
Article

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

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This piece was primarily developed during visiting professorships at Yale Law School and Stanford Law School. Special thanks to Dean Heather Gerken and former Dean Elizabeth Magill for their creative efforts to accommodate my childcare commitments and make these visits possible. Many thanks to the wonderful faculty at both schools that provided feedback on the piece. Special thanks as well for the feedback at faculty workshops hosted by many other fantastic schools including Northwestern School of Law, the University of Connecticut School of Law, Cardozo School of Law, Pace University School of Law, Fordham University School of Law, Arizona State School of Law, Washington & Lee School of Law, and the UC Davis School of Law. Additional portions were conceptualized as part of the Bodenheimer Lecture for the UC Davis School of Law, and for a panel on constitutional law and family law sponsored by Jill Hasday for the American Association of Law Schools Conference in 2017. Many colleagues were kind enough to offer extensive comments on the draft or special opportunities for feedback including Bruce Ackerman, Anne Alstott, Mary Anne Case, Richard McAdams, Ralph Richard Banks, Amalia Kessler, Bernadette Meyler, Reva Siegel, Noa Ben-Asher, Kimani Paul-Emile, Tracey Meares, Dov Fox, Jane Schacter, David Sklansky, Robin Lenhardt, Ian Ayres, Michelle Adams, Jessica Clarke, Joseph Grundfest, Monica Bell, James Forman Jr., Claire Priest, Doug NeJaime, Rene Almeling, and Daisy Deomampo. Special thanks to Andrés Pap for organizing the 2019 ICON-S Public Law conference panel in Hong Kong that helped me flesh out the comparative aspects of the piece. Thanks also to the USC Gould School of Law for the summer support that allowed the further development of these ideas. Finally, warm thanks to my writing retreat partners at the Stinson Writers Workshop: Orly Lobel, Tristin Green, Rachel Arnow-Richman, Michelle Travis, Deborah Widiss and Leticia Saucedo. Special thanks to the *Minnesota Law Review* including my primary editors Stanton McManus, Michelle Cardona Vinasco, Jackie Fielding, and Brooke Robbins for their diligence, creativity, and wonderful suggestions during the editing process. My piece is undoubtedly better as a result of their efforts. This Article is dedicated to my mother, Carolyn Gear Thompson, and all others who are willing to ask the sometimes hard and unwelcome questions about race.

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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.”¹ Cramblett, however, like many other prospective mothers, faced certain challenges that threatened to thwart her desire to biologically reproduce. Luckily Cramblett, as an economically privileged prospective mother,² discovered that the market would provide what Mother Nature would otherwise deprive—the genetic material and the technological means required 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.³ 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.⁴ The clerk’s mistake erupted into a com-

1. See Complaint ¶¶ 7–8, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400 [hereinafter *First Complaint*] (discussing Cramblett’s four-year committed relationship to Amanda Zinkon and the couple’s desire to have two children). 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., Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 629–30 (2013); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387 (2008). The implicit assumption that accompanies these family norms is that a biologically-created nuclear family is ideal.

2. In vitro fertilization (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 which results in exorbitant costs for consumers); see also Alicia Armstrong & Torie C. Plowden, *Ethnicity and Assisted Reproductive Technologies*, 9 CLINICAL PRAC. 651, 652 (2012) (noting only three states have insurance mandates that cover ART services).

3. For a general discussion of services currently available in the ART market and potential future technologies, see HENRY T. GREELY, *THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION* (2016).

4. *First Complaint*, *supra* note 1, ¶¶ 9–10, 16.

mercial controversy, a family controversy, and a racial controversy all in one.⁵ Cramblett, as a member of a monoracial blond, white lesbian couple, had contracted for the chance to form a white nuclear family.⁶ 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, as she effectively had been denied the "benefit-of-the-bargain"⁷ she contracted for in her ART transaction.⁸

What was the "benefit-of-the-bargain" in Cramblett's case? The answer to this question spurred a firestorm of controversy, as it seems impossible to respond without violating certain colorblindness norms.⁹ 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 preeminent source of injury in her mind, the only source of her damages.¹⁰ Moreover, simple compensation was not

5. *Id.* ¶ 22 (discussing injury caused by bearing a "beautiful, obviously mixed race, baby girl").

6. For a discussion of the monoracial family norm and its influence on white families, see ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 17–19 (2013). See also Huntington, *supra* note 1, at 591 (discussing the racialized nature of the nuclear family norm).

7. *Benefit-of-the-Bargain Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. See First Complaint, *supra* note 1.

9. 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. ON RACE & SOC. JUST. 41 (2016) (discussing moral deficits in plaintiff's race-based wrongful birth claims); R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2079 (2017) (using the *Cramblett* case to call for greater attention to the way race shapes family formation decisions and family law); Suzanne Lenon & Danielle Peers, 'Wrongful' Inheritance: Race, Disability and Sexuality in *Cramblett v. Midwest Sperm Bank*, 25 FEMINIST LEGAL STUD. 141 (2017) (discussing moral deficits in plaintiff's race-based wrongful birth claims). 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.

10. See First Complaint, *supra* note 1, ¶ 20. Cramblett received a twenty-three-page description of each sperm donor and used this description to select her final choice. *Id.* ¶ 9. 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. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 865, 868

enough in her opinion. The sperm clinic was apologetic and reimbursed the money she had paid for her sample.¹¹ 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.¹² Cramblett's suit therefore forced the court to answer questions it was likely eager to avoid: Should we enforce contracts that purport to exchange race? Does race have an exchange value? If the answer is yes, how can this conclusion be justified under the logic of the United States' so-called post-racial, colorblind ethos? How can contracts for race exist in a society ostensibly marching towards racial equality?

Free market champions¹³ joined by strong reproductive rights advocates,¹⁴ tend to endorse Cramblett's right to sue and

(N.D. Ill. 2017) (citing First Complaint, *supra* note 1, ¶ 16) (seeking compensation for external pressures associated with an unplanned "transracial" parent child relationship).

11. First Complaint, *supra* note 1, ¶ 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. *Id.*

12. See *generally id.* ¶¶ 17, 23–25 (discussing additional race-related injuries and how happiness was "replaced with anger, disappointment and fear"). Cramblett also noted the racial mistake's secondary consequences as she and her partner wanted to have two children by the same sperm donor. *Id.* ¶ 9. 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. *Id.* ¶¶ 14–16. At that point, the couple faced the Hobbesian choice of choosing the same donor or having children of "different races" in their family.

13. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994) (arguing 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"); Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 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).

14. 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., Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, 31 HASTINGS CTR. REP. 13, 17 (2001) (arguing that racial categorization limits individual freedom and encourages racial stereotyping but declining to forbid its use); cf. Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 5 (2011) [hereinafter Fox, *Choosing*] (expressing con-

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.¹⁵ Indeed, since its inception, the American ART market has represented the right to parenthood as being first and foremost about consumer choice.¹⁶ 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.¹⁷ Race understandably is one of several significant characteristics. For another

cern about racial categorization's symbolic effects in the ART market but declining to forbid its use). Fox is not an enthusiastic supporter of the use of race in this fashion, but sees race as an established and perhaps intractable component of some consumers' ART selection decisions. See Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 135–36 (2019).

15. See Fox, *Choosing*, *supra* note 14, at 10 (describing the search for same-race gametes and same-race dating partners as an innocent search for shared culture); see also Julie Shapiro, *What Damages When a Sperm Bank Errs?* (Oct. 4, 2013), <https://julieshapiro.wordpress.com/2014/10/04/what-damages-when-a-sperm-bank-errs> [<https://perma.cc/7ZY2-NQXU>] (asserting Cramblett's desire for racial sameness in her child is similar to wanting a deaf child if you are deaf); Barbara Spiegel, *It's Not Racist To Want Your Child To Look Like You*, TIME (Oct. 9, 2014), <http://time.com/3482873/lesbian-couple-sues-sperm-bank-racism> [<https://perma.cc/EHV7-U3XV>] (comparing Cramblett's claim to that of consumer-mother with dwarfism traumatized by clinic's apparent accident causing her to be impregnated with sperm from a standard height donor); cf. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the 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).

16. See generally GREELY, *supra* note 3 (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 14, 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 *Become an Egg Donor*, CAL. CRYOBANK, <https://cryobank.com/services/become-an-egg-donor/> [<https://perma.cc/7MDG-7VT3>] (describing information required to qualify as a donor); STE-PANKA, *Make Money Donating Your Eggs!*, YOUTUBE (May 13, 2014), <https://www.youtube.com/watch?v=Is8yzODvM2U> (showing a video account from a six-time egg donor noting that intake process requires disclosure of SAT scores, hobbies, college major, and various talents).

17. See Fogg-Davis, *supra* note 14, at 15 (outlining the various donor characteristics shared with consumers).

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.¹⁸ A child of a different race, they argue, frustrates this very reasonable expectation.¹⁹ 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.²⁰ This race-based aesthetic-sameness argument may strike some of Cramblett's defenders as particularly innocuous, as they themselves or people close to them may have entered family-formation contracts to secure same race children. Cramblett also 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.²¹ 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.²²

Many equality scholars, in contrast, view Cramblett's case with dismay, arguing it reveals the lie of contemporary claims of colorblindness and post-raciality.²³ Numerous scholars have criticized our culture's naturalization of gamete banks' practice of

18. 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: "[The receptionist] asked Jennifer if she had requested an African American donor to which she replied, 'No, why would I request that? My partner and I are Caucasian. You know that from our profiles.'" First Complaint, *supra* note 1, ¶ 16.

19. See, e.g., Fox, *Choosing*, *supra* note 14, at 16.

20. See MARY LYNDON SHANLEY, WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND 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) (sympathetically describing the case of *Andrews v. Keltz*, 838 N.Y.S.2d 363, 365 (Sup. Ct. 2007), in which a donor mixup led to a couple "rais[ing] a child that is not . . . the same race, nationality, or color' as they are").

21. Interview with anonymous ART consumer (Sept. 2017) (on file with author).

22. *Cramblett v. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 865 (N.D. Ill. 2017). Cramblett is not the first plaintiff to file a claim of this nature. For other cases, see *infra* Part II.

23. See DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 267–70 (1997) (discussing the way ART figures white mothers as legitimate procreators in need of assistance compared

categorizing, pricing, and marketing sperm and eggs based on race.²⁴ They also have criticized the way the American ART market naturalizes the desire for a monoracial family.²⁵ Unpersuaded by innocent aesthetic-preference arguments, these scholars press American ART consumers to more deeply probe their motivations. Specifically, these scholars argue that the marketing of racially marked gametes in the American ART market is an explicit, contemporary example of racial commodification.²⁶ 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.²⁷ 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.²⁸ For these reasons, they argue, the

to poor Black mothers); PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG* 230 (1995) (same); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 64 (2003) (arguing that racial classification in ART sends a message of white superiority); Roberts, *supra* note 13, at 789 (arguing current ART racial categorization practices send a social message that indicates white children are of higher value).

24. See sources cited *supra* note 23.

25. See Roberts, *supra* note 13, at 790 (criticizing ART market developments that radically constrict the choices of people of color).

26. See sources cited *supra* note 23.

27. The racial products available 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 et al., *Cross-Border Reproductive Care: A Review of the Literature*, 22 REPROD. BIOMEDICINE ONLINE 673 (2011) (describing reproductive tourists coming to the United States as roughly four percent of the domestic ART market). Latin Americans, Europeans, and Canadians are some of the largest foreign consumer groups. *Id.* at 678. 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., AMY SPEIER, *FERTILITY HOLIDAYS: IVF TOURISM AND THE REPRODUCTION OF WHITENESS* (2016) (discussing American demand for whiteness as powering Czechoslovakian market for ART consumers); Carolin Schurr, *From Biopolitics to Bioeconomies: The ART of (Re-)Producing White Futures in Mexico's Surrogacy Market*, 35 SOC'Y & SPACE 241 (2017) (discussing American demand for whiteness as shaping Mexican ART market).

28. See Lenhardt, *supra* note 9, at 2073–74.

courts should refuse to enforce contracts that exchange race and dismiss Cramblett's claim.²⁹

The court's steps in assessing Cramblett's suit seem largely preordained, 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 law 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. For example, the clinic's failure to exercise due care in maintaining the racial identification tags for the samples could be legally characterized as negligence.³⁰ 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.³¹ 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 be summarily declared void.³² Without clear legal norms outlining the role of race in the commercial marketplace, and no moral or ethical guideposts for resolving such questions, a court is rudderless in resolving the *Cramblett* dispute.³³

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

29. 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. See Daniels & Heidt-Forsythe, *supra* note 2, at 721. The race-based commercial exchanges made in the ART market effectively ensure that white wealth remains in the hands of monoracial white families.

30. 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 Szkupinski Quiroga, *Blood Is Thicker than Water: Policing Donor Insemination and the Reproduction of Whiteness*, 22 *HYPATIA* 143, 150 (2007).

31. Bernabe, *supra* note 9 at 48–66 (cataloging Cramblett's possible claims and their likelihood of success).

32. 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.

33. Fogg-Davis, *supra* note 14, at 14–16.

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.³⁴

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 Black persons, Latinx persons, and Asians were racialized in particular ways to ensure their forced participation in developing the industrial and agricultural economy of the United States.³⁵ Indeed, racial commodities have played a key, disturbing role in the United

34. 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 forty-five days. Because Cramblett did not re-file and instead sought to file an identical claim in federal court, the Illinois Appellate 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. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 865 (N.D. Ill. 2017).

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

States' formation story.³⁶ 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.³⁷ The explicit racial commodification in gamete markets forces the question: Is there harm in classifying and selling genetic material based on race?³⁸ This Article begins to answer that 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.³⁹ 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 re-instantiate race-based subordination.⁴⁰

36. *Id.*

37. The most explicit bar on racial commodification is found under Title VII's race-based employment discrimination protections. Employment discrimination cases are beyond the scope of this Article, but they are consistent with and derivative of the Fourteenth Amendment equal protection law cases emphasizing the importance of dignity and equal access. *See, e.g., Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 744 (7th Cir. 1999) (rejecting employer's claim that a segregated sales force was required for customer service purposes); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 477 (11th Cir. 1999) (describing a case where an employer was not permitted to terminate a Black worker after racially specific "get out the vote calls" were no longer needed). Unfortunately, Title VII's prohibition on racial commodification is also routinely ignored by certain parties, including media entities and healthcare industry employers. *See, e.g., Kimani Paul-Emile, Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462, 464 (2012) (discussing hospital doctors' informal practice of respecting patients' racial preferences in assigning doctors); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 1–6 (2007) (discussing the existence of racial commodification dynamics when the entertainment industry issues race-specific casting requests).

38. Fogg-Davis, *supra* note 14, at 13 (arguing the gamete selection process encourages consumers to engage in racial stereotyping).

39. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S*, at 62–63, 66–67 (2d ed. 1994).

40. Fogg-Davis, *supra* note 14, at 16 ("[S]hould each individual donor have the freedom to describe his racial identity using language that transcends the sperm bank's racial boxes? And how are racial descriptions of sperm donors related to the consumer's goal of creating a baby?").

This Article 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.⁴¹ The *Cramblett* case is a flash point for this controversy because no such right to reproductive freedom currently exists.⁴² Rather, the broad reproductive choices Americans are offered in the ART market result from policymakers’ inattention and indecision, a resulting absence of legal regulation,⁴³ and the failure to fully engage with the philosophical question of what the right to procreate means.⁴⁴ 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.⁴⁵ Even in the United States, consumer freedom has always been understood as situated within a

41. See Yehezkel Margalit, *Artificial Insemination from Donor (AID)—From Status to Contract and Back Again?*, 21 B.U. J. SCI. TECH. L., 69, 69–71 (2015) (describing a shift from status and public ordering toward freedom of contract and private ordering in familial relationships).

42. See generally MICHELLE N. MEYER, NELSON A. ROCKEFELLER INST. OF GOV'T, STATES' REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES: WHAT DOES THE U.S. CONSTITUTION ALLOW? (2009), <http://research.policyarchive.org/20311.pdf> [<https://perma.cc/A974-6AUG>] (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 ARTs Technology: Lessons from Octomom*, 21 ALB. L.J. SCI. & TECH. 313, 315 (2011) (“[T]here is not . . . a general right to use assisted reproductive technology as a matter of reproductive autonomy, but there may be a limited right . . . to use ARTs as a matter of reproductive equality.”).

43. 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 a lack of regulation in the American ART market).

44. The right to reproduce is not freestanding; 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, *Preface to (IN)FERTILE CITIZENS: ANTHROPOLOGICAL AND LEGAL CHALLENGES OF ASSISTED REPRODUCTION TECHNOLOGIES* 13 (Venetia Kantsa et al. eds., 1st ed. 2015).

45. See *infra* Part I.C.5 for a discussion of Turkey, Israel, and Britain. Canada also faces significant restrictions resulting in roughly ninety percent of

network of necessary limitations, yet we still perceive the exercise of our marketplace rights as meaningful.⁴⁶

Throughout this Article readers will also be called upon to engage with the social mechanisms that give racial inequality permanence in an ostensibly post-racial society. 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. Stated simply, there is no need for compulsory anti-miscegenation statutes to maintain racial purity and racial covenants establishing racially segregated communities when the same results can be achieved through voluntary private decisions, a regime of “atomized inequality.”⁴⁷ Indeed, today the same anti-miscegenation goals are achieved through strategic marketing ploys and claims about individual consumers’ innocent “private” preference for a monoracial family.⁴⁸ 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.⁴⁹ Consumers are poised to demand that courts recognize the legal right to procure a monoracial family.⁵⁰ This

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), <https://slate.com/human-interest/2016/03/canadas-sperm-crisis-forces-citizens-to-find-seed-elsewhere.html> [<https://perma.cc/97CF-29EC>]. The point is that various countries’ restrictions may motivate reproductive tourism, but consumers in restrictive countries do not complain that these impediments have wholly deprived them their key reproductive rights. They may not agree with these restrictions, but they recognize the state’s strong interest in regulating ART markets.

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

47. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 886 (1998) (introducing the concept of “atomized inequality”).

48. Schurr, *supra* note 27, at 242 (explaining that there is a new “liberal eugenics” driven by consumer choices in a new bioeconomy).

49. Deborah Zalense, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 U. RICH. L. REV. 419, 479–84 (2017) (highlighting several breach of contract cases arising from ART).

50. *Id.* at 452–54 (discussing intended parents’ preference for same-race babies).

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 is effectively being asked to subsidize the private discriminatory preferences that *it created* on the front end.

This Article is also 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.⁵¹ 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.⁵² Parenthood and family are more easily subordinated to this framework as children are procured through ART, adoption, and other baby market arrangements.⁵³ In this baby market, race becomes one more commodity bought and sold, a thing easily procured as a means to perfect family relations.⁵⁴ 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

51. Randolph Hohle, *The Color of Neoliberalism: The “Modern Southern Businessman” and Postwar Alabama’s Challenge to Racial Desegregation*, 27 SOC. F. 142, 143 (2012) (describing the relationship between race and neoliberalism).

52. See Laura Mamo, *Queering the Fertility Clinic*, 34 J. MED. HUM. 227, 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); Roberts, *supra* note 13, at 785 (“[D]iversion of attention away from social causes and solutions reinforces privatization, the hallmark of a neoliberal state that seeks to reduce social welfare programs while promoting the free market conditions conducive to capital accumulation. Thus, reproductive health policies involving women at opposite ends of the reproductive hierarchy play an important role in the neoliberal state’s transfer of services from the welfare state to the private realm of family and market.”).

53. See Zalense, *supra* note 49, at 419–20.

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

and normative questions.⁵⁵ 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.⁵⁶ Understanding Americans' relationship to race in the market, and understanding how race continues to be bought and sold in American society will give us great insight 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.⁵⁷ Families that are unable to biologically reproduce are now turning to various family formation arrangements for acquiring children, such as adoption, surrogacy, gamete purchase, etc., that are shaped by market pressures.⁵⁸ We must examine the relationship between the various markets for acquiring children and why these markets have formed.⁵⁹ Additionally, we must understand the role that race plays in these

55. Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 285, 295 (2007) (explaining that markets are cultural products and can be analyzed to identify cultural norms).

56. This approach is sometimes referred to as economic sociology. *Id.*

57. Dov Fox, *Race Sorting in Family Formation*, 49 FAM. L.Q. 55, 60 (2015) (describing how some private adoption agencies "openly make placement decisions based primarily on race and prominently highlight the racial backgrounds of adoptive children in online advertising and other promotional materials, while charging higher fees to adopt white children than black ones" (footnotes omitted)).

58. *Id.*

59. 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 that 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 the 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 U. CHI. LEGAL F. 393, 410 (2004) (discussing legal structures that create incentives for ART as the more "private" unregulated option as compared to adoption). Additionally, the racial segregation and selection

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;⁶⁰ 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.

This Article proceeds as follows. Part I, *Packaging Race in the ART Market*, probes the racial categorization practices currently used in the United States 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 nineteenth century and early twentieth century. Part II, *Purchasing Racial Essence: Understanding the Benefit of the Bargain*, 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.⁶¹ 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,

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 interests are required by statute to be honored and fairly evaluated. Goodwin, *supra*, at 62–64.

60. 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).

61. See *infra* Parts II.C, E.

Charting a Way Forward, considers the approaches federal and state governments could use if they attempt to disrupt current racial marketing practices in the ART industry. Part III explores approaches that function as direct prohibitions as well as more gradual, indirect incentive measures. Part III concludes by exploring issues that may be raised about the various regulatory approaches, and argues that our racial equality guarantees mandate that some action be taken to address the harms caused by racial marketing of ART products.

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 the family, that promote and reflect messages about race.⁶² 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.⁶³ 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 function 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. Importantly, as one grows more familiar with the rules of racial exchange in the American gamete market, one is confronted with their questionable logic and rampant inconsistency, and 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.⁶⁴ They tend to rank it first or second in importance when selecting

62. See generally Zalense, *supra* note 49.

63. *Id.*

64. Some consumers rank race as being the most important criteria. Fogg-Davis, *supra* note 14, at 15. Most websites feature a drop-down menu that invites purchasers to select by race. See, e.g., *Find a Donor*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/search> [<https://perma.cc/QXB5-7YJC>]; *Find a Donor*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/donors/#>

a donor; occasionally, it is trumped by intelligence.⁶⁵ Although American ART consumers rank race high on the list of desired characteristics, curiously they do not 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.⁶⁶ Consumer naivety about a clinic's racial packaging practices 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.⁶⁷

A. PACKAGING GAMETES

The process for selecting a sperm or egg donor is highly competitive. At some banks, only one to two percent of persons that apply are ultimately accepted as donors.⁶⁸ 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

[<https://perma.cc/Q3FM-CA9C>]; *Find A Donor*, XYTEX SPERM BANK, <https://www.xytex.com/search-donors> [<https://perma.cc/2R7U-BSW9>].

65. Race is typically one of the introductory informational items requested on a donor form. Fogg-Davis, *supra* note 14, 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.

66. Research failed to reveal any sources providing consumers with an open, comparative discussion of the clinic's varying racial categorization practices. Sources instead focus on clinics' general intake practices as analyzed by sociologists and other scholars. *See, e.g.*, Quiroga, *supra* note 30, at 149 ("ART practitioners are not consciously devoted to controlling women's bodies or upholding whiteness. . . . [B]ut they are often oblivious to the subtle ways in which they perpetuate racial classificatory systems. . . . For example, as a service to potential consumers, semen banks will provide catalogs detailing donor characteristics, presumably to facilitate matching of donor characteristics with that of the potential social father. Yet it is the bank's personnel who decide what information about the donor will be highlighted and ultimately who is an appropriate donor.").

67. *Id.*

68. *See, e.g.*, *Selecting a Sperm Bank*, CAL. CRYOBANK, <https://cryobank.com/why-use-us/selecting-a-sperm-bank> [<https://perma.cc/QC46-E3KL>] (explaining that California Cryobank only accepts one to two percent of potential applicants as donors).

health information as well as information about his or her race and ethnicity.⁶⁹ The prospective donor's health information is reviewed to screen out persons that are ineligible because of infectious diseases or hereditary conditions.⁷⁰ For example, at present, HIV-positive persons cannot donate, nor can persons infected with hepatitis or other diseases potentially transmitted to a mother through the ART process.⁷¹ Similarly, persons with congenital defects and disabilities of various kinds, including mental illness, are ineligible as well.⁷² More controversially, persons that allegedly engage in high-risk behaviors are screened out, including IV drug users and men "who have ever had sex with other men"⁷³ or women that have sex with bisexual men.⁷⁴ Lastly, persons with so-called "undesirable" social backgrounds do not make the cut; applicants that cannot pass a criminal background check are subject to disqualification.⁷⁵

69. See, e.g., *Be a Sperm Donor – FAQ*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/be-a-sperm-donor-faq> [<https://perma.cc/UDD6-YED7>].

70. *Id.*; *What Does It Take To Become a Sperm Donor?*, PHX. SPERM BANK (Jan. 19, 2015), <https://www.phoenixspermbank.com/blog/take-become-sperm-donor> [<https://perma.cc/C3HL-PHQ6>]. 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, 8:47 AM), <http://www.slate.com/human-interest/2005/06/my-short-scary-career-as-a-sperm-donor.html> [<https://perma.cc/T988-5NYC>].

71. *Cf. What Does It Take To Become a Sperm Donor?*, *supra* note 70 (discussing the screening process).

72. See Plotz, *supra* note 70. These rules are derived from the FDA regulations governing sperm banks. *Cf. Be a Sperm Donor – FAQ*, *supra* note 69 (explaining the FDA regulates donors).

73. See *What Does It Take To Become a Sperm Donor?*, *supra* note 70. The FDA has banned men who have had sex with other men in the last five years from anonymously donating sperm. See Taimour Tahir Chaudhri, *Gay Men Cannot Anonymously Donate Sperm?: How the FDA's Exclusion Unconstitutionally Restricts and Discriminates Against the LGBT Community*, SETON HALL U. L. SCH. STUDENT SCHOLARSHIP (May 1, 2014), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1419&context=student_scholarship [<https://perma.cc/N9WE-P2W9>].

74. See, e.g., *Requirements for Donors*, EGG DONATION CTR. OF DALLAS, http://www.eggdonorcenter.com/donor_requirements.html [<https://perma.cc/2EEE-B6NZ>] ("You must not have had any sexual contact with homosexual or bisexual men at this time, or at any time in the past.").

75. Reputable sperm banks routinely run criminal background checks on candidates, looking for all misdemeanors and felonies. See *Screening Process for Sperm Donors*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/screening-process-for-all-sperm-donors> [<https://perma.cc/K4JS-K96Y>] (discussing criminal background checks); see also *Donor Screening*, FAIRFAX CRYOBANK,

Screening does not merely take the form of excluding those persons in categories deemed socially 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 prized characteristics. As one bank puts it, banks want their buyers to know that their donor pool is made up of high quality people.⁷⁶ 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.⁷⁷ For example, banks refuse donations from men under five feet eight inches tall and most men or women that do not have a “healthy” BMI, meaning, for example, who seem “overweight” by Western standards.⁷⁸ Donor catalogues also suggest that gamete agencies select donors with features that are in accord with traditional notions of femininity and masculinity.⁷⁹ The swimsuits photos sometimes used make it clear that, beyond BMI, donors are selected if they have aesthetically pleasing bodies.⁸⁰ Also, “glamour” shots or headshots

<https://fairfaxcryobank.com/donor-screening> [<https://perma.cc/L92V-YPST>] (discussing the need to “pass” a criminal background check).

76. See *Screening Process for Sperm Donors*, *supra* note 75. “Research on how recipients select donors suggests that staff are responding to client 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 AM. SOC. REV. 319, 326 (2007) (citations omitted).

77. See Almeling, *supra* note 76, 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?”).

78. See Cynthia R. Daniels & Janet Golden, *Procreative Compounds: Popular Eugenics, Artificial Insemination and the Rise of the American Sperm Banking Industry*, 38 J. SOC. HIST. 5, 17–20 (2004) (describing the range of characteristics sought in sperm donors and effects on pricing); *Become a Sperm Donor*, CAL. CRYOBANK, <https://cryobank.com/services/become-a-sperm-donor/> [<https://perma.cc/6CTA-Y4QD>].

79. Cf. Almeling, *supra* note 76, at 327 (explaining donors are “expected to embody middle-class American femininity or masculinity”); Daniels & Golden, *supra* note 78, at 5 (describing “catalogs which feature glossy photos of virile men”).

80. See, e.g., *Quick Donor Search (Donor ID 1687)*, DONOR NEXUS, <https://myeggdonation.com/egg-donors/> [<https://perma.cc/PF52-L88E>].

are common.⁸¹ Every effort is made to ensure that the consumer is choosing from a pool of aesthetically pleasing donors.⁸² 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-a-likes for their donor.⁸³ 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.⁸⁴ 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.⁸⁵

81. See *id.* This process, however, is somewhat fraught as the norms of ideal femininity must be carefully negotiated. See Almeling, *supra* note 76, at 329. An employee at Creative Beginnings, an egg agency, 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." *Id.*

82. See Almeling, *supra* note 76, at 326–27.

83. See, e.g., *Donor Look-A-Likes*, CAL. CRYOBANK, <https://www.cryobank.com/donor-search/look-a-likes> [<https://perma.cc/U8RX-LMDB>]. 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. Cf. Dan Neuharth, *Why We Choose the Mates We Do – and How To Choose the Best Mate for You*, PSYCH CENT., <https://blogs.psychcentral.com/love-matters/2018/08/why-we-choose-the-mates-we-do-and-how-to-choose-the-best-mate-for-you> [<https://perma.cc/DHC7-W3M8>] (last updated Jul. 24, 2019) ("[M]ales tend to seek women who show signs of good fertility . . . [t]hus men instinctively look for women who display youth and physical attractiveness."). 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. Cf. Daniels & Golden, *supra* note 78, at 20 ("[C]onsumer demands, based on misguided beliefs about heritability, shaped the operations of sperm banks.").

84. See Daniels & Golden, *supra* note 78, at 17–20; *How To Choose a Sperm Donor*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/how-to-choose-a-sperm-donor> [<https://perma.cc/E9L8-PEST>] (explaining that donor traits one selects for are not guaranteed to be passed to progeny).

85. Some of the sperm donor descriptions read more like descriptions of the lead in a romance novel. One can choose between the "active architect," the "world traveler," an "eager engineer," or the man who is "going for a Grammy."

Similarly, intelligence is highly valued.⁸⁶ To address this concern, sperm and egg banks are well known for concentrating their recruitment efforts near college campuses.⁸⁷ As a result, the sample collected tends to be more educated than the general United States public. Of course, college attendance does not necessarily guarantee intelligence.⁸⁸ Rather, prior educational attainment merely reflects access, social privilege, and interest in securing a higher degree.⁸⁹ Additionally, there is no gene currently known to transmit measured intelligence in a sure fashion.⁹⁰ This fact seems of little concern to gamete banks as they continue to produce materials highlighting donors' SAT scores and academic accomplishments.⁹¹ Intelligence and beauty assessments are merely examples of a larger problem. Gamete banks list a wide range of highly desirable 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.⁹² 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.⁹³ He or she may be asked to fill out a questionnaire describing his or her favorite animal, color, or musical group.⁹⁴ Donors may also be asked to consent to recorded interviews so that ART consumers

Donor Search, CAL. CRYOBANK, <https://cryobank.com/search/> [<https://perma.cc/8LKE-2XCW>].

86. See Daniels & Golden, *supra* note 78, at 19.

87. See *id.* (noting most "donors come from UCLA, USC, Stanford, Harvard and MIT"). Daniels and Golden also found two sperm banks selling something called "Doctorate Donors" with higher prices. *Id.* They also discussed Heredity Choice, a sperm bank that specializes in intelligent donors. *Id.*

88. See Almeling, *supra* note 76, at 326.

89. Cf. *id.* (discussing how childless women have more time to pursue academia).

90. See Emily Willingham, *No, Research Has Not Established that You Inherited Your Intelligence from Your Mother*, FORBES (Sep. 16, 2016, 3:21 PM), <https://www.forbes.com/sites/emilywillingham/2016/09/16/no-research-has-not-established-that-you-inherited-your-intelligence-from-your-mother/> [<https://perma.cc/4QJQ-U3C3>].

91. See Daniels & Golden, *supra* note 78, at 18.

92. Donors may also be asked about their SAT scores or GRE scores, musical ability, religious affiliation, and other items. *Id.* at 19.

93. See *id.*

94. See *id.* Other information requested may include pet preferences and handwriting samples. *Id.*

can determine whether they think the donor “has a nice personality.”⁹⁵ Administrators 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.⁹⁶ 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.⁹⁷ Indeed, the initial process of being selected hinges on these broader attractiveness considerations.⁹⁸

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.⁹⁹ In reality, however, the

95. See Almeling, *supra* note 76, at 326–27 (“Some screening standards are based on biomedical guidelines for genetic material most likely to result in pregnancy, but many reflect client requests for socially desirable characteristics. . . . [T]he staff are responding to recipients who ‘want to know that the person donating is a good person.’”); Plotz, *supra* note 70 (explaining he would be required to supply an audio CD about himself to proceed with the donation process).

96. See Almeling, *supra* note 76, at 329 (“The profile really gives recipients a chance to get to know you on another level, even though it’s anonymous. It feels like it’s personal. It feels like they’re making a connection with you.”); Daniels & Golden, *supra* note 78, at 17–19 (“Such traits [height, weight, hair color, eye color, skin tone, hair texture] are presumed to be heritable, that is, transmitted through genes, although there is no guarantee that a blue-eyed, blonde-haired donor, even when coupled with a blue-eyed, blonde-haired mother, will produce a blue-eyed, blonde-haired baby. . . . [Sperm banks providing information about social traits, such as education, standardized test scores, and religion] drive the marketing and advertising of sperm and that marketing, in turn, feeds fantasies about offspring and about the power of modern science to satisfy consumer demands.”).

97. See Almeling, *supra* note 76, at 336. Egg pricing is more susceptible to these pricing fluctuations based on traits. In the sperm market one sees them most prominently in stocking decisions. These issues are discussed in more detail in the sections that follow.

98. See Plotz, *supra* note 70 (describing searching questions and intake workers’ use of these considerations to determine his eligibility to be a donor).

99. See Laura Harrison, *The Woman or the Egg? Race in Egg Donation and Surrogacy Databases*, *GENDERS* (2013), <https://www.academia.edu/8452491/>

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.¹⁰⁰ While the pricing structure for sperm tends to be relatively flat, sales of eggs show that race plays a key role in pricing.¹⁰¹ A blond, highly educated egg donor can fetch as much as \$100,000 for her eggs.¹⁰² More recently eggs from Asian donors, particularly “pure-blood Chinese eggs” have

The Woman or the Egg Race in Egg Donation and Surrogacy Databases [https://perma.cc/Y4CJ-MTMK?type=image] (“The mainstream scientific consensus is that race is not a biological phenomenon but rather a complex historical, social, political, and scientific construct. In sharp contrast, companies that profit from the sale of sperm or eggs seamlessly transfer the self-identification of the donor to the disembodied gamete.”).

100. See Sharyn Alfonsi, *Inside Egg Donation: More Money for Blondes?*, ABC NEWS (May 11, 2010, 10:15 AM), <https://abcnews.go.com/WN/egg-donation-agencies-paid-money-favored-attributes/story?id=10614326> [https://perma.cc/2AB6-JTT6].

101. See Almeling, *supra* note 76, at 336 (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. Clara Moskowitz, *Exorbitant Fees Offered to Human Egg Donors, Study Finds*, LIVE SCI. (Mar. 26, 2010), <https://www.livescience.com/8171-exorbitant-fees-offered-human-egg-donors-study-finds.html> [https://perma.cc/6FRY-RJBJ?type=image]. However, this guideline is violated regularly. See Clara Moskowitz, *Egg Donors Offered up to \$50,000: Fees Far Exceed Ethics Guidelines, Study Finds*, NBC NEWS (Mar. 26, 2010, 9:26 PM), http://www.nbcnews.com/id/36057566/ns/health-womens_health/t/egg-donors-offered/#.XjN7fC2ZNQJ [https://perma.cc/T5LR-BCJ3] (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).

102. *Egg Donation in America*, MARIE CLAIRE (Oct. 27, 2014, 4:49 PM), <https://www.marieclaire.co.uk/reports/egg-donation-in-america-200226> [https://perma.cc/TH5U-XKVQ] (“While the average payment per donor cycle is \$4,217 (£2,795), it’s not uncommon for a donor to be paid \$15,000 (£9,940), and in special cases (typically, a blonde, blue-eyed, athletic Ivy League student) fees have hit the \$100,000 mark.”); see also Alfonsi, *supra* note 100 (describing study showing rising prices and higher price for blondes, with some women earning \$50,000 per engagement); Marilee Enge, *Ad Seeks Donor Eggs for \$100,000, Possible New High*, CHI. TRIB. (Feb. 10, 2000), <https://www.chicagotribune.com/news/ct-xpm-2000-02-10-0002100320-story.html> [https://perma.cc/B3UJ-4CPL] (describing donor-advertisement that specified the egg “donor must be under 30, Caucasian and an athlete”).

commanded a high price.¹⁰³ Importantly, because there are no federal or state regulations for gamete banks regarding marketing or pricing, racial pricing occurs regularly.¹⁰⁴

The clearest role race plays is in sperm banks' 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 only seventy-one percent of Americans racially identify as white, overall eighty percent of sperm and eggs available in the United States are drawn from "Caucasian" donors.¹⁰⁵ Additionally, American consumers can easily import "white" sperm or eggs if they are unhappy with the current domestic stock available, or they can choose to have cheaper ART services conducted abroad.¹⁰⁶ 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.¹⁰⁷ Also, the ART market makes fertility

103. See, e.g., Shan Li, *Asian Women Command Premium Prices for Egg Donation in U.S.*, L.A. TIMES (May 4, 2012, 12:00 AM), <https://www.latimes.com/health/la-xpm-2012-may-04-la-fi-egg-donation-20120504-story.html> [<https://perma.cc/V6V4-8AT8>] (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 100% pure Chinese women with degrees in math. *Id.*; see also Erin Ryan, *Want To Sell Your Eggs To Pay for College? Be Asian*, JEZEBEL (May 4, 2012) <https://jezebel.com/want-to-sell-your-eggs-to-pay-for-college-be-asian-5907657/> [<https://perma.cc/SP22-UWFM>]. Some advertisements promise "Asian" eggs will fetch a price of \$100,000 to attract donors. Li, *supra*.

104. See Li, *supra* note 103.

105. Daniels & Golden, *supra* note 78, at 18.

106. Cf. Sirin Kale, *Women Are Now Pillaging Sperm Banks for Viking Babies*, VICE (Oct. 1, 2015, 11:00 AM), https://www.vice.com/en_us/article/3dx9nj/women-are-now-pillaging-sperm-banks-for-viking-babies [<https://perma.cc/SJA8-6V38>] (discussing the exportation of Danish sperm). See generally SPEIER, *supra* note 27 (discussing ART tourism to Eastern Europe).

107. Sarfraz Manzoor, *Come Inside: The World's Biggest Sperm Bank*, GUARDIAN (Nov. 2, 2012, 7:00 PM), <https://www.theguardian.com/society/2012/nov/02/worlds-biggest-sperm-bank-denmark> [<https://perma.cc/8DMC-6TM5>] ("Cryos . . . is today the world's largest sperm bank. Schou estimates that Cryos has been responsible for more than 30,000 births, producing more than 2,000 babies a year, and - in what has been called a new Viking invasion - the company exports sperm to more than 70 countries. Cryos and similar companies, such as the European Sperm Bank, have helped turn Denmark into the sperm capital of the world."); see also *About Us*, CRYOS DENMARK, <https://dk.cryosinternational.com/about-us> [<https://perma.cc/896L-Y93T>] (listing itself as "The World's Largest Sperm Bank"). But see Soo Youn, *America v Denmark: The Battle for Dominance in the Growing, Global Sperm Market*, IRISH TIMES (Aug.

tourism available to white-American working-class consumers priced out of domestic ART services; these consumers flock to the Czech Republic because the ART industry in that country offers an easy supply of low-cost anonymously donated eggs from white, blond donors.¹⁰⁸

Again, “standard” white sperm in the ART market sometimes costs less than sperm of other races because the ART market ensures that white sperm is plentiful and therefore always has a large supply.¹⁰⁹ 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 predominate in the search for egg donors.¹¹⁰ 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.¹¹¹ Clinics justify these racially tilted stocking decisions based on customer demand: white consumers are their primary customers, and they assume these consumers

16, 2018), <https://www.irishtimes.com/life-and-style/health-family/parenting/america-v-denmark-the-battle-for-dominance-in-the-growing-global-sperm-market-1.3598113> [<https://perma.cc/U3AP-58X7?type=image>] (“Sperm from the US and Denmark dominate the market because those countries currently have the most supply, experts say. It’s unclear whether their rivalry is serious or in jest, but US-based California Cryobank and Denmark’s Cryos International each insist that their sperm repository is biggest.”).

108. See generally SPEIER, *supra* note 27.

109. *Id.*

110. *Id.*

111. Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 27–28 (2003) (conducting a review of one sperm bank and finding only four percent of stores were labeled “Black”); Arlett R. Hartie, *Where’s the Black Sperm???*, YOUTUBE (Apr. 9, 2015), https://www.youtube.com/watch?v=DSCUX6srY_w (discussing difficulties replicating her phenotype because the sperm bank she used only had a small number of Black samples); Arlett R. Hartie, *Where’s the Black Sperm! The Joy of Picking a Sperm Donor*, CHASING JOY BLOG (Apr. 10, 2015), <http://chasing-joy.com/choosing-black-sperm-donor> [<https://perma.cc/KN98-2THF>] (discussing difficulties of finding Black sperm donors); Sohmakun, *Has Anyone Ever Used a Donor of a Different Race?* MOTHERING (Jan. 18, 2019, 8:38 PM), <http://www.mothering.com/forum/438-multicultural-families/1032432-has-anyone-ever-used-donor-different-race.html> [<https://perma.cc/93XX-H7P7>] (describing difficulties because sperm bank used only had one to two Black samples); Brittany Thornburley, *Aspiring Queer Mom Seeks Black Sperm Donor, Can’t Find Too Many*, AUTOSTRADDLE (Apr. 20, 2017, 11:00 AM), <https://www.autostraddle.com/aspiring-queer-mom-seeks-black-sperm-donor-cant-find-too-many-375953> [<https://perma.cc/AG8V-D39H>] (noting difficulties of “getting some damn black sperm”).

want white gametes.¹¹² Yet this stocking decision assumes racial rejection as a constant—white consumers are never challenged to look beyond their group because white gametes dominate the sample pool.

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 minorities, simply cannot afford to use them.¹¹³ The social messages projected by gamete banks' stocking decisions establish that the industry is primarily designed for white consumers.¹¹⁴ Indeed, this evidence is sufficient to debunk the claim that the ART market provides equal access for all races.¹¹⁵

Of course, gamete-agency providers likely know they are not actually selling race; rather, they are selling gametes from donors with certain racially associated phenotypes.¹¹⁶ More precisely, gamete agencies are offering ART consumers a donor pool that has a good probability of transmitting certain racialized characteristics to their progeny.¹¹⁷ However, because the gamete

112. See, e.g., 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_straight_attractive_women_allowed_the_strange_world_of_egg_donation [https://web.archive.org/web/20160402185721/https://www.alternet.org/story/147682/only_white%2C_straight%2C_attractive_women_allowed_the_strange_world_of_egg_donation]. Similar rules also apply to sperm donors. See Ertman, *supra* note 111, at 15–30 (illustrating how customer demand explained sperm bank's decision to maintain a sperm catalogue that was nearly seventy percent white).

113. See Nanette R. Elster, *ART for the Masses? Racial and Ethnic Inequality in Assisted Reproductive Technologies*, 9 DEPAUL J. HEALTH CARE L. 719, 721–22 (2005); Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 939 (1996).

114. See Roberts, *supra* note 113, at 937.

115. See Elster, *supra* note 113, at 722 (noting a study addressing disparities in access to infertility services).

116. Gamete agency-providers are not selling race, per se, but rather phenotypic traits that are typically associated with race. See Almeling, *supra* note 76, at 332 (discussing one study that demonstrated how sperm-bank staff are “responding to client interest in . . . donors whose phenotypes are similar to their own”); see also John H. Relethford, *Race and Global Patterns of Phenotypic Variation*, 139 AM. J. PHYSICAL ANTHROPOLOGY 16, 16 (2009) (noting how “most classic definitions of race focus on phenotypic traits such as skin color, cranio-facial shape, and hair color and texture” and how such traits are used for “classification in every day contexts”).

117. See Roberts, *supra* note 113 at 945 (noting how infertile couples choose gametes based on a desire to share genetic traits).

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.¹¹⁸ 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.¹¹⁹ At present, gamete providers’ donor catalogues suggest that gamete banks are enforcing variations of the infamous “one drop” rule with regard to Black gametes.¹²⁰ 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.¹²¹ Consistent with contemporary “honorary whiteness” norms, “whites” with a small amount of Latin American or Asian ancestry are designated white at some clinics, but standards of racial purity are far stricter at others.¹²² Gamete providers’ catalogues also more

118. Fogg-Davis, *supra* note 14, at 19.

119. *Id.*

120. *Id.* at 13 n.15 (citing J.F. DAVIS, WHO IS BLACK? ONE NATION’S DEFINITIONS (1991)).

121. *Sperm Donor Search*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/donors> [<https://perma.cc/2U6S-39UL>].

122. Honorary whiteness norms are norms that allow for certain groups to be afforded similar privileged social treatment as whites—even though they are recognized as actually being members of a minority group or mixed race. See Eduardo Bonilla-Silva, *From Bi-Racial to Tri-Racial: Towards a New System of Racial Stratification in the USA*, 27 ETHNIC & RACIAL STUD. 931, 931 (2004) (coining the term “Honorary Whites”). Mixed race persons who visually appear to phenotypically fall within the category of whiteness are sometimes given privileged social status over other members of their group. *Id.*; see also *Donor Catalog*, MANHATTAN CRYOBANK, <http://www.manhattancryobank.com/donors> [<http://web.archive.org/web/20180215225553/http://www.manhattancryobank.com/donors>] (listing over forty donors as Caucasian all with pure European ancestry); *Donor Search*, *supra* note 85 (listing whites as including a broad range

recently have featured certain Asian purity standards, given the high price these “racially pure” Asian gametes may fetch.¹²³ In other ostensibly lower status groups, such as Blacks and Latinx persons, racial admixture of various kinds is more easily “tolerated.”¹²⁴ 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.¹²⁵ These mixed categories are vastly smaller than the white samples,¹²⁶ 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 forty-nine percent of sperm stores available at that time, concluded that donors are selected based on how closely they can match with a Euro-American ideal.¹²⁷ Even within minority categories, light-skinned donors and donors with less “nappy” hair are preferred.¹²⁸ In short, some clinics appeared to be actively constructing representations of Black persons that trend towards the aesthetics associated with white standards of beauty.¹²⁹ Other minority consumers have reported the opposite problem: that the racial gametes in stock at a given

of Asian, Latino and Middle Eastern relatives as Caucasian persons); *Sperm Donor Search*, *supra* note 121 (listing only 7 of 164 donors as having any African American Race/Ethnicity).

123. Li, *supra* note 103.

124. Quiroga, *supra* note 30, at 155 (discussing the case in which one Black woman was willing to settle for sperm that was racially tangential, with “African descent over history and time,” when told that Black donors weren’t available).

125. See, e.g., *Find a Donor*, *supra* note 64 (offering six check boxes for ancestry in a sperm donor search, including “Any,” “Caucasian,” “Asian,” “Latino,” “Black,” or “Multi”).

126. See, e.g., *id.* (noting, as of February 23, 2020, a total of 473 sperm donors, including 299 Caucasian donors, and only 43 “Multi”-racial donors); *Sperm Donor Search*, *supra* note 121 (noting, as of February 23, 2020, a total of 164 sperm donors, including 112 Caucasian donors, and only 21 “Mix”-racial donors).

127. Daniels & Golden, *supra* note 78, at 20.

128. *Id.*

129. Almeling, *supra* note 76, 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 have a Hispanic couple.” *Id.*

clinic have phenotypic characteristics that represent a more stereotypical view of Blackness and do not match their actual features.¹³⁰ Given the extraordinarily small number of Black samples various sperm banks provide, consumers have argued that ART providers are simply not interested in representing the true phenotype diversity in Black communities in the United States.¹³¹

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.¹³² Dorothy Roberts and other scholars confirm this widespread anxiety exists; indeed, it is reflected by the numerous news stories and urban legends documenting racial mistake and accidental mixing “problems.”¹³³ To minimize the risk of mistake, many gamete banks attach color-coded labels to the sperm vials and eggs samples they have in storage.¹³⁴ There is no subtlety in this labeling regime. Black sperm is given a black label.¹³⁵ Asian sperm is

130. Quiroga, *supra* note 30, at 157 (highlighting a trend of “interchangeability” between “any black donors” and a Black individual looking for sperm, and how ART providers “are not concerned with matching [the Black consumer’s] physical characteristics” with the available sperm).

131. *Id.* at 156 (noting the case of one woman whose fertility doctor’s attitude that “any black male available” is a satisfactory donor regardless of physical attributes “calls up the prejudiced phrases ‘can’t tell them apart’ or ‘they all look alike’”).

132. Almeling, *supra* note 76, at 327 (“In 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.’ During a tour of Cryo-Corp, the founder lifted sperm samples out of the storage tank filled with liquid nitrogen, explaining 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.’”).

133. 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 ROBERTS, *supra* note 23, at 271 (“But receiving the wrong *white* child would have been a far less devastating experience. In the American market, a Black baby is indisputably an inferior product.”); WILLIAMS, *supra* note 23, at 240–41 (discussing the media hysteria surrounding a case in which a Black woman gave birth to a white child after having been implanted with a white woman’s egg). For a contemporary example, see David Mikkelson, *Black Donor’s Sperm Mistakenly Sent to Neo-Nazi Couple?*, SNOPE (Jan. 18, 2015), <http://www.snopes.com/fact-check/the-color-of-sperm/> [https://perma.cc/N637-J8UB] (debunking widely circulated news story alleging racial mix-up in ART).

134. See, e.g., Daniels & Golden, *supra* note 78, at 20.

135. See *id.* at 5.

given a yellow label.¹³⁶ White sperm receives a white label.¹³⁷ Red is sometimes used for mixed populations or Latinx individuals.¹³⁸ This process is profoundly disturbing as it makes race real in a particularly concrete way.¹³⁹ By applying these labels to the sperm or egg samples, gamete banks create a racial predestiny 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² Structures of this nature that privilege racial choices effectively nudge customers to adopt a perspective that gives race special value.¹⁴³ Multiple aspects of the selection process

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 5–8.

140. *Id.* at 18 (noting sperm banks reflect “consumer demand”).

141. *Id.* at 13 (noting how scholars described germinal choice as an opportunity “to improve upon genetic constitution of their offspring” (internal citations omitted)).

142. *See, e.g., Find a Donor, supra* note 64.

143. The term nudge as used here is slightly different from the one offered in other discussions, although draws on these sources for insight. By nudge, I am referring to a background structural mechanism that shapes spaces or moments of “free” choice in ways that take account of individuals typical cognitive biases, normal routines, habits and rational cost-avoidance behavior. Well-designed nudges give people opportunities to prefer societal beneficial choices as more consistent with their own perceived or self-declared interests. These nudges may operate by making hidden salient social costs more visible or framing the to appear more salient to decision-makers, delaying information reveals to minimize this information’s role in decision-making or structuring regimes in ways that increase burdens associated with the use of certain kind’s information. For a general discussion of nudges, see RICHARD H. THALER & CASS R.

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,¹⁴⁴ 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

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.¹⁴⁵ However, most geneticists agree that race has no clear biological basis that can be established at the level of genetic code.¹⁴⁶ Gamete sellers know that race cannot be traced to particular genes.¹⁴⁷

SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (exploring concept as defined in behavioral economics).

144. See, e.g., Huntington, *supra* note 1, at 597–601, and accompanying text.

145. See Patricia J. Williams, *The Elusive Variability of Race*, in RACE AND THE GENETIC REVOLUTION: SCIENCE, MYTH, AND CULTURE 241 (Sheldon Krimsky & Kathleen Sloan eds., 2011).

146. See generally Jennifer A. Hamilton, *Revitalizing Difference in the Hap-Map: Race and Contemporary Human Genetic Variation Research*, 36 J.L. MED. & ETHICS 471 (2008). Unfortunately, theories of genetic race are again on the rise in some quarters. *Id.* 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. *Id.* at 471. However, in the years since, some scientists have attempted to mine the 0.1% difference to discover a basis for claims of genetic race. *Id.* Attempts to track genes to particular geographically trapped populations are now used by some scientists to argue that genetic race exists. *Id.* at 472–73. However, even these population mapping definitions fail to neatly map onto the social definitions of race, which vary by country and shift over time. *Id.* at 474. 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. *Id.* For further discussion, see also Lynn B. Jorde & Stephen P. Wooding, *Genetic Variation, Classification and "Race,"* 36 NATURE GENETICS SUPPLEMENT S28, S28 (2004) (“[B]iomedical scientists 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 making decisions about medical treatment or the design of research studies.”).

147. DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 4–5 (2012) (explaining that race is political and not biological, and that races cannot be sorted

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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ 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 instantiation 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 clearer.¹⁵¹

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

into “zoological” categories because they are politically constructed).

148. *Id.*

149. See ROBERTS, *supra* note 23, at 261, 267–68 (discussing the concept of “racial impurity” and its use as a tool against minority groups).

150. See Almeling, *supra* note 76, at 337 (describing how the “reinscription” of race at the genetic level is “worrisome”); Quiroga, *supra* note 30, at 148 (explaining that the use of biomedical technology “reproduces cultural ideologies, power relations, and structural inequities”); Williams, *supra* note 145, at 241 (recognizing the widespread cultural understanding that race is not genetic but the ambivalence many feel about accepting this proposition).

151. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (examining how whiteness has developed into a form of property).

so in an ad hoc, seemingly apolitical fashion that is designed to maximize profit but also cultivates racial resentment and confusion.¹⁵² 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 category.¹⁵³ Some gamete providers regard Jewish donors as white, while other gamete providers treat Jewish persons, a religious category, as a separate racial category.¹⁵⁴ Some providers appear to have made up racial and ethnic categories that don't exist anywhere else, such as Aztec or Mayan.¹⁵⁵ 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 its sperm: African American or Black, Asian, Caucasian, Hispanic or Latino, Indian (Asian), Multi-ethnic, and Other.¹⁵⁶ Under the "Other" category, the sperm bank provides a sole donor of Egyptian descent.¹⁵⁷ In contrast, the California Cryobank provides eight different classifications: American Indian or Alaska Native, Asian, Black or African American, Caucasian, East Indian, Hispanic or Latino,

152. Fogg-Davis, *supra* note 14, at 15.

153. See, e.g., *Donor Profile – 5377*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/search/donorprofile.aspx?number=5377&s=1> [<https://perma.cc/BMR3-RCSS>] (categorizing donor as Latino despite listing his maternal ethnic background as Brazilian-Spanish and his paternal ethnic background as Portuguese-Syrian). Native Americans are treated similarly and are sometimes absorbed into the category of whiteness. See, e.g., *Short Profile Donor Number: B1025*, CRYOGAM COLO., http://media.wix.com/ugd/3cdfcb_a7f7fbf9b31b40dcb9061fa3ba560816.pdf [<https://perma.cc/6T7E-8N9E>] (listing Donor B1025's ethnicity as "Irish, Native American" but race as "Caucasian" and noting brown hair color and medium skin tone).

154. Daniels & Golden, *supra* note 78, at 18 (noting how religions such as Judaism are sometimes conflated with race).

155. See, e.g., *Donor Catalog Search*, PACIFIC REPROD. SERVICES, https://www.pacrepro.com/index.php?main_page=donor_search [<https://perma.cc/8T28-PWKW>] (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.

156. See *Donor Catalog*, MANHATTAN CRYOBANK, <http://www.manhattancryobank.com/donors> [<http://web.archive.org/web/20180215225553/http://www.manhattancryobank.com/donors/>].

157. See *Donor: 274*, MANHATTAN CRYOBANK, <http://www.manhattancryobank.com/donors/274> [<http://web.archive.org/web/20180205180131/http://www.manhattancryobank.com/donors/274>].

Middle Eastern or Arabic, and Mixed or Multi-Ethnic.¹⁵⁸ The Sperm Bank of California lists ninety-four different ethnic/racial categories, leaving it open as to how it will decide to sort these ethnicities into racial groupings.¹⁵⁹ Gamete banks have extraordinary power to shape consumers' understandings of race as consumers sort through these materials.¹⁶⁰ 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.¹⁶¹

3. Racial Purity Rules

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.¹⁶² 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.

158. See *Donor Search*, *supra* note 85.

159. *Donor Catalog*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/donor-catalog> [<https://perma.cc/G8F2-BDBB>].

160. 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., *Donor Catalog*, *supra* note 156.

161. See Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1517–23 (2010) (explaining that many ethnic whites sit at an intersectional valence that marks them as low status whites and causes them to experience white privilege in inconsistent and partial fashion). Here this low status whiteness may cause them to be grouped as ethnic or minority, and may even trigger sperm bank operators to question whether they should be seeking "white" gametes at all. Alternatively a donor may be rejected because he does not offer the kind of whiteness as the sperm bank defines this term.

162. See, e.g., *Donor 5604*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/donor-5604> [<https://perma.cc/5GCT-TVY4>] (listing Donor 5604's ancestry as "African/Black Descent" on the search results page, then listing Donor 5604's Ancestry as "African/Black Descent" and "European/White Descent" and his ethnicity as "African American, English, Irish, and Creole" on his donor profile, demonstrating that despite the donor having both African/Black and white ancestry, his African/Black ancestry caused him to be labeled as "African/Black" instead of white).

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 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 contain eggs or sperm with different genetic-ethnically associated codes; some of these genetic mixes may cause these gametes to be labeled as a different race or produce a child with a phenotype that places her in a different racial category than the donor.¹⁶³ Clinics may 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.¹⁶⁴ 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. First, white persons are encouraged to view themselves as genetically different from other racial groups. Additionally, white persons are encouraged to imagine themselves as similar to a eugenically filtered slice of their community. Finally, white persons are driven towards donors that comport with ideal notions of whiteness in ways that further bolster whiteness's disciplinary power.¹⁶⁵ Each consideration is examined in turn.

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

163. *See supra* note 84.

164. *See, e.g.,* STEPANKA, *supra* note 16 (indicating that clinic asks what "your parents look like" and to provide pictures of family members).

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

the donor samples in the pool. The donor material that consumers are offered are not average white Americans.¹⁶⁶ 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 white people in the United States.¹⁶⁷ This experience reinforces a certain inaccurate perception of whiteness and invites the consumer to imagine him or herself in this group.

Empirical data screening white consumers' 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 United States.¹⁶⁸ Additionally, foreign entities that service United States consumers appear to be singularly focused on producing white children. Cryos International, a Denmark sperm bank with a large number of United States customers, proudly boasts that it is the largest in the world.¹⁶⁹ It produces 2000 babies per year with their donors, and "almost all the donors are white and blond with blue eyes."¹⁷⁰ Working class white persons heavily use the booming fertility tourism industry in the Czech Republic, known for providing endless quantities of cheap, anonymously donated eggs from blond white women.¹⁷¹ Simply put, working class white people who 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

166. Daniels & Heidt-Forsythe, *supra* note 2 at 724.

167. *Id.*

168. See Almeling, *supra* note 76, at 326 (discussing strong demand for white skinned, blond donors); *supra* note 70.

169. See Manzoor, *supra* note 107.

170. *Id.*

171. See generally SPEIER, *supra* note 27 (describing phenomenon of white, working-class North Americans traveling to Central Europe for IVF).

dark” or have “Jewish noses.”¹⁷² 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.¹⁷³

Moreover, United States gamete banks sometimes explicitly admit that they are inviting their white consumers to purchase a superior 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.¹⁷⁴ They suggest that one can look to an extended family member or one can shop for gametes based on a desired kind of look.¹⁷⁵ The donor-selection process could be likened to looking at products on Amazon. Consumers 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.¹⁷⁶ 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.¹⁷⁷ 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

172. KATHARINA SCHRAMM ET AL., 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 clinics consumers have expressed concern about the biological source for the eggs being too dark or looking too Jewish. *Id.*

173. *See id.*

174. “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?” *Choosing Donor Sperm—7 Things You Should Know*, WIN FERTILITY, <http://www.winfertility.com/choosing-donor-sperm-7-things-know/> [https://perma.cc/54CK-MET7].

175. *Id.*

176. *See How To Choose a Sperm Donor*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/how-to-choose-a-sperm-donor> [https://perma.cc/3D4X-AGR7] (“Our goal is to ensure that you are able to choose from an exceptionally large number of sperm donors who are high quality people.”).

177. Manzoor, *supra* note 107, at 2 (sperm purchaser joking that “people see what they want to see” when they look at her children).

known social risks that accompany marginal whiteness, specifically low-status, ethnically-marked versions of white identity.¹⁷⁸ Specifically, white consumers understand that there are more and less privileged versions of white identity.¹⁷⁹ 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 subordination, including looking too “ethnic,” or failing to conform with traditionally idealized gender norms.¹⁸⁰ White people are disciplined or taught by this experience about what types of whiteness are valued and what features are important. When white people engage in this search process, they typically 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 discourage monoracial families from purchasing gametes from another racial group in a variety of ways. 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.¹⁸¹ Indeed, certain sperm banks make it clear in their marketing materials that cross-racial selection is a practice that is fraught with danger.¹⁸² When gamete banks engage in this kind of messaging, they encourage essentialized notions of race and socialize consumers to expect pain when

178. See generally Rich, *supra* note 161 (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).

179. *Id.* at 1516 (describing the concept of marginal whiteness as experienced by some whites).

180. *Id.* at 2010.

181. See Fogg-Davis, *supra* note 14, at 18 (describing barriers faced by consumers when purchasing gametes).

182. See *Donor Ethnicity, Your Family and Your Future Child*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/tsbcfile/choosing-ethnicity-my-donor/> [https://perma.cc/C4DW-FEY4].

engaging in race mixing.¹⁸³ 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 “creating rainbow families” to satisfy her whims.¹⁸⁴ 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.¹⁸⁵

To explore these disincentivizing marketing messages in the United States, 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

183. For a discussion of essentialism, see Andrew Sayer, *Essentialism, Social Constructionism and Beyond*, 45 SOC. REV. 453, 456 (1997). For a debate about essentialism in critical race theory, see Kenneth B. Nunn, “*Essentially Black*”: *Legal Theory and the Morality of Conscious Racial Identity*, 97 NEB. L. REV. 287 (2019).

184. Jessica Barrett, *No ‘Rainbow Families’: Ethnic Donor Stipulation at Fertility Centre ‘Floors’ Local Woman*, CALGARY HERALD (July 25, 2014) <http://www.calgaryherald.com/news/calgary/rainbow+families+ethnic+donor+stipulation+fertility+centre+floors+local+woman/10063343/story.html> [<https://perma.cc/F3HT-X4V6>] (documenting experience of white woman denied access to sperm of a different race, citing a race matching policy it had in place since 1980).

185. 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 (B.O.E. 2006, 126) (Spain). Canada requires that donors and families be matched using a “best interest of the child” standard, under which 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 REPROD. BIOMEDICINE ONLINE 555, 555–64 (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.

a donor that is not from their racial group.¹⁸⁶ The clinic explains that its views are based on thirty years of experience in the industry.¹⁸⁷ 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 or her experiences of discrimination.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰

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

186. See *Donor Ethnicity, Your Family and Your Future Child*, *supra* note 182. There is great variation in anti-miscegenation messaging. Some sperm banks do nothing more than privilege race as a selection criterion and then discuss the "natural" impulse to choose someone that looks like you or your family. See *How To Choose the Right Sperm Donor*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/how-to-choose-the-right-sperm-donor/> [<https://perma.cc/M4PC-W6TA>]. Others are more explicit about the psychological harm a child will face when he "looks different" from the family. See *How To Find a Sperm Donor: Tips for Choosing the Right One*, INVITRA, <https://www.invitra.com/donor-selection/#race-and-ethnicity> [<https://perma.cc/WC24-QY5U>]. 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." *Id.*

187. See *Donor Ethnicity, Your Family and Your Future Child*, *supra* note 182.

188. *Id.*

189. Quiroga, *supra* note 30, at 155 (discussing the case in which one Black woman was willing to settle for sperm that was racially tangential—with "African descent over history and time"—when told that Black donors weren't available).

190. See Daniels & Golden, *supra* note 78, at 18 ("Caucasians and Asians are overrepresented, while African Americans and Latinos and those of 'mixed race' are underrepresented.").

a sense of belongingness in their families. The bank argues that most children will crave an environment that makes them feel similar.¹⁹¹ 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.¹⁹² After considering the best interests of the potential child, the family decided against choosing sperm from a different race. As the mother explained, "it would require us to acknowledge the heritage and cultural background that would belong to our child, but not to us."¹⁹³ 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.¹⁹⁴ This observation is highly pessimistic. It assumes that (1) discrimination exists in most communities, (2) most white families have been happily insulated from and ignorant of discrimination dynamics, and (3) these families

191. See *Donor Ethnicity, Your Family and Your Future Child*, *supra* note 182.

192. *Id.*

193. *See id.*

194. *See id.*

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 concrete legislative blocks in other countries. The resistance to cross-racial matching rests on an essentialized understanding of race that reduces culture to biology in indefensible ways and further assumes racial segregation and monoracial families as the norm.¹⁹⁵ 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, banks 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,¹⁹⁶ 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 previously explained, the United States is contending with the rise of a new discursive model for racial understandings called elective race.¹⁹⁷ 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 the United States in the 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 identities, meaning the racial

195. The Sperm Bank of California seems to assume that the only way to avoid dangerous commodification is to reaffirm the separateness and distinctiveness of groups, rather than encouraging responsible selection. See *Donor Ethnicity, Your Family and Your Future Child*, *supra* note 182.

196. See generally Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 *Geo. L.J.* 1501 (2014) (describing the phenomenon of racial self-identification and its effects on perceptions of race).

197. *Id.*

identity each individual is socially recognized as having by others.¹⁹⁸ 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 a clearly labeled racial product that produces a given racial phenotype. To be clear, clinics routinely request donor self-identification information as a way of ascertaining whether the donor has a certain phenotype.¹⁹⁹ Yet the donor’s self-identification choice and phenotype may not consistently match. When clinics intervene to re-categorize and repackage donors to ensure that they choose a racial label that matches their individual respective racial phenotypes, clinics 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.²⁰⁰ Involuntary ascription occurs when one is socially recognized as a member of a given racial group, sometimes without one’s knowledge or consent.²⁰¹ The most common trigger for involuntary ascription is physical characteristics.²⁰² These characteristics are socially recognized as being linked with a particular racial or ethnic group—a racial phenotype—and result in an individual being ascribed a particular racial identity.²⁰³ 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—such as speaking styles, modes of dress, or presentation—that also cause him to assign persons to a particular racial group.²⁰⁴ However, in the

198. *Id.* at 1512–20.

199. *See supra* note 76 and accompanying text.

200. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145 (2004) (describing concepts of involuntary and voluntary ascription).

201. *See id.* at 1145–46.

202. *Id.*

203. *Id.*

204. *Id.* at 1158.

United States, and in most other countries, phenotype, or physical characteristics, remain the primary way individuals are racially identified.²⁰⁵

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. The ART market promises consumers that they can purchase sperm or eggs that will produce children that automatically will 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 may know that the donor's genes will mix with their own, this doesn't necessarily lead to their questioning the link between the donor's physical appearance and the donor's genetic code in his or her sperm or eggs. What consumers are actually buying in the gamete 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.²⁰⁶ 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 or aesthetic marking that one intends or understands will cause others to identify one as belonging to a particular racial group.²⁰⁷ These voluntary signaling codes include dress, behavior, and manner of speaking.²⁰⁸ One of the most important voluntary ascriptive behaviors in the modern era is what I call documentary race.²⁰⁹ Documentary race is established 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 initially use to categorize their

205. *Id.* at 1145.

206. *What Is Meiosis*, YOURGENOME.ORG, <https://www.yourgenome.org/facts/what-is-meiosis> [<https://perma.cc/2MAD-6WDP>].

207. *See* Rich, *supra* note 200 at 1158.

208. *Id.* at 1161–62.

209. *See* Rich, *supra* note 196, at 1514–15.

donors.²¹⁰ When a person approaches a gamete bank with the intent of donating, he is asked to fill out a form and go through an interview in which he is asked to identify by race.²¹¹ 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.²¹² Other banks try to fine tune their judgments by asking about ethnicity.²¹³ The goal is to find “racially pure” subjects that they can market easily.

Documentary race has taken on increased political importance in contemporary society, in part, I argue, because of the growing number of mixed race persons in the United States.²¹⁴ Indeed, multiracial Americans have played a particularly strong role in the rise of elective race, as they argue they have a dignity interest in ensuring their mixed-race backgrounds are fairly represented in social life.²¹⁵ The United States also has received immigration from countries that have racial categorization paradigms that dramatically differ from our own.²¹⁶ When gamete banks ask donors for racial identification information, they run headlong into these new forces. They encounter donors that feel a strong need to be able to accurately identify themselves racially.²¹⁷ Some readers will view these issues as negligible and conclude that they do not create a basis for concern. First, they would argue, people applying as donors know what racial traits customers are actually looking for; they will not risk identifying

210. *See id.* at 1514.

211. For a discussion of questions about race in the donor donation process, see Fogg-Davis, *supra* note 14, at 15.

212. *See* Plotz, *supra* note 70.

213. *See id.*

214. *See* Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 222 (2004) (noting that one in forty people describes themselves as multiracial today and that current trends suggest that one in five will describe themselves as multiracial by 2050).

215. *See* Rich, *supra* note 196, at 1513.

216. *Id.* at 1523.

217. *See, e.g.,* Rosely Gomes Costa, *Racial Classification Regarding Semen Donor Selection in Brazil*, 7 DEVELOPING WORLD BIOETHICS 104, 105 (2007) (arguing clinic's power to reclassify shows “disrespect for the ethical principles of autonomy, privacy and equality”); Quiroga, *supra* note 30 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”).

as white if they are likely to transmit physical features that are associated with minorities. Also, they would argue a gamete bank retains the discretion to reclassify donors that identify as white but are apparently mixed race. The clinic certainly should 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.²¹⁸ 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) suggest 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.²¹⁹

Also, we know that in the era of elective race, mixed race persons with white heritage will sometimes identify as white if they are psychologically and economically triggered in particular ways.²²⁰ These triggers exist in the ART market. There are strong economic incentives to identify as white when being screened as a donor; stocks are eighty percent white and minority donors are routinely turned down because there is far less demand for their gametes.²²¹ 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 likely transmit certain desired characteristics. Donors do not know when the risk of producing less desired characteristics is reduced to a negligible level. Does having one minority grandparent prevent one from identifying as white? Donors cannot be expected to understand how racial phenotype is tied to an individual’s genetics; moreover, they might be offended by whatever standard the clinic would use to mitigate the risk they pose.

218. See Gomes Costa, *supra* note 217, at 106 (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).

219. See Fogg-Davis, *supra* note 14, at 15 (describing American racial categories as “ad hoc” and noting discretion of sperm bank intake workers to place people in racial categories).

220. See Rich, *supra* note 161, at 1516.

221. See *Become a Sperm Donor*, *supra* note 78.

In addition, it provides little reassurance to allow gamete banks to make final determinations about race. Because the standards individual clinics use are not transparent, there is no guarantee or check on whether they are consistent. 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.²²² Again, fairness and consistency is important here in the era of elective race. One can imagine the dignitary assault a so-called “white” donor might experience when she learns her Asian grandmother now causes her to be classified as Asian.²²³ She similarly might be offended if she identifies as Latinx and finds herself reclassified as white because the clinic perceives her skin color to make her white despite her Dominican background.²²⁴ She might be even more offended if she learns that the clinic’s decision to racially re-classify her effectively ensures that her samples are rarely seen by Latinx families and are only seen by white ones. At present, most clinics cannot tell donors how they are racially re-classifying donor samples because they have not established clear, transparent, and consistent rules about this process.

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 who buy sperm or eggs that produce a child who does not phenotypically match the donor’s appearance. This group could involve mixed-race donors who periodically have chosen to identify as white or minority and have chosen, because of financial 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 who 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 a person of color or must it respect her claim of

222. See, e.g., *Available Donor List*, BIOGENETICS CORP., http://www.sperm1.com/biogenetics/donor_list.html [<https://perma.cc/JJ7T-P9V6>]. 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.” See *id.* Similarly, Donor 575 identified as ethnically Brazilian and Portuguese, but the clinic categorized the individual as “Caucasian.” See *id.*

223. Cf. Gomes Costa, *supra* note 217, at 107–08 (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. See *id.*

224. See *supra* note 170 for examples.

whiteness? A couple may contract for eggs from a mixed race woman with blond hair and blue eyes and have a first child who matches that donor's phenotype. They may order eggs again from this individual which produces a child who appears 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 gamete banks begin to ask more questions. Instead they will require banks to create their own rules for racial identification and make assessments about who may be classified as Black, Latino (or Latinx), white, or Asian under the bank's racial identification rules. Courts might still find themselves in the position of assessing family "blood lines" if family history is used. Alternatively, gamete banks may turn to genetic testing, prescreening their donors. However, as Section I.C.3 explains, this solution creates more problems than it solves because individual gametes contain different combinations of genetic code from the donor.²²⁵ A mixed race person may produce sperm or eggs in the same collection sample that technically would produce children classified as different races and the race assigned may not match their phenotype.

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. Instead of shrugging off these reassignment practices, we should be concerned 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.²²⁶ The gamete banks' attempts to negotiate the discrepancy between phenotype and racial identification practices draws our attention to the ways in which the items being sold in the sperm and egg markets are, at bottom, social constructions. Ironically, these racial assignment practices operate unchallenged because the ART intake process is not transparent, and persons inclined to sue are given no reason why their

225. See *What Is Meiosis*, *supra* note 206.

226. See *supra* Part I.C.1.

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. 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.²²⁷ These interests are clearly at stake in the ART market where questionable representations are being made about the products sold. The representations ART providers make about race are materially misleading if not patently false. The simple exchange of racial phenotype promised by sperm and egg banks is not as 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.²²⁸ Their designations often deviate from the categories used by United States administrative regimes, increasing the risk of confusion. Second, their marketing practices suggest that race is biologically transmitted through genes, similar to eye color or hair. This is patently false; race is determined by personal identification and social reactions to a given phenotype.²²⁹ Additionally, the precise mechanisms for transmitting particular racial-phenotype traits are unknown.

227. 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 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).

228. California Cryobank does disclose that ancestry is self-reported but does not explain how it determines ethnicity or race. *See Donor Search, supra* note 85; *Sperm Donor Search, supra* note 121; *cf. Find a Donor, supra* note 64 (allowing individuals to search for donors based off reported ancestry). Xytex Sperm Bank has a frequently asked questions page that includes a detailed exploration of genetics but does not explore race nor indicate that race is not genetic. *See Frequently Asked Questions, XYTEX SPERM BANK*, <https://www.xytex.com/about-xytex/frequently-asked-questions/> [<https://perma.cc/4EQN-FDKP>].

229. *See supra* Part I.D.

Last, clinics fail to disclose 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 always transmit the characteristics advertised in his profile to his progeny. Yet this disclaimer is typically so general and subtle that it cannot cancel out the various advertising mechanisms that encourage parties to believe they are securing particular traits. Some will argue that ART clinics are allowed to engage in these misleading practices because they are reconstructing for the consumer the same fictions that exist when one assesses various partners to identify the person with whom one wants to create a child. Indeed, many people will assess the genetic potential of a sexual partner if they 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.²³⁰ More honesty is required. We will return to the regulatory possibilities created by commercial speech justifications in Section III.B.2.

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

230. 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 (2013).

purchase gametes of a particular race. This discussion 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 preoccupied with family status, 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, admixture, or different genetic code, ART consumers in racial mix-up cases singularly focus on the social cost of having a Black relative. On close review, even those interests that appear to be potentially severable from our racially discriminatory past are rooted in regressive notions of masculinity and femininity.

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.²³¹ Self-replication, self-realization, and new forms of intimate connection are all being negotiated in this process.²³² What the ART racial mix-up cases reveal is that ART is 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.²³³ Several scholars have discussed the role race plays in the social signaling processes 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

231. SARAH FRANKLIN, EMBODIED PROGRESS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION 163 (1997).

232. *But see* Quiroga *supra* note 30, at 147 (“[C]ultural beliefs about the race, purity, and heredity that shape the white heteropatriarchal kinship model are driving forces behind the popularity of ARTs.”).

233. *See, e.g.*, 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); Huntington, *supra* note 1, at 589, 591 (discussing the invisibility accorded monoracial families).

monoracial family norm.²³⁴ 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 a variety of strategic, public behavioral performances, in compliance with certain cultural norms, to communicate their status as a family.²³⁵ 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 spaces 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.²³⁶ 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.²³⁷ This discipline takes the form of anxiety about any difference that meaningfully diverges from expected family norms.

234. See *infra* note 247 (listing complaints and lawsuits from white ART consumers).

235. Huntington, *supra* note 1, at 609–11. Huntington focuses on gender, explaining the ways in which families signal conformity with marital norms, nuclear family norms, and gender construction norms as a way of establishing status in a community. The law in 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. *Id.* at 619.

236. *Id.* at 609 (listing performance activities from cookie-baking to firm gatherings).

237. *Id.* at 619. 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. *Id.* at 619–22. The nuclear family is a particularly 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. JONATHAN VESPA ET AL., AMERICA'S

While not framed as a discussion of performativity, Angela Onwuachi-Willig's account of interraciality-based²³⁸ and discrimination also provides insight into the overt and subtle social sanctions that effectively punish families that violate the monoracial norm. In other works, I have attempted to precisely catalogue these sanctions and their social effects. These sanctions include being subject to base negative animus as well as to stereotyping, experiencing functional blackness—meaning when 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.²³⁹ By contrast, compliance with the monoracial norm brings forms of pleasure from inverse social dynamics: families that comply will experience social invisibility in public spaces and this social invisibility may shield them from government attention. Specifically, compliance with the monoracial family norm may insulate families from inquiries about potential domestic violence, child abuse, or other issues that the government considers to be part of dysfunctional family dynamics.²⁴⁰ More generally, they will be met with positive public recognition, indeed particularly high positive regard.²⁴¹

FAMILIES AND LIVING ARRANGEMENTS: 2012, at 5 (2013), <https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-570.pdf> [<https://perma.cc/BW72-APXP>]. Queer families, divorced-blended families, and unmarried couples make an effort at preserving an air of normalcy in the two-parent with child model. Huntington, *supra* note 1, at 619–22.

238. Interraciality is a concept that describes the ways in which interracial families, collectives that involve members of different racial groups, provoke a particular kind of discrimination and mistreatment. As Onwuachi-Willig explains, interraciality may trigger discrimination even though persons may not feel inclined to discriminate against any particular racial group. Instead, the notion of cross-racial intimacy subjects a couple or family to mistreatment, as well as causing their mixed race children to be mistreated. ONWUACHI-WILLIG, *supra* note 233, at 17–19.

239. Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*, 127 HARV. L. REV. 1341, 1353–59 (2014).

240. *Cf. id.* at 1387 (proposing new protections for the interracial family).

241. *See id.* at 1368–72 (outlining the argument that interracial-based protections should be added to antidiscrimination statutes).

The dynamics Huntington and Onwuachi-Willig describe should be viewed as part of a larger “intra-group” esteem system, as described by Richard McAdams.²⁴² The positive social recognition 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.²⁴³ 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 United States remain quite low.²⁴⁴ White persons remain the group least likely to marry outside of their own racial group.²⁴⁵ 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, this Article 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 the 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, as 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 and they have strong incentives to settle these claims quickly to

242. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1029–30 (1995).

243. *Id.* at 1046.

244. 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).

245. *Id.* at 228–29.

avoid negative publicity.²⁴⁶ Also, white parents violate color-blindness 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 United States.²⁴⁷ 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. Midwest Sperm Bank* and *Andrews v. Keltz*, provide us with a window into performance of the monoracial family and its 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*,²⁴⁸ was brought in 2007 by a New York couple against a New York

246. 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. 715 N.Y.S.2d 19, 21 (App. Div. 2000). The court granted full custody of the resulting African American child to the African American parents and denied visitation to the white parents. *Id.* at 22; *see also* Bender, *supra* note 23, at 75.

247. *See* First Complaint, *supra* note 1, ¶ 1 (alleging wrongful birth and breach of warranty); *see also* *Andrews v. Keltz*, 838 N.Y.S.2d 363, 373 (Sup. Ct. 2007) (dismissing biracial couple's negligence claims based on impregnation of mother with sperm from African American donor); *Fasano*, 715 N.Y.S.2d at 27 (family with twins including one Black child required to give back to Black family); Quiroga, *supra* note 30, 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*, GUARDIAN (July 8, 2002), <https://www.theguardian.com/society/2002/jul/08/health.lifeandhealth> [<https://perma.cc/KD8F-TFJQ>] (discussing two cases, one American and one Dutch, in which a 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 (Mar. 22, 2017), <https://www.channelnewsasia.com/news/singapore/court-dismisses-appeal-over-ivf-sperm-mix-up-8581384> [<https://perma.cc/ZHC5-CRCX>] (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. *Id.* 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.

248. *Andrews*, 838 N.Y.S.2d at 365.

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.²⁴⁹ 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.”²⁵⁰ 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.”²⁵¹ Concerned, the couple purchased an at home DNA kit and discovered the child was not genetically related to Mr. Andrews.²⁵² Although the complaint alleged loss because of the anxiety associated with not knowing what had become of Mr. Andrews’s 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.²⁵³ 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.²⁵⁴

The second case with publicly available materials is *Cramblett v. Midwest Sperm Bank*, discussed at the start of this 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 Midwest Sperm Clinic—a mix-up that resulted in her giving birth to a brown child.²⁵⁵ Her complaint can be distinguished from the *Andrews* complaint because it more self-consciously documents the love she has for her child. However, the

249. *Id.* (quoting the 11th paragraph of Andrews’s affidavit).

250. *Id.*

251. *Id.*

252. *Id.* at 365–66.

253. *Id.* at 366.

254. *Id.*

255. Specifically, Cramblett raised breach of warranty, breach of contract, negligence, and gross negligence claims in her Second Amended 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.” *Cramblett v. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 385, 368 (N.D. Ill. 2017) (quoting First Complaint, *supra* note 1, ¶ 16).

complaint is also notable for the detailed list of burdens and costs it documents as associated with raising a mixed race child. Cramblett's goal is to establish that she should be compensated because her financial costs are far greater than they would have been if she had been given the monoracial family she wanted.²⁵⁶ Among the injuries she alleged were moving expenses, because she lived in a nearly all white community that had elements of prejudice, and family alienation, because members of her family also might subject the child to discrimination, as well as costs associated with exposing the child to the child's culture and costs for haircare.²⁵⁷ Cramblett also complained that she would be forced to enter majority black spaces—where she alleged she was not welcome—in order to secure various things she believed were necessary for her child.²⁵⁸ As one sorts through the two legal complaints in these public cases, 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 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 mixed race children will not look like their parents and will be subject to public sanction. The *Andrews* plaintiffs specifically complained about the *public* nature of their injury.²⁵⁹ 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.²⁶⁰

The court in *Cramblett* did not reach a substantive judgment on this issue, but the *Andrews* Court considered 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,

256. First Complaint, *supra* note 1, ¶¶ 24–26.

257. *Id.*

258. *Id.*

259. *Andrews*, 838 N.Y.S.2d at 366–67.

260. First Complaint, *supra* note 1, ¶ 15.

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.”²⁶¹ 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.”²⁶² 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.”²⁶³ 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 “disease[d]” 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.²⁶⁴ Importantly, the *Andrews* 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, as it could have more directly addressed the social sanctions mixed race families face in public life. It is clear from the *Andrews*’s complaints about the “darkness” of their child’s skin color that they are primarily concerned with the impact a visibly brown child will 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 had a different skin color than the parents.²⁶⁵ Parents in the ART cases are mainly focused on colorism,

261. *Andrews*, 838 N.Y.S.2d at 367.

262. *Id.*

263. *Id.*

264. *Id.* at 368.

265. *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 (Jan. 10, 2013), <http://fertilitylabinsider.com/2013/01/hey-doc-is-that-my-iui-sperm> [<https://perma.cc/8RAV-EYZM>] (discussing fertility clinic worker’s fifteen 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 children of color); see Maggie O’Farrell, *IVF Mother: I Love Him to Bits*.

not aesthetic similarity. These parents believe that a brown child will decrease the status of the family, a dignity assault they would like to avoid. These complaints signal that 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. The United States may become a nation of mixed race people that still sanction anyone who has brown skin.²⁶⁶ 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 seems 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,

But He's Probably Not Mine,' GUARDIAN (Oct. 29, 2009), <https://www.theguardian.com/lifeandstyle/2009/oct/30/ivf-errors-baby-mix-up> [<https://perma.cc/66BT-ZSL8>] (discussing British and United States 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,'* STRAITS TIMES (Oct. 6, 2016), <https://www.straitstimes.com/singapore/health/ivf-mix-up-at-thomson-medical-a-look-back-at-the-case-of-baby-p> [<https://perma.cc/NH9Z-857M>] (discussing Asian woman's rejection of child in racial mix-up case because of its white color).

266. Tanya Katerí Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 121–33 (2012) (noting discourse about multiracial groups in United States 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. 1487, 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, 1709–11 (2000) (warning as to colorism dynamics in the United States that favor lighter skin Blacks over darker tone persons); cf. Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 59–60 (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).

more attractive, and allegedly smarter than the average consumer.²⁶⁷ If consumers wanted actual sameness they would demand banks stock sperm and eggs from donors who were heavier 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.²⁶⁸ In some cases, consumers 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 the donor's eye shape or color, nose shape, bone structure, and any number of characteristics that would better assure facial similarity. Instead, samples are organized based on racial distinctions that create random separations between donors and consumers truly looking for physical similarity.²⁶⁹ Indeed, the ART fora contain numerous examples of consumers 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.²⁷⁰ As sociologist Sven Bergmann explains, if gamete markets were structured to look beyond skin color and instead focus on actual facial similarities, sameness could be better guaranteed.²⁷¹

A thought experiment helps bring this home for some readers. One could imagine a selection regime like there is in Spain,

267. See *supra* Part I.C.

268. See *supra* Part I.C.4.

269. See *supra* notes 133–35 and accompanying text.

270. See, e.g., Journey 123, *Using Egg Donor of Different Race*, BABYCENTER (Jan. 3, 2014), https://community.babycenter.com/post/a46810456/using_egg_donor_of_different_race [<https://perma.cc/H2L7-NAHW>] (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. *Id.*; see Moonadea, *Would You Use Donor Sperm from a Different Race?*, WEDDING BEE (June 2012), <https://boards.weddingbee.com/topic/spinoff-would-you-use-donor-sperm-from-a-different-race/> [<https://perma.cc/8QRU-788A>] (discussing willingness to cross racial categories in search for physical similarity).

271. “[A]nonymity, resemblance and non-disclosure are related and intertwined.” Sven Bergmann, *Assisted Authenticity: Naturalisation, Regulation and the Enactment of “Race” Through Donor Matching*, in (IN)FERTILE CITIZENS: ANTHROPOLOGICAL AND LEGAL CHALLENGES OF ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 44, at 231, 232–34.

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.²⁷² Many United States 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. That argument abandons any pretense that the consumer seeks aesthetic sameness.

Finally, history is key to understanding this aesthetic sameness argument as Americans are the product of a historical legacy that has taught us to ignore facial similarities across color lines. For example, when one looks at pictures of Amanda Cramblett and her daughter, physical similarity or aesthetic sameness is clear to many people; it is even more clear when one is instructed to ignore color differences. But why is it then that color exerts such a powerful influence that it will cancel out some parties' ability to see otherwise obvious physical similarities between parent and child? It appears that the difficulty some people have seeing aesthetic similarity between people of different skin tones is cultural, social, or political rather than being the product of a universal cognitive blindness. Of course historically there were harsh social penalties during American chattel slavery when persons explicitly acknowledged facial similarities between brown slave children and their white property owners/fathers.²⁷³ Americans did not acknowledge these family similarities across color lines because they often documented sexual assault and exploitation by their family members.²⁷⁴ With this in mind, it is little wonder that today we tend to look away or not notice similarities across skin color. This ability was of no social benefit in the past and potentially produced social dangers for people that openly discussed such similarities. Social habits

272. See Law on Assisted Human Reproduction Techniques (B.O.E. 2006, 126) (Spain).

273. See Thelma Jennings, "Us Colored Women Had To Go Through a Plenty": Sexual Exploitation of African-American Slave Women, 1 J. WOMEN'S HIST. 45, 60-63 (1990) (documenting consequences of peoples' recognition of shared blood, similarity or connection between master-father and mulatto children including sale of both slave child and mother). The Master's shame when these parent-child relationships were revealed was one source of danger; additional danger was posed by the master's wife or jealous "legitimate" white children.

274. See *id.*

and aesthetic understandings are passively absorbed and passed down in families. We may still unwittingly be reflecting the residuum of antebellum racial understandings when we refuse to see facial similarity across color; we culturally continue one of the saddest aspects of our historical legacy.

In conclusion, when stripped to their core we see that aesthetic sameness concerns actually play a much smaller role in the ART consumers' quest for the perfect child than previously believed. Rather than aesthetics, it is anxieties about color, the trigger for a more modern version of white privilege, that is actually the key animating force that drives consumer aesthetic choices, far more than any other physical feature. Yet, as we will see in Part III, there are ways that the ART industry could be structured to lessen this phenomenon, rather than amplifying it.

C. LOSS OF PRIVACY

The *Andrews* complaint also raised 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."²⁷⁵ The couple claimed to be "distressed by th[e] mistake, each and every time [they] appear[ed] in public."²⁷⁶ 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."²⁷⁷ From the couple's 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. As Angela Onwuachi-Willig explains, the constant intrusive questioning mixed race families face can be exhausting.²⁷⁸ The *Andrews* family appears to understand that the family permanently will be subject to additional attention and scrutiny because of this 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 child of a different race will either

275. *Andrews v. Keltz*, 838 N.Y.S.2d 363, 368 (Sup. Ct. 2007).

276. *Id.*

277. *Id.* at 366.

278. See ONWUACHI-WILLIG, *supra* note 233.

(1) immediately reveal the use of ART services, (2) raise the specter of infidelity in the family, or (3) 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 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 who 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's 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."²⁷⁹ 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

279. *Andrews*, 838 N.Y.S.2d at 365.

white racial purity.²⁸⁰ Gay 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.²⁸¹ 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.²⁸² 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.²⁸³ 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 instead use ART and racial sameness to decrease their visibility remains to be seen.²⁸⁴ 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

280. See generally Quiroga, *supra* note 30 (explaining that there is an assumption of donor racial purity that undergirds ART procedures).

281. See Maura Ryan & Amanda Moras, *Race Matters in Lesbian Donor Insemination: Whiteness and Heteronormativity as Co-Constituted Narratives*, 40 *ETHNIC & RACIAL STUD.* 579, 585–93 (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. *Id.*

282. Lenon & Peers, *supra* note 9, 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 displaces the ability of the monoracial couple to enjoy this form of homonormative privilege.

283. See Naomi Cahn, *The Uncertain Legal Basis for the New Kinship*, 36 *J. FAM. ISSUES* 501, 504 (2014) (recognizing the potential for donor constituted families to redefine how we understand family or reinscribe it).

284. See Mamo, *supra* note 52, at 230–31 (2013).

ART, the need to resort to technological assistance creates embarrassment. Men fear that they will be viewed as less virile or as “failed” men. Women also fear being viewed as infertile because sterility seems to raise questions about their femininity. 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 its 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.²⁸⁵ Gender stereotyping, rather than having abated, has simply been reborn in modern form. Now women 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 anxious that 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. In ART and in other domains, these idealized notions of gender harm many Americans.

Finally, consumers’ desire to hide the stigma of ART becomes a less persuasive justification as ART usage increases in frequency. To be clear, stigma is waning. Given its high cost, participation in the ART market tends to be read as a demonstration of financial security, or even 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 historically have normalized the desire for secrecy about ART, we should consider at what cost. As Karen-Anne Wong writes, “[r]ecipient 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

285. See generally SPEIER, *supra* note 27; Daniels & Golden, *supra* note 78, 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.*

children and changing social attitudes to reduce stigma and generate acceptance for non-traditional families.”²⁸⁶ Wong notes that many families that are driven by the matching model become profoundly preoccupied with concerns about secrecy, privacy, and trust.²⁸⁷ Nothing about this arrangement serves the interests of the children in the family.²⁸⁸

D. FEAR OF CULTURAL DIFFERENCE

Cramblett also complained that she was unprepared to raise a child in a largely racially segregated world. She worried about moving through largely minority spaces to service her daughter’s needs.²⁸⁹ Interestingly, in this section of her complaint, she accepts the naturalness of segregation and operates on the assumption that she would 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.”²⁹⁰ 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.²⁹¹ With this move, Cramblett attempted to portray her claim less

286. Karen-Anne Wong, *Donor Conception and “Passing” or: Why Australian Parents Want Donor-Conceived Children Who Look Like Them*, 14 J. BIOETHICAL INQUIRY 77, 77 (2017).

287. *Id.*

288. 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.” *Andrews v. Keltz*, 838 N.Y.S.2d 363, 366 (Sup. Ct. 2007). 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.

289. First Complaint, *supra* note 1, ¶ 24 (complaining that she must “travel to a black neighborhood, far from where she lives, where she is obviously different in appearance, and not overtly welcome”).

290. *Id.* ¶ 23.

291. *Id.*

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 into the sphere of parenting, showing how the dream of motherhood is often understood through a commercial lens. Specifically, Cramblett's claim is 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 racial 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.²⁹² Any racial expertise or proficiency she has in this area as a white person, grooming "white" hair, has been rendered utterly useless. Scholars have commented on this experience-focused trend in marriage, and the fact that marital unions grow less permanent as we enter an era in which parties treat marriage as a site of self-satisfaction and self-realization. Cramblett's complaint reveals that children too have become a vehicle of self-affirmation. 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 desire 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.²⁹³ 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

292. *Id.* ¶ 24.

293. *Id.* ¶ 23.

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 consider the fact that many African American communities don't actually celebrate these holidays. If they believe these holidays are important, they can certainly create opportunities for children to have these African American holiday experiences in the same way that children from culturally non-observant African American families do. Also, a properly 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 she will face as she tries to help 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 order to relocate in a more diverse community.²⁹⁴ She explained in her Complaint that she had moved to the white community because it was a "better" living environment and had better schools.²⁹⁵ Importantly, Cramblett uncritically accepts the fact that white enclaves for unstated reasons seem to have superior access to government services as a standard background norm. Equally important, she complains that she will have to consult with multiple therapists and experts to learn more about how to navigate raising a biracial child, to make sure that intolerance and discrimination do not affect her daughter's academic or psychological well-being.²⁹⁶ 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. Also, 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.²⁹⁷ The race mixture in her immediate family will now only make her seem even more different, more odd to her extended

294. *Id.* ¶ 26.

295. *Id.* (noting the family had moved back to Unionstown from racially diverse Akron in search of better schools).

296. *Id.* ¶¶ 26–27.

297. *Id.* ¶ 25.

family than she did before. She realizes that her daughter cannot cover her source of difference and try to blend in as Cramblett has; as a consequence, her daughter will be sanctioned by the extended family even more. Moreover, Cramblett's own unfamiliarity with issues of race makes her even more anxious that she will not be able to help her child.²⁹⁸ As she explains, she did not meet any African Americans until she attended college.²⁹⁹

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, her argument concedes the permanence of racism as a social fact. Second, she *outsources* responsibility for negotiating racism as a social inconvenience that should primarily 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.³⁰⁰ 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.³⁰¹

298. *Id.*

299. *Id.* ¶ 22.

300. See *Procter & Gamble: 'The Talk,'* WASH. POST (Aug. 4, 2017), https://www.washingtonpost.com/video/business/procter-and-gamble-the-talk-ad/2017/08/04/52345b76-7940-11e7-8c17-533c52b2f014_video.html.

301. 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 shows that the performative family is alive and well. The complaints 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 a mixed ethnic (and arguably mixed race) 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 in the Art process. People express surprise, alarm, or curiosity at the decision to take a non-white partner or have a non-white child.³⁰² 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.³⁰³

302. ONWUACHI-WILLIG, *supra* note 233, at 138–55.

303. To be clear, a white person's desire for social status, or the desire to escape mockery, questioning, or discomfort is not the innocent nondiscriminatory 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*, 388 U.S. 1 (1967). 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 where 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.

III. CHARTING A WAY FORWARD

A. GENERAL GOALS AND STANDARDS

Parts I and II demonstrate that the racial classification systems used in the ART market promote discredited notions of biological race and lay a fraudulent scientific patina over their procedures; encourage racial stereotyping, racial determinism, and racial anxiety; and promote racial segregation. Given these observations, under a functionalist inquiry race clearly is not serving a valid purpose in the ART market and, the ART market instead actively undercuts the United States' racial equality norms. Part III considers the means federal and state governments could use if they attempt to disrupt current racial marketing in the ART industry. This Part explores measures that function as direct prohibitions solutions that exceed nudges, as well as more gradual nudge-like incentive measures.

Certain themes are common and shared by all of the measures described below. First, all of them reflect the equal protection values and norm that should inform Supreme Court review in this area. Indeed, they specifically reflect the antibalkanization norm that I believe will be the prevailing value the Supreme Court uses in its review assessing the constitutionality of proposed ART market restrictions. Numerous equal protection scholars have taken note of the Supreme Court's tolerance of racial categorization in regimes in the affirmative action context, while the Court broadly decries the dangers of racial labels in other venues. This shift, according to Reva Siegel, represents a transition to an antibalkanization 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.³⁰⁴ Scholars like Siegel have generally worried about the Court's steady march in the equal protection cases towards an anti-classificationist logic. As Siegel explains, this anti-classificationist logic is part of a values project, making colorblindness a central equal protection norm.³⁰⁵ However, as the Court marched down this dangerous

304. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1279, 1352–55 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*].

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

anti-classificationist path, Justices have consistently argued that this approach is necessary to avoid racial subordination and segregation—their primary goal.

Importantly, Siegel and other scholars had long argued for an anti-subordination approach in Supreme Court doctrine—one which permits the State to recognize and create racial distinctions under regimes that have the goal of disrupting racial hierarchy.³⁰⁶ However, because the anti-subordination logic scholars have offered has not commanded the support of today's more conservative Supreme Court, efforts must turn to whether antibalkanization justifications can be remobilized to create a basis for the same anti-subordination policies that progressive scholars believe are essential to prevent the exploitation and marginalization of minority groups. To be clear, at present, antibalkanization principles are embraced by the Court. Most racial classification systems fail to survive strict scrutiny unless they meet certain antibalkanization goals: the goal of diversity, cross-racial learning, and racial exchange.³⁰⁷ These values are recognized when they are part of regimes that do not compromise the interests of whites or burden majority racial interests. The question is, are there regimes and spaces where arguing to dismantle racial labels actually do appear to serve anti-subordination purposes in the way progressives would hope? This Article cannot fully explore these questions, but it offers for consideration one space where an anti-classification ethos reduces marginalization and stereotyping in ways that would satisfy anti-subordination.

Kenji Yoshino similarly sees this antibalkanization logic behind the Supreme Court's shift away from an equal protection analysis when examining the interests of vulnerable minorities.³⁰⁸ The Supreme Court instead prefers treating vulnerable

306. See Kenji Yoshino, *The New Equal Protection*, 114 HARV. L. REV. 747, 750 (2011).

307. For a compelling discussion outlining the antibalkanization approach and the limits of the antibalkanization approach, see generally Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1 (2015). For scholars exploring the antibalkanization perspective, see Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006); Siegel, *From Colorblindness to Antibalkanization*, *supra* note 304; Yoshino, *supra* note 306.

308. Yoshino, *supra* note 306, at 751.

minorities as individuals seeking vindication of due process liberty interests.³⁰⁹ The Court has expressed a desire to avoid the Lilliputian-multiplication and hierarchical ranking of minority groups that might be recognized under equal protection law. A liberty analysis seems superior to certain Justices, he explains, because it confirms the minority litigants' right to pursue certain kinds of freedom without making arguments about the specter of illogical discrimination.³¹⁰ Scholars are now being called to explore how these liberty justifications and individual arguments also might attend to some of the same concerns central to the anti-subordination paradigm. I suggest that there are a range of liberty arguments and consumer freedom arguments that can be mobilized in support of marginalized communities interests' in the ART market.

In short, I suggest that the Court's anti-classificationist orientation and its anxiety about balkanization heralds positive treatment for the arguments I raise in Section B.³¹¹ For most of the proposals in Section B address how my proposed ART regulations are designed to disrupt the existing racial categorization practices in ART markets to promote greater consumer freedom and reduce stereotyping. These regulations are designed to prevent 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 previously proposed for the ART market 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, and capacities erroneously associated with particular races. Whether courts and legislators are driven by anti-subordination or anti-classificationist logic, individual

309. *Id.* at 751–52.

310. *See id.* at 792–97 (discussing the advantages of liberty-based claims).

311. *Infra* Part III.B.

liberty, or antibalkanization considerations, all can find reasons to support the interventions offered below.

Indeed, to remedy the problems caused by the past use of race, we need antibalkanization measures that encourage ART consumers to abandon biological concepts of race and look beyond racial categories. Additionally, we need antibalkanization-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 the 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 does suggest that ART marketers have great power.³¹² Marketing features and market structuring features, if properly designed, can nudge consumers to acknowledge that the features they assume fall within one racial group are actually shared. Also, evidence suggests ART consumers are price sensitive, more open to nudges in conditions of scarcity and will look past racial lines.³¹³ These features make it likely that there is room to change the market with properly structured policy initiatives.

B. SPECIFIC PROPOSALS

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

312. Looking across racial lines for phenotype-based similarity is already part of the ART industry in some other countries. See New Delhi Surrogacy Clinic, *Egg Donor in India*, YOUTUBE (Oct. 5, 2011), <https://www.youtube.com/watch?v=hdVy38ko72E> (showing a 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").

313. See sources collected *supra* note 270.

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 shows, 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 United States consumers willing to import frozen eggs and sperm from places like Denmark and the Czech Republic, 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 United States gametes would not produce any one race; it would not start a eugenicist trend. Specifically, United States 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 sperm donor may donate to ensure that only a limited number of genetically related children are produced by a single 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 even abandon their current racial categories and racial purity rules.

The restriction on foreign imports has multiple advantages beyond its potential to disrupt racial marketing in the ART industry. Policymakers could justify the foreign import restriction as necessary to protect the American ART industry and keep American dollars at home. Additionally, American ART consumers, forced to contract within the United States market are likely to bring the costs of ART services down. ART providers will com-

pete 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 creating a child that looks like them. This 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 phenotypes/features are not known, (3) the phenotype/features of a given donor are not guaranteed to be present in the donor's gametes, (4) definitions of race vary from clinic to clinic and may be changed without notice to the consumer, and (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.³¹⁴ 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.

314. See generally Jennifer J. Argo & Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*, 23 J. PUB. POL'Y & MARKETING 193 (2004) (explaining that effectiveness of disclaimers and warnings does not vary by product type but more costs of behavioral compliance).

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 tainted fruit and illicit behavior.³¹⁵ However, this research examined behavior such as consumption of unhealthy products;³¹⁶ by contrast, dismissal of antidiscrimination messages is only likely to spur pride or produce pleasure for already highly discriminatory consumers. It is more likely to produce discomfort and feelings of hypocrisy in our target consumer group—those that have at least superficially embraced diversity values but failed to fully conform their behavior to these values.³¹⁷ While the tenor of recent racial politics in America have shifted to naturalize xenophobia and even claims of white racial superiority for a slice of Americans, these messages still create a level of cognitive dissonance for many others, as we now have been socialized for decades to embrace racial equality norms. Admittedly more research in this area would be helpful. At this juncture it is enough to suggest that electronic antidiscrimination nudges, triggered by how a website is constructed,

315. 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 N. Ata et al., *Effects of Exposure to Thin-Ideal Media Images on Body Dissatisfaction: Testing the Inclusion of a Disclaimer Versus Warning Label*, 10 *BODY IMAGE* 472, 479 (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 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 Magazine Advertisements*, 3 *FASHION, STYLE & POPULAR CULTURE* 357 (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. Brad J. Bushman & Angela D. Stack, *Forbidden Fruit Versus Tainted Fruit: Effects on Warning Labels on Attraction to Television Violence*, 2 *J. EXPERIMENTAL PSYCHOL.* 207 (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).

316. Bushman & Stack, *supra* note 315.

317. See Harmon & Rudd, *supra* note 315.

could disrupt the currently naturalized racial eugenicist overtones in the ART industry.³¹⁸ Explicit messages may be very effective as well.³¹⁹ Research suggests that disclaimers and warnings issued in close proximity to when an action is contemplated can be extraordinarily effective in changing behavior.³²⁰ Again, these disclaimers and warnings do not limit consumer choice; they merely encourage consumers to broaden their search parameters.³²¹ This innovation is not present in other countries.³²² Rather it is specifically based on the United States' long history under the commercial speech doctrine of addressing fraudulent or materially misleading marketing representations.³²³

Some may argue that the disclosure proposal is an unconstitutional imposition of compelled speech in violation of the First Amendment.³²⁴ 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,³²⁵ this disclosure or warning requirement is likely to survive constitutional scrutiny.³²⁶ ART clinics, of course, should be permitted to frame the disclaimers

318. See *supra* note 315.

319. See Harmon & Rudd, *supra* note 315.

320. Ross Buck & Rebecca Ferrer, *Emotion, Warnings, and the Ethics of Risk Communication*, in HANDBOOK OF RISK THEORY 693, 694–718 (Sabine Roeser et al. eds., 2012) (explaining that although the analytic cognitive aspects of effective warning have been closely studied, to be truly effective these warnings must command attention, stimulate memory, and evoke emotion).

321. See Daniels & Golden, *supra* note 78, at 19–20.

322. See *Terms of Use*, UNITED NATIONS, <https://www.un.org/en/sections/about-website/terms-use/> [<https://perma.cc/DE2Y-85A6>].

323. See FED. TRADE COMM'N, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD (2000), <https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf> [<https://perma.cc/S2FD-RQUQ>].

324. See, e.g., Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

325. *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); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553–55, 567 (2005) (recognizing as constitutional a beef industry taxation scheme used to fund government messages encouraging beef consumption even though beef producers were not able to control the messaging from the government).

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

in ways that ensure consumers know the disclaimers are government messaging.³²⁷ Over time these disclaimers may fade in significance like the health warnings displayed on cigarettes;³²⁸ 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.³²⁹ 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.³³⁰ 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

The government has substantial latitude to spend money to hire speakers to communicate its message under the government speech doctrine.³³¹ Additionally, the government may use its spending power to support the provision of services that have an expressive dimension.³³² The Supreme Court has recognized that government cannot possibly be viewpoint neutral as it chooses which services to fund.³³³ As Justice Scalia has explained, “[g]overnment must [be free to] choose between rival

327. 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.”).

328. *FDA Proposes New Health Warnings for Cigarette Packs and Ads*, U.S. FOOD & DRUG ADMIN. (Jan. 30, 2020), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/fda-proposes-new-health-warnings-cigarette-packs-and-ads> [<https://perma.cc/VPH6-QZU9>] (“Research shows that today’s warnings have become virtually invisible.”).

329. See Fox, *Choosing*, *supra* note 14, at 14.

330. *Id.*

331. See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 208–09 (2013).

332. *Id.* at 221 (Scalia, J., dissenting) (stating the government may enlist private parties to pursue policy goals and speech connected with those goals that may be content specific); *id.* (“The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own.”).

333. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005).

ideas and adopt some as its own.”³³⁴ Both of these sources of authority suggest that the federal government could offer subsidies to ART providers that do not use race to categorize or market gametes.³³⁵ Government officials can easily explain that the State has an interest in supporting clinics that operate in a race-neutral fashion as these clinics reflect the colorblindness or race neutral norms that the State believes are part of the Fourteenth Amendment equal protection guarantee. Government subsidized ART providers would be directed to ensure that individual donors are not reduced to mere representatives of a given race in the donation process, and that clinics should not produce marketing material that privileges race in donor descriptions.³³⁶

Also, 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.³³⁷ In addition, the government has set up relationships with certain Romanian sperm and gamete providers to provide genetic material to Israeli couples.³³⁸ The norm the state hopes to project is the importance of the family in Israeli society.³³⁹ A subsidy regime in the United States would, by contrast, be designed to reflect antibalkanization and racial equality values we hold dear. Subsidies for ART may be closer to reality than many people realize. As birth rates in the United States fall to levels below the population replacement level nec-

334. *Agency for Int’l Dev.*, 570 U.S. at 221 (Scalia, J., dissenting).

335. *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.*, 570 U.S. at 221–27 (Scalia, J., dissenting) (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)).

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

337. See Dapha-Birenbaum-Carmeli, *Thirty-Five Years of Assisted Reproductive Technologies in Israel*, 2 *REPROD. BIOMEDICINE & SOC’Y ONLINE* 16, 17 (2016) (discussing how fertility treatments in Israel are publicly funded).

338. See *id.* at 19 (discussing how most Israeli recipients of donor eggs would be happy to receive Romanian eggs).

339. See *id.* at 21 (discussing how the state’s funding demonstrates its support for “traditional biogenetic families”).

essary to maintain healthy economic growth, reproductive subsidies may grow more attractive for economic reasons.³⁴⁰

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.³⁴¹ 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 donors of different races. Further restrictions would heighten the possibility that consumers will combat their tendency to discriminate based on skin color.³⁴² For example, a gamete bank could limit the number of samples a consumer is presented to choose from within a period of time, perhaps ten 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 donors of different races that are highly appealing and physically similar in surprising ways.

Moreover, even consumers that end up choosing sperm or egg donors that are phenotypically white will be better off as a consequence of having shopped in a system for gametes that embraces a colorblindness norm. After repeated experiences looking at donor samples that compel them to look across race, these consumers are likely to see the potential of donors in other racial groups that they otherwise would have never seen. Additionally, ART consumers are invited into an exercise that causes them to see similarity across race, which is an antidiscrimination exercise that benefits us all.

340. America's total fertility rate today stands at 1.93, according to the Centers for Disease Control and Prevention and hasn't been above the replacement rate in a sustained way since the early 1970s. Jonathan V. Last, *America's Baby Bust*, WALL STREET J. (Feb. 12, 2013, 4:31 PM), <http://www.wsj.com/articles/SB10001424127887323375204578270053387770718> [<https://perma.cc/5FRN-N2UN>]. This creates a dual problem—a population that is disproportionately old and shrinking overall. *Id.* The phenomenon has enormous economic, political, and cultural consequences. *See id.*

341. *See supra* Part III.B.3.

342. *See supra* Part I.C.4.

The subsidy program described above is specifically designed to express long-celebrated American antidiscrimination norms.³⁴³ 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 who wish to search based on race and ethnicity can forgo government support; however, again, since they are not wholly prohibited from finding a donor that is phenotypically similar, the government subsidy program will likely 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.³⁴⁴ Others may be concerned that the wealthy will opt out of this subsidy regime and continue to purchase gametes from allegedly pure blood white donors.³⁴⁵ 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 likely 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 who 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.³⁴⁶ There are some concerns with 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

343. See Fox, *Choosing*, *supra* note 14, at 5–6.

344. See *supra* note 113 and accompanying text.

345. See *supra* Part I.C.4.

346. Fox, *Choosing*, *supra* note 14, at 13 (“A sin tax is an excise on certain goods and services—like tobacco, alcohol, and gambling—that aims to convey disapproval and deter consumption of the practice in question.”).

tobacco and alcohol seems an antiquated notion today.³⁴⁷ 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.³⁴⁸ The message projected by sin taxes is tolerance, rather than judgment; these taxes function as a clear acknowledgment of each consumer's personal freedom.³⁴⁹ These propositions make sin taxes an ill fit for discouraging the use of race in ART markets. The government will want 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. These consumers are triggered by ART marketing to make racial decisions when choosing eggs and sperm,³⁵⁰ and taxes therefore should be directed to ART marketers rather than consumers themselves. If taxes are imposed, legislatures should use the tax revenue 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.³⁵¹ This commerce clause power, coupled with the federal government's constitutional racial equality guarantees justify regulations that disrupt racial

347. See *Alcohol Facts and Statistics*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics> [<https://perma.cc/69AZ-83P8>] (last updated Feb. 2020) (stating that according to the 2018 National Survey on Drug Use and Health, 70 percent of people ages 18 or over drank alcohol in the past year, and 55.3 percent drank alcohol in the past month).

348. Fox, *Choosing*, *supra* note 14, at 13 (explaining how sin taxes are aimed to "convey disapproval and deter consumption of the practice in question").

349. See *id.*

350. See *supra* Part I.C.4.

351. See *National ART Surveillance*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 7, 2019), <https://www.cdc.gov/art/nass/index.html> [<https://perma.cc/KDM9-SMP7>] (describing how the CDC collects data from all fertility clinics across the United States and monitors ART).

marketing in the ART industry. The federal government additionally has First Amendment interests that allow it to communicate a racial equality message.³⁵² 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.³⁵³ 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.³⁵⁴ 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.”³⁵⁵ Cramblett’s

352. For more than a decade the Supreme Court has recognized that the government has its own independent speech interests that must be respected. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (recognizing local government’s right not to display monuments in order to protect its own speech interests). For these reasons the Court has rejected initiatives that would cause the government to be associated with messages that might convey support for racial bias. *See, e.g., Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (rejecting permissions to create state sponsored specialty license plates making use of the confederate flag).

353. MEYER, *supra* note 42, at 5–6.

354. *See New State Ice Co. v. Liebman*, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting) (explaining how states can “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

355. *Andrews v. Keltz*, 838 N.Y.S.2d. 363, 369 (Sup. Ct. 2007).

claim was not well received and died in a haze of procedural complications.³⁵⁶ 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 ART cases.³⁵⁷ 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.³⁵⁸ 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 decline 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. Limits on Government and Respect for the Right of Intimate Association

Some scholars may be persuaded that *some* customers’ race preferences in the ART market are driven by rank stereotyping; however, they worry that the state and federal government agencies are not in the right position to attempt to disrupt intimate racial preferences in any direct fashion. Specifically, while Dov Fox, Russell Robinson, and Liz Emens are all in agreement that in some cases intimate connections based on race are in part caused by prior *de jure* arrangements and may reflect unfair race-based generalizations, they also agree that affairs of race and the heart are a complicated space that is not easily legislated. Moreover, they all agree that these race preferences may

356. *See supra* Introduction.

357. *See supra* note 32.

358. *See supra* Part I.C.

be traceable to multiple justifications of varying levels of legitimacy.³⁵⁹ These alternative justifications and concerns are discussed in more detail below.

Robinson urges some limited, voluntary changes to discourage race-based intimate selections: counseling web designers to reconsider exactly how they are using race, for example.³⁶⁰ He explains that designers of websites that give users the opportunity to generally sort by race should think critically about how web design can facilitate unfair stereotyping—a concern squarely at issue in the ART context.³⁶¹ Indeed, as he explains, when regimes give one the ability to choose descriptors based on “race,” they are encouraging stereotyped perceptions about what people of a given race look like.³⁶² Instead, he prefers selection regimes that give users more time to think about variation within a “race” category, to make finer, more exact physical description choices, and avoid stereotyped judgments about racial categories that fail to attend to physical diversity.³⁶³ In this way, he might be a fan of the aspects of my marketing regime that gave clinics economic incentives to design websites in this way.

Unlike me, however, Robinson stops short of advocating for explicit legal rules or subsidies that incentivize website operators to wholly take race out of the filtering choices available on intimate connection websites. As he explains, there are reasons apart from rank stereotyping that might cause one to prefer someone within her own race and avoid cross-racial interaction.³⁶⁴ Yet, the reasons Robinson would allow for racial filtering focus on an individual’s possession of certain kinds of racialized knowledge, specifically a person’s understanding of racial microaggressions, or a desire for intimacy based on a shared racial perspective about certain kinds of discrimination.³⁶⁵ These arguments seem less persuasive in the ART context. Rather, when

359. See Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sexual Love*, 122 HARV. L. REV. 1307 (2009); Fox, *Choosing*, *supra* note 14; Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787 (2008).

360. See Robinson, *supra* note 359.

361. *Id.* at 2795–97 (describing range of options in how race might be used, ways in which importance of race might be minimized, and ways to avoid appearance stereotyping).

362. *Id.* at 2796–97.

363. *Id.*

364. *Id.* at 2798–2800.

365. *Id.*

parents select gametes to produce progeny, the potential children will not be born with any innate sense of racialized knowledge or authentic experience of discrimination—issues that he believes might justify racial sorting in other intimacy spaces. To the extent the child's physical characteristics trigger the parents to confront more race discrimination in society, the children give families an important opportunity to acquire certain kinds of racialized knowledge and forge a shared family perspective on race. These families will have more open conversations about what he calls perceptual segregation—different racial experiences in perceiving bias.³⁶⁶ However, this is a key set of conversations. My argument suggests that having these conversations about perceptual segregation is an important part of advancing racial equality.

Liz Emens also urges us to tread lightly. She recognizes that Americans have not taken full consideration or full responsibility for the structural issues that create so-called private preferences for intra-racial or same race intimate relationships.³⁶⁷ And while she prefaces her argument by explaining that she is only concerned with romantic intimacies,³⁶⁸ some of her insights bear on the way the market is shaped for ART as well. Specifically, Emens notes that there might be special justifications for government working to encourage interracial intimacies because of its prior role in preventing these relationships from forming.³⁶⁹ However, she explains that symbolic interventions that express support for these relationships, even explicit moves to remove social barriers, will be perceived as social engineering and could backfire.³⁷⁰ Furthermore, like Robinson she worries that interventions to promote cross-racial intimacy ignore important considerations disempowered groups have for maintaining racial distinctiveness.³⁷¹ It is not enough to call these groups' intra-racial desires “defensive . . . responses” to racism, she explains, as the desire to avoid assimilation and maintain distinctiveness are true values worthy of respect and consideration.³⁷²

366. *Id.* at 2788.

367. *See* Emens, *supra* note 359, 1340–43.

368. *Id.* at 1312.

369. *See id.* at 1379–81.

370. *Id.* at 1397.

371. *Id.*

372. *Id.* at 1347.

I agree with Emens that a desire to avoid assimilation and maintain distinctiveness deserves respect, particularly when raised by disempowered groups that have had their expressive project and dignity compromised by rank discrimination.³⁷³ However, Emens reveals a thin conception of race in these arguments. For as minority groups are well aware, out-marriage and the interracial children produced often do not result in assimilation or a weakening of minority identity.³⁷⁴ Rather, because race is very often a matter of individual choice and affiliation, the mere decision to cross racial lines in seeking out sperm or eggs does not mean that the child produced will necessarily look like or identify with the more socially powerful racial group with which she is linked. Rather, in cases where phenotype associated with a marginalized group is more pronounced, cross-racial ART actually potentially broadens the circle of persons recognized as minority. At least in the ART context, cross-racial selection, or selection that does not wholly de-privilege race, leaves open the question of what racial identity the resulting offspring from the ART process will choose.³⁷⁵ To be clear, government intervention here, by limiting the use of race, does not usher in the dilution or weakening of opportunities for voluntary racial affiliation or the articulation of racial identity. Instead it gives individuals more opportunities to reconsider how family racial identity is formed.

2. 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

373. *Id.* at 1397.

374. See Sarah E. Gaither et al., *Monoracial and Biracial Children: Effects of Racial Identity Saliency on Social Learning and Social Preferences*, 85 *CHILD DEV.* 1, 20 (2014) (finding that racial identification of biracial children is susceptible to situational and psychological factors). “Out-marriage” is marriage outside of one’s race or ethnic group. See *out-marriage*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/out-marriage> [<https://perma.cc/TS3Q-CMGE>]; *out-marriage*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/outmarriage> [<https://perma.cc/JWT3-RUPU>].

375. *Id.*

race-based choices.³⁷⁶ 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 gametes from white donors, some positive results still arise. 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 which celebrates whiteness in a particularly aggravated fashion. Shame will prevent many from exiting the primary system; white persons 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. Lastly, a person who willfully finds ways to search for gametes based on race will be forced to face her/his level of investment in a racialized society. This understanding alone could lead to more honest engagement when thinking about racial inequality more broadly.

3. 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.³⁷⁷ 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

376. See *supra* Part I.C.4 (discussing how ART consumers tend to want whiteness when making their donor selection).

377. *But see* Roberts, *supra* note 13, at 798 (highlighting the way these arguments are used to protect ART vendors from regulation).

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.³⁷⁸ The right to ART services has never been understood to guarantee to consumers the right to have information presented in a particular fashion.³⁷⁹ Indeed, when viewed from this perspective, consumers' demand to have a gamete market structured around race seems a mere customer preference, a *de minimis* concern that does not limit procreative freedom in any substantive fashion.

4. Inconsequential Effects

Some may argue that that the changes proposed here will not do much to disrupt race discrimination in ART markets.³⁸⁰ Families that want white 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.³⁸¹ 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.³⁸² Under the subsidy program, ART clinics should be required to provide a mixed race sample to anyone who approaches the clinic for services. Clinics

378. Polina Vlasenko, *Desirable Bodies/Precarious Laborers: Ukrainian Egg Donors in the Context of Transnational Fertility*, in (IN)FERTILE CITIZENS: ANTHROPOLOGICAL AND LEGAL CHALLENGES OF ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 44, at 197; Emily Thomas, *Fertility Clinic Tells Woman She Can't Use Sperm Donor from Another Race*, HUFFINGTON POST (July 28, 2014, 2:33 PM), https://www.huffpost.com/entry/calgary-sperm-donor-race_n_5627382 [<https://perma.cc/2BRT-DBWS>].

379. *See supra* Parts I.A–B.

380. Some will argue that these protocols will merely cause colorism to take over the ART market, rather than race. These concerns 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.

381. *See* Ryan & Moras, *supra* note 281, at 593–94. 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.

382. *See supra* Part I.C.4.

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 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.

5. Claims of Discrimination

Some may argue that my proposals are naïve regarding 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. Lastly, 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 have parents who are naïve about discrimination and parents who may not be fully prepared to talk to a child about discrimination.³⁸³ They will face perceptual segregation issues. 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.³⁸⁴

383. See *11 Things To Know Before Having Interracial Kids*, MIXED.UP.MAMA, <https://mixedracefamily.com/10-things-to-expect-before-having-children-in-your-interracial-marriage> [<https://perma.cc/UR2G-3L64>] (discussing how raising interracial kids can be new territory for parents).

384. See *id.*

Children facing these challenges will not be alone, and responsible parents will find means for them to connect with minority friends or relatives.

6. Claims of Distortion Effects—The Death of Race

Some will argue that the proposals I have outlined effectively call for the death of race or that I have transformed the ART process into an engine for producing mixed race children, however, this critique seems overblown. Only approximately two percent of children born in the United States are produced through ART.³⁸⁵ Biological reproduction is still the norm and most children will be born through biological reproductive procedures.³⁸⁶ 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.³⁸⁷ 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—such as tattoos or other changes—political choice, public recognition, and voluntary claiming.³⁸⁸ In a more concrete sense, we must recognize that children born through ART may

385. See Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2016*, 68 MMWR SURVEILLANCE SUMMARIES 1, 6 (2019), <https://www.cdc.gov/mmwr/volumes/68/ss/pdfs/ss6804a1-H.pdf> [<https://perma.cc/35UG-WLT8>] (finding that only 1.8 percent of births in the U.S. and Puerto Rico were produced through ART procedures in 2016).

386. See Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RES. CTR. (July 17, 2018), <https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/> [<https://perma.cc/X2WV-RVG7>] (“About 2% of all births in the United States now result from ART, with higher rates in several Northeastern states”). The latest year for which data is available is 2016. 2016 data indicates that most births in the United States are still unassisted.

387. But see Mark Sussman, *The “Miscegenation” Troll*, JSTOR DAILY (Feb. 20, 2019), <https://daily.jstor.org/the-miscegenation-troll/> [<https://perma.cc/4UHS-E6C9>] (describing the creation of the term “miscegenation” in 1864).

388. See *id.* (identifying that *Miscegenation* introduced the idea that race is expressed through visible bodily differences that signal internal differences).

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 antidiscrimination norms. Our exploration of clinic marketing practices provides new context for understanding Cramblett's perspective. She is not a backwards symbol of outdated racial thinking or a throw-back to an old racial era; rather, she is a creature of contemporary racial norms promoted by the ART market, a market that encourages her to think that certain racial products are her "just due" as an ART consumer. Viewed from this perspective, it seems clear that Jennifer Cramblett 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 United States 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 consumer 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. I suggest that 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.