Contracting Our Way To Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child

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Introduction

The day eventually came when Jennifer Cramblett, like many other American women, lovingly looked at her partner and decided, it was time to "start a family.[2]" Cramblett, however, like many other prospective mothers, faced certain biological challenges that threatened to thwart her desire to reproduce. Luckily Cramblett, as an economically-privileged prospective mother,[3] discovered that the market would provide what Mother Nature would otherwise deprive — the genetic material and the means necessary for her to produce biologically-related progeny. Her salvation was the Assisted Reproductive Technology ("ART") marketplace, a space where she could purchase sperm or eggs, or even rent a womb if necessary to achieve her goal.[4] Cramblett's ultimate choice — to purchase genetic material from a sperm donor, would have been an unremarkable, standard ART transaction, but for a small administrative error that had major racial implications. Although Cramblett requested and purchased sperm from Donor 380, a blond blue eyed white male, the clerk handling the transaction misheard her request and sent her sperm from Donor 330, a brown haired, brown eyed Black male.[5] The clerk's mistake erupted into a commercial controversy, a family controversy and a racial controversy all in one.[6] For Cramblett, as a member of a monoracial blond, white lesbian couple, had contracted for the chance to form a white nuclear family.[7] While she ultimately opted to give birth to the mixed race baby now actively growing in her womb, Cramblett also filed suit for the clerk's "racial mistake," for she effectively had been denied the "benefit" of her bargain in the ART transaction.

What was the benefit of the bargain in Cramblett's case? The answer to this question spurred a firestorm of controversy, as it is seems impossible to respond without violating certain colorblindness

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[2] *See* Complaint at ¶ 7, *Cramblett v. Midwest Sperm Bank*, LLC, 2014 WL 4853400 (Ill. Cir. Ct. Sept. 29, 2014) (No. 2014-L-010159) (discussing Cramblett's four-year committed relationship to Amanda Zinkon and the couple's desire to have two children) (hereinafter First Complaint). Numerous scholars have discussed the coercive pull of American family norms which posit that true success lies in achieving a nuclear family. See, e.g., Melissa Murray, *The Networked Family: Reframing The Legal Understanding of Care and Caregivers*, 94 VA. L. REV. 385, 387 (2008); Clare Huntington, *Staging the Family*, 88 N.Y.U. L. Rev. 589 629-630 (2013) (same).

[3] IVF is typically not covered by insurance and is prohibitively expensive for low-income Americans. *See* Cynthia R. Daniels & Erin Heidt-Forsythe, *Gendered Eugenics and the Problematic of Free Market Reproductive Technologies: Sperm and Egg Donation in the United States,* 37 SIGNS 719, 721 (2012) (explaining that IVF services involving gamete donors have no regulations limiting price resulting in exorbidant costs for consumers). *See also* Alicia Armstrong & Torie C Plowden, *Ethnicity and Assisted Reproductive Technology,* 96 CLIN. PRACTICE 651, 653 (2012) (noting only three states have insurance mandates that cover ART services).

[4] For a general discussion of services currently available in the ART market and potential future technologies see HANK GREELY, THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION (2016).

[5] *First Complaint* at ¶9.

[6] *Id*. at ¶22 (discussing injury caused by bearing a "beautiful, obviously mixed race girl.").

[7] For a discussion of the monoracial family norm and its power for white families, *see generally*, ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 17-19 (2013)(discussing ways in which American culture naturalizes single race families and single race romantic relationships). *See also,* Huntington, *supra* note 2, at 591(discussing racialized nature of the nuclear family norm).

norms.[8] Cramblett conceded that race was the gravamen of her complaint as, despite the multiple other differences between the sperm sample she was given and the sperm sample she had chosen, the racial difference between the two was the pre-eminent source of injury in her mind, the only source of her damages.[9] Moreover, simple compensation was not enough in her opinion. The sperm clinic was apologetic and reimbursed the money she had paid for her sample.[10] However, to Cramblett this was scant compensation. True compensation for the loss of a monoracial family was impossible to measure she suggested but, in any event, she was entitled to far more than a simple refund of her expenses for the clinic's services.[11] Cramblett's suit therefore forced the court to answer questions it was eager to avoid: Should we enforce contracts that purport to exchange race? Does race have exchange value? If the answer is yes, how can this conclusion be justified under the logic of America's so-called post-racial, colorblind ethos? How can contracts for race exist in a society ostensibly marching towards racial equality?

Free market champions[12] joined by strong reproductive rights advocates[13], tend to endorse Cramblett's right to sue and receive damages. In their view, Cramblett is merely using the courts to vindicate a genuinely-held and innocent private preference the market offered her based on race.[14] Indeed,

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[8] Multiple authors have analyzed the race-based claims raised in *Cramblett* but they have not investigated the discursive origins and impact of her claims, and how they reflect standard ART marketing practices. *See* Alberto Bernabe, *Do Black Lives Matter?: Race As A Measure of Injury in Tort Law,* ST. MARY'S L. REV. & SOC. JUST. 41 (2016) (discussing moral deficits in plaintiff's race-based wrongful birth claims); Suzanne Lenon & Danielle Peers, '*Wrongful' Inheritance: Race, Disability and Sexuality in Cramblett v. Midwest Sperm Bank*. 25 FEMINIST LEGAL STUDIES 141 *(*2017) (same); R.A. Lenhardt, *The Color of Kinship,* 102 IOWA L. REV. 2071, 2078 (2017) (using case to call for greater attention to the way race shapes family formation decisions and family law). By more closely examining the role of race-based "private preferences" in ART family-formation decisions, we uncover critical social understandings linking, reproductive freedom and freedom of contract.

[9] *See First Complaint* at ¶22. Cramblett received a 23 page description of each sperm donor and used this description to select her final choice. However, the racial difference between donor 380 and 330 was the only difference she decided was significant enough to trigger a lawsuit. *See Cramblett v. Midwestern Sperm Bank, LLC*, 230 F. Supp. 3d 865 (N.D. III. 2017) at 1 (discussing *First Complaint* at ¶16) (seeking compensation for external pressures associated with an unplanned "transracial" parent child relationship").

[10] *First Complaint* at ¶20 (discussing clinic's apology letter with check refunding cost of six vials of sperm purchased in September 2014). The clinic did not refund all of the money she paid for its services.

[11] *See generally First Complaint* at ¶17 ("happiness was replaced with anger, fear and disappointment"), and ¶¶23-25 (discussing additional race related injuries*)*. Cramblett also noted the racial mistake's secondary consequences as she and her partner *wanted to have two children by the same sperm donor*. The couple only discovered the racial mix-up when they attempted to purchase more of their chosen donor's sperm to hold in reserve for Amanda Zinkon's expected later pregnancy. *First Complaint* at ¶¶ 8-9. Now the couple faced the Hobbesian choice of choosing the same donor or having children of "different races" in their family.

[12] Dorothy E. Roberts, *Race Gender and Genetic Technologies: A New Reproductive Dystopia,* 34 SIGNS 781, 798 (2009) (collecting sources and demonstrating how arguments about women's reproductive freedom are used as a cover to prevent regulation of the ART industry); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994) (explaining broadly that "individuals should be free to use [ART resources] or not as they choose without government restriction unless strong justification for limiting them can be established.")

[13] Some scholars have condemned racial categorization practices in gamete markets but argue we should not prohibit the use of race because of reproductive freedom concerns. *See, e.g.,* Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 5 (2011); Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, 31 HASTINGS CENTER REPORT 13, 17 (2001)(arguing racial categorization limits individual freedom and encourages racial stereotyping but declining to forbid its use).

[14] *See* Fox, *supra* note 13 at 10 (describing search for same-race gametes and same-race dating partners as an innocent search for shared culture). *See also,* Barbara Speigel, *It's Not Racist to Want Your Child To Look Like You,* (2014) http://time.com/3482873/lesbian-couple-sues-sperm-bank-racism/ (comparing Cramblett's claim to that of consumer-mother with dwarfism traumatized by clinic's apparent accident

since its inception the American ART market has represented the right to parenthood as being first and foremost about consumer choice.[15] Parents are encouraged to select everything for their children, from eye color to height, from intelligence level to sense of humor, as they search for these traits in donors. Race understandably is one of several significant characteristics. For another group Cramblett's decision to purchase white sperm is not about *race per se*, but rather, reflects a parent's normal desire to have genetic children that look like her.[16] A child of a different race, they argue, frustrates this very reasonable expectation.[17] This group also argues that racial sameness has secondary value: it hides the fact of the ART procedure, as well as forestalls questions about family integrity.[18] This race-based aesthetic-sameness argument strikes some of Cramblett's defenders as particularly innocuous, as they themselves or people close to them have entered family-formation contracts to secure same race children. Also, Cramblett rightly complained that she was now faced with new cultural and political challenges, as she was now shouldering the burden of unexpectedly raising a mixed-race child.[19] While the bare honesty of Cramblett's complaint triggers embarrassment for some parties (given its violation of social norms), they still believe she is entitled to damages.[20]

Many equality scholars, by contrast, view Cramblett's case with dismay, arguing it reveals the lie of contemporary claims of colorblindness and post raciality.[21] Numerous scholars have criticized our

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causing her to be impregnated with sperm from a standard height donor) ; Julie Shapiro, *What Damages When A Clinic Errs, Related Topics (blog posting)* (Oct. 4, 2013) https://julieshapiro.wordpress.com/2014/10/04/what-damages-when-a-sperm-bank-errs/ (comparing Cramblett's desire for racial sameness in her child is similar to wanting a deaf child if you are deaf). *Cf.* Liz Ememns, *Intimate Discrimination: The State's Role In Accidents of Sex and Love,* 122 HARV. L. REV. 1307, 1347, 1382 (2009) (declining to analyze parent-child relationships but arguing that a mix of complicated factors motivate same race-choices in intimate relationships and legislation should not attempt to directly disrupt the exercise of choice in this arena).

[15] *See generally* GREELY, *supra* note 4 (charting various ways in which the ART market will create more complicated ethical questions based on the power ever expanding consumer choice plays in the expansion of the ART market); Fogg-Davis, *supra* note 13 at 15 (noting consumers are invited to view donor profiles that allow one to choose between certain "vital health" information to "genetically irrelevant" items). Donor profiles ostensibly offer consumers their choice of genetic donors based on hair and eye color, educational history, hobbies and personal goals. For specific examples, *see* California Cryobank, *Become An Egg Donor* https://cryobank.com/services/become-an-egg-donor/ (describing information required to qualify as a donor); "Stepanka*," Make Money Donating Your Eggs!*, YOUTUBE https://www.youtube.com/watch?v=Is8yzODvM2U (last visited Feb. 23, 2018) (video account from six-time egg donor noting that intake process requires disclosure of SAT scores, hobbies, college major, and various talents).

[16] Cramblett's response to the mix-up certainly was telling and suggestive of the larger problem, as was the ART clerk's response. Both parties abided by the monoracial family norm. The clerk sought to confirm what she perceived to be a strange request: "You are requesting the sperm of a black donor, correct?" Cramblett replied, "No why would I do that? You know my partner and I are Caucasian." *First Complaint* at ¶16.

[17] *See, e.g.,* Fox, *supra* note 13 at 16.

[18] *See* MARY LYNNE SHANDON, WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, SAME SEX AND UNWED PARENTS 97 (2001) (rejecting race-blind gamete donation as a viable option because people have myriad reasons for rejecting minority gametes, most significantly aesthetic sameness); Dov Fox, *Reproductive Negligence,* 117 COLUM. L. REV. 149, 201 (2017) (describing case showing family members' sadness and regret because different race ART-produced child was not recognized as part of the family unit in social contexts).

[19] *Interview, Anonymous ART consumer* (September 2017) (notes on file with author)

[20] *Cramblett v. Midwestern Sperm Bank, LLC*, 230 F. Supp. 3d 865 (Nd. Ill. 2017). Cramblett is not the first plaintiff to file a claim of this nature. For other cases *see infra* Part II, *Purchasing Race*.

[21] *See* Roberts, *supra* note 12 at 789 (arguing current ART racial categorization practices send a social message that indicates white children are higher value) *;* Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 64 (2003) (same). *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY

culture's naturalization of gamete banks' practice of categorizing, pricing and marketing sperm and eggs based on race.[22] They also have criticized the way the American ART market naturalizes the desire for a monoracial family. [23] Unpersuaded by innocent aesthetic-preference arguments, these scholars press American ART consumers to more deeply probe their motivations. These scholars argue that the marketing of racially-marked gametes in the American ART market is an explicit, contemporary example of racial commodification. They note that race is not just one minor characteristic among many highlighted in gamete donor profiles; rather, it is a constitutive element of the donor being offered. ART marketing practices make race a commodity, a thing of value, whether it is described as racial essence, racial identity or racial status.[24] In their view, Cramblett's case raises the stakes, as her suit asks the courts to condone the existence of markets in racial essence, bolstering their legitimacy. For these reasons, they argue, the courts should refuse to enforce contracts that exchange race and Cramblett's claim should be dismissed. [25]

The court's steps in assessing Cramblett's suit seem largely pre-ordained, choreographed by existing legal doctrine, but the dance the law outlines does not speak to the core normative questions that must ultimately decide the case and, indeed, are foremost in most Americans' moral calculations. Specifically, both contract and tort seem amenable to providing Cramblett relief, but for the hanging question of whether public policy considerations prevent recovery on a contract for the sale of a racial product. Specifically, the clinic's failure to exercise due care in maintaining the racial identification tags for the samples could be legally characterized as negligence.[26] Alternatively, the clinic's failure to provide Cramblett with the racially-distinct sperm sample identified in her purchase contract could constitute a material breach of a contract term.[27] Yet, if a court determined that our antidiscrimination commitments prevent race from being treated as a material consideration, these potential tort and contract claims would

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267-270 (1997) (discussing the way ART figures white mothers as legitimate procreators in need of assistance compared to poor black mothers)*;* PATRICIA WILLIAMS, THE ROOSTER'S EGG 230 (1995) (same).

[22] *See supra* sources collected at note 21.

[23] *See* Roberts, *supra* note 11 at 790 (criticizing ART market developments that radically constrict the choices of people of color)

[24] The racial products in the United States are also sold to consumers from foreign jurisdictions, increasing the risk that American racial norms are being exported. *See* Nicky Hudson & Lorraine Curry *et. al., Cross border Reproductive Care: A Review of the Literature*, 22 Reproductive BioMedicine Online 673 (2011) (describing reproductive tourists coming to the US as roughly 4% of the domestic ART market). Latin Americans, Europeans and Canadians are some of the largest foreign consumer groups. However the largest impact American consumers' racial norms have is on the global market, which is organized in substantial part by Americans' celebration of European whiteness. See, e.g., Caroline Schurr, *From Biopolitics to Bioeconomies: The ART of (re-)producing White Futures in Mexico's Surrogacy Market,* 35 SOCIETY AND SPACE 241(2017)(discussing American demand for whiteness as shaping Mexican ART market); AMY SPEIER, FERTILITY HOLIDAYS: IVF TOURISM AND THE REPRODUCTION OF WHITENESS (2016)(discussing American demand for whiteness as powering Czechoslavakian market for ART consumers) .

[25] Additionally, the sale of race, more than in any other market, has clear social stratification implications with real wealth effects. Consumers in the gamete market are typically wealthy and white. Daniels & Heidt-Forsythe, *supra* note 3. The race- based commercial exchanges made in the ART market effectively ensure that white wealth remains in the hands of monoracial white families.

[26] Sperm banks are very conscious of customer anxieties about racial mix ups and use color coded caps to classify and organize sperm. Black sperm vials have a black cap, Asian sperm receives a yellow cap, and white sperm a white cap. Seline Szupinski Quiroga, *Blood Is Thicker Than Water: Policing Donor Insemination and the Reproduction of Whiteness,* 22 HYPATIA 143, 150 (2007)

[27] Bernabe, *supra* note 8 at 52 (cataloguing Cramblett's possible claims and their likelihood of success)

be summarily declared void.[28] Without clear legal norms outlining race's role in the commercial marketplace, and no moral and ethical guideposts for resolving such questions, a court is rudderless in resolving the Cramblett dispute.[29]

There is much to be learned from the Cramblett case, as it lays bare the numerous naturalized assumptions at the heart of the ART market regarding racial commodification, reproductive freedom, and freedom of contract. Once these assumptions are laid bare, we can better assess whether a society ostensibly committed to racial equality can allow buyers and sellers in the gamete market to continue forming contracts that purport to exchange race. Once these assumptions are laid bare, the State's role in structuring family formation practices is rendered visible; only then can we openly assess the state's expected future role in supporting the formation of families. Yet this process of defamiliarization and re-evaluation is bound to prove unsettling, as challenges that threaten ART freedoms and the primacy of the monoracial family are rare. Challenges of this nature test the depths of our commitment to racial equality and, further, require a ranking of privacy and freedom of contract against equality concerns in ways we historically have sought to avoid.[30]

To begin this discovery process, a reader must be prepared to honestly engage her core assumptions about race and its historic and contemporary role as a commodity in American society. Indeed, Americans know our early economy was organized at its core on the principle of racial commodification, as Blacks, Latinos and Asians were racialized in particular ways to ensure their forced participation in developing the industrial and agricultural economy of the United States.[31] Racial commodities have played a key, disturbing role in America's formation story. However, Americans may be surprised to discover that, in a country fundamentally shaped by the dangers of racial commodification, there is no clear normative, constitutional principle that prevents private parties from selling racially marked material.[32] The explicit racial commodification in gamete markets forces the question, is there a

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[28] Specifically, if race cannot be exchanged there is no material breach of contract, and no breach of the duty of care necessary for a negligence claim.

[29] Fogg-Davis, *supra* note13 at 2.

[30] The court never reaches these questions in the *Cramblett* case because the plaintiff failed to properly negotiate multiple procedural rules. Cramblett's original complaint was filed in a trial court in Cook County, Illinois. Her complaint alleged breach of warranty and wrongful birth. Both claims were dismissed without prejudice for failure to state a claim. Her second amended complaint, filed in DuPage County, alleged multiple statutory causes of action, as well as breach of warranty, breach of contract, negligence and gross negligence. Cramblett's claims were dismissed again for technical defects; however, her common law and breach of contract claims were dismissed without prejudice and plaintiff was given leave to file another amended complaint within 45 days. Because Cramblett did not re-file and instead sought to file an identical claim in federal court, the Illinois Appeals Court dismissed all claims with prejudice effectively ending the litigation without any substantive or detailed review of her claims. For a full summary of the procedural history and resolution of the case, *See Cramblett v. Midwestern Sperm Bank, LLC*, 2017 IL App (2d) 160694-U (June 27, 2017).

[31] Authorities on this topic are too numerous to include here. For a helpful summary *see* Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255, 267 (2008) (juxtaposing the racialization and exploitative labor practices used to exploit Chinese, African American and Mexican laborers and the consequences for citizenship status).

[32] The most explicit bar on racial commodification is under Title VII's race based employment discrimination protections. These employment cases are beyond the scope of the article, but they are consistent with and derivative of the 14th Amendment equal protection law cases emphasizing the importance of dignity and equal access. *See, e.g., Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 477 (11th Cir. 1999) (employer was not permitted to terminate black worker after racially specific "get out the vote calls" were no longer needed); *see also Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 744 (7th Cir. 1999) (rejecting employer's claim segregated sales force required for customer service purposes). Unfortunately, Title VII's prohibition on racial commodification is also routinely ignored by certain parties, including media entities and health care industry employers. *See, e.g.,* Russell K. Robinson, *Casting and Caste-Ing: Reconciling Artistic Freedom and Anti-*

harm in classifying and selling genetic material based on race?[33] This article begins to answer this question by using our understanding of racial formation to examine the practices of the State, gamete sellers and ART consumers as they purport to exchange race.[34] As we examine what parties promise and prohibit, and what consumers say and do, we learn a great deal about the role of race in personal identity and in family formation. Our analysis will also take the form of a functionalist inquiry, as this inquiry allows us to determine whether race is deployed in the ART market for a legitimate purpose or instead operates in ways that reinstantiate race-based subordination.[35]

This discussion will also call upon the reader to challenge the current insistent drive to treat reproductive freedom as consonant with and including an unrestrained right to freedom of contract. This right to "freedom of contract" in the reproductive realm is key to the current assertion that consumers should be able to buy *any* genetic material they desire for their children, packaged in any form, including racially-classified genetic material. The Cramblett case is a flash point for this controversy because no such right to reproductive freedom currently exists.[36] Rather, the broad reproductive choices Americans are offered in the ART market result from policymakers' inattention and indecision, a resulting absence of legal regulation,[37] and the failure to fully engage with the philosophical question of what "the right to procreate" means.[38] As a point of contrast, sperm and egg markets in foreign countries are structured in ways that constrain choice without being challenged as fundamental bars to the exercise of reproductive rights.[39] Even in the United States, consumer freedom has always been understood as situated within a network of necessary limitations, yet we still perceive the exercise of our marketplace rights as meaningful.[40]

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*Discrimination Norm*s, 95 CAL. L. REV. 1 (2007) (discussing entertainment industry and racial commodification); Kimani Paul-Emile, *Patient's Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462 (2012) (discussing hospital doctors' informal practice of respecting patients' racial preferences in assigning doctors)

[33] Fogg-Davis, *supra* note 13 at 13 (arguing process encourages consumers to engage in racial stereotyping)

[34] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 62-63, 66-67 (2d ed. 1994).

[35] Fogg-Davis, *supra* note 13 at 16 ("should each individual have the freedom to describe his racial identity using language that transcends the sperm bank's racial boxes? How do racial descriptions of sperm donors relate to the consumer's goal of creating a baby?").

[36] *See generally*, Michelle Meyer, *States' Regulation of Assisted Reproductive Technology: What Does The US Constitution Allow?*, The Nelson A Rockefeller Institute of Government (2009). (explaining that neither the right to contraception nor the right to abortion directly supports advocates' claim that there is a constitutional right to unencumbered ART usage); Radhika Rao, *How (Not) To Regulate Reproductive Technology: Lessons from Octomom*, 21 ALB. L.J. SCI. & TECH. 313 (2011) (explaining "there is no general right to use ART as a matter of reproductive autonomy, but there may be a more limited right to use ART as a matter of reproductive equality.")

[37] Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL'Y 349, 362-63 (2012) (describing minimal approach to regulation in the American ART market).

[38] The right to reproduce is not free standing; it should be understood as a time-dependent, context-specific, unique amalgam that is shaped by cultural attitudes towards conjugal childlessness, beliefs about the difficulty of procreating, gendered subjectivities, law and the parties' understanding of technology. *See* Venetia Kantsa, (IN) FERTILE CITIZENS: ANTHROPOLOGICAL AND LEGAL CHALLENGES OF ASSISTED REPRODUCTION TECHNOLOGIES 14 (2015).

[39] *See infra* discussion of Turkey, Israel, and Britain in Part IV. Canada also faces significant restrictions resulting in roughly 90% of sperm used being purchased from foreign jurisdictions. See Ruth Graham, *"Don't be fooled by Justin Trudeau's virility—Canada is in a sperm crisis*!" SLATE (Mar 8, 2016). The point is that various countries' restrictions may motivate reproductive tourism, but these consumers complain of impediments to the exercise of rights. They do not argue that has wholly deprived them of a key reproductive right, but instead recognize the state's strong interest in regulating ART markets,

[40] For example, the United States prohibits the commercial sale of human organs. See Mary Lyndon Shanley, *Collaboration and*

Readers will also be called upon to engage with the social mechanisms that give racial inequality permanence in an ostensibly post- racial society. For the Cramblett case illustrates how the work of former *de jure* segregation can now frequently be accomplished by so called "private racial preferences" enforced and enacted through private contracts. Put simply, there is no need for anti-miscegenation statutes to maintain racial purity and racially-segregated communities when the same thing can be accomplished through "atomized inequality."[41] Indeed, today the same anti-miscegenation goal is achieved through strategic marketing ploys and claims about individual consumers' innocent "private" preference for a monoracial family.[42] Moreover now that consumers want courts to legally enforce ART contracts for the exchange of race, courts are being invited to instantiate a new era of legally-subsidized racial inequality. Consumers are poised to demand that courts recognize the legal right to procure a monoracial family. This discussion challenges legal scholars to examine how current private market choices are the consequence of prior *de jure* institutional arrangements. When we create new legal rights that allow individuals to vindicate these so-called modern "private" racial preferences, law effectively is being asked to subsidize private discrimination it created on the front end.

This discussion also is part of a larger project that will examine the ways race is framed in an era that tends to uncritically celebrate neoliberalism and the promise of the free market economy. Critics have raised concerns about neoliberalism's sway precisely because the framework encourages us to believe all things of value can be conceptualized as market commodities and all personal relations can be understood through the frame of market relations.[43] Parenthood and family are more easily subordinated to this framework as children are procured through ART, adoption and other baby market contracts. In this baby market, race becomes one more commodity bought and sold, a thing easily procured as a means to perfect family relations.[44] Certainly, using market frames for certain matters does effect a certain kind of interpretive violence; yet market framing also provides a valuable discursive opportunity to understand race and family through a different lens. There is a way in which market analyses squarely confront us with core ethical and normative questions. When we bar or permit certain products to be sold, we reveal that the market does have a soul. We make stark ethical decisions when we decide what we will recognize as commodities and whether we will ask for government assistance in enforcing contracts based on certain commercial understandings.[45] Understanding Americans' relationship to race in the market, understanding how race continues to be bought and sold in American society, will give us great insight

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Commodification in Assisted Procreation: Reflections on An Open Market and Anonymous Donation in Human Sperm and Eggs, 36 LAW & SOC'Y REV. 257, 271 (2002) Some will argue that formal legal restrictions hide the true economic reality that even these supposedly market-exempt items are still available for sale.

[41] R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents Racial Preferences Through Discriminatory State Action*, 107 YALE. L. J. 875, 883 (introducing concept of "atomized inequality").

[42] Schurr, *supra* note 24 at 240. Schurr explains, that there is a new "liberal eugenics" driven by consumer choices in a new bio-economy." *Id.* at 241.

[43] *See* Roberts, *supra* note *12;* Laura Mamo, *Queering the Fertility Clinic*, 34 J. MED. HUMANITIES 227, 230-231 (2013) (discussing the way consumer purchases in the fertility market are represented as self-realization through consumption, a common theme under a neoliberal framework)

[44] *See* Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQUALITY 277-309 (2009)(discussing the way market transactions for ART are romanticized by language about privacy and family relations)

[45] This approach is sometimes referred to as economic sociology. Marion Fourcade & Kieran Healy, *Moral Views of Market Society,* 33 ANNU. REV. SOCIOL. 285, 295 (2007) (explaining that markets are cultural products and can be analyzed to identify cultural norms).

into the thus far elusive social norms that prevent us from attaining racial equality.

Increasingly it is clear that a market-based approach to understanding race is essential in thinking about family formation in American society. Families that are unable to biologically reproduce are now turning to various family-formation contracts for acquiring children (adoption, surrogacy, gamete purchase, etc.) that are shaped by market pressures. We must examine the relationship between the various markets for acquiring children and why these markets have formed.[46] Additionally, we must understand the role that race plays in these markets and discover what these insights about race markets teach us about our broader racial equality norms. The need is urgent. Our understanding of equality has always in large part been articulated through the language of freedom of access and freedom of contract;[47] however, that articulation process is not finished. We must examine the symbolic and normative power commercial markets play in our conversations about race, and also structure legal regimes that interrogate and subvert these commercial market exchanges when they threaten our racial equality goals.

Part I, *Packaging Race,* probes the racial categorization practices currently used in the American gamete market to provide a better account of what is actually being exchanged when parties purport to sell racially marked ova and sperm. After exploring the high risk of fraud, confusion and potentially misleading speech, Part I demonstrates why gamete banks' current racial categorization practices could thrust courts back into discredited legal arguments about racial purity, racial fraud, and blood lines that our legal system abandoned as distasteful after the late 19th Century and early 20th Century. Part II, *Purchasing Race* probes customer preference claims about race to determine what it is consumers believe they are buying when they purchase race in the ART market. Close examination of customers' arguments reveals a fundamental anxiety about "ideal" family performance — concerns that reflect the residual influence of anti-miscegenation norms, regressive femininity and masculinity constructs and a desire to outsource the challenges associated with achieving racial equality. Careful review of these arguments further suggests that buying patterns for racial products in the United States ART market do not reflect the celebratory exercise of consumer freedom, but rather a profound anxiety about the existing racial order in the United States.

Part III, *Protecting Race* addresses how constitutional law could be used to challenge the exchange of racial products in the ART market. Section A begins by examining current reproductive rights arguments that superficially appear to support the right to buy particular racial products in the ART market. I argue that certain conceptual blinders have formed in this area and offer ways to overcome them.

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[46] It is useful to think of the ART market as contiguous with the domestic and international adoption market, as race plays an important market structuring and pricing role in these domains as well. Michele Goodwin, *The Free-Market Approach to Adoption*: *The Value of A Baby*, 26 B.C. THIRD WORLD L.J. 61, 62-64 (2006) (explaining how race and ethnicity currently structure the international and domestic adoption market). Scholars like Susan Appleton have observed, the ART market and the adoption market have become integrally related, as both are seen as near equivalents as viable options for parents interested in securing children. Specifically, parents frustrated by the challenges of securing a white child through adoption may turn to ART market. Conversely, ART consumers may turn to adoption when their chance to have a biological child fails. *See generally*, Susan Appleton, *Adoption in the Age of Reproductive Technology*, 2004 UNIV. OF CHICAGO LEGAL FORUM 391, 410 (2004)(discussing legal structures that creates incentives for ART as the more "private" unregulated option as compared to adoption). Additionally, the racial segregation and selection norms in the adoption market are identical, with adoption agencies sorting children by race and allowing white parents to reject minority children on a racial basis. Yet the market also has certain racial equality norms. For example, in contrast to the ART market, if a parent wishes to adopt a multi-racial or minority child, those wishes are required to be honored by statute. Goodwin, *supra* note 46 at 62-64.

[47] Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1542-45 (2002) (discussing the ways in which freedom of contract has shaped race-based civil rights jurisprudence)

Section B addresses equal protection arguments that support challenging ART race-marketing procedures, but shows how equal protection law's preoccupation with merely confirming equal access to commerce for all races has prevented the doctrine from squarely addressing the evils of racial commodification itself. Part III concludes by summarizing trends in reproductive rights doctrine and equal protection doctrine that could support legal claims that challenge the ART market's racial commodification practices, but also notes that there is valid cause for concern when the state attempts to regulate family formation contracts based on race. Part IV explores mechanisms at the state and federal level that could be used to eliminate commercial practices that involve the sale of race in the ART market. Part IV concludes by examining some of the most common concerns raised about preventing the use of race in family formation contracts.

Part I – Packaging Race in the ART Market

The ART market provides a unique opportunity to study the dynamics of racial formation, as it involves two critical institutions, the market and family, that promote and reflect messages about race. Consumers and sellers reproduce race by circulating certain formal institutional definitions of race and by producing their own individual interpretations of racial definitions and rules. With this in mind we will examine the dynamics of racial exchange in the ART market — the specific assurances and practices that together establish a contract between buyer and seller for gametes of a particular "race." With an understanding of the rules of racial exchange, we learn why ART consumers believe that race is an item "of value," and we can evaluate the legitimacy of this kind of commercial exchange. More specifically we can determine whether we should recognize contractual promises for the sale of race and whether we should allow suits for damages when racial commodities that were promised are not delivered. Unfortunately, as one grows more familiar with the rules of racial exchange in the American gamete market — as one is confronted with their questionable logic and inconsistency, one is forced to conclude that the current commercial regime is administratively untenable and ripe for litigation.

Race is clearly important to American ART consumers.[48] They tend to rank it first or second in importance when selecting a donor; occasionally it is trumped by intelligence.[49] Although American ART consumers rank race high on the list of desired characteristics, curiously they do not do appear to do any due diligence on the racial identity of their chosen donors or inquire about clinic categorization practices. Instead, they tend to accept clinic representations at face value, a practice that is profoundly naïve given the politics of racial identification in the United States. Consumer naivety is to be expected. Clinic practices related to the packaging of race when initially described seem simple and transparent, and therefore do not invite scrutiny. However, once the veil is lifted, one discovers that this packaging regime is a powerful force that shapes race and consumers' racial desire; the regime then justifies the standards it has created by citing thin arguments about market demand and customer preferences.

[48] Some consumers rank race as being the most important. Fogg-Davis, *supra* note 13 at 15. Most websites feature a drop down menu that invites purchasers to select by race almost immediately. *See, e.g.,* Fairfax Cryobank, *Find A Donor* https://fairfaxcryobank.com/search/ (last visited Feb., 10 2018); Seattle Sperm Bank, *Find A Donor*, https://www.seattlespermbank.com/donors/# (last visited Feb., 10 2018); Xytex Sperm Bank, *Find A Donor* https://www.xytex.com/search-donors.

[49] Race is typically one of the introductory informational items requested on a donor form. Fogg-Davis, *supra* note 13 at 15. Other forms request that donors identify the "ethnicities" in their families. The sperm or egg bank then sorts them into racial categories as it defines those categories.

A. Packaging Gametes

The process for selecting a sperm or egg donor is highly competitive. Only 1% -2% of persons that apply are ultimately accepted as donors.[50] The process in the first stage is mechanical. A prospective donor fills out an intake form in which he or she is required to provide basic background health information as well as information about his or her race and ethnicity. The prospective donor's health information is reviewed to screen out persons that are ineligible because of infectious diseases or hereditary conditions.[51] For example, at present HIV carriers cannot donate, as well as persons infected with hepatitis or other diseases potentially transmitted to a mother through the ART process. Similarly, persons with congenital defects and disabilities of various kinds, including mental illness, are ineligible as well.[52] Also, more controversially, persons that allegedly engage in high-risk behaviors are screened out, including IV drug users and "men that have sex with other men" or women that have sex with bisexual men. Last, persons with so-called "undesirable" social backgrounds do not make the cut: a history of incarceration is disqualifying.

Screening does not merely take the form of excluding the undesirable. The second stage of donor selection is more impressionistic and discretionary. Gamete banks take great care to recruit only those donors that have highly desirable characteristics. As one bank puts it, we want our buyers to know that our donor pool is made up of high quality people.[53] Consequently, sperm and egg providers tend to search for persons with a superior physical appearance, to ensure their donors have the ability to pass on physical traits deemed socially attractive.[54] For example, banks refuse donations from men under five feet, nine inches tall and most men or women that do not have a "healthy" BMI— e.g., who seem "overweight" by Western standards.[55] Donors catalogues also suggest gamete agencies select donors with features that are in accord with traditional notions of femininity and masculinity. The swimsuits photos sometimes used make it clear that beyond BMI — donors are selected if they have aesthetically pleasing bodies. Also,

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[50] See, e.g., California Cryobank Website, *Selecting a Sperm Bank,* https://cryobank.com/why-use-us/selecting-a-sperm-bank/ (last visited Feb 23, 2018) (explaining 1-2% of potential applicants are accepted as donors).

[51] Phoenix Sperm Bank Website. *What Does it Take to Become a Sperm Donor?* https://www.phoenixspermbank.com/blog/take-become-sperm-donor/ (last visited Feb 23, 2018); Seattle Sperm Bank Website, *Be a Sperm Donor – FAQ*, https://www.seattlespermbank.com/be-a-sperm-donor-faq/ (last visited Feb 23, 2018). For an anecdotal account of the process, see David Plotz, *The Genius Factory, My Short Scary Career As A Sperm Donor,* SLATE (June 7, 2005) http://www.slate.com/articles/life/seed/2005/06/the_genius_factory.html

[52] These rules are derived from the FDA regulations governing sperm banks. Seattle Sperm Bank Website, *Be a Sperm Donor – FAQ*, https://www.seattlespermbank.com/be-a-sperm-donor-faq/ (last visited Feb 23, 2018)

[53] Research "on how recipients select donors suggests that staff members are responding to their clients' interest in attractive and intelligent donors whose phenotypes are similar to their own." Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks and the Medical Market in Genetic Material,* 72 AMERICAN SOCIOL. REV. 319, 326 (2007).

[54] *See* Almeling, *supra* note 53 at 326 (discussing Western Sperm Bank's standard for donor selection: ""When I'm interviewing somebody to be a donor, of course personality is really important. Are they gonna be responsible? But immediately, I'm also clicking in my mind: Are they blond? Are they blue-eyed? Are they tall? Are they Jewish? So [I'm] not just looking at the [sperm] counts and the [health] history but also can we sell this donor?")

[55] California Cryobank Website, *Become a Sperm Donor*, https://cryobank.com/services/become-a-sperm-donor/ (last visited Feb 23, 2018). *See also*, Cynthia Daniels & Janet Golden, *Procreative Compounds: Popular Eugenics, Artificial Insemination and the Rise of the American Sperm Banking Industry* 38 Journal of Social History 5, 17-20(2004) (describing range of characteristics sought in sperm donors and effects on pricing).

"glamour" shots or headshots are common. [56] Every effort is made to ensure that the consumer is choosing from a pool of aesthetically pleasing donors. Donor selection is so heavily tilted toward the attractive that many ART websites include a search feature that allows consumers to identify donors by choosing two or three celebrity look-alikes for their donor .[57] Savvy ART consumers know that there is no assurance that a child produced from an attractive donor's gametes will have the same physical characteristics as the donor, as the mechanisms for genetically transmitting many traits are not well known.[58] However, the probability that the donor's characteristics may be passed to the child are apparently sufficient to make these aesthetic characteristics an important part of the donor selection process. [59]

Similarly, intelligence is highly valued.[60] To address this concern, sperm and egg banks are well known for concentrating their recruitment efforts near college campuses. [61] As a result, the sample collected tends to be more educated than the general American public. Of course, college attendance does not necessarily guarantee intelligence. Rather, prior educational attainment merely reflects access, social privilege and interest in securing a higher degree. Additionally, there is no gene currently known to transmit measured intelligence in a sure fashion. This fact seems of little concern to gamete banks as they continue to produce materials highlighting donors' SAT scores and academic accomplishments. Intelligence and beauty assessments are merely examples of a larger problem. Gamete banks list a wide range of highly desired characteristics their donors happen to have, even though they know these traits, qualities or talents will not necessarily be genetically transmitted to the donor's progeny.[62] Musical ability, an interest in writing poetry, a desire to work in humanitarian fields --- all of these features are likely to be included in a donor's profile. He or she may be asked to fill out a questionnaire describing their favorite animal, color, or musical group.[63] Also, donors may be asked to consent to recorded interviews so that ART consumers can determine whether they think the donor "has a nice personality." Administrators

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[56] This process, however, is somewhat fraught as the norms of ideal femininity must be carefully negotiated. *See* Almeling, *supra* note 53 at 329. An employee at the Creative Beginning's Sperm Bank makes reference to this issue when describing the ideal donor picture: "You don't want something where your boobs are hanging out of your top [*laughter*]. These people are not looking for sexy people."

[57] One could argue that consumers are not duped by these marketing practices. Rather, they do not challenge these false marketing representations made by the ART industry because these representations are in accord with common social practice, the industry is merely mimicking how we search for mating partners in the "real world." Choosing an intelligent or beautiful sexual partner or life partner is often motivated by the expectation that one's progeny will bear the same traits. The average lay person does not factor in that the chosen mate's traits may not be carried over to the child, nor are they interested in the relative probability of this transfer occurring.

[58] See Fairfax Cryobank Website, *How to choose a sperm donor*, https://fairfaxcryobank.com/how-to-choose-a-sperm-donor (last visited Feb 23, 2018) (explaining that donor traits one selects for are not guaranteed to be passed to progeny); Daniels & Golden, *supra* note 55 at 17-20.

[59] Some of the sperm donor descriptions read more like descriptions of the lead in a romance novel. One can choose between the "calming craftsman," the "calculus wiz," "a real knockout," or the man who is "oh so worldly." California Cryobank, *Donor Search*, https://cryobank.com/search/ (last visited Feb 23, 2018).

[60] Daniels & Golden, *supra* note 55 at18.

[61] Daniels & Golden, *supra* note 55 at 19 (noting most donors come from UCLA, USC, Stanford, Harvard and MIT.) The authors also found two sperm banks selling something called ("Doctorate Donors") with higher prices. They also discussed Heredity Choice, a sperm bank that specializes in intelligent donors. *Id*.

[62] Donors may also be asked about their SAT scores or GRE scores, musical ability, religious affiliation and other items. Daniels & Golden, *supra* note 55 at 19

[63] Other information requested may include pet preferences and handwriting samples. Also, the donor must have a "nice personality." Daniels & Golden, *supra* note 55 at 17.

at gamete banks freely admit that, although they know that the traits listed in a donor's profile may not be genetically transmitted, detailed profiles tend to make consumers feel close to particular donors, and consumers are more likely to choose a donor with whom they feel an emotional connection.[64] The most disturbing aspect of this phenomenon is, even though gamete providers know they cannot predict whether a donor's traits and skills will be genetically transmitted to her child, pricing in some cases is still determined by how many of these favorable characteristics a donor has, including preferred racial characteristics. Indeed, the initial process of being selected hinges on these broader attractiveness considerations.[65]

B. Packaging Race

The initial screening to determine the "race" of gamete donors seems simple; donors answer a questionnaire asking them to self-identify by ethnicity and/or race.[66] In reality, however, the procedures for packaging race are far more complicated: they fundamentally structure the ART market, involve multiple discretionary decisions, and (perhaps unwittingly) send important messages to ART consumers. Also, the consequences of this screening process have huge financial implications. In the ART market race is big business. While the pricing structure for sperm tends to be relatively flat, sales of eggs show that race plays a key role in pricing.[67] A blond highly-educated egg donor can fetch as much as $100,000 for her eggs.[68] More recently Asian eggs, particularly "pure-blood Chinese eggs" have commanded a high price. [69] Importantly, because there are no federal or state regulations for gamete banks regarding marketing or pricing, racial pricing occurs regularly.

The clearest role race plays is in sperm bank stocking decisions. Most banks have a set stock of sperm in storage; they take multiple steps to ensure that high demand racial products are available. While

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[64] *Id*. at 18 (discussing racial disparities in stock provided based on race). Although Blacks and Latinos are 12% of the US population, they represent 5% and 2% of California Cryobank's samples.

[65] *See* David Plotz, *The Genius Factory, My Short Scary Career As A Sperm Donor,* SLATE, http://www.slate.com/articles/life/seed/2005/06/the_genius_factory.html (June 7, 2005) (describing searching questions and intake worker's use of these considerations to determine his eligibility to be a donor)

[66] Almeling, *supra* note 53 at 336.

[67] *Id*. (describing race's effect on pricing). The American Society for Reproductive Medicine, an advisory organization that monitors the ART industry, strongly discourages pricing eggs and sperm based on donor characteristics. However, again, this guideline is violated regularly.

[68] Clare Moskowitz, *Exorbidant Fees Paid to Human Egg Donors Study Finds*, LIVE SCIENCE (March 26, 2010) https://www.livescience.com/8171-exorbitant-fees-offered-human-egg-donors-study-finds.html (indicating that more than a quarter of 100 ads studied offered more than $10,000 for eggs and some offered as much as $50,000).; *Fees Exceed Recommended Guidelines Study Finds,* NBC HEALTH NEWS (MAR 26, 2010) http://www.nbcnews.com/id/36057566/ns/health-womens_health/t/egg-donors-offered/#.WdSTRK3Mw6g.
Sharon Alfonsi, *Inside Egg Donation*: *More Money For Blonds?,* ABC NEWS (May 11, 2010) http://abcnews.go.com/WN/egg-donation-agencies-paid-money-favored-attributes/story?id=10614326 (describing study showing rising prices and higher price for blondes, with some women earning $50,000 per engagement). See also, Marile Enge, *Ad Seeks Donor Eggs for $100,000, Possibly A New High,* CHICAGO TRIBUNE (Feb. 10, 2000) (describing donor-advertisement that specified the egg donor must be under 30, Caucasian and an athlete).

[69] For examples *see* Shan Li, *Asian Women Command Premium Prices for Egg Donation in U.S.*, LA TIMES (May 4, 2012)(discussing clinic's decision to compensate Asian women donors $10,000 to $20,000 instead of the $6,000 normally paid for eggs because it was difficult to find Asian ova). The highest prices were paid for eggs from a 100% pure Chinese woman with an advanced degree in math. *See also* Erin Ryan, "*Want to Sell Your Eggs to Pay for College? Be Asian.*" JEZEBEL (May 4, 2012) *https://jezebel.com/5907657/want-to-sell-your-eggs-to-pay-for-college-be-asian*. Some advertisements promise "Asian" eggs will fetch a price of $100,000 to attract donors.

only 60% of America racially identifies as white, 80% of sperm and eggs available in the United States come from "white" donors.[70] Additionally, American consumers can easily import "white" sperm or eggs if they are unhappy with the current domestic stock available, or if they choose to have cheaper ART services conducted abroad. Denmark is the largest exporter of sperm in the world; some believe its success is due to the fact that the country has a large native population of white, blonde and blue-eyed donors.[71] Also, the ART market makes fertility tourism available to White-American working-class consumers priced out of domestic ART services; these consumers flock to Czechoslovakia because the ART industry in that country offers an easy supply of low-cost anonymously donated eggs from white, blond donors.[72]

Again, "standard" white sperm in the ART market sometimes cost less than other "race" sperm because the ART market ensures that white sperm is plentiful – and therefore always has a large supply. Certain minority consumers, by contrast, will often find that their chosen sperm bank does not charge more for their race, it just has extremely few samples available for their racial group. Similar dynamics obtain in the search for egg donors. For example, typically one can only find two to three black egg or sperm donors on a gamete agency website; some have no black donors at all.[73] Clinics justify these racially-tilted stocking decisions based on customer demand; white consumers are their primary customers and they assume these consumers want white gametes. [74] Yet this stocking decision assumes racial rejection as a constant; white consumers are never challenged to look beyond their group because whites dominate the sample pool. Also, the reason the customer base is white points to other inequality concerns. Specifically, the price charged for ART services is so high that poor couples, many of whom are minority, simply cannot afford to use them.[75] The social message projected by gamete banks' stocking decisions establish that the industry is primarily designed for white consumers. Indeed, this evidence is sufficient to debunk the claim that the ART market provides equal access for "all races."

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[70] Almeling, *supra* note 53 at 335-336.

[71] Cryos Denmark Website, *About Us*. https://dk.cryosinternational.com/about-us (last visited Feb 23, 2018).

[72] *See generally* SPEIER, SUPRA *note 24*.

[73] Mothering.com, *Has Anyone Ever Used a Donor of a Different Race?,* http://www.mothering.com/forum/438-multicultural-families/1032432-has-anyone-ever-used-donor-different-race.html (last visited Feb 23, 2018) (describing difficulties because sperm bank used only had 1-2 black samples) ; Arlett Harti, *Where's The Black Sperm?*, YOUTUBE https://www.youtube.com/watch?time_continue=31&v=DSCUX6srY_w (last visited Feb 23, 2018) (discussing difficulties replicating her phenotype because the sperm bank she used only had a small number of Black samples); Artlett Thomas, *Where's the Black Sperm! The Joy of Picking a Sperm Donor*, CHASING-JOY(Apr 10, 2015) *http://chasing-joy.com/choosing-black-sperm-donor/ ;* Brittany Thornburley, *Aspiring Queer Mom Seeks Black Sperm Donor, Can't Find Too Many, https://www.autostraddle.com/aspiring-queer-mom-seeks-black-sperm-donor-cant-find-too-many-375953/;* Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. Rev. 1 (2003) (conducting a review of one sperm bank and finding only 4% of stores were labeled Black)

[74] *See, e.g., See* Rachel Rabbit White, *Only White, Straight, Attractive Women Allowed? The Strange World of Egg Donation,* ALTERNET (Aug 3, 2010) https://www.alternet.org/story/147682/only_white%2C_straight%2C_attractive_women_allowed_the_strange_world_of_egg_donation . Similar rules apply to sperm donors, Ertman, 82 N.C. L. Rev. 1 (2003) (explaining customer demand explained sperm bank's decision to maintain a sperm catalogue that was nearly 70% white)

[75] Dorothy E. Roberts, *Race and the New Reproduction,* 47 HASTINGS L.J. 935, 950 (1996) N.R. Elster, *ART for the Masses? Racial and Ethnic Inequality in Assisted Reproductive Technologies (ART),* 9 DEPAUL J. HEALTH CARE L. 719, 734 (2005).

Of course, gamete-agency providers know they are not actually selling race; rather, they are selling gametes from donors with certain racially-associated phenotypes. More precisely, gamete agencies are offering ART consumers a donor pool that has a good probability of transmitting certain racialized characteristics to their progeny. However, because the gamete providers are merely selling donors with racially-associated phenotypes, gamete banks are required to make a number of discretionary decisions about how race is defined. The more "racially pure" a white donor is, the less likelihood there is that the donor will have recessive genes associated with minority-phenotypes that will unexpectedly emerge. Therefore, clinics must make determinations about what kind of racial admixture will still count as "white" and how much racial admixture they will tolerate when accepting a person into the category of whiteness. At present, gamete providers' donor catalogues suggest that gamete banks are enforcing variations on the infamous "one drop" rule with regard to Black gametes. Stated simply, one black grandparent is sufficient to take a donor-candidate out of the category of whiteness, in stark contrast to the way racial admixture is treated concerning other groups.

Indeed, review of sperm donor catalogues reveals that intake workers at ART clinics are exercising a fair degree of inconsistent and unrestrained discretion in screening out what they perceive to be non-white donors. Most gamete providers' donor web-catalogues include persons with a range of European or traditionally "white" ethnicities in the category of whiteness, specifically French, English, Russian and Danish. Consistent with contemporary "honorary whiteness" norms "whites" with a small amount of Latin or Asian ancestry are designated white at some clinics, but standards of racial purity are far more strict at others.[76] Gamete providers' catalogues also more recently have featured certain Asian purity standards, given the high price these "racially pure" Asian gametes may fetch as well. In lower status groups, such as blacks and Latinos, racial admixture of various kinds is more easily "tolerated." Also, most gamete-provider donor-catalogues feature a "Mixed" or "Other," category, typically used by mixed race couples attempting to create a child that reflects their "racial union." These mixed categories are vastly smaller than the white samples, and they function well to demarcate the genetic distinctiveness and purity of the samples the sperm and egg banks are offering as "white" sperm and egg donors.

The tolerance of mixed race "blood" in low-status racial categories also has consequences for the minority consumer. One study, conducted by reviewing more than 1000 sperm bank profiles (or roughly 49% of sperm stores available at that time), revealed that a higher numbers of light-skinned minority donors were featured in alleged "low-status" minority categories. Also, donors from low-status minority categories needed to have softer or "less kinky" hair to be featured. For example, even if an ART consumer requested Black[77] sperm, the options she would be given would be light-skinned blacks with the straightest hair in that category. Some clinics appeared to be actively constructing representation of Blacks that trend towards the aesthetics associated with white standards of beauty.[78] Other minority

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[76] See Manhattan Cryobank, *Donor Profiles,* http://www.manhattancryobank.com/donors (last visited Feb 23, 2018) (49 listed as Caucasian all with pure European ancestry); Seattle Sperm Bank, *Donor Profiles*, https://www.seattlespermbank.com (last visited Feb 23, 2018) (listing 340 donor profiles with small number of Asian or Latino family members but none with Black family members); California Cryobank, *Donor Profiles,* https://cryobank.com/ (last visited Feb 23, 2018) (listing whites as including a broad range of Asian, Latino and Middle Eastern relatives as Caucasian persons).

[77] Sven Bergmann, IN(FERTILE) CITIZENS: ANTHROPOLOGICAL & LEGAL CHALLENGES OF ART TECHNOLOGIES 231 (2015), (included article *Assisted Authenticity: Naturalization Regulation and the Enactment of Race Through Donor Matching).*

[78] Almeling *supra* note 53 at 332. One ART worker in the egg donor sector explained of a donor "She's Caucasian enough, she's white enough to pass, but she has a nice good hue to her, if you get a Hispanic couple." *Id.*

consumers have reported the opposite problem: that the racial gametes in stock at a given clinic have phenotypic characteristics that represent a more stereotyped view of blackness and do not match their actual features. Given the extraordinarily small number of black samples various sperm bank provide, consumers have argued that ART providers are simply not interested in representing the true phenotype diversity in Black communities in the United States.

Gamete providers also believe there is great consumer anxiety about accidental race-mixing and they have used many procedures to ensure these racial mistakes do not occur.[79] Dorothy Roberts and other scholars confirm this widespread anxiety exists; indeed, it is reflected by the numerous news stories and urban legends documenting this accidental mixing "problem."[80] To minimize the risk of mistake, many gamete banks attach color-coded labels to the sperm vials and eggs samples. Black sperm is given a black label. Asian sperm is given a yellow label. White sperm receives a white label. Red is often used for mixed populations or Latinos. For some race scholars, this process is profoundly disturbing at it "makes" race real in a particularly concrete way. By applying these labels to the sperm or egg samples, sperm banks create a racial pre-destiny for the progeny produced from these genetic materials as they use specific, choreographed, marketing approaches to determine who should be offered gametes of a particular race and how the resulting children should be understood by their parents.

C. Packaging and Its Effect on Consumer Perceptions

Gamete banks indicate that the racial categorization standards they use are merely a response to pre-existing customer preferences. However, this representation cannot be taken at face value. Instead various aspects of the process actively train donors to perceive the selection process as a way of either identically replicating their own genetic stock or taking steps to improve the genetics of their family line. For example, most sperm banks feature a questionnaire or drop-down menu that asks customers to record their race and the race of their desired donor. Structures of this nature that privilege racial choices effectively "nudge" customers to adopt a perspective that gives race special value. Multiple aspects of the selection process trigger consumers to develop certain views about race and racial hierarchy in the United States. While other scholars have documented how the ART gamete search process shapes customer views of femininity and masculinity, this Article catalogues the significant ways gamete sellers' marketing practices shape racial understandings. With a full view of the ways the process subtly and not so subtly shapes views about race, one understands the challenges ART marketing norms create for the project of racial equality.

1. The Re-Biologization of Race

[79] Almeling *supra* note 53 at 391. She explains that "[i]n Creative Beginnings' office, there is a cabinet for "active donor" files. The top two drawers are labeled "Caucasian," and the bottom drawer is labeled "Black, Asian, Hispanic." Also, during a tour of CryoCorp, the founder lifted sperm samples out of the storage tank filled with liquid nitrogen and explained that the vials are capped with white tops for Caucasian donors, black tops for African-American donors, yellow tops for Asian donors, and red tops for donors with "mixed ancestry."

[80] Patricia Williams and Dorothy Roberts argue that the dominant placement ART racial mix-up cases secure in American media demonstrates whites' profound anxiety about racial mistakes in ART. *See* DOROTHY ROBERTS, *supra* note 21 at 261;WILLIAMS *supra* note 21 at 230 (1995). For a contemporary example, *see* David Mikkelson, *Black Donor's Sperm Mistakenly Sent to Neo-Nazi Couple,* http://www.snopes.com/media/notnews/nazisperm.asp (debunking widely circulated news story alleging racial mix-up in ART) (last accessed October 1, 2017).

One of the biggest threats the ART market poses to the project of racial equality is that gamete banks are counseling consumers that race is genetically carried and inheritable; however, most geneticists agree that *race has no clear biological basis* that can be established at the level of genetic code.[81] Gamete sellers know that race cannot be traced to particular genes. Rather, it is an unstable collection of phenotype-features that are recognized in certain social contexts as placing an individual in a particular racial group. The definition of race, the physical characteristics recognized as composing race, vary over time and in response to political conditions. ART consumers are invited to abandon this understanding, and instead reinvest in a logic of blood lines and racial purity. This racial purity logic underpins white supremacy and has been used for generations to devalue and villainize minority communities.[82] The greater irony is, the consumers most likely to use ART — educated and wealthy consumers, have been subject to diversity and equality messaging for years that encourages cross racial contact and often challenges the concept of biological race.[83] Therefore, the ART industry is either actively re-inculcating people who had overcome biological concepts of race or, even worse, revealing that none of the instruction these Americans received debunking the notion of biological race had any impact at all. One thing is clear: the ART process is socializing a community with significant capital and social influence to believe in biological race. The reinstantiation of race with this particular group, the active encouragement to get them to reinvest in the logic of racial purity, racial distinctiveness, and the naturalness of segregation, poses significant dangers. Reassuring this group of consumers that it can pass its wealth and power through new pure white racial bloodlines represents one of the most startling aspects of the ART process. Never has the property interest in whiteness been more clear.[84]

2. Re-instantiating Racial Categories

The ART market has a second significant impact on discussions of race: it is actively creating racial definitions, but it does so in an *ad hoc* seemingly apolitical fashion that is designed to maximize profit but also cultivates racial resentment and confusion. Specifically, because there is no guidance in this area, definitions of race vary from clinic to clinic. Some gamete providers regard Arab and Middle Eastern donors as white; other ART providers treat members of these groups as being in a separate racial

[81] Unfortunately theories of genetic race are again on the rise in some quarters. The mapping of the human genome, which established that human beings shared 99.9% of the same genetic code, appeared to put genetic theories of race to rest in 2000. However, in the years since, some scientists have attempted to mine the .1% different to discover a basis for claims of genetic race. Attempts to track genes to particular geographically trapped populations are now used by some scientists to argue that genetic race exists. However, even these population mapping definitions fail to neatly map onto the social definitions of race, which vary by country and shift over time. Additionally, the genetic differences associated with particular geographically distinct populations also occur in other groups, making even narrow genetic claims about race rest on questionable foundation. For further discussion *see generally* Jennifer A. Hamilton, *Revitalizing Difference in the HapMap: Race and Contemporary Human Genetic Variation Research,* RACE PHARMACEUTICALS AND MEDICAL TECHNOLOGY 471 (2008). Lynn B. Jorde & Stephen P. Wooding, *Genetic Variation, Classification and Race,* NATURE GENETICS SUPPLEMENT S28(2004). The authors explain that "biomedical scienctists are divided in their opinions about race. Some characterize it as "biologically meaningless" or "not based on scientific evidence" whereas others advocate the use of race in medical decisions about medical treatment or the design of research studies.")

[82] ROBERTS, *SUPRA* note 21 at 261

[83] *See* WILLIAMS *SUPRA* note 21 (recognizing he widespread cultural understanding that race is not genetic but the ambivalence many feel about accepting this proposition); Almeling, *supra* note 53 at 337 (describing the way ART is re-inscribing of genetic race in the popular as a worrisome trend); Quiroga, *supra* note 26 at 147(explaining that the use of biomedical technology reproduces cultural ideologies, power relations and structural inequities) .

[84] Cheryl I. Harris, *Whiteness As Property,* 106 HARV. L. REV. 1709, 1759 (1993)

category.[85] Some gamete providers regard Jewish donors as white; other gamete providers treat Jewish persons (a religious category) as a separate racial category. Some providers appear to have made up racial and ethnic categories that nowhere else exist, such as Aztec or Mayan ethnicity.[86] To be clear, there are no consistent standards for racial and ethnic definitions in the ART industry. Manhattan Cryobank provides seven different racial/ethnic classifications for their sperm: African American or Black, Asian, Caucasian, Hispanic or Latino, Indian (Asian), Multi-ethnic, and Other. Under the "Other" category, the sperm bank provides a sole donor of Egyptian descent.[87] In contrast, the California Cryobank provides nine different classifications (American Indian or Alaska Native, Asian, Black or African American, Caucasian, East Indian, Hispanic or Latin, Middle Eastern or Arabic, Mixed or Multi-Ethnic, and Native Hawaiian or Other Pacific Islander).[88] The California Sperm Bank lists 41 different ethnic/racial categories, leaving it open as to how it will decide to sort these ethnicities into racial groupings. Gamete banks have extraordinary power to shape consumers' understandings of race as consumers sort through these materials.[89] A white donor that meets the definition of whiteness at one sperm bank may very well not meet that definition at another. For groups that are marginal whites, the understanding that certain administrative groupings arbitrarily cast them outside the circle of white racial purity can be startling.[90]

3. Racial Purity Rules

Additionally, many clinics are tacitly enforcing eugenicist notions of racial purity to sort through mixed race donors, in particular employing the "one drop" rule to disfavor donors with some African American or Black ancestry. Again, because they know race cannot be genetically transmitted, gamete banks know they are merely selling the consumer a donor that displays a certain racially-associated phenotype, a donor that has a significant probability of passing some of these phenotype-characteristics to their progeny. However, the process of genetic inheritance, even with regard to physical characteristics, is inexact and unsure. Consumers are purchasing the probability their children will have certain characteristics, but nothing is guaranteed. This results in many mixed-race people being cast outside the circle of whiteness. Administrators of gamete banks know that people with a "so-called" mixed racial

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[85] *See, e.g.*, Fairfax Cryobank, *Donor Search—5377*, https://fairfaxcryobank.com/search/searchresults.aspx (last visited Feb 23, 2018)(maternal ethnic background Brazilian-Spanish, paternal ethnic background Portuguese-Syrian. Donor categorized as "Latino," although he has "Middle Eastern and European heritage); Native Americans are treated similarly and are sometimes absorbed into the category of whiteness; CryoGam Colorado, *Donor List*, http://www.cryogam.com/donor-list (last visited Feb 23, 2018) (Donor B1026. Ethnicity listed as "Irish, Native American," but race listed as "Caucasian." Donor has brown hair and a medium skin tone).

[86] *See e.g.* Paraceo Donor Search, https://www.pacrepo.com (last visited Feb 23, 2018) (allowing donors to search for donors of Mayan or Aztec ancestry). These categories likely correspond to Mexican and Central American ancestry, but allow the bank to use higher status sounding ethnicities for their donors.

[87] Manhattan Cryobank, *Donor 274*, http://www.manhattancryobank.com/donors/?eye_color%5B%5D=&hair_color%5B%5D=&ethnicity%5B%5D=Other (last visited Feb 23, 2018)

[88] Cryobank, https://cryobank.com/ (last visited Feb 23, 2018)

[89]This approach is not followed by all sperm banks or egg donor websites, but it is particularly true of ones claiming a highly selective process. *See, e.g.*, Manhattan Sperm Bank, *Donor List*, http://www.manhattancryobank.com/donors/?eye_color%5B%5D=&hair_color%5B%5D=&ethnicity%5B%5D=Other (last visited Feb 23, 2018)

[90] See Camille Gear Rich, *Marginal Whiteness*, 98 Cal. L. Rev. 1497, 1517-1523 (2010) (explaining that many whites sit at an intersectional valence with some other low status social identity and therefore episodically experience white privilege in partial and incomplete ways)

background will have tremendous genetic variation between each individual sperm and egg cell created, and great opportunity for phenotype variance from the donor herself. Specifically, each harvest of gametes from the mixed-race donor will likely contain an egg or sperm with genetic-ethnic codes that causes it to fall into a different racial category than the other eggs or sperm from the same donor. Clinics assume this variation occurs with less frequency when the potential donor's "mixed" history is several generations old. To avoid unwanted phenotype-based surprises in the children produced, clinics are carefully screening their "white" donors to ensure there is no likelihood of recessive genes producing unwanted low-status, minority phenotype characteristics in the babies produced for white consumers.[91] In order to avoid this problem they aggressively screen out certain kinds of mixed race persons from their pool of white donors.

4. The Toxic Search for Whiteness

Gamete providers' marketing approaches aggravate white identity in three concrete ways. Whites are encouraged to view themselves as genetically different from other racial groups. Additionally, whites are encouraged to imagine themselves as similar to a eugenically-filtered slice of their community. Finally, whites are driven towards donors that comport with ideal notions of whiteness in ways that further bolster whiteness's disciplinary power. [92] Each consideration is examined in term.

Typically clinics allege that they are merely giving white consumers the genetic material to re-create themselves when they create donor catalogues, but this process of searching for sameness is already compromised by the radical pre-screening of the donor samples in the pool. The donors consumers are offered are not "average" white Americans. Rather, consumers are being invited into a catalogue of elite whiteness that celebrates whiteness in an artificial and surreal form. Indeed, because of the structure of the search process, white consumers' understanding and relationship to whiteness *and to themselves* is profoundly shaped as they sort through gametes. Again, consumers are being presented with white donors that are on average taller, more physically fit, more accomplished, and more traditionally beautiful than the general pool of whites in the United States.[93] This experience reinforces a certain inaccurate perception of whiteness and invites the consumer to imagine him or herself in this group.

Empirical data screening whites' buying patterns is difficult to come by; records of this nature are not easily accessible. However, qualitative accounts and individual stories provide telling evidence of the search for a certain kind of whiteness in the US.[94] Also foreign entities that service American consumers appear to be singularly focused on producing white children. *Cryos International*, a Denmark sperm bank with a large number of US customers, proudly boasts that it is the largest in the world. They produce 2,000 babies a year with their donors, and "almost all the donors are white, blond and blue eyed."[95]

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[91] Stepanka, *Make Money Donating Your Eggs!*, YOUTUBE https://www.youtube.com/watch?v=Is8yzODvM2U (last visited Feb. 23, 2018) (indicating that clinic asks what "your parents look like" and to provide pictures of family members)

[92] DAISY DEOMAMPO, TRANSNATIONAL REPRODUCTION: RACE, KINSHIP AND COMMERCIAL SURROGACY IN INDIA 96 (2016).

[93] Daniels & Heidt-Forsythe, *supra* note 3 at 724.

[94] *See* sources collected at note 67. *See* Almeling, *supra* note 53 at 326 (discussing strong demand for white skinned, blond donors).

[95] Sarfraz Mansour, *Come Inside the World's Largest Sperm Bank*, THE GUARDIAN (Nov. 12, 2012) https://www.theguardian.com/society/2012/nov/02/worlds-biggest-sperm-bank-denmark

Working class whites heavily use the booming fertility tourism industry in Czechoslovakia, known for providing endless quantities of cheap, anonymously donated eggs from blond women.[96] Simply put, working class whites that that cannot afford the ART process in the United States know they can journey abroad to produce white children. Foreign consumers from certain other countries show a similar preoccupation with the construction of ideal whiteness. In Israel, for example, mothers reportedly have tried to sift through the Romanian donors they are given easy access to by state-affiliated marketers to avoid donors that are "too dark" or have "Jewish noses."[97] While the state of Israel has its own view of whiteness, its citizens seem to disagree as to what characteristics are preferred within that construct. Oddly, in Spain Croatian sperm is disfavored, but it is considered a perfectly acceptable form of whiteness in the United States.

Moreover, American gamete banks sometimes explicitly admit that they are inviting their white consumers to purchase a better version of whiteness, rather than simply replicating themselves. After a gesture to the typical consumer's desire for aesthetic sameness, websites clearly invite one to look beyond one's partner. They suggest that one can look to an extended family member or one can shop for gametes based on a desired "kind of look."[98] One buyer likened the donor-selection process to looking at products on Amazon. Consumers also are in general encouraged by gamete banks to shop for genetic superiors, donors who possess traits that give the child an advantage in the world, including greater physical attractiveness.[99] Therefore, while there is a professed desire for sameness, there is also ample opportunity for white consumers to engage in self-deception or cherry-picking between family members when setting an aesthetic baseline.[100] If a family has a single blond family member, or one of the consumers was blond as a child, it is easy to see how suddenly blond donors seem credible.

On the whole, white consumers' choices during this professed search for "aesthetic sameness" suggest that, consciously or unconsciously, consumers are reacting to anxiety about marginal whiteness.[101] Specifically, they understand that there are more and less privileged versions of white identity. ART allows these parents to buy their children the ability to avoid certain problems within this privileged identity category. Traits to be avoided may include relatively inconsequential variables like having a poor singing voice or teenage acne. Other features more clearly relate to current patterns of social

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[96] *See generally*, AMY SPEIER, FERTILITY HOLIDAYS: IVF TOURISM AND THE REPRODUCTION OF WHITENESS (2016)

[97] KATHARINA SCHRAMM, DAVID SKINNER, RICHARD ROTTENBURG, IDENTITY POLITICS AND THE NEW GENETICS, RECREATING CATEGORIES OF DIFFERENCE AND BELONGING 86 (2012) (discussing the way Romanian eggs are used to reinscribe Jewish persons heritage as Slavic or European). In Israeli fertility clinic consumers have expressed concern about the biological source for the eggs being too dark or looking too Jewish.

[98] "This is a highly personal question. Do you want to have a child who resembles you or your partner, or other members of your family? Is there a "look" you are attracted to**?** Or you just want a healthy baby, and don't care if he grows up to be short or tall, or otherwise different from you?" WIN Fertility, *Choosing Donor Sperm—7 Things You Should Know*, http://www.winfertility.com/choosing-donor-sperm-7-things-know/ (emphasis added) (last visited Feb. 23, 2018)

[99] "Our goal is to ensure that you are able to choose from an exceptionally large number of sperm donors who are high quality people." See Fairfax Cryobank, *What Physical Characteristics Do You Prefer the Donor Have?,* https://fairfaxcryobank.com/how-to-choose-a-sperm-donor (last visited Feb. 23, 2018)

[100] Mansour, *Come Inside* at 2 (sperm purchaser joking that "people see what they want to see" when they look at her children)

[101] See generally Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497 (2010) (discussing ways in which the experience of whiteness is fractured for some groups by their possession of features perceived to be low status, including ethnicity and sexual orientation).

subordination, including looking too "ethnic," or failing to conform with traditionally idealized gender norms. Whites are disciplined or taught by this experience about what types of whiteness are valued and what features are important. When whites engage in this search process, typically, they enter without full appreciation of the stickiness of this strictly constructed eugenics-based world. They emerge from the process with their racial views shaped more than they realize, and the long-term effect of this intense racial experience is disturbingly unclear.

5. Anti-miscegenation Ethos

Clinics and providers also in various ways discourage monoracial families from purchasing gametes from another racial group. While there is no legal prohibition on cross-racial matching in the United States, many consumers report barriers, either when purchasing gametes or when working with ART doctors. Indeed, certain sperm banks in their marketing materials make it clear that cross-racial selection is a practice that is fraught with danger. When gamete banks engage in this kind of messaging, they encourage essentialized notions of race and socialize consumers to expect pain when engaging in race mixing. In some cases when the anti-miscegenation message is too explicit, concerns are raised. A Canadian sperm bank received international attention for being too explicit in warning against miscegenation; a doctor employed there informed his white client that he would not assist her in "making rainbow babies" to satisfy her whims.[102] And while explicit legal prohibitions on race mixing are now rare in foreign countries, there is ample evidence that multiple countries did have race-based restrictions in the past and continue to implement them as a *de facto* matter in certain jurisdictions.[103]

To explore these disincentivizing marketing messages in the US, one can examine sperm-bank marketing materials. The Sperm Bank of California issues particularly extreme and clear warnings, devoting an entire webpage to the problems that result when a monoracial family considers a donor that is not from their racial group. [104] The clinic explains that its views are based on thirty years of

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[102] Jessica, Barrett, *No 'rainbow families': Ethnic donor stipulation at fertility centre 'floors' local woman,* CALGARY HERALD (Jul 25, 2014) http://www.calgaryherald.com/news/calgary/rainbow+families+ethnic+donor+stipulation+fertility+centre+floors+local+woman/10063343/story.html (documenting experience of white woman denied access to sperm of a different race citing a race matching policy it had in place since 1980)

[103] England explicitly prohibited cross racial matches; it subsequently changed its legislation to discourage matches that cross ethnic lines. *See* Human Fertilisation and Embryology Act, 2008, c. 22 (Eng.). In Spain, by law, parents are matched by doctors with eligible donors based on the parents' physical "type"; this "type" matching does not, absent special circumstances, permit selection of ova or sperm from a different racial group than the parents. *See* Law on Assisted Human Reproduction Techniques, http://www.boe.es/buscar/doc.php?id=BOE-A-2006-9292 (last visited Feb 12, 2018) Canada requires that donors and families be matched using a "best interest of the child" standard. Under this standard cross-racial matches are disfavored. Previously they were prohibited in Canada under the Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.). Finally, some jurisdictions, like Turkey, wholly forbid foreign gametes to be donated or sold to their citizens and can even institute criminal penalties for those that engage in reproductive tourism. See Zeynep B Gurtin, *Banning Reproductive Travel: Turkey's ART Legislation and Third-party Assisted Reproduction* 23 REPRODUCTIVE BIOMEDICINE ONLINE 555–564 (2011) (discussing Turkey's "Legislation Concerning Assisted Reproduction Treatment Practices and Centers") Often these restrictions have a religious basis but the consequences for the racial and ethnic stock of the country are quite clear.

[104] There is great variation in anti-miscegenation messaging. Some sperm banks do nothing more than privilege race as a selection criteria and then discuss the "natural" impulse to choose someone that looks like you or your family. *See* Seattle Sperm Bank, How To Pick A Sperm Donor, https://www.seattlespermbank.com/how-to-choose-the-right-sperm-donor/ Others are more explicit about the psychological harm a child will face when he "looks different" from the family. *How To Find a Sperm Donor: Tips for Choosing the Right One: Invitra: The Leading International Community to Help You Through IVF* https://www.invitra.com/donor-selection/#race-and-ethnicity

experience in the industry. The three primary reasons to avoid this practice, they explain are: 1) the need for family resemblance; 2) the child's desire for belongingness and 3) white parents' inability to connect with or understand the minority child's culture and/or her experiences of discrimination. Anecdotal accounts confirm that in many cases doctors or clinics raise warnings against crossing racial lines. African American women, in particular, report being denied access to sperm designated as a "different" racial group. However, African American consumers are the consumers most likely to cross racial-lines to find donors because gamete providers have very few African American donors and often these donors do not have the same physical features as the customers requesting gametes.

As one examines the justifications providers offer to discourage race mixing, one notices that they rest on several assumptions about race relations in the United States that seem significant. First, administrators at the California Sperm Bank appear to assume that mixed race children will not feel a sense of belongingness in their families. They argue that most children will crave an environment that makes them feel similar. This assumption is based on another assumption: that there is no one in the consumer's wider family that is of a different race. It also presumes that the family lives in a white habitus, including neighborhood and social circle; the guidance assumes there are no other mixed-race families in the child's community.

Cultural arguments also play a role. To further discourage consumers interested in cross-racial donation, The California Sperm Bank shares the insights of a white family that considered Middle Eastern sperm because the donor's other non-racial characteristics better matched with what the family desired. After considering the best interests of the potential child, the family decided against choosing "different race" sperm. As the mother explained, "it would require us to acknowledge the heritage and cultural background that would belong to our child, but not us." [105] Here the clinic uses a quote that conflates biology or genetics with culture, even as it knows there is no way to genetically transmit culture or race. The sperm bank strategically uses the experiences of families with transracial adoptees to provide research in support of its views. Yet a transracially-adopted child's experience will be different than a mixed-race child produced through an ART procedure. The child produced through ART typically will have some genetic connection to the parents, and often far less of a basis for claims of physical difference. Moreover, children actually born in a different country and adopted in their tender years may feel a strong bond with their place of origin and have a more concrete connection to a particular cultural community. Most concerning, the California Sperm Bank warns white parents that they will not have the tools and understanding necessary to help their children negotiate a discriminatory world. This observation is pessimistic in the extreme. It: 1) assumes discrimination exists in most communities; 2) assumes most white families have been happily insulated from and ignorant of discrimination dynamics; and 3) assumes these families will be incapable or unwilling to learn how to confidently defend children of color from discrimination.

In summary, gamete providers sometimes erect formal and informal barriers to gamete consumers looking beyond racial boundaries; their behavior mirrors more explicit legislative blocks in other countries. The resistance to cross-racial matching rests on an essentialized understanding of

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The webpage for the organization explains, "As it happens with race and ethnicity, resemblance is seen as a signal of kinship. A child who shares physical resemblance with his parents and the people surrounding him is more likely to create a feeling of connectedness instead of unfamiliarity as he grows up."

[105] *See* Sperm Bank of California, *How To Choose Your Donor*, https://www.thespermbankofca.org/tsbcfile/choosing-ethnicity-my-donor

race that reduces culture to biology in indefensible ways and further assumes racial segregation and monoracial families as the norm.[106] Even banks that do not explicitly direct people away from using different race samples have opportunities to do so in informal interactions. Instead of facilitating cross racial exchange, discussing any number of potentially valid reasons that a person might look across racial lines, they remain focused on emphasizing distinctions between racial categories. Concerns about this essentialized approach to race grow even more acute in the era of elective race,[107] a consideration explored in more detail in the section that follows.

D. Concerns About Packaging Race in the Era of Elective Race

As I have elsewhere explained, the United States is contending with the rise of a new discursive model for racial understandings called elective race. [108] This section more closely examines the racial identification and racial enforcement rules used by ART clinics to highlight the problems they pose in light of current discursive shifts in America's discussion of racial equality.

In the era of elective race, various institutions, including government authorities and market players, are being asked to recognize the strong dignity interest individuals claim to have in determining their public racial identity – the racial identity they are socially recognized as having by others. [109] The ART market honors this dignitary self-interest by allowing sperm and egg donors to racially self-identify. Yet the ART market, first and foremost, is in the business of selling a certain promised phenotype – the physical characteristics that will ensure that one is socially recognized by others as being from a particular racial community. The next round of conflicts in the ART market will pit the individual donor's right to voluntary self-identification against the consumer's right to expect clearly-labeled racial product that produces as given racial phenotype. To be clear, at present clinics routinely request donor self-identification information as a way of ascertaining whether the donor has a certain phenotype. Yet the donor's self-identification choice and phenotype may not consistently match. When clinics intervene to re-categorize and repackage donors to ensure they are selected, they violate both the self-identification rights of the donor and may ultimately deliver a product to the consumer that is not racially labeled in a logical or defensible fashion. This point deserves further discussion.

There are two ways a person is racialized in society: involuntary ascription and voluntary ascription. Involuntary ascription occurs when one is socially recognized as a member of a given racial group, sometimes without one's knowledge or consent. The most common trigger for "involuntary" ascription is physical characteristics. These characteristics are socially recognized as being linked with a particular racial or ethnic group and result in an individual being ascribed a particular racial identity. Each person in each community has a particular racial lexicon that causes him to associate particular physical features with a given group. Sometimes his lexicon will also include so-called voluntary behavior, (speaking styles, modes of dress or presentation) that also cause him to assign persons to a particular

[106] The California Sperm Bank seem to assume that the only way to avoid dangerous commodification is to reaffirm the separateness and distinctiveness of groups, rather than encouraging responsible selection. There is the risk consumers will eroticize gamete donors of other ethnicities in dangerous ways. At least one sperm bank warned that consumers were seeking Indian sperm because they had lived in India for a time and wanted to memorialize their connection to that particular location.

[107] Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self Identification*, 102 GEO. L. J. 1501(2014)

[108] *Id*.

[109] *Id*. at 1512-1520.

racial group. However, in the United States, and in most other countries, phenotype – physical characteristics remain the primary way individuals are racially identified.

The ART market, by encouraging consumers to browse donor profiles and choose physical characteristics is allowing people to shop for racial phenotypes that promise a certain kind of involuntary ascription. They are promising consumers that they can purchase sperm or eggs that will produce children that automatically will "involuntarily" be identified as members of a particular racial group. What consumers are less aware of is that the characteristics presented in donor pictures are not guaranteed. While they know that the donor's genes will mix with their own, they ask few questions about how strongly linked the donor's physical appearance is with the genetic code in his or her sperm or eggs. What consumers are actually buying in the market is far less sure than it seems. Instead they are playing with genetic probabilities in a process in which the precise genes that allegedly transmit many phenotype features have not yet been identified, and the transmission triggers are unknown. Moreover, each sperm or egg, individually, will carry different genetic code with different material from the donor. To be clear, for some "white" Americans, not all of their sperm would be coded as white. If they have any mixed heritage, some portion of the sample may have higher percentages of DNA linked with regions of the world that are associated with communities of color.

Voluntary ascription, by contrast, involves any behavior that one intends or understands will cause others to identify you as belonging to a particular racial group. These voluntary signaling codes include dress, ways of behaving and ways of speaking. One of the most important voluntary ascriptive behaviors in the modern era is what I call: documentary race.[110] Documentary race is visible when a person consciously checks off a box on a racial identification form or racially identifies herself during an intake procedure. Documentary race is what sperm and egg providers use to categorize their donors. When a person approaches a gamete bank with the intention of donating, he is asked to fill out a form and go through an interview in which he is asked to identify by race. There is no standard process for the collection of this material. Some banks merely ask for current identification; others inquire whether one has any mixed heritage for three generations past. Other banks try to fine tune their judgments by asking about ethnicity. The goal is to find pure subjects that they can market easily.

Documentary race has taken on increased importance in contemporary society, in part, I argue because of the growing number of mixed race persons in the United States. Indeed, multiracial Americans have played a particularly strong role in the rise of elective race, as they argued they had a dignity interest in ensuring their mixed backgrounds were fairly represented in social life. We also see immigration from countries that have racial categorization paradigms that dramatically differ from our own. When gamete banks ask donors for racial identification information, they run headlong into these new forces. The donor feels a strong need to be able to accurately identify him or herself racially.[111] Some will view this state of affairs without concern. First, they would argue, people applying as donors know what traits customers are actually looking for; they will not risk identifying as white if they are likely to transmit minority characteristics. Also, as explained above, a gamete bank retains the discretion to reclassify donors that

[110] *See Rich*, supra note 107 at 1514-1515.

[111] Rosely Gomes-Costa, *Racial Classification Regarding Semen Donor Selection in Brazil, 7* DEVELOPING WORLD BIOETHICS 104-111 (2007) (arguing clinic's power to reclassify shows "disrespect for the ethical principles of autonomy, privacy and equality); Quiroga, *supra* note 26 at 149 (noting that clinic personnel do not explicitly display eugenicist attitudes but are "often oblivious to the subtle ways in which they perpetuate racial classification systems.")

identify as white but are apparently mixed race. The clinic certainly can reserve the right to reclassify an individual when he does not disclose that he has a minority relative or because he physically appears to be mixed. [112] However, neither of these assurances should prove particularly reassuring as they: 1) do not take account of contemporary elective race understandings; 2) freeze a certain interpretation of whiteness and attempt to enforce this understanding and 3) confirm that sperm banks and donors will be engaged in practices that smack of eugenicist tendencies and the enforcement of the historically antiquated "one drop" rule. [113]

Also, we know that in the era of elective race mixed race persons with white heritage will sometimes identify as white with appropriate triggers. These triggers exist in the ART market. There are strong economic incentives to identify as white when being screened as a donor; stocks are 80% white and minority donors are routinely turned down because there is far less demand for their gametes. The donor with one Native American or Asian grandmother, who appears white, will have strong reasons to classify herself as "white." The features potentially produced by her egg, however, may substantially deviate from her current physical appearance. Donors themselves often have little understanding of genetics. They merely know that they carry genes that create a probability of transmitting certain desired characteristics. They do not know when this risk is reduced to an effectively negligible level. Does having one minority grandparent prevent one from identifying as white? Donors cannot be expected to understand this risk and moreover, they might be offended by whatever standard the clinic would use to mitigate these risks.

Second, it provides little reassurance to allow gamete banks to make final determinations about race. The standards individual clinics use are not consistent at a single clinic or between clinics, nor are they transparent. There is no written guidance on these questions. Instead, individual intake workers are called upon to make choices about the mixed background and appearance of donors.[114] Again, a donor's racial identity has economic consequences. Also, beyond the monetary considerations, one can imagine the dignitary assault a so-called "white" donor experiences when she learns her Asian grandmother now causes her to be classified as Asian.[115] She similarly might be offended if she identifies as Latino and finds herself reclassified as white.[116] She might be even more offended if she learns that the clinic's decision to racially reclassify her effectively ensures that her samples are rarely seen by Latino families and are only seen by white ones.

ART suits in the era of elective race are likely to take a number of forms. The first class of suits could sound in the nature of fraud and would involve purchasers that buy sperm or eggs that produce a child that does not phenotypically match the donor's appearance. This group could involve mixed race donors that periodically have chosen to identify as white or minority and have chosen, because of financial

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[112] Gomes-Costa, *supra* note111 at 3 (noting clinic personnel's reclassification of race is "conditioned by their own criteria of racial classification" and these classification issues often work side by side with racism).

[113] Fogg-Davis, *supra* note 13 at 16 (describing American racial categories as "ad hoc" and noting discretion of sperm banks intake workers to place people in racial categories)

[114] *See, e.g.,* BioGenetics Corporation. Available Donor List. http://www.sperm1.com/biogenetics/donor_list.html
For Donor 392 and 566, father and mother's ethnic origin was marked as "Puerto Rican," but the donor's race was recorded as "Caucasian." Similarly, Donor 575 identified as ethnically Brazilian and Portuguese, but the clinic categorized the individual as "Caucasian."

[115] *Cf.* Gomes-Costa, *supra* note 111at at 5 (documenting Brazilian clinic director's statement that Caucasian donors that visually appear Arab will be characterized as Arab, despite the Caucasian designation. In Brazil persons with apparent mulatto blood can also be re-characterized).

[116] See examples at Footnote 105.

incentives, to identify as white for the gamete-donation process. In this group of cases, the donor's gametes would individually vary a great deal, and therefore may produce children that do not appear to be phenotypically white. Does the gamete bank have a claim against the mixed-race donor for deceit? Does the sperm bank have a right to require that donor to identify as minority or must it respect her claim of whiteness? A couple may contract for eggs from a mixed-race woman with blond hair and blue eyes, and have a first child that matches that donor's phenotype. They may order eggs again from this individual and produce a child that appears visibly black. Should the purchasers have a claim against the gamete bank for fraud or negligence if this information is not known? Should the bank have a claim against the donor for fraud if he or she fails to properly disclose her mixed-race heritage? What if the purchaser has recessive genes that when combined with the donor's DNA cause these unexpected minority phenotype features to emerge?

These problems do not abate if banks begin to ask more questions. Instead they will require private organizations to create their own rules of racial identification and make assessments about who "counts" as Black, Latino, white or Asian under the bank's racial identification rules. Courts might still find themselves in the position of assessing blood lines if family history is used. Alternatively, gamete banks may turn to genetic testing, prescreening their donors. However, as Part A explains, this creates more problems than it answers for individual gametes all contain different combinations of genetic code from the donor. A mixed-race person may produce sperm or eggs in the same collection that are technically of different races.

The litigation risk posed by racial purity rules have real implications in the era of elective race, making it clear that clinic screening practices are in noticeable dis-alignment with current racial norms. It should strike us as concerning that clinic intake personnel would be changing the racial designations of donors or disqualifying otherwise qualified donors merely because of their chosen designation. Indeed, they have no basis for doing so as *race has no biological foundation*. The gamete banks' attempts to negotiate the discrepancy between phenotype and identification practices draws our attention to the ways in which the item being sold in the sperm market is at bottom a social construction. Ironically, these rules go without challenge because the ART intake process is not transparent and persons inclined to sue are given no reason why their samples were rejected. Those in the small group of chosen donors have no incentive to challenge how their materials are racially categorized; indeed, they may not even know their samples have been re-designated as associated with a different racial group. We cannot know if litigation will trigger review of these processes, but government still has a role to play. For the fast and easy exchanges ART marketers are making between racial categories raise the specter of consumer confusion, disappointment and alienation in ways that may complicate the operation of other administrative regimes that depend on racial identification.

The ART industry also has a First Amendment commercial speech problem. Government has long exercised its authority to regulate commercial speech that is false or materially misleading.[117] These interests are clearly at stake in the ART market where questionable representations are being made about the products being sold. The representations ART providers make about race are materially misleading if

[117] Commercial speech is defined as any speech by a producer which proposes a transaction or characterizes a product intended to be sold, as part of an effort to induce the product's purchase. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495-97 (1996)(discussing government's interest in regulating commercial speech that is false or materially misleading) *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (same) .

not patently false. The simple exchange of racial phenotype promised by sperm and egg banks is not so simple as it appears. First, the websites make no mention of the ways in which racial categorization practices vary between ART sellers or that sellers exercise discretion in making racial categorization decisions. Their designations often deviate from the categories used by US administrative regimes. Second, they suggest that race is biologically transmitted by genes, similar to eye color or hair. This is patently false; race is determined by personal identification and social reactions to a given phenotype. Additionally, the precise mechanisms for transmitting particular phenotype-traits are unknown. Last, clinics fail to disclose that that the genetic load of a donor is not consistently carried in individual gametes: sperm or eggs from the same person vary from gamete to gamete. We cannot expect consumers to know these facts and the seductive approach clinics rely on, grouping race with other non-transmittable characteristics (such as a love of poetry) causes significant social harm.

Importantly, ART providers knowingly seduce consumers into believing these biological fictions about race and phenotype. They invite consumers to check off the precise characteristics they are searching for in an attempt to allow them to shop for gametes that will deliver particular characteristics. Donors are at some point presented with a disclaimer during the search process that generally explains that a donor may not transmit the characteristics advertised in his profile to his progeny. Yet this disclaimer is typically so general and so subtle that it cannot cancel out the various advertising mechanisms that encourage parties to believe they are securing particular traits. Perhaps ART clinics are allowed to engage in these misleading practices because they are reconstructing for the consumer the same fictions that obtain when one assesses various partners to identify the person with whom one wants to create a child. Many people will assess the genetic potential of a partner if we anticipate having a child with that given partner. However, the fictions we entertain in real life take on a different tenor when they are mobilized for commercial purposes.[118] More honesty is required. We will return to the regulatory possibilities created by commercial speech justifications in Part IV.

Part II - Purchasing Racial Essence: Understanding the Benefit of the Bargain

Sometimes the value of what one has contracted for only becomes clear when a contract fails and one loses the benefit of her bargain. Part II examines plaintiffs' accounts of loss in ART lawsuits over racial mistakes, in an attempt to more deeply probe what it is that consumers believe they have secured when they purchase gametes of a particular race. The article drills down to uncover the foundations of some of the "innocent" racial preferences consumers currently express when making purchases in the ART market. Part II paints a disappointing if not frightening picture, as it reveals that the American ART consumer is fundamentally consumed with family status and social signaling, colorism, and a reluctance to honestly engage with the presence of racism in society. To be clear, rather than raising biological arguments about impurity or admixture, or different genetic code, ART consumers in racial mix-up cases singularly focus on the social cost of having a black relative. Even those interests that appear to be potentially severable from our racially discriminatory past are rooted in regressive notions of masculinity and femininity.

[118] Genetic testing kits offer readings of an individual's genetic code that are further interpreted based on a subjective assessment of tribal movements during various historical periods. Consequently, the ethnic footprint one company identifies in a subject's genetic sample may not match the genetic footprint another company derives from the identical sample. For further discussion of genetic testing kits see generally Catherine Bliss, *The Marketization of Identity Politics*, 47 SOCIOLOGY 1011-1025 (2013)

A. Understanding the Monoracial Family Norm

As sociologist Sarah Franklin has observed, given the prices charged for gametes and ART procedures by the American ART industry, it is abundantly clear that something far more valuable than genetic material is being sold.[119] Self-replication, self-realization and new forms of intimate connection are all being negotiated in this process.[120] What the ART racial mix-up cases reveal is that ART is also intended to quietly assist in the performance of ideal family life. Parties complaints in racial mix up cases are not about blood lines, racial purity or genes. Instead, parties claims in the racial mix-up cases focus on the symbolic tragedy a brown child causes for a white family as they move through public life. Several scholars have discussed the role race plays in the social signaling process families engage in when they enter public space. Together their work renders visible the social sanctions and benefits that make white ART consumers profoundly preoccupied with maintaining the white monoracial family norm. In the racial mix-up cases we are given an opportunity to glimpse this larger regime of disciplinary power based on ideal family performance. This regime inflicts pain for violating the monoracial expectation, and in this way ensures whiteness remains a stable and socially advantaged racial category.

In her article, *Staging the Family*, Clare Huntington explains how intimate collectives depend on variety of strategic, public behavioral performances, in compliance with certain cultural norms, to communicate their status as a family. [121] While her work focuses on gender norms and norms associated with a nuclear family structure, she notes that gendered family performances also contain a racial dimension. Specifically, she acknowledges that families' symbolic "performative" behaviors in public space have an intersectional valence: families are typically performing norms that reflect white heteronormativity and traditional notions of white masculinity and white femininity, as these constructs reflect certain understandings about financial solvency, independence and caretaking. Huntington's goal is to demonstrate how these gender norms and family structure norms find their way into the law, but much of her analysis paints a picture of the important social dimensions of these practices, as they effect a kind of disciplinary power over family members. [122] This discipline takes the form of anxiety about any difference that meaningfully diverges from expected family norms.

While not framed as a discussion of performativity, Angela Onwuachi-Willig's account of interraciality discrimination also provides insight into the social sanctions, overt and subtle, that effectively punish families that violate the monoracial norm. In other work I have attempted to precisely

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[119] SARAH FRANKLIN, EMBODIED PROGRESS: A CULTURAL ACCOUNT OF ASSISTED REPRODUCTION 163 (1997).

[120] *But see* Quiroga *supra* note 26 at 147 *('cultural beliefs about the race, purity and heredity that* shape the white heteropatriarchal kinship model are the driving force behind ART")

[121] Huntington, *supra* note 2, at 589. Huntington focuses on gender, explaining the ways in which families signal conformity with marital forms, nuclear family norms and gender construction norms as a way of establishing status in a community. The law turn responds to and reflects these idealized norms and expected performances in either in legislative provisions or by interpreting existing legislation or common law rules to conform with these gender and family norms.

[122] *Id*. at 589-90. Specifically, Huntington shows that judges decide tough cases in ways that comply with gender and family structure norms, stretching common law or legislative provisions in the process. The nuclear family is a particular seductive norm. Although only 19.6% of American families actually live in two parent homes with biologically related children, the cultural salience of this form still exerts extraordinary disciplinary power over those that are unable to comply, giving them lower status and making them question their legitimacy in various ways. Queer families, divorced-blended families, and unmarried couples an effort at preserving an air of normalcy in the two parent with child model.

catalogue these sanctions and their social effects. These sanctions include being subject to base negative animus, being subject to stereotyping, experiencing functional blackness - in which the family is treated as having the same lower status as a black family, as well as being commodified by others for diversity purposes. The most common sanction the family faces is the use of the monoracial gaze – the refusal of people in public settings to recognize the connection between members of a mixed-race family unit until explicitly instructed to do so. [123] By contrast, compliance with the monoracial norm brings forms of pleasure from inverse social dynamics. Families that comply experience social invisibility in spaces that may shield them from government attention. More generally they will be met with particularly high positive regard.

The dynamics Huntington and Onwuachi-Willig describe should be viewed as part of a larger "intragroup" esteem system, as described by Richard McAdams[124]. For the positive social sanction received by families that conform to the monoracial norm are effectively a kind of racial "status" payment that, as McAdams explains, is part of a regime for the maintenance of white privilege. While esteem payments appear to be less effective in maintaining white privilege in some areas of social life, they appear to still be powerful in maintaining the monoracial family. Rates of cross racial marriage in the US remain quite low. Whites remain the group least likely to marry outside of their own racial group.[125] Recent political events have created a context in which these intra-group esteem payments are more explicitly discussed by some whites and are more visible. What the racial mix-up cases reveal, is that these esteem payments may be a powerful force in the lives of seemingly "progressive" white families as well.

With this disciplinary regime in mind we will examine the various harm constructs presented in the ART racial-mistake cases. The losses include: (1) loss of aesthetic sameness (2) loss of family privacy; (3) anxieties related to expected cultural difference; and (4) anxieties regarding possible exposure to racial discrimination. Importantly, as we consider the norm-setting function law plays in protecting against injuries or compensating forms of harm, it is worth considering whether any of these fears are worthy of legal concern. As we will see, each of these injuries is tied in various ways to the status payment regime that McAdams explains maintains whiteness as a socially privileged category.

Understandably the number of ART racial mistake cases that are publicly available is small. Sperm banks are not required to separately record or keep track of these incidents; they have strong incentives to settle these claims quickly to avoid negative publicity. [126] Also, white parents violate

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[123] Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*, 127 HARV. L. REV. 1353-1359 (2014)

[124] Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1029 - 1030 (1995).

[125] Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 228 (2004) *(explaining that on average only* about thirteen percent of American marriages involve persons of different races). Whites were the group least likely to marry outside of their group. *Id*. at 228–29.

[126] In *Perry-Rogers v. Fasano*, a fertility clinic mistakenly implanted plaintiff African American couple's embryo into defendant Caucasian mother's uterus along with Caucasian embryo. The court granted full custody of the resulting African American child to the African American parents and denied visitation to the white parents. XYZ Bender, Genes, *Parents, and Assisted Reproductive Technologies: Arts, Mistakes*, SEX, RACE, & (AND) LAW 12 COLUM. J. GENDER & L. 1, 76 (2003)

colorblindness norms in extreme ways when they publicly file suit to complain about bearing a mixed-race child. However, public records show that at least five cases have been filed in the US.[127] Many cases have settled, a result which prevents us from fully knowing how these parents experienced the losses or injuries in their cases. The two most famous cases *Cramblett v. Midwestern Sperm Bank*, and *Andrews v. Keltz*, provide us with a window into performance of the monoracial family and it's expected benefits. Because the number of cases covering this issue is particularly small, I closely read the complaints that were filed and looked for confirmation of the sentiments expressed in other places. These sources included ART guidance materials, op-eds, blog postings and other spaces where ART consumers would more openly and honestly express their anxieties and reservations.

The first published case on this issue, *Andrews v. Keltz*,[128] was brought in 2007 by a New York couple against a New York sperm bank. Plaintiffs Nancy Andrews (a Dominican woman with "skin coloration and facial characteristics typical of that region") and her husband (a man the court described as Caucasian), sued a sperm bank for allegedly impregnating Ms. Andrews with sperm from someone other than her husband. The couple recognized the error because they concluded that their child had "skin, facial and hair characteristics more typical of African, or African–American descent." When Ms. Andrews questioned the sperm bank about this "abnormality" her doctor reported that it was normal and the child would "get lighter over time".[129] Concerned, the couple purchased an at home DNA kit and discovered the child was not genetically related to Ms. Andrews husband. Although the complaint alleged loss because of the anxiety associated with not knowing what had become of Mr. Andrews' sperm, and whether it had been used by another party, much of the complaint focused on the racial mistake of implanting Ms. Andrews with sperm from an obviously black donor, resulting in a brown child. The couple's claims sounded primarily in negligence and fraud, alleging loss both from not having a child genetically-related to both of them and one marked as racially different in prominent ways.

The second case with publicly available materials is *Cramblett v. Midwestern Sperm Bank*, discussed at the start of the article. Again, Cramblett raised a variety of tort and contract claims, alleging that she had been injured by the mix-up in the sperm samples at the Midwestern Sperm clinic- a mix-up that resulted in her giving birth to a brown child. [130] Her complaint can be distinguished from the *Andrews*

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[127] *See Cramblett*, note 1. See also *Andrews v. Keltz*, 838 N.Y.S.2d 363 (dismissing biracial couple's negligence claims based on impregnation of mother with sperm from African American donor); *Perry-Rogers v. Fasano,* 96 N.Y.2d 712, 754 N.E.2d 199 (N.Y. 2001) (family with twins including one black child required to give back to black family) ; Quiroga, *supra* note 26 at 143 (describing clinic director's attempt to get African American client Laura Howard to get abortion after being impregnated with white sperm) *White Couple Have Black Twins Through IVF Error The Guardian* (discussing two cases, one American and one Dutch in which white family is accidentally given "Black" sperm) . Additionally there have been reports of cases from overseas. *Court Dismisses Appeal Over IVF Mix-up,* Channel News Asia (March 20, 2017). (discussing Chinese- Singaporean woman and German Caucasian man's suit over mistaken implantation of Indian sperm resulting in visibly "dark" mixed race child) The court dismissed their claim for damages based on lack of "genetic affinity" on public policy grounds. Because these cases are likely settled quickly to avoid negative publicity and clinics are not required to keep records of these mistakes, it is difficult to assess how common this problem is at present.

[128] *Andrews*, 838 N.Y.S.2d 363

[129] *Andrews'* affidavit, ¶ 11.

[130] Specifically, Cramblett raised breach of warranty, breach of contract, negligence and gross negligence claims in her Second Amendment complaint. An earlier version of the complaint alleged wrongful birth, but was dismissed for failure to state a claim. The language of Cramblett's complaint changed to clearly indicate that she valued her child but faced new difficulties she did not anticipate. As Cramblett explained, the birth of her mixed race child had "given rise to numerous challenges and external pressures associated with an unplanned transracial parent child relationship for which Cramblett was not and is not prepared." *See Cramblett v. Midwestern Sperm Bank*, No 16-C 4553 at 1 (January 27, 2017) (discussing First Complaint at ¶16).

complaint because it indicates more clearly the obvious love she has for her child. However, the complaint is also notable for the detailed list of burdens and costs associated with raising a mixed race child, arguing that she should be compensated because her costs were far greater than if she had been given the monoracial family she wanted.[131] Among the injuries she alleged were moving expenses, because she lived in a nearly all white community that had elements of prejudice, family alienation because members of her family also might subject the child to discrimination, costs associated with exposing the child to the child's culture and costs for haircare. Cramblett also complained that she would be forced to enter majority black spaces (where she allegedly was not welcome) in order to secure various things she believed she needed for her child.[132] As one sorts through the two complaints, common themes rise to the surface, issues normally only discussed in private fora and hushed whispers among ART clients.

B. The Loss of Racial Aesthetic Sameness

Both Cramblett and Andrews allege injury because the resulting child in each case did not look like the members of the couple that had sought ART services. Indeed, this concern about aesthetic sameness is quite common in ART cases as well as online fora and other spaces where these concerns are raised. Consumers worry that the mixed-race child will not "look like" her parents and be subject to public sanction. The Andrews plaintiffs specifically complained about the *public* nature of their injury. Cramblett similarly bemoaned the loss of the blond blue-eyed child she had contracted for, noting that her family had intended to use the same donor again, to ensure that all of the children looked like her and her partner.

The court in *Cramblett* does not reach a substantive judgment on this issue, but the *Andrews* Court considers the issue of aesthetic sameness more squarely Specifically, the court ruled that bearing an unexpected child of color in and of itself could *not* be a source of injury in an ART case. Rather, the court explained, one cannot be injured by giving birth to a healthy child. The Andrews court explained "it is a fundamental principle of Anglo–American tort law that an act contrary to law, which does not result in legal harm—*injuria absque damnum*—is not actionable and does not give rise to any claim or cause (citations omitted)." The judge explained that "... [t]his court has recognized the 'very nearly uniform high value' which the law and mankind have placed upon human life." Consequently, the court explained "... it cannot be said, as a matter of public policy, that the birth of a healthy child constitutes a harm cognizable at law." In short, for public policy reasons courts typically reject such claims, as they will not entertain the notion that any child is unwanted. Even in cases of ineffective sterilization or abortion, the court explained, the resulting child cannot be a source of damages. The court then proceeded to explain that even *diseased* children produced through reproductive care errors could not be a source of damages in that jurisdiction, except for specific kinds of harm inflicted during delivery. Importantly, this decision plays a key performative role for the court, allowing it to adopt both a pro-life and race-blind position in the decision, but one that seems profoundly naïve in terms of contemporary social conditions.

The *Andrews* Court missed a key opportunity here, as it could have more directly addressed the social sanctions mixed race families face in public life. For it is clear from the Andrews' complaints about the "darkness" of the child that they are primarily concerned about the impact a visibly brown child will

[131] First Complaint at ¶¶ 24-26

[132] Id.

have on the family's public life. Indeed, in every "racial mix up case" I reviewed, formal and informal, litigated or settled, the parties' primary complaint about racial admixture was based on producing a child that was a different color than the parents.[133] Parents in the ART cases are mainly focused on colorism, not aesthetic similarity. These parents recognize that a brown child will decrease the status of the family, a dignity assault they would like avoid. These complaints signal the emergence of a modern form of discrimination may take hold in the United States as it becomes more of a mixed-race nation. The United States may be headed towards the same racial-fate as many Latin American countries. It may become a nation of mixed-race people that still sanctions anyone that has brown skin.[134] Instead of equality we will usher in a new world of near-white privilege, where brown children and families are subject to discrimination and light children and families are not. To be clear, ART consumers in racial mix-up scenarios are fundamentally preoccupied with brownness. *Other indicia of potential aesthetic sameness are irrelevant when a white family is presented with an ART-produced child that is visibly brown.*

Additionally, ART consumers "aesthetic sameness" argument seem far less credible when we honestly consider how the ART market is currently organized. As Part I shows, consumers are picking from a sample of white donors that is taller, thinner, more attractive, and often smarter than the average consumer. If consumers wanted actual sameness, they would demand banks stock sperm and eggs from donors that were heavier weight and shorter, but we do not see these trends. Indeed, *consumers are not looking for aesthetic sameness*. At best they are looking for an idealized version of whiteness with some reference to themselves. In some cases they wholly depart from their own appearance to choose physical characteristics they believe match a celebrity or some distant family member. Also, the gamete market is not organized in a manner that allows for an honest quest for sameness based on physical features. Gamete samples could be organized by eye shape, color, nose shape, bone structure and any number of characteristics that would better assure facial similarity. Instead markets are organized based on racial distinctions that create random separations between donors and consumers truly looking for physical similarity. Indeed, the ART fora contain numerous examples of donors choosing donors of other races under conditions of scarcity because they recognize that a donor from another racial category actually resembles one of their family members.[135] As sociologist Sven Bergman explains, if gamete markets were

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[133] Andrews and Cramblett clearly involve these concerns. Other examples hail from domestic and foreign contexts. *Hey Doc Is That My IUI Sperm?* Fertility Lab Insider (January 10, 2013)(discussing fertility clinic worker's 15 years of experience and explaining that parents typically do not charge mix ups in IVF cases unless the child is obviously of a different race). *Id.* (describing New York and Connecticut cases involving white mothers bearing a child of color) See Maggie O'Farrell, *IVF mother: 'I Love Him to Bits. But He's Probably Not Mine*, THE GUARDIAN (October 29, 2009) (discussing British and US cases all involving parents' questions when the child was "an unusual color") *Cf. IVF mix-up at Thompson Medical: A Look Back at the Case of 'Baby P*, THE STRAITS TIMES (October 6, 2016) (discussing Asian woman's rejection of child in racial mix up case because of its white color).

[134] Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classification in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 121–33 (2012) (noting discourse about multiracials in US contradicts the way these groups have performed in Latin American countries where they have not advanced racial progress); Trina Jones, *Shades of Brown: The Law of Skin Color* 49 Duke L. J. 1488, 1524 (2000)(warning that mixed-race groups have functioned as buffer classes in other Latin American countries and have not facilitated racial progress); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1709, 1711 (2000) (warning as to colorism dynamics in the United States that favor lighter skin blacks over darker tone persons); Cf. Angela P. Harris, *From the Color Line to the Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52 (2008) (discussing the emergence of color and identity performance, rather than racial categories, as bases upon which future race-based benefits or disadvantage may turn).

135 *See, e.g., Baby Center Community,* Journey 123. January 3, 2014. Using egg donor of different race. https://community.babycenter.com/post/a46810456/using_egg_donor_of_different_race (discussing experience of Indian woman married to African American man forced to use white sperm because of lack of African American donors). After reassuring this woman another woman disclosed that she is white and her husband is Chinese, but failure to locate a Chinese donor led them to select a similar looking Thai donor. See also, *Would you use donor sperm from a different race? Wedding bee,* Moonadea (June 2012)

structured to look beyond skin color and instead focus on actual facial similarities, sameness could be better guaranteed. [136]

A thought experiment helps bring this home for some readers. One could imagine a selection regime like there is in Spain, where donors are pre-matched with consumers based on skin color, hair texture, blood type, ethnicity and a range of characteristics and then delivered a sample chosen by the state.[137] Many American gamete buyers would chafe at this system, based on the view that the government should not have authority to decide what they look like and, further, that they should have a chance to supplement their genetic characteristics with the best available to give their child the best chance in life. This argument abandons any pretense that the consumer seeks aesthetic sameness. When stripped to its core we see that aesthetic sameness actually plays a much smaller role in the ART consumers' quest for the perfect child than previously believed. We also see that anxieties about color, the trigger for a more modern version of white privilege, is actually a key animating force that drives consumer decisions far more than any other physical feature. Yet, as we will see in Part IV, there are ways that the ART industry could be structured to lessen this phenomenon, rather than amplifying it.

C. Loss of Privacy

The selections from the *Andrews* complaint highlighted above also raise concerns about the loss of invisibility and privacy. As the couple explained, the clinic's racial mistake created "an unending feeling of helplessness and despair. They claimed to be "distressed by th[e] mistake, each and every time [they] appear[ed] in public."[138] They further argued that the "confusion, ill ease, depression and emotion [sic] strain and damage [would continue] for the entire life of all the parties involved as well as the unnamed siblings, unnecessary curiosity, questioning & emotional damages all of which have yet to be played out & identified." From their perspective, the brown child in their family would always trigger curiosity, preventing the family from enjoying social invisibility - a normal benefit of monoracial white families. Angela Onwuachi-Willig explains, the constant intrusive questioning mixed-race families face can be exhausting. The *Andrews* family appears to understand that the family permanently will be subject to additional attention and scrutiny because of their difference.

While these general scrutiny concerns are understandable, blog postings and other confidential conversations reveal that these complaints mask different privacy concerns. Specifically, consumers believe having a different race child will either immediately reveal the use of ART services; raise the specter of infidelity in the family, or suggest the presence of an earlier minority relative. The first concern amounts to the claim that interracial sex is so unthinkable in the consumer's community, that people automatically would know that she resorted to the ART market. This claim is easily rejected as offensive on its face. Indeed, other ART users have confessed their fears that the brown child will signal to

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https://boards.weddingbee.com/topic/spinoff-would-you-use-donor-sperm-from-a-different-race/ (discussing willingness to cross racial categories in search for physical similarity

[136] "Anonymity, resemblance and non-disclosure are intimately intertwined." Sven Bergmann , *Assisted Authenticity: Naturalization Regulation and the Enactment of Race Through Donor Matching* 231

[137] *See* Law on Assisted Human Reproduction Techniques, http://www.boe.es/buscar/doc.php?id=BOE-A-2006-9292 (last visited Feb 12, 2018)

[138] *Andrews'* affidavit, ¶ 13.

members of their community that they were actually involved in interracial relationships at some point in their lives. Yet this concern, again confronts us with the reality of racial bias in the consumer group. Apparently some people that publicly support interracial relationships do not want others to think that *they themselves* would have a sexual relationship with a person of color. Last, some have argued that the child will be interpreted as a signal that the family has some minority relative that is simply not on view. This concern seems eerily similar to stereotyped notions of the past, such as hiding "black blood" within the family unit, or the notion that interracial sex must be part of an illicit and temporary union. To the extent that consumers privacy concerns stem from fears about questions regarding pre-existing racial admixture in the family or interracial sex, these arguments should strike the reader as deeply troubling. All of these arguments are premised on the need to maintain the perception of white racial purity.

The Andrews family's sense of injury should seem particularly ironic. It appears that they too believe they live in a community in which race mixing does not appear natural and, moreover, where the racial purity of their family was previously clear. The court does not appear to agree. Ms. Andrews Dominican ancestry is an issue for the judge. He does not seem prepared to recognize her as Caucasian, distinguishing her from her husband in the opinion as being Dominican and having Dominican "coloring." The Andrews family is effectively suing to enforce their own definition of whiteness, one which the *Andrews* court apparently did not share. More disappointing, this seemingly progressive mixed ethnic family doubles down on whiteness and colorism concerns. They want to take part in the intragroup esteem system that undergirds white privilege.

Indeed, even in families where ART practices are more readily apparent and accepted, there is still a preoccupation with white racial purity.[139] Gay male and lesbian couples cannot biologically reproduce; their children are produced through ART, adopted, or formed through prior heterosexual coupling. Yet monoracial white gay and lesbian couples consistently select gametes to match their racial group. They tend to select these gametes without explicitly referring to race, and instead focus on a desire for similar physical characteristics.[140] Scholars have suggested these queer families may strive for racial invisibility as a form of privilege and as a way to avoid "queering" the family more than they already have by their same sex union. [141] The claim is made that these families participate in the monoracial family as a way of erasing ART and also placing them more squarely within the traditional family.[142] Queer families have been heralded in other contexts as key players that can transform unnecessarily restrictive understandings of family, parenthood, fertility and genetic relations. Whether queer families function in this way or

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[139] Quiroga *supra* note 26 at 143–161 (explaining that there is an assumption of donor racial purity that undergirds ART procedures).

[140] Maura Ryan & Amanda Moras , *Race matters in Lesbian Donor Insemination: Whiteness and Heteronormativity as Co-constituted Narratives*, 40 ETHNIC AND RACIAL STUDIES, 579 (2017) Ryan and Moras note that lesbian couples also express this preference for same race gametes, even though these preferences are linked to a naturalized nuclear family structure that historically has been used to render gay couples deviant. Rather than explicitly acknowledging the preference for same race gametes, they tend to point to issues like hair texture and eye color as the reason for their choices, simply assuming that gametes of the same race will be provided by default and the preference need not be justified.

[141] Lenon, Suzanne and Danielle Peers. '*Wrongful' Inheritance at 6* (discussing how gays negotiate the politics of "homonormativity" which allows them the gift of invisibility if their practices appear consistent with heterosexual norms). They explain that a mixed race child places the ability of the monoracial couple to enjoy this form of homonormative privilege.

[142] Naomi Cahn, *The Uncertain Legal Basis for the New Kinship* 36 JOURNAL OF FAMILY ISSUES 501, 504 (2014)(recognizing the potential for donor constituted families to redefine how we understand family or reinscribe it)

instead use ART and racial sameness to decrease their visibility remains to be seen.[143] Again, we see that families with progressive politics in some domains are still seduced by the racial intragroup esteem system and the status accorded the white monoracial family.

Last, some of the privacy concerns raised in the ART context are inextricably tied to gender norms. For some families using ART, the need to resort to technological assistance creates embarrassment. Men fear that they will be viewed as less virile or failed men. Women also fear being viewed as sterile because sterility seems to raise questions about their femininity as well. These concerns about how ART affects social perceptions of masculinity and femininity have historical antecedents. Indeed, gender-based shame was an important consideration at the start of the ART industry, during a period when it's eugenicist strains were more apparent. Doctors treating women for infertility feared that people would discover that the father in the family was sterile and this would affect public perceptions of his masculinity.[144] Gender stereotyping, rather than having abated, has simply been reborn in modern form. Women want to hide the use of ART because they fear being socially sanctioned for having "waited too long to conceive" or "being too focused on career concerns." Both criticisms are used to make career women realize they have failed to comply with standard femininity norms. Also, both genders may face the critique that they waited too long to marry when they are forced to use ART. When parents ensure that their children produced through ART appear to be genetically linked to them, they pursue oppressive idealized notions of gender that cause many Americans pain.

Finally, consumers' desire to hide the "stigma" of ART becomes a less persuasive justification as ART usage increases in frequency. Indeed, given its high cost, participation in the ART market tends to be read as a demonstration of wealth and privilege. Also, increasingly children born from donor gametes have demanded access to information about their donors, compelling parents to reveal this information to their children as part of responsible parenting. Although we have normalized the desire for secrecy about ART, we should consider at what cost. As Karen Anne Wong writes, "recipient parents who choose not to prioritize "matching," and actively disclose the process of children's conceptions, may embark on a project of queering heteronormative family structures and place great trust in both their own children and changing social attitudes to reduce stigma and generate acceptance for non-traditional families."[145]Wong notes that many families that are driven by the matching model become profoundly preoccupied with concerns about secrecy, privacy and trust. Nothing about this arrangement serves the interests of the children in the family. [146]

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[143] Laura Mamo, *Queering the Fertility Clinic*, 34 J. MED. HUMANITIES 227, 230-231 (2013)

[144] *See generally,* SPEIER, SUPRA *note 121* (2016); *Procreative Compounds* at 8 (explaining that the first woman artificially inseminated in 1884 was never told by the doctor and had sperm from his most handsome medical student used to produce her child). The primary concern was that men would be seen as less virile or masculine if the quality of their sperm was placed in doubt. Id.

[145] Katherine Wong, *Donor Conception and Passing or Why Australian Parents Want Donor Conceived Children That Look Like Them,* 14 Journal of Bioethical Inquiry 77–86 (2017).

[146] The Andrews family's complaint is also interesting because it suggests that they chose the ART market because of its promise of genetic purity, raising the conscious understanding of the interrelation of gamete markets and their relative status. As they explain "the parents have been caused to suffer exactly what they intended to avoid & exactly what they were NOT promised by the process provided by the answering defendant." In other words, the adoption market, with its slate of potentially racially mixed and genetically unrelated children was an option consciously not chosen in favor of a process that would give them the genetic and racial mix they truly desired.

D. Fear of Cultural Difference

Cramblett also complained that she was unprepared to raise a child in a largely segregated, racially separate world. She worries about moving through largely minority spaces to service her daughter's special needs.[147] Interestingly, in this section of her complaint, she accepts the naturalness of segregation and operates on the assumption that she will be perceived as a racial interloper in a minority community, regardless of the fact that she has a minority daughter. Cramblett seems to concede that white parents learn about "minority culture" with training, but in her view transracial parenting has introduced her to a new and unwelcome burden in this domain. As she explains, she has "limited cultural competency relative to African Americans, and [there is] a steep learning curve."[148] In specifying her damages and her need for relief, she highlighted that she was politically and *culturally* ill-equipped to help a child of color navigate the world. With this move Cramblett attempted to portray her claim less as a frustrated consumer, and more as a mother now traumatized by the unexpected responsibility of parenting a child of color.

Cramblett's claim is significant in two respects. First, it marks the steady march of neoliberalism, showing how the dream of motherhood is often understood through a commercial lens. Cramblett's claim makes it clear that she has been denied the *motherhood experience* she contracted for - an experience within the comforting zone of racial sameness where she feels capable and valued. This loss is permanent and is a direct result of the clinic's mistake. She is careful to make clear that she does not perceive her child as less valuable, but only that she is destined to feel inadequate throughout her motherhood experience because of the difference. For example, she cannot brush and style her mixed-race daughter's hair in the morning in the same way she imagined she would with a "white" child. Scholars have commented on this "experience focused" trend in marriage, and the fact that martial unions grow less permanent as we enter an era in which parties treat marriage as a site of self-realization. Cramblett's complaint reveals that children too have become a vehicle to self-realization. The promise is that by shopping for the perfect genetic profile one can purchase a certain parenthood experience that one might otherwise be denied. Indeed, some would liken the process of searching for a sperm donor to searching through dating profiles, although in sperm donor catalogues, there is no risk of rejection from the consumer's chosen love object. Rather, one is presented with a perfect slate of men and women that have no interest or ability to turn an interested party away.

Importantly, Cramblett's complaint about cultural unfamiliarity is not plucked from the ether; it is specifically encouraged by certain ART marketing materials. Specifically, Cramblett argues that, as a white woman, she does not have the background to educate her child about minority culture. We have already discussed the way this argument conflates culture with biology and assumes that people of color operate in separate spheres from white Americans. The argument gives short shrift to the convergence of culture in the United States; in many ways Americans are linked by a profound cultural sameness instead of racial difference. To be clear, if a family fears using a black donor because they do not know anything about Kwanzaa or Juneteenth, they should be consoled by the fact that most African-Americans don't actually celebrate these holidays. If they believe these holidays are important, they can create opportunities for children to have these African American holiday experiences. Also, a properly

[147] Id. at ¶24(complaining that she must "travel to a Black neighborhood, far from her home, where she is obviously different in appearance and not welcome.")

[148] *Id*. at ¶ 22.

supported child may actively request these experiences on her own, allowing her to actively participate in creating her own racial identity.

E. Outsourcing Discrimination Challenges

Finally, Cramblett alleges damages because of the challenges associated with helping her child navigate race discrimination. One source of harm stems from the fact that she must now abandon the monoracial white community she moved to in search of a more diverse community. She had moved to the white community because it was a better living environment and had better schools.[149] She accepts the fact that white enclaves have superior services as a background norm. Equally important, she argues that she will need to seek counseling to help her child learn how to deal with race discrimination.[150] Specifically, she suggests that parents of color have special skills and can educate children about how to identify and respond to racism better than white parents. Part of her trauma stems from the fact that she is aware of how intolerant her family is of her sexual orientation; they had explicitly instructed her to "cover" or mask her difference as much as possible. She realizes that her daughter cannot "cover" and, as a consequence, will be sanctioned even more. Moreover, her own unfamiliarity with issues of race makes her even more anxious that she will not be able to help her child.[151] As she explains, she did not meet any African Americans until she attended college. [152]

While Cramblett's empathy for her child is understandable, this is insufficient reason to subsidize racial segregation in the ART market. Her argument amounts to the claim that minorities must learn about discrimination from other minorities to survive. Americans committed to racial equality should be offended by the claim for two reasons. First, the argument concedes the permanence of racism as social fact. Second, she *outsources* the responsibility for negotiating racism as a social inconvenience that should solely be borne by minority families. It is hard to imagine an argument that is more socially irresponsible than this claim. Antidiscrimination education efforts strongly encourage white Americans to acknowledge racism and participate in dismantling this problem. Admittedly the unexpected presence of a multi-racial child sometimes triggers otherwise uninterested white Americans to become committed to antidiscrimination efforts, but this is a positive development. Indeed, white wealthy couples suddenly exposed to the realities of discrimination are often extremely well positioned to challenge racism. As they are enlightened about how discrimination concretely affects minority children's life chances, they are more inclined to challenge discriminatory structures -- and ***they will do so from a position of privilege***. Recently social media focused on a video produced called "The Talk" in which minority parents talked to their children about how to negotiate racism. White parents can certainly give "the Talk" but they also will sometimes be far *more influential* than minority parents in actually *changing* white schools, workplaces and other spaces that have discriminatory dynamics.[153]

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[149] First Complaint at ¶26 (noting the family had moved back to Unionstown from racially diverse Akron in search of better schools)

[150] Id. at ¶¶ 20-25 (discussing her conversations with therapists and sociologists which establish the family will need extensive support and counseling).

[151] *Id*. at ¶ 25.

[152] *Id*.

[153] Stories have also surfaced of children of color raised in white families, subject to racism, and their families confronting that racism with surprise but defiance as well.

Review of the complaints raised in racial mix-up cases show that the performative family is alive and well. They demonstrate that, rather than biological or genetic considerations, monoracial white families are profoundly concerned with the role race plays in public social signaling. Moreover, the complaints raised in the racial-mix up cases suggest that the disciplinary regime for maintaining the monoracial family may rather strongly endure in spaces where whites in other respects support diversity and other non-discriminatory values. Both of the plaintiffs in these cases are mothers experiencing anxiety, fear and or discomfort about the prospect of introducing a visibly brown person into the family. One plaintiff is a member of a gay partnership; the other is a member of an arguably mixed ethnic union. Progressives who sympathize with these individuals' concerns can easily imagine similar macro and microaggressions within their own families if they attempted a cross racial match. People express surprise, alarm or curiosity at the decision to take a non-white partner or have a non-white child. Yet avoiding these moments of discomfort is a key reason why white privilege and monoracial families endure. In short, when plaintiffs complain in the racial mistake cases about the symbolic disruption a mixed race or minority child causes, they render visible the continuing power of a white intra-group esteem system that helps maintain the white monoracial family norm.[154]

III. Protecting Race

Part III evaluates constitutional arguments marshalled in favor and against permitting the sale of racially-categorized gametes in the ART market. Section A suggests that the concept of reproductive freedom has been conflated with the concept of freedom of contract in discussions of ART users' interests. This conflation distorts discussions of ART-related reproductive rights, as jurisprudence in other areas of reproductive rights shows that government regularly limits commercially available reproductive services because of countervailing state interests. Given the state interests previously invoked to limit reproductive rights, the state's interest in racial equality also can be used to support regulation of the ART industry. Section B more deeply examines the Fourteenth Amendment equal protection arguments that could be marshalled to challenge racial labeling and marketing in the ART industry. The analysis shows that many equal protection cases concerning discrimination in the commercial market have been focused on ensuring equal access to the market, rather than the dangers posed by racial commodification itself. The dangers posed by racial commodification have been addressed more squarely in equal protection voting rights and affirmative action cases, in the form of complaints about racial stereotyping and racial essentialism. Section C concludes that reproductive rights doctrine and equal protection doctrine taken together permit the state to strongly limit, if not wholly prohibit racial marketing in the ART industry. The value at the heart of contemporary equal protection jurisprudence, anti-balkanization, clearly supports imposing restrictions on the ART industry's use of race in organizing genetic material.

A. Reproductive Freedom in the ART Market

[154] To be clear, a white person's desire for social status, or the desire to escape mockery, questioning or discomfort is not the innocent non-discriminatory moment it seems. This persistent desire to remain invisible is key to the American regime of racial subordination. The special status and social recognition accorded the monoracial family is a result of our prior commitment to a de jure monoracial system. It is worth noting that we are a mere fifty years after state anti-miscegenation statutes were declared unconstitutional in *Loving v. Virginia*. Older relatives who lived most of their lives against a legal backdrop shaped by de jure segregation of this nature have raised children in homes were the monoracial family was a clearly required aspect of appropriate behavior. Honoring these families' preferences, avoiding upsetting their expectations, and internalizing their expectations is a key vehicle for negative racial animus and stereotyping to continue.

Bioethicists paint a world in which the ART market explodes with a range of new options for producing offspring, a world that presses us to resolve certain deep philosophical questions about what we mean by family, parentage and progeny.[155] This engagement, while critical, focuses on a question different from the one raised by this analysis. Here we ask, are we unwittingly conflating reproductive freedom with freedom of contract when we train our focus on the ethical questions raised by the products the ART market offers? Certainly, we must interrogate the morality of particular ART techniques as bioethicists suggest, but legal scholars equally have the obligation to ensure that our understanding of reproductive freedom does not get conflated with the menu of service options offered in the ART marketplace. When legal scholars train their focus on questions about whether particular ART products can be marketed, they participate in an iterative process that gives the market extraordinary power to draw the contours of reproductive freedom in this realm. These analyses therefore must be contextualized; they should be balanced with scholarship that draws insight from reproductive rights cases more generally, to consider how dignity and autonomy considerations related to the freedom to procreate have been treated in other contexts.

Legal scholars have faced a huge task as they attempt to map the multiple services that ART providers offer, and the consequences of these providers' failure to deliver on certain services. However, scholars' current focus on ART service options also risks artificially inflating the importance of certain ART services. Potentially minor considerations get treated as permutations and or partial iterations of core reproductive rights. Yet many of the services offered by the ART market might strike one as *de minimus* and tangential to core reproductive freedoms. Does the right to procreate include the right to select the sex of one's child, his eye color, his intelligence level or his race? An analysis that proceeds from the ART market as it currently exists assumes these choices are equal considerations in the realm of reproductive rights, yet it is an open question whether limitations on these smaller considerations should be treated as undue interference with the basic right to procreate. The failure to interrogate, evaluate and rank these smaller choices leaves legal scholars committed to protecting existing markets rather than interrogating more deeply what the right to procreate fundamentally means. Additionally, when particular services and options are treated as iterations of freedom to procreate we find ourselves in a war of competing rights when we consider conflicting broader constitutional commitments. Is the right to choose a child's race a minor personal-expression issue or a core choice exercised as part of reproductive freedom? Once the power to select race it is treated as part of a core reproductive interest, the claim that our racial equality guarantees forbid this practice faces a much higher hurdle.[156]

Dov Fox is one of the very few scholars that have discussed the sale of race in the ART market, but his analysis falls short because he is ultimately seduced by the market he is studying. Because his work largely takes the ART market as a given, he tends to treat the concerns raised about racial products as a mere symbolic consideration, one that must defer to individual consumer freedom. Specifically, Fox has argued for a comprehensive theory of reproductive negligence that allows for distinct interests in particular ART services to be vindicated in legal claims. His goal is to hold ART providers to deliver what it is they have promised, or pay for injuries that frustrate procreative interests in different ways. He rightly notes that there are currently numerous victims of failed ART services and other procreative

[155] *See* GREELY, *supra* note 4 at 1-5.

[156] *See generally,* Fox, *supra* note 18 (offering at three part model to discuss concepts of harm related to reproductive technologies that are not adequately attended to under existing contract, tort and other legal doctrines). As he explains, we do not at present have a concept of reproductive wrongdoing that recognizes the harm caused by the disruption of reproductive plans in the absence of some "material" harm.

services that presently are uncompensated by tort law; he argues that we need new concepts to recognize new kinds of injury such as the frustration and loss of procreative opportunities from ART mistakes, including racial errors.[157] Again, while his analysis has a number of commendable features, he is more focused on whether consumers should be compensated when providers fail to deliver existing commercial options. His analysis gives short shrift to whether a given option should be offered at all. Moreover, the solutions he devises are careful not to infringe too much on this notion of reproductive commercial choice, which in his analysis is parallel to consumer freedom.[158]

Specifically, Fox agrees with certain CRT scholars about the negative social message projected by the racialization of gametes in the ART market. [159] CRT scholars such as Dorothy Roberts and Patricia Williams have written eloquently about the disturbing social norms projected by current racial marketing practices in the ART and adoption markets, including racially-specific pricing.[160] They rightly noted that the current approach suggests that children of color are valued less than white children.[161] These scholars have concluded that the ART market functions as a vehicle that facilitates the expression of discrimination. Fox, by contrast, is not willing to go this far. He excuses the individual consumer for expressing preferences for same race children, and even permits parties to sue when an ART procedure results in the production of a child of the "wrong" race.[162] However, he simultaneously argues that gamete providers should discourage the expression of these preferences because of the social norm communicated. His solution is sin taxes, a proposal discussed further in Part IV. Fox, however, proceeds from the assumption that the selection of race is a core part of reproductive freedom that should not be disturbed by the state. He believes it should only be discouraged rather than prohibited.

A change in the framing in this discussion leads to dramatically different conclusions. If we think about reproductive freedom in connection with other cases concerning procreative rights, we ask different questions. The central question becomes, under what circumstances is the State permitted to exercise power to limit how and when we reproduce? When we look at other reproductive rights cases, instead of analyzing ART in a vacuum, we realize that reproductive rights have always been exercised against a legal backdrop that permits the state to intervene and raise countervailing considerations. The exercise of these powers is apparent in cases and controversies concerning contraception[163], abortion[164] and welfare.[165]

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[157] Fox, *supra* note 18 at 160-173.

[158] Fox, *supra* note 13 at 6. Fox arrives at the same conclusion as Roberts and Williams but does not specifically cite their work.

[159] Fox, *supra* note 13 at 6.

[160] For references discussing Williams' and Roberts' view see *supra* note 21.

[161] Roberts also called for further theorizing about the role of race, reproductive freedom and the ART market as she recognized the reproductive dystopia in the United States was evolving into even as we attempted to analyze the market's functioning. ROBERTS, SUPRA note 21 at 307. In later work she rightly noted that the ART market had changed in ways that complicated simple charges of racism, as it now appears to serve both white and minority consumers in creating monoracial families. Roberts, *supra* note 12 at 798.

[162] *See* Fox, *supra* note 18 at 172.

[163] Federal and state authorities appeared to be making fewer efforts to limit contraception access. However, the desire to regulate has re-emerged with many state legislatures passing "conscience clause" legislation allowing pharmacists to deny valid prescriptions for "The Morning After Pill" and similar contraceptives on moral grounds. Alice Dong, *Access to Contraception,* 8 Geo. J. Gender & Law 775, 789 (2007). These states include Arizona, Georgia and Idaho. The National Women's Law Center, *Healthcare and Reproductive Rights,* https://nwlc.org/resources/pharmacy-refusals-101/ (last accessed February 29, 2018). Many states also use regulations concerning prescription requirements to limit teenagers ability to access certain methods of contraception in the absence of parental consent. Guttmacher

Moreover, in these cases the State is clear that it allows restrictions on procreative freedom in part to communicate certain *larger social norms*. Not surprisingly, this state power in the past has been exercised to limit the procreative rights of socially vulnerable women: the disabled, the young and people of color. The question now is, can the exercise of state power for this social norm function be used to vindicate the State's interest in racial equality? Additionally, we must determine if the will exists to use this state power to limit the powers of wealthy consumers, rather than merely using this power to police vulnerable communities.

Consider, for example, the State's exercise of its police power in cases involving the disabled. The state's power to limit this group's reproductive rights was established as early as 1927, in the notorious case, *Buck v. Bell*. In that case, the Supreme Court upheld Virginia's right to forcibly sterilize a mentally disabled woman to prevent her from having more disabled children. In an 8 to 1 decision, the Court held that the state law requiring her sterilization outweighed her procreative rights given the health, safety and welfare concerns the state alleged. The State of Virginia explained that the children of the mentally infirm became wards of the state, criminal threats or starvation risks; it was kinder and more economically efficient to prevent mentally disabled children from being born rather than wait for these problems to occur.[166] The eugenicist thrust of state power was mildly cabined by a subsequent case, *Skinner v. Oklahoma*, which denied the state of Oklahoma leave to sterilize "a chicken thief" after his three convictions. However, importantly, the court invalidated the state law requiring his sterilization on equal protection grounds – because it did not treat all persons with comparable offenses similarly. The Supreme Court acknowledged the eugenicist logic behind the state's action in this area. It also worried that that there was a growing tendency to try to reduce unfavorable traits to genetics using questionable scientific theories. However, the Supreme Court did not rule that the state was otherwise limited in its ability to exercise power in this area.

The State has also exercised its power to limit the core reproductive rights of poor women, often invoking cost as a justification. Under welfare reform the federal government supported the creation of family caps that prevent a mother from seeking support for an additional child born while the parent is on welfare. State interests have also been used to curtail the reproductive rights of female probationers. They are given the "choice" to install birth control devices like Norplant[167] or to submit to various birth

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Institute, *Minors Access to Contraceptive Services,* https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services (last accessed March 1, 2018)

[164] The state's interest in exercising its norm-setting power is nowhere more apparent than in the abortion realm. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992) (plurality opinion) (recognizing state's overriding interest in protecting fetal viability as sufficient justification limit women's reproductive rights and prohibit abortion after this stage). Before viability, women's access to abortion can be limited as long as state legislation does not create a "substantial obstacle" that does not pose an undue burden to the exercise of reproductive rights. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

[165] CRT scholars have argued that family caps constitute a restriction on reproductive rights of poor women in exchange for government benefits. Some politicians have gone further, proposing legislation that would require public assistant recipients to use birth control to remain eligible for government benefits. For a general discussion of bills proposed in connection with wefare reform regarding family caps, incentives and mandatory provisions for birth control, see R.B. Gold, *Some Lawmakers Continue to Promote Contraceptive Use In Return For Welfare*, 6 STATE REPROD HEALTH MONIT. 3, 6 (1995).

[166] In *Buck v. Bell*, 274 U.S. 200 (1927). Judge Oliver Wendell Holmes famously opined, "three generations of imbeciles is enough."

[167] ROBERTS, SUPRA note 21 at 307.

control injections in exchange for shorter sentences.[168] There is even precedent for "cost to the state" arguments being used to justify limits on the ART consumer. Indeed, cost specifically was invoked to limit the rights of ART consumers in Georgia. Reacting to Claudia Suleman, the California "Octomom" who was impregnated with multiple embryos and gave birth to eight children, the Georgia legislature proposed a bill limiting Georgia doctors to fertilizing only a limited number of embryos in a single egg harvest and implanting only a limited number of embryos.

This history shows that the State has limited core procreative rights of many Americans based on cost; in other circumstances it does so for more strongly normative and symbolic reasons. Women's access to abortion has been limited by the state's interest in protecting minors, women's mental health, spousal interests and the life of the fetus.[169] Access to contraception previously has been limited by the state's interest in protecting children and encouraging abstinence.[170] In summary, this discussion shows that Americans have tolerated substantial infringements on core reproductive rights for vulnerable Americans based on myriad concerns. The novel claim here is that this same State authority could be invoked for progressive purposes, to root out commercial practices that facilitate discrimination. An intervention that limits the use of race in the ART market does not fundamentally deprive citizens of their reproductive rights like some of the other measures mentioned. Also, our interest in prohibiting discrimination is equal if not greater than the State interests offered as justifications in other reproductive rights cases. I recognize that some of the cases cited here, including *Buck v. Bell,* represent a shameful chapter in our nation's history and are rarely cited as authority for the exercise of state power. However, *Buck* and other cases have a role to play in showing us how poor and vulnerable communities have had their reproductive interests substantially limited based on state concerns. This analysis suggest that same State power can be used to limit the reproductive interests of wealthy socially-powerful Americans in pursuit of broader racial equality goals.

While American reproductive rights jurisprudence is unique, we should also bear in mind that other countries impose substantial restrictions on ART marketplace practices and these standards are not treated as denials of reproductive freedom. For example, Turkey only allows eggs to be donated by its citizens and it will not allow foreign importation of gametes. This legislation creates a closed population of genetic material. Other countries merely control how gametes may be used. For example, Britain originally had legislation prohibiting clinics from engaging in cross-racial matching in the ART process, unless there was a reason to do so under a "best interests of the child" standard. [171] The word race in the statute was recently changed to ethnicity, but the presumption against cross-racial matches endures. Canada has a similar policy, stating that matching should be conducted in a fashion that serves the "best interests of the child.[172]" This policy is recognized as discouraging cross-racial matching, especially given

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[168] The state's authority to make sterilization part of a reduced sentence offer is also established. Smith v. Superior Court of Arizona, 725 P.2d 1101 (1986).

[169] These statutes were ultimately ruled unconstitutional but they demonstrate that states have not been After viability, they are free to prohibit abortion, as long as the legislation makes provisions that allow for exercise of the abortion right for health safety and welfare reasons.

[170] For a discussion of early contraceptive cases, see sources collected *supra* note163

[171] See sources collected *supra* note 103

[172] In 2006, the official position of the government on Canada *Assisted Human Reproduction Act provided that….* "Based on current research, it is the practice of the Regional Fertility Program not to provide assisted reproductive services that would result in a future child appearing racially different than the recipient or the recipient's partner."
Canada Assisted Human Reproduction Act, (2004).

the legislation's explicit racial prohibition in earlier interpretations. Spain does not allow its citizens to choose their gametes at all; state doctors match donors with families based on facial similarity. Cross-racial matching rarely occurs. Some states use their spending power, rather that legislative directives to promote social norms in the ART market. For example, Israel subsidizes ART services for Israeli citizens, a move some argue is designed to increase their number relative to the Palestinian population. [173] Others suggest it reflects the government's "pro-family" orientation. Finally, the Israeli government also places a thumb on the scale with regard to the precise ethnic/racial composition of ova donated to Israeli women. It primarily licenses Romanian egg providers to give eggs to its citizens because the government believes the Romanian physical aesthetic reflects a highly desired European version of Jewishness (or whiteness).[174] Of course, some citizens resist these restrictions and flock to other countries for ART treatment in order to evade them. However, the cost and inconvenience of leaving one's own home country ensures that the majority of citizens interested in ART find a way to exercise their "procreative" freedom within their government's restrictions. The negative eugenicist thrust of this legislation is disturbing. The United States could chart a new course, using this regulatory power to affirm its belief in racial equality.

In summary Part III challenges the assumption that ART consumers enjoy a right to "reproductive freedom" that gives them open access to whatever the ART market can provide. Reproductive freedom should not be conflated with freedom of contract. While there is ample precedent for the exercise of state power to limit reproductive options, we should view this history with some skepticism given its eugenicist history.[175] However, it is time to explore whether state or federal interventions that disrupt patterns of racial subordination could be constructed under this line of precedents as well. Some may question whether our antidiscrimination and equal protection guarantees truly do justify imposing limits on the commodification of race in the ART market. *This section will explore the relevant equal protection cases primarily as an inquiry into our shared values and norms with regard to racial equality subordination.* As Part IV later reveals, there are a range of constitutional sources of authority other than equal protection law, including government First Amendment interests and the spending power, that should be used to structure specific legislative initiatives.

B. Equal Protection Law and Norms

1. Market Based Arguments and Equal Protection Law

Equal protection law in the United States has long been understood to include the equal opportunity to contract for all items, without regard to the race of the purchaser or seller.[176] Indeed,

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[173] See Report, Library of Congress, *Israel: Reproduction and Abortion*, http://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf (last visited Feb 12, 2018)

[174] Public Health (In Vitro Fertilization) Regulations 5747-1987, KT No. 5035, p. 987 (Isr.)(discussing requirement that clinics be authorized by the State of Israel); Nahman, *Materializing Israeliness* at 200.

[175] What does the right to procreate entail? Is it right to have one's genetic material transmitted or merely the right to a child regardless of genetic ties? While this paper cannot resolve what the right to procreate means in this instance, it is enough to say that existing legal doctrine permits limitations on that right, and would provide space for government support.

[176] This regime stands in contrast to Spain for example, where medical authorities determine what sperm is available to a purchaser, guiding purchasers into a field of choices that match their physical characteristics, and these choices always match with the purchaser's race. J.

several of the paradigmatic key equal protection cases offered in law school primers and casebooks concern racial covenant cases[177], in which a willing purchaser and willing seller could not engage in a transaction because of a restriction imposed by a third party. Our understanding of equal protection in the marketplace is based on this construct, but it leaves substantial ground hidden.

Viewed from the traditional lens of market-based equal protection arguments, the ART market seems wholly reasonable. Given the racially diverse supply of eggs and sperm available, there appears to be an open invitation to any gamete donor to sell whatever he desires and a buyer to purchase whatever he desires. Indeed, in the United States, the norm is that a person of any race can appear and purchase sperm or eggs from persons of a different race without restriction. Yet this ideal vision does not match with anecdotal accounts of consumers. Some providers do not provide for an open access approach to racially marked gametes; this is especially true at websites that have anti-miscegenation messages in sperm and egg bank marketing materials. Additionally, anecdotal accounts of minority purchasers being denied access to white donors also raises questions. The Cramblett controversy itself confirms the bias against race mixing, as the clerk calls to "confirm" that this is a white family requesting black sperm, rather than accepting the selection as unremarkable. Therefore, even under the traditional market-based approach to equal protection, there are questions about discriminatory access that should be of interest to antidiscrimination scholars and litigators.

Ironically, even the injuries that arise under the traditional equal protection framework have been given short shrift. Dov Fox, the sole scholar writing on this question recognizes that racial labeling facilitates race discrimination by ART market consumers because it primes people to believe race is important and triggers them to purchase in a particular way. He notes that sperm donors are being judged unfairly because of racial labeling; the donor loses the commercial opportunity to have his sample selected merely because of race. Fox, however, concludes that the interest at stake in these cases is not significant enough to treat this as an equal protection concern. He notes that sperm banks have stores that are 2% African American, but African Americans represent 13% of the US population. He explains that the banks are likely turning away Black donors at greater rates than they should to represent the US accurately, but he concludes that the banks are merely responding to customer demand, given the higher number of white consumers.

In multiple ways Fox's argument concedes too much. The customer preference argument for banks' stocking decisions assumes that racial variety is a legitimate distinction or sorting concern. The desire to sort based on race however is actually just stereotyping. Phenotype distinctions are not consistently designated by racial labels; banks are making all sorts of decisions based on racial essentialism. Additionally, Fox fails to fully appreciate the financial and dignity interests at stake for gamete donors. He is clearly wrong when he claims that there is no substantial financial interest at stake in being chosen as a donor. An egg donor can secure $6,000 to $100,000 *depending on the race* of her eggs.[178] Sperm pricing is more consistent across race, for reasons that may be due to ease of procurement.

Mouzon et al., *Assisted reproductive technology in Europe, 2006: results generated from European registers by ESHRE*, HUMAN REPRODUCTION, Aug. 1, 2010, at 1851

[177] *Shelley v. Kramer*, 331 US 1 (1948)

[178] These funds are made available at a critical period in young peoples' lives and often are sometimes used by working class and poor whites to pay for college.

However, outright rejection based on race has severe consequences for sperm donors as well.[179] Sperm donors from minority groups can lose up to $30,000 when they are rejected as donors. Moreover, clinics may be falsely telling minority donors that they are from a "low demand" racial category because they have no intention of servicing minority commercial demand. The dignity concerns are substantial as well, and are detailed in our discussion of elective race concerns. Many Americans no longer hold the same pure "bloodline" view of racial identity and are faced with harsh realities about its continued usage when they are thrust out of the category of whiteness by sperm and egg bank racial categorization rules.

Also, the traditional free access approach to equal protection should strike us as extraordinarily thin. It does not fully capture nature of concerns about the operation of race in gamete markets. [180]A market that naturalizes the sale of racial essence raises a number of questions beyond the question of open exchange. Are we prepared to support mechanisms in this market that price "racial products" differently, even if there appear to be different levels of demand for particular products or difficulties in procurement? Should we be concerned about the disturbing symbolic and political messages this different pricing sends? Are we prepared to enforce legal definitions of race in the gamete market, whether decided by public law or private law? If we enforce these rules aren't we engaged in an inquiry similar to ante-bellum and Reconstruction courts? Additionally, is there something so fundamentally offensive about being categorized based on race that we are unwilling to support a regime that reduces individuals to racial status? Finally, does the desire to buy the materials to create a baby of a particular race invite the kind of racial stereotyping or essential notions about racial characteristics that equal protection law was designed to help avoid?

While they do not address all of the concerns raised by racialization in the ART market, some family law scholars have offered an instructive, and full-throated critique of racial segregation and marketing practices in the analogous adoption market in the United States.[181] Ralph Richard Bank's article, *The Color of Desire* is perhaps the most nuanced analysis of these equal protection concerns. He describes adoption agencies' use of race in the adoption process as an illicit form of "facilitative accommodation," as they make it easy for parents to search for and reject children based on race. He advocates for the abolishment of the use of race in adoption markets as a basis for selecting children, noting that the use of race in this area is in direct conflict with our equal protection norms. Banks notes that facilitative accommodation pits the liberty interests of parents against the equality interests of children. Specifically, parents' autonomy interest in selecting adoptive children based on race is in direct conflict with minority

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[179] In some context the racial steering is painfully clear, and the message to Black women is that their eggs are not wanted. In one article a sperm bank worker describes the selection process, noting most of the women calling in were Black and were from the "wrong side of the tracks." They were routinely rejected as donors. At least 80 percent of girls didn't pass the first round of requirements. If one of my usual black callers made it through, I knew she would just sit in the system, never earning the promised seven grand. "You just want white bitches," one girl said when her application was denied, and hung up. We did. The intended parents were buying genes, and they wanted white, movie star beautiful and diplomas from the right university. *See* Rachel Rabbit White, *Only White, Straight, Attractive Women Allowed? The Strange World of Egg Donation,* https://www.alternet.org/story/147682/only_white%2C_straight%2C_attractive_women_allowed_the_strange_world_of_egg_donation

[180] Racial covenants were created by white developers to attract white residents to high-end neighborhoods; they effectively designated property solely for purchase by whites. Courts were slow to declare these contracts unconstitutional but ultimately did so in *Shelley v. Kramer*. The most controversial aspect of *Shelley* was the claim that a contract between two private parties required "state action" for enforcement and therefore was subject to equal protection law. The same state action principle would inform any equal protection challenge to a contract dispute between parties selling racialized gametes in the ART market.

[181] Michelle Goodwin, *The Free Market Approach to Adoption*: 26 B.C. Third World L.J. 61(criticizing race and gender dynamics in the international and domestic adoption market).

children's interest in having equal opportunity to compete for selection. Two kinds of equal protection harms occur as a result of racial selection procedures in the industry. First, children that are racially categorized are stereotyped and denied equal consideration by adoptive parents. Second, the practice inflicts asymmetrical harms, a kind of disparate impact, knowingly inflicted. The equal protection interests are particularly stark in the adoption market because state adoptive agencies are a large part of the market and facilitative accommodation requires that they be engaged in race-based state action. [182]

Banks' work is prescient in many respects regarding the concerns raised by ART practices. First, Banks rightly notes that adoptive parents so-called private racial preferences cannot be treated as innocuous; they are a major driver of inequality- they are a form of "atomized inequality" where private parties do the work that institutions used to do to maintain anti-miscegenation regimes. We are a mere 50 years after *Loving* declared anti-miscegenation law unconstitutional. [183] Put differently, we are merely one generation away from a time when preference for anything other than a monoracial family triggered criminal prosecution. Therefore the "natural" desire for a monoracial family might not be natural at all, and seems particular suspect when consumers are prominently reminded and primed to think about race in family formation decisions. Banks also notes that in *Palmer v. Sidotti,*[184] the Supreme Court embraced using equal protection to invalidate racial bias in the family formation context. In that case, a white father sought to deprive a white mother of her white children because their mother had initiated an interracial relationship, and her choice to remain in the relationship would subject the children potentially to race discrimination. The court rejected the consideration of race as part of the custody analysis, explaining that "private racial biases may exist outside of the law but the law cannot directly or indirectly give them effect."[185]

Some distinctions emerge between the ART context and the adoption context upon closer examination. For one, the harm analysis is somewhat different. When racial distinctions are made in the ART market there are no actual children injured by racial selection procedures, unless one counts the interest of the unborn. As explained above, the racial stereotyping harms instead are inflicted upon sperm and egg donors that are denied fair opportunity to compete. Also, the ART industry is wholly private, making it far more difficult to make the arguments Banks has made about the problem of involving the state in racially-biased family-formation contracts. There is some state role however when parties ask court to enforce race-based ART contracts.

C. Equal Protection Law and Non-Market Based Sources of Injury

Some of the remaining equal protection issues not covered by existing scholarship can be addressed by looking back to equal protection cases themselves for evidence of other kinds of harm. Two conceptions of harm, separate from equal racial access questions, emerge when we look beyond free market cases. The first is a form of dignity injury – the recognition that racial labeling itself constitutes a form of status harm and denies an opportunity to fairly compete. This harm, discussed in the context of voting rights and elections, is a close fit with some of the concerns discussed in our section on ART

[182] Banks, *The Color of Desire* at 883.

[183] *Loving v. Virginia*, 388 U.S. 1 (1967).
[184] (add citation)

[185] *Palmer v. Sidotti*, 466 U.S. 429, 433 (1984).

categorization and elective race. The second form of harm is more squarely about the harm from racial categorization and commodification as a particular racial product. Descriptions of this harm arise in the affirmative action cases. Notably all three forms of harm: equal access, dignity-harms from labeling and commodification concerns may be discussed simultaneously in multiple cases. However, each notion of injury deserves separate consideration as they hearken to different antidiscrimination goals. All of these harms can be inflicted by the ART industry's current racial marketing practices.

1. Racial Labeling, Social Norms and Dignity Based Harm

Anderson v. Martin provides a good description of the Supreme Court's views regarding the evils of racial labeling. The court concluded that a local rule requiring that a candidate's race be included next to his name on a voting ballot violated Fourteenth Amendment equal protection doctrine. The Court explained that the labeling triggered improper consideration of race at the most politically salient moment in a citizen's voting decision.[186] The Court further explained that listing race functioned as a kind of illicit nudge, "inviting citizens to vote their presumptively illegitimate preferences." The Court noted that the labeling was not a dignity harm to the individual alone but constituted a mark of illegitimacy for the entire electoral process. As the Court stated, the racial identifiers "furnishe[d] a vehicle by which racial prejudice may be . . . arouse[d]," rather than merely functioning as a descriptor.[187] Specifically, the Court noted that race might be a plus for some voters and a negative mark for others, but neither result made it a legitimate consideration. Similarities to the ART racial labeling process seem clear. All samples must be racially labeled, and the label is a racial nudge triggered at a critical decision-making moment, as one begins serious consideration of candidates to serve as genetic parents for one's child.

2. Racial Commodification and Equal Opportunity to Compete

The affirmative action cases from the education context also discuss various equal protection harms stemming from racial categorization; however, these cases focus on the way racial labeling triggers reductionist stereotyping that concretely interferes with candidates' equal chances to compete. The Court takes the concern about labeling and commodification seriously, noting that the goal is to ensure "individualized consideration," and that reductionist uses of race can promote messages of "racial inferiority" and even "racial hostility." [188] However, it also notes that there are limited contexts in which labeling and categorizing can occur without violating constitutional principles. Specifically, affirmative action regimes in the educational context may use systems that label and categorize based on race as long as race is not the determinative factor in any candidate's application for a particular admissions spot. Use of race is permissible as long as it is one variable among many that are considered.[189] The idea is to avoid bare naked racial reductionism in which any candidate's chances are entirely frustrated because he or she is in a particular racial category. [190] For, in the court's view, an equal protection injury clearly arises when

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[186] *Anderson v. Martin*, 375 U.S. 399 (1964)

[187] *Id.* at 403

[188] *Parents Involved in Community Schools v. Seattle School District*, 55 U.S. 701, 746 (2007)(citing *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493)

[189] *See, e.g., Grutter v. Bollinger*, 539 U.S., at 306, 325(2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)

[190] *Id.*

"one is forced to compete in a race-based system that may prejudice the "[individual"] because of her race[191]. Race, when used for diversity purposes, is tapping into cultural or experiential differences related to political realities, tapping for diversity – related insights that are key to an educational institution's mission. Demographic diversity, based on race, is never a sufficient justification for an admissions decision on its own.

The court's jurisprudence on race in the affirmative action context operates in tension with the norms for race in the ART market in several ways. First, the ART racial selection regimes clearly do reduce individual donors to race, at least at point of sale. Some donor candidates are wholly disqualified from consideration once an ART consumer checks a box excluding all samples from a particular racial/ethnic group. The second source of tension is particularly ironic. Specifically, the Supreme Court permits people to be labeled based on race in educational contexts *to facilitate* cross-cultural and cross racial exchange. In contrast, in the ART market, racial labels are assigned *to discourage* cross racial and cross-cultural exchanges. Consumers are told not to cross racial lines when considering gametes because minorities face special, distinct experiences of subordination that white parents cannot prepare their minority children to handle. Additionally, they are told minorities are entitled to a specific cultural heritage that is foreign to white consumers. Donors should, out of respect, avoid raising a child that they cannot expose to his or her "culture." Again, ironically, it appears that the ART market is encouraging racial separateness on the very grounds that the justices in the Supreme Court used to try to ensure minority students are given an opportunity to interact with their white student peers. Under one reading, the ART market is now actively producing a particular kind of racial subject, as staff in the ART industry apparently cannot imagine a white family raising a minority child that is not socialized based on these discrimination expectations and with a connection to a distinct minority ethnic cultural heritage.

D. Synthesis of Reproductive Rights and Equal Protection Arguments

Review of the equal protection cases suggests that the ART market could be regulated as part of an effort to vindicate our racial equality norms. These regulations could be effected through state police power without compromising the right to reproductive freedom. Indeed, even under the most conservative, traditional model of equal protection, concerning equal access to markets and products, it appears that individual gamete sellers and consumers are being injured by ART providers' racial-marketing rules. One could imagine ART consumers, effectively barred in a contract from buying sperm of a different race, bringing an equal protection challenge alleging they suffered discrimination. Additionally, one could imagine a sperm or egg donor challenging ART restrictions, arguing equal protection law should prohibit a sperm bank from rejecting a donor or declaring him in breach of contract based on racial representations made. Neither of these lawsuits however are likely. The rate of acceptance for gamete donors is extremely low, and the process is wholly impressionistic and involves a large array of factors, providing cover for ART providers. It would be challenging for a donor to establish that he was denied the ability to sell his gametes based on race. Also, ART consumers are unlikely to challenge an industry that they hope will work with them to secure a child. Finally, the state action principle recognized in *Shelley v. Kraemer* has always been a source of controversy. Is it sufficient to find state action merely because a private contract must be enforced by judicial actors? The current posture of the Supreme Court makes it very unclear whether this justification would stand. Moreover, these arguments about equal access and equal

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[191] *Parents Involved*, 551 U.S. at 718.

opportunity still do not sufficiently mine the dignity considerations that should be a key part of the debate regarding the exchange of racial products.

Interestingly, recent moves in equal protection scholarship provide new insight into the Court's attempts to manage its concerns about racial commodification and categorization. Specifically, numerous equal protection scholars have taken note of the Supreme Court's tolerance of racial categorization in the affirmative action context, while broadly decrying the dangers of racial labels in other venues. This shift, according to Reva Siegel, represents a transition to an anti-balkanization approach to equal protection law: racial categories are tolerated in the affirmative action context precisely because they are being recognized in a way that is designed to disrupt racial segregation dynamics.[192] Previously scholars like Siegel had criticized the court's steady march in the equal protection cases towards anti-classificationist logic. In particular, she raised concerns about the use of colorblindness as an equal protection norm.[193] Scholars instead argued for an anti-subordination approach under which courts permitted the State to recognize and create racial distinctions under regimes that had the goal of disrupting racial hierarchy.[194] At present, however, most racial classifications fail to survive strict scrutiny unless they meet this goal of diversity, cross-racial learning and exchange in ways that *do not compromise the interests of whites or the majority group*. Kenji Yoshino[195] similarly sees this anti-balkanization logic behind the court's shift away from equal protection analysis when analyzing the interests of vulnerable minorities. The Court instead prefers treating vulnerable minorities as individuals' seeking vindication of due process liberty interests.[196] There is a desire to avoid the Lilliputian-multiplication and hierarchical ranking of minority groups recognized under equal protection law. A liberty analysis is superior because it confirms the minority litigants' right to pursue certain kinds of freedom without the specter of illogical discrimination.

The Court's anxiety about balkanization heralds positive treatment for the arguments I raise here. For most of the proposals in Part IV to address ART race-based marketing are designed to disrupt the racial categorization practices in ART markets that promote the clear establishment of separate racial groups, reductionist evaluations based on race, and inappropriate nudges to racial considerations during family formation decisions. Additionally, the reforms I propose for the ART market in are framed in terms of individual donors' and consumers' core liberty interests rather than being group-based concerns. My central claim is that donors and consumers should not have their aesthetic choices constrained by the arbitrary racial categorization rules imposed by ART providers. Prohibiting or discouraging the use of racial labels and categorization is sure to increase cross-racial intimacy and exchange. Consumers themselves are then left in the position to make determinations about race with regard to each candidate, and how important race is in light of their other characteristics. Also, in the absence of clear racial labels, parties will be less likely to resort to stereotypes about features, characteristics, capacities erroneously

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[192] *See* Reva Siegel, *From Colorblindness to AntiBalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1279, 1352-1355 (2011).

[193] *See, e.g,* Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Reva B. Siegel, *Equality Talk Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

[194] Kenji Yoshino, *The New Equal Protection* 114 HARV. L. REV. 747, 750 (2011).

[195] *Id*. at 751.

[196] Id. at 751-52.

associated with particular races. As we review the proposals in Part IV, these values continually come into play. Whether courts and legislators are driven by racial equality, individual liberty, or anti-balkanization considerations, they can find ample reasons in equal protection law and scholarship to support intervention. Questions regarding what form these interventions may take and the symbolic norms they communicate are taken up in Part IV.

Part IV Solutions, Questions and Concerns

A. General Goals and Standards

Parts I and II demonstrated that the racial classification systems used in the ART market promote racial stereotyping and encourage racial segregation. Parts III reviewed various sources of constitutional law to explore how these authorities can be used to explain why we must disrupt markets like the ART market that purport to exchange racial materials. Part IV considers the means federal and state governments could use if they attempt to disrupt the current racial marketing in the ART industry. This section explores measures that function as direct prohibitions as well as more gradual incentive measures.

Certain themes are common and shared by all of the measures described below. All of them reflect the anti-balkanization norm I believe should govern in ART transactions. Having concluded that race is not serving any credible function in the market for ART consumers, there is nothing to justify its continued usage. Also, to remedy the problems caused by *past use* we need anti-balkanization measures that encourage ART consumers to abandon biological concepts of race and look beyond racial categories. Additionally, we need anti-balkanization based measures that address some of the equal access problems minority gamete donors and minority ART consumers face. To achieve this end, the proposals below encourage ART clinics to stop organizing gamete donors into distinct racial groups. They incentivize they development of ART marketing materials that cause parties to look beyond racial categories and to recognize race as a social construction. Ultimately, some of these measures ideally will encourage consumers to privilege donor features other than race-associated phenotypic traits. At a minimum the measures are intended to disrupt the ART market's current invitation to ART consumers to celebrate an ideal construct of whiteness and disrupt the market's active discouragement of "race mixing." Skeptics may claim there is little quantitative evidence to establish that ART consumers are willing to look across racial lines when buying gametes, but evidence suggests ART marketers have great power.[197] Marketing features and market structuring features, if properly designed, can force consumers to acknowledge that the features they "assume" fall within one racial group are actually shared. Also, evidence suggests ART consumers are price sensitive, are open to nudges in conditions of scarcity to look past racial lines, and are relatively open to ART marketers' constructions of race.[198] These features make it likely that there is room to change the market with properly structured policy initiatives.

B. Future Proposals

[197] Looking across racial lines for phenotype-based similarity is already part of the ART industry in some other countries. See *New Delhi Clinic – Egg Donation (video)* https://www.youtube.com/watch?v=hdVy38ko72E (doctor from the New Delhi Sperm Clinic offering Asian women the opportunity to use Indian eggs from a region of India where people "look quite Asian")

[198] See sources collected *supra* note 135.

1. Banning Foreign Imports and Foreign ART Services

The first proposal is most effectively instituted by the federal government. Americans could be prohibited from importing gametes from foreign countries for use by ART clinics in the United States. Alternatively, the government could prohibit Americans from using foreign ART services altogether. The more direct result of the foreign import rule is that it disrupts American consumers global search for white gametes and restricts them to a potentially more diverse American gamete pool. Consequently, it will have clear positive effects on "race" markets. As Part I showed, much of the foreign trade for eggs and sperm comes from places with idealized white phenotypes, including blonde hair, blue eyes and light or "fair complexions." These foreign donors find American consumers willing to import frozen eggs and sperm from places like Denmark and Czechoslovakia, with the hope of producing "ideal" white offspring. Importantly other countries have instituted restrictions of this nature and in this way control the genetic stock available within their countries. However, because the United States' already has a diverse population, restricting American consumers to American gametes would not produce any one race; it would not start a eugenicist trend. Specifically, the American restrictions would not facilitate an understanding of our country as "monoracial" nor specifically encourage the growth of certain populations within our borders. Instead, Americans would be "trapped" in the diverse gamete pool in the United States. Clinics currently have rules that limit the number of times a donor may "donate" to ensure that only a limited number of genetically-related children are produced by a single sperm donor. Egg donors also face limits because of the intrusive nature of egg retrieval procedures. Because of the scarcity these donation limits create, ART clinics would ultimately begin to market a larger cross-section of racially-diverse donors to their clients. Even if clinics took steps to increase the number of "white" American donors, there would inevitably be a more diverse cross section of "white" donors in their catalogues to ensure that clinics can fully meet their customers' demand for quality gametes. In short, the domestic gamete restriction may make ART clinics relax or abandon their current racial classifications and racial purity rules.

The restriction on foreign imports has multiple advantages beyond its potential to disrupt racial marketing in the ART industry. Policymakers easily could justify the proposal by arguing that there is a greater risk of disease transmission, new genetic defects or contamination when one imports gametes from a global pool or uses foreign services. Additionally, policymakers could justify the foreign import restriction as necessary to protect the American ART industry and keep American dollars at home. Last American ART consumers, forced to contract within the US market, are likely to bring the costs of ART services down. ART providers will compete to provide this newly captured consumer base with reasonably-priced services. One of the advantages of this proposal is that it is not didactic: it does not directly tell consumers what race their sperm or egg donor should be. The proposal also does not prevent consumers from securing a child that looks like them. The proposal merely makes it more likely that American ART consumers will consider a more diverse donor pool during the gamete search process. This measured proposal, combined with some of the commercial speech proposals described below, could substantially change American consumers' understanding of aesthetic similarity, phenotype and race.

2. Commercial Speech Restrictions

Restrictions on foreign imports will be far more effective if coupled with new commercial speech restrictions governing ART clinics. Clinics should be required to post a series of warnings and disclaimers about race given the substantially misleading misrepresentations they make about race in their

marketing materials. These warnings and disclaimers could include the following: (1) there is no genetic basis for race; (2) the precise genetic transmission mechanisms for many phenotype/features are not known; (3) the phenotype/ features of a given donor are not guaranteed to be present in the donor's child; (4) definitions of race vary from clinic to clinic and may be changed without notice to the consumer; (5) preferred physical characteristics may appear in multiple different racial groups. This disclaimer regime may prove to be attractive because it does not restrict or limit consumer choice. Instead the disclaimer regime attempts, through a process of repetition, to destabilize consumers' understandings about race in a way that enhances consumer freedom.[199] The more prominently these disclosures appear on websites or in ART materials, the more effective they are likely to be in incentivizing consumers to look outside of so called "racial categories" when searching for gametes. For example, because many consumers search for gametes online, these disclaimers could be programmed to flash on websites with regularity as a consumer searches for a donor.

The disclaimer proposal is a minimally intrusive way to ensure the government's racial equality message is heard in some form by ART consumers. There is some research suggesting that disclaimers or warnings can trigger opposite effects in those exposed, because of the allure of so-called "tainted fruit" and illicit behavior.[200] However, this research examined behavior such as consumption of "unhealthy" products;" dismissal of anti-discrimination messages is less likely to be a source of pride or produce pleasure for the average consumer. Rather it is more likely to produce discomfort from feelings of hypocrisy. Admittedly more research in this area would be helpful. At this juncture it is enough to suggest that antidiscrimination nudges triggered by how a website is constructed or explicit antidiscrimination messages, could disrupt racial messaging in the ART industry. Explicit messages may be very effective. Research suggests that disclaimers and warnings issued in close proximity to when an action is contemplated can be extraordinarily effective in changing behavior. [201] Again, these disclaimers and warnings do not limit consumer choice; they merely encourage consumers to broaden their search parameters. [202] This innovation is not present in other countries. Rather it is specifically based on the United States' long history under the commercial speech doctrine of addressing fraudulent, or materially misleading marketing representations.

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[199] Jennifer J. Argo, Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*. 23 JOURNAL OF PUBLIC POLICY & MARKETING 193-208 (2004)(explaining that effectiveness of disclaimers and warnings does not vary by product type but more costs of behavioral compliance).

[200] The success of a disclaimer strategy will depend in part on the moral salience of the messaging about race, the form the disclaimer takes and the reinforcing mechanisms that are in place to fortify these messages. Rheanna Ata, J. Kevin Johnson *et al*., *Effects of Exposure to Thin-Ideal Media Images on Body Dissatisfaction: Testing the Inclusion of a Disclaimer Versus a Warning Label*, 10 BODY IMAGE 472-480(2013) (concluding that warning labels had little effect on regard for product but positive effects on body image). For example, some studies have suggested that that warning labels have little effect at all. Jennifer Harmon & Nancy Ann Rudd, *Breaking the Illusion: The Effects of Adding Warning Labels Identifying Digital Enhancement on Fashion Advertisements*, 3 FASHION, STYLE AND POPULAR CULTURE 357-374 (2016) (arguing warnings have minimal effect on positive body image).Other studies have suggested that warning labels can in fact increase the desirability of the discouraged product or behavior because of the temptation to partake of "forbidden fruit" or illicit material. B.J. Bushman & A.D. Stack, *Forbidden Fruit Versus Tainted Fruit: Effects on Warning Labels on Attraction to Television Violence*, 2 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: APPLIED 207-226(1996)(discussing three experiments showing that authoritative versus informative warning labels advising about the existence of violence increased interest and consumption level of violent material).

[201] Ross Buck & Rebecca Ferrer, *Emotion, Warnings and the Ethics of Risk Communication* in HANDBOOK OF RISK THEORY, S. Roeser, R. Hillerbrand, P. Sandin, M. Peterson (eds.) (explaining that although the analytic cognitive aspects of effective warning have been closely studied too be truly effective these warnings must command attention, stimulate memory, and evoke emotion)

[202] Daniels & Golden, *supra* note 55 at 19.

Some may argue that the disclosure proposal is an unconstitutional imposition of compelled speech in violation of the First Amendment. However, given the current strength of the "government speech" doctrine and recent cases requiring various industries to both pay for and display government messages related to industry conditions[203], this disclosure or warning requirement is likely to survive constitutional scrutiny.[204] ART clinics, of course, should be permitted to frame the disclaimers in ways that ensure consumers know the disclaimers are government messaging[205]. Over time these disclaimers may fade in significance like the health warnings displayed on cigarettes; however, in the near term they are likely to profoundly shape the ART gamete "shopping" experience. Importantly, this proposal does not go as far as wholly prohibiting the use of race in ART materials.[206] Wholesale prohibitions on commercial speech based on race are highly likely to trigger inquiry as a content based restriction on speech, subject to strict scrutiny. While one would assume that our equal protection commitments are sufficient to qualify as a compelling or highest order state interest, the inquiry might still fail to meet the requirement of narrow tailoring. For these reasons, a disclaimer strategy is the better option.

3. Public Subsidies

Government has substantial latitude to spend money to hire speakers to communicate its message under the government speech doctrine. Additionally, government may use its spending power to support the provision of services that have an expressive dimension.[207] The Supreme Court has recognized that government cannot possibly be viewpoint neutral as it chooses which services to fund. As Justice Scalia has explained, "[g]overnment must [be free to] choose between rival ideas and adopt some as its own."[208] Both of these sources of authority suggest that the federal government could offer subsidies to ART providers that do not use race to categorize gametes.[209] Government officials can easily explain that the State has an interest in supporting clinics that operate in a race-neutral fashion as they reflect the colorblindness or race neutral norms that the State believes are part of the 14th Amendment equal

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[203] *Johanns*, 544 U.S. 550(recognizing as constitutional beef industry taxation scheme used to fund government messages encouraging beef consumption even though beef producers were not able to control the messaging from government); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (recognizing that wording on government issued license plates constituted government speech despite some citizen participation in choosing available mottos and messages).

[204] *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (discussing government speech doctrine) .

[205] Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. Rev. 605, 615 (2008) ("[O]ne of the problems posed by mixed speech is the risk that the public will not spot government advocacy and will therefore fail to hold the government accountable for its viewpoint.")

[206] Fox, *supra* note 13 at 14.

[207] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (government may enlist private parties to pursue policy goals and speech connected with those goals may be content specific)("The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own)

[208] *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557-67 (2005)

[209] *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (discussing government's interest in ensuring service providers enlisted to implement government programs will deliver messages tailored to be consistent with the goals of such programs) cf. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (recognizing that message sought to be conveyed by government as part of the program was not properly tailored to the purposes of the program and violated the service providers' First Amendment rights)

protection guarantee. Government subsidized ART providers would be directed to ensure that individual donors are not reduced to mere "race" in the donation process, and that clinics should not produce marketing material that privileges race in donor descriptions.[210]

As Part III explained, many countries use public subsidies and other government mechanisms to communicate their views about ART. For example, countries like Israel currently use public subsidies to shape ART usage, providing full reimbursement to ART consumers for certain services. In addition, the government has set up relationships with certain Romanian sperm and gamete providers to provide genetic material to Israeli couples. The norm the state hopes to project is the importance of the family in Israeli society. A subsidy regime in the United States would by contrast be designed to reflect anti-balkanization and racial equality values we hold dear. Subsidies for ART may be closer to reality than many people realize. As birth rates in the US fall to levels below the population "replacement level" necessary to maintain healthy economic growth, reproductive subsidies may grow more attractive for economic reasons.[211]

As explained above, federal or state governments should limit these subsidies to programs that disrupt the current racialized marketing practices used by the ART industry. First, they could offer grants to gamete banks or ART clinics that do not group donors by race or ethnicity. These entities instead would allow customers to search for certain physical features in a process that ensures that the consumer is provided with a sample that contains multiple highly appealing, different "race " donors. Further restrictions would heighten the possibility that consumers will combat their tendency to discriminate based on color. For example, a gamete bank could limit the number of samples a consumer is presented to choose from within a period of time (perhaps 10 donors per month). Alternatively, the program could be structured to provide subsidies directly to consumers that purchase their gametes from providers that do not group samples by race and ethnicity. ART clinics and gamete banks would likely change their practices in order to capture these consumers. Under either regime, consumers will inevitably be confronted with different race donors that are highly appealing and physically similar in surprising ways. Moreover, consumers that end up choosing sperm or egg donors phenotypically recognized as "white" will be better off as a consequence of a system structured by a colorblindness norm. For, after repeated experiences looking at donor samples that compel them to look across race, they are likely to see the potential of donors in "other" racial groups that otherwise they would have never seen. Additionally, they are invited into an exercise that causes them to see similarity across race, which is an antidiscrimination exercise that benefits us all.

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[210] Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983)(denial of tax exemption to school that engaged in race discrimination satisfies strict scrutiny given compelling interest in eradicating race discrimination)

[211] Jonathan V. Last, *America' s Baby Bust*, WALL ST. J. (Feb. 12, 2013), http://www.wsj.com/articles/SB10001424127887323375204578270053387770718 America's total fertility rate today stands at 1.93, according to the Centers for Disease Control and Prevention) hasn't been above the replacement rate in a sustained way since the early 1970s. This creates a dual problem—a population that is disproportionately old and shrinking overall. The phenomenon has enormous economic, political, and cultural consequences..

61 *Id*.

The subsidy program described above is specifically designed to express long-celebrated American antidiscrimination norms. Claims of compulsion are unlikely to be persuasive, as the state or federal government will be paying providers to deliver its message, and ART clinics or consumers are free to decline the subsidies and continue to purchase and sell reproductive services as normal. Similarly, consumers that wish to search based on race and ethnicity can forgo government support; however, again, since they are not being wholly prohibited from finding a donor that is phenotypically similar, the government subsidy program will be highly appealing. Additionally, to the extent the program makes ART services more broadly available to all racial groups, it will eliminate the current class-based economic barriers that have discouraged minority use of the ART market. Others may be concerned that the wealthy will opt out of this subsidy regime and continue to purchase allegedly "pure blood" white donors. Certainly, some people will opt out; however, their insistent desire to search for gametes based on race is likely to cause some embarrassment if discovered publicly. Assuming their desires remain private, race-focused consumers will operate in a far smaller market for choice and end up negotiating private contracts. Most ART clinics will be eager to court the government subsidies rather than service this smaller group of customers.

4. Taxes

Other scholars have proposed that taxes can be used to sanction consumers that buy gametes based on race. For example, Dov Fox has proposed that we impose a "sin tax" on these consumers, similar to the kind imposed on persons that purchase cigarettes or alcohol. There are some concerns about this model. As an initial matter, "sin" taxes no longer communicate the same negative social sanction they did when these taxes were created. For example, the moral opprobrium originally associated with tobacco and alcohol seems an antiquated notion today. Sin taxes are more aptly described as measures that recognize an individual's personal right to engage in unhealthy habits but also recognize the state's interest in recouping costs it suffers as a result of this unhealthy behavior. The message projected by sin taxes is tolerance, rather than judgment; they function as a clear acknowledgment of each consumer's personal freedom. These propositions make "sin" taxes an ill fit for discouraging the use of race in ART markets. Government wants to send a much clearer message of disapproval for this commercial behavior. Also, it seems unfair to blame ART consumers for shopping in a racialized regime they did not create. They are triggered by ART marketing to make racial decisions when choosing eggs and sperm, and taxes therefore should be directed to ART marketers rather than consumers themselves. If taxes are imposed legislatures should use the tax revenues collected to subsidize efforts that tend to deracialize the ART industry. The money could be used to help defray the costs of a subsidy program that funds gamete banks that do not use race or subsidize consumer purchases when they buy through a system that does not segregate based on race.

At this juncture, the ideal level and form of government enforcement is unclear, as both state and federal authorities have a genuine interest in regulating in this area. The federal government's interest and power stems from its "commerce clause" power, as the ART market is an interstate and intercontinental distribution networks for gametes. This commerce clause power, coupled with the federal government's constitutional racial equality guarantees justify regulations that disrupt racial marketing in the ART industry. The federal government additionally has First Amendment interests that allow it to communicate a racial equality message. However, states also have a strong interest in regulation. Historically they have exercised broader discretion to regulate reproductive "freedom" in the ART market, citing their expansive police powers. State regulators could argue that markets in race compromise the

welfare of minority citizens by encouraging dynamics that lead to discrimination, and raise their own constitutional commitment to racial equality. States additionally could raise concerns about misleading commercial speech or their own First Amendment speech interests. For some state regulation proves a more attractive option because states are regarded as legislative laboratories that can develop policy initiatives later adopted at the federal level. States can also better reflect the views of the local communities most affected by a particular policy, a key benefit when legislation touches on potentially divisive moral and ethical issues. Therefore, although the majority of the proposals outlined appear to be federal initiatives, some may conclude they could be more effectively implemented by state legislatures.

5. No Action

Finally, we could simply continue on our current path. Courts appear to be primed to rule that contracts exchanging race in the ART market are unenforceable. Specifically, the *Andrews Court* already ruled in an earlier racial mistake case that one cannot secure damages for "wrongful birth" in cases where ART providers have made a "racial mistake." Cramblett's claim was not well received and died in a haze of procedural complications. There has been no decision, based on breach of contract or negligence that has granted a family relief based on unexpected racial mix-ups in an ART cases. However, the specter of non-enforcement will have little impact on the ART industry. Consumers do not know these contracts are potentially unenforceable. They believe they have entered a valid contract for the purchase of gametes that will produce a child of a given race. Clinics also settle and provide some payout on these contracts to avoid media attention, making government non-enforcement a secondary consideration. Finally, given how rare these cases are, it makes little sense for gamete providers to abandon highly profitable racialized marketing practices. Therefore, we should not expect judicial non-enforcement of these contracts to be a strong corrective measure. The proposals I have outlined above are based on the understanding that government must do more than merely declining to enforce private contracts exchanging "racial products" if it intends to truly change the racial register of the ART market.

C. Critiques and Concerns

1. Gaming the System and the Use of Private Markets

Some will argue that any measure that prohibits the use of race in the ART market only invites surreptitious behavior. They rightly note that some consumers will actively work to circumvent any system that prevents consideration of race in gamete selection or exit any market that prevents them from making race-based choices. Certainly, we should assume that these forms of exit and resistance will occur, just as in every other commercial market where there are limitations placed on consumer freedom. However, most of my proposals do not prohibit parties from achieving "racial aesthetic sameness" if that is what they want. My proposals merely incentivize consumers and clinics to use other distinctions in the donor search process that more closely match with consumers' claims that they want mere "aesthetic similarity." Even if we assume that some consumers exit the primary gamete market and enter into small, individual private contracts to secure "white" gametes, some positive results still obtain. First, the majority of consumers will remain in the primary market and they will not be socialized through the current racially-loaded ART marketing experience. Shame will prevent many from exiting the primary system; whites that insist they need a racially-segregated market will be viewed critically by their peers over time. Also, consumers that do exit in favor of a secondary market will still never be socialized through the current racially loaded ART gamete marketing experience. They also will find it time

consuming, complicated and difficult to court desirable individual donors. Last, a person that willfully finds ways to search for sperm based on race will be forced to face her level of investment in a racialized society. This understanding alone could lead to more honest engagement when thinking about racial inequality more broadly.

2. The Death of Consumer Freedom – Restrictions on the Right to Reproduce

Some critics will argue that attempts to limit ART consumers' racial choices, constitute an unfair infringement on the reproductive freedom of consumers.[212] Here, again, the claim is weak as the systems I have proposed merely encourage consumers to focus on physical features as they appear across groups rather than having their searches constrained by a false racial construct. Also, consumers are not being denied *freedom* by these measures; they merely are being encouraged to look more broadly at a larger class of donors. At worst, consumers are being denied marketing materials and procedures that describe the donors in factually inaccurate and reductionist ways.[213] The right to ART services has never been understood to guarantee consumers the right to have information presented in a particular fashion. Indeed, when viewed from this perspective, consumers' demand to have a gamete market structured around race seems a mere customer preference, a *de minimus* concern that does not limit procreative freedom in any substantive fashion.

3. Inconsequential Effects

Some may argue that that the changes proposed here will not do much to disrupt race discrimination in ART markets.[214] Families that want fair skinned, blond and blue-eyed donors will continue to highlight search features that give them phenotypically white donors. Even those that search for characteristics that might overlap with other groups will continue to choose the white candidates they are offered.[215] The various proposals I have offered allow for the fact that this may be true. I do think, however, that there is more reason for hope than might initially be assumed. Anecdotal accounts and qualitative data have shown us that consumers will cross racial categories because of the high cost of securing same race gametes, scarcity, and because they happen to encounter a different race donor that look similar to someone in their families. Under the subsidy program, ART clinics should be required to provide a mixed-race sample to anyone that approaches the clinic for services. Clinics that currently offer "face matching" services may deliver the ART consumer a sample that produces certain revelations about similarities across race, even if the consumer ultimately chooses a sample from within his or her own racial group. Moreover, the most doggedly biased people will choose white donors that do not look like them, merely because of hurdles to accessing their ideal sample. This experience as well could prove to

[212] *But see*, Roberts, *supra* note 12 at 798 (highlighting the way these arguments are used to protect ART vendors from regulation).

[213] Polina Vlasenko, *Desirable Bodies/Precarious Laborers: Ukrainian Egg Donors in the Context of Transnational Fertility* at 197 ; Emily Thomas, *Fertility Clinic Tells Woman She Can't Use Sperm Donor From Another Race*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/07/28/calgary-sperm-donor-race_n_5627382.html

[214] Some will argue that these protocols will merely cause colorism to take over the ART market, rather than race. These concern are credible, but colorism does not operate in a stable fashion. Individuals that have phenotypes that allow them to claim membership in multiple groups often operate in ways that tend to break down racial barriers and do not respect "color" based divisions.

[215] See Ryan & Moras , *Race Matters at*, 40. Ryan and Moras note that lesbian couples may not explicitly acknowledge their preference for same race gametes, but they highlight issues like hair texture and eye color and assume gametes of the correct race will be provided by default.

be a learning opportunity. They will be confronted with the ways their rigid views on race prevent them from securing many of the favorable attributes they hoped for in their child.

4. Claims of Discrimination

Some may argue that my proposals are naïve about the dangers mixed race and minority children face when born into white families that have a strong preference for white children. They may worry that minority children born into families that prefer whiteness are destined to be mistreated. Several thoughts are responsive to this concern. First, white families are not a monolithic group. Some couples that choose to search for white gametes merely do because they are triggered to think race is critically salient by the search procedure. They also do so because they are actively discouraged by ART marketers from crossing racial boundaries. Additionally, the genetic tie consumers will often have to the children they produce through ART should prevent mistreatment. Last, consumers will still be paying significant costs and enduring uncomfortable medical procedures to produce a child through ART. They are unlikely to go through this process if they truly do not want a mixed-race child. Instead of discrimination, mixed race children are more likely to face parents that are naïve about discrimination and parents that may not be fully prepared to talk to a child about discrimination. Resources should be provided to families that seek help in navigating these challenges. We should recognize, however, that these are exactly the same problems mixed race children face when they are raised in white households and neighborhoods. Children facing these challenges will not be alone, and responsible parents will find means for them to connect with minority friends or relatives.

5. Claims of Distortion Effects – The Death of Race

Some will argue that the proposals I have outlined effectively call for the death of race, that I have transformed the ART process into an engine for producing mixed race children. This critique seems overblown. Only 1% of children born in the United States are produced through ART. Biological reproduction is still the norm and most children will be born through biological reproductive procedures. To the extent the ART process produces more mixed-race children, I do not think this is a source of concern. So-called race mixing has always existed but has not been acknowledged. Individuals historically were forced to adopt more reductionist labels that reduced attention to mixed race status.

My proposals do try to dismantle the notion of biological race – the idea that race is genetically transmitted. My proposals instead recognize race as a social fact and a lived condition. Race increasingly is determined not by phenotype – as there are more phenotypically ambiguous individuals and these individuals make a range of racial identification decisions. Race in the social and political sense is defined by multiple factors: practice, bodily marking, political choice, public recognition and voluntary claiming. In a more concrete sense, we must recognize that children born through ART may not necessarily identify as white, even if they have some of the same features as their white parents. Rather, racial identity decisions for these children should proceed as they do for most other mixed-race persons – as the product of experience, exposure to discrimination, and exposure to cultural forms. Racial identity should be based, as it always has been for mixed race persons, on a combination of involuntary ascription based on phenotype, voluntary affinity, and political context. While these processes create alarm for some parties they are a sign of racial progress and the breaking down of clear racial lines. Mixed race children born into "white" families have the right as they reach adulthood to determine the particular

racial labels they will individually claim. This is an important and individual growth experience and their choices should not be predetermined for them decades earlier by an anonymous worker in a lab.

Conclusion

This discussion began by analyzing Jennifer Cramblett's claim of "racial mistake" and asking whether an award of damages for the ART clinic's error is a threat to American anti-discrimination norms. Our exploration of clinic marketing practices provides new context for understanding Cramblett's perspective. She is not as a *base* throw-back to an old racial era; rather she is the contemporary product of an ART marketing process that encourages her to think that certain "racial products" are her "just due" as an ART consumer. Jennifer Cramblett really is not really the person who should be sued in the court of public opinion. Our critical gaze instead should focus on the invisible hand that has shaped the ART market into a place where race is a product for purchase. Our criticism should be targeted to communities that continue to respond to racialized marketing initiatives, and the reticence of friends and family that watch others form race-based family formation contracts without raising concerns.

With a better understanding of current marketing practices in the US ART market, America's laissez faire approach to the use of race is profoundly troubling. With a better understanding of buying patterns we see more clearly how the ART marketing process encourages troubling views about whiteness itself and stokes white Americans' racial anxieties. The ART market is perhaps the first stop in a longer journey in determining how American society is still structured in ways that affirm the monoracial family and the way law is still being invited to participate in enforcing the monoracial family norm.

This discussion shows that we can address the tough questions the ART market poses without compromising the ART experience for the consumer. Reproductive freedom and freedom of contract will not be lost if we reform gamete marketing practices and strongly limit or prohibit the use of race. Rather, there are ways to accommodate customer choice and still act in a fashion that is consistent with our antidiscrimination norms. Elimination of racial classifications increases choice for the American ART consumer, allows sperm and egg banks to have more diverse gamete stores, and invites market players to imagine new ways to court ART consumers. There is more consensus in this area than one might imagine. Much can be achieved within these shared areas of agreement. These conversations however require that we not hide behind the language of "innocent" private preferences, for the loss of innocence is necessary to achieve our racial equality goals.