

The Case Against Sperm Donor Anonymity

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“The child shall [have] as far as possible, the right to know . . . his or her parents.”
United Nations Convention on the Rights of the Child, Article 7.1

“My daddy’s name is Donor.”
Slogan on child’s t-shirt at FamilyEvolutions.com

In 2002, a high school student named Claire made news by announcing her desire to contact her biological father, whom she had never met or even spoken to. Like many children from father-absent homes, she wanted to know her father better. Yet, as a child conceived through artificial insemination with an anonymous sperm donor, all she knew about him were a few physical characteristics, such as his height (6’3”), eye color (green), and hereditary illnesses (hay fever and asthma). What made Claire’s story newsworthy is that she was reportedly the first “sperm bank baby” in the United States to learn the identity of her genetic father.¹ Her mother purchased sperm through a bank’s “identity release program,” in which offspring, upon their eighteenth birthday, can learn the name of their biological father. As the first child conceived with the “open identity” sperm, Claire was looking forward to this unique birthday present. She told reporters that she had always wanted to learn more about “what half of me is, what half of me comes from.”²

Many other donor-conceived offspring feel the same way. One says she wants “to know the other half of me . . . the person who is responsible for me being here.”³ “It’s like looking in a mirror and part of you is not reflected,” describes another.⁴ For these

¹ Trisha Carlson, "'Sperm Bank Baby' to Learn Donor's Name," KPIX Channel 5, February 1, 2002

² *Id.*

³ Judith Graham, *Sperm Donors' Offspring Reach Out Into Past*, CHI. TRIB., June 19, 2005, at C1.

⁴ OFFSPRING (2001) (a documentary film on a donor-conceived person’s quest to learn the identity of his biological father). *See also* Paul van der Bijl, Family Secrets: A Review of the Documentary *Offspring*, http://www.cbhd.org/resources/movies/vanderbijl_2003-10-22.htm.

people, their biological father's identity is fundamental to their own identity. As one young adult says, "A lot of people want to know where they come from."⁵

Most children conceived through donor insemination, however, will never be able to find out. In the United States, sperm banks primarily sell anonymous semen and strive to protect the anonymity of their sperm providers. In most cases, laws are currently structured to ensure the anonymity of sperm fathers. The result is that, each year, thousands of children are born who will never be able to know who their biological fathers are. Few regulations force the industry to consider the interests of the children they help create.

While a few sperm banks sell "open identification" sperm (as in Claire's situation), should a child's ability to learn more about her biological father be contingent upon her mother's purchasing decisions?

This paper argues that people conceived through donor insemination should have the right to learn the identity of their biological fathers. Profit-seeking donors and businesses should not be able to contract away the rights of the individual who has no say in the transaction, but who will be most powerfully affected by it. In contrast to current industry practice, sperm banks and fertility clinics should be required to maintain accurate detailed records of sales and conceptions. Upon turning eighteen, donor-conceived offspring should be able to access identifying information about their biological fathers.

Part I of this paper surveys the sperm bank industry and the role of sperm father anonymity. Part II presents the case for abolishing anonymity. Part III proposes a statute

⁵ *Sunday: Sperm Banking on the Internet* (Nine Network television broadcast [Australia], Sept. 19,2004), transcript at http://sunday.ninemsn.com.au/sunday/cover_stories/transcript_1646.asp.

that would ensure that donor-conceived people would have the option to learn the identity of their absent biological parent. Part IV responds to constitutional and policy arguments against a ban on donor anonymity.

I. The Buying and Selling of Anonymous Sperm

In the United States, there is a thriving market in sperm.⁶ Approximately one hundred fifty sperm banks generate hundreds of millions of dollars in business each year as part of the multibillion-dollar fertility industry.⁷ The rank commercialization of semen, however, is relatively new. Ensuring the anonymity of sperm fathers, on the other hand, has been a fundamental feature of donor insemination for more than a century. A review of the history of donor insemination (DI) illustrates why.

A. A Brief History of Donor Insemination

Secrecy, deception, and donor anonymity have been hallmarks of donor insemination since its impromptu inception at a Philadelphia medical college in 1884. The much-recounted tale begins with a couple's request for help in conceiving a child. After their doctor determined that the husband was infertile, one of his medical students joked that it was time to "call in the hired man."⁸ While this quip would later prove prophetic, the physician instead went to a volunteer—the medical student who had been voted "best looking" by his peers. After arranging for the man's wife to come in for an examination, the doctor knocked her unconscious with chloroform and secretly

⁶ DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* 159 (2005) ("Today, sperm banking is a business with 'customers' instead of 'patients,' marketing plans instead of doctor's orders, professional donors instead of Johnny-on-the-spot medical students")

⁷ Betsy Streisand, *Who's Your Daddy?*, *US NEWS & WORLD REPORT*, Feb. 13, 2006, at http://www.usnews.com/usnews/health/articles/060213/13donor_2.htm.

⁸ PLOTZ, *supra* note 6, at 159-61. LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 76 (1999).

inseminated her with the handsome student's semen. While the doctor later told the husband what he had done, the two of them agreed to keep the truth from the happily pregnant wife. The rest of the world didn't learn of the procedure for another twenty-five years, when one of the participating medical students broke an oath of secrecy and published the story in a medical journal.⁹

After first surfacing publicly in 1909, donor insemination, insofar as it existed, largely remained underground until the 1950s.¹⁰ By 1960, though, approximately 5,000 to 7,000 babies a year were the result of donor insemination.¹¹ The process was shrouded in secrecy. Couples hoping to conceive had no choice when it came to the selection of sperm fathers; doctors typically used sperm from a nearby medical student—or, in many cases, their own. No records were maintained. Physicians instructed parents to keep the circumstances of the conception a secret and act as if their child were conceived naturally. Children were to be kept in the dark about their origins.

There were numerous reasons for secrecy. Male infertility was considered an emasculating marker of shame. The process of artificial insemination itself was considered by many to be unethical or sinful.¹² Above all, the legality of donor insemination was uncertain. In 1959 and 1963, state courts held that donor insemination constituted adultery on the part of the mother, regardless of the husband's consent.¹³ Even with the husband's approval, the donor-conceived children were deemed to be

⁹ PLOTZ, *supra* note 6, at 159.

¹⁰ Sperm Banking History, California Cryobank, at <http://cryobank.com/sbanking.cfm?page=2&sub=126> (“DI remained virtually unknown to the public until 1954. That was the year the first comprehensive account of the process was published in The British Medical Journal.”)

¹¹ PLOTZ, *supra* note 6, at 165.

¹² Cynthia R. Daniels & Janet Golden, *Procreative Compounds: Popular Eugenics, Artificial Insemination, and the Rise of the American Sperm Banking Industry* 38 J. SOC. HISTORY 5, 12 (2004).

¹³ PLOTZ, *supra* note 6, at 167. *See also* Sperm Banking History, *supra* note 10.

illegitimate. Given such court rulings, it was in the interest of all parties to keep the use of donor insemination a secret.

By the 1970s, donor insemination had become more accepted both socially and legally. The Uniform Parentage Act (UPA) of 1973, approved by the American Bar Association, openly addressed the issue of artificial insemination. Under the UPA, if a husband consented to donor insemination occurring under a physician's supervision, the husband was to be the child's legal father.¹⁴ Anonymous sperm fathers had no rights or responsibilities toward genetic children; it was to be as if they never existed. Many states eventually adopted statutes toward artificial insemination modeled on the UPA, and most case law followed suit.

By the 1970s, scientists had also developed methods to freeze and store semen while preserving its potency. The use of frozen sperm became more widespread in the 1980s after at least half a dozen women contracted HIV after being inseminated with a donor's fresh semen.¹⁵ The freezing process allowed scientists to screen semen for HIV and a variety of other diseases.

The combination of technological advances in cryopreservation with the established legality of donor insemination paved the way for the first commercial sperm banks. Banks could now stockpile sperm from many men and provide actual choices for couples. While doctors had once retained nearly total control over DI, commercial sperm banks could be responsive to consumer demand.¹⁶

¹⁴ UNIF. PARENTAGE ACT § 5(a) (1973). The current UPA disposes of physician requirement. UNIF. PARENTAGE ACT § 704 (amended 2002).

¹⁵ Daniels & Golden, *supra* note 12, at 16.

¹⁶ *Id.* at 6-7.

The trend toward accommodating consumer demand is reflected by the use of donor insemination by single women. In the early years of DI, donor insemination for single women—or lesbian couples—was unthinkable.¹⁷ Even though there were no laws against inseminating unmarried women, many physicians explicitly restricted the use of DI to married couples. Even by 1987, when the federal Office of Technology Assessment studied artificial insemination practices, half of DI practitioners refused to work with unmarried couples.¹⁸ Sixty-one percent of practitioners said they would refuse to inseminate unmarried women without a male partner, and sixty-three percent would reject lesbians.¹⁹ Of the 30,000 women who conceived through donor insemination in 1987, less than five percent were unmarried.²⁰

As stigmas against unwed parenting and homosexuality declined, the free market responded. In 1982, the Sperm Bank of California opened its doors with the purpose of selling sperm to lesbians and single women.²¹ Today, the sperm bank industry is increasingly driven by single women and lesbians, who now compose roughly half of all DI users.²² Sperm banks, according to the *New York Times*, are even seeing a “surge” in business from single women.²³ Heterosexual couples are also less likely to turn to donor sperm, as advances in fertility technology allow many men with low sperm counts to

¹⁷ Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1098-1107 (2002).

¹⁸ U.S. Office of Technology Assessment, *Artificial Insemination: Practice in the United States: Summary of a 1987 Survey: Background paper*, at 9, 29 (1988).

¹⁹ *Id.*

²⁰ *Id.* at 23

²¹ The Sperm Bank of California website, <http://www.thespermbankofca.org/about.html>.

²² Liza N. Burby, *A Fact of Life*, NEWSDAY, Feb. 6, 2006, at B10.

²³ Amy Harmon, *First Comes the Baby Carriage*, N.Y. TIMES, Oct. 13, 2005, at <http://www.nytimes.com/2005/10/13/fashion/thursdaystyles/13BANKS.html>.

conceive biological children of their own.²⁴ For these reasons, many sperm banks now “cater eagerly” to single women and lesbians.²⁵ One particular company’s branding strategy does not suffer from subtlety: “Man Not Included” is a recent internet start-up that sells and ships samples of anonymous sperm via the worldwide web.²⁶

The slogan “Man Not Included” speaks directly to the allure of anonymous donor insemination: single women or couples can select “fathers” for their children free from emotional or legal entanglements. The appeal is particularly strong for heterosexual couples in which the husband suffers from infertility problems. By calling in an anonymous “hired man” to play a limited role, they are protected from the possibility of the biological father later emerging to interfere in their family’s life. Thus, even as legislatures and courts legitimated children born through donor insemination in the 1970s and 1980s, secrecy remained the norm for married couples. Married couples who used artificial insemination did their utmost to pretend they hadn’t. Anonymous donor insemination promised to give many infertile couples a family like any other (except sometimes with a eugenic edge)²⁷—and with nobody the wiser. Any loss of secrecy or donor anonymity would explode that fiction. Known donors might threaten family unity, and children could suffer from confusion and stigma. Therefore, while families were essentially living a lie, the lie ostensibly protected the children involved.

Such lies were impossible for single mothers and lesbian couples who used donor insemination. Children conceived through donor insemination inevitably asked about

²⁴ Intra-cytoplasmic sperm injection (ICSI) allows men with low sperm counts to conceive. In ICSI, a doctor isolates a single sperm and implants it in an egg. With the development of ICSI, heterosexual couples are less likely to use a third-party sperm donor.

²⁵ David Plotz, *The Rise of the Smart Sperm Shopper*, SLATE, Apr. 20, 2001, <http://www.slate.com/id/104633/>.

²⁶ Man Not Included website, <http://www.mannotincluded.com/about.htm>.

²⁷ Daniels & Golden, *supra* note 12.

their fathers and, in these situations, there was no easier explanation than the truth. Because single women and lesbians cannot hide the fact of donor insemination, many of them have pushed for more information about their children's fathers.²⁸ In response to these requests, the Sperm Bank of California created the country's first "identity-release" program in 1983. While most industry leaders still express a preference for anonymous donors,²⁹ other sperm banks have followed with varying "open ID programs" of their own.³⁰

From the beginning, sperm banks have existed almost entirely free from regulations of any sort. It wasn't until 2005 that the federal Food and Drug Administration even required sperm banks to test semen for HIV and other communicable diseases.³¹ These FDA regulations also require minimal record-keeping to prevent the spread of disease, though in a way that protects donor anonymity.³² Aside from these limited requirements, sperm banks are free to operate as they choose. There are no legal limits on how often a sperm bank may sell the same man's sperm, raising the specter of incest between half-siblings unaware of their consanguinity. No records are kept on how many children are born as a result of donor insemination (the common estimate of 30,000 DI births a year is based on a twenty-year-old report).³³ Professional associations offer various recommendations and guidelines, but compliance is optional.³⁴

²⁸ PLOTZ, *supra* note 6, at 256.

²⁹ Ginsberg, fn 176

³⁰ See, e.g., The Sperm Bank of New York, <http://www.sperml.com/sbny/donor.html>; California Cryobank, <http://www.cryobank.com/opendonor.cfm>.

³¹ Rule on Human Cells, Tissues, and Cellular and Tissue-Based Products, 21 C.F.R. § 1271 (2006).

³² *Id.*

³³ U.S. Office of Technology Assessment, *supra* note 18.

³⁴ American Society for Reproductive Medicine, *Revised Minimum Standards for Practices Offering Assisted Reproductive Technologies*, 80 FERTILITY & STERILITY 1556 (2003), AMERICAN ASSOCIATION OF TISSUE BANKS, STANDARDS FOR TISSUE BANKING (10th ed. 2002).

As in other industries, self-regulation often fails, and numerous critics call for more stringent regulatory oversight.³⁵

Some critics of the contemporary sperm bank industry also raise concerns about the commercialization of parenthood and procreation,³⁶ while other commentators openly embrace commodification.³⁷ Either way, there is no escaping the fact that donor insemination is now a business. And, like other businesses, sperm banks must first obtain a sufficient supply of product.

B. Recruiting Anonymous Sperm Fathers

Most anonymous sperm providers are young men, typically students in college or graduate school. There are two reasons for this. First, younger men are likelier to provide healthier sperm. Second, as one “featured donor” from Xytex Corporation explains, “As a broke grad student, the primary reason is money.”³⁸ Indeed, as many commentators point out, the term “sperm donor” is a misnomer. Men who provide their gametes to sperm banks do not donate their sperm; they sell it. They are more accurately described as sperm vendors. (In this paper, I will use both terms.) Sperm banks pay men an average of \$75 per vial of semen, though men with certain desired attributes can command higher fees.³⁹

³⁵ See ANDREWS, *supra* note 8, at 207-36.

³⁶ The President’s Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* 147-51 (2004).

³⁷ Martha M. Ertman, *What’s Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. Rev. 1 (2003).

³⁸ Xytex Corporation, Profile of “Featured Donor,” <http://www.xytext.com/featured/?page=essay> (last visited May 15, 2006) (on file with author).

³⁹ Ethics Committee, American Society for Reproductive Medicine, *Financial Incentives in Recruitment of Oocyte Donors*, FERTILITY & STERILITY 216, 219 (2000).

Some sperm banks are relatively discreet about donor compensation, while others are upfront. Fairfax Cryobank takes the latter tack, giving out free pens on college campuses stamped with the question, “Why not get paid for it?”⁴⁰ ZyGen Laboratory’s pitch to potential vendors also emphasizes the allure of easy money, stating, “You may earn over \$400.00 per month expending less than six hours of your time.”⁴¹ At other sperm banks, a typical vendor may even earn \$900 to \$1500 a month.⁴² This compensation can be supplemented through referral bonuses, ranging from \$20 to \$100, to vendors who get friends to sign up.⁴³ California Cryobank attempts to attract vendors with free movie tickets and gift certificates.⁴⁴ Sperm banks resort to more psychological enticements as well. In his research on sperm banks, David Plotz observes that sperm bank recruiters “are invariably women, and they are invariably good-looking.”⁴⁵

The majority of anonymous sperm providers are quite clear about why they provide sperm: they’re in it for the money. In one survey of sperm providers, ninety-one percent responded that money was an influential factor in their decision to provide sperm.⁴⁶ They view the fact that their actions can help infertile couples as a “happy coincidence.”⁴⁷ In another survey, only eight percent of sperm providers stated that their reasons for providing sperm were purely altruistic.⁴⁸ In contrast, thirty-two percent stated that their motivations were purely financial, while sixty percent indicated both factors

⁴⁰ PLOTZ, *supra* note 6, at 155.

⁴¹ Zygen Laboratories, <http://www.zygen.com/coinfo2.htm#becoming>.

⁴² http://www.usnews.com/usnews/health/articles/060213/13donor_2.htm;
<http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601095.html>

⁴³ Xytex Corporation, <http://www.xytex.com/donor/index.html>; ZyGen Laboratories, <http://www.zygen.com/coinfo2.htm#becoming>.

⁴⁴ California Cryobank, <http://www.cryobankdonors.com/newdonors/index.cfm?ID=4>.

⁴⁵ PLOTZ, *supra* note 6, at 155.

⁴⁶ Ken R. Daniels, Ruth Curson, & Gillian M. Lewis, *Semen Donor Recruitment: A Study of Donors in Two Clinics*, 11 HUM. REPROD. 746, 747-48 (1996).

⁴⁷ *Id.* at 749.

⁴⁸ Bjorn Pedersen et al., *Psychosocial Aspects of Donor Insemination: Sperm Donors—Their Motivations and Attitudes to Artificial Insemination*, 73 Acta Obstetrica Gynecologica Scandinavica 701, 703 (1994).

played a role (and why not take credit for the happy coincidence?).⁴⁹ Another study on donor attitudes matched sperm providers with a non-donor control group. While sixty-one percent of control group perceived sperm providers as altruistic, only twelve percent of donors themselves agreed with that characterization.⁵⁰ Most anonymous sperm providers in the survey were motivated by money, as sixty-nine percent reported that they would cease “donating” their sperm if they stopped getting paid for it.⁵¹

After obtaining a steady supply of product, sperm banks also engage in active marketing of their products.

C. Shopping for a Sperm Father

Commercial sperm banks and the internet fundamentally changed the practice of donor insemination by giving prospective parents the power of choice. Doctors had once retained nearly total control over donor insemination. A 1979 survey found that over 90 percent of physicians who performed DI *never* allowed recipients to choose the sperm donor.⁵² With the rise of commercial sperm banks, those seeking DI were no longer wholly dependent on doctors; they became empowered consumers. Today, interested consumers can peruse glossy sperm bank catalogs full of handsome men and cute babies,⁵³ and they can shop for sperm on the internet just as one shops for plane tickets, books, or shoes. Some sperm banks even provide “do-it-yourself” kits (think turkey basters), so that physicians may be bypassed completely.

⁴⁹ *Id.*

⁵⁰ M.V. Sauer et al., *Attitudinal Survey of Sperm Donors to an Artificial Insemination Clinic*, 34 J. REPROD. MED. 362, 363 (1989).

⁵¹ *Id.* at 363.

⁵² George J. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L. Q. 1, 6 (1980).

⁵³ California Cryobank catalog (on file with author).

Commercial sperm banks quickly recognized that their customers wanted more than a vial of anonymous sperm. All parents want healthy babies, so most sperm banks provide extensive medical family histories of each sperm provider. But sperm banks now provide information about donors that goes far beyond pure concerns about health.

In response to consumer demand for information, many sperm donor profiles include a dizzying mix of the anonymous and the personal. Given beliefs about the heritability of intelligence, profiles of sperm providers include extensive educational information, from SAT scores to GPAs to fields of study. Profiles also include nearly every physical characteristic imaginable. In addition to the basics of race, ethnicity, height, weight, hair color, eye color, and blood type, many donor profiles also list features such as hair type, hair texture, body build, freckles (or lack thereof), and skin tone (including “tanability”). Shoppers at Fairfax Cryobank could even get their favorite sperm provider a fitted tuxedo, as profiles include the man’s neck, chest, inseam, waist, and sleeve measurements. No detail is too minor for discriminating consumers, from the structure of cheekbones to earlobe size to “nostril flair.”

Profiles also typically include a donor’s religion and other information intended to provide some sense of the man’s personality. In addition to hobbies and interests, sperm providers are asked to list a litany of their “favorites,” including music, authors, books, heroes, pets, color—even their preferred model of automobile. At some banks, sperm vendors are encouraged to list what celebrity they most resemble. Shoppers can read short essays written by donors on their “most memorable childhood experience” and “the funniest thing ever to happen to you.” For an additional cost, consumers can purchase a donor’s childhood photos, audio files of him talking, and “staff impressions” of him.

For many single women seeking a sperm father, these physical and personal details are vital to their decisions. Two single female shoppers explain their reasoning while reviewing certain profiles:

“[H]e's six feet but he only weighs 150. Which is good. If I have a girl, she wants to be skinny, and if she can eat what she wants, that's perfect. You don't have to get in fights about food.”⁵⁴

“Thick hair . . . is also nice, because if I happen to get a son, I don't like bald guys. He's Catholic, which I would obviously like, because I am. He has a very interesting book collection: he likes Hesse, Henry James, Lorca. . . . His parents are pretty boring professionally, so I was a little concerned about that.”⁵⁵

These extended profiles make it so that women aren't merely buying a vial of semen; they are buying an idea—often an idealized impression—of their child's father. Fairfax Cryolab encourages webpage visitors to “Meet our new donors!”⁵⁶ The short descriptions are nearly indistinguishable from personal ads one might read on dating websites such as Match.com, except most men probably don't provide such detailed descriptions of their hair:

#1954: This donor is tall and athletic at 6'2" with pretty hazel eyes and silky brown wavy hair. He has a BA in [sic] psychology, is still a student and enjoys martial arts, kayaking and cycling in his free time. He hopes to one day help others in his profession, focusing on the special needs of teenagers.

#1947: He is athletic and stands at 6' tall with thick brown hair and kind blue eyes. He has an adventurous personality, has traveled extensively and loves to talk about his trips abroad. He has a MA in sociology [sic], works as a program manager and enjoys cooking in his free time.

#1953: He has a PhD in Pharmacology and enjoys reading, dancing and exercising in his free time. He has a cute 'boy next door' look about him, standing at 6' tall with straight brown hair, blue eyes and a sweet smile. He appears to make friends easily, loves to talk and enjoys life. He thinks having a willingness to try new things and a sense of adventure are admirable.

⁵⁴ Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at <http://www.nytimes.com/2006/03/19/magazine/319dad.html>.

⁵⁵ *Id.*

⁵⁶ Fairfax Cryobank, <http://www.fairfaxcryobank.com/NewSpermDonors.aspx> (on file with author).

Indeed, when sifting through online databases of sperm donors, the parallels to online dating are unavoidable. Some single women who have purchased sperm to impregnate themselves also speak of being “attracted” to certain donors, concluding that their donor “seemed likable” or was “[s]uch a nice guy.”⁵⁷ The author of a *New York Times Magazine* article on DI observed that “a number of single mothers I spoke with used the phrase ‘I felt a connection’ in explaining their choice of donors.”⁵⁸ One woman chose her donor because he “sounded like somebody I might date.”⁵⁹ Another explained, “There happened to be one Jewish person. I pulled up the photo, and I looked at my friend, and I looked at his picture, and I said, ‘Oh, my God.’ I can’t say love at first sight, because, you know. But he was the one.”⁶⁰ One woman kept a photo of the sperm father in her wallet; another kept her donor’s picture on her coffee table and said, “I kind of glance at it as I pass. It’s almost like when you date someone, and you keep looking at them, and you’re, like, Are they cute? But every time I pass, I’m, like, Oh, he’s really cute. It’s a comforting feeling.”⁶¹ Another said, “What was important to me, was heart. That the donor had heart.”⁶² In selecting a man who expressed an interest in caring for terminally ill children, one mother commented, “I thought, this is a sensitive man. . . . I like the way this feels. This guy’s gotta be deep.”⁶³

⁵⁷ Lois Romano, *Multiple Single Moms, One Nameless Donor*, WASH. POST, Feb. 27, 2006, at A02, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601095.html>.

⁵⁸ Egan, *supra* note 54.

⁵⁹ Tralee Pearce, *Who’s My Daddy?*, GLOBE & MAIL (Toronto), June 18, 2005, <http://www.theglobeandmail.ca/servlet/story/RTGAM.20050618.wxspem18/BNSStory/National/>

⁶⁰ Egan, *supra* note 54.

⁶¹ *Id.*

⁶² *Sixty Minutes: Sperm Donor Siblings Find Family Ties* (CBS television broadcast Mar. 17, 2006), at <http://www.cbsnews.com/stories/2006/03/17/60minutes/main1414965.shtml>.

⁶³ *Id.*

Despite the parallels between shopping for sperm and dating online, there are, of course, many differences. One key distinction: if you like a man's profile in a sperm bank catalog, it doesn't matter what he thinks about you—you can just go ahead and buy his sperm and have his baby. As one single mother writes about her sperm bank experience: “[B]y bypassing the uncontrollable world of romance, I was able to choose a man to father my child who might be completely out of my league in the real world.”⁶⁴

The wealth of information sperm banks provide about their donors encourages consumers to make eugenic decisions.⁶⁵ The history of DI has long been linked to eugenics, from the selection of the “best-looking” medical student to the Repository for Germinal Choice, a sperm bank that sought to improve the “stock” of Americans by providing “genius sperm” to suitable families.⁶⁶ Yet while few today would publicly say anything that could be construed as support for eugenics, the practice of private eugenics seems less nefarious. As long as you're shopping around, why settle for an average, healthy sperm provider? Why not get a specimen from a tall, handsome, well-educated, athletic man? Why not someone with a nice smile, strong voice, good taste in music, and a winning personality to boot?

Given that sperm donors provide half of a child's DNA, it only makes sense that would-be mothers would want as much information as possible in making such a momentous decision.⁶⁷ Women who peruse donor catalogues, after all, are shopping for the biological fathers of their children.

⁶⁴ Lori Gottlieb, *The XY Files*, ATLANTIC MONTHLY, Sept. 2005, at 141, 148.

⁶⁵ Daniels & Golden, *supra* note 12, at 12-13.

⁶⁶ PLOTZ, *supra* note 6.

⁶⁷ Sue Montgomery, *Women Shopping for Super Sperm*, MONTREAL GAZETTE, Dec. 10, 2005, at <http://www.canada.com/vancouver/sun/story.html?id=52e43aa6-b15c-423f-a845-13a845143e70&k=9062>.

II. Sperm Father Anonymity and the Interests of Children

A. *The Norm of Anonymity*

The vast majority of sperm sold in the United States is anonymous. The buyer doesn't know—and the resulting child will likely never know—the name of the man it came from. Sperm banks are the middlemen that construct and protect sperm father anonymity. While many state statutes hold that sperm fathers have no legal responsibilities to their offspring, men who sell their sperm also sign contracts with the sperm banks that protect their anonymity. Sperm purchasers, in turn, sign contracts that state that they will respect the anonymity of the sperm provider. According to Fairfax Cryobank, “contracts are carefully constructed and information maintained” to protect anonymity.⁶⁸ At California Cryobank, purchasers of sperm promise that they will “not now, nor at any time, require nor expect [Cryobank] to obtain or divulge . . . the name of said donor, nor any other information concerning characteristics, qualities, or any other information whatsoever concerning said donor.”⁶⁹ They also agree that, “following the insemination, Cryobank shall destroy all information and records which they may have as to the identity of said donor, it being the intention of all parties that the identity of said donor shall be and forever remain anonymous.” Many sperm banks do, in fact, destroy donor files after a few years, virtually ensuring that donor-conceived people will never be able to learn more about their biological fathers.⁷⁰

⁶⁸ Press Release, Fairfax Cryobank, ID Consent Donors Now Available; New Fairfax Cryobank Program Allows Donor Contact When Offspring Reach Adulthood (Jan. 24, 2006) (on file with author).

⁶⁹ Johnson v. Superior Court, 95 Cal. Rptr.2d 864, 873 (Ct. App. 2000), *rev. denied*, [2000 Cal. LEXIS 6741](#) (Cal. Aug. 23, 2000).

⁷⁰ Karen M. Ginsberg, Note, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823, 848 n.176 (1997).

The original Uniform Parentage Act of 1973 states that information related to the insemination “shall be kept confidential and in a sealed file.”⁷¹ “All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.”⁷² While the current version of the Uniform Parentage Act, revised in 2002, does not include such language regarding confidentiality, some state codes still contain the 1973 text that promotes donor anonymity.⁷³

Sperm banks believe that this anonymity is vital aspect of their business practice. The vice president of one large sperm bank states that the lack of anonymity “would devastate the industry.”⁷⁴ In addition to concerns about attaining a steady supply of sperm to sell (an issue to which I will return), anonymity helps protect the industry in a variety of ways. With sperm father anonymity, sperm banks will be better protected from lawsuits in which they accidentally ship the wrong semen, or in which a sperm provider was improperly screened for genetic diseases. With anonymity, there is also no way for parents and donor-conceived children to learn if the information in the donor profiles was accurate (Did he really go to Harvard? Was he really a varsity athlete? In his free time, did he really volunteer to care for terminally ill children?). While many sperm banks have to company policies on how many times a particular man’s sperm may be sold, there are strong financial interests against limiting the use of their “best sellers.”⁷⁵ Thus, anonymity can also protect the sperm banks from the discovery of questionable sales

⁷¹ UNIF. PARENTAGE ACT § 5(a) (1973).

⁷² *Id.*

⁷³ *See, e.g.*, CAL. FAM. CODE § 7613 (West 2006); MINN. STAT. § 257.56 (2006); NEV. REV. STAT. § 126.061 (2006). *See also*, Uniform Matrimonial and Family Laws Locator, Cornell Law School, <http://www.law.cornell.edu/uniform/vol9.html#paren>.

⁷⁴ Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006, at <http://www.nytimes.com/2006/01/20/national/20donor.html>.

⁷⁵ *Id.*

practices, or outright fraud. Research also suggests that sperm banks and clinicians care more about donor anonymity more than DI recipients.⁷⁶ As one psychologist remarks, “Frankly, I think it's just easier for the industry to do it anonymously. If you're in total control of the information, it's more efficient and less work.”⁷⁷

B. The Trend Against Conception Deception

As ethicists and fertility experts start to consider the interests of children, there has been a move toward encouraging openness and honesty regarding the use of donor insemination. For years, physicians practicing DI told parents to deceive their children about their origins and pretend that a donor-conceived child was biologically connected to both mom and dad.⁷⁸ Though there were many reasons for this secrecy (legal concerns, to protect the father's ego) it was also supposed to be in the best interests of the child. As one doctor stated:

For the child's sake particularly I prefer that absolutely nobody but the parents themselves should know of the [donor] insemination therapy. My last advice to the parents is that under no circumstances should they, or need they, ever tell the child the method of conception—in fact they should forget about it themselves.⁷⁹

Family secrets often had a way of sneaking out, however. Upon divorce, a parent's death, or even during heated arguments, the truth can—and often does—slip out.⁸⁰ Some evidence indicates some donor-conceived offspring are not necessarily surprised by the

⁷⁶ Ginsberg, *supra* note 70, at 848.

⁷⁷ Harmon, *supra* note 74.

⁷⁸ Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES MAG., June 18, 1995, at <http://www.farfilm.com/peggy/articles/lookingforadonor.htm>.

⁷⁹ Philip Bloom, *Artificial Insemination (Donor)*, 48 EUGENICS REV. 205 (1957), quoted in Amanda J. Turner & Adrian Coyle, *What Does It Mean To Be a Donor Offspring?*, 15 HUM. REPROD. 2041, 2041 (2000).

⁸⁰ Orenstein, *supra* note 78.

revelation that “Dad” was not their biological father.⁸¹ Some could sense a family secret, while others reported feelings of “not fit[ting] in” with their families.⁸² The author David Plotz, who was contacted by many donor offspring, writes that those who learn the truth about their DI origins “are rarely surprised; they always felt something wasn’t right.”⁸³ Moreover, many donor-conceived people who eventually learned the truth were angry at having been lied to for years about such a fundamental matter of their being.⁸⁴

The reason why many DI offspring “felt something wasn’t right” is because many fathers, try as they might, cannot follow the doctor’s orders to “forget about it themselves.” Husbands often find it extremely difficult to treat donor-conceived children as if they were their own biological children, and such repression is likely to place a strain on family relationships. As Plotz writes:

While good studies on DI families don’t seem to exist, anecdotes about them suggest that there is frequently a gap between fathers and their putative children. . . . [Fathers] are drained by having to pretend that children are theirs when they aren’t; it takes a good actor and an extraordinary man to overlook the fact that his wife has picked another man to father his child. It’s no wonder that the paternal bond can be hard to maintain. When a couple *adopts* a child, both parents share a genetic distance from the kid. But in DI families, the relationships tend to be asymmetric: the genetically connected mothers are close to their kids; the unconnected fathers are distance.⁸⁵

As one donor-conceived woman states, “[Donor insemination] put an element of secrecy into our family structure that warped it.”⁸⁶ Donor-conceived people who discover the

⁸¹ *Id.*; Amanda J. Turner & Adrian Coyle, *What Does It Mean To Be a Donor Offspring?*, 15 HUM. REPROD. 2041, 2045-46 (2000); Orenstein, *supra* note 78 (quoting a handful of donor offspring); Eric Blyth, *Information on Genetic Origins in Donor-Assisted Conception*, 5 HUM. FERTILITY 185, 187 (2002).

⁸² Turner & Coyle, *supra* note 81, at 2041.

⁸³ PLOTZ, *supra* note 6, at 166.

⁸⁴ A. McWhinnie, *Gamete Donation and Anonymity: Should Offspring from Donated Gametes Continue To Be Denied Knowledge of Their Origins and Antecedents?*, 16 HUM. REPROD. 807, 812 (2001); Turner & Coyle, *supra* note 81, at 2044-45.

⁸⁵ PLOTZ, *supra* note 6, at 128.

⁸⁶ Orenstein, *supra* note 78. Another donor offspring stated, “In a normal family, the dad may be distanced for other reasons, because of personality or whatever. But this threw an extra element in that was

fact of their conception do not typically state that they wish they'd never learned the truth; they say they wish they would have learned the truth earlier.⁸⁷ They resent being lied to and believe that such secretiveness inhibited healthier parent-child relationships.

For these reasons, most experts now recommend that parents tell DI children the truth about their origins. As in adoption, the trend in donor insemination is toward openness. Acknowledging this shift, in 2004 the American Society for Reproductive Medicine, the fertility industry's leading professional organization, issued a report encouraging parents to inform their children of their use of a sperm donor.⁸⁸ The report states, "[ASRM's] Ethics Committee finds that disclosure to the child of the fact of donor conception and, if available, characteristics of the donor may serve the best interests of offspring."⁸⁹ The few existing studies also suggest that openness has no negative effects and may promote better relationships between parents and children.⁹⁰

As the proportion of DI users who are single women and lesbians grows, the issue of disclosure of DI use is becoming increasingly moot. The fact that one, two, or many women cannot create a new human life on their own forces candor about donor insemination. In these families, there is also no social father whose ego needs protection. Even for heterosexual couples, however, the experts' new advice is far from radical: when children ask, "Where do I come from?" parents should not lie.

pathological." *Id.* In *THE GENIUS FACTORY*, David Plotz describes the thoughts of a teenager who found out his biological father was an anonymous sperm donor: "That's why me and Dad don't look alike. That's why we don't get along. That's why Dad treats me that way, keeps me at a distance." PLOTZ, *supra* note 6, at xiii.

⁸⁷ A. McWhinnie, *supra* note 84, at 812; Turner & Coyle, *supra* note 81, at 2044-45.

⁸⁸ American Society for Reproductive Medicine, *Informing Offspring of Their Conception by Gamete Donation*, 81 *FERTILITY & STERILITY* 527 (2004).

⁸⁹ *Id.* at 527.

⁹⁰ *Id.* at 528.

But is it enough that children be told of their creation? Plotz writes that donor-conceived offspring often tell the same story: “*Dad wasn’t like a real dad. When Dad died, Mom finally spilled the secret. Now I want to find my donor dad.*”⁹¹ What should we make of people’s desires to find their biological fathers? Should society ensure that their desires remain unfulfilled, or should society respect the privacy of sperm fathers? Should law also ensure that, each year, thousands of children will be created who will be forever alienated from their biological fathers?

C. The Flawed Idea Behind Donor Insemination

The practice of donor insemination is rooted in an idea: the idea is that sperm in a vial renders irrelevant the man from whence it came. The DNA matters, to be sure—hopeful parents often pay a premium for sperm that they believe contains “better” genes, such as those related to height, athleticism, and intelligence. After a man masturbates into a cup, however, his importance ceases to exist. As the growth of donor insemination and sperm banks indicates, this idea is seductive. If husbands were infertile, married couples could purchase sperm and have an “as-if” family. Donor insemination can mask a man’s infertility.⁹² Single women who wanted a child but didn’t have or want a husband could get one free from any social, emotional, or legal entanglements with a father. (As the company of the same name advertises, “Man not included.”) One single mother who conceived through DI states, “I am bringing up my child with the clear understanding that he has a donor, not a father. I don’t want him to build up hopes about

⁹¹ PLOTZ, *supra* note 6, at 166.

⁹² A. McWhinnie, *supra* note 84, at 810.

some man out there who is his daddy. He doesn't have one.”⁹³ Or, as the t-shirt sold by Family Evolutions states, “My daddy’s name is Donor.”

But is it that simple? The Yale child psychologist Kyle Pruett tells of one single mother who asked him for help in responding to her five-year-old daughter’s questions.

The girl, who was donor conceived, had started asking about her father:

“Mommy, what did you do with my daddy?” “Did you get mad at him and make him go away? Didn’t you like him? Didn’t he like me?” “Does he have other children?” “Where can I find him?” “Could we ever get married?” “Can I write him a letter?” “Has he ever seen me?” “Do you have a picture of him with me?”⁹⁴

In seeking advice, the mother first went to her gynecologist who had performed the insemination. Asking what she should say to her child about her father, he replied, “Tell her she does not have one. You loved her so much you made her all by yourself.”⁹⁵

Needless to say, children will not accept that lie, or at least not for long. (Recalling that the doctor had four children of his own, the mother told Pruett, “How could he get so far into parenthood and know so little about children?”⁹⁶) As another donor-conceived four-year-old girl said to her single mother, “Mommy, what did you do with my daddy? You *know* I need a daddy or I can’t *be* a child.”⁹⁷

Therein lies the flaw with the idealized view of donor insemination. Every child *does* have a father. As much as some adults and businesses might wish, for many people conceived through DI, sperm in a vial does not render the sperm provider irrelevant. Use of the sterile term “donor” is not strong enough to eliminate the desire of many donor-conceived people to learn more about the unknown man that some nevertheless call their

⁹³ Netty C. Gross, *A Phpritz or a Dad?*, JERUSALEM REPORT, July 11, 2005, at 15.

⁹⁴ KYLE PRUETT, FATHERNEED 204 (2000).

⁹⁵ *Id.*

⁹⁶ *Id.* at 205.

⁹⁷ *Id.* at 206.

“dad.”⁹⁸ For donor-conceived individuals, after all, a sperm “donor” is their biological father.

A significant portion of donor-conceived people feel a strong desire to learn the identity of their biological fathers, and many take action. While not all donor offspring care about learning the identity of their biological fathers,⁹⁹ existing evidence suggests that a substantial portion do care, and care deeply. In one study of donor offspring, all sixteen respondents spoke of searching for their donor/father.¹⁰⁰ In another study of donor offspring ages twelve to seventeen, researchers noted that “it was clear overall that the youths wanted to know as much as possible about their donor.”¹⁰¹ Among those youths, all conceived with “open-identity” sperm, twenty-eight of the twenty-nine planned on contacting their biological fathers.¹⁰² After writing about sperm banks in the online magazine *Slate*, David Plotz received many emails from donor-conceived persons asking for his help in finding their genetic fathers.¹⁰³

The ability of donor offspring to search for their biological fathers depends a great deal on how much information their parents were able to obtain. After asking their parents for that information, donor-conceived people have used a variety of methods to try to track down their sperm fathers. One man knew his sperm donor was a medical student so he looked through that school’s yearbooks from the relevant year for faces that

⁹⁸ J.E. Scheib, M. Riordan, & S. Rubin, *Adolescents with Open-Identity Sperm Donors: Reports from 12-17 Year Olds*, 20 HUMAN REPRODUCTION 239, 243 (2005) (In a survey of donor offspring, the most common names for the donors were “biological/birth father,” “father/dad,” and “the donor.”)

⁹⁹ See, e.g., Karen Clarkson, *No, I Never Want to Meet My ‘Real’ Father*, DAILY MAIL (London), April 6, 2005, at 28; PLOTZ, *supra* note 6, at 251.

¹⁰⁰ Turner & Coyle, *supra* note 81.

¹⁰¹ Scheib, Riordan & Rubin, *supra* note 98, at 246.

¹⁰² *Id.*

¹⁰³ PLOTZ, *supra* note 6, at 50-51.

resembled his own.¹⁰⁴ After being told that her sperm father had been a Jewish medical student at the University of Southern California, one woman posed as a student working on a research project in order to access the records of medical students and made a list of any names that appeared to be of Jewish origin.¹⁰⁵ While trying to narrow down the list, she came across a photograph of her mother’s doctor—who looked like her “exactly.”¹⁰⁶ Two separate filmmakers have made documentaries on their search for their sperm donor fathers.¹⁰⁷ Many offspring contact the sperm banks themselves, but are only given information on the company’s policy of protecting sperm vendor anonymity.

Just as the internet has revolutionized sperm bank marketing, many donor-conceived people have also turned to the internet for activism and support in their searches. They organize activist groups and discussion lists, they write blogs about their experiences, and they set up registries in which to try to track down half-siblings and their biological fathers. The Donor Sibling Registry is a website database in which donor-conceived offspring can post information about their sperm donors in order to find half-siblings and, possibly, the donor-fathers themselves. Created by a divorced mother and her donor-conceived son, the Registry has over 8,000 members and has led to over 2,000 matches, mostly between half-siblings.¹⁰⁸ Such registries also exist in Australia and Great Britain.¹⁰⁹

In addition to donor registries, the internet is helping donor offspring search for their sperm fathers in other ways as well. In a widely reported story, one savvy fifteen-

¹⁰⁴ Orenstein, *supra* note 78.

¹⁰⁵ ANDREWS, *supra* note 8, at 90.

¹⁰⁶ *Id.* at 91.

¹⁰⁷ Rebecca Hamilton, *Are You My Father?*; Barry Stevens, *Offspring*.

¹⁰⁸ Donor Sibling Registry website, <http://www.donorsiblingregistry.com/>.

¹⁰⁹ J. David Velleman, *Family History*, 34 PHIL. PAPERS 357, 359 n.1 (2005).

year-old was even able to track down his anonymous sperm father through the internet.¹¹⁰ The teen first sent his DNA (a cotton swab of his cheek) to Family Tree DNA, a web-based company that has a database of over 45,000 DNA samples, to see if there were any matches. A few months later he heard back: his DNA closely matched that of two men with similar surnames. Because his mother had a record of the sperm donor's birth date and birthplace, the teenager then went to OmniTrace.com and ordered a list of names of all people born in that city on that date. One man on the list shared a surname with one of the matches from the DNA database. Shortly thereafter, the boy contacted his no-longer-anonymous biological father.

As the founder of the Donor Sibling Registry explains, "This is a generation of kids who want information, and know how to get it."¹¹¹ Yet because donor records are typically either destroyed, kept confidential, or never kept at all, for most donor-conceived people, their searches will come up empty.

D. Anonymity and Identity: The Case for a Child's Right to Know

Why do so many donor-conceived offspring seek out a man they have never met? As often stated, the sperm donor's only active contribution toward the child's existence consisted of masturbating into a cup. Sperm providers typically see their job as completed upon receiving their paycheck.¹¹² Yet sperm donation is radically different than donating blood, bone marrow, or organs, all of which can sustain life. Sperm, when matched with an egg and brought to term, creates a new human life. A sperm father

¹¹⁰ Alison Motluk, *Tracing Dad Online*, NEW SCIENTIST, Nov. 5, 2005, at 6; Rob Stein, *Found on the Web, with DNA: A Boy's Father*, WASH. POST, Nov. 13, 2005, at A09.

¹¹¹ Streisand, *supra* note 7.

¹¹² Sauer, *supra* note 50.

provides half of the genetic makeup of donor conceived offspring. For many donor-conceived people, that half matters.

Some critics argue that donor anonymity should be abolished for pragmatic reasons. Given the increasing importance of genetics in medicine, a child should have the right to learn about her family medical history. Other anti-anonymity arguments include the prospect of half-siblings unwittingly committing incest. While these concerns are compelling, they are not powerful enough to justify the removal of donor anonymity. More narrowly tailored reforms could preserve anonymity while satisfying both concerns about medical history and incest. Legislation could grant donor offspring full access to their donor's non-identifying family medical history, for example. Donor registries and legal limits on the number of times any one man's sperm may be sold could virtually eliminate any chance of consanguinity.

The most compelling argument against anonymity is more fundamental. Psychologists often use the term "genealogical bewilderment" to describe a person's reaction to having incomplete knowledge of his genetic parentage.¹¹³ The issue, however, can be described in plain language. As one donor-conceived woman put it to a reporter: "Do you know your father? Well, why shouldn't I know mine?"¹¹⁴ Human beings have a fundamental interest in knowing their biological origins.¹¹⁵ People want to know where they come from. To many donor-conceived people, the answer of "semen in a vial" is insufficient and insulting.

¹¹³ H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRITISH J. MED. PSYCH. 133 (1964).

¹¹⁴ Orenstein, *supra* note 78.

¹¹⁵ American Society for Reproductive Medicine, *supra* note 34, at 528.

For many, knowledge of one's biological ancestry is an essential part of their identity formation. The denial of this knowledge often results in a perceived emotional void, or sense of incompleteness. Like many adoptees, donor offspring search for their biological fathers in order to gain a fuller conception of themselves and a sense of existential continuity. Donor offspring explain their feelings:

I needed to know whose face I was looking at in the mirror—I needed to know who I was and how I came to be—it was a very primal and unrelenting force which propelled the search and it was inescapable and undeniable.¹¹⁶

I long to know who my biological father is, and to meet and speak with him at least once. I search for my half-siblings in other people's faces. I want to know the missing part of my family history [I]t is time for our voices to matter. We have a right to know our identity and to grow up in truth.¹¹⁷

All I know, and am allowed to know about my father, is that he masturbated his 'sample' for a sum. Yes, you could say I'm angry. . . . DI adults must be allowed to speak, and must have rights and access to information on our genetic heritage.¹¹⁸

How could doctors (...) think that we wouldn't need or want some honest answers about our heritage? Without all this information, I will never feel complete.¹¹⁹

Many offspring describe the denial of information about their genetic fathers in terms of loss: "It makes me sad to think I may never figure this puzzle about myself out."¹²⁰ "I feel such a loss. I have such a big well of grief inside myself."¹²¹ After realizing that she would most likely never learn her biological father's identity, one twenty-three-year-old woman stated, "I had to grieve that. It wasn't till I was 17 or 18 that I got it."¹²²

Such feelings of loss are not limited to offspring who grew up in unhappy or father-absent homes. "I grew up with a very loving family," says one woman. "I love

¹¹⁶ Turner & Coyle, *supra* note 81, at 2046.

¹¹⁷ A. McWhinnie, *supra* note 84, at 812-13.

¹¹⁸ *Id.* at 813.

¹¹⁹ Turner & Coyle, *supra* note 81, at 2047.

¹²⁰ *Id.* at 2046.

¹²¹ *Id.*

¹²² Pearce, *supra* note 59.

my dad, he's my dad, but he's not my biological father.”¹²³ Another woman explains, “I love my dad. I have his last name. But I'm looking for a sense of identity.”¹²⁴

Many donor offspring emphasize that they are not expecting anything like a normal parent-child relationship with their biological fathers. “These people are not looking for money or a daddy,” explains the founder of the Donor Sibling Registry, “They just want to know where they come from.”¹²⁵ Another researcher concurs, stating that donor-conceived people are typically searching for “a more complete sense of their identity.”¹²⁶

According to some donor offspring, their identity struggles are made even more difficult by their perception that many view them as pathetic or ungrateful for looking for their roots.¹²⁷ And, in fact, some commentators do deride donor-conceived people for wanting to learn more about their genetic heritage. One writer who states she “never needed persuading about the importance of blood ties” nonetheless felt “no empathy” for the fifteen-year-old teenager who tracked down his biological father through the internet.¹²⁸ “[W]hy would you want to trace someone whose only contribution to your life was the supply—kids, avert your eyes—of ejaculate, hardly a scarce natural resource?” she asked.¹²⁹ Another columnist described the idea that children should be able to learn their genetic origins as an “absurd notion” and expressed the wish that

¹²³ Insight: Generation Next (SBS broadcast (Australia) on Aug. 31, 2004), at <http://www.sbs.com.au/insight/trans.php3?transid=671>.

¹²⁴ Pearce, *supra* note 59.

¹²⁵ Leigh Woosley, *Invisible Legacy*, TULSA WORLD (Oklahoma), Jan. 5, 2006, at D1, at http://64.233.179.104/search?q=cache:hj1hTW31uVwJ:www.tulsaworld.com/FamilySceneStory.asp%3FD%3D060105_Fa_D1_Invis32261+leigh+woosley+invisible+%22want+to+know%22&hl=en&ct=clnk&cld=3&client=firefox-a.

¹²⁶ Judith Graham, *Sperm Donors' Offspring Reach Out Into Past*, CHI, TRIB., June 19, 2005, at c1 (quoting Eric Blyth).

¹²⁷ Turner & Coyle, *supra* note 81, at 2047.

¹²⁸ Anne Karpf, *On One Boy's Search for His Father*, GUARDIAN (London), Nov. 12, 2005, at <http://www.guardian.co.uk/family/story/0,,1640380,00.html>.

¹²⁹ *Id.*

donor-conceived people “could just *stop whining* about their half-empty cup.”¹³⁰ In a letter to the *New York Times*, one man who had sold his sperm anonymously expressed outright hostility toward his potential offspring:

If one of “my” kids showed up at my home, he or she would be quickly shown the door (with a subsequent restraining order, if necessary). These people need to understand that they have parents, the ones who raised them. . . . In short, grow up and deal with it.¹³¹

But why should people be made to feel guilty—or even put on the defensive¹³²—for wanting to know their genetic heritage, something most of us take for granted?

Alternatively, I would suggest that sperm banks, men who sell their sperm anonymously, and would-be DI parents listen to the voices of donor-conceived people. The stubborn, persistent fact is that a significant portion of donor-conceived people want to know who their biological fathers are. Our laws and policies must evolve to deal with it.

E. The Resistant Thickness of Blood

Proponents of sperm father anonymity argue that biological connections are of minimal importance for human beings. To be sure, day-in, day-out parenting matters far more than any biological link to a man they have never met. Even so, we should not be surprised if offspring feel that their biological connection to their fathers is relevant to

¹³⁰ Carol Sarler, *What Identity Crisis?*, *TIMES* (London), Nov. 11, 2005, at Features 24, at <http://www.timesonline.co.uk/article/0,,3284-1867195,00.html> (emphasis added).

¹³¹ Anonymous, Letter to the Editor, *Looking for a Donor to Call Dad*, *N.Y. TIMES*, June 9, 1995, at <http://query.nytimes.com/gst/fullpage.html?res=990CE6DD1739F93AA35754C0A963958260>.

¹³² As one donor-conceived person explains, “I always think about things so much and this just sometimes . . . does my head in, I guess you could say. I’m happy with my life. I think a lot of people . . . think that I’m obsessed or think that I have nothing better to do, but it’s important to me. A lot of people want to know where they come from and I’m not going to stalk anyone. I guess I just . . . really need to finish this puzzle and I’m determined to.” *Sunday: Sperm Banking on the Internet*, *supra* note 5.

their identity. Biology clearly matters a great deal to sperm banks and parents who use donor insemination. Parents want a biological connection to their children; there should be no surprise when biological connections to their parents are significant for many children as well.

First, the desire of adults to have biologically related children is the driving force behind donor insemination. Many—perhaps most—heterosexual couples who use donor insemination never disclose their use to their children in order to live the fiction that they are both the natural parents.¹³³ Single mothers also use donor insemination to have a child that is “theirs” biologically. A donor-conceived teenager exposes the paradox: “I hate when people that use D.I. say that biology doesn’t matter (cough, my mom, cough). Because if it really didn’t matter to them, then why would they use D.I. at all? They could just adopt or something and help out kids in need.”¹³⁴

The power of biology also comes into play when single women want to have more than one child through DI. In these cases, mothers typically want to use the same sperm donor for additional children, in order to ensure that siblings share the same biological father and are “full” siblings.¹³⁵ Towards this end, sperm banks often encourage their customers who may want more than one child to purchase multiple sperm specimens from their favored donor. The sperm bank then reserves it for possible future use.

¹³³ In one survey of married couples undergoing donor insemination, 47 percent planned not to tell their child about the insemination, and an additional 20 percent had not decided whether or not to tell. S.C. Klock, C. Jacob, & D. Maier, *A Prospective Study of Donor Insemination Recipients: Secrecy, Privacy, and Disclosure*, 62 FERTILITY & STERILITY 477, 481 (1994).

¹³⁴ Amy Harmon, *Hello, I’m Your Sister. Our Father Is Donor 150*, N.Y. TIMES, Nov. 20, 2005, at 1.

¹³⁵ Egan, *supra* note 54; Romano, *supra* note 57.

Finally, as discussed, biology matters to adults purchasing sperm for eugenic reasons as well. Given the genetic links between a man and his biological offspring, sperm providers who are tall and intelligent, for example, are typically in higher demand.

Given the importance of family medical history, sperm banks may also reject sperm donors who were adopted or have parents who were adopted. The irony, of course, is that people who are conceived through semen purchased from sperm banks will often not be able to get their own family histories. Thus, a donor-conceived man would not be able to become a donor himself; the sperm bank would reject him for having insufficient knowledge about his ancestry.

F. Human Rights and the “Right to Know”: The Trend Toward Abolishing Anonymity Abroad

Is anonymous donor insemination an issue of human rights? International trends are beginning to embrace the notion that children should have the right to know the identity of their biological parents. The United Nations Convention on the Rights of the Child was opened for ratification by member nations in 1989. Article Seven of the Convention states, “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”¹³⁶ Article Eight holds that states should “respect the right of the child to preserve his or her identity.”¹³⁷ In tandem, these Articles would seem to suggest that sperm donor anonymity is a violation of a donor-conceived child’s fundamental rights to identity. The Convention recognizes that it is not

¹³⁶ Convention on the Rights of the Child art. 7, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990

¹³⁷ *Id.* at art. 8.

always possible for a child to know or be raised by his or her parents, but the *deliberate* creation of children alienated from one of their biological parents insofar as a child would be denied knowledge about their parents' identity would appear to violate the spirit of the Convention.

Proponents of anonymity might argue that a sperm father, while a child's biological parent, should not be considered to be a "parent" under the Convention. In recent years, courts in the United States and Canada have given greater weight to functional parenthood, at the expense of biological parenthood, in determining legal parentage.¹³⁸ The *Implementation Handbook for the Convention of the Rights of the Child*, however, states that "a reasonable assumption is that, as far as the child's right to know his or her parents is concerned, the definition of 'parents' includes genetic parents."¹³⁹ Furthermore, according to the *Handbook*, anonymous sperm and egg donation appear to "unnecessarily breach children's right to know their genetic parents."¹⁴⁰ The "implementation checklist" for Article 7 asks, "Do all children, including adopted children and children conceived by artificial forms of conception, have the right to know, as far as possible, who their genetic parents are?"¹⁴¹ Thus, the evidence suggests that the Convention weighs in against anonymous donor insemination.

Spurred by a greater recognition of children's rights and interests, there is a distinct trend toward abolishing sperm donor anonymity in Europe and Australia.

¹³⁸ See DANIEL CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 33-41 (2005).

¹³⁹ RACHEL HODGKIN & PETER NEWELL, *IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD* 117 (2002).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 121.

Sweden became the first nation to eliminate sperm donor anonymity in 1984.¹⁴² Based partly on an interpretation of Article 7, Austria passed anti-anonymity legislation in 1992.¹⁴³ That same year, Switzerland incorporated a new constitutional article ensuring a child's "access to data concerning his lineage."¹⁴⁴ Various jurisdictions in Australia have removed donor anonymity as well.¹⁴⁵ In 1999, Western Australia's Select Committee stated, "[T]he right to know one's biological origins is a basic human right. And such a right must be enshrined and protected by state law."¹⁴⁶ In the past few years, the Netherlands, New Zealand, and Norway have also gotten rid of donor anonymity.¹⁴⁷

After much national debate, Great Britain recently passed legislation banning donor anonymity, too. The issue received national attention in 2002, when a donor-conceived woman brought a legal challenge in an effort to learn more information about her sperm donor father. In the case, Joanna Rose argued that she had a legal entitlement to information concerning her biological father's identity under Britain's Human Rights Act, which incorporated the European Convention on Human Rights. While the High Court did not rule on the ultimate merits of her claim, it held that the claims of donor offspring for information did engage Article 8 of the European Convention on Human Rights. Existing jurisprudence, the judge ruled, did indicate that the "respect for private and family life" guaranteed under Article 8 encompassed the rights of individuals to establish details about their personal identity. He continued:

¹⁴² Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 819 (2001).

¹⁴³ *Id.* at 820.

¹⁴⁴ *Id.* at 819.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 821.

¹⁴⁷ Streisand, *supra* note 7.

The bottom line, so it seems to me, is that the donor provided half of each Claimant's genetic identity and it is this that creates the interest of the Claimant to seek information about him. . . .

It is to my mind entirely understandable that A.I.D. children should wish to know about their origins and in particular to learn what they can about their biological father A human being is a human being whatever the circumstances of his conception and an A.I.D. child is entitled to establish a picture of his identity as much as anyone else.¹⁴⁸

In response to this case (which is still underway), the British government set up an identity register for donors and donor offspring. In 2004, Great Britain's Human Fertilisation and Embryology Authority also embarked on a public consultation on its existing DI regulations, including the assurance of anonymity for donors. After research and debate, the HFEA recommended that donor anonymity be removed. Though many fertility clinics opposed the move, Britain's Health Minister stated, "We have concluded that the interests of the child are paramount."¹⁴⁹ Legislation prohibiting anonymity took effect in April 2005. Now all children born through donor insemination in Britain will be able to learn the identity of their genetic parents when they turn eighteen.¹⁵⁰

III. Incorporating Children's Interests into Donor Insemination by Establishing a "Right to Know"

The "best interests of the child" doctrine is a defining feature of U.S. family law. Marsha Garrison writes, "Today—more so than at any time in our history—courts and

¹⁴⁸ R (on the application of Rose) v. Secretary of State for Health; also known as Rose v. Secretary of State for Health [2002] 2 F.L.R. 962, [2002] E.W.H.C. (Admin.) 1593, para. 38 & 47.

¹⁴⁹ Melanie Johnson, MP, Parliamentary Under Secretary of State for Public Health, Donor Anonymity and Review, Address at HFEA Conference (Jan. 21, 2004), at http://www.dh.gov.uk/NewsHome/Speeches/SpeechesList/SpeechesArticle/fs/en?CONTENT_ID=4071490&chk=zLzthb.

¹⁵⁰ *Sperm Donor Anonymity Ends*, BBC NEWS, Mar. 31, 2005, <http://news.bbc.co.uk/2/hi/health/4397249.stm>.

commentators hold that parents' rights are secondary to children's interests."¹⁵¹ The law surrounding donor insemination stands out as an exception. While it was once possible to assume that donor anonymity was in the best interests of children, the experiences of many donor-conceived people now suggest otherwise. Many of them want to know who their biological fathers are, but law is typically used to deny them access to information about their origins. Current practices in donor insemination place the interests of profit-seeking men and businesses against the interests of children. It is time to take the interests of donor offspring into account and abolish sperm donor anonymity. The United States should follow the lead of other nations and mandate the use of identifiable sperm in donor insemination.

A. A Constitutional Right to Know?

Establishing the right of donor offspring to know their origins will most likely not be achieved through the courts. In a series of cases relating to adoption, U.S. courts have consistently held that there is no constitutional right to know one's genetic heritage. Like donor-conceived people, many adoptees seek to learn the identity of their biological parents. Many states, however, keep adoption records sealed unless adoptees can meet a strict "showing of good cause" requirement.¹⁵² In the late 1970s and early 1980s, adult adoptees, seeking automatic access to their birth records, challenged the constitutionality of such burdensome "good cause" requirements. They grounded their "right to know" argument in a series of constitutional claims, including the due process right to privacy,

¹⁵¹ Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893-94 (2002).

¹⁵² Lori B. Andrus and Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125, 137 (1998).

the First Amendment right to receive important information, the right to equal protection under the law, and a fundamental liberty interest in their “personhood.”¹⁵³ These arguments, however, were uniformly unsuccessful. A New Jersey court conceded that information on one’s genetic background is “essential to that person's identity and self image,” but held that such information was “not so intimately personal as to fall within the zones of privacy implicitly protected in the penumbra of the Bill of Rights.”¹⁵⁴ Next, in *Alma Society v. Mellon*, the Second Circuit rejected the argument that “learning . . . the identity of [one’s] natural family is a fundamental right under the Due Process clause of the Fourteenth Amendment.”¹⁵⁵ In rejecting the same claim, the Supreme Court of Illinois stated, “We have found no case holding that the right of an adoptee to determine his genealogical origin is explicitly or implicitly guaranteed by the Constitution.”¹⁵⁶ The Supreme Court dismissed the subsequent appeal “for want of a substantial federal question,”¹⁵⁷ which constituted a decision on the merits. Since 1981, that holding has served as binding precedent on lower federal courts.¹⁵⁸ Thus, donor-conceived people are unlikely to find any strong constitutional footing for a “right to know.” Twenty-five years later, there are still no U.S. cases that recognize a constitutional right to information about one’s biological heritage.

But perhaps the courts got it wrong. As Justice Brennan has noted, “‘Liberty’ [is a] broad and majestic term[] . . . among the ‘[g]reat [constitutional] concepts . . .

¹⁵³ *Id.* at 145-46; Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution*, 2 U. Pa. J. Const. L. 150, 157-58 (1999).

¹⁵⁴ *Mills v. Atlantic City Dept. of Vital Statistics*, 148 N.J.Super. 302, 310, 372 A.2d 646, 650 (1977).

¹⁵⁵ *Alma Society, Inc., v. Mellon*, 601 F.2d 1225, 1230 (2nd Cir. 1979), cert denied 444 U.S. 995 (1979).

¹⁵⁶ *In re Roger B.*, 418 N.E.2d 751, 753 (Ill. 1981) (holding that adoptees do not have a fundamental right to examine their adoption records).

¹⁵⁷ *Barth v. Finley*, 454 U.S. 806 (1981) (denying appeal).

¹⁵⁸ *Boggs v. Boggs*, 520 U.S. 833, 849 (1997); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (stating that lower federal courts should follow the Supreme Court’s determination that a particular claim is unsubstantial).

purposely left to gather meaning from experience.”¹⁵⁹ And, over the past quarter-decade, more evidence has become available regarding the powerful identity-related interests of adoptees and donor-conceived people.¹⁶⁰ American society, in turn, has become more willing to acknowledge the desire of adoptees to learn more about their biological parents as legitimate, rather than as a neurotic rejection of their adoptive parents.¹⁶¹ The experiences of donor-conceived people should be similarly recognized.

Faced with a high prevalence of stepfamilies and other diverse family forms, the law also increasingly recognizes that parenthood is not a zero-sum game.¹⁶² Giving donor-conceived people access to information about their biological parents would not take away anything from the status of their legal parents.

In addition, more recent Supreme Court language provides a possible basis for challenging sperm donor anonymity. In *Roberts v. United States Jaycees*, the Court recognized the relationship between liberty, relationships, and identity, noting that “individuals draw much of their emotional enrichment from close ties with others.”¹⁶³ “Protecting these relationships from unwarranted state interference,” the Court continued, “therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”¹⁶⁴ While the tie between a donor-conceived person and her biological father is not close in an emotional sense, the uniqueness of a parent-child biological connection constitutes a close tie of another sort.¹⁶⁵ In fact, as Justice Brennan

¹⁵⁹ Michael H. v. Gerald D., 491 U.S. 110 (1989) (Brennan, J., dissenting) (internal citations omitted)

¹⁶⁰ See infra notes 113-123 and accompanying text.

¹⁶¹ Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001).

¹⁶² AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 (2002)

¹⁶³ 468 U.S. 609, 619 (1984).

¹⁶⁴ *Id.*

¹⁶⁵ *Lehr v. Robinson*, 463 U.S. 248, 272 (1983) (White, J., dissenting) (“The ‘biological connection’ is itself a relationship that creates a protected interest.”)

has noted, the liberty interest in a parent-child relationship was “among the first that this Court acknowledged in its cases defining the ‘liberty’ protected by the Constitution.”¹⁶⁶

For many donor-conceived people, the denial of information about their heritage strikes at the heart of their liberty and ability to define their identity. As the Court has stated, “At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”¹⁶⁷

For some, beliefs about these matters—beliefs that go to the heart of personhood—cannot be whole when the state supports contracts that deny them basic knowledge about who they are and how they came to exist.

Nevertheless, constitutional law remains an “awkward vehicle” for formulating the argument that donor-conceived people should have access to information about their biological parents.¹⁶⁸ Existing substantive due process decisions on parent-child relationships have focused on the rights of parents.¹⁶⁹ The more recent expansions of due process protections, from *Griswold* to *Roe* to *Lawrence*, deal with the privacy rights of adults to be free from active state interference. Furthermore, *Lawrence* repealed laws that were on the demise and rarely enforced.¹⁷⁰ No states have moved to remove sperm father anonymity. *Lawrence* also looked to international law, but donor offspring in the U.S. cannot easily supplement their constitutional claims by pointing to the Convention of the Rights of the Child, as the U.S. has not ratified it.¹⁷¹

¹⁶⁶ Michael H. v. Gerald D., 491 U.S. 110, 141-42 (1989) (Brennan, J. dissenting).

¹⁶⁷ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

¹⁶⁸ Cahn & Singer, *supra* note 152, at 153.

¹⁶⁹ *Id.* at 150.

¹⁷⁰ 539 U.S. at 573.

¹⁷¹ Office of U.N. High Commissioner for Human Rights, Status of Ratifications of the Principale Human Rights Treaties, <http://www.unhchr.ch/pdf/report.pdf>.

In arguing for open adoption records, Naomi Cahn and Jana Singer write, “A reconstituted understanding of due process, which focuses not on negative liberty, but on the development of identity and personhood that zones of liberty and privacy make possible, might well support a more robust set of constitutional arguments.”¹⁷² However, they also recognize that “such an affirmative understanding of liberty would require a new vision of the Constitution—a highly unlikely proposition at this point in our legal history.”¹⁷³ Similarly, courts are unlikely to abolish sperm donor anonymity on their own. Advocates of abolishing donor anonymity should follow advocates of open adoption records and turn to the legislative branch.

B. Establishing a Statutory “Right to Know”

Laws governing assisted reproduction, as with most family law, are typically made at the state level. States should pass laws forbidding the use of anonymous sperm in donor insemination. Yet a state-by-state patchwork approach is less preferable than a clear national standard. Given that so many sperm sales occur across state lines via the internet and mail order, the U.S. Congress should pass legislation that would ensure that all future children born through donor insemination would have the right to learn their biological father’s identity.

When donor-conceived people turn eighteen, they should have access to identifying information about their genetic fathers. No person would be obligated to look up that information; it would be entirely the prerogative of donor offspring. Sperm fathers would not be allowed to access records of children they have sired. The legal

¹⁷² Cahn & Singer, *supra* note 152, at 190.

¹⁷³ Cahn & Singer, *supra* note 152, at 192.

parents of donor-conceived children would be able to access identifying information about the donor if they can show good cause for needing it (e.g., the child suffers from a genetic disease and the genetic father's medical history could aid treatment). Mandatory identification would be prospective in order to protect the interests of donors who had been promised anonymity. To facilitate record-keeping, the government would maintain a national registry of DI births and a standardized file of all sperm providers. Sperm banks and fertility clinics would be required to report DI births to the national registry along with a variety of information on the donor, including his name, date and place of birth, physical description, detailed family medical history, mailing address, occupation, and skills and interests.¹⁷⁴ Men who provide their sperm should also be asked to describe their reasons for providing sperm and be encouraged to leave any messages to their future offspring who might access the file in the future.

IV. Objections to Establishing a “Right to Know”

While other nations have enacted such anti-anonymity legislation, proponents of anonymity in the United States might argue that establishing a “right to know” for donor offspring would violate constitutional protections regarding procreative liberty and privacy. While there is no constitutional right to learn one's genetic heritage, the Constitution might protect the rights of adults to practice donor insemination with anonymous sperm. A number of policy arguments also support retaining sperm father anonymity as an option. In this section, I will address constitutionality of the proposed

¹⁷⁴ Human Fertilization and Embryology Authority (U.K.), What You Need to Know About Donating Sperm, Eggs, or Embryos, Feb. 14, 2006, at <http://www.hfea.gov.uk/ForDonors/2005-07-21%20What%20you%20need%20to%20know%20about%20donating%20sperm%2C%20eggs%20or%20embryos.pdf>

legislation and analyze the arguments against the creation of a “right to know” for donor offspring.

A. Donor Anonymity and Procreative Liberty

Would banning donor anonymity infringe on a constitutional right to procreate? The answer, of course, depends on the scope of constitutionally protected procreative liberty. Even in terms of substantive due process rights, the right to procreate is particularly amorphous. Existing case law gives no suggestion that removing anonymity would abridge constitutional rights. Moreover, even expansive visions of procreative liberty allow room for mandating the use of identifiable donors.

The Supreme Court has repeatedly mentioned a fundamental right to procreate. In the 1942 case of *Skinner v. Oklahoma*, the Court struck down legislation allowing the forced sterilization of repeat criminal offenders. In dicta, Justice Douglas wrote that the sterilization law involved “one of the basic civil rights of man.” “Marriage and procreation,” he continued, “are fundamental to the very existence and survival of the race.”¹⁷⁵ As such, forced sterilization represented a permanent deprivation of a basic liberty.¹⁷⁶ The Court has also indicated that procreation rights are rooted in the recognized constitutional right to privacy.¹⁷⁷ As Justice Brennan famously stated in *Eisenstadt*, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so

¹⁷⁵ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941).

¹⁷⁶ *Id.*

¹⁷⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (stating that procreation is one of the personal decisions “central to the liberty protected by the Fourteenth Amendment”).

fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁷⁸ The question, then, is whether a statutory prohibition on sperm donor anonymity constitutes such unwarranted government intrusion.

Supreme Court precedent provides little guidance. The Court has never explicitly ruled on a constitutional right to procreate, much less delineated its scope beyond the issue of forced sterilization. Even advocates of an expansive view of procreative liberty recognize that the existing legal support for an affirmative right to procreate is “scant.”¹⁷⁹ The Supreme Court has never addressed a case involving donor insemination, or any form of assisted reproduction.¹⁸⁰

Furthermore, lower courts have upheld restrictions on the use of artificial insemination for married couples, albeit in the penal context. Existing case law regarding restrictions on artificial insemination are limited to prisoners’ attempts to provide sperm samples to their wives for use in AI. In four cases, courts have held that prison regulations prohibiting such efforts at artificial insemination did not abridge inmates’ constitutional rights to procreation.¹⁸¹

No case law exists on statutory efforts to place restrictions on the use of sperm from a third party, in part because there are so few regulations on the use of donor insemination. Even if courts took a narrow view of procreative liberty with regard to donor insemination, there are few statutes to strike down. Therefore, existing case law gives little reason to suspect that courts would strike down a ban on sperm father

¹⁷⁸ Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

¹⁷⁹ Katheryn D. Katz, *Lawrence v. Texas: A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN’S RTS. L. REP. 249, 249 (2004).

¹⁸⁰ *Id.*

¹⁸¹ Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002); Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990); Percy v. State Dept. of Corrections, 651 A.2d 1044 (NJ Sup. Ct. 1995); Anderson v. Vasquez, 827 F. Supp 617 (N.D. Cal. 1992).

anonymity as an unconstitutional limitation on procreative liberty. Moreover, if the Supreme Court continues to consult international human rights norms and foreign law, as it did in *Lawrence*, the chance that a “right to know” statute would be struck down is even less likely.¹⁸² As discussed, the U.N. Convention on the Rights of the Child and legal reforms in other nations support the notion that donor-conceived people should have a right to know the identity of their natural parents.

Given the paucity of precedent, legal theorists have formulated a variety of approaches in defining the scope of procreative liberty. Yet both of the leading (and competing) theoretical frameworks allow for the removal of donor anonymity.

Professor Radhika Rao argues for a limited conception of procreative liberty. In her framework, the right to privacy is a relational right that protects close, personal relationships from state intrusion. “In the context of assisted reproduction,” she argues, “the right to privacy shelters procreation, but only when it occurs within the confines of a close personal association.”¹⁸³ Therefore, the practice of donor insemination receives no constitutional protection, as it involves arms-length transactions with strangers. For Rao, the right to procreate does not protect collaborative reproduction at all, much less the use of anonymous sperm. She states plainly: “[A] woman has no constitutional right to acquire semen from an anonymous donor.”¹⁸⁴

Professor John Robertson argues for a far more robust and expansive right to procreate. In his framework, adult choices regarding procreation enjoy presumptive

¹⁸² *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003).

¹⁸³ Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. Rev. 1077, 1079 (1998).

¹⁸⁴ *Id.* at 1120.

constitutional protection. Reproduction is “central to personal conceptions of meaning and identity,” he argues, and thus restrictions on the use of artificial reproductive technology “deny[] persons respect and dignity at the most basic level.”¹⁸⁵ Courts should uphold legal limitations on assisted reproduction only if the restrictions could be shown to prevent “severe harm.”¹⁸⁶ Under this heightened standard of review, donor insemination, gestational surrogacy, and technologies to select a child’s sex would all receive constitutional protection.¹⁸⁷

At first blush, restrictions on donor anonymity might appear to violate Robertson’s vision of procreative liberty. Yet Robertson also considers the interests of donor-conceived people and acknowledges that many donor offspring will be intensely interested in their missing biological parents.¹⁸⁸ “[M]any of them will care deeply about this parent,” he writes, “and some will be strongly driven to make contact, suffering enormously until they do.”¹⁸⁹ For these reasons, he argues, legislation requiring identity disclosure would not violate procreative liberty:

If a state determines that adopted or collaborative offspring have a substantial interest in having identifying information about their biologic parents, this interest should be sufficient to justify regulations that burden the procreative or privacy of rights of collaborators.¹⁹⁰

Robertson also writes, “The state may enact—and arguably should enact—policies that protect offsprings’ need to know their genetic and gestational roots”¹⁹¹ and argues that identifying information should be collected in case a jurisdiction later decides to provide

¹⁸⁵ JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994).

¹⁸⁶ *Id.* at 39.

¹⁸⁷ *Id.* at 40.

¹⁸⁸ *Id.* at 124-25.

¹⁸⁹ John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 1016 (1986).

¹⁹⁰ ROBERTSON, *supra* note 185, at 255 n.14.

¹⁹¹ Robertson, *supra* note 189, at 1018.

offspring with a right to know.¹⁹² Unlike Rao, Robertson articulates a constitutional right to use donor insemination. Banning donor *anonymity* does not infringe that right, however, as adults would remain free to procreate through DI. If the leading proponent of procreative liberty suggests that donor anonymity should be abolished, the constitutionality of the proposed legislation should be assured.

B. Donor Anonymity and the Right to Privacy

The constitutional right to privacy does not preclude the creation of a statutory “right to know” for donor offspring. Men who sell their sperm are not engaging in a private act in the sanctuary of own homes or asking for the “right to be left alone.” Nor are they protected by physician-patient privilege, as they are not patients.¹⁹³ Men who sell their sperm are taking part in an arms-length commercial transaction. Thus, laws forbidding sperm father anonymity would not violate constitutional rights to privacy.

In 2000, a California appellate court directly addressed the question of whether or not sperm fathers have a constitutional right to remain anonymous. The court held that contracts that guarantee anonymity for sperm fathers are void for public policy and that a sperm father’s right to privacy was limited. In the case, *Johnson v. Superior Court*, a couple had purchased sperm from California Cryobank and received assurances that the semen had been screened for heritable diseases.¹⁹⁴ Their six-year-old daughter, however, developed a genetic kidney disease inherited from her biological father. Her parents then sued Cryobank and two of its physicians for fraud, breach of contract, and professional

¹⁹² ROBERTSON, *supra* note 185, at 125.

¹⁹³ *Johnson v. Superior Court*, 95 Cal. Rptr.2d 864, 872 (Ct. App. 2000), *rev. denied*, 2000 Cal. LEXIS 6741 (Cal. Aug. 23, 2000).

¹⁹⁴ *Id.*

negligence. In the discovery proceedings, the plaintiffs sought to depose the sperm father and thus requested his identifying information from Cryobank. Cryobank refused to reveal that information citing, *inter alia*, the contract guaranteeing the sperm father's anonymity as well as his constitutional right to privacy. The plaintiffs sought, and the appellate court granted, a court order compelling the donor's deposition and the production of records. In reaching this result, the court examined the confidentiality contract between the sperm bank and the girl's parents as well as the sperm father's privacy rights.

First, the court ruled that Cryobank's contract promising complete donor anonymity was void for public policy. Under the California Family Code, identifying records related to donor insemination are "subject to inspection only upon an order of the court for good cause shown."¹⁹⁵ Yet the Cryobank contract, signed by the plaintiffs who had purchased the sperm, included no "good cause" provisions for identity release; the contract prohibited disclosure of the sperm father's identity under *any* circumstances and thus conflicted with the state statute. Given that obtaining important genetic and medical information for donor offspring would, in some circumstances, require disclosure of the sperm father's identity, the court concluded that "a contract that completely forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the best interests of the child."¹⁹⁶ The court declared the contract as against public policy and therefore unenforceable.¹⁹⁷

¹⁹⁵ CAL. FAM. CODE § 7613 (West 2006).

¹⁹⁶ *Johnson*, 95 Cal. Rptr.2d at 875.

¹⁹⁷ *Id.*

Second, the court held that the sperm father's right to privacy was limited and, in this case, outweighed by compelling state interests in disclosure. In California, the constitutional right to privacy protects an individual's medical history. Insofar as the sperm father's medical history was linked to his identity, the court reasoned, he also had a privacy interest in the nondisclosure of his identity. But, the court added, privacy rights are not absolute and must be balanced against other interests. In this situation, the court held that the sperm father's own conduct reduced his reasonable expectations of privacy. By having sold 320 semen samples for over \$11,000, the sperm father was involved in "a substantial commercial transaction likely to affect the lives of many people."¹⁹⁸ Thus, the court decided, it was unreasonable for him to expect that his identity would never be disclosed.¹⁹⁹ In *Johnson*, compelling state interests also cut against the sperm father's privacy rights, including the state's interest in an open discovery process and in "ensuring that those injured by the actionable conduct of others receive full redress of those injuries."²⁰⁰ The result is that, at least in California, the law no longer ensures sperm donor anonymity.²⁰¹

A stronger privacy and procreative liberty claim could be made by parents who use donor insemination and wish to keep the donor's identity a secret. A single mother may seek to prevent the sperm father from (in her view) disruptively inserting himself into her child's life, even if her adult child wishes to contact him. This concern is likely to be even more salient among married couples. While fertility is not as stigmatized as it once was, society still places a premium on biological connectedness. Thus, despite the

¹⁹⁸ *Id.* at 877.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 878.

²⁰¹ *Id.* at 879.

trend toward openness in adoption and donor insemination, some couples who resort to donor insemination due to a husband's infertility or heritable disease may still want to pretend as if their child is their own, biologically speaking. A father in particular may be concerned that his children might develop conflicted loyalties, or pull away from him because he is not the "real" father.

Furthermore, the law generally assumes that a child's legal parents are the parties best situated to determine the child's best interests. "Particularly in the due process context, the [Supreme] Court has tended to equate children's interests with those of their parents and to protect children derivatively through such doctrines as parental autonomy and familial privacy."²⁰² The interests of parents in maintaining family integrity should be given weight. For these reasons, parents who use donor insemination should be able to prevent minor children from accessing identifying information about their sperm fathers.

The relative interests of parents and children, however, are not static. When a child is young, parental interests in autonomy and family privacy appropriately receive priority. The law—and, indeed, the Constitution—grants parents wide discretion in making decisions for their children.²⁰³ By the time a child has reached the age of majority, however, the parents' interests recede in importance. Her parents no longer have legal authority over her, and her identity-related interests in information about her biological parent are likely to be stronger. Thus, at that point, parents should not be able to prevent their adult children from accessing the identity of their sperm fathers. The proposed "right to know" statute balances the relative interests of parents and children by

²⁰² Cahn & Singer, *supra* note 152, at 150.

²⁰³ See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

allowing donor-conceived people to access information only after they have reached adulthood.

Cases involving open adoption and privacy rights also support the constitutionality of a “right to know” statute for donor-conceived people. In contrast to donor insemination, a majority of states have passed legislation allowing adoptees greater access to information about their natural parents, and others have established mutual consent registries.²⁰⁴ A handful of states—including Alaska, Kansas, Oregon, and Tennessee—allow adult adoptees to access identifying information about their biological parents even without the consent of either birth parent.²⁰⁵ In both Oregon and Tennessee, birth mothers challenged the law as an unconstitutional violation of their right to privacy. In both instances, courts ruled that the “right to know” statutes were constitutional. In the Tennessee case, *Sundquist v. Roe*, the Sixth Circuit held births were partly public events, as government has long had an interest in recording births, in part to “further[] the interest of children in knowing the circumstances of their birth.”²⁰⁶ Finding no constitutional right to avoid disclosure of adoption records, both the Sixth Circuit and the Tennessee Supreme Court found that the legislature struck a suitable balance between the interests of children in knowing their birth parents and the interests of birth parents in privacy.²⁰⁷ In Oregon, the state appellate court reached the same conclusion.²⁰⁸

²⁰⁴ Elizabeth Siberry Chestney, Note, *The Right to Know One's Genetic Origin: Can, Should, or Must a State That Extends This Right to Adoptees Extend an Analogous Right to Children Conceived With Donor Gametes?*, 80 TEX. L. REV. 365, 368 (2001).

²⁰⁵ *Id.*

²⁰⁶ 106 F.3d 702, 705 (1997), *cert. denied*. 522 U.S. 810 (1997).

²⁰⁷ *Id.* at 707.

²⁰⁸ *Doe v. Oregon*, 993 P.2d 822, 836 (Ct. App. Ore. 1999).

Adoption and donor insemination are not perfect analogues, but these cases strongly indicate that prohibiting donor anonymity would be constitutional. Both donor-conceived people and adoptees have an interest in learning the identity of their natural parents.²⁰⁹ Moreover, the privacy interests of sperm fathers are less compelling than the privacy interests of parents who give their children up for adoption. The decision to give a child up for adoption is often heart-wrenching. For this reason, states often grant the birth parents privacy so that they can “move on and attempt to rebuild their lives after what must be a traumatic and emotionally tormenting episode of their lives.”²¹⁰ Sperm fathers, in contrast, endure no such torment. They willingly choose to sell their sperm, and they are largely motivated by money.²¹¹ Adoption also provides an existing child with a home that his biological parents could not or chose not to provide.²¹² Donor insemination intentionally creates a child that is alienated from one of her biological parents.

The *Johnson* and open adoption cases indicate that the constitutional right to privacy does not entail the right of sperm donors to remain anonymous. Contracts that attempt to prohibit disclosure in all circumstances violate public policy, as there are times when such information could be vital to a child’s interests. Legislatures are free to determine that the interests of donor offspring in knowing the identity of their biological parents outweigh the privacy interests of sperm providers, as courts would have little constitutional basis on which to overturn a law prohibiting donor anonymity. A statute

²⁰⁹ A literature review concludes, “Following conservative estimates of more recent studies in countries with open adoption policies, about 50% of all adopted persons will, at some point in their life, search for their birth parents.” U. Muller & B. Perry, *Adopted Persons’ Search for And Contact With Their Birth Parents I: Who Searches and Why?*, 4 ADOPTION QUARTERLY 5, 8 (2001), quoted in Velleman, *supra* note 109, at 359. This percentage also appears to be increasing. *Id.*

²¹⁰ *Mills v. Atlantic City Dep’t of Vital Statistics*, 372 A.2d 646, 649 (N.J. Sup. 1977).

²¹¹ See *infra* notes 46-51 and accompanying text.

²¹² *Mills*, 372 A.2d at 649.

forbidding donor anonymity would also ensure that all sperm donors are aware that their identity might be disclosed. There would be no expectation of anonymity, and thus no privacy right would be infringed.

C. Donor Anonymity and Policy Considerations

The argument for establishing a “right to know” for donor-conceived people cannot stop at establishing the proposed law’s constitutionality. As Carl E. Coleman writes, “Ultimately, whether [artificial reproductive technologies] should be considered part of procreative liberty is as much about values and policy as it is about precedent.”²¹³ This paper has argued that donor-conceived people have a strong interest in learning the identity of their biological parents. Throughout the history of donor insemination, their interests have been subsumed to those of sperm donors, sperm banks, and would-be parents.

There is a fundamental structural problem with sperm bank contracts that ensure sperm father anonymity. The American Society for Reproductive Medicine’s patient guide on “Third Party Reproduction” recognizes that “there are a number of legal issues concerning third party reproduction.” Thus, “It is essential that all parties consent in writing to any procedure.”²¹⁴ Yet one party whose interests are relevant cannot provide consent. The anonymity-promising contracts between sperm vendors and sperm banks seek to protect the interests of men who sell their sperm and the interests of the sperm bank. The contracts between sperm banks and would-be DI parents, drafted by the sperm

²¹³ Carl H. Coleman, *Religion Values and Legal Dilemmas in Bioethics: Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L.J. 57, 68 (2002).

²¹⁴ American Society for Reproductive Medicine, *Third Party Reproduction: A Patient’s Guide*, 16 (1996), at <http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf>

banks, similarly aim to protect the sperm bank and donors (through their status as third-party beneficiaries). Thus, profit-seeking adults and businesses hold the power; it is their interests that are protected. No relevant party is tasked with taking children's interests for information into account. The result is that the person most affected by these contracts—the child created through the sperm that has been bought and sold—has no voice in their construction.

After sperm is sold, most sperm banks display little concern regarding the interests of the people they helped create. Instead, they seek to protect their suppliers. “[P]rotecting the identity of donors is paramount for us,” states William Jaeger of Fairfax Cryobank. “In cases where the donor does not want to be identified, we do everything we can to protect them.”²¹⁵ In other words, his company does everything it can to frustrate the longings of offspring who want to learn who their genetic fathers are. Sperm banks, as profit-driven businesses, are driven by their financial bottom-line, which is often at odds with the interests of the people help create.

Defenders of donor anonymity argue that mandating a “right to know” for donor offspring fails to take into account the interests of men who sell their sperm. Men who sell their sperm often give very little consideration to the implications of their actions.²¹⁶ Because of the guarantee of anonymity, many sperm vendors view selling their sperm as akin to selling their blood, or simply masturbating for money.²¹⁷ While not true across the board, many sperm vendors give little thought to the fact that their sperm may be used to create new children related to them.

²¹⁵ Stein, *supra* note 110.

²¹⁶ Sauer, *supra* note 50.

²¹⁷ *Id.*

For these reasons, Cappy Rothman of California Cryobank states that it is “unethical” for donor offspring to try to track down their sperm fathers: “It’s an invasion of the donor’s privacy and a breach of contract.” Randy Cohen, the columnist better known as “The Ethicist,” agrees that sperm fathers should not be identified without their consent. Describing the policies of one sperm bank, he writes:

When a child turns 18, he or she can call the sperm bank, which will then ask the donor if he wishes to make contact. Both donor and child have a say in this; a relationship may not be foisted on either. To have it otherwise would not only be unfair to those directly involved²¹⁸

Yet this moral reasoning is flawed. The sperm father did have a choice on whether or not to sell his sperm, which would be used to create a child. The donor-conceived person, however, did not “have a say” in the contract ensuring her biological father’s anonymity. By the time she was born, contracts had already been formed to deny her knowledge about her biological father. One donor-conceived woman says that when she realized she will probably never know her biological father, “I felt very angry. How dare someone take my choice away from me? How dare the medical profession tell me it doesn’t matter?”²¹⁹ That denial of knowledge was knowingly and intentionally foisted upon her without her consent. As she was not a signatory to the contract, she has no compelling ethical reason to comply with it.

Laws forbidding donor anonymity would solve this dilemma. With such “right to know” statutes in place, men who decide to sell their sperm would know that they might be contacted by their genetic offspring in the future. If men are troubled by the prospect of their biological children tracking them down in the future, they simply should not sell

²¹⁸ Randy Cohen, *Donor Secrecy*, N.Y. TIMES MAG., Oct. 2, 2005, at 34.

²¹⁹ Pearce, *supra* note 59.

their sperm. Yet some supporters of anonymity argue that this awareness is not sufficient. One critic writes:

The “Hi, Dad” letter coming out of the blue after 18 years of silence might be welcomed by some donors, but will bring irreversible distress to others. It is no answer to say that the donor knew that this might happen when he donated his sperm. How could he know what he would feel like in 18 years’ time . . . ? If, as is claimed, psychological harm can be caused to a child who knows not his father, is there not at least an equal argument about the harm that can be done to the father and those close to him?”²²⁰

It is true that some men who sold their sperm when they were, in the words of the same critic, “younger and broker” may come to regret their decision to become an identifiable sperm father. But they did have a chance to exercise agency; the children they helped create had no such say in the matter.

It is true, of course, that no child asks to be born, or gets a say in the circumstances of their conception. Children are often brought into the world in less-than-ideal settings, whether they are born out-of-wedlock, to teenagers, or even to abusive parents. Children conceived through donor insemination are wanted children. And other children, either due to adoption or other circumstances, may never know the identity of both of their biological parents, either. As one supporter of anonymity writes, “[I]f we want to declare a legal right to know one’s genetic parentage, we’d better get cracking on a massive system of sexual surveillance—because children of sperm donors aren’t the only people who don’t know who fathered them.”²²¹ Yet the fact that the law cannot ensure that *all* children will be able to know their biological parents does not mean that law should actively foster such alienation. In the case of sperm banks, multiple parties

²²⁰ Marcel Berlins, *Children Now Have the Right to Find Their Sperm Donor Father. But What About His Right to Remain Anonymous?*, GUARDIAN, Apr. 5, 2006, at <http://www.guardian.co.uk/law/story/0,1747071,00.html>.

²²¹ Kerry Howley, *Ma, Ma, Where’s My Pa?*, REASON, Jan. 23, 2005, at <http://www.reason.com/links/links012306.shtml>.

use law to deliberately create children who will never know their biological origins. There is no compelling reason why a sperm father's interest in privacy should take precedence over the interests of his biological child.

The Emergence of "Open-Identity" Sperm Sales

Some may argue that legislation establishing a "right to know" is unnecessary, as the free market is already responding to a greater interest in non-anonymous sperm, particularly from lesbian couples and single women. While most sperm banks prefer anonymity, they have begun to respond to consumer demand.²²² The popularity of the Sperm Bank of California's "Identity-Release" program has pushed its competitors to offer various "open identification" programs of their own. These programs, however, vary in terms of what information offspring are guaranteed to learn. The "Open Donor Program" at California Cryobank, for example, only assures that their donors have "stated their intent" to respond to a request for more information when the child turns eighteen.²²³ Men who sell their "open donor" sperm, however, are free to change their minds. Yet it would not matter if every sperm bank in America offered sperm from identifiable donors. Donor offspring have a fundamental interest in learning their biological lineage. Their ability to do so should not depend on the contracts of third-parties and their parents' purchasing decisions.

A Contact Veto for Donors?

²²² Romano, *supra* note 57 (quoting sperm bank official as saying "the market demanded it")

²²³ California Cryobank catalog, 8 (on file with author).

States with open adoption typically provide birth parents with a “contact veto.” By exercising their “contact veto,” birth parents cannot prevent the release of identifying information, but adoptees who attempt to contact them may be subjected to criminal penalties.²²⁴ This option should not be extended to sperm fathers, however. If sperm providers never want to be contacted by their biological offspring, they are free not to sell their sperm in the first place. Sperm donor fathers would also be free to ignore any messages they would receive from their biological offspring.

Sperm Fathers’ Access to Identifying Information

The proposed statute gives donor-conceived people the right to information about their sperm fathers. What about the sperm fathers? Should they have an accompanying right to access information about their biological children? While many sperm fathers may prize their anonymity, others may come to feel a strong desire to learn more about their possible offspring. Sperm vendors should be able to discover if they have any offspring, as well as the year of birth and sex of each child. In this way, sperm fathers can learn when they might be contacted. They should not, however, be given identifying information, even after their genetic children turn eighteen.

While the Supreme Court has recognized certain substantive due process protections for unwed biological fathers, such rights have been circumscribed. The Court has directly addressed the constitutionally protected interests of unwed fathers in four cases.²²⁵ In these cases, “The basic principle enunciated . . . is that an unwed father who

²²⁴ Tenn. Code Ann. § 36-1-132 (providing misdemeanor penalties when an adoptee or her relative contacts someone who filed a contact veto) Chestney fn. 67

²²⁵ Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978), Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child.”²²⁶ Therefore, under the Court’s “biology plus relationship” standard, sperm fathers whose only connection to the child is DNA deserve no due process protections. As Justice Brennan states, “[A] mere biological connection is insufficient to establish a liberty interest on the part of an unwed father.”²²⁷

Even a more expansive standard is unlikely to find significant due process rights for sperm fathers. In a dissent in *Lehr v. Robison*, Justice White writes, “The ‘biological connection’ is itself a relationship that creates a protected interest.”²²⁸ Nevertheless, he adds that the extent of the parent-child relationship determines the weight of that interest. Even if a sperm father’s biological connection to his offspring creates a protected interest, that interest is outweighed by other considerations.

Sperm fathers typically play no role in child-rearing. In fact, they expressly disclaim all legal rights and responsibilities toward any offspring. Unless sperm fathers do play a participatory role in their child’s life, they should not be given the right to insert himself into that child’s life years later.

Because donor-conceived people would be free to access identifying information about their sperm fathers when they turn eighteen, contact initiated by sperm fathers is likely to be unwanted. In addition, unsolicited contact from sperm fathers could very well be an unpleasant surprise for many donor-conceived people. Some parents keep their DI use a secret.²²⁹ And even though donor-conceived children should be told the

²²⁶ *Michael H. v. Gerald D.*, 491 U.S. 110, 157-58 (1989) (White, J., dissenting).

²²⁷ *Id.* at 144 n.2

²²⁸ *Lehr*, 463 U.S. at 272 (White, J., dissenting)

²²⁹ Klock, Jacob, & Maier, *supra* note 133.

truth about their origins, the time and manner of such disclosure is best left to the parents who raise them. Learning the truth, out of the blue, from a “Hi, I’m your biological father” letter or phone call would likely disrupt the donor-conceived person’s life and cause strife for her family. Although granting sperm fathers access to identifying information would probably spur more parents to be open with their donor-conceived children, the potential costs are too great.

If the proposed statute were enacted, sperm vendors would freely choose to accept the uncertainty regarding future contact from any offspring. They may come to regret their decision, but the decision was theirs. Donor-conceived people, on the other hand, never had a choice. Hence, different treatment is warranted.

The Right of Parents (and the State) to Identifying Information

Should parents who use donor insemination be able to access identifying information about the sperm provider? I would argue that parents of a donor-conceived child need not be granted automatic access to identifying information. If would-be parents want to use a known donor, they are free to do so. The Sperm Bank of New York’s “Open ID” package “allows all persons involved to contractually agree, from the onset of the process, to reveal their identity and whereabouts to each other and the future offspring.”²³⁰ Single women or lesbians are most likely to want an identifiable sperm father, and they can try to get a friend or acquaintance to donate his sperm. Since parents who use donor insemination already have the option to use identifiable sperm, there is no pressing need to mandate an automatic “right to know” for them. Moreover, the statute I

²³⁰ Sperm Bank of New York website, <http://www.sperml.com/sbny/donor.html>.

propose would include a “good cause” exception so that parents could access donor information if circumstances required.

What if a single mother becomes impoverished? Should she be able to identify the sperm father and seek child support from him? For that matter, should the state be able to access identifying information and institute a support order to recoup its welfare costs? As a practical matter, it is unlikely that many single women who use DI will require income support from the state. Most women and couples who use assisted reproductive technology are financially secure, in part because the costs of assisted reproduction tend to be so high. Donor insemination is not likely to increase the ranks of poor single mothers.

Many states allow sperm fathers to contract away the legal responsibilities of parenthood. States that follow the Uniform Parentage Act hold that, as a matter of law, “A donor is not a parent of a child conceived by means of assisted reproduction.”²³¹ If a state decides that it wants to hold sperm fathers responsible for their offspring when there is no husband or second parent, they simply need to repeal statutes that strip sperm fathers of legal responsibility and ban anonymous donor insemination. There is no reason why the state must treat fathers differently based on the means of conception. Thus, if a state has no statutes on parentage in assisted reproduction, the law would treat sperm fathers like any other unwed fathers, and, if their identity is known, single mothers could sue them for child support.²³² In 2005, a Pennsylvania court ruled that a known sperm donor had to pay child support to the unmarried mother of his children.²³³ While the two adults initially agreed that the father would have no parental responsibilities, the

²³¹ UNIF. PARENTAGE ACT § 702 (2002).

²³² Garrison, *supra* note 151, at 903-04.

²³³ McKiernan v. Ferguson, 855 A.2d 121 (Pa. Super. 2004).

court held that parents cannot bargain away a child's right to support, and thus their original agreement was unenforceable "on legal, equitable and moral principles."²³⁴

The downside of treating sperm donors as legal parents (when there is no second parent to adopt the child) is that few, if any, men would be willing to provide their sperm to single women seeking to get pregnant. Perhaps the public policy interests in establishing two parents for every child are strong enough to hold sperm fathers responsible for their offspring born to single mothers. On the other hand, such a policy would drastically limit the ability of single women to have children through artificial insemination. The number of cases in which a single mother would seek child support is likely to be small, whereas the prospect of holding sperm fathers accountable is almost certain to lead to a large drop in sperm donors. Therefore, the interests of single women seeking to become mothers should take precedence over the state's financial interests.

A Likely Decline in Sperm Providers

One of the strongest policy objections to banning anonymity is that fewer men would be willing to sell or donate their semen to sperm banks. This is not necessarily a foregone conclusion, however. Some nations, such as Sweden, saw levels of sperm donation drop initially after abolishing anonymity, but rise again over time.²³⁵ After mandating the use of identifiable sperm, donors were also more likely to be older men

²³⁴ *Id.* at 123.

²³⁵ Frith, *supra* note 142, at 823.

with existing families, rather than unmarried university students.²³⁶ And there is some evidence that certain recruitment policies can minimize a decline in sperm donors.²³⁷

Yet the experience of most nations suggests that removing anonymity does in fact lead to a reduction in sperm donors. Britain has seen a sharp decline in sperm donors since they banned anonymity,²³⁸ as has the Australian state of Victoria.²³⁹ With longer waiting lists, the “sperm shortage” forces fertility clinics to turn away some would-be parents. Britain and other nations have also limited payments to sperm providers to a small nominal fee, however. If the United States bans donor anonymity but otherwise retains a free market in sperm, sperm banks might be able to maintain adequate levels of sperm by increasing compensation for sperm vendors. Nonetheless, it is certainly likely that establishing a “right to know” for donor offspring would reduce the number of men willing to provide their sperm. Donor insemination would likely become more expensive as well, with the result that some number of people would no longer be able to use donor insemination in order to conceive.

The likelihood that fewer men would provide sperm is not a fatal objection to establishing a “right to know” for donor-conceived people. In fact, those who oppose donor insemination on ethical grounds would interpret the decline in sperm donation as a positive outcome of abolishing anonymity. As one donor-conceived person has written,

²³⁶ *Id.*

²³⁷ Eric Blyth, *Information on Genetic Origins in Donor-Assisted Conception: Is Knowing Who You Are a Human Rights Issue?* 5 HUMAN FERTILITY 185, 190 (2002).

²³⁸ Mark Rice-Oxley, *In Britain, A Decline in Donors*, CHRISTIAN SCI. MONITOR, Dec. 30, 2005, at <http://www.csmonitor.com/2005/1230/p07s02-woeu.html?s=hns>; Olga Craig, *Where Have All the Donors Gone?* TELEGRAPH (London), Apr. 30, 2006, at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/04/30/ndonor30.xml&sSheet=/news/2006/04/30/ixhome.html>; Louise Gray, *Anonymous Sperm Donor Ban to Extend Couples' Wait for Treatment*, SCOTSMAN, Apr. 1, 2006, at <http://news.scotsman.com/health.cfm?id=502902006>.

²³⁹ Carol Nader, *Laughing All the Way to the Bank, But It's Black Humour*, AGE (Australia), Apr. 26, 2006, at <http://www.theage.com.au/news/national/laughing-all-the-way-to-the-bank-but-its-black-humour/2006/04/25/1145861348250.html>.

“The fear that the removal of anonymity would lead to a drop in donor numbers . . . is, in any case, a secondary issue. Either something is cruel or it is not. It does not become less cruel because more babies are able to be produced by it.”²⁴⁰ While the view that anonymous donor insemination is “cruel” may be an extreme position, the sentiment that children’s interests should be paramount is not.

Infertile couples seeking to become parents through donor insemination are a far more sympathetic group than profit-seeking sperm vendors and sperm banks. Nevertheless, there is no compelling reason why their interests should be given precedence over those of children. There is no affirmative constitutional right to obtain anonymous sperm. Moreover, many would-be parents—particularly single women and lesbian couples—prefer identifiable sperm.²⁴¹ “In any event,” as the *Implementation Handbook for the Convention of the Rights of the Child* states, “the law on artificial forms of fertilization, as with adoption, should be framed to protect the rights and well-being of children, not to meet the needs of childless couples.”²⁴² Finally, if it turns out that few donor-conceived people actually want to learn more about their biological fathers, such laws can be overturned down the road.

Conclusion

ZyGen Laboratory is a leading sperm bank based in California. Its website states that, since its founding in 1981, ZyGen has been “a pioneer and an innovator in the field of reproductive medicine, serving the U.S. population and other communities

²⁴⁰ McWhinnie, *supra* note 84, at 814.

²⁴¹ PLOTZ, *supra* note 6, at 256.

²⁴² HODGKIN & NEWELL, *supra* note 139, at 118-19.

worldwide.”²⁴³ The company highlights their technological expertise, including sex-selected frozen semen and the latest in “computerized semen analysis.” ZyGen also focuses on customer service: “When you call ZyGen Laboratory, our promise to you, is that unlike many other organizations . . . you will hear the voice of a caring human being who loves to give you personalized service.” Finally, the company promises “extremely competitive” prices.

There is one subject area that ZyGen does not seem to focus on, however. Their homepage includes a tab for “Legal and Ethical Issues Related to Semen Donors and Women Who are Artificially Inseminated.”²⁴⁴ A click on the link, however, takes you to the following text: “This section is under review at this time. Please check back in the future for more information.” Meanwhile, of course, the sale of anonymous sperm goes on.

ZyGen’s “under construction” disclaimer is revealing, yet it *is* time for a review of the legal and ethical issues related to donor insemination. For years, it was either assumed that anonymity was best for donor-conceived children, or their interests were ignored altogether. As donor-conceived people grow up, however, they are beginning to speak out. Many express a deep desire to learn more about their biological fathers. Though the issue involves conflicting interests, policymakers should err on the side of children and establish the right of donor-conceived people to learn the identity of their missing biological parent.

²⁴³ Zygen Laboratories website, www.zygen.com.

²⁴⁴ Zygen Laboratories website, Legal and Ethical Issues Related to Semen Donors and Women Who are Artificially Inseminated, <http://www.zygen.com/coinfo3.htm#legal>.

The *Yale Daily News* recently reported on a handful of Yale students who sell their sperm for use in anonymous donor insemination.²⁴⁵ Because they are promised anonymity, they are free to ignore the implications of their employment—that they will likely have unknown genetic offspring somewhere out in the world. “To tell you the truth, I don’t think about it,” one sperm-selling student said.²⁴⁶ “The only way you can deal with it is if you don’t think about it.”²⁴⁷ His biological offspring, however, are likely to think about it a great deal. It is unethical to deliberately create children who will never know who their biological parents are. If those who sell their sperm anonymously don’t want to think about the consequences of their actions, perhaps it’s something we as a society shouldn’t be doing in the first place.

²⁴⁵ Cullen MacBeth, *Sperm Bank Attracts Anonymous Eli Fathers*, YALE DAILY NEWS, Apr. 13, 2006, at <http://www.yaledailynews.com/article.asp?AID=32661>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*