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## Racial Classification in Assisted Reproduction

**ABSTRACT.** This Note considers the moral status of practices that facilitate parental selection of sperm donors according to race. Arguments about intentions and consequences cannot convincingly explain the race-conscious design of donor catalogs. This prompts us to examine the expressive dimension of wrongful discrimination. Even practices marked by innocent motives and benign effects can give reason for pause when they needlessly entrench divisive assumptions about how people of a particular race think or act. Race-based differentiation in voting ballots, dating websites, and donor catalogs helps us to tease out the subtle normative tensions that racial preferences occasion in the contexts of citizenship, romance, and reproduction. These reflections suggest that racially salient forms of donor disclosure are pernicious social practices, which, while operating beyond the reach of the law, ought to be condemned as bad policy. The Note concludes by developing reproductive choice-structuring mechanisms that aim to balance respect for intimacy, autonomy, and expressions of racial identity with responsibility to work against conditions that divide us.

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**INTRODUCTION**

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 are looking for 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.

To help those who use donor insemination have a child of a particular race, sperm banks routinely catalog sperm donors on racial grounds. Twenty-three of the twenty-eight sperm banks operating in the United States provide aspiring parents with information about donor skin color, and the largest banks organize sperm donor directories into discrete sections on the basis of race. This practice of race-conscious donor classification invites us to rethink those racial preferences we commonly take for granted within intimate spheres of association. Insofar as race tends to reproduce itself within the family unit, race-conscious donor decisionmaking serves as a promising point of departure from which to ask whether and how our multiracial democracy should seek to preserve or diminish our collective self-identification with racial solidarities.

This Note proceeds in three parts. Part I describes the practice of racial classification by the world's largest sperm bank. Part II argues that antidiscrimination arguments about bad intentions and bad consequences struggle to make sense of the race-conscious way that sperm banks design donor catalogs and online search functions. This suggests that certain classes of discriminatory behavior require a richer moral vocabulary than traditional frameworks allow. In these cases, we do well to examine what might be called the expressive dimension of wrongful discrimination, which turns on whether a rule or action instantiates public values that characteristically erode worthy forms of social recognition.

Part III works out the social meaning of racial classification in assisted reproduction by reference to similar classifications in the more familiar settings of voting and dating. These analogies help us to tease out the subtle normative tensions that racial preferences occasion in the contexts of citizenship, romance, and reproduction. This Part argues that racial classifications marked by innocent motives and benign effects give reason for pause when they needlessly entrench divisive assumptions about how people of a particular race think or act. These reflections suggest that racially salient forms of donor disclosure are pernicious social practices, which, while operating beyond the

reach of the law, ought to be condemned as bad policy. The Note concludes by developing reproductive-choice-structuring mechanisms that aim to balance respect for intimacy, autonomy, and expressions of racial identity with responsibility to work against conditions that divide us.

## I. RACE AND REPRODUCTION

While judges and scholars have filled volumes with deliberation about the moral and legal status of private discrimination in contract, property, employment, and torts,<sup>1</sup> few have addressed race-based decisionmaking in the contexts of romance and family,<sup>2</sup> and none has considered the racial classification of gamete donors in assisted reproduction.<sup>3</sup> Such prospects are no longer futuristic but familiar.<sup>4</sup> Advances in molecular biology equip parents to

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1. See, e.g., THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM (Andras Sajó & Renata Uitz eds., 2005); HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedman & Daphne Barak-Erez eds., 2001).
  2. Several scholars have considered the role of race in intimate contexts. See RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 385 (2003); ALEX LUBIN, ROMANCE AND RIGHTS: THE POLITICS OF INTERRACIAL INTIMACY, 1945-1954, at 154 (2005); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 126 (2001); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 172 (1992); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 883 (1998); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1165 (1991); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1157 (2000); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2800 (2008).
  3. 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 252-53 (1997) (observing that even though black women experience higher infertility rates than white women, white women are twice as likely to use reproductive technologies). Touching more closely on the practice of donor classification is Martha Ertman's observation, in a 2003 article discussing commercial markets in adoption and assisted reproduction, that the "focus on white donors and recipients buying and selling sperm is borne out in the inventory and selection process." 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).
  4. The exercise of parental choice over offspring characteristics is not limited to sperm donors. Routine ads in campus newspapers offer up to \$100,000 for egg donors who are tall, athletic, Asian or Caucasian, and who boast high standardized test scores. See, e.g., Marilee Enge, *Couple Offers \$100,000 for Egg Donor. Infertile Pair's Solicitation May Be Highest Price Yet*, DENVER POST, Feb. 10, 2000, at A2; Divya Subrahmanyam, *"Ivy League Egg Donor*

choose from among a range of traits—including race—in their child-to-be.<sup>5</sup> With male fertility rates on the decline<sup>6</sup> and the advent of cryopreservation techniques that allow semen to be frozen and then fertilized years later,<sup>7</sup> donor insemination became a thriving—and largely unregulated—industry by the 1980s.<sup>8</sup> Today, facilities that collect, store, and sell sperm compete for business among infertile couples and single women seeking to have a child who is genetically related to at least one parent.<sup>9</sup>

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*Wanted*,” YALE DAILY NEWS, Apr. 23, 2008, at 8. Egg extraction is invasive and unpleasant, however, and the drugs required to produce the additional eggs put donors at risk of ill health or infertility. See Judy Norsigian, *Egg Donation Dangers: Additional Demand for Eggs Leads to Additional Risks*, GENEWATCH, Sept.-Oct. 2005, at 6, 6-7 (2005). But there is no pain, distress, or danger associated with the donation of sperm. For these reasons, plus the higher rate of infertility among men than women, sperm donation is by far the most commonly used means of artificial reproduction. See Jeffrey P. Kahn, *Bidding on the Future? The Limits of Paying for Gametes*, 20 J. ANDROLOGY 586, 586 (1999).

5. See Dov Fox, *Retracing Liberalism and Remaking Nature: Designer Children, Research Embryos, and Featherless Chickens*, BIOETHICS (forthcoming), reprinted in STEM CELLS: A LEGAL STUDY 72 (M.N. Bhavani ed., 2009) (discussing embryo selection techniques involving in vitro fertilization and preimplantation genetic diagnosis).
6. Sperm counts among U.S. men have decreased annually from 1938 to 1996 at a rate of 1.5%. THEO COLBORN, DIANNE DUMANOSKI & JOHN PETER MEYERS, OUR STOLEN FUTURE: HOW WE ARE THREATENING OUR FERTILITY, INTELLIGENCE, AND SURVIVAL 9 (1997).
7. See R.G. Bunge & J.K. Sherman, *Fertilizing Capacity of Frozen Human Spermatozoa*, 172 NATURE 767 (1953).
8. Federal regulation of assisted reproduction technologies is limited to the Fertility Clinic Success Rate and Certification Act of 1992, which requires fertility programs to report to the Centers for Disease Control the “pregnancy success rates achieved . . . through . . . assisted reproductive technology.” 42 U.S.C. §§ 263a-1 to -7 (2000). Louisiana is the only state that currently regulates the practice of assisted reproduction (though not donor insemination). See LA. REV. STAT. ANN. §§ 9:129-:130 (2008) (providing that viable embryos created by in vitro fertilization “shall not be intentionally destroyed” and shall be made available to others for “adoptive implantation”). See generally CYNTHIA R. DANIELS, EXPOSING MEN: THE SCIENCE AND POLITICS OF MALE REPRODUCTION 98 (2006) (“Sperm banks are not even required to register with the federal government before opening their doors to business, except for complying with basic standards in effect for any medical ‘lab.’”); CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 193 (2006) (“The majority of American legislatures have not attempted to regulate the practice of assisted reproductive technology (ART) services, its marketing or insurance coverage.”); Robert Blank, *Regulation of Donor Insemination*, in DONOR INSEMINATION: INTERNATIONAL SOCIAL SCIENCE PERSPECTIVES 131, 134 (Ken Daniels & Erica Haimes eds., 1998).
9. Joe Saul, the protagonist of John Steinbeck’s play *Burning Bright*, expresses his desire to have genetically related children as exerting an innate and almost irresistible influence:

A man can’t scrap his bloodline, can’t snip the thread of his immortality. There’s more than just my memory, more than my training and the remembered stories

*A. Free Market Sperm Donation*

The world's leading sperm bank, California Cryobank, Inc. Reproductive Tissue Services, has facilitated thousands of births in fifty states and more than thirty countries,<sup>10</sup> with annual sales volume of \$5-10 million.<sup>11</sup> Founded in 1977 as a storage facility for frozen tissues, California Cryobank began offering reproductive services in 1993.<sup>12</sup> The company receives no public funds.<sup>13</sup> Its offices are in Cambridge, between MIT and Harvard, in Palo Alto, not far from Stanford and Berkeley, and in Los Angeles, home to USC and UCLA.<sup>14</sup> At these and other nearby campuses, Cryobank recruiters pass out postcard-sized flyers that read: "Got Sperm? . . . make up to \$900 per month."<sup>15</sup> California Cryobank advertises in university newspapers and on websites trafficked by college students.<sup>16</sup> The company also has a Facebook page that features promotional plugs such as: "Earn up to \$100 per donation. Learn all about compensation and benefits at [www.spermbank.com](http://www.spermbank.com)."<sup>17</sup> These marketing

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of glory and the forgotten shame of failure. There is a trust imposed to hand my line over to another, to place it like a thrush's egg in my child's hand.

JOHN STEINBECK, *BURNING BRIGHT* 10 (1951).

10. See California Cryobank, Inc., *Why Use Us*, <http://www.cryobank.com/Why-Use-Us> (last visited Feb. 20, 2009).
11. See Spermbank.com, *Profile of California Cryobank, Inc. Company Information*, [http://www.1888pressrelease.com/california-cryobank-inc-company-profile\\_14061.html](http://www.1888pressrelease.com/california-cryobank-inc-company-profile_14061.html) (last visited Feb. 20, 2009).
12. See California Cryobank, Inc., *Sperm Banking History: An Excerpt from "Sperm Banking: A Reproductive Resource"* by Sonia Fader, <http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History> (last visited Feb. 20, 2009).
13. See *id.*
14. See California Cryobank, Inc., *Locations*, <http://www.cryobank.com/About-Us/Locations> (last visited Apr. 1, 2009).
15. Evan Pondel, *A Booming Baby Business*, L.A. DAILY NEWS, Apr. 23, 2006, <http://www.geneticsandsociety.org/article.php?id=1855>; see also DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 39 (2006) ("Donors are wooed through promotional material scattered around college campus or other attractive locales."). More recent ads promise donors compensation of up to \$1200 per month. See Facebook.com, *California Cryobank Profile*, Posting of Nov. 3, 2008 (on file with author) ("BE A HERO Give people the chance to have a family of their own and earn up to \$1,200/month.").
16. See California Cryobank, Inc., *Donor Recruitment: Where Does CCB Find All of These Great Donors?*, <http://www.cryobank.com/How-It-Works/Donor-Recruitment> (last visited Feb. 20, 2009) ("[California Cryobank] recruits donors via internet advertising, information seminars, and university publications.").
17. Facebook.com, *California Cryobank Profile*, Posting of Sept. 23, 2008 (on file with author). Cryobank's Facebook profile picture is an animated sperm character with hip sunglasses, a

efforts bear good fruit. The number of men applying to donate in 2008 increased by 1156 candidates, or 15%, over 2007 levels.<sup>18</sup>

Cryobank's website boasts a "rigorous screening" and selection process for donor applicants,<sup>19</sup> "less than 1%" of whom are accepted for contribution of genetic material.<sup>20</sup> The company's sperm catalog includes donor information across a wide range of traits, including height, weight, education, occupation, religion, ethnic origin, facial features, eye and hair color, hair texture, skin tone, and race.<sup>21</sup> Additional donor information, such as medical history, SAT scores, personal essays, handwriting samples, baby photos, audiotapes, and personality assessments can be obtained for an extra fee.<sup>22</sup> Donor insemination no longer requires that clients even visit the sperm bank in person or speak with representatives by phone; in September 2008, Cryobank added internet purchasing, frozen delivery, and special FedEx rates, becoming the first sperm bank to offer full online ordering, storage, and direct shipping.<sup>23</sup>

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surfer-style haircut, and a streetwise smile. Facebook.com, California Cryobank's Photos – Profile Pictures, <http://www.facebook.com/pages/Los-Angeles-CA/California-Cryobank/21452543145#/photo.php?pid=928139&id=21452543145> (last visited Feb. 20, 2009).

18. See Laura Crimaldi, *Stalled Economy Fertile Ground for Baby Business: Bay State Agencies See Rise in Numbers of Applicants*, BOSTONHERALD.COM, Jan. 25, 2009, [http://news.bostonherald.com/news/hard\\_times/view/2009\\_01\\_25\\_Stalled\\_economy\\_fertile\\_ground\\_for\\_baby\\_business:\\_Bay\\_State\\_agencies\\_see\\_rise\\_in\\_numbers\\_of\\_applicants](http://news.bostonherald.com/news/hard_times/view/2009_01_25_Stalled_economy_fertile_ground_for_baby_business:_Bay_State_agencies_see_rise_in_numbers_of_applicants).
19. California Cryobank, Inc., *Selecting a Sperm Bank*, <http://www.cryobank.com/Why-Use-Us/Selecting-a-Sperm-Bank> (last visited Mar. 2, 2009).
20. California Cryobank, Inc., *Donor Qualification: Good Isn't Good Enough*, <http://www.cryobank.com/How-It-Works/Donor-Qualification> (last visited Feb. 20, 2009); see also Sheryl James, *Chosen Few: Being Accepted as a Sperm Donor Can Be as Difficult as Entering Harvard*, ST. PETERSBURG TIMES, Oct. 16, 1989, at 1D (profiling donor acceptance rates at Florida's first commercial sperm bank); Linda Lynwander, *New Jersey Q & A: Albert Anouna; Where the Business Is Reproduction*, N.Y. TIMES, Sept. 30, 1990, at N]3 ("We reject 95 percent of the people who volunteer [to donate sperm for reproduction].").
21. See California Cryobank, Inc., *Advanced Search*, <http://www.cryobank.com/Donor-Search/Advanced-Search> (last visited Apr. 1, 2009).
22. See *id.* 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) ("Sperm banks have to cater to [parental] finickiness, or they fail. . . . [T]he attentiveness to consumer demand has reached extraordinary levels.").
23. See California Cryobank, Inc., *Ordering and Shipment*, <http://www.cryobank.com/How-It-Works/Ordering-and-Shipment> (last visited Apr. 1, 2009).

The company is not trying to produce people of any particular type.<sup>24</sup> Cryobank cofounder Dr. Cappy Rothman dissociates the company's profit motives from the mission of a former California sperm bank, the Repository for Germinal Choice, which, beginning in 1980, solicited sperm from Nobel Prize-winning scientists with the goal of creating "genius babies."<sup>25</sup> The "Nobel Prize Sperm Bank" was founded by Robert Graham, a eugenic philanthropist who sought to impede the rise of "retrograde humans" by improving the world's "germ plasm."<sup>26</sup> Dr. Rothman wants nothing to do with Graham's designs on population engineering: "[Graham's] eugenics, his perception of where the human race should go, they were terrible."<sup>27</sup> Rothman rejects the idea that sperm banks should promote a template for the human form. He and cofounder Dr. Charles Sims instead embrace a "client-driven" system that leaves decisions about donor selection to individual parents.<sup>28</sup> "Whatever [parents] want is their choice, and what we try to do is give them as much choice as possible,"<sup>29</sup> Rothman confirms, noting that "[o]ne woman wanted a water-polo player."<sup>30</sup> Shopping for a donor is little different, he argues, from looking for a 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."<sup>31</sup> A "genetic supermarket" of the

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24. Cf. Dov Fox, Book Note, *Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore*, 9 YALE J. HEALTH POL'Y L. & ETHICS (forthcoming July 2009) (discussing programs of selective procreation).
  25. David Plotz, *The "Genius Babies," and How They Grew*, SLATE, Feb. 8, 2001, <http://www.slate.com/id/100331>.
  26. David Plotz, *The Better Baby Business*, SLATE, Mar. 13, 2001, <http://www.slate.com/id/102374>; see also Note, *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850, 1850-51 n.5 (1981). The Repository for Germinal Choice closed in 1999, shortly after Graham's death. See Logan Jenkins, *Exclusive Sperm Bank Calls It Quits*, SAN DIEGO UNION-TRIB., May 19, 1999, at B1.
  27. David Plotz, *The Rise of the Smart Sperm Shopper: How the Repository for Germinal Choice Accidentally Revolutionized Sperm Banking*, SLATE, Apr. 20, 2001, <http://www.slate.com/id/104633>; see also MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* 73-74 (2007) (comparing California Cryobank with The Repository for Germinal Choice).
  28. Stephen Rodrick, *Upward Motility: At the Ivy League Sperm Bank*, NEW REPUBLIC, May 16, 1994, at 9; see also Plotz, *supra* note 27 ("[Rothman] is simply responding to market demand.").
  29. Steven Dilbeck, *Sperm Donors Wanted, Only High-Caliber Jocks Need Apply*, DAILYNEWS.COM, Aug. 25, 2008, [http://www.dailynews.com/news/ci\\_10302330](http://www.dailynews.com/news/ci_10302330).
  30. *Id.*
  31. *Id.*



kind that California Cryobank seeks to provide “has the great virtue,” philosopher Robert Nozick argued, “that it involves no centralized decision fixing the futures of human type(s).”<sup>32</sup> The company targets donors with the “kind of background that appeals to customers,”<sup>33</sup> confirms Sims. “We would like a donor that you wouldn’t be ashamed of if your daughter married him.”<sup>34</sup> Parents tend to prefer donors who are approximately six feet tall and college graduates, with brown eyes and dimples.<sup>35</sup> But “[i]f our customers wanted high school dropouts,” Rothman notes, “we would give them high-school dropouts.”<sup>36</sup>

### B. Race-Conscious Donor Catalogs

Race is important to many prospective parents.<sup>37</sup> White donors are in greater demand than donors of any other race,<sup>38</sup> and black donors are especially underrepresented among Cryobank’s inventory.<sup>39</sup> There are seven black donors

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32. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 315 n.\* (1974). For theoretical discussion of a laissez-faire approach to genetic choice, see Dov Fox, *The Illiberality of ‘Liberal Eugenics,’* 20 *RATIO* 1, 3 (2007) (contrasting an individualistic account of reproductive decisionmaking with the collectivist approach popular in early twentieth-century America and England).
  33. Sally Jacobs, *Wanted: Smart Sperm*, *BOSTON GLOBE*, Sept. 12, 1993, at 1.
  34. *See id.*
  35. Plotz, *supra* note 27; cf. Rodrick *supra* note 28, at 9 (“Nobody wants a donor who has been in prison . . . . While a college degree doesn’t guarantee the child will be a good person, it does suggest a basic level of organization and a degree of integrity.” (quoting Charles Sims) (internal quotation marks omitted)).
  36. Poltz, *supra* note 27.
  37. *See* Bartholet, *supra* note 2, at 1165 (arguing 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, 294 (2001) (surveying sixty-three women who had used donor insemination with respect to their selection of sperm donor and finding that ethnicity ranked second most influential—behind intelligence—among seventeen physical, mental, and social traits).
  38. *See You Too Can Purchase Sperm Online for Your DUI*, *EPINIONS.COM*, June 6, 2008, [http://www.epinions.com/content\\_432841068164](http://www.epinions.com/content_432841068164) (noting that the California Cryobank catalog features “[m]ore Caucasian donors than any others”).
  39. *See Sperm Donors from America’s Most Selective Universities: Limited Choices for Black Women*, 25 *J. BLACKS HIGHER EDUC.* 38, 38 (1999) [hereinafter *Limited Choices*] (noting the “deficit in black donors” at some of “the nation’s largest sperm banks”); 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, 18 (2004) (“Caucasians and Asians are

among the 312 in Cryobank's April-May-June 2009 Donor Catalog, meaning blacks comprise approximately two percent of the donor pool, compared with 13.5% of blacks in the general population.<sup>40</sup> This racial disparity among sperm donors reflects, in large part, the higher proportion of whites among those who use assisted reproduction,<sup>41</sup> and the common desire among these parents to have a child (and thus a donor) who more closely resembles their own (racially phenotypic) features.<sup>42</sup>

California Cryobank adopts measures that reflect the racial preferences of its consumers.<sup>43</sup> The company's donor catalog is prominently organized according to race, with separate sections devoted to "Caucasian Donors," "Black/African American Donors," "Asian Donors," "Jewish Donors," and "Other Ancestries Donors."<sup>44</sup> A message appears in bold font at the top of each catalog page identifying the racial identity of the donors listed on that page.<sup>45</sup> The company's website also provides a "Quick Search" drop-down menu that prompts users to sort available donors according to three characteristics

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overrepresented, while African Americans and Latinos and those of 'mixed' race are underrepresented.").

40. Compare California Cryobank, Donor Catalog - April, May, June - 2009, [https://www.cryobank.com/\\_resources/pdf/catalogs/print-catalog.pdf](https://www.cryobank.com/_resources/pdf/catalogs/print-catalog.pdf), with Press Release, U.S. Census Bureau, Hispanic Population Surpasses 45 Million: Now 15 Percent of Total (May 1, 2008), <http://www.census.gov/PressRelease/www/releases/archives/population/011910.html>.
41. 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).
42. See Gay Becker, Anneliese Butler & Robert D. Nachtigall, *Resemblance Talk: A Challenge for Parents Whose Children Were Conceived with Donor Gametes in the US*, 61 *SOC. SCI. & MED.* 1300, 1303 (2005) (finding that of 148 heterosexual couples surveyed about their experience selecting a donor for assisted reproduction, "almost all parents felt that resemblance played a role in their donor selection process"); cf. Anne Brewaeys et al., *Anonymous or Identity-Registered Sperm Donors? A Study of Dutch Recipients' Choices*, 20 *HUM. REPROD.* 820, 823 (2005) (studying public attitudes toward the use of donor insemination in the Netherlands and concluding that "[m]ale infertility and non-genetic parenthood remains more of a taboo whereas childlessness is less accepted").
43. See Ertman, *supra* note 3, at 29 (speculating whether "sperm banks screen donors for racial characteristics based on perceived or actual higher demand for Caucasian, blonde, and/or blue-eyed donors"); cf. DANIELS, *supra* note 8, at 97 ("Banks' requirement for donors to have college educations function to exclude the great majority of Hispanic and African American males, even if overt racial selection does not.").
44. California Cryobank, *supra* note 40.
45. See *id.*

featured on the main search page: hair color, eye color, and ethnic origin.<sup>46</sup> Until very recently, semen samples from each donor were stored and shipped in vials that are color-coded according to race:

- A white cap and white cane indicate a *Caucasian* donor.
- A black cap and black cane indicate a *Black/African American* donor.
- A yellow cap and yellow cane indicate an *Asian* donor.
- A red cap and red cane indicate donors of *Unique* or *Mixed ancestry*.<sup>47</sup>

To the extent that Cryobank's color-coded vials and race-based classification scheme are meant to facilitate parental desires, race-conscious donor catalogs look like a high-tech version of the customer preferences problem, whereby actors engage in practices that cater to the discriminatory preferences of the constituents those actors serve.<sup>48</sup>

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46. See California Cryobank, Inc., Donor Search, <http://www.cryobank.com/Donor-Search> (last visited March 5, 2009). There are seven options for ethnic origin: Asian, Middle Eastern or Arab, Black or African American, Caucasian, Hispanic or Latino, American Indian or Alaska Native, and Native Hawaiian or Other Pacific Islander. *Id.*

47. See Ertman, *supra* note 3, at 27; Seline Szkupinski Quiroga, *Blood Is Thicker than Water: Policing Donor Insemination and the Reproduction of Whiteness*, 22 HYPATIA 143, 149 (2007); Rodrick *supra* note 28, at 9. California Cryobank no longer advertises the racial significance of its color-coding scheme for sperm samples. The company's website provides only that "quality assurance methods" include a "[t]wo-part color coding system that verifies that clients receive the correct specimen," see California Cryobank, Inc., Frequently Asked Questions, <http://www.cryobank.com/Medical-Professionals/Frequently-Asked-Questions> (last visited Apr. 1, 2009), and that when ordering a donor sample by phone, clients must provide Cryobank counselors with the "Color Code of the Donor: as listed on the donor catalog (white, yellow, black, or red)." See California Cryobank, Inc., Ordering, <http://www.cryobank.com/Medical-Professionals/Ordering> (last visited Apr. 1, 2009).

48. See, e.g., IAN AYRES, PERVERSIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 2 (2001) (employing a range of sophisticated empirical methodologies to demonstrate "the reality of quotidian discrimination in retail markets"); ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 140 (1996) ("If we respect preferences only because we respect persons, then we must withhold our respect from [racist] preferences."); John J. Donahue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2594-95 (1994) (noting that "[w]hen employers, fellow workers, or customers shun certain protected workers for certain jobs, they impose social costs" that depress the price of labor for "the dispreferred group"); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 253 (1971) ("[E]radication of [racism] is more 'important' than preserving opportunities to vent discriminatory associational desires."); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1625 (1991) ("[N]o one should be made worse off simply to satisfy someone else's racial animus.").

The case of Ollie's Barbecue is instructive.<sup>49</sup> In 1964, Ollie McClung refused sit-down dining service to black patrons at his family-owned restaurant, Ollie's Barbecue.<sup>50</sup> Ollie's Barbeque was located in Birmingham, Alabama, where city parks and golf courses had been closed in 1962 to prevent desegregation, and, in 1963, Bull Connor ordered police to use water hoses and German shepherds against peaceful civil rights demonstrations.<sup>51</sup> Mr. McClung explained that while he himself was not prejudiced toward African Americans, serving blacks would be bad for business because his predominantly white customer base preferred not to eat in the company of blacks.<sup>52</sup> In reflecting on the case of Ollie's Barbeque, most of us have little trouble finding fault with rational business practices that pander to racial prejudices in racially hostile communities.<sup>53</sup> Surely racial classification in sperm donor catalogs is different. But our intuitions are less clear in this case. The novel context of assisted reproduction gives reason to rethink the values at stake in more difficult questions of discriminatory customer preferences. If we are reluctant to embrace a race-conscious approach to donor insemination, how can this unease be articulated?

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49. See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

50. See *id.* at 296-97.

51. See GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* 85-119 (1997).

52. "I would refuse to serve a drunken man or a profane man or a colored man or anyone I felt would damage my business," Mr. McClung said. RICHARD C. CORTNER, *CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND McCLUNG CASES* 78 (2001). If Ollie's Barbecue were to serve blacks, he feared "his restaurant would be flooded with black customers . . . and his white customers would cease their patronage as a result." *Id.* at 66.

53. A few scholars argue, however, that associational freedom justifies private racial discrimination in employment and public accommodations. See, e.g., DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 544-45 (1995) (arguing that the Civil Rights Act of 1964 should be repealed because it is "defensible and in some cases even admirable" to "prefer [hiring] members of one's own group over strangers"); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 505 (1992) (challenging Title VII on grounds that "the statute maintains that a qualified norm of forced association is better than a strong norms of freedom of association"); CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION* 81 (1997) (resisting federal antidiscrimination laws for failing to acknowledge that "[i]n a free society freedom of association cannot be abridged").

## II. THE EXPRESSIVE DIMENSION OF RACIAL DISCRIMINATION

Race-conscious classification in the donor insemination context is immune to conventional accounts of wrongful discrimination based on discriminatory intent<sup>54</sup> or discriminatory effects.<sup>55</sup> The intent-based approach holds that discrimination is wrong when it is motivated by hatred, stereotyping, or indifference with respect to a socially salient group.<sup>56</sup> The effects-based approach holds that discrimination is wrong if it causes harmful consequences such as psychological injury to members of disadvantaged groups or deprivation of minority access to valuable goods like housing, education, and employment.<sup>57</sup>

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54. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136-45 (1980); Richard J. Arneson, *What Is Wrongful Discrimination?*, 43 *SAN DIEGO L. REV.* 775, 779 (2006); David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 *HOFSTRA L. REV.* 285, 289 (1998); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 *WM. & MARY BILL RTS. J.* 89, 93 (1997); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 *STAN. L. REV.* 1105, 1107 (1989); Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 *N.C. L. REV.* 879, 963 (1985); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 *SAN DIEGO L. REV.* 1041, 1052-53 (1978).
55. See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 13 (1989); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. REV.* 1003, 1005-13 (1986); Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 *WAYNE L. REV.* 1, 1 (1983); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 157 (1976); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 *HARV. L. REV.* 1, 50 (1977); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *HARV. L. REV.* 1470, 1477 (2004); Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2435 (1994).
56. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that equal protection law requires a showing of suspect classification or discriminatory purpose, beyond mere disproportionate outcomes, to invalidate state action); cf. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (“[N]egative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for [treating some groups differently than others.]”); see also Arneson, *supra* note 54, at 779 (“Discrimination that is intrinsically morally wrong occurs when an agent treats a person identified as being of a certain type differently than she otherwise would have done because of . . . unjustified hostile attitudes toward people perceived to be of a certain kind or faulty beliefs about the characteristics of people of that type.”).
57. See, e.g., Fiss, *supra* note 55, at 157 (arguing that the Equal Protection Clause should be understood to prohibit the government from acting in a way that “aggravates (or perpetuates?) the subordinate status of a specially disadvantaged group”).

In reflecting on these approaches, I shall sometimes draw on legal reasoning to construe moral claims about wrongful discrimination. My goal in adopting this method is to clarify the moral stakes of discriminatory action by making use of “competing doctrinal positions that draw upon distinct philosophical perspectives.”<sup>58</sup> I do not mean to imply, however, that judicial decisions should be read as exigeses of normative ethics or analytical philosophy. The kind of arguments that judges enlist to control human behavior are constrained in ways unlike those that philosophers craft as a device of intellectual persuasion.<sup>59</sup>

#### A. Discriminatory Intent and Discriminatory Effects

The discriminatory-intent approach focuses on purpose not outcome. It asks whether discriminatory actors behave on account of improper attitudes such as animus or stereotyping.<sup>60</sup> The Supreme Court considered this question in *Hunter v. Underwood*,<sup>61</sup> in which the majority looked to the subjective motivations of state legislators to assess the constitutionality of an Alabama law that disenfranchised persons convicted of crimes “involving moral turpitude.”<sup>62</sup> Relying on testimonial evidence from legislative historians, then-Associate Justice Rehnquist argued that the law violated equal protection because “the crimes selected for inclusion . . . were believed by the delegates to be more frequently committed by blacks.”<sup>63</sup> The decisive wrong of criminal disenfranchisement in *Hunter* was that lawmakers had acted out of illegitimate motives.

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58. Robert Post, *Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel*, 77 CAL. L. REV. 553, 559 (1989).

59. See 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”).

60. That attitudes are often hidden or unconscious makes it difficult to determine the precise reasons for which an agent acts. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). An emphasis on discriminatory intentions therefore suggests that decisionmakers should set aside certain facts about individuals—for example, their race, national origin, or sex—on the basis of which groups have been systematically disadvantaged. See *Price Waterhouse v. Hopkins*, 479 U.S. 228, 239 (1985) (plurality opinion) (“In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.”).

61. 471 U.S. 222 (1985).

62. *Id.* at 223, 228-29.

63. *Id.* at 227.

The discriminatory-effects approach, by contrast, scrutinizes the consequences of some act or rule, questioning whether the practice impacts some protected group differently than others. The effects-based approach bars decisionmakers from acting in ways that tend to generate or fortify the harms of psychological injury or social stratification. In *Griggs v. Duke Power Co.*,<sup>64</sup> the Court invalidated facially neutral employment tests at a North Carolina energy plant because they had the effect of excluding blacks from prized positions at a disproportionately high rate.<sup>65</sup> “[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups,” Chief Justice Burger wrote for a unanimous Court.<sup>66</sup> The reason the employment tests in *Griggs* counted as wrongful discrimination was not that Duke Power officials were presumed to have discriminatory motives in designing them, but rather that the tests’ implementation had discriminatory effects.<sup>67</sup>

At first glance, the discriminatory-intent and discriminatory-effects accounts appear well equipped to resolve the problem of customer preferences at issue when sperm banks arrange donors according to race. Owen Fiss argues that the “satisfaction of discriminatory personal preferences” is troubling on both effects- and intent-based approaches.<sup>68</sup> Business practices that cater to racial preferences are wrong for consequentialist reasons to the extent such practices sustain the “continued relegation of [blacks] to an inferior . . . position.”<sup>69</sup> Pandering to racial preferences in employment or public accommodations contributes to the subordinate status of African Americans by stigmatizing blacks as second-class citizens and by denying them equal access to work and services.<sup>70</sup> Fiss’s reasoning suggests that catering to racial

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64. 401 U.S. 424 (1970).

65. *Id.* at 426.

66. *Id.* at 432.

67. On the discriminatory-effects approach to wrongful discrimination, the permissibility of discriminatory action turns on the worthiness of the goals that the practice aims to achieve and on the gravity of any harms to which it gives rise.

68. Fiss, *supra* note 48, at 254.

69. *Id.*

70. *Id.* at 248 (“Societal responsibility derives not only from widespread individual participation in the practices and institutions that kept blacks in an inferior position (slavery, Jim Crowism) but also from the impact of public laws and government agencies.”). The most plausible account of the discriminatory-effects approach assesses an individual’s discriminatory actions not solely in terms of the difference that his action makes on its own, but also in terms of the pattern of action to whose overall effects the individual’s act contributes. In some cases, an act might require widespread participation for there to be any harm. Consider Derek Parfit’s hypothetical “harmless torturers,” who each apply a trivial

preferences might also fail a version of the discriminatory-intent test that is sensitive to attitudes about distributive fairness. To hold people responsible for racial circumstances over which they exercise no control, Fiss claims, undermines the principle of desert, according to which social and economic goods should be allocated according to individual merit.<sup>71</sup>

It is not obvious, however, that a person's race could never in itself constitute merit of the kind that justifies legitimate grounds for reward.<sup>72</sup> Consider a justification for race-based affirmative action in medical school admissions that is grounded in customer preferences.<sup>73</sup> Some black patients, many of whom live in medically underserved communities, prefer to be treated by African American doctors.<sup>74</sup> If minority preferences were such that "black skin . . . enable[d] . . . doctor[s] to do a . . . medical job better," it is not implausible to think, as does Ronald Dworkin, that "black skin [counts as] 'merit'"<sup>75</sup> under these circumstances. If this is right, a medical school would not undermine but honor the principle of desert by seeking to benefit minority candidates for this reason in the selection of future physicians.

We can readily imagine less benign examples in which discriminatory preferences appear no less relevant to some critical aspect of job performance.<sup>76</sup>

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electric shock that is independently imperceptible but dreadful in the aggregate, such that the harmful consequence cannot be traced to any particular torturer's act. See DEREK PARFIT, *REASONS AND PERSONS* 80-81 (1984). An act of private discrimination may be impermissible, on this account, even if the part a perpetrator plays in bringing about some harm is marginal in isolation, provided that the individual act "is one of a set of acts that will *together* harm other people." *Id.* at 86.

71. Fiss, *supra* note 48, at 241 ("[A]n individual's race is not considered an accurate predictor of his productivity. . . . To judge an individual on the basis of his race is to judge him on the basis of his membership in a class where that membership is truly predetermined.").
72. See Norman Daniels, *Meritocracy*, in *JUSTICE AND ECONOMIC DISTRIBUTION* 164, 168 (John Arthur & William H. Shaw eds., 1978).
73. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (striking down on equal protection grounds an admissions program that guaranteed minority applicants sixteen out of one hundred seats in the first-year class at the University of California at Davis Medical School).
74. See Kenneth DeVille, *Defending Diversity: Affirmative Action and Medical Education*, 89 AM. J. PUB. HEALTH 1256, 1260 (1999) ("African Americans and other minority patients have strong grounds for doubting both the goodwill and the color blindness of White medical practitioners.").
75. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 299 (1985).
76. Such cases are straightforwardly objectionable on the discriminatory expression account described in Section II.B. Cf. *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 658 (6th Cir. 1991) (Keith, J., dissenting) ("[T]he exclusive use of white models [in residential housing advertisements] sends the subtle but distinct message of racial exclusion. 'Blacks need not apply.' 'Blacks are not welcome.'").



Suppose that racial preferences in a racist society made it such that white police officers, on account of their race, made citizens in that society feel safer than did black police officers; or that white teachers, because they were white, induced student learning more effectively than black teachers; or that white marketing models in that society could persuade customers to purchase the product in greater quantities than black models.<sup>77</sup> Such instances of the customer preferences problem are not farfetched. In 1945, the trustees of the Enoch Pratt Free Library in Baltimore refused to admit blacks to its librarian training program on grounds that white assistants could provide “more efficient service” to the library’s largely white and racially biased patron base.<sup>78</sup> Under circumstances in which a person’s race plausibly constitutes a “reaction qualification” for job performance,<sup>79</sup> a hybrid approach to discriminatory intent and effects approach may be capable of faulting rational capitulation to racial prejudice for reinforcing racial hierarchies and enacting the expectations of illegitimate attitudes.<sup>80</sup>

Neither of the traditional approaches to wrongful discrimination, however, locates a moral problem with practices by which sperm banks cater to race-conscious donor preferences among prospective parents. Looking first to the discriminatory-intent account, I have come across no evidence to suggest that racial prejudice accounts for why sperm banks sort sperm donors according to race or for why many prospective parents hope for a child of a particular race.<sup>81</sup> While systematic studies have not considered the reasons why

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77. These examples come from Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99, 100-01 (1983).

78. See *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212, 214 (4th Cir. 1945) (holding that a Baltimore library violated equal protection law by denying blacks employment under circumstances in which “the trustees [of the library] were not moved by personal hostility or prejudice against the Negro race but by the belief that white library assistants can render more acceptable and more efficient service to the public where the majority of the patrons are white”).

79. Wertheimer, *supra* note 77, at 100.

80. See *id.* at 107 (arguing that the moral status of rational discrimination based on the racial preferences of others depends on the moral status of the underlying preferences themselves).

81. Even if we were to assume that parental preferences for particular donors reflected racist judgments, the intent-based approach might find it difficult to provide a reason why it would be wrong for a sperm bank to pander to such prejudice. Return to the case of Ollie’s Barbeque. See *supra* notes 49-53 and accompanying text. If we believe that Mr. McClung’s motive for denying sit-down service to blacks was not prejudice but profit-seeking, it will not do to absolve him of wrongdoing on the theory that “instances of racial discrimination . . . that are not driven by animus” are for that reason “morally innocent.” Arneson, *supra* note 54, at 790. To perpetuate racial bigotry by pandering to it is wrong even if one does so

parents tend to opt for some sperm donors rather than others, it is plausible that most couples who select a donor on racial grounds do so because they want a child with whom they are more likely to share a physical likeness.<sup>82</sup>

Parents' preferences for a child of their own race might represent visions of a family structure that models the biological family.<sup>83</sup> Or they might reflect concern about the well-being of a future child that the parents wish to avoid making vulnerable to racial taunts, confused racial identity, or deficient access to racial culture, community, or consciousness.<sup>84</sup> Some parents might choose a white donor to reduce the chance their child would be born with certain diseases, like sickle cell anemia, that correlate with black heredity;<sup>85</sup> others might do so because they want for their child to avoid the hardships of bigotry.<sup>86</sup> Alternatively, heterosexual couples may care about their child's race for no other reason except that they do not want the world—or the child—to

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for benign reasons. That discriminatory intention cannot on its own terms furnish grounds to resist white-only restaurant seating suggests that moral analysis of such practices must extend beyond the reasons an agent intends.

82. See Guido Pennings, *The Right To Choose Your Donor: A Step Towards Commercialization or a Step Towards Empowering the Patient?*, 15 *HUM. REPROD.* 508, 508 (2000) (“Most women desire a donor who resembles their partner as closely as possible.”); 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, 262 (2002) (“[R]eports of the incidence of DI [donor insemination] indicate that race-matching is the norm . . .”).
83. See Quiroga, *supra* note 47, at 150 (arguing that one goal of race-matching in donor selection decisions is “to mimic the physical attributes of what white Americans perceive as a biological family”); cf. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 6 (1994) (describing “biological race” as the view that “there exist natural, physical divisions among humans that are hereditary, reflected in morphology”).
84. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 *STAN. L. REV.* 1, 4 (1991) (defining racial culture as “broadly shared beliefs and social practices”; racial community as “both the physical and spiritual senses of the term”; and racial consciousness as “traditions of self-awareness and . . . action based on that self-awareness”).
85. See, e.g., MELBOURNE TAPPER, *IN THE BLOOD: SICKLE CELL ANEMIA AND THE POLITICS OF RACE* 2 (1999); see also I. Glenn Cohen, *The Right Not To Be a Genetic Parent?*, 81 *S. CAL. L. REV.* 1115, 1156 (2008) (noting that Jewish or Asian couples may have medical reasons or other uncontroversial grounds for seeking “access to gametic material from their ethnic group, which is in short supply from sperm banks and egg brokers”); Dov Fox, *Genomic Justice: Genetic Testing and Health Insurance in America*, 1 *ROOSEVELT REV.* 109, 112 (2005) (“[S]tudies show that individuals of African descent are twelve times more likely than the general American population to carry the patterns of gene expression associated with sickle cell anemia.”).
86. See *Limited Choices*, *supra* note 39, at 38.

know they used a sperm bank to conceive.<sup>87</sup> It is not difficult to sympathize with these reasons and the racial preferences they motivate. Practices that facilitate such preferences can hardly be characterized as pandering to illegitimate attitudes or purposes.<sup>88</sup>

Nor are such practices likely to cause the material or psychological harm that constitutes moral wrong on the discriminatory-effects approach. Race-based donor differentiation does not, in the language of antidiscrimination doctrine, have a “disparate impact” on minority access to basic resources such as housing or education.<sup>89</sup> It does not deprive African Americans of access to public accommodations either, since sperm banks do not provide services like lodging, childcare, medical services, or entertainment.<sup>90</sup> Racial classification in donor directories cannot be said to deny black men equal opportunities employment or public participation. The provisional nature of the working relationship between sperm banks and sperm banks, combined with donors’ lack of any employee-type benefits make them less like employees than independent contractors.<sup>91</sup> And paid sperm donation for the purpose of helping people have genetically related children does not rise to the level of civic duty denied to gays who are barred from

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87. Single mothers and lesbian couples are less likely to seek a donor of a particular race for purposes of matching the physical resemblance of one or both parents. Compared with heterosexual couples in which a social father is present, these parents will feel less social pressure to present themselves to the outside world or the child him- or herself as having conceived by means of sexual reproduction. *See* Hanson, *supra* note 37, at 295 (“The issues that motivate heterosexual couples to consider resemblance to partner are not in play at all with single women and only with those few lesbian couples who see some value in having a child that looks, however fortuitously, somewhat like both of them.”).
  88. Whatever reasons parents have for wanting a child of a particular race, the seemingly “natural” origins of these race-matching preferences might afford the preferences a veneer of “legitimacy that derive[s] from [their] appearance of inevitability.” DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 248 (1997).
  89. Under disparate impact doctrine, if a plaintiff can show that a particular facially neutral employment practice excludes minority or women candidates from consideration at a disproportionately high rate, the burden shifts to the employer to prove that the disputed practice is justified by “business necessity,” and that the employer could not have met its business goals through an alternative practice with less adverse consequences for disadvantaged group members. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).
  90. *See, e.g.*, 42 U.S.C. § 2000a (2000) (prohibiting racial discrimination in places of public accommodations).
  91. *See, e.g., id.* § 2000e-2 (prohibiting employers from engaging in employment discrimination based on race and other characteristics); *Anyan v. N.Y. Life Ins. Co.*, 192 F. Supp. 2d 228, 237 (S.D.N.Y. 2002) (holding that employment discrimination laws do not protect independent contractors).

donating blood<sup>92</sup> or from serving openly in the military.<sup>93</sup> Finally, race-conscious means of donor disclosure do not cause harm to children in the way that racial disclosure in adoption can leave black children without permanent homes.<sup>94</sup> It makes no sense to say that the nonexistent children who might otherwise have been born using the sperm of black donors were harmed by never having been born in the first place.<sup>95</sup>

The threat of psychological harm,<sup>96</sup> commonly referred to as stigma,<sup>97</sup> is also doubtful. The harm of stigma occurs when words or conduct “inflict psychological injury”<sup>98</sup> that “generates a feeling of inferiority as to [the recipient’s] status in the community.”<sup>99</sup> People who take notice that donor catalogs are organized by race will probably not thereby experience feelings of

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92. See Joyce Howard Price, *Panel Mulls Allowing Gay Men To Give Blood: Banks Cite Better HIV-Detection Tests*, WASH. TIMES, Sept. 14, 2000, at A1.
93. See 10 U.S.C. § 654 (prohibiting anyone who “demonstrates a propensity or intent to engage in homosexual acts” from serving in the armed forces of the United States, because it “would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability”).
94. See Banks, *supra* note 2, at 881 (“Adoptive parents’ racial preferences dramatically diminish the pool of potential parents available to black children relative to that available to white children.”).
95. I owe this point to Glenn Cohen. For discussion of the “non-identity problem” associated with moral consideration of not-yet-existing persons, see Dov Fox, *Luck, Genes, and Justice*, 35 J.L. MED. & ETHICS 712, 713 (2007).
96. The Supreme Court first recognized the constitutional significance of psychological harm in *Strauder v. West Virginia*, 100 U.S. 303 (1879), which invalidated a West Virginia statute that prohibited blacks from serving on juries. Justice Strong affirmed that the Fourteenth Amendment protects blacks “from legal discrimination, implying inferiority in civil society,” and concluded that the statutory exclusion from jury service was “practically a brand upon them . . . an assertion of their inferiority.” *Id.* at 308.
97. See LAWRENCE A. BLUM, “I’M NOT A RACIST, BUT—” THE MORAL QUANDARY OF RACE 8–11 (2002) (discussing how racism causes stigma); Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976) (“Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior.”); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 593 (1977) (describing stigma as a sense of shame about who one is or a sense of inferiority in the eyes of others).
98. Lawrence, *supra* note 60, at 351.
99. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (citing psychological effects of segregation).

“insult and humiliation.”<sup>100</sup> Unlike segregated schools,<sup>101</sup> bars,<sup>102</sup> or swimming pools,<sup>103</sup> race-sorted donor catalogs do not convey “a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings.”<sup>104</sup> Race-based differentiation in sperm donor catalogs is no more likely to bring about psychological stigma than it is to produce material inequality.<sup>105</sup> 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.<sup>106</sup>

### B. Discriminatory Expression

To the extent that our moral judgments about racial classification in assisted reproduction are unclear, it may help to think about this case alongside a similar one in which our intuitions are more settled. Compare donor catalogs and election ballots. Asked to choose a single person from among multiple contenders varying along numerous dimensions, parents, like voters, will try to

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100. *City of Memphis v. Greene*, 451 U.S. 100 (1981) (finding no equal protection violation in the erection of a traffic barrier that closed off an all-white enclave to traffic consisting largely of black drivers).

101. See *Brown*, 347 U.S. 483.

102. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that the state action doctrine excludes the refusal of food and beverage service to blacks by a private club, even where it was issued a license by a state liquor board).

103. See *Palmer v. Thompson*, 403 U.S. 217 (1971) (holding that the closure of city-owned pools for anti-integration purposes does not violate equal protection where there is no city involvement in the pools' operation or funding).

104. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 427 (1960); see also *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (arguing that Louisiana's racial segregation of passengers in railway cars sent a message “that [black] citizens are so inferior and degraded that they cannot be allowed to sit in public coaches [or restaurants] occupied by white citizens”).

105. Cf. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (describing the wrong of racial classification as a “denial of equal treatment . . . not the ultimate inability to obtain the benefit”).

106. See Dov Fox, *The Regulation of Biotechnologies: Four Proposals*, *HASTINGS CENTER REP.*, Mar.-Apr. 2008, at 57, 57 (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*, 2005 *MICH. ST. L. REV.* 1135, 1190-92 (identifying deficiencies in deliberative frameworks that exclude unconventional but relevant moral considerations, including those involving social prejudice).

narrow their options by identifying what they regard as important decision-making criteria and then by filtering out candidates who fail to meet these requirements.<sup>107</sup> Just as race matters to parents who want their children to look like them, so, too, might race matter to voters who want to be represented in politics by people who share their racial background. There are critical differences we will explore between the electoral and reproductive contexts, but for now it suffices to observe that the use of racial markers on election ballots, as in sperm bank catalogs, could serve as an instrument for the exercise of racial preferences.

Consider a 1960 Louisiana law that required that each candidate's race be printed next to his or her name on nomination papers and ballots.<sup>108</sup> In 1962, two African Americans seeking positions on the East Baton Rouge Parish school board in the Democratic Party primary election brought an action to enjoin the state from designating the race of candidates on the ballot.<sup>109</sup> Although the law applied no differently to candidates of different races, the Supreme Court ruled in *Anderson v. Martin* that the racial labels operated as unlawful discrimination against the black candidates and that the law requiring those labels constituted a violation of equal protection.<sup>110</sup>

Writing for a unanimous court, Justice Clark found that the ballot law played on the racial prejudice that prevailed in the American South during the civil rights era.<sup>111</sup> The race-tagged ballots reflected and reinforced a Louisiana social structure in which the state legislature had in 1960 empowered the governor to close any school ordered by the courts to desegregate under *Brown v. Board of Education*.<sup>112</sup> By inviting citizens to vote their presumptively illegitimate preferences, the Court reasoned, the racial identifiers "furnishe[d] a vehicle by which racial prejudice may be so aroused."<sup>113</sup> The *Anderson* Court did not have to weigh evidence about whether the racial markers caused

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107. See Amos Tversky, *Elimination by Aspects: A Theory of Choice*, 76 PSYCH. REV. 281, 284-85 (1972).

108. See LA. REV. STAT. ANN. § 18:1174.1 (Supp. 1960).

109. See *Anderson v. Martin*, 206 F. Supp. 700, 701 (D. La. 1962), *rev'd*, 375 U.S. 399 (1964).

110. 375 U.S. at 401-03.

111. See *id.* at 404 ("Race is the factor upon which the statute operates . . ."); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-16, at 1481 n.9 (2d ed. 1988) (discussing *Anderson*).

112. 347 U.S. 483 (1954); see Michael L. Kurtz, *The Decline of Racism, 1960-1972*, in LOUISIANA: A HISTORY 373, 373-74 (Bennett H. Wall ed., 5th ed. 2008).

113. *Anderson*, 375 U.S. at 402.

psychological stigma or reduced the number of blacks elected to office.<sup>114</sup> Justice Clark conceded that calling attention to the racial background of those running for office “impose[d] no restriction upon anyone’s candidacy nor upon an elector’s choice in the casting of his ballot.”<sup>115</sup> Yet the Court concluded that “the placing of the power of the State behind a racial classification that induces racial prejudice” itself constituted a decisive constitutional “vice.”<sup>116</sup> The ballot labels in *Anderson* were wrong because “the interplay of governmental and private action” had the discriminatory effect of endorsing and facilitating harmful racial discrimination.<sup>117</sup>

But what if we could set aside the effects-based reasons for objecting to the race-differentiated ballots in 1960 Louisiana? Imagine a variation on the statute at issue in *Anderson*. Suppose the voting law was instead enacted in 2009 Hawaii. Assume Hawaiian legislators passed the law to study political attitudes and behavior. Suppose, moreover, that the Hawaiian citizenry is so progressive on questions of race that placing a candidate’s race next to his or her name on the ballot does not trigger even implicit bias at the voting booth. No one in Hawaii understands the law to mean that people of different races have

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114. Cf. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 277 n.5 (1992) (“In effect, [the Louisiana law] protected a narrow category of voters—those for whom race is a determining factor, yet who are so ill informed as to be mistaken about the race of a given candidate—against casting a vote in error. The net gain or net loss to a given candidate resulting from better information on this point is probably trivial and, in any event, is incapable of proof.”). Nor did the Court speculate further as to whether it thought that pandering to racial prejudice at the polls would have the further discriminatory effect of leading citizens to discriminate in other settings. For discussion of the limited empirical research available on whether the desire to discriminate in certain circumstances leads to a taste for discrimination in other circumstances, see NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 173-74 (1998).

115. *Anderson*, 375 U.S. at 402.

116. *Id.*

117. *Id.* at 403 (quoting *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)). “The Constitution cannot control [racial] prejudices but neither can it tolerate them,” the Court affirmed in *Palmore v. Sidoti*, which struck down the use of race as the basis for deciding which biological parent should have custody of a child. 466 U.S. 429, 433 (1984) (“Private [racial] biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); see also *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating Proposition 13, a housing amendment to the California Constitution that allowed real estate agents and landlords to reject homebuyers on the basis of race); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 108 (1967) (“[E]qual protection of the laws is denied by the state whenever the legal regime of the state . . . surround[s] the discriminators with the protection and aids of law and with the assistances of communal life.”).

“differential worth,”<sup>118</sup> and nobody believes that designation of race on the ballot demeans minorities by devaluing their standing within the political community.<sup>119</sup> So the hypothetical law is unlikely to shore up racial stigma or stratification. Would the absence of malicious motives and material injuries save the racial ballots labels from moral censure?

Making sense of this question requires us to move beyond intent- and effects-based accounts of wrongful discrimination. Animus and deprivation are serious wrongs, but they are not the only considerations that bear on whether a discriminatory practice is morally objectionable. In some cases, another wrong – what might be called discriminatory expression – also matters.<sup>120</sup>

Discriminatory expression is the public instantiation of values that erode worthy forms of social recognition that set the terms on which we understand ourselves and relate to others.<sup>121</sup> The expressive dimension of wrongful discrimination resides in the illegitimate messages that discriminatory practices can communicate.<sup>122</sup> The transmission of certain objectionable equality values,

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118. Brest, *supra* note 97, at 7; see also C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 959 (1983) (“[T]he state must not pursue purposes, and the political process must not further individuals’ preferences, to subordinate or to denigrate the inherent worth of any category of citizens.”).
119. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (striking down state support of an all-female nursing school on the grounds that 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); see also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1685-98 (1992) (arguing that criminal acts and punishment should be understood to express status relations).
120. See Paul Woodruff, *What’s Wrong with Discrimination?*, 36 ANALYSIS 158, 160 (1976); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 146-47 (1982); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 305-08 (1993).
121. Cf. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2209 n.240 (1990) (“[T]he relevant focus of unconstitutional motivation inquiry ought to be what the social meaning of the action is understood to be, that is, whether the action is understood to express disrespect for constitutionally enshrined higher values.”).
122. Discriminatory expression should be distinguished from the subtle discriminatory effects that can accompany it. To the extent that social esteem flows from the terms on which people relate to one another, the instantiation of objectionably divisive or exclusionary values can also have the effect of imperiling the social conditions on the basis of which people’s sense of self-worth tends to depend. See THOMAS E. HILL, JR., *AUTONOMY AND SELF-RESPECT* 23 (1991) (discussing the ways in which self-respect relates to the opinions of others); AVISHAI MARGALIT, *THE DECENT SOCIETY* 125 (Naomi Goldblum trans., 1996) (“The attitude of others is built into the very concept of the value of humans which the bearer of self-respect is supposed to adopt with regard to herself.”). But it is the



in the absence of compelling justification, is a constitutive wrong that cannot be reduced to concerns about either the mindset of those who perform the practice or about the impact that the practice has on those who receive its message.<sup>123</sup>

The concept of discriminatory expression rests on the idea that acts and rules can interact with existing moral frameworks to impart a readily perceivable *social meaning*.<sup>124</sup> Social meaning emerges from the contextual interplay of the reasons that animate a discriminatory practice, the authority that gives that practice force, and the context in which it takes place.<sup>125</sup> Social meaning is the public understanding of a practice that coheres most extensively with the “the narratives that locate [that practice] and give it meaning.”<sup>126</sup> There must be people who observe or learn of a practice for its social meaning to matter morally, but those who encounter the practice need not internalize its bad social meaning or experience adverse reactions because of that meaning for the practice to cause discriminatory expression.<sup>127</sup>

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instantiation of bad values and not the effects that flow from it which constitute the wrong of discriminatory expression.

123. See Dov Fox, *Human Growth Hormone and the Measure of Man*, NEW ATLANTIS, Fall 2004-Winter 2005, at 75, 80 (“[T]he meaning of an activity emerges as a function of context, not simply intention.”); Dov Fox & Christopher L. Griffin, Jr., *The Americans with Disabilities Act and Disability-Selective Abortion*, 2009 UTAH L. REV. (forthcoming Sept. 2009) (arguing that an act’s expressive content turns not on whether people *actually perceive* it as having a bad meaning, but on whether that meaning is *readily perceivable* from the way the act fits within the context of community norms and practices).
124. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1538-40 (2000) (arguing that constitutional law should account for the expressive component of state action); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 947 (1995) (discussing ways in which public and private norms and practices can “act to construct the . . . social meanings that surround us”). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1462-93 (2000) (arguing that whatever linguistic meaning attaches to a government action does not, in itself, matter morally).
125. See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 58, 70 (1983) (suggesting that interpreting human attitudes and meanings is less like “putting oneself into someone else’s skin” than it is like “grasping a proverb, catching an allusion, seeing a joke”).
126. Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).
127. See *supra* notes 99-104 and accompanying text; see also ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 58 (1995) (citing Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 252 (1970)) (“[D]ignitary harm depends not on the psychological condition of an individual plaintiff but rather on the forms of respect that a plaintiff is entitled to receive from others.”); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 55 (2000) (arguing that state segregation

The moral wrong of discriminatory expression helps to explain what is discomfiting about making candidate race known on the ballot, even when racial prejudice does not permeate the voting booth. The reasons that “[r]acial classifications with respect to voting carry particular dangers”<sup>128</sup> are not limited to the risk that racial identifiers may serve as “a vehicle by which racial prejudice may be . . . aroused.”<sup>129</sup> The problem with having race figure prominently on the Hawaii ballot is that the classification needlessly promotes the racially divisive idea that race properly governs the way that citizens understand and perform their role as voters, and also, at least implicitly, the way that candidates understand and perform their role as representatives.<sup>130</sup> To label candidates by race is to send a readily perceivable message—in 2009 Hawaii, just as in 1964 Louisiana—“that a candidate’s race or color is an important—perhaps paramount—consideration”<sup>131</sup> in a contest for political representation.

The social meaning of racial designation on the ballot is informed by the norms of deliberative electoral decisionmaking.<sup>132</sup> These norms suggest that voters should care less about a candidate’s personal characteristics, such as race, than they do about the candidate’s values and policies.<sup>133</sup> But the expressivist concern is not that racial tags might operate to “dictate electoral outcomes.”<sup>134</sup>

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of day care centers “would violate Equal Protection notwithstanding the fact that the babies suffer no psychological harm”).

128. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

129. *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

130. *Cf. Bush v. Vera*, 517 U.S. 952, 980 (1996) (holding that “bizarre shape and noncompactness” in voting districts “cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial”).

131. *Anderson*, 375 U.S. at 402.

132. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1018–19 (1976) (“Self-governing people . . . penetrate to the merits of the [candidates’] arguments.”).

133. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 245 (1957) (“[For many voters], rational behavior implies both a refusal to expend resources on political information *per se* and a definite limitation of the amount of free political information absorbed.”).

134. *Cook v. Gralike*, 531 U.S. 510, 526 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995) (internal quotations marks omitted)); *cf. id.* at 532 (Rehnquist, C.J., concurring) (arguing that a Missouri constitutional provision which mandated that the label “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” be printed on the ballot next to the name of any incumbent congressmen who failed to support a federal constitutional amendment for congressional term limits should be invalidated on First Amendment grounds because by choosing “one and only one issue to comment on [regarding] the position of the candidates . . . the State is saying that the issue of term limits is paramount”).

This worry about manipulating the polls or co-opting voter autonomy fails to distinguish mandatory racial labels from a law requiring disclosure of legitimate candidate information such as party affiliation, which could likewise “decisively influence the citizen to cast his ballot” for one candidate or not for another.<sup>135</sup> Recognizing potential inconsistency between race-conscious voting and the norms of substantive deliberation does not indict electoral practices that position any particular factor in a way that is likely to carry paramount weight in voter selection. It simply means that focusing voter attention on race cannot be readily explained by the norms of electoral decisionmaking.

My claim about discriminatory expression is not that every racialized assumption in the voting context is necessarily false or pejorative.<sup>136</sup> Nor do I believe either that race *does* not matter, as an empirical matter, to many voters, or even that race *should* not make a difference, normatively speaking, in certain electoral circumstances, especially for remedial purposes. I am not arguing that it is objectionable for citizens to cast their votes on account of race—whether their reasons for doing so are based on the assumption that a candidate’s race will lead him or her to pursue favored policies, or whether their reasons are based instead on no more than shared racial affiliations, independent of issues and ideologies.<sup>137</sup> Justice Clark was right in *Anderson* to give broad deference to the voters’ interest in freely choosing their preferred candidate.<sup>138</sup>

What the Jim Crow conditions of 1964 Louisiana allowed the *Anderson* Court to overlook is that the race-conscious design of decision-making frameworks can reify or reconstitute the ways in which people understand

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135. *Anderson*, 375 U.S. at 402.

136. See Stanley Fish, *When ‘Identity Politics’ Is Rational*, TimesPeople, Feb. 17, 2008, <http://fish.blogs.nytimes.com/2008/02/17/when-identity-politics-is-rational> (“[E]very African American—conservative or liberal, rich or poor, barely educated or highly educated—meets with obstacles to his or [sic] success and mobility that are all the more frustrating because they are structural (built into the culture’s ways of perceiving) rather than official . . . . It makes sense, therefore, that an African American voter could come to the conclusion that an African American candidate would be likely to fight for changes that could remove barriers a white candidate might not even see.”). But see Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 656 (1996) (arguing that the existence of multiple and shifting identities cuts against the coherence of any attempt to identify political representatives who can genuinely be described as sharing an individual’s overlapping group memberships).

137. Fish, *supra* note 136.

138. See *Anderson*, 375 U.S. at 402. Justice Clark argued that the wrong of racial tags on Louisiana ballots “has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate . . . necessary to a proper exercise of his franchise.” *Id.*

themselves or their relation to others in racially defined ways.<sup>139</sup> Choice structures that reinscribe racial salience within meaningful spheres of life threaten to foist racial identities upon individuals who ought not to be thus essentialized, at least not without overriding justification.<sup>140</sup> Gratuitous racial differentiation by an influential actor like the state implicitly ratifies racialized assumptions anchored in distinctions that have set us apart throughout our country's history and that continue to divide us today.<sup>141</sup> Practices that make race "predominant"<sup>142</sup> on the ballot without good reason for doing so express a social meaning within the racially jarring history of American electoral politics.<sup>143</sup> Highlighting the "single consideration of race . . . at the most crucial

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139. See Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 173, 182 (Sujit Choudhry ed., 2008) (arguing that "the structure of democratic elections profoundly altered the extent to which racial identities were made salient and were mobilized" in late nineteenth-century American South); Robinson, *supra* note 2, at 2792 ("Subtle structural differences in design might very well influence the likelihood that the user [of a dating website] expresses and acts on a racial preference."). See generally Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 31 (2000) (defending a "sociological account" of antidiscrimination law whose purpose is to "transform[] preexisting social practices, such as race or gender, by reconstructing the social identities of persons").
140. 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 10% 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.").
141. Oppressed during slavery and Jim Crow, African Americans are still denied the privileges society prizes and the professions the market rewards. See, e.g., JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 31-49 (1995) (documenting discriminatory behavior against blacks by real estate agents and mortgage lending officers); Michael Fix, George C. Galster & Raymond J. Struyk, *An Overview of Auditing for Discrimination*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 1, 18-25 (Michael Fix & Raymond J. Struyk eds., 1993) (finding prejudicial judgments among and denial of opportunities by employers with respect to minorities).
142. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
143. See, e.g., EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS*

stage in the electoral process – the instant before the vote is cast<sup>144</sup> imports the idea that a candidate’s race does or should bear heavily on how a citizen votes or on what a representative stands for.<sup>145</sup> Compulsory racial labels send the disquieting message that race-based assumptions about how people should think or act are what account for the prized place of race in democratic participation.<sup>146</sup>

It may seem puzzling to argue that the ballot labels constitute wrongful discrimination, given that most understandings of the 1965 Voting Rights Act (VRA) presuppose that race plays a legitimate role in the electoral context.<sup>147</sup> We may be inclined to take the VRA’s premise of racial relevance in politics to legitimize racial disclosure on the ballot.<sup>148</sup> But recall that the purpose of discriminatory action informs its social meaning.<sup>149</sup> Remedial and other compelling reasons for classifying people on racial grounds serve not only to “smoke out”<sup>150</sup> discriminatory intentions for racial differentiation; they also

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ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972 (1990); RACE, POLITICS, AND GOVERNANCE IN THE UNITED STATES (Huey L. Perry ed., 1996).

144. *Anderson v. Martin*, 375 U.S. 399, 402 (1964).
145. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[Racial gerrymandering] reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”); *Bush v. Vera*, 517 U.S. 952, 1055 (1996) (Souter, J., dissenting) (describing the legal injury alleged in *Shaw* as “reinforcement of the notion that members of a racial group will prefer the same candidates at the polls”); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 526-27 (1993) (characterizing as “expressive” the Supreme Court’s justification in *Shaw* for striking down majority-minority election districts in which “race concerns appear to submerge all other legitimate redistricting values”).
146. Cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) (“If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.”); *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990) (“[A] prosecutor’s assumption that a black juror may be presumed to be partial simply because he is black . . . violates the Equal Protection Clause.” (internal quotation marks omitted)).
147. See Pildes & Niemi, *supra* note 145, at 486 (“The VRA not only permits, but requires policymakers, in certain specific circumstances, to be race conscious when they draw electoral district lines.”).
148. See, e.g., 42 U.S.C. § 1973(b) (2000) (noting that “[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered” in evaluating a minority vote-dilution claim).
149. See *supra* note 125 and accompanying text.
150. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (internal quotation marks omitted).

repair illegitimate public values such practices might otherwise instantiate. Using racial considerations to ban discriminatory literacy tests imparts a social meaning of democratic equality by seeking to secure access for African Americans to exercise the franchise.<sup>151</sup> The racial labels in the Hawaii ballot law, by contrast, serve no such valid and worthy social goal, and so express a social meaning that reflects the law's less worthy justification.

Remedial purposes seek to alleviate racial stratification by undoing the effects of past discrimination in contexts such as education,<sup>152</sup> employment,<sup>153</sup> or voting.<sup>154</sup> Affirmative action programs that give minorities an advantage in employment decisions or school admissions might aim at similar antisubordination goals of racial diversity<sup>155</sup> or integration.<sup>156</sup> Likewise, contemporary census data collection practices require individuals to identify their race in order to appraise racial disparities and enforce civil rights provisions.<sup>157</sup> The mandatory designation of candidate race in the hypothetical

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151. See U.S. CONST. amend. XV.

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

153. 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).

154. 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").

155. See, e.g., Patricia Gurin, Biren A. Nagda & Gretchen E. Lopez, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 28-31 (2004) (analyzing social science studies and concluding that racial and ethnic diversity in academic settings has positive effects on "democratic sentiments and citizen participation" among students).

156. See, e.g., Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1223 (2002) (defending race-based affirmative action programs on the grounds that "whites who grew up in predominantly white neighborhoods, but attended colleges with relatively high proportions of minority students, are much more likely to have friends, neighbors, and co-workers of diverse racial backgrounds than their white neighbors who attended colleges with low racial diversity").

157. See *Caulfield v. Bd. of Educ.*, 583 F.2d 605 (2d Cir. 1978) (denying a preliminary injunction to prevent the federal collection of racial data to enforce Title VI); *Morales v. Daley*, 116 F. Supp. 2d 801, 814-15 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (upholding the Census Bureau's requirement that individuals "self-classify racially or ethnically, knowing to what use such classifications have been put in the past"); see also *Hamm v. Va. State Bd. of Elections*, 230 F. Supp. 156, 158 (E.D. Va. 1964) ("If the purpose [for keeping racial data] is legitimate, the reason justifiable, then no infringement results."), *aff'd sub nom. Tancil v. Woolls*, 379 U.S. 19 (1964). The *Tancil* Court upheld, without opinion, a Virginia law requiring that public records including voter registration, property ownership, and poll tax and residence-certificate lists be filed and maintained according to the race of the citizens whose interests were at issue.

Hawaii ballot law serves no comparable remedial purpose, such as enhanced minority representation.<sup>158</sup> Nor does the aim of academic research rise to the level of an otherwise compelling interest. Nonremedial justifications include such goals as averting imminent violence by segregating prison inmates during a race riot,<sup>159</sup> or preventing crime by describing suspects according to their perceived race under circumstances in which nonracial identifying information is unavailable.<sup>160</sup> Practices that underscore candidate race on the ballot are troubling because they instantiate an impermissibly divisive conception of citizenship.

### III. THE MORAL LOGIC OF DONOR CLASSIFICATION

This final Part applies the expressive dimension of racial classification to the context of assisted reproduction. The crucial question is not “What are the reasons that prompt sperm banks to arrange donors by race?” or “What material or psychological consequences are likely to result from facilitated race-

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158. Cf. Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL’Y 119, 124 (2000) (“Districted elections empower local minorities who would otherwise be swallowed up in a system not self-consciously designed to ensure some representation of their interests.”). The possibility that remedial purposes could, under sufficiently compelling circumstances, justify identifying the race of individual candidates suggests that Judge Wisdom’s *Anderson* opinion went too far in asserting that the government could never legitimately invoke race on electoral ballots. See *Anderson v. Martin*, 206 F. Supp. 700, 705 (1962) (Wisdom, J., dissenting) (“If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth.”), *rev’d*, 375 U.S. 399 (1964). Judge Wisdom articulated a more nuanced position of permissible color-consciousness five years later in desegregating school faculties “lock, stock, and barrel.” See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966) (“The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.”), *aff’d per curiam*, 380 F.2d 385 (5th Cir.) (en banc).
159. See *Lee v. Washington*, 390 U.S. 333 (1968) (affirming an order of racial desegregation in Alabama prisons).
160. 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.”). *But see Hall v. Pa. State Police*, 570 F.2d 86 (3d Cir. 1978) (invalidating a police photography program targeted at black bank customers).

matching in family formation?” Instead, we should ask, “What public values, if any, do race-conscious donor schemes instantiate within the context of assisted reproduction?” and “Is the instantiation of those values in that context morally acceptable?” Our inquiry should not fix attention on whether prospective parents who prefer a same-race donor do so because they want a child of a particular race or because they wish to pass as the child’s biological parents. Nor is it decisive whether race sorting causes African American men stigma or unequal opportunity to donate. The critical issue, from an expressivist perspective, is whether racial salience in the donor selection process communicates a legitimate social meaning by reference to the moral justification, power dynamics, and cultural realities at stake.

*A. The Social Meaning of Reproducing Race*

Practices that reflect or facilitate the exercise of racial preferences in donor selection do not express a social meaning of racial inferiority. The practice of color coding semen samples according to donor race does not situate racial groups in reproductive hierarchy, for example, by offering sperm from Caucasian donors in gold vials, sperm from Asian donors in silver vials, and sperm from African American donors in bronze vials.<sup>161</sup> The purpose of color-coded capsicles is simply to prevent a mix-up that many parents would regard as unfortunate.<sup>162</sup> Nor do sperm banks use exclusively white donors, serve exclusively white parents, or even charge higher prices for sperm from white donors than it does for sperm from black donors. The message sent by race-conscious donor classification schemes and search functions is not,

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161. See *supra* note 47 and accompanying text.

162. Consider a 2000 New York case in which two couples, one black and one white, visited a Manhattan fertility clinic on the same day to provide gametes for in vitro fertilization. See *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (App. Div. 2000). The clinic accidentally mixed the resulting embryos, and the white mother was impregnated with embryos from both couples, resulting in twin boys, one of whom had Caucasian features, the other of whom had African-American features. See *id.* at 21-22. Widespread media coverage emphasized less the embryo-switching itself, or the asserted injuries of unwittingly carrying another couple’s embryo or giving birth to another’s biological child, than that a white embryo was swapped for a black one, and the injury of getting a black child instead of a white one. See, e.g., Michael Grunwald, *In Vitro, in Error—and Now in Court; White Mother Given Black Couple’s Embryos Will Give One ‘Twin’ Back*, WASH. POST, Mar. 31, 1999, at A1; Kathleen Parker, *Baby Case Ends with Multiracial Scrambled Eggs*, CHI. TRIB., June 21, 2000, at 17.



therefore, that race should be conceived of in rankable, status-enforcing terms.<sup>163</sup>

Analysis of the hypothetical Hawaii ballot law suggests that framing donor configuration around race might express a different social meaning—that racial concerns properly guide the decisions that prospective parents make about what type of child they want to have. Practices that ratchet up racial salience in the donor selection process confer implied authority upon the notion that what it means to be a parent who belongs to a particular race is to have children who belong to that same race. When race is a prominent feature in donor selection, it imparts a tacit judgment that those who turn to artificial insemination should understand their parental role in racial terms and that they should distinguish among donors on the basis of race. Partitioning sperm catalogs according to the “single consideration of race”<sup>164</sup> credentializes the assumption that parents-to-be are supposed to act in racially defined ways. To accentuate race above all other donor considerations is to send an implicit message that monoracial families are preferable to multiracial ones.

To see whether this social meaning gives reason for pause, we might consider moral differences between racial classification in the reproductive context and the voting context. One important distinction is between public and private discrimination. Whereas the racial tags on Hawaiian electoral ballots were enforceable by government officials acting on behalf of the electorate, race-based donor sorting is the work of commercial sperm banks acting in the service of customers.<sup>165</sup> American law tends to be more forgiving of racial discrimination by private actors than it is of otherwise similar

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163. 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 the implications of a racially bifurcated market for donor gametes according to relative price or according to the purpose of reproduction as opposed to research).

164. *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

165. Some argue that private discrimination, which involves fewer decision-makers and often takes place behind closed doors, is more difficult to detect than similar discriminatory acts by the state. See Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043, 1045 (2006) (“[E]pistemic hurdles to discovering [private] discrimination make it a poor target for legal regulation . . . [because these are] choices about which the individual alone may have information, and which she is not typically called upon to justify to others in any sort of written or documented form.”). Others have argued that regulating the exercise of personal beliefs would prove ineffective or even counterproductive. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 27 (James H. Tully ed., Hackett Publishing Co. 1983) (1689) (arguing that people “cannot be compell’d to the belief of any thing by outward force”).

discrimination by the state.<sup>166</sup> But we think that some types of discrimination are so bad that not even private actors should engage in them. Racial discrimination in private housing or employment, for example, while permitted by the Constitution,<sup>167</sup> is statutorily prohibited.<sup>168</sup> Within most spheres of life, however, no law limits the extent to which private citizens can choose the people with whom they trade, befriend, or live, whether on the basis of national origin, sexual orientation, religion, sex, or race.<sup>169</sup>

The best reason to restrict legal scrutiny of discriminatory behavior to “state action” is that so limiting the government’s reach “preserves an area of individual freedom.”<sup>170</sup> It matters considerably that the state alone acts with the coercive threat of implicit violence.<sup>171</sup> It is not always clear, however, that the distinction between public and private discrimination can do the moral work that courts demand of it.<sup>172</sup> Nonstate actors can sometimes exercise state-

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166. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190–91 (1970) (Brennan, J., concurring in part and dissenting in part) (“[D]enials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them.”).
167. 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))).
168. See, e.g., 42 U.S.C. § 2000a (2000) (prohibiting segregation in public accommodations).
169. *But see Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (prohibiting the exclusion of women from membership in the Jaycees organization).
170. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); see also *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that while the Fourteenth Amendment “forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law’ . . . its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means”).
171. See Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in *THE FATE OF LAW* 211 (Austin Sarat & Thomas R. Kearns eds., 1991) (discussing “the ways that law manages to work its lethal will, to impose pain and death while remaining aloof and unstained by the deeds themselves”).
172. In terms of constitutional antidiscrimination doctrine, the distinction between public and private action is determinative. 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.” (quoting *Shelley*, 334 U.S. at 13)); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“[I]ndividual invasion of individual rights is not the subject-matter of [equal protection law].”). The crucial normative question, however, is not whether the state can be said to have caused a harmful practice, but rather whether the harm a practice causes is serious, and whether the state has responsibility to do something to remedy that harm. See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that a city’s “failure to train”

like influence over others.<sup>173</sup> In the case of sperm banks, private conduct is buoyed by the power of commercial markets, the prestige of the biomedical profession, and the publicity of extensive advertising.<sup>174</sup> Were the social influence that sperm banks exercised over clients and others comparable to the coercive power of the state, the public/private divide might not so readily distinguish racial labels in sperm donor catalogs, morally speaking, from racial labels on election ballots.<sup>175</sup> If the difference between state and nonstate action is not in itself morally decisive, a final example will help to mediate between racial classification in the *Anderson* variant and California Cryobank.

Consider donor catalogs alongside dating websites.<sup>176</sup> The analogy brings us back to the comparison between race-conscious reproduction and romance with which this inquiry began.<sup>177</sup> In a similar way that sperm banks seek to

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its officials, if the result of “deliberate indifference,” can qualify as a statutory civil rights violation); see also Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 33 (2006) (“[S]tate action is about responsibility, not causation.”).

173. See Martha Minow, *The Supreme Court, 1986 Term—Foreward: Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987) (“Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination.”); see also BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 19 (1980) (arguing that liberal societies should “deny any fundamental power structure the priceless advantage of invisibility”).
174. See *supra* notes 14-17 and accompanying text (noting marketing practices by California Cryobank); see also George Katona, *Rational Behavior and Economic Behavior*, in 2 *MARKETING: CRITICAL PERSPECTIVES ON BUSINESS AND MANAGEMENT* 332, 335-36 (Michael J. Baker ed., 2001) (discussing the influence of market power and commercial marketing on human understanding and behavior).
175. See Rae Langton, *Subordination, Silence, and Pornography’s Authority*, in *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION* 261, 264 (Robert C. Post ed., 1998) (comparing the influence that the Catholic church exercises over its supporters and others to the influence that pornographers exercise over pornography’s consumers and others).
176. See Abby Ellin, *The Recession. Isn’t It Romantic?*, N.Y. TIMES, Feb. 12, 2009, at E9 (discussing the recent rise in online dating among underemployed singles who find themselves with more time but less money to meet people, and citing an online dating consultant for the projection that “about 30 million people will log on this year to one of the estimated 1,500 online dating services nationwide”).
177. Personal advertisements published in the classified sections of newspapers and magazines often express racial preferences for partners to share in dating or marriage. See Theresa Montini & Beverly Ovrebø, *Personal Relationship Ads: An Informed Balancing Act*, 33 SOC. PERSP. 327, 331 (1990) (“Wealthy, entrepreneurial, fun loving, energetic, playful, said to be handsome, single WM, thirtyish. Seeks cute, young, petite, single WF for travel-mate and all around companion.”); cf. Raymond Fisman et al., *Racial Preferences in Dating*, 75 REV. ECON. STUD. 117, 131 (2008) (observing “strong racial preferences” in speed dating decisions, “even in a population of relatively progressive individuals”). For an economic analysis of

capitalize on racial preferences within the reproductive sphere, commercial websites such as 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. 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 founded on race and racial preferences are less likely to be performing prejudice than they are to be pursuing profit. Race-conscious romantic desires tend to be stereotypic and stubborn; but it is less plausible that “[I]ike attracts like”<sup>178</sup> because JDaters or AsianSingles think less of Latinos or African Americans than because people often look for partners with whom they believe they will share similar cultural backgrounds or to whom they believe they will feel a greater sense of attraction.<sup>179</sup>

The race-based preferences to which race-matching websites pander can be understood as a form of racial profiling. The person who makes known his preference for a partner of a particular race could have a diverse range of reasons for doing so; but it is not unlikely that he is “indicating his belief that by deploying racial signals, he will be more successful in gathering quickly a pool of candidates among whom he may find an enjoyable romantic partner.”<sup>180</sup> On the discriminatory expression approach, racial profiling in romance is readily distinguishable from illegitimate profiling in other contexts.<sup>181</sup> For example, when shopkeepers single out African American

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race-based mate selection, see Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973).

178. EPSTEIN, *supra* note 53, at 68 (“In certain cases it may be that the preferences for voluntary segregation are based on ill will or other uglier sentiments . . . . Nonetheless, the advantages of voluntary sorting cannot be ignored . . .”).
179. See Kang, *supra* note 2, at 1142 (“[I]n the marketplace for romance, disclosing race is the current fashion, and neither public morality nor law protests.” (citations omitted)); Alan Wertheimer, *Reflections on Discrimination*, 43 SAN DIEGO L. REV. 945, 955 (2006) (“[M]ating choices are the result of direct differentiations by particular persons, but they 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.”).
180. KENNEDY, *supra* note 2, at 31.
181. Our intuitions about race-matching in the romantic sphere might not be so easily explained by the effects-based approach to wrongful discrimination. Suppose that same-race personal ads had the effect of exacerbating segregation in neighborhoods and employment. Such ads may well promote social segregation. See THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 135-66 (1978) (using economic models to explain how same-race family dynamics can explain how American neighborhoods have become racially stratified); cf. I.

customers for heightened suspicion, racial profiling expresses the demeaning assumption that blacks are dishonest, and it puts a disparaging question mark over the heads of all black people by suggesting they that are apt to be shoplifters or pickpockets.<sup>182</sup> Racial profiling in the search for lovers or spouses, by contrast, expresses an acceptable social meaning that reflects the intimate character of romantic encounters.<sup>183</sup>

Dating websites are designed to forge affective connections between adults. Online compatibility searches, while reducing the spontaneity that typifies casual introductions, preserve the intimacy that is the mark of partner relationships. The intimate nature of romantic interactions informs the social meaning of race-based decision-making frameworks that encourage people to filter out potential lovers or spouses based on assumptions about what sorts of characteristics people from a particular racial group share, or about the racial background that people of a particular race are supposed to look for in a romantic partner. As in the voting context, the issue from an expressivist perspective is not that these assumptions are necessarily false or pejorative. The relevant question is whether these assumptions essentialize racial groups in objectionably divisive ways.<sup>184</sup> The associational autonomy interests at stake in

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Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 53-55 (2009) (arguing that residential segregation harms individuals by reducing their social capital). Nor is it implausible to think that same-race ads may reduce the chances that intimate relationships develop between blacks and whites, see Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877, 884 (1994), or reinforce the exclusion of blacks from the informal networks of association among families, friends, and neighbors that tend to open up access to educational opportunity and career advancement, see GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95-99 (2002) (discussing tendencies among whites to limit close personal contact with blacks to formal, nonintimate relationships). If we were to assume that the social costs of permitting the expression of racial preferences in personal ads are greater than the costs of staving off those preferences, we might nevertheless think that it is permissible for businesses to facilitate race-conscious assortative mating. See JAN NARVESON, *RESPECTING PERSONS IN THEORY AND PRACTICE* 208 (2002) (“If I marry Amanda because [of her race] . . . I do not thereby wrong the . . . candidates who are thus rejected.”). The discriminatory effects approach has trouble explaining our belief that racial classification in the romantic sphere is acceptable even if it has harmful social effects.

182. Cf. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 161 (1997) (discussing racial profiling by law enforcement).
183. Cf. PAUL R. ABRAMSON, *ROMANCE IN THE IVORY TOWER: THE RIGHTS AND LIBERTY OF CONSCIENCE* 14 (2007) (arguing that “[h]aving sole personal discretion over the choice of whom to romance” is, even in the context of student-faculty relations, a “fundamental right of conscience”).
184. For trenchant reflections on the public endorsement of racially prescribed self-understandings and social behavior, see RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 23-28 (2005). Ford argues that the plaintiff’s claim in *Rogers v. American Airlines*,

intimate relationships make sense of why the dating context constitutes “a private sphere of racial differentiation that civil rights law may not aspire to disestablish.”<sup>185</sup>

Our commitment to decisional<sup>186</sup> and associational<sup>187</sup> autonomy suggests that private citizens should be free from state intervention to act on whatever reasons they might have for choosing *this* neighborhood or *that* club, *this* barber or *that* partner.<sup>188</sup> Scholars argue that a person must make certain associational decisions for herself if those decisions are to have value for her,<sup>189</sup> and that people can realize the goods associated with many of our most cherished roles and attachments only if those spheres of association are embraced from within.<sup>190</sup> Associational autonomy among adult partners and parents helps to account for the “private realm of family life which the state cannot enter.”<sup>191</sup> Autonomy and privacy interests are especially weighty in the

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527 F. Supp. 229 (1981), that blacks or black women have a cultural *essence as blacks* or *as black women*, does not serve as “a vehicle of racial empowerment.” *Id.* at 25.

185. Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 29, 57 (Robert Post & Michael Rogin eds., 1998).
186. See, e.g., *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).
187. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (striking down a statute requiring disclosure of group membership lists).
188. See MATT CAVANAGH, *AGAINST EQUALITY OF OPPORTUNITY* 153 (2002); Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION* 75, 83 (Amy Gutmann ed., 1998); Peter Singer, *Is Racial Discrimination Arbitrary?*, 8 *PHILOSOPHIA* 185, 192 (1978).
189. See Cover, *supra* note 126, at 32 (“Freedom of association implies a degree of norm-generating autonomy on the part of the association.”).
190. See WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 12 (1989) (“[N]o life goes better by being led from the outside according to values the person doesn’t endorse.”).
191. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); see *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (invalidating a zoning ordinance that limited residential occupancy to a statutorily defined family). The protected family realm has been judged sufficiently expansive to include a “right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating a law forcing children to attend public schools on grounds that it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (invoking due process rights “to marry, establish a home and bring up children” as a basis for striking down a state law that barred the teaching of languages other than English in public schools).

context of family *formation*.<sup>192</sup> A right to make reproductive decisions free from state interference arose in response to sterilization<sup>193</sup> and antimiscegenation laws,<sup>194</sup> and has since been used to strike down bans on contraception<sup>195</sup> and abortion.<sup>196</sup> The Supreme Court has not considered whether autonomy or privacy rights encompass decisions involving the use of assisted reproductive technologies.<sup>197</sup> But philosophers and legal scholars have defended variations on a far-reaching “right to reproduce with the genes we choose and to which we have legitimate access, or to reproduce in ways that express our reproductive choices and our vision for the sorts of people we think it right to create.”<sup>198</sup>

Autonomy interests are implicated differently in assisted reproduction, however, than they are in sexual reproduction or romantic dating. The

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192. See Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 175 (1982) (“The rise of autonomy as a fundamental value can be discerned . . . in cases involving contraception, abortion, and other family and life-style issues . . .” (citations omitted)); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 789-90 (1989) (arguing against antiabortion laws on grounds that “the compulsion to carry a fetus to term, to deliver the baby, and to care for the child in the first years of its life . . . exert power productively over a woman’s body and, through the uses to which her body is put, forcefully reshape and redirect her life” (citations omitted)).
193. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
194. See *Loving v. Virginia*, 388 U.S. 1 (1967).
195. See *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965).
196. See *Roe v. Wade*, 410 U.S. 113 (1973).
197. See *Witbeck-Wildhagen v. Wildhagen*, 667 N.E.2d 122, 125-26 (Ill. App. Ct. 1996) (“Just as a woman has a constitutionally protected right not to bear a child, a man has a right not to be deemed the parent of a child that he played *no* part in conceiving.” (citation omitted)); *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998) (“[The] disposition of . . . [embryos created by in vitro fertilization] does not implicate a woman’s right of privacy or bodily integrity in the area of reproductive choice . . .”); *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (finding “the state’s interest in potential human life is insufficient to justify an infringement on the gamete-provider’s procreational autonomy” because “no other person or entity has an interest sufficient to permit interference with the gamete-providers’ decision to continue or terminate the IVF process”).
198. John Harris, *Rights and Reproductive Choice*, in *THE FUTURE OF HUMAN REPRODUCTION: ETHICS, CHOICE, AND REGULATION* 5, 34 (John Harris & Søren Holm eds., 1998); see also RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 148 (1994) (defending the “right [of women] to control their own role in procreation unless the state has a compelling reason for denying them that control”); JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 16 (1994) (defending a constitutional right of “procreative liberty” that protects “the freedom to decide whether or not to have offspring and to control the use of one’s reproductive capacity”); John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1441 (1998) (same).

exchange of money for genetic material provides the means to produce a child—a profoundly intimate act to which the donor contributes one-half of the necessary raw materials. But the relationship between the people who directly engage in that procreative act is characterized 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.<sup>199</sup> Prospective parents and sperm donors transact at arm's length through a corporate broker who does not ordinarily permit either party even to learn the name of the other, let alone to have interpersonal contact.<sup>200</sup> The market in donor insemination mediates reproduction to eliminate the intimacy that both typifies the relationship between consensual procreative partners, and also grounds the associational autonomy interests at stake in the act of procreation.<sup>201</sup> Dating website deal in the union of people; sperm banks deal in the union of gametes.

As with the norms of deliberative voting in *Anderson*, the norms of romantic and parental love serve to frame the social meaning of racial salience in dating websites and donor catalogs. Practices that facilitate racial profiling in the romantic sphere communicate an acceptable social meaning not just because dating decisions should be shielded from government interference. The legitimacy of race-based dating websites also derives from the idiosyncratic and discriminating nature of preferences that properly characterize intimate voluntary relationships. Romantic norms of particularity prompt us to choose among potential partners on the basis of whatever characteristics—a quick wit, straight teeth, or shared racial background—we happen to find desirable. The attitude of unreserved choosiness that governs the norms of assortative mating is very different, however, from the unconditional attachment that governs the norms of parental love. We think it justified to resign our friendship or to dissolve our vows of marriage when an adult companion has betrayed our trust, and perhaps think it acceptable to go our separate ways when we no longer care for the preferred features they once

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199. *But cf.* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1462-63 (2004) (arguing that contracts establish a moral relation of recognition and respect among those who participate in them).

200. See California Cryobank, Inc., Anonymous Donor Contact Policy, <http://www.cryobank.com/Services/Post-Conception-Services/Openness-Policy> (last visited Feb. 20, 2009) (“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.”).

201. 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”).



possessed. But it seems unfitting for the affective ties parents have for their future child to be conditional on the child's being born with whatever qualities—ingenuity, athleticism, or their own racial features—parents happen to prefer.<sup>202</sup> If we do not think that parents should adopt an exacting disposition in choosing their child's genetic constitution, the norms of parental love cannot serve to legitimize the exercise of racial preferences in reproduction in the way that norms of companionship legitimize racial preferences in romance.<sup>203</sup>

It might be argued that the case against racial classification in assisted reproduction fails to distinguish racists from rational business people, or that practices that cater to the uncoordinated aggregation of consumer preferences say nothing about the moral worthiness of the thing that is preferred for race-conscious reasons. Matt Zwolinski puts the objection this way, in discussing race-based customer preferences in the employment context:

Job candidates who are rejected [in deference to the racial preferences of customers] . . . are not rejected because their potential employer views them as less worthy of respect or inherently morally inferior. They are rejected because their employer believes, perhaps falsely, perhaps correctly, that their membership in a certain group is evidence of their possession of some other profit-affecting trait. The rejection is

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202. Frances Kamm argues that norms of parental love for an unborn child are unintelligible. She compares the idea that parents could be governed by affective attachments for a child before that child comes into being with the implausible notion that partners should be governed by norms of romantic love for their companion before the first encounter between them. “[B]efore a particular person whom we love exists (just as before we find someone to love),” she argues, “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 . . .” Frances M. Kamm, *Is There a Problem with Enhancement?*, 5 AM. J. BIOETHICS 5, 9 (2005). The analogy Kamm draws between love for a partner and love for a child fails to appreciate the uniquely primordial character of parent-child bonds, which can take hold even before parents learn about whether the child's attributes are ones that the parents wished for or would come to value. The type of parental attachment we find appealing cannot justifiably be forsaken for the reason that parents do not like a child's particular personality or IQ or looks. The kind of love we think parents should have for their children is less aptly described by a finicky attitude that Kamm calls “love [for] the particular” than by a welcoming disposition for whatever kind of person comes to occupy the child's special role within the parent-child relationship. See Dov Fox, *Parental Attention Deficit Disorder*, 25 J. APPLIED PHIL. 246, 257–58 (2008).
203. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (“[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.”).

not of the candidate as a person, but of the candidate as the supposed possessor of some undesirable trait.<sup>204</sup>

This objection misfires for two reasons. First, the distinction between attitudes toward people and attitudes toward people's traits conflates expression with intention.<sup>205</sup> The affirmative action and race riot examples illustrated how the purpose of a discriminatory practice can inform its social meaning. But the hypothetical Hawaii ballot law shows us that the credible communication of objectionably divisive values can constitute a distinct, expressive wrong, even in the absence of bad intentions.

Second, this objection misses the significance of the possible reasons *why* blackness does not sell in the market for reproductive material. While most white parents who want a white donor likely want a child whose physical features will more closely resemble their own, implicit racial bias should not be ruled out.<sup>206</sup> The race we inherit is a site of cultural growth, a mark of civic standing, and a source of social hierarchy.<sup>207</sup> Consider a recent study that asked Caucasian college-age students how much money would be reasonable to seek as compensation if they were somehow changed, from that time forward, from physically white-looking to physically black-looking. The students were told that "this will mean not simply a darker skin, but the bodily and facial features associated with African ancestry. . . . [I]nside, you will be the person you always were. Your knowledge and ideas will remain intact."<sup>208</sup> The students indicated that \$1 million per year would be suitable compensation for losing the advantages of their whiteness.<sup>209</sup> The social importance of race maps onto

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204. Zwolinski, *supra* note 165, at 1051-52.

205. See *supra* note 120 and accompanying text.

206. See Aaron Smith-McLallen et al., *Black and White: The Role of Color Bias in Implicit Race Bias*, 24 SOC. COGNITION 46 (2006) (discussing the findings of studies using as stimuli racially stereotypic names and photographs cropped to show facial features and skin color).

207. Cf. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 269-315 (1994) (drawing on a dubious empirical analysis to argue that blacks tend to be less intelligent *genetically* than whites, and that this heritably inferior cognitive ability in minority groups contributes to social problems including crime, poverty, and unemployment).

208. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 36 (2d ed. 1995).

209. See *id.* at 42; see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1761 (1992) ("Among whites, the idea persists that their whiteness is meaningful."). Few whites may be willing to trade places with even a more wealthy and successful black person. See Owen Fiss, *Another Equality*, ISSUES IN LEGAL SCHOLARSHIP, 2004, art. 20, at 22, <http://www.bepress.com/ils/iss2/art20> ("Even rich blacks are blacks. They enjoy the

what people hope for in their children.<sup>210</sup> Race-matching for physical resemblance is the most plausible reason that white parents prefer white donors.<sup>211</sup> But it is not unreasonable to think that at least for some parents, the social norms that systematically favor whites over blacks inform the norms that give rise to racial preferences in assisted reproduction.<sup>212</sup>

### *B. The Architecture of Reproductive Choice*

Different means of racial disclosure can express more acceptable or less acceptable judgments about the role that race should play within particular decision-making contexts.<sup>213</sup> Some means of disclosure are permissible, while

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privileges that wealth can buy, but they are encumbered by doubts and expectations not experienced by whites who may enjoy the same economic or social status.”).

210. See Barthelet, *supra* note 2, at 1165.

211. See *supra* note 42 and accompanying text.

212. See Roberts, *supra* note 37, at 244 (“[R]eproductive technologies are so popular in American culture not simply because of the value placed on the genetic tie, but because of the value placed on the *white* genetic tie.”); *id.* at 246 (“In the American market, a Black child is indisputably an inferior product.”); *cf.* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1966 (1992-1993) (discussing “the coercive use of the contraceptive Norplant to punish female offenders and the prosecution of women who use drugs during pregnancy”); Dorothy E. Roberts, *Race and the New Reproduction*, in CRITICAL RACE THEORY: THE CUTTING EDGE 543, 546 (Richard Delgado & Jean Stefancic eds., 2d ed. 1999) (discussing the frequency of sterilization among poor and uneducated black women). The perceived preference for white donors and not black donors may help to explain why Patricia Williams’ vision of “guerilla insemination” is so provocative. Williams imagines a future in which vials of black sperm are smuggled into sperm banks: “What happens if it is no longer white male seed that has the prerogative of dropping noiselessly and invisibly into black wombs, swelling ranks and complexifying identity? Instead it will be disembodied black seed that will swell white bellies . . . .” PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 188 (1991).

213. The Supreme Court has been sensitive to the dimension of salience in its equal protection analysis of race-conscious redistricting, affirmative action, and school desegregation. On redistricting, see *Shaw v. Reno*, 509 U.S. 630, 644, 647 (1993) (citation omitted), which found constitutional harm in “[r]edistricting legislation . . . so bizarre on its face that it is unexplainable on grounds other than race” and which argued that “reapportionment is one area in which appearances do matter”; on affirmative action, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), which held that “[c]lassification based on race . . . [u]nless they are strictly reserved for remedial settings . . . may in fact . . . lead to a politics of racial hostility”; and on school desegregation, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring), which noted 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.” Several commentators have discussed the significance of racial salience in the Court’s equal protection jurisprudence. See, e.g., Elizabeth S. Anderson, *Integration, Affirmative Action, and*

others are objectionable, as when, for example, they threaten to countenance racial differences in ways that enervate our responsiveness to the evolving character and intensity of racial identifications over time. Adjusting the prominence of race in donor catalogs can shape the social meaning of racial classification in assisted reproduction. There is a spectrum of salience-varying approaches that sperm banks could adopt to manage information about donor race. Consider four: race-blind, race-sensitive, race-attentive, and race-exclusive.

Race-blind means of disclosure withhold information about the racial identity of sperm donors. The race-blind approach to catalog design makes it impracticable for parents to act with any confidence on whatever preference they might have for a child of a particular race.<sup>214</sup> Sperm banks that adopt this approach might even borrow an antidiscrimination strategy from classified housing websites like Craigslist.org, which posts an online statement encouraging users not to make selections based on racial considerations.<sup>215</sup>

Race-sensitive means of disclosure, by contrast, reveal donor race alongside a number of features, such as height, weight, education, occupation, and religion. Under race-sensitive means of disclosure, parents learn about race as one among other donor attributes.<sup>216</sup> Race-sensitive means make it easy enough for parents to choose a donor who satisfies their racial preferences. But

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*Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1236 (2002) (“The Court prefers that, when states consider race, their actions are ambiguous enough to be explained in other ways.”); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 693 (1998) (“[W]here the racial considerations . . . are too central, too visible . . . they are almost certain to fail.”); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 75 (2003) (interpreting *Grutter* and *Gratz* to mean that “[r]acial inequalities can be addressed, but only in ways that efface the social salience of racial differences”).

214. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1209 (2008) (“[C]olorblindness occurs whenever there is no conscious or unconscious awareness of race.”); cf. Kang, *supra* note 2, at 1155 (“By making it easier for us to wear a racial veil, cyberspace promotes racial anonymity.”).
215. Craigslist.org also provides that users should flag for removal any advertisement that expresses a racial preference. See Craigslist, *Fair Housing is Everyone’s Right!*, <http://www.craigslist.org/about/FHA.html> (last visited Mar. 5, 2008) (“If you encounter a housing posting on craigslist that you believe violates the Fair Housing laws, please flag the posting as ‘prohibited.’”).
216. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (holding that universities may use race-conscious measures only if race is one of many factors considered relevant to achieving a diverse student body).

this approach does not facilitate race-based donor selection insofar as it does not make race a “defining feature” of the donor decisionmaking framework.<sup>217</sup>

A race-attentive approach to donor disclosure enhances racial salience by designing donor catalogs and online search function in ways that enable prospective parents to view only donors of a particular race.<sup>218</sup> These are the means of disclosure adopted by California Cryobank.<sup>219</sup> The Cryobank catalog arranges sperm donors into discrete sections according to their racial background and highlights donor race in boldface print at the top each page.<sup>220</sup> The company’s main online search page prompts parents to filter donors according to three “Quick Search” criteria: hair color, eye color, and ethnic origin.<sup>221</sup> Clicking on the drop-down menu for “Ethnic Origin” presents parents with donor options including “Asian,” “Caucasian,” “Hispanic or Latino,” and “Black or African American.”<sup>222</sup>

Race-exclusive means of disclosure classify donors according to racial information only, thereby giving race a decisive or outstanding place in parental decisions about which donor to select. An example of the race-exclusive approach is a quota-like system in which individual race alone, in the absence of nonracial information, is determinative of a particular selection outcome or procedure.<sup>223</sup> A race-exclusive approach to sperm donation might accept only donors who are white or might categorically reject black men who apply to donate. This approach is similar, but not identical, to the method of racial differentiation adopted by dating websites such as JDate.com and BlackPeopleMeet.com, which target their matching services (but do not limit membership or web use) to members of a particular ethnic or racial group.

These varying degrees of racial salience shape the social meaning that the race-conscious design of donor catalogs expresses in the context of assisted reproduction. Take race-blind means of disclosure. Depriving parents of knowledge about donor race would not stop them from caring about race. Nor,

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217. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (distinguishing affirmative action programs that evaluate “each applicant . . . as an individual” from programs that make “an applicant’s race or ethnicity the defining feature of his or her application”).

218. *Cf.* Robinson, *supra* note 2, at 2792.

219. *See supra* notes 43-48 and accompanying text.

220. *See* California Cryobank, *supra* note 40.

221. *See* California Cryobank, Inc., *supra* note 46.

222. *Id.*

223. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (distinguishing *Davis*’s quota system, which took race as grounds for applying distinct admissions criteria, from Harvard’s preference system, which considered race as one favorable factor among others).

perhaps, would race-blind means efface the actual influence of race in choosing a donor. Parents might still try to speculate about 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<sup>224</sup>—or when making a concerted effort not to—consider race.<sup>225</sup> Perceived measures to conceal racial information might even have the paradoxical effect of making race more conspicuous in the minds of parents.<sup>226</sup> Still, a race-blind approach would obscure the explicit presentation of donor race and encumber parents' use of racial considerations in the selection process. By denying parents explicit racial information, race-blind means send a message that race either does not or should not matter to prospective parents in the decisions they make about what kind of children to have. Since most parents *do* care about donor race, the message must be that it is objectionable for race to play *any* part in the process by which donors are selected. But this social meaning is implausible. 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 donor selection.<sup>227</sup>

Race-sensitive means of donor classification send a different message. By dampening the threat of racial essentialization, race-blind means make it

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224. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1536-37 (2005) (noting the relevance of social cognition research about implicit bias for a range of legal and moral questions); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1239 (1995) (applying insights from cognitive psychology to argue that “a broad class of discriminatory employment decisions results not from discriminatory motivation, but from a variety of unconscious and unintentional categorization-related judgment errors”); Lawrence, *supra* note 60, at 322 (arguing that “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation”).

225. See Gotanda, *supra* note 84, at 16 (“This technique of ‘noticing but not considering race’ implicitly involves recognition of [an individual’s] racial category and a transformation or sublimation of that recognition so that the racial label is not ‘considered’ in [an actor’s] decisionmaking process.”); *id.* at 19 (“To argue that one did not *really* consider the race of an African-American is to concede that there was an identification of Blackness. Suppressing the recognition of a racial classification in order to act as if a person were not of some cognizable racial class is inherently racially premised.”).

226. See Carbado & Harris, *supra* note 214, at 1210 (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”); Krieger, *supra* note 224, at 1240 (“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.’”).

227. See *supra* notes 186, 188, 192 and accompanying text.

acceptable for prospective parents, if they wish, to select a sperm donor on racial grounds and no others. Given the importance of race to many parents, race could, on this approach, be expected to have “specific and identifiable”<sup>228</sup> influence, whether conscious or unconscious, in decisions about donor selection. If race-sensitive means lay modest emphasis on donor race by rendering racial identifiers in distinctive font or listing them first among available traits, race may even legitimately be distinguished as a “plus” factor.<sup>229</sup> Because race-sensitive means reveal racial background, this approach does not prevent parents from browsing through donor profiles one-by-one and eliminating from consideration all those of a particular race.

Race-sensitive means mitigate against such exclusion, however, by declining either to organize paper catalogs along racial lines or to provide online search functions that permit parents to filter donors according to race. Cognitive psychology research suggests that reducing racial salience in this way can be expected to channel parental choice by enhancing both the transaction costs required to exercise racial preferences and relative indifference with respect to donor race.<sup>230</sup> A donor infrastructure that presses parents to review the profiles of individuals who do not match their preexisting racial preferences may encourage some parents to relax racial specifications and to give consideration to donors they may otherwise have filtered out and set aside on racial grounds. The purpose of tempering racial salience is less to secure holistic deliberation among individual sperm donors, however, than it is to mitigate expression of the divisive social meaning that racial identity ought to be the overriding consideration in reproductive decisionmaking.<sup>231</sup>

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228. *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)).

229. *Bakke*, 438 U.S. at 317 (approving an affirmative action program in which race is “deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates”).

230. 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.”).

231. Cf. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 51 (2007) (“Courts can . . . accommodate both speech and equality in the casting context by creating minor procedural hurdles that create space for decision makers to consider the race and/or sex designation carefully and reflect on alternative casting options prior to making their ultimate decision.”).

Compare this social meaning to the meaning expressed in the race-attentive approach. Race-attentive means, by positioning racial information prominently in the configuration of donor characteristics, suggest that race should carry preeminent weight in donor selection. To arrange paper catalogs by race or facilitate online filtering along racial lines is to send a message that race holds a privileged place in assisted reproduction. In the absence of remedial or otherwise compelling justifications, a race-attentive approach to donor disclosure ratifies the assumption that parents are to understand their roles as parents-to-be in racially defined terms. Race-attentive means of donor classification communicate the idea that what it means to be a responsible parent who identifies with a particular race is to have children who belong to the same race. Embedded in this idea is the troubling notion that same-race families should be preferred to mixed-race ones.

The idea that same-race families are ideal or desirable is not unique to donor insemination. In the contexts of interracial custody and transracial adoption, judges and social groups have argued explicitly that racially homogenous families should be preferred because people are better equipped to parent children of the same race.<sup>232</sup> Dissenting from a decision awarding custody over a black child to white foster parents rather than a black adoptive couple, Chief Judge Theodore Newman offered a paradigmatic appeal to the merits of parent-child race-matching:

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

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232. See *Ward v. Ward*, 216 P.2d 755, 756 (Wash. 1950) (awarding custody to a black paternal grandmother rather than to a white mother on grounds that the children, described by the court as “colored,” would have “a much better opportunity to take their rightful place in society if they are brought up among their own people”); *Barriers to Adoption: Hearing Before the S. Comm. on Labor and Human Resources*, 99th Cong. 218 (1985) (statement of William T. Merritt, President, National Association of Black Social Workers) (“We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of race and cultural genocide.”); RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 50 (1977) (“Black children should be placed only with Black families whether in foster care or for adoption.”).



recognize that this is an inferior substitute for learning directly from minority role models.<sup>233</sup>

Chief Judge Newman suggests that white parents lack the racial identity, experience, and perspective necessary to teach coping mechanisms effectively to black children.<sup>234</sup> This argument about cultural competency in transracial adoption applies with similar force in the context of donor insemination. If white adoptive parents, because of their race, are less qualified in important respects to raise black adoptive children, it follows that white mothers or white couples would be similarly ill-prepared to raise a biracial child conceived from a black sperm donor.<sup>235</sup>

I have seen no reliable evidence to support the view that a child's interests are better served by virtue of being raised by parents of the same race than by parents of a different race.<sup>236</sup> Whether in adoption or donor insemination, practices that systematically favor the formation of monoracial families bank on racialized assumptions about the way that people should think and act in their role as parents. More troubling than racial essentialization is that race-attentive means of donor disclosure instantiate the public value that Americans should be set apart by race within the family sphere.<sup>237</sup> Race-exclusive means of donor

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233. *In re R.M.G.*, 454 A.2d 776, 802 (D.C. 1982) (Newman, C.J., dissenting) (citations omitted).

234. See James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 510 (1988) ("To suggest that the skills of survival, coping and defense can be taught by those who have never themselves learned them is at best mystifying.").

235. See *id.* at 505 n.88 (noting the National Association of Black Social Workers's claim that the cultural competency argument applies no less to biracial children with black lineage).

236. See, e.g., Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54, 80 (1988) (discussing empirical research concluding that transracial adoption yields academic advantages for black children); Ruth G. McRoy & Edith M. Freeman, *Racial-Identity Issues Among Mixed Race Children*, 8 SOC. WORK EDUC. 164, 166 (1986) (noting studies that find that certain interpersonal benefits can accrue to children of transracial adoption); cf. Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 954 (1994) ("[A] white parent's denial of Black inferiority may be more believable because it is less self-serving."). Recognizing that children of color consistently languish in foster homes or child care institutions at vastly disproportionate rates, Congress in 1996 amended the Multiethnic Placement Act to prohibit adoption agencies from making placement decisions on the basis of race. See *Removal of Barriers to Interethnic Adoption Amendments*, 42 U.S.C. § 1996b(1) (2000).

237. See KENNEDY *supra* note 2, at 417 ("Government ought to welcome the prospect of multiracial adoptive families just as enthusiastically as it does that of monoracial adoptive families.").

classification exacerbate this moral wrong of discriminatory expression. Sperm banks should neither arrange donor catalogs along racial lines nor facilitate online search functions that enable prospective parents readily to exclude the class of black donors from consideration.

It is legitimate for sperm banks to make parents aware of donor race alongside other donor characteristics. The race-sensitive approach recommends that racial disclosure should be designed to soften the prominence of race in donor selection by taking measures to frustrate wholesale filtering of sperm donors on the basis of race.<sup>238</sup> Race-sensitive practices that discourage the exercise of racial preferences in donor selection may do less good as applied to prospective parents who belong to racial minorities;<sup>239</sup> but race-sensitive means in no way limit the ability of prospective parents to choose a sperm donor on the basis of race, and they have no “deterrent effect on the free enjoyment of the right to associate.”<sup>240</sup> A race-sensitive approach would frame the architecture of choice in such a way as to keep racial salience in check and thereby preserve a legitimate space for parental expression of racial identity in donor selection. The point of race-sensitive measures is to avoid discriminatory expression in assisted reproduction and not to endorse or encourage racial integration within the family unit; the creation of more multiracial families may, however, be a foreseeable and not-unwelcome byproduct.<sup>241</sup>

Antidiscrimination law has begun to take notice of online classifications and search functions in the context of interactive matching services for roommates and romantic partners. In November 2008, the online dating company eHarmony, Inc. reached a settlement agreement with the New Jersey Attorney General’s Division on Civil Rights following allegations that the company violated New Jersey antidiscrimination law by failing to offer a

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238. Cf. Robinson, *supra* note 2, at 2799 (arguing that “structural interventions [to prevent race-based filters] . . . may erode racial stereotypes and thus reshape preferences”).

239. See *id.* (observing that if a law banning the expression of racial preferences “applied to all races in the context of dating web sites, it would constrain the racial preferences of blacks and other minorities, which might be less likely to rest on stereotypes”).

240. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

241. See SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 89 (2004); cf. Dov Fox, Book Note, *Self-Made Men and Man-Made Selves: The Genetic Arms Race and the Myth of the Meritocracy*, 70 REV. POL. 665, 665 (2008) (arguing that “[p]redicting changes in social attitudes and practices requires informed guesswork that is sensitive to the moral culture in which we live,” and that reliance on such empirical speculation does not in itself invalidate proposals about the kinds of changes that are worthy of concern).

same-sex matching service.<sup>242</sup> The terms of the settlement stipulate that eHarmony did not violate the law, but they require the company to launch a new online service for same-sex matching and to provide 10,000 free subscriptions for those interested in using the website.<sup>243</sup> Unlike eHarmony, however, California Cryobank does not limit the use of its services to clients who possess any particular characteristics—indeed, anyone may place an order for donor sperm—except that online registration accounts “must be opened in the name of the individual recipient planning to be inseminated.”<sup>244</sup>

The facts at issue in a recent Ninth Circuit case more closely resemble the system of donor classification undertaken by sperm banks like California Cryobank.<sup>245</sup> The legal conflict arose when the Fair Housing Council of San Diego brought suit against Roommates.com, an interactive online matching service, for publishing discriminatory housing advertisements in violation of the Fair Housing Act (FHA)<sup>246</sup> and state antidiscrimination laws.<sup>247</sup> The district court ruled that the Communications Decency Act (CDA)<sup>248</sup> protects Roommates.com from FHA liability for facilitating discriminatory roommate advertisements.<sup>249</sup> The Ninth Circuit Court of Appeals reversed and remanded.<sup>250</sup> The court then reheard the case en banc.<sup>251</sup>

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242. See Press Release, eHarmony, eHarmony, Inc. Settles with New Jersey Attorney General, Agrees To Launch Same-Sex Matching Service in 2009 (Nov. 19, 2008), <http://www.eharmony.com/press/release/15>.

243. See *id.*; see also Compatible Partners: The Site for Long-term Committed Same-Sex Relationships, <http://www.compatiblepartners.net> (last visited Feb. 20, 2009) (“Compatible Partners, a new matching site for same sex relationships powered by eHarmony, is presently under construction.”).

244. California Cryobank, Inc., New Web User: Registration, <https://www.cryobank.com/My-Account/index.cfm?login&rurl=%2FMy-Account%2Findex.cfm%3F> (last visited Feb. 20, 2009).

245. See *supra* notes 44-47 and accompanying text.

246. 42 U.S.C. § 3604(c) (2000).

247. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1157 (9th Cir. 2008) (en banc).

248. Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

249. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 2004 WL 3799488, at \*3 (C.D. Cal. Sept. 30, 2004).

250. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007).

251. *Roommates.com*, 521 F.3d 1157.

Chief Judge Alex Kozinski wrote for the majority that Roommates.com was immune with respect to those practices by which the website “passively displays content that is created entirely by third parties.”<sup>252</sup> These protected practices include an “Additional Comments” section of user profiles for which the website had not solicited any particular information, and the provision of a free-text search function that enables users to find matches based on keywords from the “Additional Comments” section.<sup>253</sup> The court held that the CDA did not protect Roommates.com, however, for the “content that it creates itself, or is responsible, in whole or in part for creating or developing.”<sup>254</sup> These unprotected practices include questionnaires that Roommates.com required as a condition of use. The court noted that the company was not immune from liability under the FHA for search functions and e-mail notifications based on information generated from users’ responses to these questionnaires, which included pre-populated answer choices regarding sex, family status, and sexual orientation.<sup>255</sup> Chief Judge Kozinski reasoned that by soliciting, channeling, or categorizing illegitimate information about user attributes and roommate preferences, Roommates.com relinquished immunity under the CDA for this information, thereby exposing the website to FHA liability for unlawful content featured on users’ profiles.<sup>256</sup>

In considering how *Roommates.com* might apply to sperm banks, we should keep in mind that private discrimination in the housing context, as with employment, warrants heightened scrutiny as a matter of moral appraisal and

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252. *Id.* at 1162.

253. *See id.* at 1173-75.

254. *Id.* at 1162 (citation omitted).

255. *Id.* at 1164-72.

256. *See id.* at 1166 (“By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”); *cf. Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (holding that an online social networking service that requires users to answer a questionnaire regarding 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 § 230). *But see Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (holding that Craigslist is immune, under §230(c)(1) of the CDA, from liability under the FHA for discriminatory housing advertisements submitted by website users in the absence of mandates or encouragement by website operators).

federal doctrine.<sup>257</sup> Moreover, sperm banks do not receive government subsidies, contracts, or tax-exempt status.<sup>258</sup> Were the government to fund or otherwise support race-attentive means of sperm donor classification, such state sponsorship would enhance a sperm bank's vulnerability to legal challenge under federal or state civil rights statutes. Possible causes of action could arise under U.S. Code § 1981, which prohibits illegitimate discrimination in contractual relationships,<sup>259</sup> 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."<sup>260</sup> 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.<sup>261</sup>

The vice of discriminatory expression at stake in a race-salient approach to donor classification is not so great as to warrant coercive intervention or legal prohibition.<sup>262</sup> A more fitting response would use policy mechanisms by which sperm banks do away with race-attentive means of racial disclosure in favor of race-sensitive means.<sup>263</sup> Any such regulatory proposal should apply only to

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257. While racial discrimination by small employers and landlords is permitted under federal law, *see* 42 U.S.C. § 2000e(b) (2000); *id.* § 3603(b)(1)-(2), discriminatory advertising by private employers and landlords of any size is prohibited, *see id.* §§ 3603(b)(1), 3604(c).

258. *See supra* note 13 and accompanying text.

259. 42 U.S.C. § 1981(a)-(c) (protecting "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship . . . against impairment by nongovernmental discrimination and impairment under color of State law"); *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).

260. Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2007).

261. *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).

262. *See supra* note 227 and accompanying text.

263. Provided that donor insemination services could be classified as "commercial," congressional regulation could likely be exercised under the Commerce Clause. *See* *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress's lawmaking authority under the Commerce Clause does not extend so far from commerce as to authorize the regulation of handguns in schools); *see also* *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that Congress acted within its constitutional power under the Commerce Clause in barring racial discrimination in restaurants as a burden to interstate commerce); *Heart of Atlanta*

gamete providers that categorize donors in race-exclusive or race-attentive ways, and not to those that adopt a race-sensitive or race-blind approach.

Regulation could take at least two forms, neither of which is without its shortcomings. The first proposal is a sin tax on services offered by sperm banks that engage in race-attentive or race-exclusive means of donor disclosure. A sin tax is a selective excise tax levied on goods or services like tobacco, alcohol, and gambling that policymakers consider morally blameworthy or harmful to society.<sup>264</sup> The point of a sin tax on services provided through race-salient practices is to convey disapproval, deter consumption, and repair the moral wrong to which the practice gives rise. A weakness of the sin tax proposal is that it would increase the cost of donor insemination for those least able to afford it. Passing the cost of discriminatory expression back onto users of assisted reproductive technologies could deepen disparities of access rooted in class- and race-based distinctions.<sup>265</sup>

The second proposal is a ban on commercial advertising by offending banks, including ads on billboards, printed media, broadcasting, and online promotion like website ads, hypertext linking, and site aggregation on search engines.<sup>266</sup> The ad ban would aim to keep the racial preferences on which donor selection operates from seeping any further into the public consciousness.<sup>267</sup> California Cryobank does not explicitly encourage parents to find donors of their own race. But a targeted prohibition on race-attentive and race-exclusive marketing would serve to discourage discriminatory expression

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*Motel v. United States*, 379 U.S. 241, 258 (1964) (holding that the Civil Rights Act of 1964 was constitutional because “Congress had a rational basis for finding that racial discrimination . . . affected commerce”); *cf.* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 410 (1968) (holding that Congress can regulate the sale of private property under its Thirteenth Amendment enforcement powers in order to prevent racial discrimination in neighborhood composition).

264. 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.”); David J. DePippo, *I’ll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 545-49 (2002) (discussing the history of sin taxes).

265. See ROBERTS, *supra* note 3, at 252-53.

266. *Cf.* FLA. STAT. § 873.05 (2000) (“No person shall knowingly advertise or offer to purchase or sell, or purchase, sell, or otherwise transfer, any human embryo for valuable consideration.”).

267. See Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 568, 621-22 (2007) (considering limits on commercial advertising for sperm or eggs solicited from donors who possess particular characteristics).

in donor classification. Such an advertising ban would, however, raise considerable First Amendment problems.<sup>268</sup>

## CONCLUSION

When is it permissible to treat members of socially salient groups differently than others? For practices like voting, dating, and procreation, which ask us to choose among people based on desired characteristics, decision-making frameworks sometimes distinguish among people based on racial background under circumstances in which race is a factor that many of us care about. The expressive dimension of wrongful discrimination is not meant to override or replace intent- or effects-based accounts; it seeks instead to complement their explanatory power. In recognizing that race-based classification is not a necessary condition of wrongful discrimination,<sup>269</sup> 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 like autonomy, pluralism, and intimacy inform what it means to credentialize racial preferences whose legitimacy we tend to accept without question. More importantly, practices that facilitate race-based decisionmaking in assisted reproduction invite us to wrestle with questions about what sort of racial self-understandings our multiracial democracy should seek to embody.

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268. The constitutionality of the proposed marketing regulation would turn on whether the statute was “content-based,” see *Texas v. Johnson*, 491 U.S. 397, 414–15 (1989) (holding that flag burning is protected speech under the First Amendment), and on whether the ban was tailored to touch only illegitimate speech. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (invalidating two provisions of the Child Pornography Prevention Act of 1996 for abridging “the freedom to engage in a substantial amount of lawful speech”). The First Amendment does not afford sperm banks the right to advertise unlawful activity. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980); *Ragin v. N.Y. Times, Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (determining the validity of a ban on a discriminatory housing advertisement by reference to the underlying statutory ban in the FHA).

269. See 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”).