

REGULATING SPERM DONATION: WHY REQUIRING EXPOSED DONATION IS NOT THE ANSWER

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I. INTRODUCTION

Each year, more than 25,000 children are born in the United States as the result of artificial insemination,¹ one of the most common forms of assisted reproductive technology (ART).² Donated sperm is usually the crucial element in artificial insemination,³ and most sperm is donated anonymously in one of the two dozen commercial sperm banks in this country.⁴ Presently, there is a serious lack of meaningful regulation over and accountability on the part of sperm banks, and the current system has many flaws. These include incomplete medical histories for the donor-conceived child, a risk of consanguinity for the child, and uncertainty about donor privacy.⁵ Because of these flaws, some countries and states have, or are considering, legislation that would institute a non-anonymous donation⁶ (referred to as “exposed donation” throughout this article) regime. This is a faulty solution because it would cause scarcity of donated sperm and other harms to each of the parties involved in the process.⁷ This article argues that the harms of abolishing anonymity in sperm donation far outweigh any potential benefits; thus states should reaffirm donor anonymity and institute the changes proposed in Part V.

Although there is currently little federal regulation of sperm donation,⁸ the few states that have laws and regulations apply rules of limited scope.⁹ In

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1. See ETHEL SLOAN, *BIOLOGY OF WOMEN 401* (Cengage Learning 2001); Jeff Stryker, *Regulation or Free Markets? An Uncomfortable Question for Sperm Banks*, *SCIENCE PROGRESS*, Nov. 7, 2007, available at <http://www.scienceprogress.org/2007/11/regulation-or-free-markets/>.

2. *Infertility in Men*, *N.Y. TIMES*, Oct. 17, 2007, available at <http://health.nytimes.com/health/guides/disease/infertility-in-men/assisted-reproductive-technologies.html>. Other forms of ART are intracytoplasmic sperm injection, in vitro fertilization, in vitro maturation, blastocyst transfer, and ooplasmic transfer. *Id.*

3. A couple can instead choose to use the sperm of the male partner in the artificial insemination, or use what is referred to by the Food and Drug Administration as a “directed donation.” 21 C.F.R. § 1271.3(l) (2008). The latter is defined as one to a specific person, where the donor knows or is known by the recipient before donation, but does not include a sexually intimate partner. *Id.*

4. Stryker, *supra* note 2.

5. See *infra* Part III.

6. See *infra* Part III.C.

7. See *infra* Part IV.

8. See generally 21 C.F.R. § 1271 (2008).

addition to briefly explaining the history and science behind ART and sperm donation in particular, Part II of this article discusses the inadequate Food and Drug Administration (FDA) regulations, which focus merely on preventing “diseased” sperm from being circulated¹⁰ and do little to control the number of births per donor or facilitate contact between donor and child regarding genetic disorders discovered after insemination. Part II will also present the decentralized state regulation, as well as the guidelines of professional organizations, with the latter effectively being optional and not legally binding.

Due to this lack of meaningful government oversight, there are many risks and concerns associated with the existing sperm donation process. These risks will be presented in Part III. First, the risk of incest and consanguinity¹¹ are prevalent with anonymous donation¹² since there is no monitoring of the number of live births per donor. Also, a donor cloaked in anonymity is unlikely and unable to contact children conceived with his sperm should he discover he has a serious genetic disorder.¹³ Similarly, it is nearly impossible for a parent of a donor-conceived child to obtain additional information from a donor, should the child’s medical condition necessitate it, without knowledge of a donor’s identity and whereabouts. Donors may also be found to have diminished expectations of privacy,¹⁴ especially because of the ability for donor-conceived children or their parents to investigate a donor’s identity using modern genealogy services.¹⁵ Many states are attempting to pass bills calling for more identity disclosure in the medical files of women using artificial insemination, as well as a requirement that clinics offer the option to donate non-anonymously.¹⁶ In fact, the Uniform Parentage Act (UPA)¹⁷ and some state laws already allow access to donor files by court order.¹⁸

Attention from scholars and the current international trend toward exposed donation¹⁹ may hasten, or at the very least trigger, a similar movement in the United States as the solution to the risks just mentioned. As Part IV will argue, the answer to the call for regulation of sperm donation is not the outright elimination of anonymity. Not only is it logical that requiring exposed donation

9. See *infra* Part II.C.

10. See Sunni Yuen, *An Information Privacy Approach to Regulating the Middlemen in the Lucrative Gametes Market*, 29 U. PA. J. INT’L L. 527, 554 (2007) (quoting 21 C.F.R. § 1271.1). Diseased sperm includes sperm that tests positive for HIV and hepatitis. § 1271.1(r).

11. Consanguinity is defined as “kinship characterized by the sharing of common ancestors.” Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/133242/consanguinity> (last visited Dec. 15, 2008).

12. Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 15–16 (2007).

13. See *infra* Part III.A.2.

14. See *infra* Part III.B.

15. See Alison Motluk, *Anonymous Sperm Donor Traced on Internet*, NEW SCIENTIST, Nov. 5, 2005, at 6.

16. See *infra* Part III.C.1.

17. UNIF. PARENTAGE ACT § 633(b) (2002).

18. E.g., COLO. REV. STAT. ANN. § 19-4-106(1) and (2) (West 2008) (Colorado’s own Uniform Parentage Act (not modeled after the actual new UPA) states that records may be obtained upon a court order showing good cause).

19. See *infra* Part III.C.2.

will attract fewer donors, many countries that have taken this route have experienced varying degrees of scarcity in donated sperm.²⁰ This may result in an undue burden on procreation,²¹ as well as “fertility tourism”²² which would circumvent any U.S. oversight. Exposed sperm donation may also have an unsettling effect on donors’ privacy rights and could interfere with donors’ legal status as “non-parents” since anonymity is the bedrock on which that status is based.²³ This “solution” does not balance the interests of donors, donor-conceived children and the latter’s parents correctly with the need for substantive regulation.

In Part V, this article proposes that the answer to this call for sperm donation regulation lies in expanding the reach of progressive regulation already enacted by some states. Rather than abolish anonymous donation altogether, states should uniformly adopt the UPA, or at the very least enact laws clearly setting forth a donor’s status. Also, as suggested by the UPA,²⁴ states should only allow access to donor information by court order showing “good cause.” Lastly, the creation of a national donor and donor-offspring registry would ease concerns about consanguinity and incest.

II. BACKGROUND ON THE CURRENT REGULATION OF SPERM DONATION

Assisted reproduction is defined as any means of conception not achieved through sexual intercourse.²⁵ ARTs include artificial intrauterine insemination, egg and embryo donation, in vitro fertilization and sperm injection.²⁶ ARTs are used primarily to assist individuals who are unable to conceive children, whether due to the actual infertility of either partner or to the “social structure in which [an individual or a couple] self-identif[ies].”²⁷ The use of ARTs is growing due to various factors such as the increase in single and same-sex parenthood²⁸ and the increasingly common choice by many couples to delay

20. See e.g., June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 519–20 (2006) (discussing the shortages in Sweden, Austria, and the Netherlands).

21. Dennison, *supra* note 12, at 19 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

22. See generally Carbone & Gottheim, *supra* note 20.

23. See *infra* Part III.B.

24. UNIF. PARENTAGE ACT § 632 (2002).

25. *American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 171, 175 (2008).

26. *Id.* Intrauterine insemination involves the injection of sperm into a woman’s reproductive tract. Crystal Liu, *Restricting Access to Infertility Services: What is a Justified Limitation on Reproductive Freedom?*, 10 MINN. J. L. SCI. & TECH. 291, 295 (2009). Egg and embryo donation is donation by an individual of their own eggs or sperm, whether or not for consideration or for a particular person. American Bar Association, *supra* note 25, at 176. In vitro fertilization is the “formation of a human embryo outside the human body.” *Id.* at 177. Sperm injection is the injection of a single sperm directly into an egg. Catherine A. Clements, *What About the Children? A Call for Regulation of Assisted Reproductive Technology*, 84 IND. L.J. 331, 333 (2009).

27. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 24 (2008). The latter occurs when a same-sex couple or a single person wishes to reproduce.

28. *Id.* at 30–32.

having children until later in life.²⁹ As mentioned, sperm donation is a crucial element to many types of ART, such as in vitro fertilization, allowing single women, same-sex female couples, and couples with an infertile male to conceive children. In fact, the number of children born from sperm donation has doubled in recent years.³⁰ Although sperm may be donated by a relative or close friend of the couple or individual, often the sperm is donated anonymously through a sperm bank or clinic.

Sperm donors choose to donate for various reasons. Primarily, sperm and egg donors are motivated by the monetary compensation,³¹ which many use to pay for college or graduate school, or simply to supplement savings or disposable income.³² Others choose to donate for altruistic reasons, such as to assist infertile couples or others who are unable to conceive children on their own.³³ Many banks inquire into individual donor's motivations during the screening process.³⁴ This Part discusses the regulation of sperm donation by the FDA, by individual states, by the sperm banks themselves, and by professional organizations.

A. Food and Drug Administration

The federal government regulates all sperm banks and clinics by making compliance with FDA regulations mandatory.³⁵ Its regulation of sperm banks focuses on "donor screening, quality processing, and record keeping [with the] . . . goal [of] keep[ing] infectious tissue out of circulation."³⁶ The FDA's regulations cover both anonymous donations and non-anonymous donations.³⁷ Under §1271, FDA regulation of sperm banks is divided into three areas: 1)

29. Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L.J. 135, 151 (2008).

30. *Id.* at 33–34 (citing 2005 *Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports* 3, 61 (2007), available at <http://apps.nccd.cdc.gov/ART2005/clinics05.asp>).

31. Sarah Terman, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproduction Technology*, 3 NW. J. L. & SOC. POL'Y 167, n.1 (2008).

32. Gail Taylor, *Becoming a Sperm Donor* (2008), https://knol.google.com/k/gail-taylor/becoming-a-sperm-donor/1oq66jc8zi8jp/4#What_Motivates_a_Sperm_Donor (last visited Dec. 15, 2008).

33. *Id.* See also Allison Brown, *Money Shots: College Students Profit, Help Infertile Couples by Donating Their Sperm and Eggs*, The Daily Free Press, <http://www.cryobank.com/resources/pdf/News/DailyFreePressJan04.pdf> (last visited Mar. 30, 2009).

34. *E.g.*, *How Do You Test and Screen Sperm Donors-Cryos New York*, <http://ny.cryosinternational.com/our-donors/screening.aspx> (last visited Dec. 15, 2008); Sperm Donors, Inc., <http://www.spermdonorsinc.com/> (last visited Dec. 15, 2008).

35. Sperm donation is regulated under 21 C.F.R. § 1271 (2008). See Luke A. Boso, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool*, 110 W. VA. L. REV. 843, 846–49 (2008).

36. See §1271.1; Sunni Yuen, *supra* note 10, at 554.

37. Martha A. Wells, Ctr. for Biologics, Evaluation, and Research at the FDA, FDA Update: Relevant to Reprod. Establishments, Presentation at American Association of Tissue Banks Annual Meeting (Sept. 17, 2007), available at <http://www.fda.gov/CbER/tissue/aatb091707mw.pdf>. Directed donation is defined as one to a specific person, where the donor knows or is known by the recipient before donation, but does not include a sexually intimate partner. § 1271.3(l).

Establishment, 2) Registration and Product Listing, Donor Eligibility, and 3) Current Good Tissue Practice (CGTP).³⁸

With some exceptions,³⁹ sperm banks and clinics must register with the FDA using Form FDA 33556, which asks for very basic information such as the center's physical and mailing addresses, its functions, and the type of tissue(s) it maintains.⁴⁰ As of March 2007, 607 reproductive centers were registered, which comprise twenty-four percent of all tissue centers registered.⁴¹ Of those 607 centers, only about eighty-nine list semen as among the tissue being maintained.⁴² The two types of sperm centers registered with the FDA are cryobanks, which accept anonymous donations, and andrology labs, which store sperm for procedures for intimate couples.⁴³ This paper will focus on the former, since that is where the issues presented in Part III arise.

The FDA's Donor Eligibility requirements apply to both anonymous and directed donations.⁴⁴ In addition to a summary of records for each semen donation, the FDA requires a screening of each donor comprised of a physical examination and a donor medical history interview.⁴⁵ The FDA lists twenty-nine risk factors that clinics should look for when screening donors.⁴⁶ For anonymous donations, the FDA requires that donors be tested for diseases like HIV and hepatitis while their sperm is frozen and quarantined, to be released six months later when certified as "disease-free."⁴⁷ Exceptions to the donor eligibility requirement include when the donor is a sexually intimate partner of the recipient and when additional donations are unavailable due to the donor's infertility or health.⁴⁸ Those donations exempt from the eligibility requirements

38. Wells, *supra* note 37.

39. § 1271.15 (listing exemptions such as establishments that use the tissue for nonclinical scientific or educational purposes, remove and implant the same tissue in the same patient, or only store the tissue). § 1271.15(a)–(c).

40. § 1271.22. Examples of tissue types are bone, cartilage, semen, skin, and tendons. § 1271.3(d).

41. Wells, *supra* note 37. The term "tissue center" appears to be synonymous with "establishment," which is defined as "a place of business under one management, at one general physical location, that engages in the manufacture of human cells, tissues, and cellular and tissue-based products." 21 C.F.R. § 1271.3(b) (2008).

42. Wells, *supra* note 37.

43. *Id.* Andrology labs store sperm for use by the donors themselves. "Intimate couples" are those with a relationship.

44. *Id.*

45. *Id.* § 1271.3(n) (defining "donor medical history" as a "document dialog about the donor's medical history and relevant social behavior . . .").

46. FOOD AND DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS, IV.E. (2008). The risk factors include: men who have had sex with men within the preceding five years, persons who have injected drugs for non-medical reasons within the preceding five years, and persons who have been exposed in the preceding twelve months to known or suspected HIV and/or HIV-infected blood.

47. Stryker, *supra* note 2. There is no required quarantine period for directed or known donations. Wells, *supra* note 37.

48. 21 C.F.R. § 1271.90(a) (2008).

are subject to labeling, which warns the purchaser that, for example, testing for infectious diseases was not done.⁴⁹

Current Good Tissue Practice requirements “govern the methods used in, and the facilities and controls used for, the manufacture” of human tissue and cells.⁵⁰ The aspects covered by CGTP requirements range from “recovery” and donor screening to storage and distribution.⁵¹ There are also exemptions made to this section of the regulation, but the establishment seeking such an exemption must separately apply for each and provide a proposed alternative.⁵² CGTP requirements also include periodic inspections of reproductive establishments to evaluate compliance with the donor eligibility procedures and record-keeping.⁵³

In addition to the requirements and regulations just discussed, it is important to note that the FDA does not require sperm banks to place limits on births to individual donors, or even to report such a number, to track donors’ health, or to make information available to children born to sperm donors.⁵⁴

B. State Regulation

Individual states regulate aspects of the ART process related to sperm donation by licensing sperm banks, controlling the artificial insemination process, and determining parent legitimacy in these situations. Only twenty-four states have created regulatory legislation addressing the operations of sperm banks.⁵⁵ Some states set forth specific requirements for artificial insemination. For example, a state can require that artificial insemination must be performed under the supervision of a licensed physician.⁵⁶ Others set forth testing requirements and require licensing and registry of all sperm banks.⁵⁷ Most states regulate the parent-child relationship as affected by sperm donation by setting forth who are deemed the natural and legitimate parents of a child conceived through artificial insemination.⁵⁸ California makes it a felony for a person who knows he has HIV or AIDS to donate sperm.⁵⁹

49. § 1271.90(b).

50. § 1271.150(a).

51. *Id.*

52. § 1271.155.

53. § 1271.180.

54. Stryker, *supra* note 2.

55. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1621.5(a) (2007); DEL. CODE ANN. tit. 16, § 2801(a) (2008); FLA. STAT. ANN. § 381.0041 (2008); IDAHO CODE ANN. § 39-5408 (2008); KY. REV. STAT. ANN. § 311.281(1) (2008); LA. REV. STAT. ANN. § 40:1062.1(b)(1) (2008); MD. CODE ANN., HEALTH-GEN. § 18-334 (b)(2)(i) (2008); MICH. COMP. LAWS § 333.20179 (2008); MONT. CODE ANN. § 50-16-1008(1) (2008); N.H. REV. STAT. ANN. § 141-F:5 (2008); N.Y. COMP. CODES R. & REGS. tit. 10, § 52-8.5(1)(ii) (2008); N.C. GEN. STAT. ANN. § 130A-148(d) (West 2008); OKLA. STAT. ANN. tit. 63, § 2151.1 (West 2008); OR. REV. STAT. § 677.370 (2008); R.I. GEN. LAWS § 23-1-38 (2008); WASH. REV. CODE ANN. § 70.24.105(2)(d) (LexisNexis 2008); W. VA. CODE ANN. § 16-3c-2(e)(1) (LexisNexis 2008).

56. *E.g.*, ARK. CODE ANN. § 9-10-202 (2008).

57. *E.g.*, DEL. CODE ANN. tit. 16, § 2801(a) (2008); FLA. STAT. ANN. § 381.0041 (LexisNexis 2008).

58. *E.g.*, ALA. CODE § 26-17-102 (LexisNexis 2008); ALASKA STAT. § 25.20.045 (2008); ARK. CODE ANN. § 9-10-201 (2008); CAL. FAM. CODE § 7613(a) (Deering 2009); GA. CODE ANN. § 53-2-5 (2008); N.M. STAT. ANN. § 40-11-6 (LexisNexis 2008).

59. CAL. HEALTH & SAFETY CODE § 1621.5(a) (Deering 2007).

The UPA, in its model form, covers many paternity issues, such as voluntary acknowledgement of paternity, genetic testing to determine paternity, and paternity proceedings.⁶⁰ The original UPA, which was drafted in 1973, has been adopted by nineteen states.⁶¹ Article 5 of the model form provides that when a child is conceived through artificial insemination using a donor's sperm, the donor is not considered the child's father.⁶² It does this by establishing that the married woman's husband is considered the child's natural father.⁶³ Importantly, the original UPA addressed only situations in which the child's mother was a married woman and in which the procedure was performed by a licensed physician.⁶⁴ The amended version of the UPA (new UPA), finalized in 2002 and only adopted by eight states thus far,⁶⁵ specifically addresses reproductive technology issues. Whereas "[t]he original version of the UPA exempted most sperm donors from parental liability," the new version's model form goes further by stating that a "donor is not a parent of a child conceived by means of assisted reproduction."⁶⁶ Thus, according to the commentary, the donor cannot sue to establish his parental rights nor can he be required to provide child support.⁶⁷ Importantly, the new UPA does not limit this principle to situations involving a married woman and does not require that a licensed physician perform the artificial insemination.⁶⁸ Also, both versions of the UPA contain a provision allowing an inspection of paternity records upon a court order for "good cause shown."⁶⁹

Because it addresses ARTs specifically and in a more modern context, the following analysis focuses on the new UPA in noting deviations between the versions that individual states have incorporated into their statutes and the actual new UPA language. Some states do not include the language in Section 702 that states that a donor is not considered the parent of a child conceived through ART.⁷⁰ Others have transferred that exact language to their own UPA statutes.⁷¹ Some have retained the "good cause shown" standard for insemination records,⁷² while others do not mention that records may be

60. See generally UNIF. PARENTAGE ACT (2002).

61. LAURENCE C. NOLAN & LYNN D. WARDLE, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 247 (Wm. S. Hein Publishing 2005).

62. UNIF. PARENTAGE ACT § 5 (1973).

63. *Id.*

64. *Id.*

65. Alabama, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming. A Few Facts About the Uniform Parentage Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Dec. 16, 2008). The bill proposing adoption in New Mexico died on adjournment. S.B. 147, 48th Legis., 2d Sess. (N.M. 2008).

66. Paul Bailin, *Ferguson v. McKiernan: The Problematic Concept of Technological Paternity*, 36 J.L. MED. & ETHICS 425, 427 (2008) (citing UNIF. PARENTAGE ACT § 702 (2002) and commentary).

67. *Id.*

68. *Id.*

69. Compare UNIF. PARENTAGE ACT § 20 (1973) with UNIF. PARENTAGE ACT § 632 (2002).

70. See, e.g., ALA. CODE § 26-17-21 (LexisNexis 2008); OKLA. STAT. tit. 10, § 7700-633 (2008).

71. E.g., DEL. CODE ANN. tit. 13, § 8-702 (2008); TEX. FAM. CODE ANN. § 160.702 (Vernon 2008).

72. E.g., ALA. CODE § 26-17-21 (LexisNexis 2008); OKLA. STAT. tit. 10, § 7700-633 (2008).

released by court order.⁷³ Many states have adopted both of these relevant aspects of the new UPA.⁷⁴ Among the states that have not adopted the UPA, some have independently chosen to incorporate either or both of the relevant provisions of it into their own statutes.⁷⁵

States that have not adopted the new UPA often inconsistently and incompletely address the issues of a donor's parental status and access to donor records. For example, an appellate court in California held that parents of an ART-conceived child and the child herself could compel the production of documents so long as relevant and necessary to their action against a sperm bank for selling sperm that allegedly was contaminated with kidney disease.⁷⁶ A Florida court and a Maine court have also not recognized a sperm donor to be the parent of an ART-conceived child, and thus held that the donor did not have parental rights.⁷⁷

C. Sperm Banks

To a certain extent, sperm banks are self-regulating in that some choose to place limits and rules upon themselves, likely recognizing the lack of actual, meaningful federal or state regulation. The banks that choose to self-regulate set up policies "to improve the overall efficacy of the sperm donation system."⁷⁸ For example, Cryogenic Laboratories claims to track and monitor each donor and their sperm to determine, among other things, the geographic distribution of the donor's offspring.⁷⁹ Similarly, Cryos International limits donor offspring in a particular region to one in 32,000.⁸⁰ California Cryobanks opts to perform

73. See, e.g., DEL. CODE ANN. tit. 10, § 8-702 (2008); TEX. FAM. CODE ANN. § 160.702 (Vernon 2008).

74. E.g., N.D. CENT. CODE §§ 14-20-54 and 14-20-60 (2008); UTAH CODE ANN. §§ 78B-15-702 and 78B-15-619 (2008); WASH. REV. CODE ANN. §§ 26.26.705 and 26.26.610 (LexisNexis 2008); WYO. STAT. ANN. §§ 14-2-902 and 14-2-819 (2008).

75. E.g., MINN. STAT. § 257.62(5)(c) (2008) (Minnesota statute stating that a sperm donor cannot claim to be a child's biological or legal parent); OHIO REV. CODE ANN. § 3111.97(D) (LexisNexis 2008) (Ohio law also stating that a sperm donor is not a parent, and has no parental rights or responsibilities); VA. CODE ANN. § 20-158(A)(3) (2008) (Virginia also establishes that "a donor is not the parent of a child conceived through assisted conception."); COLO. REV. STAT. ANN. § 19-4-106(1) and (2) (West 2008) (Colorado's own Uniform Parentage Act, not modeled after the actual new UPA, states that records may be obtained upon a court order showing good cause.).

76. *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. App. 2d Dist. 2000). (The court considered two factors in its decision: that the bank had told donors that non-identifying information could be disclosed to purchasers and that there were compelling state interests at stake in this case.)

77. *Lamaritata v. Lucas*, 823 So. 2d 316 (Fla. Dist. Ct. App. 2002); *In re Guardianship of I.H.*, 2003 ME 130, 834 A.2d 922 (Me. 2003).

78. Omar Hasan, Amber Johnson, Shira Lipton & Rachel Turow, *New Ways of Making Babies: The Biology, Ethics, and Policy of Infertility—What Policies Govern Sperm Donation?*, <http://www.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/spermpol.htm> (last visited Dec. 19, 2008).

79. *Id.*

80. First Steps-Cryos New York, <http://ny.cryosinternational.com/for-parents.aspx> (last visited Dec. 19, 2008).

genetic screening, setting it apart from other banks.⁸¹ Because this is still *self-regulation* overseen by no one, many banks choose to become members of private organizations, which have their own policies.

D. Private Organizations

Professional organizations attempt to govern important aspects of the sperm donation process by publishing standards and guidelines aimed at adequate screening, control over children per donor, and monitoring of a donor's genetic and medical history. However, as these are institutions that sperm banks may choose to be associated with, these guidelines are effectively non-binding and merely suggestions. The following three professional organizations have published non-binding, voluntary guidelines for sperm banks and clinics.

1. American Society of Reproductive Medicine

The American Society of Reproductive Medicine (ASRM) has published several useful guidelines that address some of the most important issues in sperm donation. For example, the ASRM recommends establishing a system for ongoing monitoring of a donor's health status, even after donation.⁸² It also suggests a limit of twenty-five live births per sperm donor for every population area of 800,000.⁸³ However, banks are not required to report births and it is estimated that, in fact, only 40% of births are actually reported.⁸⁴ Lastly, ASRM advises parents to disclose to their children the details of their conception, though it opposes any additional regulation of the industry.⁸⁵ Although the ASRM may discipline a member through expulsion, a call for resignation, or other action,⁸⁶ membership in the ASRM is otherwise purely voluntary.

2. American Association of Tissue Banks

The American Association of Tissue Banks (AATB) Standards for Tissue Banking relates to donor screening, emphasizing the usefulness of genetic testing.⁸⁷ Its mission is "to establish and promulgate standards to provide tissue banks with performance requirements intended to prevent disease

81. Donor Selection-California Cryobank, <http://www.cryobank.com/Why-Use-Us/Donor-Selection/> (last visited Dec. 19, 2008).

82. The American Society for Reproductive Medicine, 2002 *Guidelines for Gamete and Embryo Donation: A Practice Committee Report*, 11 FERTILITY & STERILITY S1, S5 (2002).

83. *Id.*

84. *Large Groups of Half Siblings*, Donor Sibling Registry Blog, July 18, 2008, <http://www.donorsiblingregistry.com/DSRblog/?p=55> (last visited Apr. 11, 2009).

85. Stryker, *supra* note 2 (A spokesperson for the ASRM has stated that "[m]ore regulation of sperm banking is a solution in search of a problem"). The basis for this opposition is that more regulation gives up "important autonomy and privacy at great economic expense." *Id.*

86. ASRM Disciplinary Policy, http://www.asrm.org/Professionals/Membership/disciplinary_policy.html (last visited Dec. 16, 2008).

87. AMERICAN ASSOCIATION OF TISSUE BANKS, STANDARDS FOR TISSUE BANKING 21–32 (Richard J. Kagan, M.D., ed., 1998).

transmission.”⁸⁸ All member institutions are required to comply with the mandatory standards, but accreditation by the AATB is merely “strongly recommended” and not required to operate as a tissue bank.⁸⁹ There is neither mention of limits on distributions per donor nor of ongoing monitoring of a donor’s health.

3. American Fertility Society

The American Fertility Society’s (AFS) 1990 guidelines also emphasize the importance of the genetic history of donors.⁹⁰ It recommends that records of the genetic history or testing of the donor be made available—upon request and on an anonymous basis—to the recipient and any resulting children.⁹¹ Like the ASRM, the AFS suggests a pregnancy limit per donor.⁹² Specifically, it recommends ten pregnancies per donor, or under ten if recipients are members of an isolated subgroup of the population.⁹³

4. Donor Sibling Registry

Although not a professional organization like the three above-mentioned associations, the Donor Sibling Registry (DSR) acts in a quasi-regulatory manner by adding more transparency and illuminating some of the problems with the current system. DSR is a website that serves donors, donor-conceived children, and their parents. As of December 2008, DSR had 22,819 members.⁹⁴ Donors and donor-conceived children are able to sign up using the number assigned to the donor by a sperm bank.⁹⁵ When multiple users sign up using the same donor number, a “match” is made.⁹⁶ More commonly, these matches occur between half-siblings, but a number of donor-offspring matches have resulted.⁹⁷ As of December 2008, over 5,000 matches had been made on the DSR website.⁹⁸ The largest match between half-siblings is a startling 105 matches!⁹⁹ Not only do these numbers illustrate the consanguinity risks to be discussed below, they

88. *Id.* at Introduction.

89. *Id.*

90. American Fertility Society, *New Guidelines for the Use of Sperm Donor Insemination: 1990*, 53 FERTILITY & STERILITY S1, S8 (Supp. 1 1990).

91. *Id.* at S4.

92. *Id.*

93. *Id.* “Isolated subgroup” is not defined in the Guidelines, nor do they provide any explanation as to this modification to the limit. However, an example of an “isolated subgroup” might be if the population using the donor insemination was limited to certain individuals because the clinic is the only one in a small town.

94. Donor Sibling Registry, <http://www.donorsiblingregistry.com/index.php> (last visited Dec. 16, 2008).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Fairfax Cryobank Listings on Donor Sibling Registry, http://www.donorsiblingregistry.com/ListRegistry.php?keyword=&dpTypeID=1&faID=15&dpIdentityNumber=&usUserName_startswith=&usTypeID=&faCity_contains=&faStateID=&faCountryID=&dpDateCreated_isgreaterthan=&doSearch=Search+Registry (last visited Dec. 16, 2008).

show that if such a registry were mandated and inclusive of all donations nationwide, it would be effective in solving that problem.

III. PROBLEMS WITH UNREGULATED SPERM DONATION

Unregulated anonymous sperm donation raises many concerns and problems, particularly the health risks to donor-conceived children and their offspring, such as genetic disorders and consanguinity, and a diminishment of donor privacy. Current regulation by the FDA, individual states, and professional organizations lacks uniformity and fails to provide real solutions to these problems. This Part will also introduce the faulty solution some states and countries have chosen, which is analyzed further in Part IV.

A. Health Concerns

Anonymous sperm donation presently causes a risk of incest among unknowing half-siblings conceived using the same donor's sperm, which can lead to consanguinity. Also, limited access to information about a donor's health after donation leaves donor-conceived children with an incomplete medical history.

1. Consanguinity

As mentioned above, sperm banks are primarily self-regulating entities.¹⁰⁰ Aside from voluntary guidelines issued by the major professional organizations, sperm banks are not required to report the number of live births per donor.¹⁰¹ Thus, it is entirely possible that one sperm donor can be the biological parent of numerous children.¹⁰² This concern is compounded when one considers that these children may well grow up in the same geographic area surrounding the bank where their mothers obtained the sperm used in the ART. Even more troublesome is the fact that there are particular characteristics that result in a few frequently requested donors,¹⁰³ and a bank can divide up a single donation to sell the sperm to numerous recipients.¹⁰⁴ In fact, a search on The Donor Sibling Registry shows that "one particular donor, number 1476 of the Fairfax Cryobank, is the biological father of at least 36 children all born between 2002 and 2007."¹⁰⁵ Although some individual clinics have chosen to limit the number

100. Dennison, *supra* note 12, at 15 (citing Lucy Frith, *Gamete Donation & Anonymity: The Ethical and Legal Debate*, 16 HUMAN REPROD. 818, 821 (2001)).

101. Banks are merely required to report the number of live births generally. 42 U.S.C.A. § 263a-1 (2009).

102. *Id.* (citing Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES, June 6, 2006, available at http://www.nytimes.com/2006/06/06/health/06opin.html?_r=1). Recently, thirty lesbian women in Adelaide, Australia were inseminated by sperm from the same man. In another case, one man's sperm produced twenty-nine children in the same city in Australia. *Unregulated Sperm Donation Causes 30 Women to Be Impregnated by Same Man*, FOX NEWS, Oct. 8, 2008, <http://www.foxnews.com/story/0,2933,434511,00.html>.

103. Nordic donors are some of the most popular because of their blond hair and blue eyes, tendency to be tall and to hold advanced degrees. Rob Stein, *Mad Cow Rules Hit Sperm Banks' Patrons*, WASHINGTON POST, Aug. 13, 2008, at A01.

104. Dennison, *supra* note 12, at 15 (citing Grady, *supra* note 104).

105. *Id.*

of donations or births per donor,¹⁰⁶ there is no requirement that clinics share information regarding these statistics.¹⁰⁷

2. Access to Medical History

Although the FDA requires comprehensive donor screening for infectious diseases, it does not require genetic testing or even a procedure for continued monitoring of a donor's health.¹⁰⁸ Although a donor can consent to allowing a sperm bank to release non-identifying medical information to a recipient, that would still cover only disorders and diseases up to that point. Should a donor later develop a serious medical condition that may have been genetically passed on to an ART-conceived child, he is not required to contact either the sperm bank, the recipient-mother, or the child.

B. Donors' Concerns About Their Privacy

Donor privacy is becoming less absolute, and it appears that a state could require disclosure of information that a donor assumed, and that a sperm bank promised, would be anonymous. In fact, at least in California, a donor's constitutional right to privacy can be diminished by another person's actions.¹⁰⁹ A California Court of Appeals case in 2000 determined the level of protection given to a sperm donor's level of privacy.¹¹⁰ Commentators describing the court's holding have reported that "donor information from an anonymous donor could be disclosed under certain circumstances."¹¹¹ Although other states have not addressed this issue, most other states are like California in that the state's constitutional right to privacy provides even more privacy than federal laws, so the *Johnson* analysis could be extrapolated to other states.¹¹² By creating the possibility that a state might require disclosure, the *Johnson* decision affects a donor's privacy in two ways: by establishing that a donor "can have a diminished expectation of privacy and that contractual protection of a donor's information may not be sufficient to prevent its disclosure."¹¹³

1. Diminished Expectations of Privacy

The *Johnson* court held that the donor's reasonable expectation of privacy was "substantially diminished" for two reasons.¹¹⁴ First, the sperm clinic routinely informed its donors that non-identifying information and medical

106. *E.g.*, The Sperm Bank of California, <http://www.thespermbankofca.org/pages/page.php?pageid=2> (last visited Dec. 16, 2008).

107. Dennison, *supra* note 12, at 16.

108. *See generally* 21 C.F.R. § 1271 (2008).

109. Dennison, *supra* note 12, at 21. *See infra* Part III.B.1.

110. *Id.* (citing *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. App. 2d Dist. 2000)).

111. *Id.* Since the case did not involve a donor-conceived child seeking access to information, the court did not elaborate on the circumstances under which a court may disclose such information pursuant to the UPA. Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Registry*, DEPAUL J. HEALTH CARE L. (forthcoming 2009).

112. Dennison, *supra* note 12, at 21–22.

113. *Id.* at 22.

114. *Id.* (quoting *Johnson*, 95 Cal. Rptr. 2d at 1055).

history may be disclosed to purchasers, which lessened a donor's expectation that such information would never be revealed.¹¹⁵ Second, the donor's own conduct diminished his expectation of privacy in his identity because his very frequent donations amounted to a "substantial commercial transaction likely to affect the lives of many people."¹¹⁶

Clinics are increasingly offering to potential purchasers more donor information, such as interests, education, baby photographs, and audio interviews.¹¹⁷ Donors knowingly provide this additional information and thus are aware that it is made available to purchasers.¹¹⁸

In addition, it is increasingly difficult to maintain anonymity in the modern age. Another recent development that may diminish a donor's reasonable expectation of privacy is the very real possibility that donor-conceived children and their parents may be able to discover the donor's identity. Recently, a fifteen-year old boy in the United Kingdom traced his sperm donor's identity on the Internet using a genealogy DNA-testing service.¹¹⁹ The boy used a DNA-testing service to match up with two other people with same paternal line, which is determined by the gene variants carried by a person's Y chromosome.¹²⁰ The similarity between their Y chromosomes suggested that they must have the same father, grandfather, or great-grandfather, and the two matches shared the same last name.¹²¹ Already knowing his donor's birthplace and date of birth, the boy purchased from an online service the names of everyone born in the same place on the same day, which revealed one person with that particular last name.¹²² Thus, any internet-savvy teenager with a few hundred dollars could likely make the same discovery.

2. Weak Contractual Protection of Donor Privacy

The *Johnson* court also found that the contract between parents and clinics expressly prohibiting disclosure of the donor's identity under "any and all circumstances" cannot enhance the donor's expectation of privacy because it is contrary to public policy.¹²³ This implies that the child's best interests, including health, consanguinity, and psychological well-being, are likely an overriding concern.¹²⁴ The possibility that a donor-conceived child may be able to discover

115. *Id.*

116. *Id.*

117. *Id.* at 23 (citing California Cryobank Donor Catalog, California Cryobank, <http://www.cryobank.com/catalog/indexb.CFM>; Donor Information, Fairfax Cryobank, <http://www.fairfaxcryobank.com/donorinfo.aspx?menu=4&turn=on>).

118. *Id.*

119. Motluk, *supra* note 15.

120. *Id.*

121. *Id.*

122. *Id.*

123. Dennison, *supra* note 12 (citing *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. App. 2d Dist. 2000)).

124. *Id.*

a donor's identity, mentioned above, is also of concern in this area, as clinics are less confident in their ability to guarantee complete anonymity.¹²⁵

C. Recent State and International Trends

Within the past decade, both states and foreign countries have moved away, or attempted to move away, from complete anonymity for sperm donors. States have gradually begun to consider bills proposing to either list a donor's identity in the mother's medical chart¹²⁶ or to give donors the option to allow a clinic to reveal their identity to the donor-conceived child.¹²⁷ Internationally, anonymous donation is available in fewer and fewer places,¹²⁸ while some countries are instead releasing a donor's identity when donor-conceived children reach a certain age.¹²⁹

1. State Trends

Recently, states have attempted to reduce donor anonymity. First, the *Johnson* case mentioned above allows access to a donor's information in certain circumstances.¹³⁰ Although legislative proposals have primarily been futile, they nonetheless represent a growing interest in recognizing the above-mentioned concerns as being as important as, or even overriding, a donor's privacy right. A Virginia bill introduced in 2006 attempted to require that all unrelated sperm donors be identified in the medical chart of any unmarried female purchasers.¹³¹ Had it not been voted down, this would in effect have prohibited anonymous donation for unmarried women, one of the main groups that benefit from sperm donation. Michigan also proposed requiring licensed fertility clinics to provide donors with the option to sign a contract authorizing the clinic to reveal the donor's information to the ART-conceived child.¹³²

As described previously, the UPA allows access to a donor's medical file upon court order for good cause.¹³³ This likely includes cases of medical necessity for donor-conceived children.¹³⁴ In addition to those states that have adopted the UPA, several states have enacted legislation that would permit donor-conceived children to obtain donor information on court order, based on a satisfactory showing of "good cause" or a similar standard.¹³⁵ "Good cause" may be satisfied when a child or parent needs access to the donor's information

125. *Id.* at 24 (citing Betsy Streisand, *Who's Your Daddy?*, U.S. NEWS & WORLD REP., Feb. 5, 2006, <http://usnews.com/usnews/health/articles/060213/13donor.htm>).

126. H.B. 187, Gen. Assem., Reg. Sess. (Va. 2006).

127. H.R. 5605, 93rd Leg., 2006 Sess. (Mich. 2006).

128. *See infra* Part III.C.2.

129. *E.g.*, Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).

130. *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. App. 2d Dist. 2000).

131. H.B. 187, Gen. Assem., Reg. Sess. (Va. 2006).

132. H.R. 5605, 93rd Leg., 2006 Sess. (Mich. 2006). The bill never reached a vote.

133. UNIF. PARENTAGE ACT § 632 (2002).

134. Hollace S.W. Swanson, *Donor Anonymity In Artificial Insemination: Is It Still Necessary?*, 27 COLUM. J.L. & SOC. PROBS. 151, 188 (1993).

135. Dennison, *supra* note 12, at n80.

for early detection of a genetic disease or for location of a relative for a “lifesaving transplant procedure.”¹³⁶

2. International Trends

Responding to the rise in ART development and use, many countries have enacted legislation that regulates sperm donation. Some have chosen to eliminate anonymous donation altogether, whereas others are requiring disclosure of a donor’s information when a donor-conceived child reaches the age of majority. The United Nations (U.N.) has even taken steps acknowledging a child’s right to know her parents.

Sweden, Austria, the Netherlands, and parts of Australia do not permit anonymous donation.¹³⁷ These jurisdictions have prohibited anonymous donation in order to encourage children to contact their donors when they reach the age of majority.¹³⁸ The United Kingdom’s Human Fertilisation and Embryology Act 1990 takes a different approach by requiring disclosure once a donor-conceived child comes of age.¹³⁹ At eighteen, the child can request identifying and non-identifying information about the donor.¹⁴⁰ However, this is only allowed with the donor’s consent.¹⁴¹ Britain has also instituted a limit on creating ten families per donor.¹⁴² Similarly, in New Zealand the Human Assisted Reproductive Technology Act of 2004 provides mechanisms for accessing information by both donors and donor-conceived children, and established a registry for this purpose.¹⁴³ Those children have access to the information on the donor at age eighteen, or at sixteen or seventeen with a court order.¹⁴⁴ The Act’s guiding principles include that donor-conceived children should know of their genetic origins and be able to access information about those origins.¹⁴⁵

In 1989, the U.N. recognized the right to know one’s parents as a fundamental human right in its Convention on the Rights of the Child (CRC).¹⁴⁶ Although nearly 200 countries have ratified the CRC, the United States has yet to do so.¹⁴⁷ In fact, it and Somalia are the only two U.N. member states that have

136. See *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 875 (Cal. App. 2d Dist. 2000).

137. Dennison, *supra* note 12, at 9.

138. *Id.*

139. Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).

140. *Id.*

141. *Id.*

142. *Id.*

143. Assisted Reproductive Technology Act of 2004, 2004 S.N.Z. No. 92; Ken Daniels and Alison Douglass, *Access to Genetic Information by Donor Offspring and Donors: Medicine, Policy, and Law in New Zealand*, 27 MED. L. 131 (2008) (for children conceived after August 2005).

144. *Id.*

145. *Id.*

146. UNITED NATIONS, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, CONVENTION ON THE RIGHTS OF THE CHILD, Sept. 20, 1990, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

147. UNITED NATIONS, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, June 9, 2004, available at <http://www.unhchr.ch/pdf/report.pdf>.

not ratified the CRC.¹⁴⁸ Although the United States has given no reason as to why it has chosen not to ratify the CRC, one possible cause is the hesitance of conservative organizations that believe ratification would have implications for issues like abortion, education, and discipline.¹⁴⁹ Other critics believe that the CRC undermines a parent's roles and that it is "anti-parent" and "anti-family."¹⁵⁰ If any of these possible reasons change or are overcome, ratification by the United States of the CRC could lead to erosion of the anonymous donation process. Also, as of his inauguration, President Barack Obama had not expressed whether he intends to ratify the CRC.¹⁵¹

IV. WHY EXPOSED DONATION IS NOT THE ANSWER

Recent state and international trends as well as commentators¹⁵² suggest that information disclosure and donor-child/parent contact solve the problems discussed in Part III. As shown, some countries have even gone the way of an outright ban on anonymous donation,¹⁵³ and proponents of that view believe that the environment in which ART came about decades ago, which encouraged secrecy about these issues, has changed.¹⁵⁴ However, allowing only exposed donation creates far greater problems, such as scarcity of donations and other harms to donors, the medical profession, and society. As discussed in Part V, *infra*, a combination of the new UPA and some comprehensive regulation of the sperm bank industry may be far more effective.

A. Scarcity

Banning sperm donors from donating sperm anonymously would result in fewer donations overall. In fact, requiring exposed donations elsewhere has actually led to fewer sperm donations in those countries. The previously mentioned U.K. regulations have caused scarcity,¹⁵⁵ which has led to "pressure to accept donors with suboptimal characteristics, long waiting lists, and the development of a fresh semen market on the Internet, often with unscreened semen."¹⁵⁶ Other countries have experienced shortages as a result of similar legislation.¹⁵⁷ Requiring exposed donation in the United States could cause

148. *Id.*

149. Devanshi P. Patel, *Should Teenagers Get LoJacked Against Their Will?: An Argument for the Ratification of the United Nations Convention on the Rights of the Child*, 47 HOW. L.J. 429, 435 n.16 (2004).

150. *Id.* (Senator Jesse Helms, who said: "The United Nations Convention on the Rights of the Child is incompatible with the God-given right and responsibility of parents to raise their children.")

151. Policy Issues, <http://www.barackobama.com/issues/> (last visited Dec. 15, 2008).

152. *E.g.*, Dennison, *supra* note 12; Swanson, *supra* note 134.

153. *See supra* Part III.C.2.

154. Swanson, *supra* note 134, at 190.

155. Grady, *supra* note 102. In fact, each year Britain needs at least 500 donors to provide sperm to about 4,000 women. In 2006, only 307 donors registered; this shortage may have been due to the anonymity ban in 2005. Also, in the past, for every 100 men solicited, about five to ten would choose to donate; now, the number has decreased to fewer than five. *Id.*

156. Ilke Turkmendag, Robert Dingwall & Therese Murphy, *The Removal of Donor Anonymity in the U.K.: Silencing of Claims by Would-Be Parents*, 22 INT'L J. OF L., POL'Y & FAM. 283, 284 (2008).

157. *E.g.*, Carbone & Gottheim, *supra* note 20, at 519-20; Yuen, *supra* note 10, at 545-48.

scarcity here as well, which could lead to negative effects worse than the problems with the current process.

1. Why Exposed Donation Would Lead to Scarcity

Studies have shown that about half of sperm donors would not donate if anonymity were banned.¹⁵⁸ Although a donor may donate with the non-pecuniary intentions to help women and couples unable to have children any other way, he may not be comfortable with the idea that a child conceived with his sperm may contact him at any unexpected moment in his life. The donor may fear that a relationship, or even contact, with the child may interfere with the donor's later family life.¹⁵⁹ Despite knowing what his sperm may be used for, a donor may be psychologically disturbed when confronted with knowledge of an actual offspring conceived with his sperm.¹⁶⁰ He may even feel embarrassment over his previous decision to donate,¹⁶¹ particularly if he changed his mind over time. A donor may even fear or resent that an additional legal obligation, such as child support, has been thrust upon him or that he will be subject to paternity suits or even that the child will bring an inheritance claim.¹⁶² In fact, if anonymity is the primary reason or factor that donors are not legal parents,¹⁶³ banning anonymous donation may lead to courts deciding that donors are legal parents of donor-conceived children.

2. The Negative Effects of Scarcity Due to Exposed Donation

Should the United States choose to address the current lack of sperm bank regulation by banning anonymous donation, the scarcity that is likely to result would have many far-ranging consequences that affect both women and couples seeking sperm and donor-conceived children. First, the forced exposed donation and resulting shortage of donated sperm may place undue burdens on procreation and force childlessness, especially since it may cause an increase in the cost of sperm.¹⁶⁴ The fact that ART falls under the constitutionally-protected right to privacy in reproductive choice explains the current laissez-faire approach to regulation,¹⁶⁵ as regulators may fear that more regulation may violate that right. However, as Part V will point out, the United States can reach a middle ground between inadequate regulation and intrusion on this important right. It is also arguable that a married couple's constitutionally recognized right to procreate is broad enough to encompass ART.¹⁶⁶ Additionally, if one can accept ART as a "public good," the ban and scarcity may cause dignitary harms

158. Cahn, *supra* note 111, at 16 (citing Eric D. Blyth, Lucy Frith & Abigail Farrand, *Is it Possible to Recruit Gamete Donors Who Are Both Altruistic and Identifiable?*, 84 FERTILITY & STERILITY J. S21 (2005)).

159. Swanson, *supra* note 134, at 180.

160. *Id.*

161. *Id.*

162. Dennison, *supra* note 12, at 21.

163. See generally Paul Bailin, Ferguson v. McKiernan: *The Problematic Concept of Technological Paternity*, 36 J.L. MED. & ETHICS 425, 425 (2008).

164. Dennison, *supra* note 12, at 19 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

165. *Id.* at 10.

166. Daar, *supra* note 27, at 51–57.

due to the denial of equal access to public goods on the basis of immutable characteristics.¹⁶⁷

Other consequences address the very real likelihood that people will find a way to circumvent this undesirable ban on anonymous donation, or seek sperm where it is not in short supply. The shortage may encourage “middlemen” to respond to the excess demand by facilitating cross-border transactions,¹⁶⁸ which could result in “fertility tourism.”¹⁶⁹ Does it make sense to protect the parties to sperm donation by regulating sperm banks in a way that results in the parties going elsewhere to participate in the process, to places where donation may be even less regulated than in the United States?¹⁷⁰ Scarcity may also cause women and couples to resort to informal practices, such as asking a friend for sperm.¹⁷¹ Those situations could result in the friend being deemed a legal parent of the child, since courts often acknowledge non-parent status for a friend-donor only when it very closely resembles a “conventional, anonymous sperm donation.”¹⁷² This would require at least an oral contract exempting the friend from child support obligations and other responsibilities and obligations.¹⁷³

Lastly, this scarcity may even exacerbate the current problem of consanguinity. It is unlikely that sperm donation would cease altogether because some donors would likely continue to donate despite having to expose their identities. This could result in more donations per donor, in order to meet the excess demand arising from the shortage. Thus, the chances of many children conceived from one donor residing in one geographical area would greatly increase the chances of incest.

B. Donor Privacy

As mentioned above, a donor’s expectation of privacy may be diminished, allowing sperm banks to disclose the identity or even medical history of donors.¹⁷⁴ It appears that if donors are no longer permitted to withhold their identity, a court may choose to draw the privacy line even further away from total protection of donor medical information. Thus, a court could allow access to a donor’s complete medical file, which includes all medical history as well as other private information.

167. *Id.* at 57–62. For example, a “public accommodation” is defined in the Americans with Disabilities Act to include the “professional office of a health care provider.” American with Disabilities Act of 1990, 42 U.S.C.

§ 121821(7)(F) (2008).

168. Yuen, *supra* note 10, at 541–43.

169. Carbone & Gottheim, *supra* note 20, at 5–8. “Fertility tourism” occurs when those seeking fertility services, such as sperm, travel to, or purchase from, other countries for those services or products. *See generally id.*

170. The opposite effect may result if the United States continues to allow anonymous donation: others may choose to come to this country to obtain these services.

171. Carbone & Gottheim, *supra* note 20, at 4.

172. *See generally* Ferguson v. McKiernan, 855 A.2d 121 (Pa. 2007). Bailin, *supra* note 66.

173. *See* Ferguson, 855 A.2d at 124; Bailin, *supra* note 66. This would also help to ensure that the donor’s right to privacy is not diminished and thus that the *Johnson* reasoning (*supra* Part III.B) does not apply.

174. *See generally* Johnson v. Superior Court, 95 Cal. Rptr. 2d 864 (Cal. App. 2d Dist. 2000).

C. Harm to Parents

When a donor's identity is known to a donor-conceived child and her family, parents may fear that the donor's role in the child's life may cause an interruption in their own family life or in the parent's rearing of the child.¹⁷⁵ A parent may also experience embarrassment at others knowing that her child was conceived through ART, because it may imply infertility or an alternative lifestyle which the parent may not have disclosed to everyone she knows.¹⁷⁶ It could also be problematic in paternity hearings if the exposed donor appeared to assert parental rights; currently this fear would be irrational because most states do not allow a sperm donor to assert such rights, at least so long as the donation was anonymous.¹⁷⁷

D. Harms to ART Providers

The medical profession "has incentives to maintain donor anonymity" for several reasons.¹⁷⁸ First, a dramatic decrease in donations may have economic consequences for ART providers. Scarcity and thus fewer purchases may cause many sperm banks to go out of business. This results in a smaller number of sperm banks, and thus a greater concentration of donated sperm. As mentioned above, this will also magnify the consanguinity problem. Also, these providers may suffer reputational harms should they no longer be able to assure their donor patients that their information will be kept confidential.¹⁷⁹ Also, banning anonymity may negatively affect physician autonomy in that the providers will no longer be able to independently decide when identifying and medical information should be disclosed.

E. Harms to Society

The state's interest in the institution of marriage¹⁸⁰ causes it to "favor conduct that furthers marriage."¹⁸¹ The use of ART promotes marriage in various ways, such as by bringing couples psychologically closer together through the conception and raising of a child.¹⁸² It also allows more couples to have children, which in turn leads to marital stability.¹⁸³ By making it more difficult for couples to conceive children when conventional options are unavailable, a ban on anonymity would keep this important interest from extending to all citizens.

175. Swanson, *supra* note 134, at 180.

176. *Id.*

177. Dennison, *supra* note 12, 18–19.

178. Swanson, *supra* note 134, at 182.

179. *See id.* This could even be deemed an unconstitutional "interference with the obligation of contracts" by Congress since it would violate the contract between current donors and their sperm banks, which promise anonymity.

180. *Id.*

181. *Id.*

182. *Id.* at 183.

183. *Id.*

V. PROPOSAL: UPA & UNIFORM SYSTEM OF LAWS REGULATING SPERM BANKS

This article's proposal solves the concerns with current regulations in a way that does not cause the problems that a ban on anonymity would create. In fact, in its 2007 regulations the European Union took similar action, by requiring member states to register sperm donations without imposing any rules relating to anonymity.¹⁸⁴ An effective way to enforce the following framework would be for the United States to pass a comprehensive ART Act,¹⁸⁵ which would fill in the gaps left by states that have not adopted the new UPA and by the lack of attention paid to the other concerns addressed above.

A. Requiring Sperm Banks to Report Births

A way to lessen the risk of incest among donor-conceived children is to require sperm banks to report, or at least track, births. Special attention should be paid to the number of births per donor. This could be done through state licensing laws or through FDA regulation.¹⁸⁶ This would not infringe on donor privacy rights in any way, as it can still be done through a bank-created registry using randomly assigned donor identification numbers.¹⁸⁷ It would merely be a way to tie separate donor-conceived children to a single donor. Banks would be required to enter the information each time a donation is made. These children would then be able to contact the sperm bank to determine if another donor-conceived child is a half-sibling before engaging in a physical relationship. In the United Kingdom, before anonymity was banned altogether, donor children could contact the Human Fertilisation and Embryology Authority's Registry to verify that they were not biologically related.¹⁸⁸ A similar database should be created in the United States, modeled after the voluntary Donor Sibling Registry (DSR).¹⁸⁹ In fact, at a recent symposium, the three largest sperm banks "advocated for the creation of a voluntary registry run by a non-profit entity."¹⁹⁰

It is important to note that this article advocates a federal approach to sperm bank regulation because state implementation of a registry is replete with problems. Even if uniform legislation is created, individual states may modify it

184. Daryl Lindsey, *Danish Sperm Bank Deposits to Remain Tax-Free and Anonymous*, SPIEGEL ONLINE INTERNATIONAL, Feb. 1, 2008, <http://www.spiegel.de/international/europe/0,1518,532388,00.html>. Also, France does not guarantee a child's right to know his or her origins. Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J. LAW, POL'Y & FAM. 137, 154 (2007).

185. This note does not address any potential federalism issues.

186. For this to be done via FDA regulation, sperm donation and/or banking would need to fall under the Food and Drug Act.

187. These numbers could at some point be tied to the donor's social security number or other identifying information, so as to avoid one man donating at several banks to circumvent the donation limit.

188. Dennison, *supra* note 12, at 16 (citing The HFEA Register For Donors, Human Fertilisation & Embryology Authority, <http://www.hfea.gov.uk/en/1213.html> (last visited Dec. 18, 2008)).

189. Donor Sibling Registry, <http://www.donorsiblingregistry.com> (last visited Dec. 16, 2008); see *supra* Part II.D.4.

190. Pamela Foohey, *Potential National Voluntary Gamete Donor Registry Discussed at Recent Health Law Symposium*, 36 J.L. MED. & ETHICS 597, 599 (2008).

before enactment, much like the UPA, thus causing it to vary drastically.¹⁹¹ Multiple state registries may make it nearly impossible for a child to utilize the system without knowing exactly in which state his mother purchased the sperm.¹⁹² Also, an additional oversight entity may be required to ensure cooperation and coordination among states.¹⁹³ Lastly, having fifty registries would likely result in nationwide duplicative effort.¹⁹⁴

A simpler solution to the consanguinity problem is DNA and parentage blood testing, which is currently a readily available resource. Donor-conceived children worried about consanguinity could contract with a testing laboratory to determine whether they share the same sperm donor. A huge flaw in each of these solutions is that in order for them to be effective, both children must know that they were conceived using donor sperm; otherwise, they would not even consider checking for consanguinity. It is worth taking a moment to note the importance of this disclosure. Knowledge of the circumstances of their conception allows donor-conceived children to utilize the resources available, and those proposed here, to have a complete medical history and to be aware of the risk of incest. Because it can be an unsettling event for any donor-conceived child, studies have shown that the earlier in life the child is told, the better.¹⁹⁵ This enables the child to adapt well and to seek support from other donor-conceived children. It also avoids feelings of betrayal should the child accidentally find out later in life. However, there are some parents that will still choose to keep their child's donor-conception a secret, either to protect their children or because they fear it will diminish the father's role.¹⁹⁶ Thus, the most successful way to avoid the consanguinity concern is to require reporting or recording of births per donor, and even enforcing a limit per geographical area as the AFS guidelines already recommend.¹⁹⁷ This will ensure that, even if some children remain unaware of their status, there is at least a limit on donor births per geographic area.

B. Allowing Access to Information by Court Order

Giving donor-conceived children and their parents access to donor information would address situations where a child needs to know relevant medical history.¹⁹⁸ The court order required would only be given "for good cause," and would allow access only to the most relevant information and never to identifying information when non-identifying information is sufficient. This is

191. Cahn, *supra* note 111, at 19.

192. *Id.*

193. *Id.*

194. *Id.*

195. Sperm Bank Information, *Tell Donor Children Early in Life*, July 15, 2008, <http://www.spermbankinformation.com/2008/07/15/tell-donor-children-early-in-life/>; Science Daily, *Children Born After Donor Insemination Should Be Told As Soon As Possible About Their Conception*, July 7, 2008, <http://www.sciencedaily.com/releases/2008/07/080707100203.htm>.

196. Patricia Wen, *To Tell the Truth*, BOSTON.COM, Feb. 4, 2008, http://www.boston.com/news/health/articles/2008/02/04/to_tell_the_truth/.

197. Fertility Society, *supra* note 90, at S4.

198. *E.g.*, if a child needs information regarding a possible genetic illness or a more complete medical history.

the exact standard used by the UPA and the *Johnson* court. As mentioned, the “good cause” standard has been construed to encompass circumstances such as when detection of a genetic disease or location of a relative for a transplant is necessary.¹⁹⁹ Other state courts have not given any attention to what constitutes “good cause,” so an ideal comprehensive regulatory scheme should enumerate situations where it would be appropriate to release information. This specificity would alleviate a donor’s concerns that his privacy will be encroached upon in situations where the need for the information is not a medical necessity. Also, unlike countries such as the United Kingdom, the United States should not allow automatic disclosure of information when a donor-conceived child reaches the age of majority, as it could cause further diminishment of a donor’s privacy rights by putting donors on notice that information will be disclosed. Lastly, instituting a national registry as discussed in the previous subsection could be used to encourage donors to contact their donor-conceived children should the donor develop a genetic disease after donation. If necessary to preserve anonymity, this communication could take place through the sperm bank used for donation. Admittedly, there may be disadvantages to a registry, such as an increase in the cost of ARTs and a possible decrease in donations.²⁰⁰ However, if a streamlined, national registry is used, the cost per donation or per purchase may be minimal. Also, as the next section will show, if all states take steps to recognize that a donor is not a legal parent, donors should not be deterred simply because there will be a registry, especially since this article proposes a truly anonymous registry.

C. Establishing Donors’ Non-Parent Status

All states should set forth that a donor is not considered the legal parent of a child conceived with his sperm. This will not only assuage donors’ concerns that donating will expose them to legal and financial responsibilities to a child, but will also ease parents’ worries about donor interference. Although at least nineteen states have adopted the previous version of the UPA, which states that a when a child is conceived through artificial insemination using a donor’s sperm, the donor is not considered the child’s father,²⁰¹ very few have adopted the new UPA which specifically applies to ART and both married and unmarried users of donated sperm.²⁰² Each state should either strive to adopt the new UPA or at the very least enact a statute setting forth a donor’s status. Some state courts have recognized this by finding non-parental status when a truly anonymous donation has taken place. For example, in 2007 the Pennsylvania Supreme Court refused to treat a donor as a legal father because the parties had “preserved enough of the trappings of a conventional, anonymous sperm donation.”²⁰³ However, in the ever-evolving world of ART, this limited common law is not sufficient; specific statutory language is needed.

199. See *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 875 (Cal. App. 2d Dist. 2000).

200. Foohey, *supra* note 190.

201. Paul Bailin, Ferguson v. McKiernan: *The Problematic Concept of Technological Paternity*, 36 J.L. MED. & ETHICS 425, 427 (2008) (quoting UNIF. PARENTAGE ACT § 5 (1973)).

202. UNIF. PARENTAGE ACT, § 702(2002).

203. Bailin, *supra* note 201, at 425 (citing Ferguson v. McKiernan, 855 A.2d 121 (Pa. 2007)).

VI. CONCLUSION

Federal and state regulation of sperm donation lags far behind the constantly evolving science of ART, causing uncertainty, fear, and even medical harm. The donor is unsure of his legal relationship to a child born from artificial insemination using his sperm. The child worries that she will be unable to confirm her genetic history, or that her donor has developed a genetic disorder since donating. Any time two donor-conceived people enter into an intimate relationship, they are taking a risk that they may be biologically related and that any resulting children will suffer the consequences. The solution is not to remove an aspect that makes the artificial insemination process available and efficient— anonymity. It is to address the gaps and flaws in current regulation with practical, specific and clear mandates that do not discourage donation. In the meantime, this article's proposal will hopefully result in an increase in the ratio of donors who voluntarily release their identities to anonymous donors,²⁰⁴ due to more awareness of the underlying flaws of the current sperm donation process.

204. Foohey, *supra* note 190, at 598.