



January 2010

Book Review: Foundational Facts, Relative Truths: A Comparative Law Study On Children's Right To Know Their Genetic Origins, by Richard J. Blauwhoff

Juliet R. Guichon

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

Book Review

Citation Information

Guichon, Juliet R.. "Book Review: Foundational Facts, Relative Truths: A Comparative Law Study On Children's Right To Know Their Genetic Origins, by Richard J. Blauwhoff." *Osgoode Hall Law Journal* 48.1 (2010) : 175-182.

DOI: <https://doi.org/10.60082/2817-5069.1121>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol48/iss1/5>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

**Book Review: Foundational Facts, Relative Truths: A Comparative Law Study On
Children's Right To Know Their Genetic Origins, by Richard J. Blauwhoff**

Book Review

FOUNDATIONAL FACTS, RELATIVE TRUTHS: A COMPARATIVE LAW STUDY ON CHILDREN'S RIGHT TO KNOW THEIR GENETIC ORIGINS, by Richard J. Blauwhoff¹

JULIET R. GUICHON²

PEOPLE CONCEIVED WITH DONOR GAMETES are coming of age in greater numbers. Many do not know about their unusual conception and have been led to believe their social parents are also their genetic parents.

Do individuals have a right to know the truth about their origins? Ought they to have? These questions, unresolved in Canada, may be better answered now with the publication of the thoughtful and dispassionate work of Richard J. Blauwhoff, *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Right to Know Their Genetic Origins*.³

This long book is the publication of Blauwhoff's award-winning doctoral dissertation. Recognized in 2009 by the Erasmus Research Prize and the Dutch-German Lawyers Prize,⁴ the work is an ambitious and largely successful in-depth comparative law analysis of the right to information about one's progenitors in four European countries: France, Germany, the Netherlands, and Portugal. The book aims to delineate the conceptual and procedural scope of the right to know one's origins and to articulate the philosophical basis upon which such a right is founded in the nations under examination. It focuses on the issue from the perspective of the donor-conceived.

-
1. (Antwerp: Intersentia, 2009) 461 pages.
 2. BA, BCL, MA, SJD; Called to the Bar of Ontario; Department of Community Health Sciences; Office of Medical Bioethics; Faculty of Medicine, University of Calgary.
 3. *Supra* note 1.
 4. Intersentia Publishing, "Foundational Facts, Relative Truths," online: <<http://www.intersentia.com/searchDetail.aspx?back=reeks&reeksCode=&bookid=101173>>.

The author chose these four European jurisdictions not just because of his (impressive) linguistic skills,⁵ but also because the jurisdictions exhibit a range of legal responses. France currently permits “anonymous” births (according to which the child receives no information about its progenitors),⁶ whereas Germany “has been at the forefront in the recognition of the right to know one’s origins.”⁷ The Netherlands is moving toward a right to know with its *Donor Anonymity Act*,⁸ which requires registration of gamete providers.⁹ Portugal, on the other hand, passed legislation in 2007¹⁰ which does not grant the donor-conceived a right to know their origins, even as the country is moving toward the German model.¹¹

The book is both ambitious and sufficiently lengthy to realize its ambitions. It is comprised of five parts and eleven chapters. Part I explains why the subject is worthy of study in a comprehensive discussion entitled, “Unknown Origins, Biological Truth.” Part II describes the constitutional legal framework internationally (chapter two), regionally (chapter three), and nationally (chapter four). (The international section addresses extensively the United Nations *Convention on the Rights of the Child*¹²). Adopting the functional, or problem-solving, method of comparative law analysis, part III delineates a legal framework for a comparative analysis of the right to know in a single chapter that searches for guiding principles. Part IV engages in a thematic comparison of national law concerning the identification of the birth mother (chapter six), the identification of the father (chapter seven), the procedural issues in parenting

-
5. The author understates this skill. When describing the limitations of his work, Blauwhoff apologizes: “[T]he author had too little time at his disposal to learn Scandinavian languages with a view to conducting an in-depth comparative law research.” See Blauwhoff, *supra* note 1 at 37.
 6. *Ibid.* at 81.
 7. *Ibid.* at 32.
 8. Kingdom of the Netherlands, *Law of 25 April 2002, Concerning Rules for the Preservation, Management, and Supply of Data of Gamete Donors (Law Regarding Donor Data in Artificial fecundation)*, Bulletin of Acts, Orders and Decrees of the Kingdom of the Netherlands, 2002, 240, 1-5 [translated by reviewer].
 9. *Ibid.* at 33.
 10. The Parliament of Portugal, *Portuguese Law of Medically Assisted Procreation 32/2006; Series Dr I 143/X/1*, 26 July 2006 [translated by reviewer].
 11. *Ibid.*
 12. 20 November 1989, 1577 U.N.T.S. 3.

proceedings (chapter eight), the identification of the birth parents in adoption (chapter nine), and the right to information in the contexts of artificial reproductive technologies and “surrogate” motherhood (chapter ten). Accepting that truth is incontrovertible, the book concludes by considering whether the current legal structures effectively meet the informational needs of children who may wish to establish the identity of their genetic or gestational parents.

Perhaps the book’s strongest contribution is its very approach. It begins historically by noting that the desire to know one’s origins is hardly new: Aristotle in his *Metaphysics* stated that the desire to seek knowledge separates humans from other species.¹³ Yet the desire to know one’s origins began to crystallize as a legal interest only in the 1980s, when the identification of DNA became possible and some adoptees born in the 1950s and 60s began to insist upon the importance of knowing their identities. Then, in 1989 came what Blauwhoff calls a “watershed”¹⁴ moment in the global recognition of identity rights: the 1989 United Nations *Convention on the Rights of the Child*. Article 7 of the *Convention* states that a child has the right “as far as possible ... to know and be cared for by his or her parents.”¹⁵ Moreover, Article 8, in establishing the right of a child to preserve his or her “identity, including nationality, name and family relations,”¹⁶ adopts a broad understanding of “identity.” Neither Article establishes absolute rights; indeed, the rights established find qualification in the wording of the articles themselves. Nevertheless, the articles are powerful international recognition that identity matters. Also in 1989, the European Court of Human Rights gave impetus to the trend toward permitting persons to know about their origins. In *Gaskin v. United Kingdom*,¹⁷ the European Court of Human Rights held that the lack of access to information concerning the applicant’s childhood, development, and history raised issues under Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which states, *inter alia*, that “Everyone has the right to respect for his private

13. Aristotle, *Metaphysics*, trans. Ross, Book I, Part 1, online: The Internet Classics Archive <<http://classics.mit.edu/Aristotle/metaphysics.1.i.html>>.

14. *Supra* note 1 at 43.

15. *Supra* note 12.

16. *Ibid.*

17. (1989), 160 E.C.H.R. (Ser. A), 12 E.H.R.R. 36 at para. 49 [*Gaskin*].

and family life, his home and his correspondence.”¹⁸ The European Court of Human Rights further stated that an “independent authority” must be available to assess claims regarding access to information about a person’s personal identity.¹⁹ (Currently, records that would identify a person’s progenitor tend to be held by medical clinics or sperm banks.)

In moving from international to domestic law, Blauwhoff is perhaps most insightful. In his examination of German, French, Netherlands, and Portuguese domestic codes and judgments, he identifies three principles that underpin the interpretation and application of law in this field: decisional privacy, procreational responsibility, and equality. Decisional privacy is recognized in Germany, the Netherlands, and Portugal as a dimension of the right to personality, a right to informational self-determination. This right includes the right not to know one’s biological parentage. Procreational responsibility includes the parental obligation to recognize that some duty of disclosure exists. Equality entails recognition that children ought not to be treated unequally with respect to important interests; this right could operate where the state plays an active role in making it impossible for someone to know one’s origins. Blauwhoff asserts, “such an argument could be mounted [where] the state rigidly insists upon ensuring lifelong anonymity of the donor.”²⁰

Thus, Blauwhoff focuses on legal developments—internationally, regionally, and nationally—to determine how the legal interest in knowing one’s origins is protected and how countervailing forces limit protection of that interest. He identifies the principles that arguably elucidate both protection and refusal to protect the right to know one’s origins. In so doing, Blauwhoff suggests that the trend is toward increasing openness.

Blauwhoff’s work contributes to the body of literature most obviously because his careful efforts are undertaken from the perspective of the resulting child. Early and even present-day discussion of this subject can be dominated by understandable concern for the needs and wants of those who wish to have a child but who are unable or unwilling to do so in a heterosexual relationship. (Some such people have physical limitations that prevent them from conceiving

18. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [*European Convention on Human Rights*].

19. *Gaskin*, *supra* note 17.

20. Blauwhoff, *supra* note 1 at 160.

naturally, some have no heterosexual partner, and some are not heterosexual.) These adults have interests which they and the medical establishment articulate. Such articulation can guide law and policy.

But whether the interests of these adults *ought to* guide law and policy in assisted human reproduction has been challenged relatively unsuccessfully in North America since at least as long ago as 1980 when George Annas wrote his important article, "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor."²¹ Annas lamented the fact that even though there were then an estimated 250,000 children born of assisted insemination in the United States, these Americans would be unable to know the identities of their genetic fathers because "of an exaggeration of potential legal pitfalls and a failure to pay sufficient attention to the best interests of the ... child."²² Blauwhoff's work follows in this offspring-focused tradition.

Consider, for example, Blauwhoff's devastating analysis of the European Court of Human Rights decision in *Odièvre v. France*.²³ In that case, Pascale Odièvre, born in France in 1965 to a mother who wished to remain anonymous, made a claim based on Article 8 of the *European Convention on Human Rights*, which articulates the right to respect for a person's private and family life.²⁴ The applicant argued that Article 8 granted her the right to know the identity of her birth mother. She was not successful. Blauwhoff not only describes the judgment denying that claim, but highlights the oddity of the judges' decision, which was based, in part, on the interests of the adoptive family, despite the fact that it cannot be inferred that the adoptive family had opposed the applicant's claim.²⁵ Moreover, Blauwhoff claims that the "outright disdain for the applicant's wish to know her genetic descent"²⁶ was barely masked by the words of adjudicator Judge Rees, who wrote, "Persons who seek disclosure at any price, even against the express will of their natural mother,

21. George J. Annas, "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor" (1980) 14 *Fam. L.Q.* 1 at 1.

22. *Ibid.*

23. [GC], no. 42326/98, (2004) 38 *E.H.R.R.* 43.

24. *Supra* note 18.

25. Blauwhoff, *supra* note 1 at 83.

26. *Ibid.* at 84.

must ask themselves whether they would have been born had it not been for the right to give birth anonymously.”²⁷

The suggestion that children ought to be grateful for life itself and not complain about the complicity of a legal system in denying them knowledge of their kin is an example of what social scientist Joanna Rose calls “disenfranchised grief.”²⁸ Not only is the grief people suffer unacknowledged, the sufferers are chastised for experiencing it. Jurisprudence that lacks insight into this problem is unbalanced for privileging the needs and wants of adults over those of children who may have an entirely different perspective. As one donor-conceived person wrote, “It can be hard to come to terms with a deliberate action, endorsed by the State and executed by the medical establishment, which has cut one off from one’s natural family... . Feelings of anger and dislocation do not stem from ingratitude, but from pain.”²⁹

The privileging of adult wants and needs continues today. In its October 2009 analysis of the ethics of embryo donation, the American Society for Reproductive Medicine (ASRM) Ethics Committee focuses exclusively on the interests of those who wish to conceive using the gametes of others.³⁰ In concluding that embryo donation should not be considered at all like adoption, the ASRM Ethics Committee states that “the experience of embryo donation more closely approximates normal human reproduction than it does traditional legal adoption.”³¹ Yet, the Ethics Committee statement does not address whose “experience” it is privileging. Like adoptees, people conceived by the egg and sperm of strangers are not reared by their genetic parents. The resulting children might, contrary to the Ethics Committee statement, have an experience of embryo donation that more closely approximates the experience of those who have been adopted. Nevertheless, the Ethics Committee—some of whose

27. *Ibid.*

28. Joanna Rose, “From a ‘bundle of joy’ to a person with sorrow: Disenfranchised grief for the donor-conceived adult” (Paper presented at the Queensland University of Technology Applied Ethics Seminar Series, 2001) [unpublished], online: <<http://eprints.qut.edu.au/737/>>.

29. Louise Jamieson, “The DI Journey: Pain, Loss and Discovery” in *Who Am I?: Experiences of Donor Conception* (Warwickshire: Idreos Education Trust, 2006) 30 at 42.

30. The Ethics Committee of the American Society for Reproductive Medicine, “American Society for Reproductive Medicine: Defining Embryo Donation” (2009) 92 *Fertility & Sterility* 1818 at 1818.

31. *Ibid.* at 1819.

members earn money from engaging in embryo donation—states, “The donation of embryos for reproductive purposes is fundamentally a medical procedure intended to result in pregnancy and should be treated as such.”³²

Blauwhoff’s diligent work is bound to alter the legal landscape by elucidating in English existing European law and the developing trend of adults requesting courts and governments to consider their own needs and desires to know their parentage. Summarizing this jurisprudence as grounded primarily in the child’s right to autonomy and human dignity, Blauwhoff challenges a narrower, yet popular, perspective.

The popularity of this narrower view is evident also in the governing³³ Canadian federal statute, the *Assisted Human Reproduction Act*,³⁴ which does not acknowledge a right to know the identity of one’s progenitors. A Charter challenge, originating in British Columbia and awaiting first instance adjudication, in effect asserts such a right: it argues that the donor-conceived are similarly situated to adoptees but unequally treated.³⁵ In this novel field, Blauwhoff’s diligent work may help Canada to consider and articulate the values that will guide its own decisions.

Comprehensive in scope and ambitiously undertaken, Blauwhoff’s comparative law work is a welcome contribution to the literature. To be sure, an index would have aided readers, and the text is turgid and often difficult to penetrate. The manuscript ought to have been revised by a native English speaker. But in this increasingly important field of law concerning whether children ought to have a right to know their origins, those rare scholars who read legal texts in four languages, and summarize and analyze them in English, are to be thanked.

32. *Ibid.*

33. The Quebec Attorney General has successfully challenged significant portions of this statute as being *ultra vires* the Federal Government. See *Re Reference by the Government of Quebec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2*, [2008] R.J.Q. 1551 (C.A.).

34. S.C. 2004, c. 2.

35. “First ever class action lawsuit filed by sperm donor offspring in Canada” Arvay Finlay Barristers news archive (28 October 2008), online: <<http://www.arvayfinlay.com/news/news-oct28-2008.html>>:

Foundational Facts, Relative Truths deserves respect and a prominent place on the shelves of those who aim to understand both what is at stake and what might be achieved when law and policy attempt to address the separation of genetic and social parenting.