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Choosing Your Child's Race*

Dov Fox**

Few choices matter more to us than those we make about the person with whom we will share a life or start a family. When having children involves assisted reproduction, selecting an egg or sperm donor occasions similar gravity. Such decisions typically bring to bear a patchwork of preferences about the particular physique, disposition, or values we find desirable in a romantic or procreative partner. To many, race matters. Just as some people in the search for companionship hope to find a significant other who shares their racial background, many of those who wish to become parents would prefer a child whose racial features resemble their own.¹

To help those who use donor insemination have a child of a particular race, twenty-three of the twenty-eight sperm banks currently operating in the United States provide aspiring parents with the sperm donors' self-reported racial identity.² The largest among these—including the world's

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1. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1165 (1991) (observing that race is "central to many people's thinking about parenting"); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 223 (1995) ("In America, perhaps the most socially significant product of the genetic link between parents and children continues to be race."); see also F. Allan Hanson, *Donor Insemination: Eugenic and Feminist Implications*, 15 MED. ANTHROPOLOGY Q. 287, 291, 294 (2001) (surveying sixty-three women who used donor insemination about their selection of sperm donor and finding that ethnicity ranked second most influential—behind intelligence—among seventeen physical, mental, and social traits).

2. I know of no other work that considers the racial classification of gamete donors in assisted reproduction. Dorothy Roberts has documented racial disparities in access to and use of reproductive technologies. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 252–56 (1997). And Martha Ertman has observed that the "focus on white donors and recipients buying and selling sperm is

leading sperm bank, California Cryobank³—organize catalogs into separate sections on the basis of donor race.⁴ The top of each page in California Cryobank's catalog lists, in boldface font, the race of each donor in that section.⁵ And Cryobank's website provides a "Quick Search" drop-down menu that prompts customers to filter donors according to "Ethnic Origin" categories including "Asian," "Caucasian," "Hispanic or Latino," and "Black or African American."⁶ If we are reluctant to embrace these practices, how can this unease be articulated?

Practices that facilitate race-based decision making in donor selection are immune to conventional accounts of wrongful discrimination based on bad effects or bad motives.⁷ California Cryobank's recent monthly catalogs include over 300 donors each, fewer than ten of whom are black—that is, less than 2 percent, compared with 13.5 percent of the general population.⁸ But it is not persuasive to say that black men who are turned away at higher rates for paid sperm donation are denied valuable opportunities for employment or civic participation. So this does not seem like a matter of disadvantaging consequences.⁹

Nor does donor classification reflect racial bigotry. Instead, it reflects business attention to the high proportion of white people among those who use donor insemination services, and to a common desire among these

borne out in the inventory and selection process." See Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 27 (2003).

3. California Cryobank has facilitated thousands of births in fifty states and more than thirty countries, with an annual sales volume of \$5 million to \$10 million. See *Why Use Us*, CALIFORNIA CRYOBANK, INC., <http://www.cryobank.com/Why-Use-Us> (last visited Apr. 28, 2010); *Profile of California Cryobank, Inc. Company Information*, SPERMBANK.COM, http://www.1888pressrelease.com/california-cryobank-inc-company-profile_14061.html (last visited Apr. 28, 2010); *Sperm Banking History: An Excerpt from "Sperm Banking: A Reproductive Resource" by Sonia Fader*, CALIFORNIA CRYOBANK, INC., <http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History> (last visited Apr. 28, 2010).

4. For a detailed account of California Cryobank's donor classification system, see DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK 175-78* (2005).

5. See *Donor Catalog*, CALIFORNIA CRYOBANK, INC., https://www.cryobank.com/_resources/pdf/catalogs/print-catalog.pdf.

6. See *Donor Search*, CALIFORNIA CRYOBANK, INC., <http://www.cryobank.com/Donor-Search> (last visited Oct. 10, 2010).

7. I distinguish among three dimensions of wrongful discrimination: discriminatory intent, discriminatory effect, and discriminatory expression. Discriminatory intent turns on whether illegitimate attitudes animate some act or rule; discriminatory effect turns on whether the practice in question causes material or psychological harm; discriminatory expression turns on whether it communicates a social meaning—independent of any bad intent or bad effect—that erodes worthy forms of public recognition. See Dov Fox, *The Expressive Dimension of Donor Deferral*, AM. J. BIOETHICS 42, 42-43 (2010).

8. See *Donor Catalog*, *supra* note 5.

9. Cf. *Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1970) (striking down facially neutral employment tests that had the effect of disproportionately excluding African Americans).

prospective parents to have a child—and thus a donor—who more closely resembles the parents' own racially phenotypic features. Some heterosexual couples may care about donor race for no other reason except that they do not want the world—or the child—to know they used a sperm bank to conceive. These can hardly be described as invidious intentions.¹⁰ Yet there is a lingering feeling that when sperm banks classify donors to make it easier for prospective parents to select wholesale against black donors, something troubling persists.¹¹

The problem with sperm banks catering to these racial preferences lies in the social meaning that racial classification expresses within the sphere of family formation.¹² We should care about the race-conscious design of decision-making frameworks such as donor catalogs, dating websites, and election ballots.¹³ This is because the re-inscription of race within meaningful spheres of life such as politics, romance, and reproduction can reify or reconstitute racially defined ways in which we understand ourselves and relate to others.¹⁴ Such racial re-inscription can be justified if the race-conscious practice aims to alleviate racial stratification by undoing the effects of past discrimination in contexts like education,¹⁵ employment,¹⁶ and voting,¹⁷ or if it serves a worthy non-remedial interest like averting imminent violence by segregating prison inmates during a

10. Cf. *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (invalidating an Alabama law that disenfranchised persons convicted of crimes “involving moral turpitude” on the ground that the “the crimes selected for inclusion . . . were believed by the [enacting] delegates to be more frequently committed by blacks”).

11. See Dov Fox, *The Regulation of Biotechnologies: Four Recommendations*, 38 HASTINGS CENTER REP. 2, 57 (2008) (criticizing efforts to “filter arguments about social prejudice . . . through the lens of cost-benefit analysis”); Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, MICH. ST. L. REV. 1135, 1190–92 (2005) (identifying deficiencies in deliberative frameworks that exclude unconventional but relevant moral considerations, including those involving social prejudice).

12. Cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (declaring unconstitutional the state government’s support of an all-female nursing school because it expressed the demeaning judgment that women “are presumed to suffer from an inherent handicap” that equips them uniquely for the stereotypically female vocation of nursing).

13. Cf. *Anderson v. Martin*, 375 U.S. 399, 401–03 (1964) (holding that a Louisiana law requiring racial labels next to a candidate’s name on the ballot constituted unlawful discrimination because it invited citizens to vote their presumptively illegitimate racial preferences).

14. Cf. Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, UTAH L. REV. 845, 859 (2009) (arguing that the public meaning of particular practices can interact with existing norms to generate “expressive externalities” on social relations and behaviors).

15. See *McDaniel v. Barresi*, 402 U.S. 39, 41–42 (1971) (upholding the constitutionality of a race-conscious assignment of students to public schools).

16. See *United States v. Paradise*, 480 U.S. 149, 185–86 (1987) (upholding the constitutionality of a race-conscious employment rule for promoting state troopers).

17. See *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O’Connor, J., concurring) (arguing that states may take race into account when creating voting districts “so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy”).

race riot,¹⁸ or preserving public safety by describing a criminal suspect according to perceived race under circumstances in which nonracial identifying information is unavailable.¹⁹ But racial classification in donor catalogs is without remedial or otherwise compelling justification. I want to argue that partitioning sperm catalogs by race is a pernicious practice that we should resist because it sends a message that prospective parents should select donors on the basis of race and because it credentializes the assumption that single-race families are preferable to multiracial ones.²⁰

There is an important qualification, however, in that more or less salient means of racial disclosure can transmit more or less acceptable ideas about the role that race should play in decisions that parents make about what kind of child to have. Practices that classify people along socially salient characteristics may express views that cannot be reduced to concerns about either the mindset of those who enact the practice or about the impact it has on those who receive its message. This expressive dimension of racial salience—and its attention to the conditions of solidarity across racial groups—is not unfamiliar to recent Supreme Court opinions by race-moderate swing justices. The race jurisprudence of Justice Powell, Justice O'Connor, and Justice Kennedy evinces a distinct concern about social meaning in the context of race that animates the Court's decisions in cases about affirmative action,²¹ school desegregation,²² majority-minority redistricting,²³ and employment discrimination.²⁴

18. See *Lee v. Washington*, 390 U.S. 333 (1968) (affirming an order of racial desegregation in Alabama prisons).

19. See *Brown v. City of Oneonta*, 221 F.3d 329, 333–34 (2d Cir. 2000).

"[W]here law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the Equal Protection Clause. *Id.*

But see *Hall v. Pa. State Police*, 570 F.2d 86 (3d Cir. 1978) (invalidating a police photography program targeted at black bank customers).

20. Doctrinal reasoning helps to clarify the moral stakes of discriminatory practice and to illustrate the resonance of certain moral reasons in antidiscrimination law. This does not imply, however, that judicial decisions should be read as exegeses of normative ethics or analytical philosophy. The kinds of arguments that judges enlist to control human behavior are constrained in important ways (for example, reliance on public legitimacy and coherence with existing law) that are distinct from the arguments that philosophers craft as a device of intellectual persuasion. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610 (1986) (distinguishing "the violence of judges" from "the metaphoric characterizations of literary critics and philosophers").

21. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (holding that classification based on race may "lead to a politics of racial hostility," unless "strictly reserved for remedial settings").

22. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring) (asserting that "[c]rude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand").

In assisted reproduction too, the appearance of racial salience matters, and adjusting the prominence of race in decision making frameworks can shape social meaning. There is a spectrum of salience-varying approaches that sperm banks could adopt to manage information about donor race, each of which sends a different message about the social meaning of donor catalog and website design. I would like to consider four such approaches, or means of racial disclosure: what I call race-indifferent, race-sensitive, race-attentive, and race-exclusive.

Race-indifferent means of disclosure withhold the racial identity of donors altogether. This approach makes it impractical for customers to act on whatever racial preference they might have. By withholding explicit information about donor race, race-indifferent means send a message that racial considerations do not or should not matter to prospective parents.²⁵ Since many people clearly do care about the race of their child-to-be, however, the message must be that it is illegitimate for race to play any part in donor selection. But this social meaning is unsatisfying. Parental interests in decisional autonomy, reproductive privacy, and racial expression legitimate practices by which sperm banks permit but do not encourage the exercise of racial preferences in assisted reproduction.²⁶

Race-sensitive means, by contrast, identify racial background as one donor characteristic alongside others, including height, weight, education,

23. See *Shaw v. Reno*, 509 U.S. 630, 644, 647 (1993) (finding an equal protection violation in “[r]edistricting legislation . . . so bizarre on its face that it is “unexplainable on grounds other than race”” and arguing that “reapportionment is one area in which appearances do matter”).

24. See *Ricci v. DeStefano*, 129 S.Ct. 2658, 2676 (2009) (“Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.”).

25. Customers might still try to guess a donor’s race by reference to donor characteristics such as hair texture, audiotapes, baby photos, or skin tone. Social science research on implicit racial bias suggests that prospective parents might rely on such inferences when they do not mean to consider race or when making a concerted effort not to consider race. Perceived measures to conceal racial information might even have the paradoxical effect of making race more conspicuous in the minds of parents. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1210 (2008) (considering but not endorsing the claim that “efforts to discount or ignore race after it has already been noticed are unlikely to be successful because of how race operates unconsciously.”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1240 (1995) (“A legal duty which admonishes people simply not to consider race, national origin or gender harkens to Dostoevsky’s problem of the polar bear: “Try . . . not to think of a polar bear, and you will see that the cursed thing will come to mind every minute.”). But still the race-indifferent approach sends a message that race is not supposed to matter to prospective parents in donor selection.

26. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (holding that the state may not place undue burdens on a woman’s decision to terminate a pregnancy); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (striking down a statute requiring disclosure of group membership lists).

occupation, medical history, or even SAT scores. This approach does not, like the race-indifferent approach, prevent parents from browsing profiles for race. Instead, it allows prospective parents to choose a sperm donor on racial grounds, but only if they scroll through the catalog and at least glance at each donor profile one by one. Race-sensitive means preserve a space for the exercise of racial preferences, while framing the architecture of parental choice in a way that softens racial salience, by declining to racially classify donors or to facilitate online filtering by race. Race-sensitive means thereby send a message that it is neither objectionable nor desirable, but acceptable for prospective parents to choose a donor on racial grounds and no others. A race-attentive approach not only reveals race but places emphasis on it, by designing donor catalogs and online search functions in ways that make it easy for prospective parents, if they wish, to view just donors of one race, or to omit donors of another. This is the approach that sperm banks like California Cryobank adopt.

A race-attentive approach sends a very different message: that filtering donors wholesale by race is not only acceptable, but accepted, or even desirable. Race-attentive means—by positioning race prominently in the configuration of donor traits, and even prompting customers, with the click of a mouse, to eliminate from consideration all donors of one race or another—gives racial concerns a privileged place in donor selection. Operating against background conditions of race-matching preferences and racially disparate access to donor insemination services, the race-attentive approach implicitly ratifies the idea that parents should have children who belong to the same race—and that same-race families should be preferred to multiracial ones.

I have seen no convincing evidence, however, to support the view that a child's interests are better served by being raised in a same-race household than by parents of a different race.²⁷ To the extent that assisted reproduction technologies compete with adoption agencies, moreover, the

27. Scholars and judges have speculated in the transracial adoption context that white parents lack the necessary cultural competency (in terms of racial identity, experience, and perspective) to teach coping mechanisms effectively to black children. *See, e.g., In re R.M.G.*, 454 A.2d 776, 802 (D.C. 1982) (Newman, C.J., dissenting) (citations omitted).

Regardless of how [a child with a black biological parent] is identified by herself or her family, she will be identified as a black person by society and will inevitably experience racism. Blacks and other minorities develop survival skills for coping with such racism, which they can pass to their children expressly, or more importantly, by unconscious example. . . .

Parents of interracial families may attempt to learn these lessons and then teach them, but most authorities recognize that this is an inferior substitute for learning directly from minority role models. *Id.*

It is hard to see how a black child raised by white parents can be said to have been harmed by not having been born to genetic parents of the same race; the only alternative for that particular child, as the genetic product of a unique combination of egg and sperm, was never to have existed at all. *See* DEREK PARFIT, *REASONS AND PERSONS* 351–79 (1984); Dov Fox, *Luck, Genes, and Justice*, 35 J.L. MED. & ETHICS 712, 713 (2007).

race-attentive approach highlights the disquieting competitive advantage sperm banks offer by satisfying customers' desires for a more predictable route to a white child.²⁸ Whether in adoption or in donor insemination, practices that systematically favor the formation of monoracial families bank on troubling assumptions about the way parents should think and act in the choices they make about what kind of children to have.²⁹ This expression of racial essentialization is not the only problem. Race-attentive means of racial disclosure in donor catalogs also express a message of racial balkanization by instantiating the notion that individual families should be of uniform race, and that people should be set apart by race across family units.³⁰

Race-exclusive means only exacerbate these concerns. The race-exclusive approach differentiates donors by racial information only, thus according race a presumptively decisive role in prospective parents' decisions about which sperm donor to choose. Those who are not troubled by race-exclusive or race-attentive means of racial disclosure in donor catalogs might object that similar approaches appear benign when they are adopted by online dating websites to distinguish among potential matches.

California Cryobank's co-founder Cappy Rothman argues that shopping for a donor is little different from looking for a romantic partner: "[A]ny single woman . . . dating for a husband, or looking for a genetic source for her child, does the same thing. . . . [S]he dates, she looks, there's some desires, fantasies. We try to provide a large donor pool, so the same thing can take place."³¹ Surely there's nothing wrong with trying to look for a companion of a particular race, whether in a person's spontaneous

28. I owe this point to Professor Carter Dillard. See Carter Dillard, commenting on Dov Fox, Note, *Racial Classification in Assisted Reproduction 2* (unpublished manuscript) (on file with author).

29. Compare Justice Stewart's dissenting opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which the majority validated a federal program requiring that ten percent of funding for public works be reserved for minority-owned businesses. Justice Stewart objected that in "[m]aking race a relevant criterion . . . the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics." *Id.* at 532; cf. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.").

30. Cf. Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J. L. & MED. 568, 588 (2007) ("[U]nless people share an underlying moral bond sufficiently strong to shore up an ethos of sharing, public institutions will be without compelling moral reason for the less advantaged to make claims on the social and economic resources of the more advantaged.").

31. Steven Dilbeck, *Sperm Donors Wanted, Only High-Caliber Jocks Need Apply*, DAILYNEWS.COM, (Aug. 25, 2008), http://www.dailynews.com/news/ci_10302330.

interactions or with the help of dating websites.³² So why worry about sperm banks facilitating race-conscious donor selections? The analogy between assisted mating and online dating is a provocative one, and brings us back to the comparison between reproduction and romance with which this inquiry began.

Just as sperm banks seek to capitalize on racial preferences within the reproductive sphere, commercial websites like JDate.com, AsianSinglesConnection.com, Amor.com, and BlackPeopleMeet.com are designed to help people to find a lover or spouse in part on the basis of racial or ethnic preferences.³³ Racial classification in dating websites and donor catalogs are similar in that both practices facilitate the exchange of money for racial information that people care about in prospective matches for romance or reproduction. Like sperm banks that arrange donors according to racial background, dating services that use race-attentive means of racial disclosure are less performing prejudice than they are pursuing profit. Like the innocent motives that prospective parents have for caring about race in donor selection, the most plausible reason that people might care about race or ethnicity in a romantic partner is simply that they are looking for someone with whom they will share similar cultural backgrounds or to whom they believe they will feel a greater sense of attraction, and they believe that race or ethnicity matters to them in these respects.³⁴ If people should have access to dating services that facilitate partner searches with an eye to race, what legitimate reason is there not to provide the same measure of assistance to infertile heterosexual couples, lesbian couples, and single parents seeking to find a sperm donor of a particular race?³⁵

Let me suggest two reasons. The first is the lesser interests of relational autonomy at stake in assisted reproduction by comparison to those in sexual reproduction or romantic dating. Dating websites deal in the union of people; sperm banks deal in the union of gametes. The exchange of money for genetic material provides the means to produce a child—a

32. Alan Wertheimer, *Reflections on Discrimination*, 43 SAN DIEGO L. REV. 945, 955 (2006) (“[M]ating choices . . . do not seem to qualify as wrongful discrimination because they occur in an area of life that we believe should be immune from governmental intervention.”).

33. See Jenée Desmond-Harris, *Seeking My Race-Based Valentine Online*, TIME, Feb. 22, 2010, at 99, 99–100; Michael Winerip, *His First 50 Dates (or in Her Case, 3)*, N.Y. TIMES, Jul. 5, 2009, at ST1, available at <http://www.nytimes.com/2009/07/05/fashion/05generationb.html>.

34. See JDATE.COM, <http://www.jdate.com> (last visited Oct. 30, 2010) (“JDate’s mission is to strengthen the Jewish community and ensure that Jewish traditions are sustained for generations to come.”); See also ASIANSINGLESCONNECTION.COM, <http://www.asiansinglesconnection.com> (last visited Oct. 30, 2010) (“We bring Chinese, Japanese, Korean, Filipino and other Asian groups together because we believe that it is important to bring like-minded singles together in an environment where they can feel comfortable being themselves and expressing themselves as singles and as Asians.”).

35. I am indebted to Professors Judith Darr and Martha Ertmann for conversation on this question.

profoundly intimate act to which the donor contributes one-half of the necessary raw materials. But the relationship between those who engage directly in that procreative act is marked less by intimacy than anonymity. What is present in the romantic matching context that is missing in the reproductive matching context is meaningful interface between the parties on either side of the exchange. Parents and donors transact at arms length through a corporate broker who does not permit parties even to learn each other's name, let alone to have interpersonal contact.³⁶ The market in donor insemination mediates the practice of reproduction to eliminate the intimacy—and with it the relational autonomy interests—that characterize the connection between consensual sexual partners.³⁷

There is a second reason that race-salient dating websites are more worthy of protection than race-salient donor catalogs. The background norms of particularity that operate in the romantic sphere serve to sublimate racial preferences, while the norms that underlie reproductive choices accentuate them. The legitimacy of JDate.com and BlackPeopleMeet.com also derives from the idiosyncratic and discriminating nature of those preferences that properly typify our decisions about those with whom we wish to enter intimate relationships. These norms of particularity prompt us to choose romantic partners based on whatever traits—a quick wit, straight teeth, or shared racial background—we happen to find desirable, and they make less conspicuous the exercise of racial preferences specifically among the many other particular preferences we expect that people may legitimately have exercised in their choice of a romantic partner.

Many of us believe it is less obviously acceptable, however, for this sort of choosiness to mark the affective ties that parents have for their child-to-be.³⁸ We might hesitate to accept the idea that prospective parents should welcome the birth of a child conditional on the child being born with whatever qualities the parents happen to prefer. If preferences for particular offspring traits—for example, intelligence, good looks, or athletic prowess—are less obviously legitimate, then preferences for race become more difficult to explain away. It is tempting to think with philosopher Frances Kamm that “before a particular person whom we love

36. See *Anonymous Donor Contact Policy*, CALIFORNIA CRYOBANK, INC., <http://www.cryobank.com/Services/Post-Conception-Services/Openness-Policy> (last visited Oct. 10, 2010) (“A parent may not, either for themselves or on behalf of their underage child, receive any additional information on their donor beyond the available profile.”).

37. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1118 (1998) (developing a conception of relational privacy that excludes an asserted “right to select donor sperm, eggs, or embryos for genetic reasons”).

38. See Genetics and Public Policy Center, *Reproductive Genetic Testing: What America Thinks* (Washington, DC, Genetics and Public Policy Center, 2004), available at <http://www.dnapolicy.org/images/reportpdfs/ReproGenTestAmericaThinks.pdf>.

exists (just as before we find someone to love), it is permissible to think more broadly in terms of the characteristics we would like to have in a person and that we think it is best for a person to have”³⁹ But the undiscriminating kind of love we think parents should have for their children plausibly takes hold even before parents learn whether the child’s attributes are those that the parents wished for or would come to value.⁴⁰ If we do not think that parents should adopt an exacting disposition in choosing their child’s genetic constitution, then the norms of parental love cannot serve to legitimize the race-conscious design of donor catalogs in the way that norms of companionship legitimize the race-conscious design of dating websites.

The vice of the race-attentive approach that private sperm banks adopt is not so great as to warrant legal prohibition.⁴¹ Restricting the law’s reach to government discrimination serves to “preserve[] an area of individual freedom.”⁴² While some types of discrimination are so bad that not even private actors should engage in them—racial discrimination in most private housing or employment, for example, while permitted by the Constitution,⁴³ is statutorily prohibited⁴⁴—within most spheres of life, no law limits the extent to which private citizens can choose the people with

39. Frances M. Kamm, *Is There a Problem with Enhancement?*, AM. J. BIOETHICS 5, 10 (May–June 2005).

40. See Dov Fox, *Parental Attention Deficit Disorder*, 25 J. APPLIED PHIL. 246, 257–58 (2008).

41. Sperm banks do not receive government subsidies, contracts, or tax-exempt status. Were the government to fund or otherwise support race-attentive means of sperm donor classification, such state sponsorship would make a race-classifying sperm bank more vulnerable to legal challenge under federal or state civil rights statutes. Possible causes of action could arise under U.S. Code, Title 42, section 1981, which prohibits illegitimate discrimination in contractual relationships. 42 U.S.C. §§ 1981(a)–(c) (2006); *cf.* Runyon v. McCrary, 427 U.S. 160, 187–88 (1976) (Powell, J., concurring) (arguing that § 1981 does not apply to contractual relationships of a characteristically intimate nature, such as contracts between a family and a tutor, babysitter, or housekeeper), or California’s Unruh Civil Rights Act, which bars private discrimination that deprives salient social groups of “equal . . . facilities, privileges, or services in all business establishments of every kind whatsoever.” Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2007). But even were a sperm bank to receive government funding and licensure, mere acquiescence or inaction by public officials has been held insufficient to satisfy the state action condition required to trigger equal protection scrutiny. See *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding that the state action doctrine operates to exclude a decision by nursing homes to discharge or transfer Medicaid patients to lower levels of care); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that the state action doctrine excludes otherwise discriminatory firing practices by a nonprofit institution that receives public funds).

42. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

43. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (holding that even harmful and invidious discrimination, when performed by private citizens, is considered the sort of “private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))).

44. See, e.g., 42 U.S.C. § 2000a (2006) (prohibiting segregation in public accommodations).

whom they trade, befriend, or live, whether on the basis of national origin, sexual orientation, religion, sex, or race.⁴⁵

It is not always clear, however, that the distinction between public and private discrimination can do the moral work that courts demand of it. While it matters considerably that the state alone acts with the coercive threat of implicit violence, non-state actors can sometimes exercise state-like influence over others.⁴⁶ As a matter of constitutional anti-discrimination doctrine, the distinction between public and private action is determinative.⁴⁷ But normatively speaking, the more important question is whether the harm that a practice causes is serious, and whether the state has responsibility to do something to remedy that harm.⁴⁸

I believe that modest corrective measures are fitting. I propose two policies: a sin tax and a ban on commercial advertising.⁴⁹ 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.⁵⁰ A drawback of applying a sin tax to donor services that use race-attentive or race-exclusive means of racial disclosure is that the tax would pass these extra costs back onto consumers, and could thereby deepen existing disparities of access already rooted in class- and race-based distinctions.⁵¹ These concerns appear unremarkable within the

45. *But see* *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (prohibiting the exclusion of women from membership in the Jaycees organization).

46. In the case of sperm banks, for example, these are private companies whose influence is constrained by institutional and competitive forces alike, but whose conduct is buoyed by the power of commercial markets and the prestige of the biomedical profession.

47. *See* *United States v. Morrison*, 529 U.S. 598, 621 (2000) (“The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.” (citing *Shelley*, 334 U.S. at 13)).

48. *Cf.* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (holding that the Communications Decency Act did not protect Roommates.com, an interactive online matching service, from liability under the Fair Housing Act for search functions and e-mail notifications based on information generated from user responses to company questionnaires, which included pre-populated answer choices regarding sex, family status, and sexual orientation); *see also* *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (holding that an online social networking service that requires users to disclose preferences related to gender, sexual orientation, and living with children, and that channels information available on the site according to those expressed preferences, is responsible, at least in part, for developing the information provided by its users within the meaning of the Communications Decency Act).

49. *See* Dov Fox, *Paying for Particulars in People-To-Be: Commercialization, Commodification and Commensurability in Human Reproduction*, 34 J. MED. ETHICS 162, 165-66 (2008) (considering limits on commercial advertising for human sperm or eggs solicited from persons for the reason that they possess particular characteristics unrelated to health).

50. *See* *Murdock v. Pennsylvania*, 319 U.S. 105, 134 (1943) (Frankfurter, J., dissenting) (“A tax can be a means for raising revenue, or a device for regulating conduct, or both.”).

51. *See* Laurie Nsiah-Jefferson & Elaine J. Hall, *Reproductive Technology: Perspectives and Implications for Low-Income Women and Women of Color*, in *HEALING TECHNOLOGY: FEMINIST PERSPECTIVES* 93 (Kathryn Strother Ratcliff et al., eds., 1989).

context of a health care system that distributes many medical goods and services according to a patient's ability to pay for them.⁵² But if a sin tax on race-salient donor services were to exacerbate inequality in objectionable ways, we could consider Dorothy Roberts's suggestion that government subsidize access to reproductive technologies for those without the financial means to afford them.⁵³

The second proposal is a restriction on marketing by offending sperm banks. This restriction would limit advertising of donor services that use race-attentive or race-exclusive means of racial disclosure, whether on billboards or in printed media, broadcasting, or online promotion through website ads, hypertext linking, and site aggregation on search engines.⁵⁴ The goal of the ad ban would be to keep the racial preferences on which race-salient donor catalogs rely from seeping any further into the public consciousness. A prohibition on the advertising of legal activity would, however, raise considerable First Amendment problems. The constitutional status of the proposed marketing regulation would likely turn on whether the statute was "content-based,"⁵⁵ and on whether the ban was tailored narrowly enough to touch only illegitimate speech.⁵⁶

Putting aside the potential normative and constitutional difficulties of the proposed sin tax and marketing ban, these mechanisms could temper racial salience in assisted reproduction. Both would divert parental decision making away from racial-salient considerations by increasing the transaction costs of exercising racial preferences and enhancing the relative indifference parents that exhibit in donor selection.⁵⁷ While the creation of more multiracial families may be a foreseeable and welcome byproduct, the purpose of discouraging racial salience is not to promote racial integration. The point instead is to mitigate expression of the divisive social meaning that race should be the overriding consideration in family formation.

52. I owe this point to Professor Glenn Cohen.

53. See Dorothy E. Roberts, *Social Justice, Procreative Liberty, and the Limits of Liberal Theory: Robertson's Children of Choice*, 20 LAW & SOC. INQUIRY 1005, 1016 (1995).

54. Cf. FLA. STAT. § 873.05 (2010) ("No person shall knowingly advertise . . . any human embryo for valuable consideration.").

55. See *Texas v. Johnson*, 491 U.S. 397, 412, 414–15 (1989) (state law prohibiting flag burning was unconstitutional content-based restriction on expressive conduct).

56. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256–58 (2002) (invalidating two provisions of the Child Pornography Prevention Act as overbroad).

57. See Amos Tversky, Shmuel Sattath & Paul Slovic, *Contingent Weighting in Judgment and Choice*, 95 PSYCHOL. REV. 371, 372 (1988) (observing that "people tend to choose according to the more important dimensions" since "the more prominent attribute will weigh more heavily" in the decision making calculus). The behavioral effects of informational salience have been noted by at least one court, in the context of torts. See *Allen v. Chance Mfg. Co.*, 873 F.2d 465, 470 (1st Cir. 1989) ("People's assessments of the causes of events are inevitably influenced by the array of possible causes that are made salient to them.").

Recent civil rights scholarship has convincingly demonstrated that race-based classification is not a necessary condition of wrongful discrimination.⁵⁸ But we should not overlook the subtle reasons why racial differentiation can sometimes furnish grounds to make a discriminatory practice worth resisting. Reflection on the race-conscious design of donor catalogs opens a normative space to rethink the ways in which values such as autonomy, pluralism, and intimacy inform what it means to credentialize racial preferences whose legitimacy we tend to accept without question. Insofar as race tends to reproduce itself within the family, racial classification in sperm donor catalogs serves as a promising point of departure from which to ask what sort of racial self-understandings our multiracial democracy should seek to embody.

58. See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142 (1997) (criticizing contemporary equal protection doctrine on the ground that reserving heightened scrutiny for racial classifications “obscures the multiple and mutable forms of racial status regulation that have subordinated African-Americans since the Founding—including the facially neutral forms of state action that, since Reconstruction, have regulated racial status in matters of employment, political participation, and criminal justice”).
