

THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES

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**Summary:** *The New Kinship: Constructing Donor-Conceived Families* explores how families are made and bonds are formed between families in light of the advances in the field of reproductive technology. Author Naomi Cahn, an expert on reproductive technology and law, gives an overview of the world shared by parents, children, and gamete donors who turn to assisted reproductive technology to create their own families. The book examines how the law has developed in the field, and advocates that increased regulation is necessary based on numerous social, economic, and legal grounds.

INTRODUCTION

In *The New Kinship: Constructing Donor Conceived Families*, author Naomi Cahn examines how families and relationships form when individuals utilize assisted reproductive technology (“ART”) to conceive and bear children.<sup>2</sup> Cahn proposes that *The New Kinship* serves three purposes: firstly, it explores how emotional connections are created and develop within families who opt to use donor gametes, and documents these evolving relationships; secondly, it offers a legal foundation for promoting the development of these communities, and argues that current law should not be primarily focused on medicine, technology, and commodification, but rather family and constitutional law; thirdly, *The New Kinship* illustrates how donor families

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<sup>2</sup> NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* ix (2013).

simultaneously reinforce and complicate the meaning of family, thereby offering an opportunity to reconsider the meaning of family generally.<sup>3</sup>

In seeking to offer an in-depth look at how “donor families” both support and confuse the social, cultural, economic, and legal meaning of family, Cahn offers a chronological and thematic exploration of the donor world.<sup>4</sup> Consequently, this review will begin by examining the basic meaning of family and outlining the composition of the donor world. The second section of the review will address the questions of “who” searches for donor-based relationships, and “why.” The third section examines the law’s approach to, and relationship with, donor-conceived families. The last section discusses Cahn’s proposals for legal reform in this emerging area of law. The review will conclude by addressing the broader implications and benefits of allowing for the expansive construction and conception of the meaning of family.<sup>5</sup>

#### I. THE MEANING OF FAMILY AND THE TERRAIN OF THE DONOR WORLD

In the first section of *New Kinship*, Cahn provides a brief overview of the donor-gamete world.<sup>6</sup> Cahn argues that because of the stigma attached to infertility and impotency, and the value given to sharing genes with family, it is important to understand who drives the multi-million dollar reproductive technology industry.<sup>7</sup>

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<sup>3</sup> *Id.* at 3.

<sup>4</sup> CAHN, *supra* note 2, at 5.

<sup>5</sup> *Id.* at 5-6.

<sup>6</sup> *Id.* at 14.

<sup>7</sup> *Id.* at 13.

*A. People in the Donor World*

Reproductive technology is for many people—gay, lesbian, single, medically infertile, or partnered with someone medically infertile—the only chance to experience childbirth.<sup>8</sup> Cahn argues that the growth and development of the fertility industry, and an evolving understanding of the family structure, has created a new reproductive culture reflective of a postindustrial economy.<sup>9</sup> Specifically, the postponement of childbearing, and the growing acceptance of non-marital cohabitation and same-sex couples has drastically increased the number of people using ART within the last few decades.<sup>10</sup> Although income has not seemed to affect an individual's initial decision to seek ART services, women with higher sources of income have a greater chance of pursuing more intensive forms of treatment.<sup>11</sup> Furthermore, access to health insurance influences an individual's decision to pursue different treatment options.<sup>12</sup>

Despite the growing acceptance of using ART to conceive, both men and women are significantly more likely to view using donor sperm negatively.<sup>13</sup> Researchers have indicated this widespread perception can be attributed to a number of factors. For instance, one study in 2010 deduced that both men and women believe that using donor sperm will create marital conflict, is more likely to result in social judgment and criticism of parenting skills, and is less likely to result in a satisfying childbearing experience.<sup>14</sup> Other studies have “speculated that ‘while many assume a mother would love a child regardless of genetic relatedness, a father does not generate

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<sup>8</sup> *Id.* at 14.

<sup>9</sup> CAHN, *supra* note 2, at 15.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> CAHN, *supra* note 2, at 17.

similar feelings of selflessness . . . and in patriarchal society where children inherit the father's name, maternal relatedness is less important.”<sup>15</sup>

Thus, gendered social norms and the development of intracytoplasmic sperm injection (ICSI), which has significantly decreased the need to utilize donor sperm, indicate that the use of donor eggs is more socially acceptable.<sup>16</sup> However, donor eggs are typically available only under two circumstances; firstly, when women already undergoing an in vitro fertilization (IVF) cycle agree to provide their eggs to other women in exchange for a reduced IVF fee; secondly, when women outside of a fertility clinic are recruited to donate their eggs.<sup>17</sup> Furthermore, until recently there has been limited access to egg brokers, and the use of donor eggs still necessitates recipients utilize a fertility clinic and a cycle of IVF.<sup>18</sup> Contrastingly, a vile of sperm costs less than \$350, can be shipped from any one of 150 sperm banks throughout the United States, and can be implanted in the comfort of a woman's home.<sup>19</sup> Consequently, the general conclusion in the donor world and society generally is that “egg donors are altruists” while “sperm donors are in it for the money.”<sup>20</sup>

To police this evolving industry, states and self-regulating professional organizations have attempted to control the safety and quality of the donor world.<sup>21</sup> States are, in general, responsible for overseeing health professionals and ART procedures.<sup>22</sup> However, the federal

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<sup>15</sup> *Id.* at 17.

<sup>16</sup> *Id.* at 18.

<sup>17</sup> *Id.* at 21.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> CAHN, *supra* note 2, at 19.

<sup>20</sup> *Id.* at 28.

<sup>21</sup> *Id.* at 23.

government has recently become more involved in monitoring fertility clinic success rates and regulating clinical laboratory services, drugs, and medical devices used in IVF treatments.<sup>23</sup> Specifically, the federal government asserted its interest in regulating the fertility industry market and providing safeguarding against deceptive clinic practices in 1992 when Congress passed the Fertility Clinic Success Rate and Certification Act.<sup>24</sup> Nevertheless, Congress has been extremely deferential to the ART industry.<sup>25</sup> For example, FDA guidelines do not control how ART practices are conducted, but rather regulate the collection, processing, storage, and distribution of human gametes “as the ‘articles’ of ART.”<sup>26</sup> The ART industry has also opposed further regulation, and consistently relied on self-regulation, voluntary and ethical standards, and consumer need to drive the industry forward.<sup>27</sup>

Consequently, in the United States, future parents, donors, medical professionals, and the government share an interest in the multi-billion dollar a year business of producing families.<sup>28</sup> However, these parties often have varying incentives for driving the industry into the future.<sup>29</sup>

### *B. The Meaning of Family in a Changing World*

*The New Kinship* maintains that the goal of participating in the donor world is “to have a child in order to create, complete, or expand one’s family.”<sup>30</sup> Cahn also maintains that the

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<sup>22</sup> *Id.* at 23.

<sup>23</sup> *Id.* at 23.

<sup>24</sup> CAHN, *supra* note 2, at 23.

<sup>25</sup> *Id.* at 24.

<sup>26</sup> *Id.* at 24.

<sup>27</sup> *Id.* at 27.

<sup>28</sup> *Id.* at 27.

<sup>29</sup> CAHN, *supra* note 2, at 30.

government, donors, clinics, and parents-to-be are “stakeholders” in the ART industry’s endeavor to create each individually constructed vision of “family.”<sup>31</sup> However, Cahn also argues that these parties challenge our understanding of that word,<sup>32</sup> and consequently, donor-conceived families and the communities they create illuminate the need to address the modern conception of “family.”<sup>33</sup>

As a preliminary matter, *The New Kinship* identifies two different kinds of “donor families.” The first kind, formed with the assistance of donor gametes, is a “donor-conceived family.”<sup>34</sup> A single parent, or couple, chooses to create a donor-conceived family by using donor eggs, sperm, or embryos to create a child.<sup>35</sup> This method results in a child, but impacts the ways in which partners understand each other, their roles as parents, and their own emotional connection.<sup>36</sup> As a result, using third-party gametes to produce a donor-conceived family produces both parent and child.<sup>37</sup>

The second type, “donor-conceived family communities,” or “donor kin families or networks,” accounts for two different sets of relationships based on genetics.<sup>38</sup> The first relationship is between the donor and any offspring produced, and the second relationship is

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<sup>30</sup> *Id.* at 31.

<sup>31</sup> *Id.* at 30.

<sup>32</sup> *Id.* at 30.

<sup>33</sup> *Id.* at 33.

<sup>34</sup> CAHN, *supra* note 2, at 2.

<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 2.

among *all* of the children created by a particular donor's gametes and their individual families.<sup>39</sup> Donor conceived family communities can potentially include tens or even hundreds of people, who often think of themselves as kin despite the fact that their relationships are based on a parent's unintentional choice to use a common donor.<sup>40</sup>

Thus, donor families fundamentally challenge the societal understanding of family as based on blood and genes.<sup>41</sup> Specifically, ART runs the risk of "undermining the traditional family" because it can give children to single parents, parents of the same sex, and heterosexual couples without sexual intercourse; notions of motherhood and fatherhood are seemingly ambiguous.<sup>42</sup>

However, some social scientists have argued that because ART focuses on the science of reproduction, it actually supports the conventional understanding of family as based on biological bonds.<sup>43</sup> For example, some scientists maintain that the choice to use donor gametes and the search for genetically related family members replicates a family dynamic that would have existed notwithstanding an individual's infertility.<sup>44</sup> Therefore, ART may be traditional in the sense that it relies on the concept of a biological relationship and the creation of a child to form a family.<sup>45</sup>

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<sup>39</sup> CAHN, *supra* note 2, at 2.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 32.

<sup>42</sup> *Id.* at 33.

<sup>43</sup> *Id.* at 33.

<sup>44</sup> CAHN, *supra* note 2, at 33.

<sup>45</sup> *Id.* at 33.

Like the societal understanding of family, the legal interpretation is also conflicted.<sup>46</sup> However, the definition of family within the meaning of the law has historically implicated *status*.<sup>47</sup> For example, a child can inherit from a parent because the law bestows a relational status between them.<sup>48</sup> Historically, relational status has depended on biology or adoption.<sup>49</sup> However, in the more recent past, the law has been willing to evaluate relational status based on a person's functioning as a parent by providing care for a child.<sup>50</sup> The expansion and evolution of the donor world thus exemplifies how a biological relationship is insufficient to confer the legal status the meaning of family otherwise provides.<sup>51</sup>

The unique economic nature and commerciality of the donor world also complicates the question of how donor families affect the meaning of family.<sup>52</sup> Cahn argues that because donors sell their bodily parts to individuals expecting to pay, that commercial transaction actually implies that a family relationship has been created.<sup>53</sup> While some scholars have argued that commercializing the "miracle of the passing on of human life" is unethical, others, like Cahn, have argued that commodifying gametes reinforces and fosters the creation and meaning of family, and also accurately reflects the economic value of work performed.<sup>54</sup> Consequently, *The*

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<sup>46</sup> *Id.* at 33.

<sup>47</sup> *Id.* at 35.

<sup>48</sup> *Id.* at 35.

<sup>49</sup> CAHN, *supra* note 2, at 35.

<sup>50</sup> *Id.* at 35.

<sup>51</sup> *Id.* at 35 (explaining that children conceived after the death of a biological parent with the assistance of ART may not be recognized as the legal child because the law in certain instances treats the gametes of a dead spouse in the same way as those of an anonymous donor).

<sup>52</sup> CAHN, *supra* note 2, at 39.

<sup>53</sup> *Id.* at 39.

<sup>54</sup> *Id.* at 42.

*New Kinship* takes the position that the relevant question must necessarily be what aspect of gamete donation to commodify, and how this impacts the definition of family: “[t]he movement to understand market relationships as more than economically based, as social, helps us, simultaneously, in understanding that social relationships, such as the family, are not just socially based but are economic as well.”<sup>55</sup>

## II. CREATING DONOR-CONCEIVED FAMILIES AND COMMUNITIES

### A. *Creating Families*

When families-to-be enter the donor world, they enter with the primary goal of creating a life. However, most people wish to bear a child that is genetically related to at least one partner, or at a minimum, has “good genes.”<sup>56</sup> Thus, members of the donor world begin to create their own sense of family in a “cultural context where biogenetic relationships are central, almost ‘mystical.’”<sup>57</sup> In other words, genes matter.

To illustrate her argument that genes play a critical role in creating a family, Cahn focuses on the recently publicized controversy over “designer babies.”<sup>58</sup> This ethical microcosm—choosing specific attributes to give to a child—highlights how an emphasis on genes in the donor world has confused the understanding of family. On the one hand, selecting gametes for “brains, brawn, or deafness” raises the serious ethical issues of selective breeding and eugenics.<sup>59</sup> On the other, the decision to use gametes shows that ART services are in fact

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<sup>55</sup> *Id.* at 44 – 45.

<sup>56</sup> *Id.* at 49.

<sup>57</sup> CAHN, *supra* note 2, at 49.

<sup>58</sup> *Id.* at 52.

producing family and kinship, and that the actual process of choosing a donor creates bonds between parents, children, donors, donor-conceived family members, and between families who have used the same donor.<sup>60</sup> Thus, despite the fact that using donor gametes necessitates that a third party become part of the choice to reproduce, careful selection of the gametes can enable parents to minimize the role the donor played in creating their family.<sup>61</sup> This act, in turn, can help parents feel connected to and in control of their reproduction, as well as their child's future, thereby assisting in the creation of a family.<sup>62</sup>

### *B. Creating Communities Across Families*

The perception that genetically related family trumps any other version of family is deeply engrained in American society. For this reason, disclosure of a child's genetic origins remains a highly volatile issue in the donor world; while disclosure can allow children and their legal parents to develop *interfamilial* bonds and provide a foundation for gaining insight into the origins of their family, many parents opt to keep their use of donor gametes a secret for fear of weakening *intrafamilial* bonds.<sup>63</sup>

However, many parents of children conceived with ART do make an informed decision to tell their children how the children were conceived, and studies have illustrated that both parents and children benefit from openly discussing the subject.<sup>64</sup> The results of such disclosure,

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<sup>59</sup> *Id.* at 53.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 54.

<sup>62</sup> CAHN, *supra* note 2, at 54.

<sup>63</sup> *Id.* at 62 (emphasis added).

<sup>64</sup> CAHN, *supra* note 2, at 68 – 69.

moreover, exemplify how donor-conceived family communities expand the societal notion of family, and challenge the structure of the “nuclear heterosexual family.”<sup>65</sup> Without the expectation of finding shared cultural, religious, or social heritage, many donor-conceived children and their parents seek out their donor parent(s) and siblings in order to satisfy their personal curiosities and desire to create a larger family.<sup>66</sup> Furthermore, donors also elect to abandon their anonymity in order to learn what became of their donation, and will sometimes even pursue a relationship with their biological offspring.<sup>67</sup> Nonetheless, while children, parents, and donors may seek out a different type of relationship or choose to form a greater emotional connection with one another, the legal framework that might support the growing web of donor-conceived family communities and their respective networks is minimal at best.<sup>68</sup>

### III. THE LAW AND DONOR FAMILIES

Given that ART and the donor world raises a multitude of legal issues, it is surprising just how little guidance the law provides to members of the developing donor-created kin networks. *The New Kinship* maintains that currently the law minimally regulates donor family relationships, just as it minimally regulates other areas of reproductive technology, and that the absence of a more comprehensive framework is deeply problematic for United States policy.<sup>69</sup>

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<sup>65</sup> *Id.* at 73.

<sup>66</sup> *Id.* at 73.

<sup>67</sup> *Id.* at 86. For instance, Mike Rubino, known as Donor 929 at the California Cryobank, determined to learn what happened to his sperm donation. *Id.* Through the Donor Sibling registry (DSR), Rubino learned Rael McGehee had given birth to two children conceived using his donation. *Id.* The biological parents and their two children thereafter spent time together learning about each other. *Id.*

<sup>68</sup> CAHN, *supra* note 2, at 87.

<sup>69</sup> *Id.* at 92.

While each state has its own unique method of determining who the legal parents of children conceived with ART are, the law relies primarily on contract, marriage, biology, intent, or a “best interests of the child” standard to make that legal determination.<sup>70</sup> Still, perhaps the strongest factor in determining parenthood is based on the historically rooted marital presumption; dating back to the 1700s, the marital presumption dictated that a married man and woman were the parents of a child born into the marriage.<sup>71</sup> Today, the presumption remains entrenched in state law throughout the nation, and applies to both heterosexual and homosexual couples (where homosexual marriage is recognized).<sup>72</sup> The judicial rationale for preserving this presumption, which again reflects the social concept of what it means to have a family, is that states have interests in preserving the “sanctity of marriage” and that a child be raised in a functionally stable home.<sup>73</sup>

However, with the passage of the Uniform Parentage Act (UPA) in 1973, Congress attempted to create a standardized law that would produce consistent parental determinations regardless of a child’s place of birth.<sup>74</sup> The UPA specifically contemplated donor-conceived children, and provided that if a married woman was inseminated, then her husband would become the legal father of any resulting child, so long as the husband gave consent to the insemination, and a licensed physician supervised the procedure.<sup>75</sup> Because the UPA did not

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<sup>70</sup> *Id.* at 92.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 92.

<sup>73</sup> CAHN, *supra* note 2, at 93.

<sup>74</sup> *Id.* at 93.

<sup>75</sup> *Id.*

address a scenario in which an *unmarried* woman might conceive a child with the aid of ART, it could not bar single and lesbian women from entering the donor world on their own.<sup>76</sup>

Today, the UPA, revised in 2002, specifically contemplates the issues that might be raised with technological advances, including artificial insemination using donor gametes and the ability to freeze eggs and sperm.<sup>77</sup> The Act holds that neither an egg nor sperm donor is a child's legal parent if that child is not conceived through sexual intercourse, and states specifically that a male donor is not the father of a resulting child unless he signs a consent to paternity, or else lives with the child throughout the child's first two years of life and "holds out the child as his offspring".<sup>78</sup> While the revision has expanded the original Act to include unmarried couples and egg donors, it still does not account for same-sex couples and newer ART services.<sup>79</sup> A minority of states has adopted and currently follows the UPA.<sup>80</sup> The majority of states terminate the potential parental rights of unknown sperm donors, while only some terminate the rights of anonymous egg donors.<sup>81</sup>

The law on establishing parental rights when an individual or couple utilizes a known donor is in confusion throughout the states. A jurisdiction's individual determination as to the state of parents' and donors' legal rights reflects that jurisdiction's position on whether biology, marriage, or contract law should dictate the outcome of familial identity.<sup>82</sup> Furthermore, many states have not addressed the issues surrounding parenthood by ART for non-married couples,

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<sup>76</sup> *Id.* at 94 (emphasis added).

<sup>77</sup> *Id.* at 94.

<sup>78</sup> CAHN, *supra* note 2, at 94.

<sup>79</sup> *Id.* at 95.

<sup>80</sup> *Id.* at 95.

<sup>81</sup> *Id.* at 95.

<sup>82</sup> *Id.* at 95.

egg donors, physician involvement, and known donors, while the remaining states have created a hodgepodge of case law often decided narrowly and that continues to fluctuate.<sup>83</sup>

Like the law establishing rights as between parents and children, the law determining sibling rights is also confused. In general, existing law does not clearly support rights as between siblings conceived with donor gametes, but a number of attorneys and individuals with a stake in a legal determination on the subject have made creative arguments in support of a basis for establishing siblings' rights.<sup>84</sup> For example, Supreme Court decisions have found a basis for protecting familial relationships, and via a Fourteenth Amendment Due Process Clause argument, sibling associational rights may fit within the jurisprudence.<sup>85</sup> Furthermore, the Supreme Court has found that the First Amendment protects the rights of siblings to remain in contact with each other.<sup>86</sup> Weighing against a sibling's interest and right to association is of course the parental desire and wish to prevent such communication.<sup>87</sup> Scholars and attorneys have made a number of policy arguments reasoning that the social importance of fostering sibling relationships necessitates ensuring sibling relationships remain intact.<sup>88</sup>

In conclusion, the disarray of law in this field indicates that state law supporting the development of new relationships between individuals who are genetically related through a common donor will likely not be strictly applied. *The New Kinship* maintains that this is the appropriate direction for the legal precedent to land; the law should "focus on the meaning of

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<sup>83</sup> CAHN, *supra* note 2, at 95.

<sup>84</sup> *Id.* at 103.

<sup>85</sup> *Id.* at 104.

<sup>86</sup> *Id.* at 104.

<sup>87</sup> *Id.* at 104.

<sup>88</sup> CAHN, *supra* note 2, at 104.

family, not the technology and medicine that create the family members” because “recognizing connections among donor-conceived kin is as much about the meaning of family as it is about how to regulate families.”<sup>89</sup>

#### IV. TO REGULATE OR NOT?

In contemplating the future of regulation for ART, Cahn argues that existing legal constructs should be expanded to recognize the importance of developing a framework that emphasizes family and personhood in the donor world.<sup>90</sup> Generally, Cahn cites identity issues and the complexity of the law as factors weighing in favor of regulation.<sup>91</sup> Furthermore, Cahn maintains that regulation is critical at two specific points.<sup>92</sup> Firstly, the law should elucidate the legal relationships among offspring, recipients, and donors.<sup>93</sup> Secondly, the law should foster connections between donor-conceived families sharing genes.<sup>94</sup> At its most fundamental level, Cahn writes, the ART industry is about creating families, and thus the industry framework needs to be reconsidered so that it is subject to laws that regulate people, and not things.<sup>95</sup>

Consequently, *The New Kinship* takes the position that a few distinct measures are necessary to ensure a workable legal model protects and regulates the donor world. Specifically, Cahn argues that states need to recognize written agreements between donors, recipients, and

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<sup>89</sup> *Id.* at 105.

<sup>90</sup> *Id.* at 125.

<sup>91</sup> *Id.* at 129-31.

<sup>92</sup> *Id.* at 135.

<sup>93</sup> CAHN, *supra* note 2, at 135.

<sup>94</sup> *Id.* at 135.

<sup>95</sup> *Id.* at 136.

other families.<sup>96</sup> Furthermore, donor gametes should be subject to increased medical testing and scrutiny, with Legislatures requiring improved record keeping, more extensive counseling and disclosure to parents and donors, and limiting the number of children that may be born from a particular donor's gametes.<sup>97</sup>

Cahn does acknowledge that scholars and attorneys alike have propounded arguments against regulating the donor world and ART community.<sup>98</sup> However, to accept the arguments against regulating the industry, she maintains, would fail to recognize that the donor world consists of many different types of families, but families nonetheless.<sup>99</sup>

#### CONCLUSION

Much of the donor world remains uncharted.<sup>100</sup> *The New Kinship* proposes a paradigm shift toward regulating donor-conceived families and the communities they create so that they can more properly be understood as relational entities.<sup>101</sup> Cahn argues that while law currently exists that may be used as a background to develop these families, a new model is necessary in order to provide structure in the face of the challenges implicated by these expanding communities.<sup>102</sup> Although *The New Kinship* does not propound that donor family communities

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<sup>96</sup> *Id.* at 150.

<sup>97</sup> *Id.* at 151.

<sup>98</sup> *See CAHN, supra* note 2, at 151.

<sup>99</sup> *See id.* at 162.

<sup>100</sup> *Id.* at 181.

<sup>101</sup> *Id.* at 181.

<sup>102</sup> *Id.* at 182.

need special treatment, Cahn concludes that only when a new model is produced as a result of such a paradigm shift can the diversity and pluralism of family forms be fully appreciated.<sup>103</sup>

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<sup>103</sup> CAHN, *supra* note 2, at 182.