

10-1-2015

## Identity, Law, and the Right to a Dream?

Robert Leckey  
*McGill University*

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Family Law Commons](#)

---

### Recommended Citation

Robert Leckey, "Identity, Law, and the Right to a Dream?" (2015) 38:2 Dal LJ 525.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

---

*This paper engages critically with the new orthodoxy holding that individuals have a "right" to know their genetic origins and that such knowledge is crucial to realizing their identities. It examines two case studies: the Pratten litigation under the Canadian Charter of Rights and Freedoms regarding anonymous donor conception and scholarship approving a reform to Quebec's adoption law. It addresses the supposed "identity gap" between those who are adopted or donor-conceived and those who are neither. Arguments for law reform exaggerate that gap, opposing the incomplete, insecure identity of the adopted or donor-conceived to the ostensibly complete, secure identity of those raised by their putatively genetic parents. A result is to overstate what is distinct and harmful about being adopted or donor-conceived. The paper also identifies a mistaken perception of law's role in fashioning identity and recognizing family ties, including what law does for those who are not adopted or donor-conceived and what it might do for those who are. Some claims for law reform in the service of identity expect more from law than it can or should provide.*

*Ce texte répond à la nouvelle orthodoxie selon laquelle l'individu détient un « droit » de connaître ses origines et selon laquelle cette connaissance est essentielle à la réalisation de l'identité individuelle. Il étudie le cas de la réclamation menée par Olivia Pratten sous la Charte canadienne des droits et libertés, à l'égard du don anonyme de gamètes, ainsi que la recherche scientifique à l'appui d'une réforme au régime québécois d'adoption. Le texte examine le supposé « écart identitaire » entre ceux qui sont adoptés ou conçus par don génétique anonyme et ceux qui ne le sont pas. Les arguments pour des réformes du droit exagèrent cet écart. Notamment, ils opposent l'identité incomplète et précaire des adoptés et de ceux qui sont conçus par moyen de don génétique anonyme à celle, en apparence complète et solide, de ceux qui sont censés être élevés par leurs parents génétiques. Le texte suggère que cette conception du préjudice propre aux adoptés et à ceux qui sont conçus par don génétique anonyme se retrouve exagérée par conséquent. Par ailleurs, les discours favorables à une réforme du droit véhiculent une perception erronée du rôle du droit quant à la construction identitaire et à la reconnaissance des rapports familiaux. Cette erreur s'applique tant à ce que fait le droit pour ceux qui ne sont ni adoptés ni conçus par dons génétiques qu'à ce qu'il pourrait faire pour ceux qui le sont. Motivées par le souci identitaire, certaines réclamations laissent transparaître des attentes du droit qui excèdent sa capacité ainsi que son rôle légitime.*

---

\* Associate Professor and William Dawson Scholar, Faculty of Law, and Director, Paul-André Crépeau Centre for Private and Comparative Law, McGill University. This research was supported by the Social Sciences and Humanities Research Council. I acknowledge Fraser Harland's valuable research assistance as well as helpful conversations with students in my Family Law classes. For comments on earlier drafts, I am indebted to Ben Berger, Lori Chambers, Fraser Harland, Abby Lippman, Alexandra Popovici, David Sandomierski, Thomas Touchie, and the journal's anonymous reviewers. I also benefited from the comments of participants in the workshop *Who Are We? The Quest for Identity in Law* at the Schulich School of Law, Dalhousie University; at a Faculty Seminar and a lunchtime presentation for *Outlaw*, both at the Faculty of Law, McGill University; and at *Adoption Matters: An Interdisciplinary Workshop*, Birkbeck Gender and Sexuality (BiGS) with the Raphael Samuel History Centre at Birkbeck, University of London.

*Introduction*

- I. *Case selection*
- II. *Gamete donation and “origins”*
- III. *Preserving adoptees’ original family ties*
- IV. *Identity as complex process, for everyone*
- V. *The limits of law*

*Conclusion*

*Introduction*

The notions that individuals have a right to know their genetic origins and that such knowledge is crucial to realizing their identities have become widespread. In numerous jurisdictions, they infuse legal and policy discourse. They also drive reforms to legislation and to clinical practice regarding assisted reproduction and adoption. Indeed, they constitute a new orthodoxy. Exemplifying “the glorification of genetic connections in contemporary Western societies,”<sup>1</sup> they represent a “‘geneticisation’ of the popular imagination, such that now genes are increasingly believed to be of overwhelming significance in every aspect of life.”<sup>2</sup>

Complementary to cautions that recognizing such a right may bear disproportionately on particular kinds of families, such as ones headed by single women or same-sex couples,<sup>3</sup> this paper engages critically with this new orthodoxy by addressing two intertwined issues. One is the supposed “identity gap” between those who are adopted or donor-conceived and

---

1. Tabitha Freeman, “Introduction” in Tabitha Freeman et al, eds, *Relatedness in Assisted Reproduction: Families, Origins and Identities* (Cambridge: Cambridge University Press, 2014) [Freeman et al, *Relatedness in Assisted Reproduction*] 1 at 8; see also Abby Lippman, “Worrying—and Worrying about—the Geneticization of Reproduction and Health” in Gwynne Basen, Margrit Eichler & Abby Lippman, eds, *Misconceptions: The Social Construction of Choice and the New Reproductive and Genetic Technologies* (Hull, QC: Voyageur Publishing, 1993) 39; Dorothy Nelkin & M Susan Lindee, *The DNA Mystique: The Gene as a Cultural Icon* (Ann Arbor, MI: University of Michigan Press, 2004).

2. Petra Nordqvist & Carol Smart, *Relative Strangers: Family Life, Genes and Donor Conception* (Houndmills, UK: Palgrave Macmillan, 2014) at 4.

3. See e.g. Angela Cameron, Vanessa Gruben & Fiona Kelly, “De-Anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26:1 Can J Fam L 95 at 116-130; Angela Cameron, “A Chip off the Old (Ice) Block? Women-Led Families, Sperm Donors, and Family Law” in Jennifer M Kilty, ed, *Within the Confines: Women and the Law in Canada* (Toronto: Women’s Press, 2014) 246.

those who are neither.<sup>4</sup> Arguments for law reform exaggerate the gap between those groups. Often implicitly, they oppose the incomplete, insecure identity of adopted or donor-conceived individuals to the ostensibly complete, secure identity of those raised by their putatively genetic parents. The effect can be to construct a flattened, misleading image of the identity formation of those who are not adopted or donor-conceived. In the process, such arguments exaggerate what is distinct, and harmful, about being adopted or donor-conceived. The second issue is a mistaken perception of law's role in fashioning identity and recognizing family ties, including what it does for those who are not adopted or donor-conceived and what it might do for those who are. For instance, some calls for law reform overstate the degree to which legal family statuses align with lived experience.

This paper grounds its analysis in a close reading of two case studies, each relating to a Canadian effort to change the law in the service of identity.<sup>5</sup> One is the first-instance judgment resulting from Olivia Pratten's attempt, via litigation under the *Canadian Charter of Rights and Freedoms*,<sup>6</sup> to force the Province of British Columbia to take measures to collect, preserve, and disclose information for individuals conceived using anonymously donated gametes.<sup>7</sup> The other consists of scholarship supporting an amendment to Quebec's adoption regime that would permit legal bonds between the birth family and the child to survive the latter's adoption. Using these case studies, this paper does not directly dispute the idea of a "right to know one's origins." It neither doubts the sincerity of some individuals' avowed longings to know,<sup>8</sup> nor opposes particular policy proposals. Rather, it focuses on the arguments advanced in support of proposals, drawing out problematic and erroneous assumptions about identity, law, and the connection between them.

It is worth anticipating skepticism or impatience on the part of readers for whom it is axiomatic that information about an individual's genetic origins simply is "his" or "hers." On that view, it matters little whether

4. Freeman, *supra* note 1 at 15, notes "the limitations and inadequacies" of current language in this domain, including the awkward term *donor*.

5. On discourse analysis in this context, see Marie-France Bureau, *Le droit de la filiation entre ciel et terre: étude du discours juridique québécois* (Cowansville, QC: Yvon Blais, 2009) at 4.

6. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

7. *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656, [2011] 10 WWR 712 [Pratten], rev'd, 2012 BCCA 480, 357 DLR (4th) 660, leave to appeal to SCC refused, [2013] 2 SCR xii.

8. Rhonda E Harris & Laura Shanner, "Seeking Answers in the Ether: Longing to Know One's Origins Is Evident from Donor Conception Websites" in Juliet R Guichon, Ian Mitchell & Michelle Giroux, eds, *The Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: ASP, 2012) 57.

some arguments advanced to that end are less persuasive or accurate than others. This paper's premise is that arguments, such as those studied below, have important effects. They enter a discourse that affects policymakers and legislative drafters; inform judges' understanding of children's best interests; code some family formations as better than others, sustaining the legitimacy of the "bionormative" family;<sup>9</sup> and shape decision-making about reproduction, such as whether to use sperm from an anonymous or a known donor.<sup>10</sup> A misunderstanding of family law's role in securing identity may engender unrealistic expectations on the part of adoptees or donor-conceived individuals advocating for reform, although such a concern may appear paternalistic. More broadly, unfounded arguments in this area may intensify the harm experienced by people who do not know their genetic relatives.<sup>11</sup>

Part I explains the case selection. Part II examines the evidence in *Pratten*, including shifting meanings of "origins" and expectations of the genetic donor beyond information. Part III reads the scholarly calls for reforming Quebec's adoption law, which criticize open adoption for failing to meet adoptees' identity needs. Part IV criticizes the case studies' implication that it is possible to "complete" one's personal identity, arguing that they naturalize the identity of those not adopted or conceived by donated gametes. They exaggerate the role of "truth" and downplay the role of fiction or fable in all identity construction. Pressing further, Part V underscores a misleading account of what family law does for individuals raised by their genetic parents and what it might do for others. Overall, this paper is a reminder of the potential for comparative reasoning to misapprehend that which it takes as the norm and, indeed, to reshape it. This paper also underlines the limits of law as a response to the diverse forms of human relatedness.

### I. Case selection

Both the *Pratten* judgment and the scholarship advocating reform to Quebec's adoption law present contentions that individuals' identity-related needs justify legal changes. Both date from the past half-decade.

9. Charlotte Witt, "A Critique of the Bionormative Concept of the Family" in Françoise Baylis & Carolyn McLeod, eds, *Family-Making: Contemporary Ethical Challenges* (Oxford: Oxford University Press, 2014) 49.

10. Marie-France Bureau, "La naissance du droit aux origines" in Louise Lalonde & Stéphane Bernatchez, with the collaboration of Georges Azzaria, *La norme juridique "reformatée". Perspectives québécoises des notions de force normative et de sources revisitées* (Sherbrooke, QC: Éditions Revue de droit de l'Université de Sherbrooke, 2016) 357 at 359.

11. Kimberly Leighton, "Geneticizing the Desire to Know: Analogies to Adoption in Arguments against Anonymous Gamete Donation" in Baylis & McLeod, *supra* note 9, 239 at 242 [Leighton, "Geneticizing the Desire to Know"].

While a full demonstration would require work using other sources, this paper proceeds on the hypothesis that its case studies densely encapsulate a prominent, if partial, view of the significance of genetic relatedness.

This case selection is unusual, insofar as legal scholars often emphasize “successes”: litigation that reaches a jurisdiction’s apex court or reform efforts that produce legislative change. From that angle, the present case studies are “failures.” Pratten won at trial, only to lose on appeal, and the Supreme Court of Canada refused leave to appeal; despite efforts in Quebec, the adoption law remains unchanged. Still, there are reasons to study the “failures, the trash.”<sup>12</sup> Failure may inspire “creative, innovative ways to address problems.”<sup>13</sup> In any event, labelling this paper’s examples “failures” should not imply that their ideas have foundered. To the contrary, their ideas have achieved substantial uptake.

Two differences between the case studies establish the interest in combining them. The first is that their authors—of different backgrounds, education levels, and institutional locations—wrote them for different purposes and that they operate at different levels of generality. Scholars working on adoption had presumably reflected on law’s role in relation to identity. In contrast, the affidavits excerpted in the *Pratten* judgment emerged in the course of litigation. While they purport to represent the “experience” of particular donor-conceived individuals,<sup>14</sup> they likely do not transmit unmediated, “authentic” voices.<sup>15</sup> For example, it is impossible to know whether the donor-conceived individuals in *Pratten* believed themselves to be situated similarly to adoptees, or whether such views result from the frame of the constitutional guarantee of equality (although the analogy surfaces outside litigation contexts). Relative to scholarly work on adoption, the testimony in *Pratten* may be less informed and explicit about what law can and should do. Since Pratten’s lawyer submitted those affidavits in litigation, however, they register a

12. Robert Leckey, “Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights” (2009) 40:2 *Colum HRLR* at 474 [footnote omitted].

13. Adrian Little, “Political Action, Error and Failure: The Epistemological Limits of Complexity” (2012) 60:1 *Political Studies* 3 at 17; see also Judith Halberstam, *The Queer Art of Failure* (Durham, NC: Duke University Press, 2011) at 24 (failure opening onto “alternative ways of knowing and being”).

14. Joan W Scott, “The Evidence of Experience” in Henry Abelove, Michèle Aina Barale & David M Halperin, eds, *The Lesbian and Gay Studies Reader* (New York: Routledge, 1993) 397.

15. See, e.g., Austin Sarat & Stuart A Scheingold, eds, *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (Stanford, CA: Stanford University Press, 2005); compare an effort to document “the voices and experiences of children themselves”: Lucy Blake et al, “Families Created by Assisted Reproduction: Children’s Perspectives” in Freeman et al, *Relatedness in Assisted Reproduction*, *supra* note 1, 251 at 251.

seasoned advocate's strategic assessment that arguments foregrounding the importance of genetic connection stood the best chance of success.

The second apparent difference concerns the role envisaged for law. In *Pratten*, law's potential role is to collect, preserve, and distribute information about genetic origins. In the adoption scholarship, law's potential role is to name the connection between an adoptee and his or her birth family. Reading the case studies together occasions reflection on the extent to which law carries out those roles for other groups and to which they are distinct.

## II. Gamete donation and "origins"

Careful reading of the testimony incorporated into the first-instance judgment in *Pratten* shows the averred right to access information about genetic origins to have bundled several interests. Distinguishing these interests is important. While subsuming interests under a claim of right suggests that they are all preemptory, they rest on ethical and legal bases of varying persuasiveness. In addition, different measures would vindicate the respective interests.<sup>16</sup>

Pratten contended that the guarantee of the right to liberty and security of the person, in section 7 of the *Charter*, includes a freestanding right to know one's origins and genetic heritage. She also alleged that it was discriminatorily under-inclusive, contrary to the equality guarantee in subsection 15(1), for British Columbia to have legislated for the identity needs of adoptive children without addressing the needs of donor-conceived individuals.<sup>17</sup>

The litigation's procedural path made the judgment a rich, relatively unfiltered repository of a certain viewpoint on the part of donor-conceived individuals. Pratten sought summary judgment—a determination of the legal questions on the assumption that the submitted evidence was true—rather than a trial during which her opponent could test her evidence by cross-examination. The attorney general of British Columbia acceded.<sup>18</sup> To that end, the parties filed approximately 50 affidavits, including, on Pratten's side, testimony from other donor-conceived individuals and from experts. Neither party requested or conducted cross-examination on

16. Eric Blyth & Lucy Frith, "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23:2 Intl JL Pol'y & Fam 174.

17. *Pratten*, *supra* note 7 at paras 6, 7.

18. This choice may surprise, since many *Charter* cases turn on the evidence. It may reflect confidence that the legal claims were weak, a sense that the government would look unsympathetic if it contested the personal testimonies of Pratten and others like her, or resource constraints.

the affidavits.<sup>19</sup> The attorney general did not challenge Pratten's evidence purportedly showing the "importance of knowing identifying and non-identifying information about one's origins...and hardships caused by donor anonymity."<sup>20</sup> Nor did the attorney general dispute her assertion that adoptees and donor-conceived individuals have the same or similar psychological and medical needs to obtain information about their biological origins.<sup>21</sup> Whatever the reasons, the attorney general of British Columbia did not even contest evidence presented in a "deliberately dramatic" fashion.<sup>22</sup> In a trial testing the evidence, the equivalence of adoptees and donor-conceived individuals would have drawn dispute. One distinction is that donor-conceived individuals were never relinquished by their birth parents and are raised by the parents who planned their conception.<sup>23</sup> The judgment's tacit concession that donor-conceived individuals suffer "genealogical bewilderment" would also have attracted challenge.<sup>24</sup>

While enumerations vary, it is plain that the supposed "right to know one's genetic origins" represents a number of concerns. Vardit Ravitsky, a bioethicist, distinguishes four aspects,<sup>25</sup> all present in *Pratten*. The first is the *medical* aspect, represented in the desire to have a detailed medical history.<sup>26</sup> The second is the *identity* aspect, concerning narrative information about the donor as a person. Pratten's claim foregrounded this desire for "knowing about" anonymous donors via identifying and non-identifying information, such as clinics might collect when someone provides gametes.<sup>27</sup> The donor's identity in this sense can be "discovered" or "confirmed."<sup>28</sup>

19. *Pratten*, *supra* note 7 at paras 25, 26, 30.

20. *Ibid* at para 34.

21. *Ibid*.

22. Lori Chambers & Heather Hillsburg, "Desperately Seeking Daddy: A Critique of *Pratten v British Columbia (Attorney General)*" (2013) 28:2 CILS 229 at 236.

23. Leighton, "Geneticizing the Desire to Know," *supra* note 11; see also Vanessa Gruben & Daphne Gilbert, "Donor Unknown: Assessing the Section 15 Rights of Donor-Conceived Offspring" (2011) 27:2 Can J Fam L 247 at 261-264.

24. *Pratten*, *supra* note 7 at paras 94, 95. See e.g. Kimberly Leighton, "Addressing the Harms of Not Knowing One's Heredity: Lessons from Genealogical Bewilderment" (2012) 3 Adoption & Culture 63.

25. Vardit Ravitsky, "'Knowing Where You Come From': The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness" (2010) 11:2 Minn JL Sci & Tech 665 at 668; on the social interests clustered as relating to genetics, see further Shane K Green, "Openness in Gamete Donation: It's Not about Genetics" [unpublished manuscript, on file with author].

26. *Pratten*, *supra* note 7 at paras 1, 19, 20, 42 (Olivia Pratten); see also at paras 49, 50 (Shelley Deacon), 54 (Damian Adams), 56 (Victoria Reilly), 62 (Barry Stevens), 66, 67 (Kathleen LaBounty), 72 (John Hunter), 83, 88 (Dr. Lauzon), 92 (Dr. Ehrensaft).

27. *Ibid* at para 19.

28. *Ibid* at para 59.



The third is the *relational* aspect, which involves the donor's full identity, for making contact and attempting to establish a relationship. At times, the desire for information functions as shorthand for the relational aspect and a desire for "relating to" the gamete provider.<sup>29</sup> For example, John Hunter had obtained information about his donor, including his hair and eye colour, age range, height, weight, a briefly stated health history, and that, at the time, he was a student at the University of Western Ontario. That Hunter wished, additionally, to know the donor's "ethnicity, interests [and] occupation" suggests that he meant current occupation, a biography updated across decades rather than a more detailed snapshot of the donor when he contributed gametes.<sup>30</sup> Kathleen LaBounty wanted to know what her donor "looked like, was he married, did he have other children?" she wondered "whether he was curious about her."<sup>31</sup> To satisfy such curiosity, one would need to reach beyond accessing the information sealed in a treating physician's records. The individual would need to have a relationship with the donor, one including storytelling and the revelation of thoughts and feelings. The identity and relational aspects of the right to know thus intertwine, in an "elision of the right to know the parent's identity, with the right to know and have a relationship with that parent."<sup>32</sup>

Pressing the relational aspect further, some donor-conceived individuals want information regarding their donor's "motivation in providing gametes."<sup>33</sup> One expert, Professor Ken Daniels, reported that donor-conceived individuals "want to believe that their donor acted altruistically," rather than for money.<sup>34</sup> Under cover of a desire for information, this wish is not merely for transparency and disclosure, but for a particular motivation to have operated decades ago.

The fourth is the *parental disclosure* aspect, the truth about the circumstances of one's conception. At times, "origins" refers to this aspect, making "origins" the fact of conception using donated gametes.<sup>35</sup> Thus, although having no information identifying the donor, Pratten's mother wrestled with whether or not to tell her daughter "the truth about her origins."<sup>36</sup>

29. For "knowing about" and "relating to," see Carol Smart, "Law and the Regulation of Family Secrets" (2010) 24:3 Intl JL Pol'y & Fam 397 at 405.

30. *Pratten*, *supra* note 7 at para 71.

31. *Ibid* at para 64.

32. Jane Fortin, "Children's Right to Know Their Origins—Too Far, Too Fast?" (2009) 21:3 Child & Family LQ 336 at 354.

33. *Pratten*, *supra* note 7 at para 109.

34. *Ibid*.

35. Ravitsky, *supra* note 25 at 668.

36. *Pratten*, *supra* note 7 at para 38; see also at paras 70, 95.

In addition to Ravitsky's four aspects of the right to know one's origins, the judgment in *Pratten* reveals two others. "Origins" sometimes refers, *genealogically*, to "a socially constructed bond between people linked as a family," rather than to bare "genetic linkages."<sup>37</sup> It does so where Damian Adams, aware that his parents underwent fertility treatment because his legal and social father, a paraplegic with kidney failure, was unable to produce sperm, has nevertheless "*no information about his origins*: that grounding that nearly everyone else has, a heritage and a connection with the past."<sup>38</sup> In effect, the "grounding" Adams desires would be genealogical information about the socially constructed group to which he is linked by donated gametes. The approach by which Adams has "no information about his origins" exiles, from those "origins," any knowledge of the father who raised him. It also effects an "erasure"<sup>39</sup> of the birth mother out of whose egg he grew and who carried him in her womb.

The genealogical aspect is further present where unanswerable questions about Pratten's "biological origins" touch on physical resemblance and personal mannerisms.<sup>40</sup> Since family resemblances "exist only as part of a family mythology and hence are social,"<sup>41</sup> a full attempt to answer such questions might require storytelling by grandparents and other members of the gamete provider's entourage. Justice Adair echoes the desire for information's genealogical aspect by switching from the language of "genetic information" regarding a donor-conceived individual to the rhetorically loaded "truth of her biological heritage."<sup>42</sup>

The sixth, *consanguineous* aspect targets identifying information about half-siblings and others genetically related. It appears in the wish to avoid unwittingly committing incest through sex with a genetic relation.<sup>43</sup>

37. Iain Walker, Pia Broderick & Helen Correia, "Conceptions and Misconceptions: Social Representations of Medically Assisted Reproduction" in Gail Moloney & Iain Walker, eds, *Social Representations and Identity: Content, Process, and Power* (New York: Palgrave Macmillan, 2007) 157 at 161.

38. *Pratten*, *supra* note 7 at para 54 [emphasis added]; see also at paras 34, 100.

39. Wanda Wiegers, "Gender, Biology, and Third Party Custody Disputes" (2009) 47:1 *Alta L Rev* 1 at 12.

40. *Pratten*, *supra* note 7 at para 41.

41. Charlotte Witt, "Family Resemblances: Adoption, Personal Identity, and Genetic Essentialism" in Sally Haslanger & Charlotte Witt, eds, *Adoption Matters: Philosophical and Feminist Essays* (Ithaca, NY: Cornell University Press, 2005) 135 at 141.

42. *Pratten*, *supra* note 7 at para 52.

43. *Ibid* at paras 1, 20, 49, 50, 72, 86, 94, 111.

This aspect also underlies the desire of some donor-conceived individuals to develop (non-sexual) relationships with half-siblings.<sup>44</sup>

Despite the judgment's dominant framing of the *Pratten* claim as a quest for genetic information, the identity, relational, and genealogical aspects—which are social, not merely genetic—are salient in the testimony. Elements in *Pratten* offer credence to a scholar's judgment that genetic identity is “a meaningless concept,” since it “does not describe what is missing if a donor's name is not known”; it is not “DNA alphabet soup” that “donor offspring are perceived to lack.”<sup>45</sup> Instead, donor offspring may want to know “information about the means of conception and the other people involved and their actions and motives,” which has “nothing to do with genetics at all.”<sup>46</sup> Similarly, curiosity and desire for information cast “in terms of the child not knowing his or her genetic origins” often bears more on “notions of the donor as a person.”<sup>47</sup> It is time to examine the second set of texts, regarding adoption.

### III. *Preserving adoptees' original family ties*

A brief overview of adoption law lays the groundwork for Quebec's proposal that legal bonds with the birth family might survive a child's adoption. Although the legislature has failed to enact the proposal, several researchers supported it strongly, underscoring the limits of open adoption and the virtues of using law to recognize the child's genetic connections. The scholarship reveals a conviction in the frailty, unreliability, or inadequacy of social ties unconsecrated by a legal bond.

The “full” model of adoption terminates the legal bonds between a child and his or her birth family and creates bonds with the adoptive family. When adoption is “closed,” confidentiality preserves the secret of the legal transfer of a child from one family to another. In departure from the closed model, “open adoption” is increasingly prevalent in North American common-law jurisdictions. This term includes points “on a spectrum...from the simple transmission of anonymous information...

44. *Ibid* at paras 67 (Kathleen LaBounty), 72 (John Hunter). See also at para 60 (Barry Stevens, having identified 13 half-siblings, “delighted to have this new family” and finding “a greater sense of membership and belonging” via “participat[ing] in an extended family”). See, e.g., Naomi Cahn, “The New Kinship” (2012) 100:2 *Geo LJ* 367.

45. Martin Richards, “A British History of Collaborative Reproduction and the Rise of the Genetic Connection” in Freeman et al, *Relatedness in Assisted Reproduction*, *supra* note 1, 21 at 37.

46. *Ibid* at 38 [reference omitted]; see also Geneviève Delaisi de Parseval, “Comment entendre les demandes de levée du secret des origines?” [2009] 5 *Esprit* 165 at 175 (“right to origins” less apt than “right to a history”).

47. Susanna Graham, “Stories of an Absent ‘Father’: Single Women Negotiating Relatedness through Donor Profiles” in Freeman et al, *Relatedness in Assisted Reproduction*, *supra* note 1, 212 at 228.

to the organization of effective personal relations.”<sup>48</sup> Laws in several common-law provinces foresee the formation of an “openness agreement” or the issuance of an “openness order.”<sup>49</sup>

Under Quebec civil law’s regimes of filiation,<sup>50</sup> the sole model of adoption is full and closed. However, this traditional model is cracking under pressure from changing attitudes towards extramarital births; the adoption of older children from the youth protection system; and the international adoption of children who look genetically unrelated to their adoptive parents. In 2007, a working group issued its report.<sup>51</sup> In 2009, the Liberal government prepared a draft bill.<sup>52</sup> In 2012, the Liberal government introduced Bill 81.<sup>53</sup> In 2013, the Parti Québécois government introduced Bill 47.<sup>54</sup> Despite these efforts, Quebec’s reforms have stalled.

The 2009 draft bill and Bill 81 proposed a measure inspired by French law more than by the experience of common-law provinces and American states. In France, “simple adoption” creates a new family bond. By opposition to “full adoption,” however, simple adoption does not cut the ties between the adoptee and his family of origin. The adoptee maintains his “family rights” regarding successions and the reciprocal support obligation vis-à-vis the birth family subsists.<sup>55</sup> In Quebec, the draft bill and Bill 81 would have allowed a domestic adoption that, akin to simple adoption, preserved the prior filiation. On the proposal, judges could depart from full adoption where doing so, “to protect a meaningful identification of the child with the original parent,” would be in the child’s best interests.<sup>56</sup> Although maintaining a legal bond, like French simple adoption, the

48. Dominique Goubau, “Open adoption au Canada” in Agnès Fine & Claire Neirinck, eds, *Parents de sang, parents adoptifs: Approches juridiques et anthropologiques de l’adoption: France, Europe, USA, Canada* (Paris: LGDJ, 2000) 63 at 65 [author’s translation].

49. See e.g. *Adoption Act*, RSBC 1996, c 5, ss 59, 60; *Child and Family Services Act*, RSO 1990, c C11, ss 145.1, 153.1, 153.6.

50. Quebec civil law theorizes parentage differently than the common law, through the institution of filiation. Filiation is the legal bond connecting a child to his mother or father. Its effects include the reciprocal duty of support, the mother’s or father’s parental authority respecting the child, and succession rights in the event of intestacy. Robert Leckey, “‘Where the Parents Are of the Same Sex’: Quebec’s Reforms to Filiation” (2009) 23:1 *Intl JL Pol’y & Fam* 62 at 63-64.

51. Groupe de travail sur le régime québécois de l’adoption, *Pour une adoption québécoise à la mesure de chaque enfant* (Québec, QC: Ministère de la justice, 2007) (chair: Carmen Lavallée).

52. Draft Bill, *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, 1st Sess, 39th Leg, Quebec, 2009.

53. Bill 81, *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, 2nd Sess, 39th Leg, Quebec, 2012 (first reading 13 June 2012).

54. Bill 47, *An Act to amend the Civil Code and other legislative provisions as regards adoption, parental authority and disclosure of information*, 1st Sess, 40th Leg, Quebec, 2013 (first reading 14 June 2013).

55. Gérard Cornu, *Droit civil: la famille*, 9th ed (Paris: Montchrestien, 2006) at 450, para 293.

56. Bill 81, *supra* note 53, cl 23.

model that Bill 81 would have introduced would extinguish all effects of that original filiation, including parental authority and all reciprocal rights and obligations between parent and child.<sup>57</sup> It would not imply contact between the child and birth parents.<sup>58</sup> The legal bond's survival would crystallize in the mention of the first, abiding filiation on the post-adoption birth certificate.<sup>59</sup> This proposal's symbolic use of a status of the civil law, with no foreseeable legal effects, is exceptional.<sup>60</sup> The enduring filial status would allow the adoptee to say to the birth parents, with the law's imprimatur, "You are still my mother" or "You are still my father." The proposal would derogate from the prevailing understanding by which Quebec law recognizes at most two parents.<sup>61</sup>

The proposal for an adoption maintaining a prior filiation had roots in persistent scholarly advocacy. That advocacy included criticisms of Quebec's full adoption as anachronistic, "conceived by a mode of rupture rather than by one of continuity."<sup>62</sup> For the critics, open adoption, in which information is no longer secret or inaccessible to the concerned parties, problematically fails to call into question full adoption's "breaking of ties," since it "always creates an exclusive bond between the child and his new parents."<sup>63</sup> These criticisms thus led to prescriptions for a form of adoption that would preserve the original filiation.<sup>64</sup> Maintaining the original filiation, scholars say, would make it possible to give back to

57. The draft bill would have retained a residual support obligation on the birth parent's part: Robert Leckey, "Le passé de l'adopté aux frontières du droit" in Institut canadien d'études juridiques supérieures, ed, *Droits de la personne: La circulation des idées, des personnes et des biens et capitaux* (Cowansville, QC: Yvon Blais, 2013) 487 at 498.

58. Bill 81, *supra* note 53, cl 51, which would have amended art 579 CCQ.

59. *Ibid*, cl 6.

60. Compare, on the changing reasons underlying the allocation of parental responsibility in England and Wales—including a move towards parental responsibility as a pure status without content—Helen Reece, "The Degradation of Parental Responsibility" in Rebecca Probert, Stephen Gilmore & Jonathan Herring, eds, *Responsible Parents and Parental Responsibility* (Oxford: Hart, 2009) 85 at 102.

61. Commentators detect this limit in the requirement that, where a child has two parents, an individual seeking to establish his or her filiation towards that child must also contest an existing filiation. Arts 532, para 2, 539, para 2 CCQ.

62. Françoise-Romaine Ouellette & Alain Roy, "Prendre acte des nouvelles réalités de l'adoption: Coup d'œil sur l'avant-projet de loi intitulé *Loi modifiant le Code civil et d'autres dispositions législatives en matière d'adoption et d'autorité parentale*" (2010) 44:3 RJT 7 at 23 [author's translation].

63. Françoise-Romaine Ouellette, "L'adoption devrait-elle toujours rompre la filiation d'origine? Quelques considérations éthiques sur la recherche de stabilité et de continuité pour l'enfant adopté" in Françoise-Romaine Ouellette, Renée Joyal & Roch Hurtubise, eds, *Familles en mouvance: quels enjeux éthiques?* (Québec, QC: Presses de l'Université Laval, 2005) 103 at 107 [author's translation].

64. See e.g. Alain Roy, *Droit de l'adoption: adoption interne et internationale*, 2nd ed (Montreal: Wilson & Lafleur, 2010) at 29-32, para 16; Jean Pineau & Marie Pratte, *La famille* (Montreal: Thémis, 2006) at 766, at para 478; Marie-Blanche Tahon, *Vers l'indifférence des sexes?: Union civile et filiation au Québec* (Montreal: Boréal, 2004) at 68.

the adopted child “the right to a true continuity of his identity and of his family ties.”<sup>65</sup> This form of adoption “would name each individual’s place, limiting the destructive movements that arise from denials, things going unsaid, and secrets.”<sup>66</sup>

The Quebec literature on reforms to adoption presupposes a distinctive and significant role for state law. For some authors, “recognizing a place for the parents of origin,”<sup>67</sup> “protecting the significant value of this [original] filiation in the lived experience and in the imagination of the child,”<sup>68</sup> or cutting neither the “bonds of origin”<sup>69</sup> nor “meaningful bonds”<sup>70</sup> calls for legal measures. This emphasis on the legal bond reflects the sensitivity of these authors to the law’s heavy “symbolic effects on personal identity, irreducible to a simple matter of official papers.”<sup>71</sup> Use of the synecdoche by which “bond” is used for “legal bond” denies the potential for the non-legal—the non-binding openness agreement of some common-law provinces; the good-faith undertaking to exchange information; visits between birth mother and adopted child—to participate in fashioning the adoptee’s complex identity. In contrast, common-law judges in cases of open adoption, in which no legal bond of parentage subsists, speak of maintaining a “parental...relationship”<sup>72</sup> or “ties” with the family of origin.<sup>73</sup>

Both the dissatisfaction with open adoption and the perceived need for a form of adoption that would preserve the legal bond with the birth family manifest a desire for law to order family relationships and to define personal identity. They imply that a meaningful bond requires legal recognition. This accent on the civil law’s role in constructing its citizens’

65. Ouellette & Roy, *supra* note 62 at 25 [author’s translation].

66. *Ibid* at 29 [author’s translation]; see also Chantal Collard, “Les adoptions internationales d’un enfant apparenté au Québec” in Ouellette, Joyal & Hurtubise, *supra* note 63, 121 at 138.

67. Françoise-Romaine Ouellette & Julie Saint-Pierre, “Parenté, citoyenneté et état civil des adoptés” (2011) 14 *Enfances, Familles, Generations* 51 at 73 [author’s translation].

68. Carmen Lavallée, “L’adoption coutumière et l’adoption québécoise: vers l’émergence d’une interface entre les deux cultures?” (2011) 41:2 *RGD* 655 at 695, para 70 [author’s translation].

69. Ouellette & Roy, *supra* note 62 at 15 [author’s translation]; see also (“family ties”) [author’s translation].

70. Ouellette, *supra* note 63 at 118 [author’s translation].

71. Agnès Fine, “Problèmes éthiques posés par l’adoption plénière” in Ouellette, Joyal & Hurtubise, *supra* note 63, 141 at 145 [author’s translation]. For regret that, in discussion and in legislative drafting, the identity dimension of preserving a child’s original filiation overshadowed the preservation of the child’s belonging to the family of origin, see Françoise-Romaine Ouellette & Carmen Lavallée, “La réforme proposée du régime québécois de l’adoption et le rejet des parentés plurielles” (2015) 60:2 *McGill LJ* 295 at 316-317.

72. *SM (Re)*, 2009 *ONCJ* 317 at para 103, 70 *RFL* (6th) 421.

73. *Family and Children’s Services of Annapolis County v AR-R*, 2006 *NSFC* 28 at para 7, 29 *RFL* (6th) 328.

family identity aligns with other efforts for the state to control its citizens' civil status and identity,<sup>74</sup> and it leads to a broader discussion of how identity takes shape and what law's role may be.

#### IV. *Identity as complex process, for everyone*

Accentuating the difficulties of adoptees and donor-conceived individuals distorts the process and experience of how others form their identities. It effectively frames questions or problems relating to identity as distinct to those not raised by their genetic parents. An alternative approach regards such questions and problems as potentially common to all.

The prominent sense of personal identity in *Pratten* is relatively static. It is a "fixed" notion of identity, rooted in genetics.<sup>75</sup> Thus, identity is something that, with the proper information, one could "complete."<sup>76</sup> A closed sense of identity, anchored to genetics, enables Damian Adams to feel that he is missing not part of his identity or certain strands, but "half."<sup>77</sup> The *Pratten* testimony reflects "a seemingly growing attitude that one is not 'complete', is deprived of a fixed identity, unless there is exact knowledge of one's genetic or biological origins."<sup>78</sup> As the anthropologist Jeanette Edwards puts it, "one strand of identity is singled out: knowing the identity of the person who donated the gamete which led to your birth means knowing where you came from, means knowing who you are."<sup>79</sup> Such a focus on knowledge of a specific genetic connection "tends to obliterate all the other factors that might contribute to the ongoing construction of personal identity."<sup>80</sup>

Similarly, the adoption discourse in Quebec presumes a solidity to identity such that preserving the original filiation would vindicate the

74. Consider the prohibition against changing one's name on marriage and the strict procedure for changing sex on the birth certificate. Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 5th ed (Cowansville, QC: Yvon Blais, 2014) at 276-277, 319-322, paras 242, 291-296; see also Marie-France Bureau & Jean-Sébastien Sauvé, "Changement de la mention du sexe et état civil au Québec: Critique d'une approche législative archaïque" (2011) 41:1 RDUS 1. For a somewhat dated but still devastating indictment, see Viviane K. Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000) at 235-263.

75. Sarah Wilson, "Identity, Genealogy and the Social Family: The Case of Donor Insemination" (1997) 11:2 Intl JL Pol'y & Fam 270.

76. *Pratten*, *supra* note 7 at 43 (for *Pratten*, "not knowing about her biological origins makes her feel incomplete"); see also at paras 111, 232.

77. *Ibid* at para 54.

78. Jill Marshall, "Concealed Births, Adoption and Human Rights Law: Being Wary of Seeking to Open Windows into People's Souls" (2012) 71:2 Cambridge LJ 325 at 348 [footnote omitted].

79. Jeanette Edwards, "Undoing Kinship" in Freeman et al, *Relatedness in Assisted Reproduction*, *supra* note 1, 44 at 56.

80. Nordqvist & Smart, *supra* note 2 at 25.

adoptee's "right to a true continuity of his identity and of his family ties."<sup>81</sup> Empirical researchers caution that attributing meaning and significance to a genetic connection is a social process,<sup>82</sup> and that "deploying genetic arguments in a highly visible manner" need not signal "a simplified and geneticized reading of kinship."<sup>83</sup> Still, the selected case studies, especially *Pratten*, foreground a genetically focused, fixed identity.<sup>84</sup>

Perhaps unwittingly, efforts to depict a disadvantage distinctive to adoptees or donor-conceived children sufficient to justify legal change flatten and naturalize the identities of those raised by their progenitors. Arguments for reform imply that the latter benefit from a sense of "completeness"<sup>85</sup> and can "create the whole picture" about their identity, origins, and medical history.<sup>86</sup> The premise is that for them, legal parentage and genetic parentage overlap, up the family tree. If they did not, the medical history that children raised by their ostensibly genetic parents have would be unreliable. Yet factors such as divorce, death, migration, estrangement, and sexual relations outside a different-sex conjugal relationship can deny a complete medical and family history to those other than the donor-conceived and the adopted. More importantly, whatever the impact of such factors, it is radically simplistic to posit as straightforward the identities of those who are not adopted or donor-conceived. In *Pratten*, "living with a number of highly personal questions that are never answered"<sup>87</sup> emerges as a consequence of lacking information about one's genetic forebears. A venerable tradition of literary, religious, and philosophical literature, however, would take such permanent questioning as a shared feature of being human.

The focus on genetic forebears as grounding a secure, complete identity overlooks that individuals whom their genetic parents raise may not relate closely to them. Many children raised by their birth parents fantasize that they are adopted. Children may inherit their parents' "vertical identities," being born into a religious community or a racialized or linguistic identity. In ways that parents may find challenging, even painful, however,

81. Ouellette & Roy, *supra* note 62 at 25 [author's translation]; compare a subtler sense of identity, as the result of a process of authorship, in reference to an individual's need "to stitch the threads of his personal history in a complex fabric of identity" (*ibid* at 23 [author's translation]).

82. Tabitha Freeman et al, "Making Connections: Contact between Sperm Donor Relations" in Freeman et al, *Relatedness in Assisted Reproduction*, *supra* note 1, 270 at 292.

83. Janet Carsten, *After Kinship* (Cambridge, UK: Cambridge University Press, 2004) at 179.

84. The legislative specification that a judge would order the original bond of filiation's survival to protect "a meaningful identification" with the birth parent indicates that the measure does not target the bare genetic tie, but the genetic tie serves as precondition for an identification worth protecting.

85. Compare *Pratten*, *supra* note 7 at paras 3, 111.

86. *Ibid* at para 96 (Dr. Ehrensaft).

87. *Ibid* at para 41.



children may also develop “horizontal identities,” with no appreciable connection to their genetic forebears. Consider the horizontal identities of children who, against family expectations, turn out to be gay, autistic, Deaf, or transgender.<sup>88</sup> This paper’s case studies redefine the “already insurmountable difficulty of any human effort to know and fix one’s origin”<sup>89</sup> as a burden unique to adoptees or donor-conceived individuals. The claims in *Pratten*, and to a lesser degree those in Quebec’s adoption literature, obscure that feeling different in an alienating way or confusion about one’s identity is something that those groups may experience in common with “all children.”<sup>90</sup>

Furthermore, an unsubtle sense of the “truth” about origins runs through *Pratten* and the adoption discourse. In the adoption context, “[t]he search for roots assumes a past that is there, if we can just find the right file, the right papers, or the right person.”<sup>91</sup> So does the language of “discovering” or “confirming” the gamete donor’s identity. Recall how, in *Pratten*, the desire for “information” sometimes involved a wish for storytelling and for knowledge of motivations and feelings. Donor-conceived individuals may want not only objective “knowledge,” but also a story that they can believe,<sup>92</sup> as part of a “process of personal history” or a “narrative trajectory.”<sup>93</sup> The focus on accessing the “truth” and the sense that denying such access constitutes a harm distinctive to donor-conceived individuals call for acknowledging the role of storytelling and fiction in the lives of those who are neither adopted nor donor-conceived. They also invite reflection on the role of “secrets and lies”<sup>94</sup> in “ordinary” family circumstances.

The selected texts imply a false baseline by which children who are neither adopted nor donor-conceived know their “origins” as an unwavering, verifiable “truth.” Instead, all origins are artifacts, constructed in response

88. Andrew Solomon, *Far from the Tree: Parents, Children and the Search for Identity* (New York: Scribner, 2012).

89. Margaret Homans, *The Imprint of Another Life: Adoption Narratives and Human Possibility* (Ann Arbor, MI: University of Michigan Press, 2013) at 112.

90. Leighton, “Geneticizing the Desire to Know,” *supra* note 11 at 255 [footnote omitted].

91. Barbara Yngvesson, “Going ‘Home’: Adoption, Loss of Bearings, and the Mythology of Roots” (2003) 74 *Social Text* 7 at 13.

92. Sarah Polley, *Stories We Tell* (National Film Board, 2012).

93. Marie-France Bureau, “Filiation et origines: questionnement et hypothèses sur le rôle du droit” in Christelle Landheer-Cieslak & Louise Langevin, eds, *Mélanges en l’honneur d’Edith Deleury* (Cowansville, QC: Yvon Blais, 2015) 75 at 94 [author’s translation].

94. Carol Smart, *Personal Life: New Directions in Sociological Thinking* (Cambridge: Polity, 2007) at 108.

to “needs felt in the present.”<sup>95</sup> Children raised by their genetic parents may ask them a number of questions: Were you happy to learn of the pregnancy? Would you two have married one another without the pregnancy? Have you ever regretted having me? Am I partly responsible for your divorce? Answers to these questions, delivered with love, may help children to feel grounded and connected to the past (just as answers given without love may destabilize or further alienate the child). Moreover, the answers may change over time: the woman whose unplanned pregnancy appeared as a curse and who comes to love the child might one day recount an origin story of love. Such answers may not be “true,” however, or perhaps the truth they speak is familial or affective, rather than objective or scientific. In a novel by Heather O’Neill, the narrator knows her genetic origins—her famous singer father had sex with a fourteen-year-old at a party—and says lucidly: “I think that all kids—no matter how acrimonious their parents’ relationship is—want to believe that at the point of their conception, their parents had been in love.”<sup>96</sup> Close reading of the testimony excerpted in *Pratten* hints that some donor-conceived individuals desire not to access the truth, but to hear fables equivalent to those spun for children conceived “naturally.” The upshot is that accounts centred on the search for “truth” significantly understate the fictitious character of much of people’s “grounding” in the past.

Implications follow for law and policy regarding donor-conceived individuals. Data captured on gamete transfer, such as the pecuniary motive for donating, might not amount to the origin story that offspring will want to hear. Alternatively, cognizant of many donor-conceived individuals’ desire for meaning, the donor might fib and say that he contributed gametes to give the gift of life. Such information, entered in a database, made available when the offspring turned eighteen, might help them to fashion a story of origins. It would not be, however, the “truth.” Measures addressing the parental disclosure aspect—facts about the circumstances of conception—may collide with the relational desire to know, like, and respect the donor. That is, collecting and preserving accurate information from the moment of gamete donation may thwart the desire for a fable of origins tailored to circumstances, in the fashion of oral history, or for altruism to have motivated the donation.

95. Homans, *supra* note 89 at 12; see also Bernard Golse, “La quête des origines: acte administratif ou acte narratif?” (2013) 59 *Enfances & Psy* 144 at 145 (the history of an individual’s origins “can only...be reconstructed” [author’s translation]).

96. Heather O’Neill, *The Girl Who Was Saturday Night* (Toronto: HarperCollins, 2014) at 250.

Taking up a more constructivist account of identity does not entail ending the effort to expand access to information about individuals' genetic origins, although it may reduce the intensity of discussion. Accessing information relating to genetic origins may be part of developing one's identity, without taking biological parentage as the "natural" or "authentic" source of identity.<sup>97</sup> Indeed, lack of information may pose a significant obstacle in "the process of self-discovery and self-development through reflecting on, interpreting and reinterpreting...narratives of their different experiences."<sup>98</sup> Yet even if it is understandable that someone searching for a missing element might focus on that element, perhaps exaggerating its overall importance, the extent to which the discourse of genetic origins can efface the kin-making work of gestation, labour, and family practices is troubling. It would be preferable for the discourse on genetic origins to recognize that "for most people the world over, including donor-conceived people, identity is a complex matrix of social positions: it is neither acquired in one moment nor in one event. Identity is not usually a steady state, nor fixed, singular or given."<sup>99</sup>

If, ultimately, genetic information is relevant, why should those advocating for law reform adopt a more accurate account of identity formation, if a fixed, inaccurate version strikes them as more efficacious? Here, a distinction emerges between the case studies. Arguably, legal scholars writing on adoption (or any other subject) should not propagate misleading images of anybody's identities. Pratten and other donor-conceived offspring may not have the same responsibility as scholars, but they might consider the appropriateness of amplifying the sense of loss and harm on the part of those who lack information about their genetic forebears and widening the perceived gap between them and others. This paper turns now from conceptions of identity formation to the role of law.

#### V. *The limits of law*

The case studies hint at unrealistic expectations of what law can achieve for donor-conceived or adopted individuals, and what it does for others. Given this field's interdisciplinary nature, legal scholars arguably have a responsibility to indicate the limits of law, and to be alert to differences between what they mean by "the right to know one's origins," relative to what researchers in other fields may mean.<sup>100</sup>

97. Marshall, *supra* note 78 at 353 [footnote omitted]; see also Freeman, *supra* note 1 at 15.

98. Wilson, *supra* note 75 at 281.

99. Edwards, *supra* note 79 at 56.

100. Marie-France Bureau & Edith Guilhermont, "Le droit de connaître ses origines: chronique d'une réforme annoncée" (2014) 73:2 R du B 597 at 613-614.

In *Pratten*, the discourse in support of the “right” to know one’s origins reached beyond harms remediable by law. For present purposes, it does not matter whether setting up a donor registry requires positive action or whether abolishing donor anonymity would remove barriers to genetic information for which the state was responsible. The question is the extent to which even sympathetic lawmakers could resolve the claimants’ issues by legislating. Although the state could order the collection, storage, and distribution of data about gamete donors within its territory, the strong relational aspect of the “right to know one’s genetic origins” signals the limits of legal ordering. A regime of disclosure might offer donor-conceived individuals the chance of a relationship with their donor (depending on whether, say, he were still living), although the outcome would be uncertain. Unquestionably, though, some harms cited in *Pratten* lie beyond the reach of any legislature. Legal measures cannot satisfy the desire for family storytelling. The motions judge quoted from the expert Dr. Ehrensaft’s evidence that some donor-conceived individuals “wonder about whether their donor thinks about them” and that they may lament it if the donor, once found, “wants no contact with the offspring he or she has contributed to creating.”<sup>101</sup> On prevailing understandings of law and privacy, the sense of loss where a donor does not want contact with donor-conceived offspring is not legally remediable. Inclusion of such testimony in the judgment is a reminder that the “right to know one’s origins”—of which the “content, foundations, and extent are neither known nor examined”<sup>102</sup>—is more a norm or element of discourse than a legal right. This sense of loss, like the desire for altruism to have motivated the donor, gives the impression that, at times, claimants assert the right to a dream.<sup>103</sup>

Moreover, the calls for a form of adoption preserving the original bond of filiation exaggerate what law does. The prospect that a new form of adoption could “name each individual’s place”<sup>104</sup> assumes that family roles fit into law’s blunt boxes. The idea that preserving a legal tie to the birth family would name the place of each individual with an important emotional connection to the child wrongly supposes that law already does so outside situations of adoption. On the contrary, legal kinship attributes

101. *Pratten*, *supra* note 7 at para 96.

102. Bureau, “La naissance du droit aux origines,” *supra* note 10 at 383 [author’s translation].

103. The efficacy of potential legal measures becomes less relevant if the chief ill in *Pratten* is, symbolically or expressively, that the “exclusion” of donor-conceived individuals from the province’s regime for adoptees “promotes the view that [they]...are less worthy of recognition and protection” (*M v H*, [1999] 2 SCR 3 at para 73, 171 DLR (4th) 577). The testimony gives little sense, however, that abolishing the regime for adoptees would be satisfactory.

104. Ouellette & Roy, *supra* note 62 at 29 [author’s translation].

a place to a few individuals as mother, father, sister, brother, grandparent, and so on, whatever the lived experience of the child. Legal effects follow, for example, in the law of successions. While “the lines of kinship and marriage...draw the pathway of presumed affection,”<sup>105</sup> the degree to which kinship identifies ties of affection in individual circumstances does not generally affect the operation of legal regimes.<sup>106</sup>

Furthermore, law omits to name meaningful figures such as stepfather, godmother, and “auntie.” Numerous connections and practices of family remain unrecognized or unnamed by the state’s family law. Think of “othermothers,” especially in the Afro-American context;<sup>107</sup> of aboriginal customary adoption;<sup>108</sup> and of gay, lesbian, or queer practices of “chosen family”<sup>109</sup> or “queer domesticities,”<sup>110</sup> of which not all are reducible to same-sex marriage. Strictly speaking, unmarried cohabitants or *de facto* spouses remain legal strangers in Quebec, with legislative drafters implying that they and their children do not constitute a “family.”<sup>111</sup> Consider, too, the difficulties facing trans people, especially in asserting their status as parents.<sup>112</sup> Whatever the blind spots and gaps of law, families name each individual’s place, using diverse positions, statuses, relations, affective ties, and truths that outstrip lawyers’ constructs.

To be sure, that law fails to name some, or many, places in individuals’ experiences of family and kinship does not preclude efforts to expand law’s reach. It calls, however, for a fuller acknowledgement than marks the adoption case study of how little law currently names. When it comes

105. Christian Jubault, *Droit civil: les successions, les libéralités*, 2nd ed (Paris: Montchrestien, 2010) at 163, para 216 [footnotes omitted, author’s translation].

106. Sanctions for “ingratitude” in the civil law of liberalities make a small exception. See Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville, QC: Yvon Blais, 2003) at 150, *sub verbo* “ingratitude.”

107. Stanlie M James, “Mothering: A Possible Black Feminist Link to Social Transformation?” in Stanlie M James & Abena PA Busia, eds, *Theorizing Black Feminisms: The Visionary Pragmatism of Black Women* (London: Routledge, 1993) 44 at 45; see also Katherine Franke, *Wedlocked: The Perils of Marriage Equality: How African Americans and Gays Mistakenly Thought the Right to Marry Would Set Them Free* (New York: New York University Press, 2015) at 90-91.

108. See e.g. Ghislain Otis, “La protection constitutionnelle de la pluralité juridique: le cas de l’adoption coutumière autochtone au Québec” (2011) 41:2 RGD 567.

109. Kath Weston, *Families We Choose: Lesbians, Gays, Kinship*, revised ed (New York: Columbia University Press, 1997).

110. Matt Cook, *Queer Domesticities: Homosexuality and Home Life in Twentieth-Century London* (Basingstoke, UK: Palgrave Macmillan, 2014).

111. Beyond limiting spousal rights and obligations to spouses by marriage or civil union, the Civil Code uses the adjective “family” to qualify such restrictively applicable measures. Thus, only married or civil-union spouses have a “family residence” (art 401 CCQ).

112. Beth A Haines, Alex A Ajayi & Helen Boyd, “Making Trans Parents Visible: Intersectionality of Trans and Parenting Identities” (2014) 24:2 Feminism & Psychology 238; see generally Dean Spade, “Documenting Gender” (2008) 59:4 Hastings LJ 731.

to adoptees and donor-conceived individuals, the baseline for comparison cannot be the idea that other people's birth certificates, or networks of legal kinship, name everyone's place.<sup>113</sup> Moreover, rather than taking the development and sustenance of profoundly significant relationships beyond law's recognition as neutral, or as good—as a healthy counterweight, say, to law's ambition to signal to individuals which relations they should value—the push for reform in Quebec takes them as indicating state law's failure or loss of control. Whatever the contingent contours of law's involvement in defining family and individual identity, a fundamental commitment to pluralism—in the forms of intimacy, in political attachments, and in religious affiliation and its manifestations—highlights the necessity of preserving ecologies of relating that law will not purport to regulate or even to name.

As acknowledged in the introduction, it is arguable that information about donor-conceived individuals' genetic history simply is theirs. Nobody has a better claim to such information, the argument would go; truth is better than lies, and the full truth is better than a partial truth.<sup>114</sup> This argument does not escape criticism. It appears insensitive to potentially competing privacy rights; it may occlude genetic information's relational implications; and, as explorations of the "right not to know" in the genetic context hint,<sup>115</sup> it is risky to assume that the fullest technologically available truth is always best. Whatever questions it raises, this truth claim appears to play out differently for *Pratten* than for Quebec's proposal for adoption reform. In *Pratten*, the truth claim might support the demand for law, administratively, to open access to existing information. Regarding adoption, the truth claim might militate for loosening the confidentiality of adoption files, but it would not lead to sustaining the legal bonds between adoptee and birth family. Rather than working within the existing kinship structure, the Quebec scholars of adoption—more drastically—sought the

113. See, e.g., Eric Blyth et al, "The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception" (2009) 17:2 *Intl J Child Rts* 207; Michelle Giroux & Mariana De Lorenzi, "Putting the Child First: A Necessary Step in the Recognition of the Right to Identity" (2011) 27:1 *Can J Fam L* 53 at 91 ("child's birth certificate" as a method "to facilitate transparency and truth"); but see Julie McCandless, "The Changing Form of Birth Registration?" in Fatemeh Ebtehaj et al, eds, *Birth Rites and Rights* (Oxford: Hart, 2011) 187.

114. See, e.g., John Eekelaar, *Family Law and Personal Life* (New York: Oxford University Press, 2006) at 76 (children's interests "in knowing the physical truth are always stronger than those of the adults, because for children they give rise to claims in justice, whereas for adults they form the basis for attempts at exercising power"); see also David Gollancz, "Time to Stop Lying" in Guichon, Mitchell & Giroux, *supra* note 8, 340.

115. Julia Crouch et al, "'We Don't Know Her History, Her Background': Adoptive Parents' Perspectives on Whole Genome Sequencing Results" (2015) 24:1 *J Genetic Counselling* 67 at 67.

insertion of a new kinship form into the Civil Code, dispensing with the two-parent maximum.

This formal distinction should not conceal, however, the effects of making information available. Even if facilitating access to genetic information advances the attractive goal of “maximi[zing] choice and opportunity for donor-conceived people,”<sup>116</sup> doing so implements contentious value judgments and functions as a form of governance.<sup>117</sup> Moreover, as the queer critics of same-sex marriage have pointed out, achieving new choices does not simply enhance freedom against a backdrop of stable preexisting preferences. Instead, new “rights” and “choices” will reshape desires and priorities.<sup>118</sup> Moreover, whatever its positive effects, making information available in some situations, such as donor conception, but not others, such as conception by extra-marital or casual intercourse,<sup>119</sup> will signal some families as incomplete relative to others.

### Conclusion

This paper has registered the contemporary significance of genetic connections to identity. That significance coexists uneasily with an emphasis, in other areas, on difference as socially constructed, on the potential to inhabit new family forms by virtue of intention and practice, and on identity formation as a social endeavour. Indeed, it rubs uncomfortably against geneticists’ reminders of the need to contextualize what genes reveal about human life and relatedness.<sup>120</sup> This paper has argued that claims for legal change on behalf of donor-conceived individuals and adoptees exaggerate the differences, in identity terms, between them and others. While it has focused on case studies from Canada—the first-instance judgment in the *Pratten* litigation from British Columbia and the scholarship favourable

116. Eric Blyth et al, “Donor-Conceived People’s Views and Experiences of Their Genetic Origins: A Critical Analysis of the Research Evidence” (2012) 19:4 JL & Medicine 769 at 788.

117. The *Civil Code of Québec* stipulates that intended spouses must “be informed of the advisability of a premarital medical examination” (art 368, para 2 CCQ), while the *Code of Civil Procedure* requires attendance at an information session on the mediation process before the court hears a family case, with limited exceptions (art 814.3 CCP). See further Helen Reece, “Leaping without Looking” in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (Abingdon, UK: Routledge, 2015) 115.

118. Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 2000).

119. I Glenn Cohen, “Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands” (2012) 100:2 Geo LJ 431 at 443-445.

120. See, e.g., Nessa Carey, *The Epigenetics Revolution: How Modern Biology Is Rewriting Our Understanding of Genetics, Disease, and Inheritance* (New York: Columbia University Press, 2012); see also Louis Maheu & Roderick A Macdonald, “The Changing Boundaries of Genes and Social Environment in Perspective: An Overview” in Louis Maheu & Roderick A Macdonald, eds, *Challenging Genetic Determinism: New Perspectives on the Gene in Its Multiple Environments* (Montreal: McGill-Queen’s University Press, 2011) 3.

to a proposal for amending adoption law in Quebec—its insights are of broader relevance. Discourse shaped for reform risks presenting donor-conceived individuals and adoptees as bearing distinctively incomplete identities, rather than as representing “in a particularly acute form the problem of the unknowability of origins and the common tendency to address that problem with fiction making.”<sup>121</sup> More than the case studies acknowledge, the quest for identity may be universal and never-ending. While this paper remains largely within the conceptual frame of identity proposed by the workshop for which it was prepared, concepts such as relatedness,<sup>122</sup> or belonging,<sup>123</sup> may offer promising avenues for further research.

The reform efforts in this paper’s case studies have not yet succeeded. The crucial insight is that they sought more from law than it could provide, or than it should. Researchers have approached questions of adoption, assisted reproduction, identity, and kinship from fields such as ethics, philosophy, medicine, anthropology, sociology, and law. Given this disciplinary breadth, it may be helpful to have a lawyerly reminder—informed by the current constraints of family law in Canada’s common-law and civil-law jurisdictions—of law’s limits on this terrain. Law cannot address all desires or name all affiliations, but those alert to the risks of totalizing legislative ambitions will not lament such incapacity. Jean Carbonnier, the great French sociologist of law who traced the relationships between state law and the ordering of other normative regimes, poetically captures the limits of state law in psychic and imaginative domains. “It is psychically happy for individuals and for society, too,” he writes, “that each might imagine an alternative, more beautiful genealogy for himself. The danger appears when the state or states seek to fabricate rights to a dream from the right to dream.”<sup>124</sup>

121. Homans, *supra* note 89 at 114.

122. Freeman, *supra* note 1.

123. See Vanessa May, *Connecting Self to Society: Belonging in a Changing World* (Basingstoke, UK: Palgrave Macmillan, 2013) at 9, suggesting that “the embodied experience of belonging...allows us to retain a complex view of the self as not made up of two-dimensional identity categories.”

124. Jean Carbonnier, *Droit et passion du droit sous la V<sup>e</sup> République* (Paris: Flammarion, 1996) at 248 [author’s translation].



