfully freezing eggs, however, remains more difficult than successfully freezing sperm.

b. Young Eggs and Beyond

Doctors regularly use the eggs of younger women with their older recipient patients. According to the CDC’s 1999 ART Report, egg donors are typically in their twenties or early thirties, and egg recipients are typically over thirty-six, with the most likely recipient over forty years of age. The use of eggs from young donors was extended to its logical extreme in 1994 with the suggestion that women use the eggs of aborted female fetuses; at twenty-two weeks gestation, females have the maximum number of eggs they will ever have in their lifetimes, untouched by environmental and other hazards. This possibility created a furor when it was publicized, and it lacks ASRM approval; presently, it is not offered in the United States.

D. Embryo Donation

It was first proposed that an embryo could be donated by flushing it out from one uterus and implanting it in another, but this technique has not been pursued. Instead, because other ARTs such as in vitro fertilization regularly involve the production of numerous and unused extra embryos, recipients have normally obtained donor embryos from this source. Clinics ask potential donors to execute agreements regarding the disposition of any unused embryos, and include embryo donation as an explicit option. These agreements further require donating parents

102 See 1999 ART REPORT, supra note 27, at 1.
103 See id.
104 ANDREWS, supra note 41, at 100.
105 See 1999 ART REPORT, supra note 27, at 1.
107 See ANDREWS, supra note 41, at 19.
109 Once embryos are created with IVF and not implanted in the womb of the woman
to waive all rights to any children born as a result of their embryo donations. The ASRM guidelines instead suggest that the recipient, and not the donor, “must take full responsibility for the embryos and any child or children that may result from the transfer.”

Fifty-one percent of all fertility clinics offered embryo donation in 1999. The CDC does not collect statistics on, and it is difficult to find, the total number of ART cycles involving the use of donor embryos. It is worth noting, however, that since the development of embryo cryopreservation, it is estimated that 100,000 to 200,000 embryos are in frozen storage in the United States today, although no source claims to have precise figures.

There are also clinics that offer human embryos, not as a byproduct of IVF, but through the deliberate merging of particular eggs with particular sperm in order to “make a variety of embryos with different pedigrees.” The egg and sperm donors involved in any embryo donation are usually anonymous to the intending parents, though, of course, extensive personal and medical histories of the donors are available to the recipients for selection of desirable traits. According to the fertility programs involved, the process of embryo donation is no more complicated than that of any other ART involving only one donor.

The widespread appeal of embryo donation is due, in part, to its cost; it is less expensive than creating one’s own embryo from scratch. In Virginia, a state with numerous prominent fertility clinics, it costs $2,600 for a donor embryo as compared to the $9,400 to $11,600 necessary to complete an IVF cycle involving a donor gamete or gametes.

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for whom they were initially created, there are a variety of ways clinics may handle them. According to the CDC, 49.6% of labs discard some excess embryos immediately with patient consent and 6.5% do the same without patient consent. See CTRs. FOR DISEASE CONTROL & PREVENTION, FINAL REPORT, supra note 35, at 66. Forty-six percent culture the embryos until they die naturally, with patients’ consent, and another twelve percent do the same without patient consent. See id. Eighteen percent donate some embryos to another couple with the patient’s consent; none do this without the patient’s consent. See id. Twenty-two percent donate some embryos for IVF or related training with patient consent, but 3.9% donate embryos for the same purpose without patient consent. See id. Twenty-three percent donate embryos for research with patient consent and none do so without consent. See id.

111 See 1999 ART REPORT, supra note 27, at 57.
114 See Jadrnak, supra note 112, at A1.
Unique to the United States in embryo donation is embryo "adoption." This process differs from embryo donation not mechanically but primarily because traditional adoption procedures may be brought to bear on the embryo transfer. Agencies offering this adoption service have sprung up recently, with perhaps the best-known being the Snowflakes Embryo Adoption Agency, a Christian organization. The agency advertises its service on the Internet where adoptions are "open, with couples exchanging letters, biographies, and photos. Donor and recipient parents detail what they are looking for in each other, then choose and meet the family that appeals to them." One couple required, for example, that the couple adopting their embryo be Christian, college graduated, and married for at least seven years. The cost of the adoption process is approximately $7,000. As with adoptions of born children, the agency requires home studies and investigations of any past child-abuse convictions. Lawyers may draft "embryo adoption" contracts. Snowflakes reports that to date, there are approximately 1050 embryos who have been adopted.

E. Fertilization and Implantation

There are different ways in which sperm and eggs are brought together for fertilization using ARTs, regardless of whether one is using a couple’s own gametes, donor sperm alone, a donor egg alone, or both donor sperm and donor egg. Fertilization is the penetration of the female egg by the male sperm, causing the fusion of nuclei to create an embryo with a new genetic blueprint. Some methods for bringing about fertilization with donor gametes take place within the intending mother’s body, “in utero”; others occur “ex utero,” in the laboratory. Each will be described briefly in this Part.

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118 Id.
119 Sheryl Gay Stolberg, Adoption of Leftover Embryos Emerging as an Option for Some Couples, MILWAUKEE J. SENTINEL, Mar. 19, 2001, at 1G. See also Snowflakes Embryo Adoption, supra note 117.
120 See Stolberg, supra note 119, at 1G.
121 See id.; Jadranka, supra note 112, at A1.
122 See Snowflakes Embryo Adoption, supra note 117.
123 See Stolberg, supra note 119, at 1G.
124 Snowflakes Embryo Adoption, supra note 117.
126 Id.
1. Artificial Insemination by Donor

Artificial Insemination by Donor ("AID") is the insertion of an instrument containing male semen into a woman's uterus (known as intrauterine insemination or "IUI") or near her cervix. AID may be done by a woman at home or by a doctor. At home, a woman may use a device as simple as a plastic kitchen implement used to baste meat to inject semen into her uterus while she lies on her back. In fact, some fertility Web sites publish explicit directions for at-home insemination. Alternatively, a woman may go to a doctor for this procedure.

2. In Vitro Fertilization

In vitro fertilization ("IVF"), once the talk of the scientific community and the public, has become the daily bread and butter of the ART industry. With IVF, the embryo is created literally "in glass," in vitro. After eggs and sperm are obtained by any of the methods described above, IVF involves the placement of semen and eggs into a petri dish containing a specialized medium where they will form the embryo. After two or three days, the embryos are evaluated and then implanted in a woman, or frozen for later use. The first child born of this process was Louise Brown in England in 1978; in the United States the first IVF child was born in 1981. By 1999, it is estimated that 300,000 IVF children were created in the United States.

While it is ordinarily the case that the federal government's National Institutes of Health ("NIH") investigates new technologies of this significance, the NIH did not fund any initial studies of IVF. Still, clinics in the United States opened at a rapid pace, immediately competing commercially for patients. According to Lori B. Andrews, "in vitro was done on women in 1978, but not on baboons until 1979 and chimps until 1983. This led embryologist Don Wolf to quip that perhaps women were serving as the model for nonhuman primates." Doctors regularly create more embryos than are used in an individual ART cycle, generating commentary from both the scientific and ethi-

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127 See id.
129 See id.
130 See Neri Laufer et al., In Vitro Fertilization, in INFERTILITY: A COMPREHENSIVE TEXT 703, 721 (2d ed. 1997).
131 See id. at 720.
132 See Andrews, supra note 41, at 209.
134 See Andrews, supra note 41, at 33.
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cal communities. Excess embryos are created for a number of reasons, particularly to increase the probability of success and maintain the high "take home baby rate" of IVF clinics. According to the president of the ASRM, fertility "specialists today can’t reliably predict how many embryos it will take to conceive a baby." Therefore, in order to ensure the highest possible take home baby rates—required to be accurately published—doctors implant as many as ten embryos in the hopes that at least one of the embryos will successfully implant in a woman's uterus. As a result, one in three IVF births produces multiples, for example twins or triplets, a fact that has caused a flurry of criticism from the medical community for both health and ethical reasons. Multiples are at a greater risk for obstetrical and neonatal complications. The ASRM recommends that doctors implant only two to five embryos in a woman, depending upon the patient's age and probability for a successful pregnancy, but no law requires observation of this recommended limit.

3. Intracytoplasmic Sperm Injection

A variation on IVF known as Intracytoplasmic Sperm Injection ("ICSI") consists of a woman’s eggs being harvested from her ovaries and then injected directly with sperm without the need for IVF’s petri dish or other growth medium. It was successful for the first time in 1992. While ICSI was initially considered merely a response to a male’s low sperm count or decreased sperm motility, today, it is used where neither of these conditions exists. By 1997, more than one-third

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135 Am. Soc’y for Reprod. Med., Guidelines for Cryopreserved Embryo Donation, 77 FERTILITY & STERILITY S9, S10 (June 2002). The concerns have become prevalent among the general public through the embryonic stem cell debate. See id.
136 ANDREWS, supra note 41, at 52.
137 Szabo, supra note 108, at A2.
139 See Andrews, supra note 41, at 48.
139 See 1999 ART REPORT, supra note 27, at 20.
142 See Laufer, supra note 130, at 724.
144 See infra Part II.B.6.
146 See id.
of all IVF treatments used ICSI methods. Of all embryo laboratories responding to a CDC survey, ninety-four percent offered ICSI.

The statistics are alarming as research indicates the possibility of defects in children conceived by ICSI. In 1999, reports of the "novelty and the many unknown aspects of ICSI" suggested a "slightly increased risk of sex-chromosomal anomalies among children conceived after ICSI." Those findings, however, are dismissed as inconclusive by some proponents of ICSI, even as the ASRM states that ICSI "may be associated with a higher incidence of congenital defects." The precise source of such defects is not certain. In a recent report, the National Institute of Child Health and Human Development has suggested that the defects might arise because of abnormal sperm processing during the course of their injection in the female egg.

4. Zygote or Gamete Intrafallopian Transfer

Two additional variations on IVF are utilized in response to varying infertility problems. In the case of male infertility, zygote intrafallopian transfer ("ZIFT") may be employed. With ZIFT, a woman's egg is retrieved in the same way as with standard IVF, but after fertilization with sperm in a petri dish, the embryo is transferred directly into the woman's fallopian tube, rather than the uterus. Another variation on IVF is known as gamete intrafallopian transfer ("GIFT"). In GIFT, the retrieved eggs and sperm are placed into the fallopian tube so that fertilization may take place in the mother's body.

F. Post-Fertilization Tests

Once an individual or couple is willing to allow a human embryo to be created outside of a mother's uterus, a host of additional technological interventions on the embryo become possible.

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148 See id. at 756.
149 See 1999 ART REPORT, supra note 27, at 2; ANDREWS, supra note 41, at 210.
151 Van Steirteghem et al., supra note 145, at 756.
152 Id.
156 See id.
1. Pre-implantation Genetic Testing

After embryos are formed, but before they are placed in a woman's uterus, a patient may seek—or a doctor may recommend—pre-implantation genetic testing. The doctor will make such a recommendation if a genetically determined disorder is prevalent in either of the parents or their families.

Pre-implantation genetic testing is not yet widespread, and the number of disorders tested for is relatively few. Where available, doctors can test embryos for cystic fibrosis, sickle cell anemia, and Alzheimer's, among other disorders. Despite the currently limited use and application of genetic research, it is proceeding rapidly and with enthusiasm. Consequently, the number of genetic tests possible for an embryo is quite likely to increase as patients and doctors increasingly seek more control over the qualities of offspring. These tests are accomplished by removing one cell of an approximately eight-celled embryo, and testing it for the presence or absence of a certain gene or genes. After the results are disclosed, the parents may decide to implant, destroy, or save the embryos. It is also possible to screen embryos for sex-linked genetic disorders. One report puts the cost of such diagnostic tests at $12,000, another at $3,000.

2. Sex Selection

Sex selection is another pre-implantation technique available to prospective parents. This method involves processing male sperm in order to select those with X or Y chromosomes, thereby selecting the sex of the offspring. One company charges $375 for such a test and claims to have a three-to-one success rate screening for girls and a four-to-one rate for boys. While initially touted as a method to avoid passing on a sex-specific disease, sex-selection now has clearly passed into the realm of

See Denise Grady, Baby Spared Mother's Fate by Genetic Tests as Embryo, N.Y. TIMES, Feb. 27, 2002, at A16.
See infra Part I.F.2.
See Grady, supra note 157, at A16.
See Tanner, supra note 158, at 2.
See id.
the commonplace as evidenced on the Web site of a large fertility center that advertises "gender-selected frozen semen" to any buyer for $410.166

3. Selective Reduction

One final technique that has developed alongside the new reproductive technologies is selective reduction. This is not a method of fertilization, nor is it related to determining the traits of the intended child. Called a "staple of infertility therapy," selective reduction requires the termination of one or more otherwise healthy fetuses growing in a mother's womb to avoid a multiple or very high-order multiple pregnancy. Selective reduction can be employed in either a natural pregnancy or one initiated with technological assistance. The procedure has gained greater notoriety due to the frequency of multiple pregnancies arising from ARTs.

Fertility clients report pressure from doctors to reduce their multiple pregnancies in order to increase the chance for successful delivery of a healthy child. The process of selective reduction is similar to abortion techniques, except that a doctor performing selective reduction intends to leave one or more fetuses alive at the end of the procedure. A doctor injects potassium chloride into the heart of one or more of the fetuses. Usually, the other fetuses survive, but there always exists the chance that all of the fetuses will be lost. In 1999, between seven and thirteen percent of selective reduction procedures resulted in the loss of all fetuses. Among the women who have undergone a selective reduction procedure, there is an extremely high rate of depression. As one patient wrote, it is "one of life's tragic ironies. You've unsuccessfully tried for years to have a baby . . . . Finally it happens . . . . But there's a hitch." The psychological and physical effects of selective reduction procedures cannot lightly be dismissed.

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168 See id. at 773.
169 See id. at 771.
171 See Evans, supra note 167, at 771.
172 See id.
173 See ANDREWS, supra note 41, at 58.
174 See id.
175 O'Brien, supra note 170, at 1.
Part I presents a picture of a multi-billion-dollar industry in an environment of high emotion and deep desires—desires that are as “primary as the need to eat or sleep.” 176 The industry is in the business of selling superior genetic inheritances for high fees. Even individuals who approach collaborative reproduction with a “simple” desire for a child will soon find themselves tempted to buy the makings of the best possible child. 177 Sperm donors may be exposed to pornography weekly for months or years; egg donors will undergo often painful procedures to “superovulate”; embryos will be screened, tested, and frozen; and some women who started the process for the love of children will find themselves terminating fetal lives by selective reduction. When the processes of collaborative reproduction are “done,” there may remain eggs, sperm, and embryos to be frozen, destroyed, or donated to a stranger; high order multiple births with complications; and possibly post-selective-reduction depression. All of the children created will be estranged from one or both of their biological parents. Many will be raised in single-parent homes. These are the results if everything goes mostly as planned.

Despite these consequences, the regulatory approach to ARTs in the United States might be described as laissez-faire. Lori Andrews has gone so far as to describe our “dominant social value” in this area as “show me the money.” 178 Many articles have addressed the relative dearth of regulation; 179 it is not the aim of this Part to review every federal and state regulation in this area. Rather, this Part will offer a characterization of the kinds of concerns that have risen to the level of regulatory interests and those that have not. An examination of possible reasons for the scarcity of regulations will follow—particularly the claim that regulations would run afoul of constitutional proscriptions.

176 Andrews, supra note 41, at 25.
178 Andrews & Elster, supra note 133, at 45.
B. Acknowledged Regulatory Interests

The patchwork of federal and state laws concerning ARTs may be characterized broadly as attempts to facilitate transactions in gametes and embryos by allowing the reassignment of parental rights from biological donors to intending parent(s); to prevent the transmission of some diseases; to prevent fraud on customers and promote truth in advertising; and to provide some protection for human embryos. First, the laws concerning assignment of parental rights share some features across state lines but leave substantial gaps as some fail to address the unmarried parent or the use of donor eggs or embryos. The second interest, disease prevention, is also widespread, although the precise levels of protection for recipients of gametes varies with individual state laws. The third interest, consumer protection, has been pursued most aggressively through federal law, although some states have used false advertising and consumer fraud laws against fertility clinics. The fourth interest in protecting human embryos has recently gained some momentum, but is also unevenly expressed across state laws. Taken together, this patchwork of laws expresses a rough national consensus to allow private intent and invention to govern, with an injection of minimal safeguards concerning commercial fraud, health, nascent human life, and parental assignment. Virtually no regulatory attention is devoted to the effects of collaborative reproduction—both its processes and its results—on children or on family relations and structures. Some guidelines have been suggested by professional societies such as the ASRM, but these are voluntary rather than compulsory.

1. Legal Parentage of Children Conceived

Parental assignment laws for children conceived with donor gametes or embryos do not reflect direct regulation of collaborative reproduction. Instead, they are an indispensable condition of most donors’ and recipients’ willingness to participate in collaborative reproduction. In fact, the subject matter most often treated in legislation at the state level concerning collaborative reproduction is the legal parentage of children conceived with the use of AID. By the year 2000, at least thirty-five states had statutes providing that the consenting husband of a married recipient would be the legal father of any child conceived through IVF. Such laws reveal a preference for the traditionally defined, two-parent family

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180 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 422.
182 See infra notes 184–216 and accompanying text.
183 See Andrews & Elster, supra note 133, at 36 n.2.
rather than a family structure consisting of three parents, one-parent, or two parents including the sperm donor. Some other states simply cut off any parental rights of a sperm donor, without reference to the marital status of recipients. Altogether, these laws may be characterized as facilitating the use of AID by allowing the intentions of donors and recipients to be effected.

Interestingly, while legislation assigning parental status after AID is prevalent, analogous legislation concerning egg donation is conspicuously absent. In fact, only five states have enacted specific legislation on this topic. In general, these statutes provide that a married recipient and her husband are the parents of a child from an egg donation. The legal parentage of children conceived by single woman using egg donation is not addressed, leaving such determinations to be made contractually between the parties, or by a court in the event of a dispute.

Similarly, only a few states have legislation assigning parental status in the event of embryo donation. Louisiana treats such donations like adoption and makes them available only to married couples. Texas and Florida provide simply that donors are not the parents of a child conceived using artificial reproduction, without affirmatively assigning parentage.

2. Screening Donors

Several surveys have found considerable inadequacies and inconsistencies in fertility clinics' screening of donor materials. State laws, where they exist, may require a variety of limited tests on proposed sperm donations. Some laws require only HIV testing, while others require syphilis and hepatitis testing as well. Screening of both egg and

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184 See, e.g., CAL. FAM. CODE § 7005(b) (West 1994) (conditioning parental assignment on the participation of a licensed physician); COLO. REV. STAT. § 19-4-106-2 (2000); WYO. STAT. ANN. § 14-2-103 (Michie 2001).

185 See FLA. STAT. ANN. § 742.14 (West 1997) (stating that donors relinquish all rights and obligations with respect to resulting children); N.D. CENT. CODE §§ 14-18-01 to -07 (1997); OKLA. STAT. ANN. tit. 10, § 555 (West 1998); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002); VA. CODE ANN. § 20-158 (Michie 2000) (making intended mother the legal mother and relieving egg donor of all rights and obligations).


190 See, e.g., CAL. HEALTH & SAFETY CODE § 1644.5 (West 2002); IND. CODE ANN. § 16-41-14-5 (West 1998).
sperm donations is necessary to comply with the law of a few states. 191 In the absence of laws specifically applicable to gamete donors, fertility clinics may be subject to existing state laws covering other donations—namely, tissue and bodily fluid donations. 192 There are no federal laws requiring screening, although the Food and Drug Administration has proposed an oversight system for the collection, processing, screening, and distribution of sperm. 193 Federal law does, however, penalize HIV positive persons who knowingly donate or sell semen, among other bodily fluids. 194

3. Clinic Oversight

The most prevalent federal regulation affecting collaborative reproduction requires fair advertising of clinic success rates. After the ART explosion in the mid-1980s, the United States Office of Technology Assessment published its 1987 survey of business practices in the fertility industry. 195 Following a series of hearings, Congress passed the Fertility Clinic Success Rate and Certification Act ("FCSRCA"), requiring fertility clinics to provide pregnancy success statistics to the CDC in a standardized form. 196 The CDC has published these figures annually since 1996. The FCSRCA also promised that a model program would be developed for the inspection and certification of laboratories that handle embryos and for reporting procedures to the Department of Health and Human Services. 197 According to the Encyclopedia of Reproductive Technology, however,

the American Society for Reproductive Medicine . . . effectively exercised its influence by shaping the legislation in order to ensure that laboratory inspectors had no authority over the clinical practices of physicians. The selection, screening and matching of ova donors and recipients were categorized as "medical services" beyond the reach of systematic regulation. 198

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192 See N.Y. State Task Force on Life & The Law, supra note 12, at 246.
195 Off. of Tech. Assessment, supra note 125.
197 Id.
Furthermore, as no funds were appropriated in a timely manner to implement the legislation, no model program has ever been proposed, leaving individuals and couples without any assurance that they will "receive only nonexperimental procedures, be provided with full information, or be offered counseling of any kind."199

According to a number of studies, the FCSRCA has hardly prevented clinics from operating unfairly with their patients.200 Furthermore, according to one respected report, "the only local authority monitoring the development and use of new reproductive techniques is likely to be the local hospital institutional review committee, which often includes in its membership colleagues of the researcher who is requesting project approval."201 Thus, the federal foray into regulation has left the clinics largely unfettered, with the exception of a requirement to report accurate success rates.

A handful of states have enacted their own reporting laws,202 but these tend to require reporting information only about limited types of procedures—for example AID or IVF, but not both—making it difficult for the public to assess clinics’ overall success rates. Only a few states have enacted laws requiring clinic certification.203 More common is self-regulation for members of professional societies such as the Society for Assisted Reproductive Technologies ("SART")204 or the ASRM.205 Such societies issue reports and guidelines, and compliance is made a condition of continuing membership.

4. Embryo Manipulation

State legislation concerning the handling of embryos and fetuses created by ARTs is often confusing or vague. The statutes tend to use different terminology and inconsistently define words like “therapeutic,” "embryo," and "fetus." It is therefore difficult to determine with certainty which stages of unborn life are protected and which aspects of collaborative reproduction might be affected. Candidates for procedures in

199 Id. at 322.
202 See, e.g., IDAHO CODE § 39-5403 (Michie 2002); OR. REV. STAT. § 677.365 (2001) (requiring doctors to report all children born as a result of AI, but not IVF, to state vital statistics office); PA. CONS. STAT. ANN. § 3213(e) (West 2000) (requiring the production of quarterly reports similar to those required by the federal government); VA. CODE ANN. § 54.1-2971.1 (Michie 2001) (requiring clinics to disclose success rates to patients).
which the embryo could be harmed or even destroyed include: embryo
donation, cryopreservation, fertilization, and pre-implantation testing.

State statutes also vary widely in terms of the level of protection
they provide for human embryos. They may require that every embryo be
implanted, forbid nontherapeutic experimentation, or even criminalize
embryo experimentation. Of twenty-four state laws restricting fetal
research, three contain language construed to ban pre-implantation testing
because it is not, by definition, therapeutic for the embryo and not
always directed toward the transplantation.

There is no federal law specifically banning research on human em-
bryos, although federal funding for research in this area is quite lim-
ited. No funding is available, for example, for experiments on embryos
created specifically for research or for the direct destruction of embryos.
Only limited funding is available for research on stem cells from em-
bryos specifically destroyed to obtain such cells. Thus, federal law,
while it does not outright protect human embryos, expresses some re-
spect through funding limits.

5. Payment to Donors

While Louisiana and Florida forbid the exchange of money for gam-
etes or embryos, Virginia, home of several world-famous fertility clinics,
explicitly allows their sale. There is certainly the possibility that
existing statutes concerning sale of body parts, fetuses, or fetal tissue
might be interpreted to limit direct commercial trafficking in gametes and
embryos. Even if this were done, clinics might respond only by taking
greater care to associate their pricing for transfers of gametes and em-

206 See, e.g., LA. REV. STAT. ANN. §§ 9:123, 9:129 (West 2000) (recognizing human embryo outside the womb as "juridical person" and forbidding manipulation save for purposes of the "complete development of human in utero implantation."); N.M. STAT. ANN. § 24-9A-1(D) (Michie 2002) (defining fetuses to include embryos requiring implantation in utero of each fertilized egg or embryo).
207 See, e.g., 18 PA. CONS. STAT. ANN. § 3216(a) (2000) (protecting an "unborn child" from fertilization onwards against any nontherapeutic medical procedure).
208 See, e.g., N.D. CENT. CODE § 14-02.2-01 (1997) (banning all research or experimentation on human fetuses, possibly including embryos); R.I. GEN. LAWS § 11-54-1 (2000) (banning research and experimentation, possibly from fertilization).
209 See Andrews, supra note 159, at 40–41.
210 See Consolidated Appropriations Act FY-2001, Pub. L. No. 106-554, § 510, 114 Stat. 2763 (2000) (prohibiting use of funds on research "in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero" under the Public Health Act).
211 See id.
212 See id.
213 FLA. STAT. ANN. § 873.05 (West 1994); LA. REV. STAT. ANN. §§ 9:122, 9:130 (West 2000).
bryos with the labor of donors and with laboratory procedures, thereby escaping commercial laws.215

B. What Is Left Unsaid

Reflecting on the sum of current regulations, what is not regulated is more remarkable than what is. Regarding gamete and embryo recipient qualifications, for example, only New Hampshire imposes age and health requirements.216 No state or federal law distinguishes between participants who are married or unmarried, heterosexual or homosexual. It is left to individual clinics to decide whether the very young or the much older woman or man can become a recipient. No law presently limits the number of donations per donor, though some clinics limit these voluntarily.217 No law limits the number of embryos that may be implanted simultaneously in a woman’s uterus or the availability of selective reduction. No law regulates advertisements for and about donors, no law limits the price for “donations,” and no law constrains the grounds on which intending parents might choose donors.

Finally, only fourteen states have laws concerning the preservation of records related to ARTs.218 These laws do not always guarantee that the rearing parents, the donors, or the children will be able to identify important medical history or one another in the future.219 For the most part such statutes only regulate record-keeping about husbands’ consent to AID procedures, though a noticeable few do require retention of some donor information.220

C. Why Is the Sky the Limit?

1. Some Brief Considerations

Considering the picture of the industry drawn in Part I, and the picture of existing regulation drawn above in this Part, the obvious question emerges: why the dearth of regulation? One possible reason is economic: the reproductive technology industry is reported to take in $2 billion an-

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215 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 258–59.
216 N.H. REV. STAT. ANN. § 168-B:13 (2001) (allowing IVF or pre-embryo transfers only for women twenty-one years of age or older).
217 See, e.g., N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 272–73; Thomas Maier, Daddies Unlimited: No Rules on How Many Babies Donors Can Father, NEWSDAY, Apr. 29, 1997, at B29 (reporting that one individual semen donor was responsible for the conception of more than fifty children).
218 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 372–73.
219 See id. at 374.
nually.\textsuperscript{221} In part because of looser rules than those of European countries, the United States attracts customers from around the world.\textsuperscript{222} The industry is also associated with scientific discoveries that bring additional power and income to the domestic technology sector, including discoveries in stem cell research and genetics.

A second possible reason for the current state of regulation could be the inherent difficulty of making hard and fast rules suitable for a complex and constantly changing industry. In the last twenty years, artificial insemination has developed from a technique used primarily by married persons in the privacy of the doctor-patient relationship, to one used frequently by single persons at home with "mail order" semen. Genetic pre-selection of embryos has moved from a science fiction scenario to a \textit{fait accompli}. The size and scope of the legislative project—even the definition of the individual and the social dilemmas to be approached—may appear too large and too rapidly changing a target for legislatures.

The fading of family law's traditional preferences concerning the family form is a third possible reason for the lack of regulation. Increasingly, nontraditional groupings of adults and children are seen to function as traditional families. Fewer legislatures and courts make strict delineations between the rights and obligations of persons who are partners or parents by the traditional means of marriage, adoption, or natural childbearing, and the rights and obligations of those who become partners or parents by other means.\textsuperscript{223} For example, unmarried fathers, gay partners, or heterosexual cohabitants may now possess rights and obligations that were not previously acknowledged.\textsuperscript{224} It is not difficult to understand how some observers have concluded that the creation of families by means of collaborative reproduction does not require special regulatory attention. A more complete consideration of this phenomenon as it applies to collaborative reproduction will be undertaken in Part II.C.2.

It is also possible that the nation's ongoing struggles with abortion have dampened legislators' will to regulate the new reproductive technologies.\textsuperscript{225} Statutes expressing opinions about the status of embryos created in the course of collaborative reproduction, or the scope of various persons' interests in and rights respecting such embryos could be interpreted as commentary upon the existing state of the abortion right. Proposed statutes could end in stalemate after being endorsed and fought

\begin{itemize}
    \item \textsuperscript{221} See Andrews, \textit{supra} note 159, at 48.
    \item \textsuperscript{222} See Weiss, \textit{supra} note 68, at A1.
    \item \textsuperscript{223} See generally \textsc{Jane Carbone}, \textit{From Partners to Parents} (2000); Harry D. Krause & David D. Moya, \textit{What Family for the 21st Century?}, 50 \textit{Am. J. Comp. L.} 101 (2002).
    \item \textsuperscript{225} See Eggen, \textit{supra} note 13, at 668.
\end{itemize}
over by groups on either side of the abortion debate, on statutory effects other than those intended by the drafters.

Another reason for the absence of regulation might be a reluctance to tread in an area filled with so much human longing for something as natural and beautiful as a baby. Public criticism of the practices of the ART industry can be interpreted by persons suffering infertility as a personal judgment. After writing an article about couples bidding for the eggs of beautiful, Ivy League coeds, one reporter received many letters from readers accusing her of heartlessness toward the infertile. Wrote one reader, "I sat at the dining table and cried . . . How can I make you understand the level of grief that I feel."226 Anyone who has ever testified before a legislature or watched a hearing touching personal, medical issues can attest to the pressures created by emotional testimony.

2. Introduction to Constitutional Arguments About ARTs

In addition to the possible practical and normative explanations for the dearth of regulation of collaborative reproduction, it is important to consider the constitutional elephant in the living room: the argument that collaborative reproduction might enjoy constitutional protection and that government involvement should therefore be minimal.227 The constitutional arguments are extended from the body of Supreme Court cases concerning pregnancy, parenting, and the family rather than a definitive Supreme Court pronouncement. Combined with the belief that family relations created through collaborative reproduction are not wholly different from those created through natural conception,228 the constitutional objection may act as a powerful impediment to regulation.

One constitutional position argues that the fundamental "right to make reproductive decisions includes the right of an infertile couple to utilize medically assisted reproduction, such as in vitro fertilization and donated embryos."229 Other observers contend that the trajectory of all Supreme Court cases concerning procreation points toward a concomitant constitutional right to decide how to conceive children:230

228 See John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 Va. L. REV. 405, 428 (1983) (explaining that ARTs involve the same interests and values as coital reproduction when used by married couples where one or both spouses are infertile); John Robertson, Assisted Reproductive Technology and the Family, 47 HASTINGS L.J. 911, 929 (1996) ("[T]he 'prevailing paradigm' of a couple raising offspring is preserved and the third party is absent").
229 Andrews & Elster, supra note 133, at 45 (citations omitted).
230 See, e.g., Note, Reproductive Technology and the Procreation Rights of the Unmar-
[t]hese cases, viewed as a coherent whole, reveal that the constitutional right protected by the Court thus far is not likely a narrow right to be free from forced sterilization, to obtain birth control, or to obtain an early term abortion. Rather, the right is one of procreational autonomy, the fundamental right to decide whether, when, and how to bear or beget a child.231

After briefly reviewing the constitutional arguments, this Article will show, however, that Supreme Court precedent could not be extended to shield collaborative reproduction from additional regulation. This is because the values concerning family and procreation that inhere in the steps of collaborative reproduction are not those values protected by the Supreme Court’s cases involving more traditional means of reproduction. Rather, those decisions propose: considering parental rights as limited by responsibilities;232 promoting the ideal that children should have substantial, long-term stability and security in their family relations with preferably two, married biological parents;233 and protecting the notion that family life ought to preserve and promote American democracy and community.234

Collaborative reproduction, by design and practice, is procreation outside of marriage. The process may pose significant physical and emotional risks to the children created and to the people who create them, although these risks are not yet well-studied. Furthermore, and more fundamentally, collaborative reproduction has the potential to undermine an understanding of the family that Supreme Court decisions portray as important to both individuals and the nation: family as a “given” versus “chosen” community, in which legitimate freedoms correspond to mutual duties and duties to the wider society. For these discrete but also foundational reasons, it does not appear that constitutional protection would easily be extended to collaborative reproduction practices. The following will summarize the arguments in favor of constitutional protection for collaborative reproduction, suggest their shortcomings, and propose a reading of the relevant Supreme Court cases that would indicate that collaborative reproduction would not find a ready home in the panoply of Supreme Court decisions touching upon parenting, procreation, and the family. It will also point out that the values and interests expressed in

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231 See Lehr v. Robertson, 463 U.S. 248, 256-57 (1983) (noting that “state laws almost universally express an appropriate preference for the formal family”).
232 See infra text accompanying notes 313–322.
233 See Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Lehr, 463 U.S. at 257.
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these cases provide guidance about what types of regulatory interests in collaborative reproduction might appropriately be asserted in the future. Thus, it will overcome the contention that there are constitutionally based impediments to regulation of collaborative reproduction and proposes, instead, constitutionally grounded family interests that could support regulation.

3. Constitutional Arguments

Arguments for the extension of constitutional protection to collaborative reproduction are generally of two types. The first posits that individuals have a substantive due process liberty interest in making decisions concerning family matters generally, including matters related to children. These arguments rely on Supreme Court decisions recognizing parental rights to send children to nonpublic schools, to obtain foreign language instruction for their children, and to direct their children's education in the free exercise of their religion. They also claim that the Constitution extends some protection to quasi-parent-child relationships—those not formed by the traditional ties of blood, marriage, or adoption—against "arbitrary governmental interference." Finally, they sometimes claim that the state is not free to interfere with non-traditional familial living arrangements, relying particularly upon the Supreme Court's holding that a zoning ordinance may not forbid a grandmother from residing with her sons and grandsons.

Other commentators argue that access to ARTs, including collaborative reproduction, is constitutionally protected by relying on cases that appear to grant a positive right to procreate. In *Skinner v. Oklahoma*, for example, the Supreme Court struck down, on Equal Protection grounds, a state statute requiring mandatory sterilization for criminals convicted of two felonies of moral turpitude. The Court stressed the importance of protecting the defendant's procreative capacity, saying: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the [human] race." Similarly, in *Cleveland*

235 See, e.g., Kritchevsky, supra note 227, at 4.
239 See Kritchevsky, supra note 227, at 38 (citing Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816 (1977)).
241 See Note, Reproductive Technology and the Procreation Rights of the Unmarried, supra note 227, at 674 (arguing that these cases likely would defeat states' attempts to justify restrictions on access to ARTs).
243 Id. at 541.
Board of Education v. LaFleur, the Supreme Court upheld female teachers’ right to bear children without being subject to a law imposing mandatory leave for pregnant women and new mothers.\(^{244}\) The Court held that the Due Process Clause of the Fourteenth Amendment protected personal marriage and family choices.\(^{245}\)

Finally, there are arguments based on Supreme Court cases that appear to offer constitutional protection to a realm of private decision-making on matters related to procreation. In contrast to the arguments above, these assert that access to ARTs would receive constitutional protection, not because they are “about family” or preserving the capacity to procreate as against state action, but simply because they are decisions about the very private subject of procreation itself.\(^{246}\) These arguments rely on the Supreme Court's contraception and abortion “right of privacy” cases. These include *Griswold v. Connecticut*,\(^{247}\) *Eisenstadt v. Baird*,\(^{248}\) *Carey v. Population Services International*,\(^{249}\) *Roe v. Wade*,\(^{250}\) and *Planned Parenthood v. Casey*.\(^{251}\)

In *Griswold*, the Court found that a penumbral right of privacy covered married persons’ decisions to use contraceptives.\(^{252}\) Justice Goldberg’s concurrence went further, calling the traditional family a “relation as old and as fundamental as our entire civilization.”\(^{253}\) He also found it “difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.”\(^{254}\)

Yet as clearly as *Griswold v. Connecticut* located the right of privacy concerning contraception within marriage,\(^{255}\) *Eisenstadt v. Baird* located it in the individual.\(^{256}\) In so doing, the *Eisenstadt* Court used language that facially appeared to define a constitutionally protected zone of privacy around virtually all individual decisions regarding procreation: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”\(^{257}\) This expansive perspective on privacy might,

\(^{244}\) 414 U.S. 632 (1974).
\(^{245}\) See id. at 639–40.
\(^{246}\) See, e.g., Eggen, supra note 13, at 644–48.
\(^{247}\) 381 U.S. 479 (1965).
\(^{248}\) 405 U.S. 438 (1972).
\(^{250}\) 410 U.S. 113 (1973).
\(^{252}\) *Griswold*, 381 U.S. at 485.
\(^{253}\) Id. at 496.
\(^{254}\) Id. at 495 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting)).
\(^{255}\) Id. at 485–86 (“The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).
\(^{257}\) Id.
argue the opponents of regulation, constitutionally protect access to ARTs as merely procreative decisions.

Carey v. Population Services International, in upholding the single minor’s right of access to contraception, appeared to conflate the privacy right with the right to make procreative decisions, as in Eisenstadt:258 The Carey Court cited Eisenstadt, among other cases, as standing for the proposition that “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices” about marriage, procreation, contraception, family relationships, child rearing, and education.259

Perhaps the Court’s most expansive rendering of the reach of procreative liberty—with language almost philosophical and theological—came in Planned Parenthood v. Casey. Casey upheld some, but not all, of Pennsylvania’s abortion regulations and affirmed Roe v. Wade while denoting abortion a constitutional “liberty” interest.260 The Casey plurality noted that

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relations, child rearing, and education . . . [T]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.262

Were the expansive pronouncements of Casey and Eisenstadt taken at face value, they would appear to grant constitutional protection to virtually all decisions concerning procreation, parenting, and family. The decision to use others’ gametes and embryos would, by definition, be included among such decisions and would be folded into the category of privacy rights begun in Griswold.263

259 Id. (emphasis added).
262 Id. at 851.
263 Relying on Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990) (enjoining the state from enforcing a statute making a physician performing IVF the custodian of the embryo under a child abuse act from 1877), aff’d without opinion, sub nom. Scholberg v. Lifchez, 914 F.2d 260 (7th Cir. 1990). Lori B. Andrews claims that infertile couples have a constitutionally protected right to access collaborative reproduction. See Andrews & Elsters, supra note 133, at 45. Sounding Casey’s themes, Professor John Robertson sees the Supreme Court’s privacy cases as affirming the “notion that individuals have a right to choose and live out the kind of life that they find meaningful and fulfilling.” Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, supra note 228, at 430. This right includes, Robertson believes, access to collaborative reproduction for married persons. See id. He expresses uncertainty regarding whether such rights would be extended to the unmarried but asserts that single persons also have “valid interests in
For a number of reasons, it is difficult to conclude that collaborative reproduction merits constitutional protection as an extension from any of the cases discussed above. First, with respect to arguments from cases about the rights of families, the Court’s decisions to date involve traditional subject matters for family decision making, such as children’s education and extended family household composition. To the extent that the cases mention rights regarding procreation at all, they do so only in the context of marriage and coital conception. *Meyer v. Nebraska*’s pronouncement is typical, speaking about rights to “marry, establish a home and bring up children, [which are] essential to the orderly pursuit of happiness by free men.”

Thus, *Meyer* upheld the rights of parents to choose foreign language instruction for their children. The family choices in these cases are very different in kind and in effect upon children from the choices implicated in collaborative reproduction. The latter are not about marrying but about creating children outside of the marital context. They are less about setting up a home or bringing up children than about contracting to conceive children by new means, or about the freedom to select desired traits in a child.

Second, cases extending protection for nontraditional family arrangements are also not easily extended to collaborative reproduction. All such cases involve the preservation of relations between children and their biological relatives. Thus, it was preserving the connection between a grandmother and her grandsons that deserved constitutional recognition in *Moore v. City of East Cleveland*. In *Smith v. OFFER*, blood ties were protected as the court declined to extend the rights of foster parents at the expense of the natural parents. Furthermore, even in conceding a willingness to support an unwed biological father’s relationship with his child, the Court in *Lehr v. Robertson* cautioned that society’s preference for the unitary marital family was strong:

The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.

Additionally, marriage has explicitly been noted as the context for procreation in the only two Supreme Court cases treating affirmative

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265 Id.
rights to procreate. The *Skinner* Court, for example, automatically paired marriage and procreation as rights. The *La Fleur* Court did likewise, affirming “freedom of personal choice in matters of marriage and family life ...” Marital rights are inapposite to collaborative reproduction because collaborative reproduction necessarily involves procreation with at least one biological parent outside the marriage, if the recipient is even married at all. The combination of family life with marital rights suggests that regulating collaborative reproduction would not run afoul of the affirmative rights of procreation found in *Skinner* and *La Fleur*.

*Skinner* and *La Fleur* are difficult to marshal on behalf of a constitutional right to procreate by all means available due to their limited factual settings. In his comprehensive article on constitutional rights in marriage and kinship, Professor Bruce Hafen observed that *Skinner* spoke precisely about the capacity to procreate “but only in the context of state action that would have resulted in permanent sterilization.” *La Fleur* affirmed procreative rights only in the context of statutory employment penalties for procreating teachers. These narrow holdings do not readily transfer to collaborative reproduction regulation.

Also limited, the “right of privacy” cases concern only a right to avoid procreation through contraceptives, not to affirmatively conceive a child. In the contraception and abortion cases, it appears the Court was actually protecting individuals’ right to avoid procreation or parenting in situations that could prove problematic for them, their children, and society. Thus, it is possible for Professor Bruce Hafen to characterize the right of privacy cases as protecting the ability to avoid “long-term commitments to one’s own potential offspring” in order to preserve values of personal autonomy. Intended parents use collaborative reproduction, however, not to avoid offspring, but to create them.

The Court has not supported rights to procreate generally, let alone among the unmarried. Justice Brennan wrote specifically in *Carey* that the Court was not answering the “difficult question whether ... the Constitution prohibits state statutes regulating sexual activity among adults.” Even Justice Brennan’s majority opinion in *Eisenstadt* “conced[ed] the legislature a full measure of discretion in fashioning means to

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271 *Skinner*, 316 U.S. at 541. Collaborative reproduction, not as a matter of state policy, but as a result of cumulated individual decisions about what makes an attractive donor, may also produce outcomes with eugenic overtones.
274 Hafen, supra note 272, at 534.
prevent fornication."276 The Roe Court specifically disavowed equating the abortion right with the "right to do with one’s body as one pleases."277 In fact, as pointed out by both Professors John Robertson and Marsha Garrison, there remain a "range of existing restrictions on nonmarital procreational choice," such as "laws against fornication, adultery, incest, and bigamy."278 These laws are not likely to be struck down as unconstitutional.279

There is also language in the contraception and abortion decisions indicating that the Court believed its decisions were necessary to give individuals the freedom to avoid problematic family situations detrimental to social stability. Regularly following the Court's announcement of the constitutional right at issue in each case, the Court laments the difficulties that would be created if a person—usually the would-be mother—were not able to prevent or terminate a pregnancy. In Eisenstadt, for example, the Court stated that a single person's lack of access to contraception could lead to "an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support."280 In Roe, the Court similarly listed the societal effects of an unwanted pregnancy.281

In sum, the cases show a willingness to accord constitutional protection to means deemed necessary to avoid procreating in situations where the Court is convinced that individual and social harms might otherwise result. There is difficulty in extracting affirmative rights to procreate—let alone a right to use donor gametes and embryos—from the abortion and contraception cases. This is a troublesome conclusion for supporters of constitutional protection for collaborative reproduction. Collaborative reproduction always creates children outside of the formal marital context, often into single parent settings. Rather than avoid, it may lead to difficulties and uncertainties in family relations—even if legal parentage is formally, statutorily defined—because of the deliberate severance of the relationship between the donor "parent" and the child.282

278 Garrison, supra note 179, at 854 (citing Robertson, supra note 10, at 38).
279 Id.
280 Eisenstadt, 405 U.S. at 452–53.
281 Roe, 410 U.S. at 153 ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").
282 The potential for such difficulties is illustrated by cases involving fathers and other partners seeking to avoid responsibilities for children born to their spouses or partners using AID. See, e.g., People v. Sorensen, 437 P.2d 495 (1968) (describing a husband's refusal to pay child support and why he is found guilty of willful failure to support the child born by artificial insemination to his marriage); Dunkin v. Boskey, 98 Cal. Rptr. 2d 44 (Ct. App. 2000) (holding that a cohabiting, unmarried partner of a woman who bore a child using AID, had support obligations similar to a husband in the same situation).
That the Supreme Court will not likely extend its current jurisprudence to protect collaborative reproduction is also evident in the methods and principles the Court uses to determine what family interests rise to the constitutional level. Three methods or principles appear particularly relevant. Not all of them are agreed upon by a majority of the members of the Court. Because they are responsible for outcomes in recent cases, however, they are worthy of note and, together, lead to the conclusion that a constitutional right of access to donor gametes or embryos is not likely to be found.

a. Narrow Definition of Interests

In *Michael H. v. Gerald D.*, Justice Scalia stated that the Supreme Court should refer to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" when searching for unenumerated constitutional rights. Furthermore, longstanding societal traditions limiting the asserted interest would cut against constitutional protection. Justice O'Connor, however, argued that the Court had not limited itself to this method of analysis but had grounded constitutional rights in less specific but relevant traditions. Nevertheless, Justice Scalia's thoughts are not without historical support. They are, rather, a recent application of the oft-cited sentiment of Justice White that the Court "is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."

Another recent decision highlighted the Court's concerns about asserted constitutional interests that do not have precise textual support. In *Washington v. Glucksberg*, the Court considered a claimed constitutional interest in determining the time and manner of one's death. Noting that constitutional pronouncements would take the issues out of legislative debates, the Court cautioned for judicial humility when "creating" constitutional rights. Following this caution, the Court engaged in a two-pronged substantive due process analysis requiring, first, a

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284 Id. at 127 n.6.
285 See id.
286 Id. at 132 (O'Connor, J., concurring in part).
289 Id. at 722.
290 Id. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of the Court.").
search of the nation’s history and traditions for deeply rooted fundamental rights, and second, a limited "careful description" of the liberty interest being asserted. The Court resisted a historical analysis that would have directed it to search the nation’s traditions for a broad personal autonomy right that would include the right to die. It looked instead for the presence of a more precise description of the liberty interest: "a right to commit suicide which itself includes a right to assistance in doing so."

Were the Court to apply this analysis to collaborative reproduction, it would be unlikely to find a specific constitutional right to conceive and parent a child using gametes from a person other than one’s spouse. The types of choices offered by ARTs are of recent vintage and lack specific historical support. Conversely, there is a long history of laws and social policies banning or discouraging procreation outside of marriage. This tradition has been recently reinvigorated at the national level with laws and programs designed to encourage abstinence among singles and to encourage unmarried parents to marry.

b. Considering the Rights of All Affected Persons

The Supreme Court has acknowledged that the recognition of the constitutional rights of some family members, or would-be family members, necessarily affects the rights and interests of other family members. The Court has further recognized that this dynamic should form a part of the very analysis through which it determines the existence of a claimed constitutional interest in the family setting. For example, in Smith v. Organization of Foster Families for Equality and Reform, writing for the majority, Justice Brennan noted that recognizing liberty interests in foster parents would, by definition, undercut natural parents’ rights to their relationships with their children. This theme was echoed by Justice

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291 Id. at 721.
292 Id.
293 Id. at 724 (quoting Brief for Respondents at 10).
294 Id. at 723.
295 Id.
296 See Separate Program for Abstinence Education, 42 U.S.C. § 710(b)(1) (2002) (providing allotments from the Department of Health and Human Services to states for programs promoting "abstinence from sexual activity," with special attention to "those groups which are most likely to bear children out-of-wedlock").
297 See Alan J. Borsuk, Kids May Pay for City's High Rate of Single Moms, MILWAUKEE J. SENTINEL, July 3, 2002, at 1A.
299 Id. at 846 ("It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has rec-
Scalia in *Michael H.*, in which he analogized an approach to finding constitutional interests which overlooked others' interests to an inquiry about a constitutional right to fire a gun that neglected to consider the effect on the human target. 300

Even the abortion cases reflected some consideration for the interests of all parties affected by the declaration of a constitutional right. The *Roe* Court took pains to assert that if the "fetus is a 'person' within the language and meaning of the Fourteenth Amendment" the "appellant's case [for a constitutional right to abortion], of course, collapses."301 And even if the prenatal life is not a constitutional person, the Court held that

it is reasonable and appropriate for a State to decide that at some point in time, another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.302

The *Casey* Court was equally explicit in taking account of the interests of all affected persons.303

A number of lower courts have also adopted this contextual manner of seeking constitutional interests in the family setting. In *Johnson v. Calvert*, for example, the California Supreme Court evaluated the claim of a gestational surrogate who claimed a constitutional right to privacy that granted her parental rights.304 The court juxtaposed interests, stating that any parental rights the surrogate might successfully assert could come only at the natural mother's expense.305 In *Jhordan C. v. Mary K*, when evaluating the claim of a child's genetic mother to have a constitutional right to a relationship with her child exclusive of the biological father, the court again observed that it had to consider the interests of all persons who might be part of the family.306 Before determining whether particular persons possessed "family autonomy" rights to legal parentage, other interests must be weighed.307

The cases suggest that the interests of children conceived by means of collaborative reproduction should form a significant part of any analysis of the rights of parents to undertake collaborative reproduction processes. But the effects on children born through collaborative reproduction

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302 Id. at 159.
305 See id.
307 See id.
are, at best, unknown because so few studies have addressed the topic. It is unknown, for example, whether children suffer physical effects from the technological processes of collaborative reproduction or emotional effects of not knowing their biological identities. A child may indeed react negatively to the knowledge that she’d “started life in a small plastic dish after [her] father masturbated in the next room.” A growing number of anecdotes about children searching for donor parents indicate feelings of loss as a result of conception from an unknown donor, but again, this is little studied.

At worst, the technological methods of fertilization, pre-implantation genetic testing, cryopreservation, and selective reduction are risky or even fatal to embryonic or fetal life, and therefore, incompatible with the notion that one individual’s constitutional rights should not cause harm to others with recognized interests. Surely, as evidenced by the abortion cases and the allowance of some embryo research, neither the federal government nor the states have made the value of embryonic and fetal life paramount. Nevertheless, the existence of limits on fetal and embryonic research in a growing number of states, and the language in abortion cases allowing some state abortion regulation show respect for developing life. Should the rights of all affected lives be considered in any search for constitutional rights in the family arena, it does not appear that access to collaborative reproduction will find constitutional protection.

c. Rights from Duties

A third principle for determining the limits of constitutional protection for collaborative reproduction stems from the notion that constitutional rights in the family context should correspond to and enable parents to fulfill their duties toward their children. This is a longstanding principle: “The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Off-


309 See Kathleen Coswell, Opening the Door to the Past: Recognizing the Privacy Rights of Adult Adoptees and Birth Parents in California’s Sealed Adoptions Records While Facilitating the Quest for Personal Origin and Belonging, 32 GOLDEN GATE U. L. REV. 271, 284, 286 (2002).

310 Andrews, supra note 41, at 99.

311 See, e.g., Dennis Bueckert, Dad Was a Sperm Donor, WINNIPEG FREE PRESS (Canada), June 3, 2001, at B2 (noting the formation of the New Reproductive Alternatives Society, a “support group for donor insemination families”).
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From the earliest cases concerning parents' rights over children's education, unwed fathers' rights, and the abortion and contraception cases, the Supreme Court has consistently articulated the rights-generated-through-duty principle. In the course of any inquiry regarding claimed rights associated with procreation and parenting, the Supreme Court has undertaken some inquiry into the degree to which exercise of the claimed right might contribute to the well-being of children for their own sake and for society's. This inquiry, in turn, appears intrinsically related to the often repeated theme of the family's contribution toward democracy and social progress. Over 117 years ago, in Murphy v. Ramsey, the Court said that marriage is "the sure foundation of all that is stable and noble in our civilization; . . . the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." The same theme was sounded nineteen years ago in Lehr v. Robertson when the Court described the marital family as playing a "critical role" in democratic society.

Cases making the specific connection between parental duties and rights include Meyer v. Nebraska, in which the Court concluded that parents had duties that followed from their control over their children. Two years later in Pierce v. Society of Sisters, in upholding parents' right to send their children to religious schools, the Supreme Court echoed the correspondence between parental rights and duties: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." A later case, Prince v. Massachusetts, involved the scope of a guardian's right to rear a child according to her religious beliefs, in violation of child labor laws. The Prince Court again tied parental rights to duties, this time duties owed to the larger community: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."

Finally, the Supreme Court's "unwed father" cases also place claimed constitutional rights concerning parenting into the context of

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312 JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 58 (Thomas P. Peadon ed., Liberal Arts Library 1952).
313 See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Wolcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248, 257 (1983) (establishing that when unwed biological fathers assume their parental duties, their constitutional liberty interests in maintaining their parental rights will be recognized).
314 Murphy v. Ramsey, 114 U.S. 15, 45 (1885).
315 Lehr, 463 U.S. at 257.
317 See id. at 400.
319 See Prince v. Massachusetts, 321 U.S. 158, 166 (1943) (noting that the family provided essential tools to the appropriate upbringing).
320 Id. at 168.
parental duties. In Lehr v. Robertson,\textsuperscript{321} for example, the Court observed that an unwed father, who had acted paternally by participating substantially in the rearing of his children, was entitled to a hearing on his fitness as a parent before the state could take the children into its custody: "[T]he Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed."\textsuperscript{322} The Lehr Court found that parental responsibility could create parental rights.\textsuperscript{323} Similarly, as indicated in Part II.C.2, the Supreme Court's decisions on contraception and abortion indicate that the Court may recognize constitutional rights where it is helpful to promote parental duties. Conversely, where there is an absence of parental duties, the presence of parental rights is not clear.

Access to collaborative reproduction appears unrelated to the exercise of any parental duties. Collaborative reproduction is, rather, an outgrowth of a desire to have a child—and not an adopted child, but an infant whose conception is directed by an intending parent. It is difficult to conceive of a duty to children, and to the wider society, that is served by the conception of children by means of collaborative reproduction.

It is not sufficiently concrete or responsive to assert that the duty or benefit is in the fact of the child's existence versus nonexistence. Indeed, the opposite might be true. It is possible that, for the sake of the child as well as the wider society, one should avoid creating children using technology that experiments with their health; deliberately estranging children from their biological parents; and creating children without the benefits of stability, the network of love, and the biological relationships available in two-parent families. Courts have long recognized the role traditional family settings play in the communication of the mature freedom necessary for American democracy. That not all children are treated to such an environment is no reason to replicate possibly problematic environments deliberately using new reproductive technologies; rather, it is a reason to work harder to provide the best environment whenever possible.

In sum, the constitutional arguments against greater regulation of collaborative reproduction techniques fail because they rely upon inapplicable precedent. They also ignore the means used to find constitutional rights concerning procreation, parenting, and families. In the end, it is regulation of collaborative reproduction that promotes the values upheld by the Supreme Court in the cases concerning procreation, parenting, and family.

\textsuperscript{321} Lehr v. Robertson, 463 U.S. 248 (1983).
\textsuperscript{322} Id. at 257.
\textsuperscript{323} See id. at 261.
Regulating Collaborative Reproduction

III. LOOKING TO TRADITIONAL FAMILY LAW PREFERENCES AND PRINCIPLES

As noted in the Introduction, certain areas in family law have operated at first purely according to the interests of adults. It would be more than unfortunate if this pattern were repeated in one of the newest areas potentially affecting family life. If collaborative reproduction compromises the welfare of children in the name of adult desires, then appropriate investigations should ensue and existing impediments to regulation should be overcome. Concerns about the power and size of the industry, the difficulties of legislating on complex and changing matters, and fears of unleashing an abortion debate or taking on constitutional questions ought not to stand in legislators' way. Some children's interests are suggested in the above review of constitutional cases concerning procreation, parenting, and family. This Part demonstrates that these concerns have been incorporated into existing family law rules, and argues that they can and should be applied to collaborative reproduction.

Existing regulations tend to facilitate collaborative reproduction by providing some assurance to recipients that progenitors are free of some diseases, that clinics' published success rates are true, and that the mutual intent of donors and recipients regarding parental assignment will be honored. As described in Parts II.A and B, even in these categories, existing regulations are far from comprehensive or adequate. A variety of abuses by doctors and laboratories continue to occur. Infected donors may fail to disclose their illnesses, and donor gametes are sometimes used in situations where the law has no mechanism for assigning parentage. Prior articles have addressed these lacunae, and they will not be further addressed in detail here.

This Part will propose that regulations should first respond to problems raised by the steps of collaborative reproduction processes. Many of these steps remain experimental or near-experimental. Collaborative reproduction also sets up the regular possibility of multiple births and their attendant problems. Collaborative reproduction can further initiate a "predetermining" mind set on the part of parents about the characters and abilities of their children, promoting eugenics effects.

The second set of problems concerning family relations arise because collaborative reproduction always creates either single-parent

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326 See, e.g., Daar, supra note 13, at 222. See generally ANDREWS, supra note 41, at 31–49.
families or families in which the two parents, married or unmarried, heterosexual or homosexual, are partly or completely biologically unrelated to the child. These problems have analogs outside the context of ARTs that might provide guidance. Laws and policies favoring the maintenance of ties between children and their biological parents, and those favoring two-parent families are relevant to collaborative reproduction's regular creation of antithetical situations.327

A. Family Law Preferences

There remains today, as for centuries back, a solicitousness for ties between children and their natural parents. Individuals prize the ties for the deep experiences of intimacy, continuity, security and unconditional love they promise. In turn, the law gives deference to the bonds formed between biologically related family members out of respect for the extra-legal origins of such relations328 and for the "intangible fibers that connect parent and child," which give "strength, beauty, and flexibility" to our society.329 The law guards natural family relations to perpetuate those traditions,330 to restore children to previously existing family units,331 and to safeguard traditional family notions even in situations where the child has not known a biological parent at all,332 a scenario regularly occurring for collaboratively reproduced children. It is a preference visible not only in the laws pursuing family reunification after parental abuse or neglect, but also in the adoption arena, with its strict requirements for truly vol-

327 Interestingly, some participants in collaborative reproduction affirm the value placed on maintaining biological connections when they pursue collaborative reproduction precisely so that one member of a couple will have biological progeny. See Weiss, supra note 68, at A1 ("The woman settled on egg donation . . . partly for her husband. 'He is such a good man; I've got to pass on his genes.'").


329 Lehr v. Robertson, 463 U.S. 248, 256 (1983). See also Prince v. Massachusetts, 321 U.S. 158, 168 (1943) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (stating that children should be prepared for "additional obligations" to society at large).

330 Smith, 431 U.S. at 843 ("[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.").

331 See Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that the state could not remove children from the care of an unwed biological father without due process following the mother's death, where the father had demonstrated his commitment to parenting by caring for the children for years prior to the mother's death).

332 Cf. Santosky v. Kramer, 455 U.S. 745, 760 (1981) (lamenting that "some losses cannot be measured" when the judge removed a three day old child from his natural parents for neglect).
untary surrender of parental rights\textsuperscript{333} and its allowance for revocation of contractual agreements, even after surrender.\textsuperscript{334}

Family law's preference for two parents, a father and a mother, is grounded in (1) well-documented concerns for the child's economic well-being;\textsuperscript{335} (2) a widespread social preference for stability;\textsuperscript{336} and (3) a variety of other contributions that an intact, two parent family makes toward a child's healthy development, opportunities, and sense of security.\textsuperscript{337} Economic concerns are addressed through child support laws and the concomitant development of effective ways to assure continuity of child support payments from reluctant, absentee parents.\textsuperscript{338} Additionally, there are economic, personal, and social considerations in suggestions to reform no-fault divorce laws to create obstacles for divorce proceedings for persons with small children.\textsuperscript{339} The preference for two parent child rearing also lies behind the movement to consider joint custody of children following a divorce.\textsuperscript{340}

Statutes protecting human embryos, while not family law per se, also manifest preferences about offspring that are contradicted by collaborative reproduction. Certain collaborative reproduction techniques can damage or destroy the developing embryo. In \textit{Casey}, the Supreme Court reminded states that they are permitted to express an interest in the embryo even at the "earliest stages."\textsuperscript{341} About one-fifth of the states have legislated to protect embryos at different developmental stages from harmful experimentation.\textsuperscript{342} Several more have laws specifically forbid-
The ongoing controversy over abortion and embryonic stem cell research, and the current strict federal limits on funding the latter research, indicate that this area of concern is not as dormant as Roe and Casey might first suggest. Collaborative reproduction techniques that may damage or destroy the developing embryo necessarily implicate the same concerns as the abortion and embryonic stem cell research areas and require a careful weighing of the preferences and policies implicit in both.

B. To Apply or Not To Apply Family Law Preferences to Collaborative Reproduction

In an article on how to resolve parenting questions arising out of ARTs, Professor Marsha Garrison argues for greater similarity between the laws governing parentage applicable to naturally and to technologically conceived children. Garrison explicitly recognizes the law's preferences for two-parent families and for unity with biological parents. She also notes that the law does not regularly step in to forbid the many coital conceptions that do not result in preferred familial circumstances. Instead, rather than bar those circumstances, the law simply takes a "responsibility" approach that she concludes should govern technological conception as well. Therefore, Garrison suggests that donor responsibility laws, rather than out-right bans would be the correct method of regulation.

Garrison also indicates, and rightly so, the risks of proposing legislation based upon "broad value assertions rather than statements of fact." This point ought to be taken seriously with collaborative reproduction, especially considering the strong opinions, emotions, and desires inherent in the debate. Garrison's caution can, nevertheless, be honored by legislation that brings technological conception more closely in line with existing family law preferences. The law should not allow collaborative reproduction to recreate behaviors widely assumed to be problematic for children. To adopt the sentiments of Lori Andrews, "How can you argue that two wrongs make a right? Bad things are happening in another area and so we should allow bad things to happen here. I don't think that follows."

34 Garrison, supra note 179, at 922-23.
341 Id. at 895-96.
34 Id. at 912 (citation omitted).
347 Id. at 895.
Regulating Collaborative Reproduction

Certainly, many couples who conceive naturally fail to place children into families "most likely to succeed." For several reasons, however, collaborative reproduction ought not be allowed to inflate them. First, there are real differences between natural and technological conception that make the latter a good candidate for regulation. Second, public alarm about the effects of certain family situations on children is increasing, reflecting a public climate ripe for regulation. Third, laissez-faire treatment of collaborative reproduction can and has led to arguments for similar treatment of human cloning, a result presently at odds with majority sentiment in the United States.

1. Increasing Public Alarm

There is public disagreement today about what degree of respect is owed to embryonic or fetal life, stages of life often compromised by collaborative reproduction. This is reflected in the patchwork of laws on the subject. There appears, however, to be some significant support for treating embryonic life with a degree of respect. The national debate over embryonic stem cell research as well as relatively recent state laws recognizing the special status of embryos reflect real concern about embryo experimentation.

It is evident that many children today are living in single parent households or otherwise away from their biological parents, situations that collaborative reproduction knowingly creates. Meanwhile, the law increasingly takes a hands-off approach to persons' sexual lives, repealing, weakening, or declining to enforce laws regulating activities that place children in potentially problematic situations. Correspondingly, the law increasingly treats children conceived outside of traditional marriage like children conceived within traditional marriage.

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351 See infra text accompanying notes 207–213 and accompanying text.


On the other hand, federal and state lawmakers have recently devoted substantial attention to encouraging abstinence before marriage and to preventing out-of-wedlock pregnancy. Serious studies about the harmful and long-term effects of single parenting on children are proliferating. In addition, if pregnancy does occur out of wedlock, state laws are holding absent biological fathers responsible with new and stronger mechanisms. The frequency of out of wedlock pregnancies and the increasing number of absentee parents who fail to pay support are generating real alarm and renewing the cry for regulation. Clearly, individual decisions to plan and create single-parent households will not receive automatic deference when contrary to longstanding social and family law preferences.

Some downplay the effects of collaborative reproduction, pointing to the small number of collaboratively reproduced children. Professor John Robertson suggested that the number of children born through gamete donation and surrogacy will always be small. Professor Leon Kass similarly suggests that "if the single cases [of collaborative reproduction] are so innocent . . . multiplying their performance [should not] be so off-putting . . ." This is not an argument, however, that alleviates the cumulative impact of collaborative reproduction on notions of family life. Indeed, the total numbers of collaboratively reproduced children have likely reached the hundreds of thousands today. Furthermore, Robertson's account fails to consider the thousands of individuals trying and failing to conceive through collaborative reproduction, the thousands of medical personnel, donors, affected family members, and the hundreds of thousands of investors and ordinary citizens affected by the new technologies. America's is an increasingly gene-crazed culture that receives the messages about family that are sent through the collaborative reproduction debate. The arguments about the proportionately small number of successful collaborative reproduction processes cannot, empirically or in principle, succeed.

354 The federal government is offering funding to states specifically to encourage abstinence and avoid unwed parenting. See supra text accompanying note 296.
355 See McLanahan, supra note 335, at 310 (noting that, in addition to economic disadvantages, children in single parent households struggle with a lack of regular parental involvement and supervision; difficulties accessing community resources; and disruptions in ongoing relationships with peers, teachers, and others).
357 See Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, supra note 228, at 421.
359 See supra text accompanying notes 26-34. See also Antonia Regaldo, Could a Skin Cell Someday Replace Sperm or Egg?, WALL ST. J., Oct. 17, 2002, at B1 (citing the ASRM's figure that 30,000 children are born from ARTs each year as of 1999).
2. Differences from Coital Reproduction

There are real differences between coital and collaborative reproduction that demonstrate that the latter ought still to be regulated, despite the absence of out-of-wedlock procreation regulation. First, coital procreation is often unexpected while collaborative reproduction is deliberately planned and brought about over a relatively long period of time. This is not to recommend carelessness respecting procreation, but to point out that the legal culture regularly expresses greater disapproval of intentionally—as opposed to merely negligently—created harms. It is possible to perform animal testing to understand the physical risks of techniques commonly used for collaborative reproduction. Additionally, the emotional and social consequences of collaborative reproduction are observed in families that have already used such technologies. The effects must be studied and the implications understood; without a thorough understanding, the call for regulation may go unheeded.360

A second difference between collaborative and coital reproduction is the experimental quality of technologies regularly implicated in a course of collaborative reproduction. All new reproductive technology methods are experimental at their inception,361 and it is worth remembering not only that some are never fully animal-tested, but that some are taken up for commercial use in the year of their first success, as was the case with the use of cryopreserved eggs.362 This commercially driven haste affects the embryos involved and may also permanently affect the born children. Even today, scientists are still studying possible harms to children created using frozen embryos,363 frozen eggs,364 IVF, and ICSI.365 In contrast, coital reproduction is not experimental. Problems that may arise in coitally conceived pregnancies are not due to the knowing alteration of the conditions affecting the development of embryonic or fetal life. To concede that the outcome will be unknown in any given pregnancy, due to factors outside the control of the parents or doctor, is different from suggesting that a pregnancy is being conducted experimentally.

A final reason to limit collaborative reproduction, while not similarly regulating coital conception, rests with the types of choices and the monetary expenditure required in collaborative reproduction. Intending parents are always put in the position of choosing and paying for donor traits that a parent hopes will appear in a child. These practices are the

360 See supra text accompanying notes 309–310 (concerning the continued practice of some ART techniques despite the knowledge that outcomes for children are insufficiently scientifically researched).
361 ANDREWS, supra note 41, at 26.
362 See infra Part I.C.3.a.
363 See Damario et al., supra note 65, at 790–800.
365 See infra Part I.E.3.
bread and butter of collaborative reproduction, yet they appear to contra-
dict an impulse near the heart of family relations and family law: the no-
tion that parents do not choose their children according to their own
tastes and preferences but that parents should love and nurture whomever
their children will be.

The numerous choices that collaborative reproduction necessitates
are described at length in Part I. Parent(s) choose a donor based upon
factors such as education, appearance, health, height, talents, and even
hobbies. It is true that collaborative reproduction experts attempt to edu-
cate the public about the lack of certainty in genetic inheritance. Never-
theless, particular donor qualities are the but-for reason one donor is se-
lected over another. News reports quoting intending parents regularly
indicate that the choice of donor depends upon the traits the parents in-
tend and hope the child will have. This protracted, intense focus at the
beginning of collaborative reproduction might well affect the parent-
child relationship that follows.

This sense of expectation may also be exacerbated by the large sums
of money paid by clients of fertility clinics. Fertility clinics offering
“Ph.D semen” obviously intend to encourage the belief that it will pro-
duce brighter children, and they charge twice the price for that expecta-
tion. Parents seeking an egg donor believe that a tall, Ivy League edu-
cated athlete’s eggs will produce like children, and offer more than the
going rate for her eggs. Expectations are being created through the cost
of the gametes or embryos, several thousand dollars for fertilization and
implantation procedures, thousands more for donor screening and for
pre-implantation genetic screening of the embryo,366 and possibly even
several thousand more for selective reduction. Expectations of this type
are ordinarily associated with a luxury good or service, not with a child.
The new attitude of parents involved in the collaborative reproduction
setting can be, “I want the best child, the way I want the best car, and I’m
willing to pay for it.”367

Collaborative reproduction confronts parents not only with a choice
among donors but also with a choice among embryos, a say in the child’s
sex, and a choice over the number of children to be born. Collaborative
reproduction thus jeopardizes the idea of parents as recipients of a very
vulnerable gift, as lovers of an unknown person. It puts parents in the
position both of attempting to choose who a child will be, and of risking
that child’s physical well-being before and possibly after birth. The inter-
ests of the parents are, again and again, made paramount in contravention

366 See Fertility Options, supra note 61 (charging $950 minimum medical screening
fee); Allison Sherry, Genetic Testing’s Promise, Danger, Denver Clinical Trial is at the
Forefront of Fertility Science, DENVER POST, Oct. 8, 2002, at A1 (reporting that a Denver
fertility clinic charges about $10,000 for in vitro fertilization and another $3,000 for pre-
implantation genetic testing).

367 Weiss, supra note 81, at 3E (quoting Alex Capron).
of a bedrock principle of family law that the interests of the child should prevail.

The choices that inhere in collaborative reproduction seem to contradict an important paradigm of the parent-child relationship, one on which family law is generally based. This paradigm holds that merely by virtue of the birth of “this child” to “this parent,” this parent has been “chosen” to love “this child.” Parents are to be the chosen ones, not, as with collaborative reproduction, the choosers. One sees this paradigm expressed in a number of family law contexts. In the adoption context, it is often said that homes “should be selected for children, rather than children for homes.” 368 It is also expressed in child custody cases in which a custodial parent is chosen according to the child’s best interests, even if a court has to contradict a parental agreement. 369 It is expressed in the law refusing to enforce a contract in which parents have chosen to deny a child the support of one or both parents: the law will require both parents to contribute support.

There are arguably good reasons for each choice posed in collaborative reproduction: the desperate desire for a child, the hope of avoiding a genetic disease, and the yearning to give a child the best chance for happiness as a parent understands it. Altogether, however, these choices easily lead to parent-child relations far removed from presumptive norms. Perhaps no one parental prerogative risks the paradigm; it is their sum total that creates serious concern. 370

It might be argued, however, that the same expectations created through choices offered by collaborative reproduction are created naturally in parents who hope that their own traits will be inherited. There is even a sophisticated biological argument that the selection of one’s mate implicates the evolutionary drive to select one’s children. But there are important differences between selecting a partner and a child. Choosing a partner is first about forming an adult relationship; over time and only later, if at all, do aspirations for children arise. The time lapse between choosing a spouse and naturally conceiving a child, and the difference in focus between sexual intercourse and a day spent with donor profiles surely indicate that parents’ expectations about children are more directly expressed through collaborative reproduction. Demographic data buttresses the claim that choosing a spouse is not equivalent to choosing a child. Data shows that people are having fewer children than parents of several decades ago. 371 Additionally, American society now places greater

370 See infra Part IV.
371 Nat’l Ctr. for Health Stats., U.S. Census Bureau, Fertility of American
emphasis on satisfaction as between spouses, and only later on the satisfaction that children might bring. The preceding suggests that real differences exist in the strength of the impulse to "select" one's child through a spouse and to select a child through collaborative reproduction. It is weak to counter the desirability for regulation of collaborative reproduction with conclusory statements arguing that decisions in natural and technological procreation are the same.

IV. RELIANCE ON COLLABORATIVE REPRODUCTION AS PRECEDENT FOR CLONING

Technology enables people to substitute for a random outcome their own all too predictable wishes.372

There is tremendous support in the United States today for a ban on the cloning373 of human beings.374 A July 2002 report of the President's Council on Bioethics favored a permanent moratorium on human cloning for reproductive purposes in the United States.375 There are several arguments for a ban on human cloning that have garnered particular public support, as evidenced by their frequent repetition. This Part will describe these arguments, point out how they echo concerns about collaborative reproduction raised in Parts II and III, and show how they strengthen the case for additional regulation of collaborative reproduction.

Participants in the cloning debate have recognized the influence of existing collaborative reproduction practices on cloning arguments. They understand that the public has begun to accept collaborative reproduction, whether proactively or passively through non-regulation. As a result, opponents of cloning are busy attempting to distinguish collaborative reproduction from cloning, while cloning proponents are claiming that collaborative reproduction and cloning are ethically and practically similar.376

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373 By "cloning," I am referring to somatic cell nuclear transfer in order to create a genetically identical human being intended to be born. This is not intended to include other processes, such as embryo division, which have also been referred to as cloning, see N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 389–91, nor to the use of cloned embryos as a source of embryonic stem cells.


375 See PRESIDENT'S COUNCIL ON BIOETHICS, supra note 2, at § 5.

376 See The Point, supra note 348 (comments of Professor Gregory Pence) (revealing the similarity in arguments for cloning and ART in advocating for cloning).
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Cloning proponents emphasize the similarity between creating genetic replicas of oneself, as in cloning, and selecting donors to match the genetic traits of others. In fact, proponents argue that cloning presents an even better opportunity for creating discrete family relationships than collaborative reproduction because it eliminates the "the need to introduce third parties into private relationships and, in the case of egg donation, to subject those third parties to substantial medical risks." In fact, while it cannot be denied that there are some real distinctions between collaborative reproduction and cloning, it is true that there are sufficient similarities so that collaborative reproduction may be said to invite cloning. Also, due to these similarities, the root objections to the cloning apply rather easily to collaborative reproduction. What follows will examine these objections and consider their applicability to collaborative reproduction.

A. Harm to Experimental Creations Before "Perfection" of Techniques

A preliminary roadblock to cloning in the minds of many is summarized in one science reporter's comments:

[I]f you were willing to sustain lots of miscarriages, lots of forced abortions because many of the fetuses would be deformed; if you were willing to risk the almost certain fate that some of these children would be born and would die soon after; that any of the children who were born and who were viable might suffer all sorts of ill effects like the mammals that have been cloned so far . . . . If you are willing to take all of those risks, you could probably clone someone pretty soon.

Litanies such as these have led even supporters of collaborative reproduction to argue against cloning. Leon Kass, chair of the President's Council on Bioethics, argued that the physical risks of cloning made any attempt to clone an "unethical experiment." Further, cloning research deliberately creates these risks whereas normal reproductive risks are not created from "purposeful intervention," but from genetic chance.

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377 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 12, at 395–96.
378 See id. (weighing the desirability of evicting third parties from individuals’ and couples’ decisions to have children); David Orentlicher, Cloning and the Preservation of Family Integrity, 59 LA. L. REV. 1019, 1020 (1999) (arguing that cloning eliminates the need for third party genes—a principle objection Orentlicher sees to collaborative reproduction—and is therefore a better and beneficial alternative).
379 The Point, supra note 348 (comments of Lisa Beyer, Senior Editor, Time Magazine).
380 See id. (comments of Lori B. Andrews).
381 Kass, supra note 358, at 22.
Like cloning, the techniques required for collaborative reproduction continue to go through an experimental period. Fertility drugs, the processes of embryo cryopreservation, the selection of the appropriate medium for fertilization and growth of the embryo, ICSI, and IVF are all relatively recent discoveries. Scientists are still studying their effects. It is possible that children created through collaborative reproduction will suffer harms—physical as well as psychological—that will not be known for some years.

B. Family Mix-ups

A second common objection to cloning is the way in which it perverts normal family relationships, creating a twin of a child's mother or parents of a child's grandparents. Cloning also promotes the "usually sad situation of the 'single-parent child.'" In addition, it invokes incestuous overtones where, for example, a man is married to the adult version of his daughter. Arguing that nuclear family relations are already corrupt does not support the perpetuation of such matters.

Collaborative reproduction similarly alters family relationships. It may inflate the numbers of quasi-parental figures in the child's life to as many as five: two social or intending parents, two gamete donors, and a surrogate mother. Like cloning, it can create two familial identities in one person, for example by making a biological parent out of an aunt or a grandmother. Like cloning, it can even create incestuous situations. In 2001, a French woman used her brother's sperm to create two embryos, one of which was carried to term by a surrogate mother, and the other by herself.

\[\text{See id.}\]
\[\text{See, e.g., Achilles, supra note 34, at 152 ("[B]ut long term studies have yet to be undertaken to evaluate outcomes of various methods of insemination where more invasive therapies and drug treatments have been employed to assist with conception . . . ").}\]
\[\text{See Kass, supra note 358, at 22.}\]
\[\text{Id.}\]
\[\text{See id. (stating that one bad scenario does not justify creating another bad scenario).}\]
\[\text{U.S. Doctor Says Sixty-Two-Year-Old Woman Carrying Brother's Baby Not Unethical, AGENCE FRANCE PRESSE (France), June 21, 2001. A tremendous controversy ensued in France, which has an age cutoff for the use of certain ARTs, when a doctor from the United States performed an in vitro fertilization for a fifty-eight-year-old French woman using donor eggs and the sperm of her brother, fifty-two years old, who was recovering from a suicide attempt which left him permanently disabled. Id. One of the children was carried to term by the sister and another by a younger American surrogate. Id.}\]
C. Individuality

The loss of individuality and uniqueness is another persistent and important objection to cloning. Genetic uniqueness is associated with a child’s eventual independence from his parents, and cloning necessarily removes the uniqueness that leads to independence. Professor Andrews has even argued that cloning is a new form of slavery in violation of the Thirteenth Amendment because it constrains individuals with genetic expectations. Although the arguments recognize that genes are not the whole of a person’s destiny, the very selection of particular genes suggests the power of genetic makeup over identity. Professor Andrews further argues that cloning will not fully satisfy a person’s urge to shape another life; this desire will likely lead to genetic engineering, the manipulation of specific human genes to produce or avoid specific traits.

Like cloning, though admittedly not to the same degree, collaborative reproduction involves the attempt to choose the traits of a child. Fertility clinics and intending parents invest much effort into the compilation, advertisement, or review of donor profiles in order to effectuate a particular choice. As discussed more fully in Part III.B.2, this is different from choosing a spouse, despite hopes that a child may inherit certain of his or her traits. Collaborative reproduction is a choosing of traits with the child’s creation directly and solely in mind. Like cloning also, the techniques of collaborative reproduction open the door to genetic manipulation; once the embryo is ex-utero and available for inspection and even alteration, the scientific and medical imperatives toward health and improvement become difficult to resist.

D. Commodification

Another trenchant objection to cloning is its potential to cast human beings as products: “We believe that life is a creation, not a commodity, and that our children are gifts to be loved and protected, not products to be designed and manufactured by human cloning.” Cloning research attempts to marshal scientific and technological resources toward the production of human beings. Such production can quickly become sub-

389 See Andrews, supra note 382, at 667 (noting America’s foundational respect for individuality).
390 See Kass, supra note 358, at 22–23 (stating that a child loses his independence when he is “the designed result of someone’s artful project”).
391 See Andrews, supra note 382, at 668; U.S. CONST. amend. XIII.
392 See Kass, supra note 358, at 25 (arguing that the desire to replicate certain qualities through genes is manifest through the selection of particular donors).
393 The Point, supra note 348 (comments of Lori B. Andrews) (arguing that genetic engineering is but another way to assume power and control over another individual).
394 President’s Satellite Remarks to the Southern Baptist Convention, WKLY. COMPILATION OF PRES. DOCS. 987, 988 (June 11, 2002), available at 2002 WL 14547488.
ject to the commercial imperative toward standardization and modernization. The reproductive technology industry has already proven itself unable to resist attempting to attract the well-off with advertisements for only the most obviously successful and typically appealing progenitors. Beyond harm to individuals, there is also the possibility of social harm from a decline in genetic diversity if too many of the same persons or “type” of persons are created.

Similarly, collaborative reproduction, employs technological processes in order to “make” children. Providers of collaborative reproduction services already use commercial techniques to attract certain donors and offer their services for very high prices, generally paid by the white and the wealthy. Finally, like cloning, collaborative reproduction risks creating too many children from the same donors.

E. Power Imbalance

A final objection to cloning is that it could lead to an excess of parental power over children. Lori Andrews has said that cloning represents the potential for “[a]buses of the power to control another person’s destiny—both psychological and physical—of an unprecedented order.” It is true that this is an uncertain harm, yet according to Andrews, there are bans on other behaviors with speculative effects, such as incest, because they are likely to lead to excessive parental power over children.

Despite an intending parent’s simple desires for a child, the processes of collaborative reproduction place the intending parent(s) in the position of directly attempting to choose many features of the child. These may include features such as the child’s height, sex, and any genetic predisposition for sports, hobbies, and intelligence. Parents who would engage in cloning would “take at the start a decisive step which contradicts the entire meaning of the open and forward-looking nature of the parent-child relations” and replace it with a limited, known future path.

Collaborative reproduction, like cloning, can undermine the reality that children, the “given,” will often do the unexpected, virtually entirely outside of parental control.

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395 See Kass, supra note 358, at 23.
396 See The Point, supra note 348 (comments of Lisa Beyer) (“Some of these parents have a lot of money and some may be willing to underwrite this kind of venture [cloning]. That’s certainly the market that these scientists who have announced their intentions are looking at.”).
398 See Kass, supra note 358, at 23.
399 Andrews, supra note 382, at 669.
400 Kass, supra note 358, at 24.
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When a couple now chooses to procreate, the partners are saying yes to the emergence of new life in its novelty, saying yes not only to having a child but also, tacitly, to having whatever child this child turns out to be . . . [they] are tacitly confessing the limits of [their] control.401

The problems of too much parental control are evident in both cloning and collaborative reproduction and suggest that both should be regulated.

V. Conclusion and Recommendations

There are a number of ways legislators might approach regulation of collaborative reproduction. Some ways will reach beyond the precise borders of collaborative reproduction, affecting processes employed regularly not only there, but in ARTs that do not employ donor gametes and embryos. Others will look to collaborative reproduction alone. This Part will suggest various types of legislation primarily to protect the interests of children affected by collaborative reproduction.

First, at the very least, the time has come to fund studies about the long term effects—physical, emotional, social—of collaborative reproduction on children. Research grants given by the National Institutes of Health can create a federal response to the need. States can jointly pursue such studies.

Second, legislators at the state and federal levels could also act now to avoid more of the physical risks collaborative reproduction poses to children, whether these arise at the embryonic or the fetal stage of development. Before any particular ART process "goes commercial," it should be more carefully scrutinized, and more animal testing should be conducted.

Third, were there a public and legislative will to extend additional protection to life at the embryonic stages, the law could limit the proliferation of "leftover" embryos by limiting the number that can be created simultaneously, and by requiring that all those created up to this limit be implanted. Limits could also be placed on the number of embryos a doctor could implant simultaneously in a woman in order to avoid the physical and psychological risks posed by multiple births and by selective reduction.

Fourth, the law could assign parental responsibility for technologically conceived children born to single parents also to the donor parent in order to preserve two-parent support for the child.402 This would likely reduce the number of donors dramatically.403 Lawmakers might also go

401 Id.
402 See Garrison, supra note 179, at 909–12.
403 See id.
further and simply prevent the use of collaborative reproduction by unmarried persons at all.

Fifth, legislators might address the use of collaborative reproduction by married persons. Hearings regarding the impact of collaborative reproduction upon marriage—a currently fragile though still preferred institution—would be a useful precursor to any action. To preserve the full, traditional understanding of marriage and parenting, a state could choose to ban collaborative reproduction even for the married, and especially if it found that it might detrimentally affect marriage. A state might also choose to allow married persons to resort to collaborative reproduction only after a determination of infertility, mandatory counseling for all parties, and resolution of inquiries similar to some of those used in the adoption context regarding the parties' suitability for parenthood. This would mirror the direction taken by one of the surrogacy statutes proposed in the Uniform Status of Children of Assisted Conception Act.404

Sixth, to combat some of the larger and less tangible social problems associated with collaborative reproduction, a complex legislative strategy might act to take some of the choices or information about donors out of the process. Even to suggest this is to realize how directly such a strategy strikes at the value of having choices—a value evident in many public conversations about sexual relations and family forms. This approach also necessitates the hard work of deciding the kinds of knowledge that should be available to intending parents, as well as the social implications of those categories of knowledge included. Should we include race? Health and disabilities? Education and employment? All of these categories are fraught with controversy. Still, the notion of prohibiting parents from seeking “designer babies” already has some supporters. In 2000, the California Legislature considered, but failed to pass, a bill that would have forbidden intending parents from choosing gamete donors based on the donor’s physical or psychological profile.405 Echoes of support for such regulation might also be found in scientists’ reluctance to employ pre-implantation genetic diagnoses for reasons other than physical health.406

Finally, legislation might also seek to reduce the purely economic motivations of egg and sperm donation by capping donor compensation. At the very least, such regulation could demand greater efforts to comply with state laws forbidding the sale of body parts. Clinics would be required to demonstrate a correlation between the costs of obtaining or processing donations and the costs charged to intending parents.

405 See S.B. 1630, § 1703 (Cal. 2000)
406 See Tanner, supra note 158, at 2 (noting that defenders of genetic testing proffer health reasons for testing, not designer baby rationales).
If legislation took some of the "choosing" out of collaborative reproduction and perhaps simultaneously took some of the money out of it, lawmakers would have addressed a host of persistent worries about collaborative reproduction concerning elitism, predetermination, and standardization. They would also likely find that, while collaborative reproduction would continue, it would occur much less frequently.

Surely, it is difficult to approach the topic of regulating collaborative reproduction in a nation that seems already to have voted with its feet. It is also difficult to approach a topic so fraught with human longing. On the other hand, it is possible that Americans have not "voted," but have rather drifted to the place where they are now. Americans have not yet turned their full attention to the implications of collaborative reproduction. The cloning debate provides an immediate opportunity and an imperative to focus. It provides the occasion to review the deepest values and paradigms in existing family law. It is time to reconsider collaborative reproduction, before even attempts to outlaw "hitting the ground" are preempted.

407 BERRY, supra note 1, at 141.