

1-1-2012

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### Recommended Citation

Mark Ballantyne, *My Daddy's Name is Donor: Evaluating Sperm Donation Anonymity and Regulation*, 15 RICH. J.L. & PUB. INT. 569 (2011).

Available at: <http://scholarship.richmond.edu/pilr/vol15/iss3/5>

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## MY DADDY'S NAME IS DONOR: EVALUATING SPERM DONATION ANONYMITY AND REGULATION

*Mark Ballantyne*\*

### I. INTRODUCTION

Sperm donation is a multi-billion dollar industry internationally; in the United States alone, sperm banks and fertility centers generate 3.3 billion dollars annually.<sup>1</sup> Despite the size and significance of the industry, the gamete donation industry is not regulated nationally in the United States.<sup>2</sup> Donors may contribute anonymously, there are no legal limits on the number of children produced by a given donor, and there are no restrictions on who may be a donor or a donation recipient.<sup>3</sup> Donor children have been calling for reform,

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<sup>1</sup> ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION, INST. AM. VALUES 5 (2010), available at [http://www.family scholars.org/assets/Donor\\_FINAL.pdf](http://www.family scholars.org/assets/Donor_FINAL.pdf).

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

<sup>3</sup> Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 207 (2009) [hereinafter Cahn, *Mandatory Gamete*].

seeking the right to know the identities of their biological fathers and further regulation of the sperm donation industry.<sup>4</sup>

Issues surrounding sperm donation have recently come to both cultural and legal prominence. In 2010, Focus Features released a movie titled *The Kids are All Right*, which tells the story of two children conceived through artificial insemination who seek out and build a relationship with their biological father.<sup>5</sup> In 2011, the state of Washington passed a law requiring the full disclosure of sperm donor names and medical histories to donor-created children once they turn eighteen.<sup>6</sup> That same year, the Supreme Court of British Columbia delivered a landmark decision banning anonymous sperm donation.<sup>7</sup> The court found that the children's interest in discovering both medical and identifying information about their biological fathers outweighed the donors' interest in remaining anonymous.<sup>8</sup>

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<sup>4</sup> See Jared Yee, *Sperm Donor Children Seek More Respect and Rights*, BIOEDGE (Aug. 21, 2010), [http://www.bioedge.org/index.php/bioethics/bioethics\\_article/9160](http://www.bioedge.org/index.php/bioethics/bioethics_article/9160).

<sup>5</sup> THE KIDS ARE ALL RIGHT (Alliance Films & Focus Feature Films 2011).

<sup>6</sup> WASH. REV. CODE § 26.26.750 (2011); see also Bonnie Rochman, *Where Do (Some) Babies Come From? In Washington, A New Law Bans Anonymous Sperm and Egg Donors*, TIME, July 22, 2011, available at <http://healthland.time.com/2011/07/22/where-do-some-babies-come-from-in-washington-a-new-law-bans-anonymous-sperm-and-egg-donors/>.

<sup>7</sup> Pratten v. British Columbia (Att'y Gen.), 2011 BCSC 656 (Can. B.C. Sup. Ct.), available at <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf>.

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

Internationally, countries have been moving towards regulation of sperm and egg donation over the last twenty years.<sup>9</sup> These regulations include banning anonymous donation, limiting the number of children fathered by a given donor, restricting who can become a donation recipient, and creating registry systems where children can uncover information about their biological fathers.<sup>10</sup>

In contrast, a lack of national regulation in the United States permits sperm banks to impose regulations individually on sperm donation.<sup>11</sup> Citing the often-reported psychological struggles of donor children, some legal analysts have criticized this lack of regulation.<sup>12</sup> These analysts call for a national registry and an end to anonymous sperm donation.<sup>13</sup> They advocate for regulations addressing the number of children a donor can create and the information parents should be providing to their children.<sup>14</sup>

Bringing new insight to the debate, the Institute for American Values released a study titled “My Daddy’s Name is Donor” in

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<sup>9</sup> Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL’Y 379, 392 (2009).

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

<sup>11</sup> Jacqueline Mroz, *One Sperm Donor, 150 Children*, N.Y. TIMES, Sept. 5, 2011, at D1.

<sup>12</sup> Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 174–75 (2000).

<sup>13</sup> See, e.g., Cahn, *Mandatory Gamete*, *supra* note 3, at 221.

<sup>14</sup> See, e.g., Naomi Cahn, *Children’s Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, 2 GEO. J. GENDER & L. 1, 4 (2000).

2011.<sup>15</sup> Through a survey of young adults in America, this study compares donor children with adopted and biologically raised peers.<sup>16</sup> The study examines rates of psychological problems, problems with the law, and feelings of incompleteness in donor children.<sup>17</sup> The study also compares donor children who were raised by heterosexual couples, homosexual couples, and single mothers.<sup>18</sup>

Using the data in the study, this comment analyzes proposals for a national registry system in the United States and for further regulation of the sperm donor industry. While others have written on this subject,<sup>19</sup> no one has applied the data from “My Daddy’s Name is Donor” to legal theory. The study, which is the first of its kind,<sup>20</sup> leads to a different proposal regarding sperm donor regulation from those supplied previously. The United States should implement a national registry system. While donors should have the option to refuse volunteering identifying information, all donors should be required to provide updated non-identifying medical information to the registry. The parents of donor children should have immediate access to donor

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<sup>15</sup> See generally MARQUARDT ET AL, *supra* note 1.

<sup>16</sup> *Id.* at 5.

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

<sup>18</sup> See generally *id.*

<sup>19</sup> See, e.g., Cahn, *Mandatory Gamete*, *supra* note 3, at 216–23 (arguing for the United States to develop a federal registry).

<sup>20</sup> MARQUARDT ET AL, *supra* note 1, at 5.

medical information, and the donor children should be permitted to access the registry at age sixteen. Along with the registry, the United States should regulate the number of families that can use donations from a given donor. However, the study does not provide justification for more intrusive regulation, such as eliminating anonymous donation, regulating who can be a recipient of sperm donation, or regulating what information parents disclose to their children.

In Part I, this comment explores the debate on anonymous sperm donation and the current law in the United States. Part II surveys new developments in the regulation of sperm donation internationally and domestically. Part III reviews “My Daddy’s Name is Donor” and how its findings relate to the anonymity debate. Part IV concludes with suggestions regarding the national registry and future regulation of sperm donation in the United States.

## II. PROS AND CONS OF DONOR ANONYMITY

The movement in favor of providing donor children access to information is gaining momentum, as seen both internationally and domestically in scholarly articles and state legislation.<sup>21</sup> With this recent trend of challenges to donor anonymity, it is important to un-

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<sup>21</sup> See *infra* Part IV.C for a discussion of the laws in other countries.

derstand the basic arguments for and against anonymity. From scholarly review, legislative bodies, and the courts, the arguments for and against donor anonymity fall into place. While opponents of continued anonymity advocate that children have a right to know their biological fathers, the proponents of anonymity contend that the donor's right to privacy trumps the rights of the children.<sup>22</sup>

#### A. The Debate

In deciding whether to release identifying information to donor children, the key issue is whether donor-conceived children's right to know identifying information trumps the donor's right to privacy.<sup>23</sup> The solution depends on whether banning donor anonymity would actually address the psychological problems faced by donor children.<sup>24</sup> Some theorists have argued that the donor's right to pri-

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<sup>22</sup> Compare HK Jørgensen & Michael A. Fitts, *Anonymity in Connection with Sperm Donation*, 26 MED. & L. 137, 138–42 (2007) (making arguments for protecting anonymity), with Elizabeth Marquardt & Leah Ward Sears, *Fathers Matter: Anonymous Sperm Donation and the Age-Old Problem of Father Absence*, 4 J. MARSHALL L.J. 113, 134 (2011) (arguing that a child's interest in disclosure outweighs the privacy interest of the donor), and Kristin E. Koehler, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321,332–34 (1996) (seeking a compromise between the donor's interests and the child's interest).

<sup>23</sup> Koehler, *supra* note 22, at 329–30.

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

vacy is supreme, while others have suggested the law should provide information to donor children.<sup>25</sup>

Some scholars argue against the elimination of donor anonymity.<sup>26</sup> They suggest that both the donors and the resulting family have a right to privacy that would be jeopardized by the elimination of anonymity.<sup>27</sup> Without privacy for donors, these theorists fear donors would be susceptible to unwanted solicitations for affection from children and legal entanglements brought by mothers seeking child support and child care.<sup>28</sup> These scholars also worry that eliminating anonymity will reduce the number and quality of sperm donors.<sup>29</sup> The director of one of the oldest sperm banks in the United States recently stated, “you’re going to lose the really smart, the really wonderful people who I think are going to question . . . ‘Do I really

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<sup>25</sup> *Id.* at 329–34. *See generally* Marquardt & Sears, *supra* note 22 (arguing that lawmakers should attempt to minimize father absenteeism by limiting the ability to make anonymous sperm donations).

<sup>26</sup> *See generally* Pi, *supra* note 9.

<sup>27</sup> *See, e.g., id.* at 390–92.

<sup>28</sup> *See, e.g., id.* at 390–91.

<sup>29</sup> *Id.* at 395; *see* Alison Motluk, *Canadian Court Bans Anonymous Sperm and Egg Donation*, NATURE INT’L WKLY J. OF SCI., May 27, 2011, available at <http://www.nature.com/news/2011/110527/full/news.2011.329.html>.



want to be in a situation where, down the road, someone may contact me?”<sup>30</sup>

Additionally, banning anonymity may cause greater psychological damage for donor children if their donor fathers reject them.<sup>31</sup> While stories of donor children seeking their parents are emotionally touching, in some, if not most instances, the donors may not want to be found.<sup>32</sup> Many sperm donors in America are college students.<sup>33</sup> These college students are not looking to start a family, but are either attempting to help another family get started or make some money.<sup>34</sup> They are not trying to create a long-term relationship with their future children.<sup>35</sup> As these donors move on with their lives and start their own families, the unexpected presence of an unknown biological child may be a destabilizing intrusion rather than a welcome addition.<sup>36</sup> This is not true of all donors, and as scholars correctly note,

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<sup>30</sup> *Sperm Donor Ethics*, (PBS television broadcast Aug. 25, 2006), transcript available at <http://pbs.org/wnet/religionandethics/week952/feature.html>.

<sup>31</sup> Koehler, *supra* note 22, at 329.

<sup>32</sup> Elizabeth L. Gibson, *Artificial Insemination by Donor: Information, Communication and Regulation*, 30 J. FAM. L. 1, 28 (1992).

<sup>33</sup> Ryan Ferone, *College Students and Sperm Donors*, ASKSTUDENT (last visited Jan. 30, 2012), <http://www.askstudent.com/sex/college-students-and-sperm-donors/>; Allison Brown, *Money Shots: College Students Profit, Help Infertile Couples by Donating Their Sperm and Eggs*, THE DAILY FREE PRESS, Jan. 13, 2004, available at [www.cryobank.com/\\_resources/pdf/News/DailyFreePressJan04.pdf](http://www.cryobank.com/_resources/pdf/News/DailyFreePressJan04.pdf).

<sup>34</sup> Brown, *supra* note 33.

<sup>35</sup> See Ferone, *supra* note 33; Brown, *supra* note 33.

<sup>36</sup> See David Crary, *Sperm-Donors' Kids Seek more Rights and Respect*, MSNBC, Aug. 16, 2011, [http://www.msnbc.msn.com/id/38679526/ns/health-childrens\\_health/t/sperm-donors-](http://www.msnbc.msn.com/id/38679526/ns/health-childrens_health/t/sperm-donors-)

some donors may be curious about the results of their donations.<sup>37</sup> Still, it is important to consider that while not knowing the identity of the sperm donor father may be unsettling, the possibility of rejection by a biological relative may cause more catastrophic results.<sup>38</sup> Without anonymity, some donor children would find themselves in just this situation.

Nevertheless, some scholars argue against continued donor anonymity.<sup>39</sup> These scholars use the emotional pleas of donor children as their strongest argument against donor anonymity.<sup>40</sup> Without anonymity, children could obtain both identifying and non-identifying information about their fathers once they reach a certain age.<sup>41</sup> In theory, those donor children could then use the data to seek out their biological fathers, and attempt to build a relationship with them.<sup>42</sup> Numerous news articles and studies detail donor children's feelings of incompleteness from not being able to

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kids-see-more-rights-respect/ (telling the story of Lindsay Greenawalt, who has been looking to find her father but has been unable to because "he doesn't want to make contact" resulting in a psychological toll on her and her mother).

<sup>37</sup> See DONOR OFFSPRING/PARENT REGISTRY & FREE SEARCH PAGE, <http://www.amfor.net/DonorOffspring/viewregistry.cgi> (last visited Jan. 30, 2012); THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited Jan. 30, 2012).

<sup>38</sup> See MARQUARDT ET AL, *supra* note 1, at 27.

<sup>39</sup> E.g. Koehler, *supra* note 22, at 337–38; Marquardt & Sears, *supra* note 22, at 137–38.

<sup>40</sup> See, e.g., Marquardt & Sears, *supra* note 22, at 130–31; MARQUARDT ET AL, *supra* note 1.

<sup>41</sup> See Pi, *supra* note 9, at 393.

<sup>42</sup> See *id.* at 391.

know the identity of their biological father.<sup>43</sup> For example, Katrina Clark, who was donor-conceived, relates: “[T]he emptiness came over me. I realized that I am, in a sense, a freak. I really, truly would never have a dad. I finally understood what it meant to be donor-conceived, and I hated it.”<sup>44</sup> This feeling led her on a search to find her father and she eventually succeeded.<sup>45</sup> Now, Katrina notes “if I can’t be too attached to him as my father, I’ll still always be attached to the feeling I now have of *having* a father. I feel more whole now than I ever have. I love our conversations, even the most trivial ones.”<sup>46</sup> Without donor anonymity, more donor children could follow Katrina’s path and seek meaningful connections with their biological fathers.

Scholars arguing against anonymity cite the UN Convention on the Rights of the Child, ratified in 1989 (though not by the United States),<sup>47</sup> which states the child “shall have the right from birth to . . .

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<sup>43</sup> E.g., Crary, *supra* note 36; Craig Malisaw, *Donor Babies Search for Their Anonymous Fathers*, HOUSTON PRESS, Nov. 5, 2008, available at <http://www.houstonpress.com/2008-11-06/news/donor-babies-search-for-their-anonymous-fathers>; Katrina Clark, *My Father was an Anonymous Sperm Donor*, WASH. POST, Dec. 17, 2006, at B1

<sup>44</sup> Clark, *supra* note 43.

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

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

<sup>47</sup> Jide Nzelibe, *Strategic Globalization: International Law As an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. 635, 671 (2011) (“In the modern era, the issues surrounding the Bricker Amendment continue to play out in debates re-

know and be cared for by his or her parents.”<sup>48</sup> Donor children, they claim, have a right to know the identity of their biological fathers.<sup>49</sup>

Some of these theorists reject the notion that banning anonymity will decrease the number of donors.<sup>50</sup> They point to studies in the United Kingdom that show donation numbers have actually increased since banning anonymity in 2005.<sup>51</sup> Instead, opponents suggest the ban on anonymity is a chance for the sperm donation industry to revamp its publicity image and attract new types of donors.<sup>52</sup>

These arguments against donor anonymity mirror the arguments for disclosure in the adoption context.<sup>53</sup> Naomi Cahn catalogs them as follows: first, adult children have a fundamental right to know about themselves; second, there is no legitimate interest in withholding birth information from adults; third, withholding birth information violates equal protection because the children do not

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garding ratification of the U.N. Convention on the Rights of the Child (CRC), the U.N. Convention on the Rights of Persons with Disabilities (CRPD), and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>145</sup> For instance, the 2008 Democratic platform endorsed the ratification of CEDAW as well as the Convention on the Rights of Persons with Disabilities.<sup>146</sup> By contrast, the 2008 Republican platform vowed to reject the ratification of both CEDAW and CRC . . . .”)

<sup>48</sup> U.N. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

<sup>49</sup> See Yee, *supra* note 4.

<sup>50</sup> See *UK Sperm Donor Numbers Increase*, BBC NEWS (May 3, 2007, 11:12 AM), <http://news.bbc.co.uk/2/hi/health/6618977.stm>.

<sup>51</sup> *Id.*

<sup>52</sup> See Cahn, *Mandatory Gamete*, *supra* note 3, at 216.

<sup>53</sup> See *id.*

have the same rights as other persons; fourth, allowing courts to decide when to release information could lead to inequitable decision making; and fifth, children should not be bound by the decisions of their parents.<sup>54</sup>

#### B. The United States: A Lack of Regulation and Judicial Deference

Through the American Society for Reproductive Medicine (“ASRM”) guidelines, the legislature, and the courts, sperm donation in America is largely unregulated, undocumented, and anonymous.<sup>55</sup>

As the guidelines are advisory, and legislatures and courts have not imposed further regulation, individual sperm banks impose the majority of rules on donation.<sup>56</sup> With over one hundred sperm banks in the United States, this system has led to inconsistent and ineffective regulation of sperm donation.<sup>57</sup>

In the United States regulation of sperm donation at a national level is relatively non-existent.<sup>58</sup> The ASRM sets only advisory guidelines.<sup>59</sup> Concerning anonymity, the ASRM supports the abilities of sperm donors and families to choose whether to remain ano-

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<sup>54</sup> *Id.* at 213–14.

<sup>55</sup> *Id.* at 206–07.

<sup>56</sup> *See id.* at 207.

<sup>57</sup> *See Cahn, Mandatory Gamete, supra note 3, at 206; see What is Assisted Reproductive Technology, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/art>.*

<sup>58</sup> *See id.* at 206–07.

<sup>59</sup> *See id.* at 207.

nymous.<sup>60</sup> The ASRM also recommends that no more than twenty-five children be conceived using the same donor in an area of 800,000 people.<sup>61</sup> Sperm banks may choose whether to impose those regulations because they are merely advisory.<sup>62</sup> Sperm banks differ widely in donor regulation: some attempt to acquire and maintain accurate donor health information;<sup>63</sup> some encourage donors to make non-anonymous donations;<sup>64</sup> and, some avoid regulating any aspect of sperm donation.<sup>65</sup> By not implementing specific legislation banning anonymous donation, legislatures generally have permitted anonymous donation.<sup>66</sup>

Likewise, American courts have refused to second guess legislatures who sever the ties between sperm donors and donor children through anonymity because there are legitimate interests in encouraging sperm donation and in protecting the donor and the donor children's family from future unwanted legal entanglements.<sup>67</sup>

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<sup>60</sup> Rochman, *supra* note 6.

<sup>61</sup> 2006 *Guidelines for Gamete and Embryo Donation*, 86 AM. SOC'Y REPROD. MED. (2006).

<sup>62</sup> Cahn, *Mandatory Gamete*, *supra* note 3, at 207.

<sup>63</sup> *Donor Health Updates*, NW CRYOBANK, <https://www.nwcryobank.com/donor-health-updates/> (last visited Jan. 29, 2012).

<sup>64</sup> EUROPEAN SPERM BANK USA, <http://www.europeanspermbankusa.com/> (last visited Dec. 11, 2011).

<sup>65</sup> See Mroz, *supra* note 11.

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

<sup>67</sup> See generally Pi, *supra* note 9.

American courts have done little to address regulating artificial insemination, and generally support donor anonymity.<sup>68</sup> While no courts have directly faced the anonymity issue, one court has come closest to directly upholding donor anonymity.<sup>69</sup> *In re K.M.H.*, decided by the Supreme Court of Kansas, involved a sperm donor seeking joint custody and visitation of the donor children.<sup>70</sup> The court upheld a Kansas statute permitting anonymity and severing the paternal link between the sperm donor and donor children.<sup>71</sup> While the court acknowledged there are “understandable desires of at least some children conceived through artificial insemination to know the males from whom they received half of their genes,”<sup>72</sup> the court noted the legislation was designed to realize “the expectation of unknown or anonymous sperm donors, whether their motive for participation in artificial insemination is altruistic or financial.”<sup>73</sup> In direct response to the Equal Protection challenge, the court held the statute served two “legitimate legislative purposes and important governmental objectives:” encouraging men “who are able and willing to

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<sup>68</sup> See generally *id.*

<sup>69</sup> See generally *In re K.M.H. v. K.C.H.*, 169 P.3d 1025 (Kan. 2007).

<sup>70</sup> *Id.* at 1029.

<sup>71</sup> *Id.* at 1040–41.

<sup>72</sup> *Id.* at 1041.

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

donate sperm . . . by protecting the men from later unwanted claims for support from the mothers or the children,” and protecting “women recipients as well, preventing potential claims of donors to parental rights and responsibilities.”<sup>74</sup> The court found the legislation to be constitutional, therefore allowing privacy interests of sperm donors to trump the interests of donor children.<sup>75</sup>

Other courts have discussed the issue when sperm donors seek parental rights.<sup>76</sup> For instance, in *McIntyre v. Crouch*, the Oregon Court of Appeals considered the constitutionality of a statute providing that “a child born as a result of artificial insemination shall have no right, obligation, or interest with respect to the donor.”<sup>77</sup> A sperm donor seeking visitation attacked the statute as a violation of due process and equal protection.<sup>78</sup> In response to the equal protection challenge, the court found the statute was rationally related to a legitimate interest because it strove to “encourage men to donate semen by protecting them against any claims by the mother or the child.”<sup>79</sup> In another case, *Jhordan C. v. Mary K.*, an American court

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<sup>74</sup> *In re K.M.H.*, 169 P.3d 1025, 1039 (Kan. 2007).

<sup>75</sup> *Id.* at 1038.

<sup>76</sup> *See, e.g., McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989).

<sup>77</sup> *Id.* at 242–43.

<sup>78</sup> *Id.* at 242.

<sup>79</sup> *Id.* at 243.



noted the importance of separating sperm donors from children to both the recipients and the donors.<sup>80</sup> The court held that anonymous sperm donation and lack of interference provided “a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity, and has likewise provided men with a statutory vehicle for donating semen . . . without fear of liability for child support.”<sup>81</sup>

In contrast to the general trend, one American court has suggested that a change to anonymous donation may be on the horizon.<sup>82</sup> In *Johnson v. Superior Court*, a California appellate court recognized a limited privacy interest for sperm donors.<sup>83</sup> With a showing of good cause, the court suggested it would disclose a donor’s identity;<sup>84</sup> good cause could be demonstrated in the case of medical necessity.<sup>85</sup> The application of this case is limited, however, as the court makes these statements in dicta.<sup>86</sup> The court also stops short of ad-

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<sup>80</sup> *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (Cal. Ct. App. 1986).

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

<sup>82</sup> See generally *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. App. 2nd Dist. 2000).

<sup>83</sup> *Id.* at 876.

<sup>84</sup> *Id.* at 874.

<sup>85</sup> *Id.* at 875.

<sup>86</sup> *Id.* at 1066.

dressing the debate regarding identifying information and the psychological needs (as opposed to medical needs) of donor children.<sup>87</sup>

### III. CHANGES IN THE LAW: A MOVEMENT TOWARDS BANNING ANONYMITY AND REGULATION

While the lack of national regulation in America has fostered an active debate regarding the positives and negatives of anonymity and the regulation of sperm donation, courts and legislatures around the world have deliberately taken steps to ban anonymity and regulate gamete donation.<sup>88</sup> To some degree, this movement has infiltrated the United States, as the State of Washington's legislature recently enacted new legislation that takes a step towards banning anonymous sperm donation.<sup>89</sup> These changes signify a movement away from anonymity and towards the regulation of sperm donation that traverses geographical and cultural lines.

#### A. Changes Internationally

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<sup>87</sup> *Id.* at 1069.

<sup>88</sup> See Lucy Frith, *Gamete Donation and Anonymity, The Ethical and Legal Debate*, 16 HUMAN REPROD. 818, 821 (2001).

<sup>89</sup> WASH. REV. CODE § 26.26.750 (2011). See Rochman, *supra* note 6.

Internationally, countries have been moving away from anonymous donation over the past decade.<sup>90</sup> A Canadian court recently banned donor anonymity, reasoning that the interest of the donor child was more important than a donor's right to remain anonymous.<sup>91</sup> In Europe, a directive by the European Union has sparked a variety of new regulations regarding artificial insemination.<sup>92</sup> These changes, along with anti-anonymity regulations already in place in Australia and New Zealand, demonstrate a growing global movement against anonymous gamete donation.<sup>93</sup>

In a groundbreaking case, the Supreme Court of British Columbia, Canada, recently delivered an opinion banning anonymous

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<sup>90</sup> See, e.g., Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INTL. J.L. POL'Y & FAM. 174, 177 (2009).

<sup>91</sup> Pratten v. British Columbia, 2011 BCSC 656, para.111(h) (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/06/2011BCSC0656cor1.htm>.

<sup>92</sup> Council Directive 2004/23/EC, 2004 O.J. (L 102), available at <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2004:102:0048:0058:en:PDF>; see, e.g., *Tánaiste signs Regulations to transpose Directive 2004/23/EC on Quality and Safety of Tissues and Cells*, AN RÓNN SLÁINTE, <http://www.dohc.ie/press/releases/2006/20060418.html> (describing Ireland's adoption of the European Parliament's Directive 2004/23/EC governing standards for the quality and safety of tissue cells).

<sup>93</sup> *Assistive Reproductive Treatment Act 2008* (Vic) div 3 pt 19(a) (Austl.) (codifying Victoria's ban on anonymous donation); *Assisted Reproductive Technology Act 2007* (NSW) div 4 pt 30 (1-2) (Austl.) (codifying the New South Wales ban on anonymous donation); *Human Reproductive Technology Act 1991* (WA) div 5 pt 44(1)(a-b) (Austl.) (codifying Western Australia's ban on anonymous donation); *Human Assisted Reproductive Technology Act 2004* cl. 47, 50 (N.Z.) (codifying New Zealand's ban on anonymous donation); see also Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INTL. J.L. POL'Y & FAM. 174, 176 (2009). But see Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on Donor Conception Practices in Australia* (2011) 2.2 (highlighting that while three Australian states have codified the ban on anonymous donation, the states of Queensland, Tasmania, the Northern Territory, and the Australian Capital Territory lack any legislation governing donor conception).

donation.<sup>94</sup> In support of the decision that anonymous sperm donation was harmful to the child, and it is not in the best interest of donor offspring, Madam Justice Adair highlighted both physical and mental health problems as a result of anonymity.<sup>95</sup> First, the court concluded that anonymous donation compromises the child's health by denying a useful medical history, creating the potential for in-breeding with half-siblings and by potentially delaying medical treatment.<sup>96</sup> The court found these reasons justified, mandating the release of non-identifying information.<sup>97</sup> Second, the court recognized that donor children have a psychological need for identifying information to complete their personal identity and eliminate the "stress, anxiety, . . . frustration," sadness, and depression experienced by many donor children.<sup>98</sup> Third, the court noted that while parents have an "important and legitimate interest in deciding what their children know and when [they] know it," secrecy and anonymity can have "devastating effects . . . when the truth is finally revealed."<sup>99</sup> For these three rea-

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<sup>94</sup> Pratten v. British Columbia, 2011 BCSC 656, para. 335(c) (Can.), *available at* <http://www.courts.gov.bc.ca/jdb-txt/SC/11/06/2011BCSC065corl.htm>.

<sup>95</sup> *Id.* at para. 111 (c-d).

<sup>96</sup> *Id.* at para. 111 (b), (f).

<sup>97</sup> *Id.* at para. 215.

<sup>98</sup> *Id.* at para 111 (d-e).

<sup>99</sup> *Id.* at para 111 (g-h).

sons, the court rejected regulations enabling anonymous sperm donation.<sup>100</sup>

Other countries disagree whether to permit anonymous sperm donation.<sup>101</sup> Like the United States, some countries permit anonymous donation.<sup>102</sup> For instance, sperm donors in Iceland can choose to remain anonymous.<sup>103</sup> Other countries, such as Sweden, Austria, Switzerland, parts of Australia, New Zealand, Holland, and the United Kingdom recently have banned anonymous donation.<sup>104</sup>

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<sup>100</sup>Pratten v. British Columbia, 2011 BCSC 656, para. 215 (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/06?2011BCSC065cor1.htm>.

<sup>101</sup>Compare Andrew Vorzimer, *Ireland to Ban Anonymous Donation?*, THE SPIN DOCTOR BLOG (Jan. 30, 2012), <http://www.eggdonor.com/blog/2012/01/30/ireland-ban-anonymous-donation/> (highlighting Ireland's current absence of legislation banning donor anonymity and legislation that is currently being considered to implement such a ban), with Human Assisted Reproductive Technology Act 2004, cl 47, 50 (N.Z.) (codifying New Zealand's ban on anonymous donation).

<sup>102</sup>Rita Rubin, *Personality of a Sperm Donor—Study Offers First Clues*, MSNBC.COM (Oct. 24, 2011, 9:34:19), <http://www.msnbc.msn.com/id/44979426/ns/health-mens-health/t/personality-sperm-donor-study-offers-first-clues/> (explaining that United States still has no national ban on sperm donor anonymity); see, e.g., Vorzimer, *supra* note 101 (explaining that, for now, Ireland still allows anonymous donation).

<sup>103</sup>Act on Artificial Fertilisation and Use of Human Gametes and Embryos for Stem-Cell Research (Act No. 55/1996), Art. 4 (Ice.), available at <http://eng.velferdarraduneyti.is/acts-of-Parliament/nr/20092>.

<sup>104</sup>FÖRTPFLAMZUNGSMEDIZINGESETZ, [Reproductive Medicine Act], BUNDESGESETZBLATT I [BGB, I] No.275/1992 (Austria) (codifying Austria's ban on anonymous donation); 6 ch. 7 §Genetic Integrity Act (SCS 2006:351) (Swed.) (codifying Sweden's ban on donor anonymity); *Assistive Reproductive Treatment Act 2008* (Vic) div 3 pt 19(a) (Austl.) (codifying Victoria's ban on anonymous donation); *Assisted Reproductive Technology Act 2007* (NSW) div 4 pt 30 (1-2) (Austl.) (codifying the New South Wales ban on anonymous donation); *Human Reproductive Technology Act 1991* (WA) div 5 pt 44(1)(a-b) (Austl.) (codifying Western Australia's ban on anonymous donation); *Wet donorgegevens kunstmatige bevruchting* (Law on data from donors for artificial reproduction), Stb. 2002, p. 240 (Neth.) (codifying the Netherlands' ban on anonymous donation); Human Assisted Reproductive Technology Act 2004 cl. 47, 50 (N.Z.) (codifying New Zealand's ban on anonymous donation); AS 3068 (2000) (Switz.) (codifying Switzerland's ban on anonymous donation); Human Fertilisation and Embryology Act 1990, 1990 c. 37 (U.K.) (codifying the United Kingdom's ban on anonymous donation).

Some countries have attempted to attack gamete donation issues by increasing regulation.<sup>105</sup> Spurred by the 2004 European Parliament directive concerning human tissue regulation, many European countries have begun implementing regulations on sperm donation.<sup>106</sup> The United Kingdom set a limit of ten families that could use a given donor.<sup>107</sup> Denmark limited donors from creating more than one pregnancy per two hundred thousand citizens in the patient's country.<sup>108</sup> Sweden capped donations from a single donor to six couples.<sup>109</sup> Additionally, Sweden's Genetic Integrity Act of 2006 prohibits single women from receiving sperm.<sup>110</sup> In Austria, no more than three couples may use the gametes of a given donor.<sup>111</sup> The movement to regulate sperm donation extends beyond Europe as well. For example, in Hong Kong, only three children may be born

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<sup>105</sup> Robert Cook-Deegan, *What Policies Govern Egg Donation?*, STANFORD IN WASHINGTON SEMINAR AND TUTORIAL, <http://www.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/eggpol.htm> (last visited Feb. 1, 2012).

<sup>106</sup> See generally, Council Directive 2004/23/EC, 2004 O.J. (L102), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:102:0048:0058:en:PDF>.

<sup>107</sup> HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/> (last visited Feb. 19, 2012).

<sup>108</sup> CRYOS DENMARK, <http://dk.cryosinternational.com/home.aspx#7689> (last visited Feb. 19, 2012).

<sup>109</sup> See, e.g., SAHLGRENSKA UNIVERSITETSSJUKHUSET, *Gynekologi Och Reproduktionsmedicin*, [http://www.sahlgrenska.se/upload/SU/omrade\\_oss/reproduktionsmedicin/Spermadonatorinformation.pdf](http://www.sahlgrenska.se/upload/SU/omrade_oss/reproduktionsmedicin/Spermadonatorinformation.pdf) (last visited Feb. 15, 2012).

<sup>110</sup> LAG OM GENETISK INTEGRITET [Act on Genetic Integrity] 6 ch.1 § (Svensk författningssamling [SFS] 2006:351) (Swed.), available at <http://www.notisum.se/rnp/sls/lag/20060351.htm> (last visited Feb. 11, 2012).

<sup>111</sup> Cahn, *supra* note 111, at 84.

from a given donor's sperm.<sup>112</sup> As seen by the new regulations in North America, Europe, and Asia,<sup>113</sup> the movement away from donor anonymity and towards regulation of gamete donation spans across geographical and cultural boundaries.

#### B. A New Act in the State of Washington

Consistent with the trend internationally, the state of Washington's legislature recently inched towards banning anonymous donation in new legislation.<sup>114</sup> Previously, Washington sperm banks had been accepting anonymous donations, but the sperm donor could elect to reveal his information to future children.<sup>115</sup> The new law flips this burden.<sup>116</sup> When the donor makes his donation, his full name and medical information will be disclosed to his children at age eighteen unless the donor opts out and elects not to disclose that information.<sup>117</sup> This legislation suggests America may be more willing to fall in line with the international retreat from anonymous donation.

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<sup>112</sup> Human Reproductive Technology (Licensing) Regulation, (2007) Cap. 561A, 6, §15(2)(a)(ii) (H.K.); *see also* Cahn, *supra* note 111, at 84.

<sup>113</sup> Cahn, *supra* note 111, at 83–84.

<sup>114</sup> Rochman, *supra* note 6.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

Upon closer inspection, the legislation does not make much of a practical impact. There are two sperm banks in Washington.<sup>118</sup> At one sperm bank, three-fourths of donors request to remain anonymous, and the new legislation will allow those donors to continue to choose anonymity.<sup>119</sup> The other sperm bank accepts only “open-Id” donors.<sup>120</sup> Open-Id donors are donors who agree to make themselves available for contact from children once those children reach the age of 18.<sup>121</sup> Over recent years, less than one percent of those donors have inquired about remaining anonymous.<sup>122</sup> Therefore, the act seems more of a legislative statement rather than a practical transformation of Washington’s artificial insemination practices. Nonetheless, this new legislation coupled with the current global trend towards donor regulation suggests America may be on the edge of banning donor anonymity.

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Rochman, *supra* note 6.

<sup>121</sup> *Open or ID Release Donors*, SPERM CENTER, Sept. 9, 2009, <http://www.spermcenter.com/content/open-or-id-release-donors>.

<sup>122</sup> Rochman, *supra* note 6.



## IV. TESTING THEORY WITH DATA: “MY DADDY’S NAME IS DONOR” STUDY

With such a large international movement towards regulation of sperm donation and banning anonymity, it is now crucial to examine the implications of such a ban. A new study analyzing the psychological impact of being donor-conceived has shed new light on the arguments for and against donor anonymity, and whether those theoretical arguments have a factual basis in data.<sup>123</sup> This study, “My Daddy’s Name is Donor”, is the first study to investigate in-depth the psychological effect of being donor children.<sup>124</sup> The study surveys a pool of approximately 500 donor children raised by single mothers, lesbian couples, and heterosexual couples, and compares those responses with the responses of adopted children and children raised by two biological parents.<sup>125</sup> The study suggests that increased psychological problems in donor children are correlated with, but not necessarily caused by, four factors: the practice of artificial insemination itself, anonymous donation, family structure, and full disclosure of method of conception.<sup>126</sup>

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<sup>123</sup> MARQUARDT ET AL, *supra* note 1, at 5.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 115–19.

<sup>126</sup> *See id.* at 7–8, 11–12.

First, the study reveals artificial insemination itself may be detrimental to donor children.<sup>127</sup> Generally, “My Daddy’s Name is Donor” shows that donor children statistically lead more troubled lives than adopted children or biologically raised children.<sup>128</sup> The study finds that a higher number of donor children (compared with adopted or biological children) fear being related to a potential sexual partner, feel sad when they see friends with their biological parents, and are more suspicious their parents are hiding something from them.<sup>129</sup> The study also found donor children are more likely to have problems with the law, are more likely to have mental health problems, including depression, and are more likely to experience substance abuse.<sup>130</sup> Forty-five percent of donor children are troubled by the donor process itself and are disturbed that money was involved with their conception.<sup>131</sup> The study paints an image of donor children as more hurt, more confused, and more isolated than similar young adults in their generation who were raised as adoptees or by biological parents.<sup>132</sup>

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<sup>127</sup> *Id.* at 81.

<sup>128</sup> *Id.* at 37–38.

<sup>129</sup> *Id.* at 7–8.

<sup>130</sup> *Id.* at 9.

<sup>131</sup> *Id.* at 7.

<sup>132</sup> *Id.* at 7–12.

Second, the study suggests that donor children disfavor anonymous donation.<sup>133</sup> For instance, the study finds over two-thirds of donor children wonder what their donor's family is like.<sup>134</sup> Approximately two-thirds of the donor children support the right to know information about the biological father, including medical history and identity, and information about the existence and identity of half-siblings.<sup>135</sup> Two-thirds personally want the opportunity to get to know both their donor and their half-siblings.<sup>136</sup> Without donor anonymity, donor children would be able to fulfill some of these desires.<sup>137</sup>

On the other hand, the study also suggests that banning anonymity could cause greater harm in donor children in some circumstances.<sup>138</sup> The study shows that a majority of donor children wonder if their donor's families would even want to know them.<sup>139</sup> More than half of the donor children surveyed agree, "I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or the father who raised me would feel

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<sup>133</sup> See, e.g., *id.* at 27 (describing Joanna Rose, a donor offspring who fought to end anonymous donation in Britain).

<sup>134</sup> *Id.* at 28.

<sup>135</sup> *Id.* at 11–12.

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

<sup>137</sup> See generally, e.g., *id.*

<sup>138</sup> See *id.* at 57.

<sup>139</sup> *Id.* at 28.

angry or hurt.”<sup>140</sup> Seventy percent agree, “I find myself wondering what my sperm donor’s family is like,” and sixty-nine percent agree, “I sometimes wonder if my sperm donor’s parents would want to know me.”<sup>141</sup>

Third, the study reveals donor children whose parents attempt to conceal the circumstances of their conception may experience increased psychological problems.<sup>142</sup> When parents lie or attempt to conceal that the child was donor-conceived, donor children face higher rates of depression, mental health problems, substance abuse, and problems with the law.<sup>143</sup>

Finally, “My Daddy’s Name is Donor” demonstrates that family structure may influence the psychological health of the donor children.<sup>144</sup> If the donor child was raised by a single mother, some categories are significantly worse for that child, including: children who wonder what their donor’s family is like, children who have been in trouble with the law by age twenty-five, children who expe-

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<sup>140</sup> *Id.* at 21–22.

<sup>141</sup> *Id.* at 28.

<sup>142</sup> *Id.* at 12–13.

<sup>143</sup> *Id.* at 12.

<sup>144</sup> *Id.* at 10.

rience mental health problems, and children who have a history of substance abuse.<sup>145</sup>

When all four variables are considered together, only two significant areas remain which are solely attributable to anonymous donation: the children's desire to know the identities of their genetic half-siblings, and the desire to know the identity of their biological father.<sup>146</sup> Depression, mental health, and substance abuse in children are all at least partially correlated to the upbringing of the donor children, and not necessarily attributable to anonymity.<sup>147</sup> While "My Daddy's Name is Donor" certainly highlights the psychological problems that accompany donor children, it is less clear that these problems are tied, or could be cured by, eliminating donor anonymity.<sup>148</sup>

Ultimately, the study is inconclusive as to whether donor anonymity is a predominant factor in the increased psychological problems of donor children.<sup>149</sup> The study suggests anonymity may be a contributing factor in the problems of donor children; however, the

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<sup>145</sup> *Id.* at 10–11.

<sup>146</sup> *Id.* at 11–12.

<sup>147</sup> *See id.* at 12–13.

<sup>148</sup> *Id.* at 59.

<sup>149</sup> *Id.* at 56–57 (explaining the complications of assessing whether psychological issues come from donor anonymity or simply from being a donor child).

study also shows it is not the only factor.<sup>150</sup> The study suggests it is also important for the donor child's family to be truthful about the conception, and for the child to be raised in a two-parent environment (either with a heterosexual or homosexual household) rather than by a single mother.<sup>151</sup> It is unclear whether the effect of eliminating donor anonymity would be sufficiently positive for children to outweigh the costs imposed by invading the privacy of donors.<sup>152</sup>

#### V. PROPOSAL OF A NEW UNITED STATES DONOR REGISTRY

"My Daddy's Name is Donor," sheds new light on when children's right to information is so important that it should outweigh the donor's right to privacy.<sup>153</sup> In deciding whether and how to regulate sperm donation, the key issue is whether the children's right to information trumps the donor's right to privacy.<sup>154</sup> Courts and legislatures should impose regulations when sperm donation practices are proven to cause direct psychological harm to donor children. "My Daddy's Name is Donor" describes how artificial insemination itself

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<sup>150</sup> *Id.* at 56–59.

<sup>151</sup> *Id.* at 10–11.

<sup>152</sup> *See id.* at 64–67 (highlighting the types of confusion donor offspring feel about donor conception).

<sup>153</sup> *See generally, id.*

<sup>154</sup> *Compare id.* at 61–62 (describing the child's right to know information about their donor parent, *with id.* at 62–64 (describing the donor's right to keep their information private).

may be psychologically harmful to donor children, and the possible individual causes of that harm.<sup>155</sup> Based on the study, which suggests donor children encounter greater struggles than adopted or biologically raised children, the United States clearly needs some form of donor registry to help curb those detrimental effects.<sup>156</sup> The registry should be designed to provide medical information to all donor children, discourage any fears of an accidental incestuous relationship, and minimize the psychological harm experienced by donor-conceived children.

The selection of the appropriate registry turns on what type of information is necessary to the health of donor children, and whether the registry should be national or more localized. Donors should only be required to disclose the type of information that has been shown to cause psychological damage in donor offspring. Additionally, the registry should be large enough in scope to be effective, while not overly burdensome or unrealistic.

Applying the data in “My Daddy’s Name is Donor” to the registry systems proposed by other scholars and implemented in other coun-

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<sup>155</sup> *Id.* at 37–38.

<sup>156</sup> *Id.*

tries,<sup>157</sup> I conclude the United States should institute a national registry of sperm donors and sperm donor children. Donors should have the choice whether to volunteer their identifying information. While donors would not be required to provide identifying information, they should be forced to provide updated medical information to the registry. Parents of donor children should have immediate access to this information, and the donor children should be able to access the registry at age sixteen. Finally, through the registry, the United States should limit the number of families who can use a given donor's sperm; however, the United States should not regulate who can receive sperm or when parents should tell the children about their method of conception. I examine each issue below.

#### A. Volunteering Identifying Information Disclosure

The most important issue in establishing the registry is whether the donor should be required, or have the option, to provide identifying information. Requiring the donor to disclose identifying information would effectively ban anonymous donation in the United States. Identifying information could include some combination of the donor's name, current address, contact information, family infor-

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<sup>157</sup> *Id.* at 29–30.



mation (such as marital status and number of children), education level, employment, and any personal message to be given to the donor's children.<sup>158</sup> With this identifying information, the children could find their donors and attempt to establish a relationship. As "My Daddy's Name is Donor" does not prove a clear causal link between donor anonymity and psychological health problems in children, donors should have the choice whether to keep their identities anonymous.<sup>159</sup>

Without the registry, the current system in the United States permits sperm banks individually to determine the permissibility of anonymous donation.<sup>160</sup> While the Uniform Parentage Act of 1973 provided "all papers and records pertaining to the insemination . . . are subject to inspection only upon an order of the court for good cause shown,"<sup>161</sup> this language is not found in the 2002 Uniform Parentage Act.<sup>162</sup> No state in the United States forbids anonymous do-

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<sup>158</sup> See, e.g., *Xytex Sperm Donor Bank Patient Information*, XYTEX CRYO INTERNATIONAL SPERM BANK, <http://www.xytex.com/sperm-donor-bank-patient/index.cfm#donoroptions> (detailing one sperm bank's "Information Options" for different amounts of information that donors can give; this example provides a sample of what kinds of information those obtaining sperm are interested in having).

<sup>159</sup> MARQUARDT ET AL *supra* note 1, at 56.

<sup>160</sup> *How to Carefully Choose a U.S. Sperm Bank*, CHOICEMOMS.ORG, [http://www.choicemoms.org/choosing\\_a\\_sperm\\_bank/42](http://www.choicemoms.org/choosing_a_sperm_bank/42) (explaining that each United States sperm bank makes its own decisions about requiring or allowing anonymity).

<sup>161</sup> UNIF. PARENTAGE ACT §5(a) (1973).

<sup>162</sup> See generally UNIF. PARENTAGE ACT (2002).

nation.<sup>163</sup> Without any guidance, the sperm banks make the choice whether to permit anonymous donation.<sup>164</sup>

Legal scholars have debated the merits of banning anonymous donation, and have reached different conclusions.<sup>165</sup> Naomi Cahn, an advocate for banning donor anonymity, argues the release of a donor's identifying information should be mandatory.<sup>166</sup> Cahn also suggests donors could include a "no contact" message for their children.<sup>167</sup> Cahn argues banning anonymity would benefit children by minimizing the possibility of accidental donor-children incest, limiting the number of children produced by one donor, and satisfying the strong interest of donor children to have access to identifying information, thereby helping the children to discover a psychological and emotional sense of identity.<sup>168</sup>

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<sup>163</sup> MARQUARDT ET AL, *supra* note 1, at 52.

<sup>164</sup> *How to Carefully Choose a U.S. Sperm Bank*, CHOICEMOMS.ORG, [http://www.choicemoms.org/choosing\\_a\\_sperm\\_bank/42](http://www.choicemoms.org/choosing_a_sperm_bank/42) (explaining that each United States sperm bank makes its own decisions about requiring or allowing anonymity).

<sup>165</sup> *Compare*, Cahn, *supra* note 3 (advocating the ban of donor anonymity), with Mary Patricia Byrn & Rebecca Ireland, Abstract, *Anonymously Provided Sperm and the Constitution*, COLUM. J. OF GENDER & L. (forthcoming), available at [http://papers.ssrn.com/sol3/papers/cfm?abstract\\_id=1957713](http://papers.ssrn.com/sol3/papers/cfm?abstract_id=1957713) (raising constitutional issues with a ban on donor anonymity).

<sup>166</sup> Cahn, *supra* note 3, at 18.

<sup>167</sup> *Id.* at 23.

<sup>168</sup> *Id.* at 21–22.

On the other hand, Mary Byrn and Rebecca Ireland reject banning donor anonymity.<sup>169</sup> They argue a ban on donor anonymity would be unconstitutional because it would assume “that the fundamental rights to procreate and to raise one’s child are less robust for persons who conceive [through assisted reproductive technology] than they are for persons who conceive through sexual reproduction.”<sup>170</sup> At the far end of the spectrum, Glenn Cohen rejects a ban on donor anonymity and a registry system entirely.<sup>171</sup>

While “My Daddy’s Name is Donor” demonstrates a correlation between anonymous donation and psychological problems, it does not prove causation because there are other variables that could also be responsible for those problems.<sup>172</sup> At this time, anonymity has not been shown to cause psychological problems in donor children.<sup>173</sup>

“My Daddy’s Name is Donor” shows a clear correlation between donor anonymity and psychological problems in donor child-

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<sup>169</sup> Byrn & Ireland, *supra* note 166.

<sup>170</sup> *Id.*

<sup>171</sup> I. Glenn Cohen, *Rethinking Sperm-Donor Anonymity: Of Changed Selves, Non-Identity, and One-Night Stands*, 100 GEO. L.J. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1961605](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961605).

<sup>172</sup> MARQUARDT ET AL, *supra* note 1, at 37 (adjusting for socio-economic status, age, gender, race, subjective family income at age sixteen, and mother’s education).

<sup>173</sup> *But see* MARQUARDT ET AL, *supra* note 1, at 7–11 (stating many donor children do in fact suffer concerns and doubts).

ren.<sup>174</sup> Donor anonymity is correlated with donor children's desire to know information about their father, a feeling of missing some sense of self, heightened depression, substance abuse, and problems with the law by age twenty-five.<sup>175</sup>

Correlation does not always indicate causation,<sup>176</sup> but statisticians may make the leap in the absence of other explanations for a result.<sup>177</sup> "My Daddy's Name is Donor" reveals other potential explanations for heightened psychological distress in donor children: artificial insemination, family structure, and concealment of their method of conception.<sup>178</sup> Claims of psychological harm in donor children seem far more complex than previously suggested.<sup>179</sup> To some degree, all donor children experience psychological problems, not only children with anonymous donors.<sup>180</sup> Higher rates of psychological problems, drug abuse, problems with the law, and depression are also consistent among donor children who were raised by a single mother or who were shielded from the truth about their method of concep-

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<sup>174</sup> See *id.* at 27–28.

<sup>175</sup> See generally *id.* at 7–11.

<sup>176</sup> *What is the Difference Between Causation and Correlation?*, STATS: Statistical Assessment Service, [http://stats.org/in\\_depth/faq/causation\\_correlation.htm](http://stats.org/in_depth/faq/causation_correlation.htm).

<sup>177</sup> *Id.*

<sup>178</sup> See MARQUARDT ET AL, *supra* note 1, at 56–59.

<sup>179</sup> *Id.* at 6–8.

<sup>180</sup> *Id.* at 12.

tion.<sup>181</sup> These other explanations limit “My Daddy’s Name is Donor” from proving a causal link between donor anonymity and psychological problems in donor children.<sup>182</sup>

Now we must weigh this speculative harm against the problems intertwined with eliminating anonymity. If anonymity is the cause of depression, substance abuse, and unlawful behavior in donor children, the donor’s right to privacy would be lesser than the donor children’s interest in identifying information.<sup>183</sup> If, however, anonymity only causes the donor children to want to know their biological father, the donor’s right to privacy should overcome the children’s desire for information.<sup>184</sup> “My Daddy’s Name is Donor” does not establish a causal connection between donor anonymity and psychological problems in donor children.<sup>185</sup> Therefore, the donor children’s interest in identifying information does not trump the donor’s interest in privacy, and the registry should not require that sperm donors provide identifying information.

By permitting but not requiring donors to provide identifying information, the registry would be optimal for sperm donors. Donors

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<sup>181</sup> *Id.* at 44–45.

<sup>182</sup> See *What is the Difference Between Causation and Correlation?*, *supra* note 178.

<sup>183</sup> See MARQUARDT ET AL, *supra* note 1 at 62–64.

<sup>184</sup> See generally *id.* at 7–11 (explaining the desire of donor children to know their fathers).

<sup>185</sup> See *id.* at 29–30, 57.

who wish to know their children can provide information that would be accessible to the children; donors who wish to avoid future contact can choose to remain anonymous. The voluntary nature of providing information would also allow donors to decide later in life to make information available to their children or retract their identifying information. They would not be bound by their decision at the time of donation. Suppose a college student makes the decision to donate sperm for some extra spending money. At the time, information disclosure seems harmless. However, the donor may feel differently if he eventually has a family of his own. Without a system of voluntary disclosure, the donor would have no way to conceal his identifying information. If children seek out the donor, he may meet them with hostility and rejection, rather than hospitality and open arms. An outright ban on donor anonymity could lead to significant issues for both the donor and the donor children.

Additionally, voluntary disclosure of identifying information would provide benefits to donor children. Donor children would be assured that their donor actually wants to be found if the donor provides identifying information, alleviating the anxiety of potential re-

jection displayed in “My Daddy’s Name is Donor.”<sup>186</sup> While some children would not be able to contact their biological father, the lack of contact may be less psychologically detrimental than tracking down a biological father who wishes to remain anonymous.

Finally, permitting anonymous sperm donation would help ensure a continued, adequate supply of sperm. A ban on anonymous donation may decrease the number of sperm donors. People feared such a decrease in British Columbia<sup>187</sup> and in England<sup>188</sup> after the banning of anonymous donation. Under the present system, a decrease in the number of sperm donors in the United States would not concern sperm banks, as sperm banks generate large profits by using one donor’s sperm to inseminate many different women.<sup>189</sup> For example, *The New York Times* reported one donor fathered 150 children.<sup>190</sup> However, if the numbers of families who can use a given donor are limited, as proposed later in this article, a decreased number of sperm donors could lead to an insufficient supply of sperm to satisfy the demands of potential mothers.

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<sup>186</sup> *Id.* at 27.

<sup>187</sup> Motluk, *supra* note 29.

<sup>188</sup> Julie-Ann Amos, *Sperm Donors: Myth and Reality*, <http://julieannamos.hubpages.com/hub/Sperm-Donor>.

<sup>189</sup> Mroz, *supra* note 11, at 1.

<sup>190</sup> *Id.*

American courts and legislatures should be cautious about banning donor anonymity outright until there is a causal connection between anonymity and psychological problems in donor children. Allowing donors the choice to volunteer identifying information to the registry would benefit sperm donors, donor children, and the sperm donation industry. Without such a causal connection, the donor children's right to identifying information does not trump the donor's right to privacy. "My Daddy's Name is Donor" does not prove a causal connection between donor anonymity and psychological problems in donor children;<sup>191</sup> thus, donors should be permitted, but not required, to volunteer identifying information to the registry.

#### B. Mandatory Disclosure of Updated Medical Information

While donors should be allowed to choose to keep their identifying information confidential, they should be required to make their updated medical history available to children through the registry. Donor children's interest in obtaining medical information should overcome the donor's right to privacy concerns if obtaining medical information relates directly to the children's health. Medical, non-identifying information includes all medical records neces-

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<sup>191</sup> See MARQUARDT ET AL., *supra* note 1, at 57.



sary for a doctor to assess a donor child's health and to treat the child in the case of illness or an emergency.<sup>192</sup> This information would include blood type, personal history of surgeries and illnesses, family history of illnesses, and health updates. Donor children have a heightened interest in obtaining this medical information because such information directly impacts their health; conversely, providing medical information only minimally infringes on the donor's privacy. Therefore, consistent with the views of other legal scholars, donors should be required to provide updated medical information to the registry.<sup>193</sup>

Unlike the active debate regarding the disclosure of identifying information, most legal scholars support mandatory disclosure of medical information to donor children.<sup>194</sup> In addition to the scholars mentioned above that advocate for full disclosure of both identifying and medical information, Kristin Koehler recommends mandatory disclosure for only medical and physical donor information.<sup>195</sup> This more limited mandatory disclosure requirement, she argues, strikes a

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<sup>192</sup> *Non-Identifying Medical Information*, QUEENSLAND GOV'T, available at <http://www.communities.qld.gov.au/childsafetey/adoption/past-adoptions/non-identifying-medical-information#how-to-request-non-identifying-medical-information>.

<sup>193</sup> See, e.g., Pi, *supra* note 9, at 387; see, e.g., Cahn, *supra* note 12, at 217, 220; see, e.g., Koehler, *supra* note 22, at 329–30.

<sup>194</sup> Koehler, *supra* note 22, at 334.

<sup>195</sup> *Id.*

balance between the child's search for a sense of identity and the donor's interest in preserving anonymity.<sup>196</sup> Scholars generally support requiring sperm donors to disclose medical information to children.<sup>197</sup>

With medical, non-identifying information, the interest of the donor children to information clearly outweighs the donor's privacy interest; thus, donors should be required to provide and update medical information to the registry. First, donor children have a heightened interest in obtaining their family medical histories because knowing such information can directly affect their physical health. Medical histories can give doctors the insight they need to accurately diagnose a life-threatening illness.<sup>198</sup> In the case of emergency, where the line between life and death can be a matter of minutes, lacking such information can cause delay and lead to catastrophic consequences.<sup>199</sup> Accordingly, the donor child has a strong interest in obtaining the donor's medical history.

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<sup>196</sup> *Id.*

<sup>197</sup> Cahn, *Mandatory Gamete*, *supra* note 3, at 217, 220.

<sup>198</sup> See, e.g., *Family Medical History*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-science/genetics-molecular-medicine/family-history.page>.

<sup>199</sup> See, e.g., Susan Donaldson James, *Sperm Donor's 24 Kids Never Told About Fatal Illness*, GENETICS & SOC, July 21, 2011, <http://www.geneticsandsociety.org/article.php?id=5795>.

Second, providing medical information only minimally infringes on a donor's privacy. As suggested in *Johnson v. Superior Court*, when dealing with the disclosure of medical information, the donor has a limited right to privacy because the medical information is so important to the child.<sup>200</sup> Even without the limited privacy right, the release of non-identifying medical information does not compromise the donor's privacy.<sup>201</sup> Donor children cannot find or contact the donor with non-identifying medical information alone.<sup>202</sup> A simple system of assigning numbers to donors and donor children could prevent any inadvertent disclosures of the donor's identity when the children seek medical information. Therefore, the donor children's high interest in obtaining medical information overcomes the donor's low interest in privacy. Donors should be required to provide medical information to the registry, and update that information if later diagnosed with a genetically transmitted disease.

The national mandatory medical registry would serve one last crucial function: the release of the identity of donor siblings. "My Daddy's Name is Donor" highlights that donor children are largely

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<sup>200</sup> *Johnson v. Superior Court*, 80 Cal. App. 4th 1050 (2000), modified 101 Cal. App. 4th 869 (2002).

<sup>201</sup> *Pi*, *supra* note 9, at 393, 398.

<sup>202</sup> *Id.*

concerned with unintentionally entering a sexual relationship with a biologically related person.<sup>203</sup> While statistics are unavailable on the actual frequency of such accidental incest, the fear itself seen in donor children is problematic.<sup>204</sup> Through the donor's file, and the donor children attached to that file, donor children will have the option of making their information known to the other donor children conceived from the same donor. While the choice to access this information about half-siblings would be the children's, this choice would allow most children to know at least their donor siblings (though admittedly, this does not solve the problem if the donor has a family and naturally conceives children later in life). The disclosure of the identity of the donor siblings should drastically reduce the chances of unintentional biological relationships, and thereby alleviate some of the concerns and pressures on donor children.

### C. A National Registry

With the decision to have a registry containing medical history information for all donor children and donor identifying information for some donor children, practical issues arise regarding the implementation of the registry. For instance, we must determine the

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<sup>203</sup> Mroz, *supra* note 11.

<sup>204</sup> *Id.*

appropriate scope of the registry. Should the registry be international, national, state, or local? Current registries in the United States vary in scope.<sup>205</sup> International legal strategies and scholarship suggest the benefits of a national registry.<sup>206</sup> The United States should implement a national registry because a national registry would provide the greatest benefit to both donors and their children.

Registries already implemented in other countries, along with proposals from other legal scholars, suggest a preference for a national registry.<sup>207</sup> First, of the countries who have implemented registries, most have done so on a national scale.<sup>208</sup> New Zealand,<sup>209</sup> Sweden,<sup>210</sup> and the United Kingdom<sup>211</sup> have all created national registries, while Australia has a state-by-state donor registry with differ-

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<sup>205</sup> See, e.g., FREE SPERM DONOR REGISTRY, <http://freespermdonorregistry.com/> (last visited Jan. 31, 2012).

<sup>206</sup> See, e.g., Pi, *supra* note 9, at 381; see, e.g., Cahn, *Mandatory Gamete*, *supra* note 3, at 217, 220.

<sup>207</sup> See, e.g., Cahn, *Mandatory Gamete*, *supra* note 3.

<sup>208</sup> EUROPEAN SOCIETY OF HUMAN REPRODUCTION AND EMBRYOLOGY, COMPARATIVE ANALYSIS OF MEDICALLY ASSISTED REPRODUCTION IN THE EU: REGULATION AND TECHNOLOGIES 13–16 available at [http://ec.europa.eu/health/blood\\_tissues\\_organs/docs/study\\_eshre\\_en.pdf](http://ec.europa.eu/health/blood_tissues_organs/docs/study_eshre_en.pdf).

<sup>209</sup> *Human Assisted Reproductive Technology Register*, DEPT. INTERNAL AFFAIRS: TE TARI TAIWHENUA, available at [http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Human-Assisted-Reproductive-Technology-%28HART%29-Register](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Human-Assisted-Reproductive-Technology-%28HART%29-Register).

<sup>210</sup> SWEDEN-PERSONUPPGIFTSLAG [PERSONAL DATA ACT], (Svensk frfattningssamling [SFS] 1998:204) (Swed.), available in unofficial English translation at <http://www.sweden.gov.se/content/1/c6/01/55/42/b451922d.pdf>.

<sup>211</sup> HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/> (last visited Jan.31, 2012).

ent registries in Victoria<sup>212</sup> and Western Australia.<sup>213</sup> Second, legal scholarship supports the implementation of a national registry.<sup>214</sup>

Naomi Cahn recommends a national registry to prevent donors from making donations at multiple sperm banks and to provide children optimal access to information.<sup>215</sup> The trend, supported both internationally and by legal scholars suggests the benefits of a national registry system.<sup>216</sup>

While legal scholars and other countries suggest a national registry as the best option,<sup>217</sup> the practical impossibility of an international registry and the insufficiency of a state or local registry make implementing a national registry the *only* feasible option. Theoretically, an international database would seem to make sense. In an age of available international travel and communication, an international database could enable connections between children in the United States and donors overseas. Without an international database, children whose parents imported the sperm from another country would

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<sup>212</sup> E. Blyth, *Donor Assisted Conception and Donor Offspring Rights to Genetic Origins Information* 6 *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 237.

<sup>213</sup> *Select Committee on the Human Reproductive Technology Act Report*, PARLIAMENT OF WESTERN AUSTRALIA (1999).

<sup>214</sup> *See, e.g., Pi, supra note 9, at 381; see, e.g., Cahn, Mandatory Gamete, supra note 3, at 220.*

<sup>215</sup> Cahn, *Mandatory Gamete, supra note 3, at 217, 220.*

<sup>216</sup> *Id.* at 205–206.

<sup>217</sup> *Id.*

still encounter difficulties in obtaining information. Exporting sperm is a booming business in some European countries.<sup>218</sup> For example, Cryos, a sperm bank in Denmark, ships to over sixty-five nations, has enabled over 18,000 pregnancies in the last twenty years, and maintains at least 500 sperm donors on stock for their customers' selection.<sup>219</sup> The site even provides baby pictures of the donors.<sup>220</sup> However, an international sperm bank is practically impossible. An international sperm bank would require multi-national consensus regarding data storage, anonymity laws, and sperm distribution regulation.<sup>221</sup> Attempting such a consensus would be a political nightmare because regulation of sperm donation varies greatly throughout Europe, Asia, and Australia; countries differ in the number of children per donor, anonymity, and the permitted recipients of sperm donation.<sup>222</sup> While an international registry would be ideal for sperm donor children, implementing an international registry is not realistic.

At the other end of the spectrum, registries at local and state levels would not adequately alleviate the burden on donor children. As the states and local governments are more in touch with the

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<sup>218</sup> *Id.*

<sup>219</sup> CRYOS, <http://dk.cryosinternational.com/home.aspx> (last visited Feb. 1, 2012).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See Cahn, *Mandatory Gamete*, *supra* note 111, at 83.

people of that state than the federal government, a state-by-state registry would permit more targeted regulation and reporting. Unfortunately, a local or state registry would be less effective at helping donor children. Without a national registry, donors who move from the donation state would likely stop reporting their new contact information to the registry, as the more burdensome task would discourage updating information. The children would then have the increased burden of determining which state the donation was made, and engaging in an investigative process to track their donor from state to state.<sup>223</sup> As one goal of the registry is to effectively distribute information to donor children to help alleviate the psychological strains of being donor-conceived, a state or local registry system is inadequate.

A national registry would be the most beneficial for donor children, without imposing too much of a burden on the political process. With the availability of long distance transportation and communication, donors have the ability to freely move from state to state. A national registry would enable children to find their donors across state lines. Similarly, the burden on donors would be diminished as they could provide updated information at a convenient lo-

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<sup>223</sup> Cahn, *Mandatory Gamete*, *supra* note 3, at 218.



cal location that would then be transferred to the national databank. As an international registry is practically impossible and a state or local registry is inadequate, the United States should adopt a national registry for the benefit of the donors and donor children.

Other practical issues in implementing the registry include funding, effective implementation, and monitoring. Those issues will not be discussed in detail in this comment.<sup>224</sup>

D. Regulations accompanying the implementation of the registry

“My Daddy’s Name is Donor” suggests the donor children could benefit from some national regulation.<sup>225</sup> With the implemen-

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<sup>224</sup> In my opinion, another issue is how to operate and fund the national registry. The maintenance of a national registry would be expensive. The registry would need a data center for information storage, staffed branch locations throughout the country to collect updated medical and geographical information from donors, and staff to handle requests for, and distribution of, information to donor children. I believe funding the registry should turn on who benefits from the registry, who has the ability to pay for such a registry, and providing incentive for the registry to be run effectively. There are three possibilities for registry funding: the sperm donor children, the government through taxpayer dollars, or the sperm banks. Sperm donor children should not be required to fund the national donor registry because they did not make a voluntary choice to be donor-conceived and they do not have the ability to fund the registry. Likewise, the burden of funding the registry should not be placed on American taxpayers because they only indirectly benefit from the registry and lack the ability to pay. It would make the most sense for sperm banks to fund the national registry. Sperm banks have the ability to pay, and would derive direct benefit from the implementation of the registry.

If sperm banks run and fund the registry, it is unclear whether sperm banks would have adequate incentive to promote and run the registry effectively. A government system of monitoring and penalties could incentivize sperm banks to run the registry effectively. The registry’s effectiveness would depend on sperm banks to encourage donors to volunteer identifying information and update the medical information.

tation of a national registry, the United States could regulate sperm donation in a similar fashion with countries around the world. Potential regulation should be geared to address the children's concerns found in "My Daddy's Name is Donor": accidental incest, family structure, and disclosure of the method of conception.<sup>226</sup> Potential regulations could include how many children could be conceived by one donor, who may be a recipient of sperm donation, and when parents should disclose the method of conception to their children. While the United States should regulate the number of families who can use a given donor, the United States should not regulate who can receive artificial insemination or when parents should tell the children they are donor conceived.

1. Limiting the Number of Families Who Can Use a Donor

Currently, the United States does not limit the number of children who may be conceived by a single donor.<sup>227</sup> The ASRM suggests no more than twenty-five children should be conceived by a

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<sup>225</sup> See Cahn, *Mandatory Gamete*, *supra* note 3.

<sup>226</sup> See MARQUARDT ET AL., *supra* note 1, at 77–78.

<sup>227</sup> ASRM & PRACTICE COMM., SOC'Y FOR ASSISTED REPROD. TECH., *2008 Guidelines for Gamete and Embryo Donation*, 90 Fertility S30, S36 available at [http://asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Practice\\_Guidelines/Guidelines\\_and\\_Minimum\\_Standards/2008](http://asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008).

single donor in a population of 800,000.<sup>228</sup> This mere suggestion does little to dissuade sperm banks from using one donor many times to generate high profits.<sup>229</sup> Over-using one sperm donor increases the chance of accidental incest and rare disease distribution.<sup>230</sup> Consistent with the trend in other countries, by regulating the number of families who can use a given donor, the United States could alleviate some of the donor children's concerns displayed in "My Daddy's Name is Donor."<sup>231</sup>

Countries around the world limit the number of times a donor may be used in two ways: either limiting the number of families that can use the donor, or limiting the number of children the donor may conceive.<sup>232</sup> Belgium, Denmark, France, Germany, Hong Kong, the Netherlands, Norway, Spain, and Switzerland, regulate the number of children one donor may conceive.<sup>233</sup> The number of children allowed ranges from three (Hong Kong) to twenty-five (Denmark).<sup>234</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> See e.g., Mroz, *supra* note 11.

<sup>230</sup> *Id.*

<sup>231</sup> Cahn, *supra* note 111, at 103–104.

<sup>232</sup> Cahn, *supra* note 3, at 220.

<sup>233</sup> See Cahn, *supra* note 111, at 83–84. See also *Maximum Children per Donor (Most Recent) by Country*, THE NATION MASTER, available at [http://www.nationmaster.com/graph/hea\\_spe\\_don\\_max\\_chi\\_per\\_don-donation-maximum-children-per-donor](http://www.nationmaster.com/graph/hea_spe_don_max_chi_per_don-donation-maximum-children-per-donor) (last visited Feb. 1, 2012).

<sup>234</sup> *Maximum Children per Donor (Most Recent) by Country*, THE NATION MASTER, available at [http://www.nationmaster.com/graph/hea\\_spe\\_don\\_max\\_chi\\_per\\_don-donation-maximum-children-per-donor](http://www.nationmaster.com/graph/hea_spe_don_max_chi_per_don-donation-maximum-children-per-donor) (last visited Feb. 1, 2012).

Other countries, such as New Zealand, Sweden, parts of Australia, and the United Kingdom regulate the number of families that can use a donor.<sup>235</sup> The number of permitted families ranges from four (New Zealand)<sup>236</sup> to ten (United Kingdom).<sup>237</sup>

In support of limiting the usage of one sperm donor, “My Daddy’s Name is Donor” highlights that donor children are highly concerned about unintentionally entering into a sexual relationship with a biological relative.<sup>238</sup> Forty-six percent of donor children, compared with seventeen percent of adopted adults and six percent of adults raised by biological parents, fear being attracted to a relative.<sup>239</sup> Similarly, forty-three percent of donor children, compared with sixteen percent of adopted adults and nine percent of adults raised by biological parents, fear having sexual relations with a rela-

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<sup>235</sup> See Frith, *supra* note 88, at 818. See also *Maximum Children per Donor (Most Recent) by Country*, THE NATION MASTER, available at [http://www.nationmaster.com/graph/hea\\_spe\\_don\\_max\\_chi\\_per\\_don-donation-maximum-children-per-donor](http://www.nationmaster.com/graph/hea_spe_don_max_chi_per_don-donation-maximum-children-per-donor) (last visited Feb. 1, 2012).

<sup>236</sup> *Human Assisted Reproductive Technology Register*, DEPT. INTERNAL AFFAIRS: TE TARI TAIWHENUA, available at [http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Human-Assisted-Reproductive-Technology-%28HART%29-Register](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Human-Assisted-Reproductive-Technology-%28HART%29-Register) (last visited Jan. 31, 2012).

<sup>237</sup> HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, available at <http://www.hfea.gov.uk/498.html#guidanceSection4296> (last visited Jan. 31, 2012).

<sup>238</sup> MARQUARDT ET AL, *supra* note 1, at 8.

<sup>239</sup> *Id.*

tive.<sup>240</sup> These findings demonstrate a heightened fear of accidental incest in donor children.<sup>241</sup>

However, with a national registry in place, donor children should have the option to discover the identity their half-siblings, which would alleviate some of the incest concerns found in “My Daddy’s Name is Donor.”<sup>242</sup> Donor children, just like their donor fathers, would have the option of volunteering their identifying information to the national registry so half-siblings could find them. While donor children would still risk accidental incest if the donor fathered children outside the artificial insemination context, disclosure of the identities of donor siblings would drastically reduce the chance of accidental incest.

In addition to the functions of the national registry, the United States should also alleviate incest concerns by regulating the number of families that can use a given sperm donor. Such regulation would also control the dissemination of rare genetic diseases. First, limiting the number of families who can use a donor would help address the fears of donor children found in “My Daddy’s Name is Donor.”<sup>243</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 61–62.

<sup>243</sup> *Id.* at 78.

This would minimize the concern, but not eradicate it entirely. For true elimination of incest fears, only one family should be able to use each donor. The limited supply of sperm donors prohibits the limitation from being so restrictive.<sup>244</sup> Second, if the widespread usage of one donor's sperm may lead to the spread of a rare disease that transfers through genes. For instance, one teenage donor child discovered his donor father, who had fathered at least twenty-four children, has a connective tissue disorder and a heart defect.<sup>245</sup> Regulating the number of families that could use a given a donor would limit the spread of such diseases. With the registry in place to likewise prevent unknowing incestuous relationships, the United States should limit the number of families that can use a given donor to ten, paralleling the United Kingdom's regulations.<sup>246</sup>

## 2. No Regulation of Donation Recipient or Disclosure to Children

“My Daddy's Name is Donor” also suggests additional regulations could positively impact the children's psychological health.<sup>247</sup>

Children of artificial insemination who were raised in a household

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<sup>244</sup> *Id.* at 119.

<sup>245</sup> James, *supra* note 200.

<sup>246</sup> HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, *available at* <http://www.hfea.gov.uk/498.html#guidanceSection4296> (last visited Jan. 31, 2012).

<sup>247</sup> MARQUARDT ET AL, *supra* note 1, at 37–42, 77–78.

with two parents were less likely to experience psychological problems than donor children raised by a single parent.<sup>248</sup> In addition, “My Daddy’s Name is Donor” suggests full disclosure of conception may be beneficial for the mental health of the donor children.<sup>249</sup> However, “My Daddy’s Name is Donor” only demonstrates correlation, not causation, between the household environment and the children’s psychological health.<sup>250</sup> Therefore, the United States should not regulate who can be a recipient of sperm donation or when parents should tell their children about the artificial insemination. Both of these regulations would infringe on the robust interpretation of family privacy in the United States.<sup>251</sup> Similar to the anonymity issue, without a clear causal relationship between these factors and psychological harm to children, family privacy trumps the donor children’s interest in such regulation.

Other countries have imposed regulations on sperm donation recipients, but not disclosure of information to the children.<sup>252</sup> For instance, Sweden only permits sperm artificial insemination for mar-

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<sup>248</sup> *Id.* at 37, 45–47.

<sup>249</sup> *Id.* at 77–79.

<sup>250</sup> *Id.* at 44–47.

<sup>251</sup> *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1055, 1059–61 (6th Cir. 1998).

<sup>252</sup> *See, e.g.*, Act (2006:351) on Genetic Integrity, available at <http://www.notisum.se/rnp/sls/lag/20060351.htm>.

ried or cohabitating women, and requires the consent of the spouse or partner.<sup>253</sup> Switzerland's laws are the most restrictive, permitting sperm donation only for heterosexual married couples.<sup>254</sup> While regulation of the permissible sperm donor recipient is fairly common, no country regulates when the parent must tell the child about their conception.<sup>255</sup>

The United States should not regulate the recipients of sperm donation or when parents should disclose the method of conception because there is no proven causal effect between the household environment and harm to the children to overcome the parent's right to raise and control a family. First, the donor children have a minimal argument for regulation, as "My Daddy's Name is Donor" fails to prove a causal connection.<sup>256</sup> Second, in the United States, parents have a privacy right to have custody of, care for, and raise their children.<sup>257</sup> The United States Supreme Court stated in *Troxel v. Granville*, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests

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<sup>253</sup> *See id.*

<sup>254</sup> *Insemination with Donor Sperm*, CENTRE HOSPITALIER UNIVERSITAIRE VAUDOIS, [http://www.chuv.ch/dgo/en/dgo\\_home/umr/dgo\\_fer\\_prise\\_charge/dgo\\_fer\\_faqs.htm](http://www.chuv.ch/dgo/en/dgo_home/umr/dgo_fer_prise_charge/dgo_fer_faqs.htm) (last visited Dec. 12, 2011).

<sup>255</sup> *See generally*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, *Talk to Your Child About Their Actions*, available at <http://www.hfea.gov.uk/116.html>.

<sup>256</sup> MARQUARDT ET AL., *supra* note 1, at 45–47.

<sup>257</sup> *Truelove v. Hunt*, 67 F. Supp.2d 569, 579 (D.S.C. 1999).



recognized by this Court.”<sup>258</sup> The Due Process Clause of the Fourteenth Amendment protects the parent’s right, and it the state should not infringe upon it unless the parent is not adequately caring for the child.<sup>259</sup> Courts in the United States have upheld legislation infringing on the privacy right when the child’s health demands it, such as cases of incest.<sup>260</sup> Here, such legislation would likely not survive review as it would unjustifiably infringe on the privacy right because such factors are not proven to impact the child’s health. In this situation, as there is no clear causal connection between being raised by a single mother or the disclosure of the method of conception and psychologically harm to the child, United States courts and legislatures should not infringe on such a fundamental liberty interest through regulation of those areas.

## VI. CONCLUSION

Based on “My Daddy’s Name is Donor,” a review of current American sperm donation practices, and a review of foreign law, I have reached a number of proposals to revolutionize the sperm donor industry in the United States to alleviate burdens felt by donor children.

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<sup>258</sup> Troxel v. Granville, 530 U.S. 57, 65 (2000).

<sup>259</sup> *Id.*

<sup>260</sup> *See, e.g.,* Smith v. State, 6 S.W.3d 512, 518–19 (Tenn. Crim. App. 1999).

However, I take greater caution than some other legal analysts in that my proposals focus only on proven causal connections leading to the detriment of donor children. The “My Daddy’s Name is Donor” study identifies four problematic facets of the artificial insemination practice. First, sperm donor children are more troubled than the general population of children their age. Second, sperm donor children conceived by anonymous donors experience psychological problems more than other donor children do. Third, sperm donor children raised by single mothers experience greater difficulty than their peers do. Finally, donor children whose parents omit the truth about their conception encounter higher rates of psychological problems than other donor children their age. Because these four problem areas are inseparably intertwined, a direct causal connection between any one factor and donor children psychological health is not yet available.

Based on this information and the competing policy concerns, this article suggests the United States should create a national registry of sperm donors and the resulting children. The registry should be immediately accessible to all parents and accessible to donor children when the children reach the age of sixteen. The age of sixteen reflects the time when donor children may begin to have fears about

accidental incest. Every sperm donor should be required to provide medical information, including family history to the registry. Sperm donors should have the option of providing identifying information to the registry, including personal and contact information. With the adoption of the registry, the government should also limit the number of families who can use a given sperm donor to ten. However, the government should not regulate who may undergo artificial insemination, or when parents should tell their children about the method of conception. These conclusions are designed to help sperm donor children overcome the hurdles of being a donor child while not intruding on the rights of donors or potential parents when there is no proven causation to necessitate such infringement.