

WHO'S YOUR DADDY? THE INTERNATIONAL MARKET FOR AMERICAN SPERM

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“America is the largest exporter of sperm. But what happens when all those kids grow up and decide to go looking for Daddy?”¹

-Jay Newton-Small
TIME Magazine

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1. Jay Newton-Small, *Frozen Assets*, TIME (Apr. 16, 2012), at 49.

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I. INTRODUCTION

The U.S. is sending a lot of *semen* abroad – but not sailors. Currently, the U.S. is the number one exporter of human sperm.² The French may be the expert in romance, and Latin Americans may flaunt their machismo, but it is American sperm that foreigners want.³ While the rest of the world may not respect our goods and services – the French bomb McDonald's⁴ – one author has commented that “it’s nice to know this country can still produce in one area where it counts. And in great quantities.”⁵

Sperm donation has ballooned into a multi-billion dollar global industry. Internationally, countries have been moving towards regulation of sperm donation over the last twenty years.⁶ Such regulations include banning anonymous donation, regulating the number of children fathered by a given donor, placing eligibility requirements on donors, and creating registry systems for children to obtain information about their biological fathers.⁷ However, “growing pressures” on the U.S. to impose regulations on sperm donation have been to no avail.⁸ And, with scant regulations in place, numerous legal complications have surfaced.

2. Buck Wolf, *Sending Sperm Abroad*, ABC NEWS (Dec. 16, 2005), available at <http://abcnews.go.com/US/Sex/story?id=93277&page=1> (last visited Oct. 10, 2013).

3. *Id.*

4. John-Thor Dahlburg, *To Many French, Ugly American is McDonald's*, L.A. TIMES (Apr. 22, 2000), available at <http://articles.latimes.com/2000/apr/22/news/mn-22176> (last visited Oct. 10, 2013).

5. Wolf, *supra* note 2.

6. Mark Ballantyne, *My Daddy's Name is Donor: Evaluating Sperm Donation Anonymity and Regulation*, 25 RICH. J.L. PUB. INT. 569, 571 (2012).

7. *Id.*

8. ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, *MY DADDY'S NAME IS DONOR* 53 (2010).

This note purports to critically examine the legal issues that have surfaced as a result of such a *lassiez-faire* U.S. approach to artificial insemination. Further, this note engages in an analysis of domestic legislation relating to artificial insemination, comparing the U.S.'s approach with other countries that have elected to place restrictions or bans on donor anonymity.

Section II of this note offers a brief overview of the history of artificial insemination by donor ("AID"), and the modern industry. Section III analyzes several international approaches that have been undertaken in addressing AID. Section IV sets out various legal issues due to the inadequacy of the American legal system in the artificial insemination industry. And finally, this note concludes with Section V, where I propose possible remedies to curtail the potential liabilities that accompany non-regulated AID.

II. ARTIFICIAL INSEMINATION BY DONOR

It is difficult to grasp the depth and breadth of the current market for artificial insemination without providing a brief historical overview and an analysis of the current industry in the U.S.

A. What is Artificial Insemination by Donor?

Artificial insemination, also known as "assisted reproduction," is defined as a "method of causing pregnancy other than sexual intercourse."⁹ Assisted reproduction has been primarily used to "assist individuals who are unable to conceive children," whether due to actual infertility of either partner, or the "social structure in which [an individual or couple] self-[identifies]."¹⁰

Artificial insemination has been used for over two centuries as an alternative method to sexual intercourse as a means of achieving conception.¹¹ There are several types of artificial insemination, and each carries with it different rates of success: intrauterine insemination (fertilization);¹² intra-fallopian insemination;¹³ and in vitro

9. UNIFORM PARENTAGE ACT § 102(4) (2002) (the term includes "intrauterine insemination").

10. Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 381 (2009) (quoting Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKLEY J. GENDER L. & JUST. 18, 24 (2008)).

11. Jennifer M. Vagle, *Putting the "Product" in Reproduction: The Viability of a Products Liability Action for Genetically Defective Sperm*, 38 PEPP. L. REV. 1175, 1201 (2011).

12. Intrauterine insemination (fertilization) is fertilization by injection of sperm into

fertilization.¹⁴

There are “two broad categories” of artificial insemination, distinguished by who provides the sperm: (1) artificial insemination by husband, in which the recipient-mother’s husband is the individual providing the sperm; and (2) AID, where the sperm is provided by a male other than the recipient-mother’s husband.¹⁵ With AID, the identity of the donor “may or may not be known to the recipients(s).”¹⁶

B. The History

The concept of artificial insemination has existed since about 200 A.D.¹⁷ Jewish commentary written between 400 A.D. and 1200 A.D. reveals an interest in the possibilities of artificial insemination.¹⁸ One commentator during this period posed the question of “who would be the legitimate father of a child born by accidental fertilization of an egg from indirect contact, such as from bath water.”¹⁹

The first occurrence of human artificial insemination was in the late 1700s, and there is a dispute over where it occurred.²⁰ One account credits England, while the other credits a French doctor.²¹ The first performance of artificial insemination in the U.S. was in 1884, at Jefferson Medical College in Pennsylvania.²²

the uterus. Ninety percent of couples usually conceive within the first six cycles or treatments, making an average success rate of fifteen percent for each treatment. *Artificial Insemination Tips: Success Rates of Artificial Insemination*, LIFETIPS (2012), available at <http://infertility.lifetips.com/cat/64201/artificial-insemination/index.html> (last visited Oct. 10, 2013).

13. Intra-fallopian insemination is fertilization by the injection of sperm directly into the fallopian tubes. The average success rate is thirty percent. *Id.*

14. In vitro fertilization is fertilization of an egg by sperm in a test tube or petri dish. The success rate for achieving pregnancy is an average of thirty percent, but once pregnant, the success rate for live birth is eighty-three percent. *Id.*;

Vagle, *supra* note 11, at 1201; see Dawn R. Swink & J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 BYU L. REV. 857, 860-61 (2007).

15. Swink & Reich, *supra* note 14, at 860-61.

16. *Id.*

17. Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN’S STUD. 173, 176 (1996) (Artificial insemination was used on animals first, “possibly as early as the fourteenth century.”).

18. *Id.*

19. *Id.*

20. *Id.* at 176-77.

21. *Id.* at 177.

22. Denise S. Kaiser, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793, 794 (1988).

AID was initially a response to male infertility and, given associated “unresolved moral and legal questions,” the early use of artificial insemination was considered an intensely private matter: “[s]ecrecy thus benefited the physician, the woman receiving the sperm, any child born as a result of the procedure (who were called ‘artificial bastards’ by some critics), and the husband whose infertility needed to be masked from public view.”²³ Later, artificial insemination received attention as a means of preventing the transmission of genetic diseases.²⁴ However, doctors continued to select donors for mother recipients.²⁵

With the advent of cryopreservation technologies,²⁶ the U.S. sperm banking industry grew rapidly,²⁷ and the procedure has been welcomed by those wishing to conceive.²⁸ In 1969 an estimated ten sperm banks were in operation.²⁹ Now there are nearly 700 sperm banks in the U.S.³⁰ The fertility industry in the U.S., which amassed to \$979 million in 1988, is projected to be worth \$4.3 billion in 2013.³¹ In sum, artificial insemination has transformed from what was initially considered a primarily doctor-dominated process, to a consumer-driven *industry*.

23. Vagle, *supra* note 11, at 1202; *see also* Kaiser, *supra* note 22, at 794 (explaining that AID was initially regarded as a “sensational procedure” and labeled by early practitioners as “immoral and equivalent to adultery”); Harlow, *supra* note 17, at 177 (recognizing that physicians who women consulted were often adamantly opposed to AID because they believed that “such a proposition came from the devil”).

24. Vagle, *supra* note 11, at 1202.

25. *Id.*

26. “Cryopreservation: The process of cooling and storing cells, tissues, or organs at very low temperatures to maintain their viability.” *Definition of Cryopreservation*, MEDICINET.COM, [available at http://www.medterms.com/script/main/art.asp?articlekey=7252](http://www.medterms.com/script/main/art.asp?articlekey=7252) (last visited Oct. 10, 2013).

27. Vagle, *supra* note 11, at 1202.

28. “Today, it is estimated that between ten and twenty percent of married couples in the United States cannot conceive. The procedure is naturally welcomed by these couples as perhaps their only means of parenting a child other than by adoption. This procedure has also been welcomed by those single women who are either unable to conceive naturally or chose AID as an alternative means of conception.” Kaiser, *supra* note 22, at 795. AID has also been welcomed by lesbian couples. Newton-Small, *supra* note 1, at 51 (explaining that, “[m]ost international sperm business has been for heterosexual couples with fertility challenges, but that is changing as more cultures accept lesbians as single parents—two groups that compose by some estimates up to 60% of the U.S. market”).

29. Vagle, *supra* note 11, at 1202.

30. *Sperm: America's most renewable resource?* CBS NEWS (Apr. 5, 2012), [available at http://www.cbsnews.com/8301-505269_162-57409735/sperm-americas-most-renewable-resource/](http://www.cbsnews.com/8301-505269_162-57409735/sperm-americas-most-renewable-resource/) (last visited Oct. 10, 2013).

31. *Id.*

III. A MOVE TOWARDS INTERNATIONAL REGULATION

Given the significance of the artificial insemination industry over the last twenty years, a move has been made internationally towards regulation.

A. Sweden: The Forerunner

Sweden was one of the earliest states to regulate AID. Swedish society is considered by scholars, not solely in a material or a political context, but with philosophical or even moral significance, as epitomizing the good life.³² In that context, Sweden can be seen as the forerunner of a new social order.³³ A model of “social ethics,” and a “nation above suspicion,” Sweden’s ideological underpinnings are consensus and transparency.³⁴ And, Swedish legislation of AID is no exception to this notion of transparency.

Prior to 1985, AID was performed worldwide without any legal restrictions.³⁵ Thus, the provider of the semen was anonymous not only to the recipient couple, but also to the donor offspring.³⁶ However, a case in Sweden highlighted the need for legislative enactment to protect a child of AID.³⁷ There, the social father of a child conceived through AID sought, and won, release from fatherhood in a lawsuit, referring to the fact that he was sterile.³⁸ And, because the semen provider was unknown, the child thereby became “fatherless.”³⁹

The debates accompanying the introduction of the legislation were passionate.⁴⁰ However, legislation finally came as a result of a four-year investigation by a government-appointed committee charged with reviewing AID, and advising whether legislation or regulation was necessary.⁴¹ The Committee in favor of legislation maintained that the rights of children had to be protected, and that was best achieved by

32. KRISTINA ORFALI, *The Rise and Fall of the Swedish Model, A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES* 417 (Antoine Prost & Gerard Vincent, eds., 1991).

33. *Id.* at 418.

34. *Id.*

35. A. Lalos, K. Daniels, et al., *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUM. REPROD. 212, 212 (2003).

36. *Id.*

37. K. Daniels, A. Lalos, et al., *Semen Providers and Their Three Families*, 26 J. OF PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 15, 15 (2005).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

permitting access to the identity of the donor.⁴² In contrast, those against such regulation argued that it would lead to the end of donor insemination in Sweden, as no one would elect to donate.⁴³

Notwithstanding such concerns, in 1985 Sweden introduced groundbreaking legislation that required all semen providers to furnish identifying information about themselves.⁴⁴ Becoming the first country in the world to regulate the practice of AID, Sweden enacted the Swedish Law of Artificial Insemination ("SLAI").⁴⁵ SLAI gave "'sufficiently mature' donor offspring the right to 'obtain identifying information concerning their donor[s,] . . . in other word[s,] . . . donor[s] could be *identified*.'"⁴⁶ Further, the legislation imposed requirements upon physicians, requiring them to keep records identifying donor information for at least seventy years.⁴⁷

While there was a temporary decline in donor availability, the decline reversed itself despite predictions that the law would deter sperm donation.⁴⁸ In fact, one study, which presented data covering the pre- and post-legislation period, revealed that there had been an increase in the number of semen providers recruited.⁴⁹ The subjects of the study were the current semen providers at two Swedish Fertility Clinics: Karolinska, located in Stockholm; and Umeå, located in the northern part of Sweden.⁵⁰ The study, conducted by anonymous questionnaires, was aimed at getting answers from semen providers in Sweden regarding factors associated with their requirement and motivation.⁵¹ The response rate was 100%.⁵²

While there were demographic differences between the two clinic populations,⁵³ the corresponding data showed that providers were in total agreement that their desire to assist infertile couples was their sole,

42. Daniels, *supra* note 37, at 15.

43. *Id.* (emphasis added).

44. Chia R. Rosas, *A Necessary Compromise: Recognizing the Rights of a Donated Generation to Tame the Wild Wild West of California's Sperm Banking Industry*, 37 Sw. U. L. REV. 393, 406-07 (2008).

45. *Id.* at 406-07.

46. *Id.* at 407 (emphasis added).

47. *Id.*

48. *Id.*

49. Daniels, *supra* note 37, at 15-16; *see also* Rosas, *supra* note 44, at 407.

50. Daniels, *supra* note 37, at 16.

51. *Id.*

52. *Id.*

53. There was a difference in how the two groups of sperm donors first became aware of AID, which may reflect the different ways in which the clinics approach recruitment. *Id.* at 16-19.

or main motivating factor, in becoming a provider.⁵⁴ The study highlighted the fact that semen providers have a drive to help infertile couples regardless of the possibility of future contact by genetic offspring.⁵⁵ In sum, semen providers *can* be recruited within a system that provides for their potential future identification to offspring.

B. The United Nations Convention on the Rights of the Child (1989)

On November 20, 1989, the United Nations (“UN”) adopted, without a vote, the Convention on the Rights of the Child (“CRC”).⁵⁶ The CRC is a “legally binding international instrument” that sets forth basic human rights for children (people under 18 years old).⁵⁷ The human rights recognized in this treaty had never previously been protected in an international treaty. They include the child’s right to identity and the right to know his or her parents.⁵⁸ It is, for the aforementioned reasons that the terms of the CRC are worth exploring.

The *travaux préparatoires*⁵⁹ provide a useful reference point in interpreting the final draft.⁶⁰ Dr. Jamie Sergio Cerda was the Argentinean sponsor of the article, and the original wording proposed by Argentina is as follows:

The child has the inalienable right to retain his true and genuine personal, *legal* and family identity.

In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to *his blood relations* to be brought up.⁶¹

The *travaux préparatoires* illustrate that at least from Argentina’s perspective, the right to a “true and genuine” identity – a legal identity – is a specific right worthy of international recognition.

54. Daniels, *supra* note 37, at 20.

55. *Id.*

56. George A. Stewart, *Interpreting the Child’s Right to Identity in the U.N. Convention to the Rights of the Child*, 26 FAM. L. Q. 221, 221 (1992).

57. *Convention on the Rights of the Child*, UNICEF (May 25, 2012), available at <http://www.unicef.org/crc/> (last visited April 4, 2013).

58. Stewart, *supra* note 56, at 221.

59. “Preparatory works.”

60. Stewart, *supra* note 56, at 222.

61. Report of the Working Group on a Draft Convention on the Rights of the Child, U.N.Doc. E/CN.4/1986/39 (Mar. 13, 1986) (emphasis added); see also *id.* at 222-23.

The final text of the CRC strongly suggests that the members agreed that the right to identity necessitated protection in the international arena.⁶² For instance, Article 8 provides:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.⁶³

Further, in Article 7, the UN recognized the significance of a child's "right to acquire a nationality" and, "as far as possible, the right to know and be cared for by his or her parents."⁶⁴ Transcripts of the debates at the time make it "clear that the term 'parents' in this clause includes biological parents in the first instance, and that the Convention therefore militates against the practice of anonymous gamete donation."⁶⁵

However, the final version of the CRC, described by Dr. Cerda as a "negotiated compromise,"⁶⁶ is riddled with elusiveness and ambiguity. For instance, a major problem arises from the use of the term "identity," in Article 8.⁶⁷ Significantly, the term is not defined in Article 8, nor is "identity" defined elsewhere in the CRC.⁶⁸ In place of a definition are *elements* of identity – nationality, name, and family relations as recognized by law.⁶⁹ In addition, the original draft proposed by Argentina provided for an enforcement provision.⁷⁰ However, there is

62. Stewart, *supra* note 56, at 223.

63. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 8, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last visited Oct. 1, 2013).

64. *Id.* art. 7; see Rosas, *supra* note 44, at 408 (maintaining that the "CRC 'recognize[s] the significance of children knowing who they are and where they have come from'" (citation omitted)).

65. David J. Velleman, *Persons in Prospect, Part II: Gift of Life*, 36 PHIL. & PUB. AFF. 221, 225 n. 12 (2008).

66. According to Dr. Jamie Sergio Cerda, the "negotiated compromise" was in part determined by significant hesitations and fears expressed by many of the working group members. Jamie Sergio Cerda, *The Draft Convention on the Rights of the Child: New Rights*, 12 HUM. RTS. Q. 115, 116 (1990).

67. *Id.*; see also Stewart, *supra* note 56, at 224.

68. Convention on the Rights of the Child, *supra* note 63; see also Stewart, *supra* note 56, at 224.

69. Convention on the Rights of the Child, *supra* note 63; see also Cerda, *supra* note 66, at 116; Stewart, *supra* note 56, at 224.

70. "In the event that a child has been fraudulently deprived of some or all of the

no longer an explicit obligation for a state to reunite a child with his or her blood relations.⁷¹ Further, while Article 7 of the Convention stipulates the right to know one's parents, this right is hedged with the qualification, "as far as possible."⁷²

As suggested by Dr. Cerda, the nature of the new rights created by the convention will "depend on the development of the legal systems of the countries concerned."⁷³ Further, developments in the area of genetic engineering "should be covered by an element in Article 8 relating to the duty of states to preserve the identity of the child."⁷⁴ Though, despite its shortcomings, the treaty may have given rise to the elimination of donor anonymity around the world.⁷⁵

C. Canada

Canada similarly has undertaken regulations of the AID industry. Canada is a federation of ten provinces and three territories.⁷⁶ The roles and responsibilities for Canadian health care are shared between the national and provincial-territorial governments.⁷⁷ According to the Canada Health Act (1985), the federal government is responsible for both administering the national principles or standards of the health care system,⁷⁸ and providing funding to help pay for health care services through cash and tax transfers to the provinces-territories.⁷⁹ The provincial-territorial governments are responsible for the "management,

elements of his identity, the State *must give him special protection and assistance* with a view to re-establishing his true and genuine identity as soon as possible." Report of the Working Group on a Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1986/39 (Mar. 13, 1986) (emphasis added).

71. Stewart, *supra* note 56, at 225.

72. Convention on the Rights of the Child, *supra* note 63.

73. Cerda, *supra* note 66, at 117.

74. *Id.* (emphasis added).

75. Rosas, *supra* note 44, at 408. To date, the U.S. and Somalia are the only countries that have not ratified the CRC. *Status of Treaties: Convention on the Rights of the Child*, UNITED NATIONS (Sept. 11, 2012), available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en (last visited Oct. 9, 2013).

76. Jean Hassee, *Canada: The Long Road to Regulation*, in *THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL, AND ETHICAL PERSPECTIVES* 55, 55 (Eric Blyth & Ruth Landau eds., 2004); see *Provinces and Territories*, GOVERNMENT OF CANADA (Dec. 5, 2011), available at <http://www.canada.gc.ca/othergov-autregouv/prov-eng.html> (last visited Oct. 9, 2013).

77. Hassee, *supra* note 76.

78. *Id.* at 55.

79. *Id.*

[organization], and delivery of health services for their residents.”⁸⁰

In Canada, semen – unless donated to a spouse or sexual partner – is regulated like a drug.⁸¹ As such, because it is a drug, semen must pass through a “battery of checks” under the Food and Drugs Act and “Processing and Distribution for Assisted Conception Regulations,” which includes a six-month “quarantine period” during which the sperm is frozen.⁸² Though Canada initially had a “hands off” approach with regulation of sperm, the recent and groundbreaking case of *Pratten v. British Columbia* – “the first of its kind in North America” – put British Columbia “on par with the U.K. and several other European Nations, as well as the state of Victoria, in Australia, in banning anonymous gamete donation.”⁸³

The May 2011 decision banned anonymous sperm donation, holding that anonymity is harmful to the child and is “not in the best interest of donor offspring.”⁸⁴ In her opinion, Madam Justice Adair highlighted both physical and mental health problems that arise as a result of donor anonymity.⁸⁵ Preliminarily, the Court found that “donor offspring fear that their health can be comprised, and may be seriously compromised, by the lack of information about their donor . . . [E]ven with the availability of genetic testing, a good old-fashioned family history is more predictive, and genetic testing is best interpreted in the context of a family history.”⁸⁶ The Court concluded that the lack of information about the donor further comprises a child’s health because of their inability to “have conditions that are inherited or genetic, diagnosed or treated.”⁸⁷ The Court also recognized that donor offspring “commonly, and legitimately[,] fear inadvertent consanguinity.”⁸⁸

Moreover, the Court noted that like adoptees, donor offspring

80. Hassee, *supra* note 76, at 55.

81. Processing and Distribution of Semen for Assisted Conception Regulations, 2006, SOR/96-254 (Can.); see also *Age, sex, location. . . sperm count? Free sperm donors online*, PROUD PARENTING (Apr. 4, 2012), available at <http://www.proudparenting.com/node/16831> (last visited Oct. 1, 2013) (explaining that semen is regulated as a drug in Canada, unless it is donated to a spouse or sexual partner).

82. *Age, sex, location. . . sperm count? Free sperm donors online*, *supra* note 81.

83. Alison Motluk, *Canadian court bans anonymous sperm and egg donation*, NATURE (May 27, 2011), available at <http://www.nature.com/news/2011/110527/full/news.2011.329.html> (last visited Oct. 1, 2013).

84. *Pratten v. British Columbia*, 2011 BSCS 656, ¶ 215 (Can. B.C.).

85. *Id.* ¶ 111.

86. *Id.* ¶ 111(a).

87. *Id.* ¶ 111(b).

88. *Id.* ¶ 111(f).

experience a “sense of loss and incompleteness.”⁸⁹ Thus, the Court recognized that, for psychological reasons, children have a need for identifying information to “complete their personal identities and to alleviate the stress, anxiety and frustration caused by not knowing. Donor offspring demonstrate a strong commitment to searching for information about the other half of their genetic make-up.”⁹⁰ Moreover, when they are unable to obtain such information, donor offspring “experience sadness, frustration and anxiety . . . [t]hey feel the effects both for themselves and, when they become parents, for their own children.”⁹¹ Similarly, the Court noted that the secrecy, which often shrouds the process of conception, can have “devastating effects on donor offspring when the truth is revealed.”⁹²

The Court allowed the province fifteen months to generate a new adoption law that would recognize the rights of those conceived via donors and to bring it in accordance with the Charter of Rights and Freedoms.⁹³ However, the province appealed the decision and the plaintiff maintains that the case will likely go before the Supreme Court of Canada.⁹⁴ If the ruling is upheld by the Supreme Court, the entire country would have to comply, and would join other jurisdictions that have banned anonymity for sperm donors.⁹⁵

D. *The United States: The “Best” Interests of the Child?*

1. *The “Best Interests” Principle*

The broadly stated general principle of the “best interests of the child” is all too often misapplied in the U.S. Though the best interests of children are usually a consideration in cases concerning parental

89. Pratten, 2011 BSCS ¶ 111(i).

90. *Id.* ¶ 111(d).

91. *Id.* ¶ 111(e).

92. *Id.* ¶ 111(g).

93. *Id.* ¶¶ 332, 335(b).

94. *Olivia Pratten Case: Sperm Donor Information Should be Shielded*, B.C. Argues, HUFF POST (Feb. 14, 2012), available at http://www.huffingtonpost.ca/2012/02/14/olivia-pratten-case-sperm-donor-information_n_1277512.html (last visited Oct. 2, 2013).

95. The Court of Appeals for British Columbia overturned the lower court’s decision, ruling that there is no constitutional right to know the identity of one’s parents. James Keller, *Olivia Pratten, Sperm Donor Case Won’t be Heard by Supreme Court*, THE CANADIAN PRESS (May 30, 2013), available at http://www.huffingtonpost.ca/2013/05/30/olivia-pratten-sperm-case-supreme-court_n_3359567.html (last visited Feb. 19, 2014). Failing to provide any reasoning, the Supreme Court of Canada declined to hear the case. *Id.* Nonetheless, it is still significant that a trial court found donor anonymity unconstitutional, and further supports the notion that the move towards abolishing AID anonymity is on the horizon.

rights, they are not the *primary* consideration.⁹⁶

If one looks to the infamous case of *Michael H. v. Gerald D.* – which is often referred to as establishing the right to privacy in the marital relationship – what happened to the “best interests of the child,” Victoria?⁹⁷ The facts were, in brief, as follows: Carole D. and Gerald D. were married, during which time Carole became involved in an adulterous affair with Michael H; Carole became impregnated with a young girl, Victoria, who turned out to be Michael’s child; Gerald D. held Victoria out to be his daughter, but Michael H. and Victoria, through guardian ad litem, sought visitation rights for Michael.⁹⁸

There, the United States Supreme Court found that Michael failed to adduce modern or historical precedent recognizing the power of a natural father to assert parental rights.⁹⁹ As such, the Court rejected petitioner’s argument, finding that Michael had no constitutionally protected liberty interest sufficient to maintain his father-daughter relationship with Victoria.¹⁰⁰

When an individual denies the importance of biological ties – irrespective of what brilliant judge, scholar, etc., uttered that denial – how can that individual be said to read world literature with *any comprehension*? The following has been offered in regards to this dilemma:

How do they make any sense of Telemachus, who goes in search of a father he cannot remember? What do they think is the dramatic engine of the Oedipus story? When the adoptive grandson of Pharaoh says, ‘I have been a stranger in a strange land,’ what do they think he means? How can they even understand the colloquy between Darth Vader and Luke Skywalker? [With], the revelation ‘I am your father.’¹⁰¹

As the aforementioned stories illustrate, persons unacquainted with their origins have been perceived throughout history as tragically disadvantaged.¹⁰² There must be some reason why persons, living at different places and times, under dramatically different conditions, have

96. In Article 3 of the Convention on the Rights of the Child, the “best interests” of the child are deemed to be a “primary consideration” for all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Convention on the Rights of the Child, *supra* note 63.

97. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

98. *Id.*

99. *Id.*

100. *Id.*

101. Velleman, *supra* note 65, at 256.

102. *Id.*

converged on the *same* opinion: a relationship with one's biological parents is essential to a child.¹⁰³ It is in the child's *best interests*.

However, the arguments for secrecy in the AID context rarely invoke the "best interests" of the child.¹⁰⁴ The notion that information about one's origin should be withheld from children because it is in their best interests is a "stark form of welfarism," which could be used to "justify many forms of state manipulation deemed to be of benefit to citizens."¹⁰⁵ In actuality, "would anyone choose to live his or her entire life on the basis that he or she had been deliberately deceived about their genetic origin?"¹⁰⁶

One proposed rationale for secrecy has been the parents' interest in having a "normal family." Parents may feel threatened by the possibility that their child's biological father could appear and disrupt their family.¹⁰⁷ Alternatively, parents may not want people to know that they resorted to AID.¹⁰⁸ Though, in these justifications, the child is really being used as a means to his or her parents' end.¹⁰⁹ Meaning, the interests of the parents in achieving this seemingly "normal family," are paramount to any needs of the child. However, using one person as a means to another's end can never be right, "unless the person has consented to be so used. [And] as the AID children grow towards adulthood . . . they are more and more being made an object of contempt."¹¹⁰

2. Anonymity Regulation

Regulation of sperm donation in the U.S. remains relatively non-existent.

a. The Food and Drug Administration

The Food and Drug Administration ("FDA") currently provides the only federal means to regulate AID. The FDA regulation falls under 21 CFR § 1271, which proposes to create a "unified registration and listing

103. Velleman, *supra* note 65 at 256.

104. See Michael Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 INT'L J. CHILD. RTS. 274 (1996).

105. *Families and Children: From Welfarism to Rights*, in CHRISTOPHER MCCRUDDEN, INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 317 (Clarendon Press, 1994).

106. *Id.*

107. Hollace S. W. Sawonson, *Donor Anonymity in Artificial Insemination: Is It Still Necessary?* 27 COLUM. J. L. & SOC. PROBS. 151, 180 (1993).

108. *Id.*

109. Mary Warnock, *The Good of the Child*, 1 BIOETHICS 141, 151 (1987).

110. *Id.*

system for establishments that manufacture human cells . . . and to establish donor-eligibility, current good tissue practice, and other procedures to prevent the introduction, transmission, and spread of communicable diseases”¹¹¹ Accordingly, under § 1271, FDA regulation of sperm banks is divided into three pertinent areas: (1) Establishment; (2) Registration and Product Listing, Donor Eligibility; and (3) Current Good Tissue Practice (“CGTP”).¹¹²

Sperm banks and clinics must register with the FDA and update registration annually.¹¹³ They must register with the FDA using Form FDA 3356, which asks for very basic information, such as the center’s physical mailing address and the establishment’s function (i.e. type of tissue(s) it maintains).¹¹⁴

Under the FDA’s Donor Eligibility rules, both anonymous and non-anonymous donors must undergo a physical examination and medical history interview, which includes assessments of their physical and “relevant social behavior.”¹¹⁵ The physical examination requires that sperm donors be tested for communicable diseases, but there is no federal requirement that sperm banks screen for genetic diseases.¹¹⁶ As for the latter test (“relevant social behavior”), according to the FDA there are twenty-nine “risk factors,” which include men who have had sex with other men in the preceding five years, persons who have injected drugs for non-medical reasons in the preceding five years, and persons who have engaged in sex in exchange for money or drugs.¹¹⁷

The FDA’s CGTP requirements include periodic inspections of fertility institutions to evaluate compliance with the Donor Eligibility

111. 21 C.F.R. § 1271.1(a) (2007).

112. *See generally id.*; Pi, *supra* note 10, at 382-83.

113. 21 C.F.R. § 1271.21(a) (2007).

114. *Id.*; FOOD AND DRUG ADMINISTRATION, FORM FDA 3356, ESTABLISHMENT REGISTRATION AND LISTING FOR HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASKED PRODUCTS, *available at* <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Forms/UCM082428.pdf> (last visited Sept. 30, 2013).

115. 21 C.F.R. § 1271.21(a) (2007).

116. Jacqueline Mroz, *In Sperm Banks, A Roll of the Genetic Dice*, N.Y. TIMES (May 14, 2012), *available at* http://www.nytimes.com/2012/05/15/health/in-sperm-banks-a-matrix-of-untested-genetic-diseases.html?pagewanted=all&_r=0 (last visited Sept. 30, 2013).

117. FOOD AND DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY: ESTABLISHMENT REGISTRATION AND LISTING FOR HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASKED PRODUCTS, IV.E (2012), *available at* <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidance/tissue/ucm073964.htm#DONORSCREENING12171.75> (last visited Sept. 30, 2013).

Rule and record-keeping standards. However, this type of mandatory record-keeping does not require sperm banks to “track donors’ health, disclose information to donor-conceived children, or even place limits on the number of births resulting from one donor.”¹¹⁸

b. State Regulation

Individual states regulate aspects of the AID process by licensing sperm banks, controlling the process, and determining parental legitimacy. Additionally, twenty-four states have created regulatory legislation addressing the operations of sperm banks, though varying in terms of how much they ultimately choose to regulate. For example, some states set forth explicit requirements for AID, such as requiring it be performed under the supervision of a licensed physician.¹¹⁹ Others set forth specific testing requirements.¹²⁰ In addition, most states regulate the parent-child relationship by establishing who are the biological and legal parents of a child conceived through AID.¹²¹

(1) The Uniform Parentage Act

The Uniform Law Commission (“ULC”) provides states with “non-partisan, well conceived, and well drafted legislation” that brings clarity and stability to critical areas of state statutory law.¹²² The ULC is comprised of practicing lawyers, judges, legislators and legislative staff, and law professors, who have been appointed by state governments, and the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to research, draft, and promote enactment of uniform state laws in areas where “uniformity is desirable and practical.”¹²³ Accordingly, the ULC revised the Uniform Parentage Act (“UPA”) in 2000, and amended it in 2002.¹²⁴ The UPA is considered the most

118. 21 C.F.R. § 1271.80; Anetta Pietrzak, Note, *The Price of Sperm: An Economic Analysis of the Current Regulations Surrounding the Gamete Donation Industry*, 14 J. L. & FAM. STUD. 121, 125 (2012).

119. Pi, *supra* note 10, at 384.

120. *Id.*

121. Beth G., *U.S. Sperm Donation Laws by State*, KNOWN DONOR REGISTRY, available at <http://knowndonorregistry.com/component/content/article/166-legal/private-donation-laws/114-us-sperm-donation-laws-by-state> (last visited Sept. 25, 2013); Pi, *supra* note 10, at 384.

122. *About the ULC*, UNIFORM LAW COMMISSION (2012), available at <http://uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Sept. 25, 2013).

123. *Id.*

124. *Parentage Act*, UNIFORM LAW COMMISSION (2012), available at <http://uniformlaws.org/Act.aspx?title=Parentage%Act> (last visited Sept. 25, 2013).

important Uniform Act addressing children's rights,¹²⁵ and has been accepted in nine states,¹²⁶ with numerous others enacting significant portions of the model act.¹²⁷

Section 702 of the UPA states that "a donor is not a parent of a child conceived by means of assisted reproduction."¹²⁸ Moreover, commentary to Section 702 clarifies that if a child is conceived as a result of AID, then the donor is not a parent of the resulting child.¹²⁹ Further, the donor can neither sue to establish parental rights, nor be sued for child support for the resultant offspring.¹³⁰ In sum, "donors are eliminated from the parental equation."¹³¹ Therefore, as a matter of law, the sperm donor has "no paternal rights or responsibilities,"¹³² nor does the child have any recourse for seeking parental support – or love.

Thus, the UPA is inherently different from the CRC in that the UPA explicitly states its refusal to recognize a child's right to know and be cared for by a parent.¹³³ Although the U.S. has not given a reason for why it has not elected to ratify the CRC, one possibility is the "hesitance of conservative organizations that believe ratification would have implications for issues like abortion, education, and discipline," or, alternatively, the notion that the CRC is "anti-family."¹³⁴

c. Individual Sperm Banks

To a certain extent, sperm banks are self-regulating, and may voluntarily choose to implement rules and regulations upon

125. Swink & Reich, *supra* note 14, at 871.

126. The Uniform Parentage Act has been enacted in Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Legislative Fact Sheet-Parentage Act*, UNIFORM LAW COMMISSION (2012), available at <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act> (last visited Sept. 25, 2013).

127. Although Alaska, Arizona, New York, North Carolina, and Tennessee have not adopted the Uniform Parentage Act, AID is mentioned in their statutes – either directly or indirectly – stating that a child conceived through artificial insemination and born to a married couple is the natural and legitimate child of both parents. ALASKA STAT. § 25.20.045 (LexisNexis 2013); ARIZ. REV. STAT. ANN. § 25-501(B) (2012); N.Y. DOM. REL. LAW. § 73(1) (McKinney 2013); N.C. GEN. STAT. § 49A-1 (LexisNexis 2013); TENN. CODE ANN. § 68-3-306 (LexisNexis 2013); see also Pietrzak, *supra* note 118, at 127; Swink & Reich, *supra* note 14, at 871.

128. UNIF. PARENTAGE ACT § 702 (2002).

129. *Id.*

130. *Id.*

131. *Id.*

132. Swink & Reich, *supra* note 14, at 871.

133. Compare UNIF. PARENTAGE ACT § 702 (2002), with Rosas, *supra* note 44, at 408.

134. Pi, *supra* note 10, at 394.

themselves.¹³⁵ For example, Cryogenic Laboratories is a bank committed to tracking, monitoring, and evaluating each donor specimen in order to acquire, among other things, knowledge of donor fecundity and geographical distribution of donor progeny.¹³⁶ Also, the NW Cryobank bank has a webpage aimed at providing the public with notice of any important updates to donor health history information.¹³⁷ There, a donor number is listed along with any health updates, such as notices that a donor has since been treated for testicular cancer, or that a child has experienced growth and developmental problems.¹³⁸ In contrast, some sperm banks avoid regulating any aspect of sperm donation.¹³⁹

d. Private Organizations

Professional organizations attempt to govern important aspects of the sperm donation process by publishing standards and guidelines. However, they are non-binding, and merely suggestive.¹⁴⁰ For instance, the American Society for Reproductive Medicine (ASRM) sets advisory guidelines.¹⁴¹ Regarding anonymity, the ASRM supports the prerogative of sperm donors to remain anonymous.¹⁴² The ASRM also recommends that institutions, clinics, and sperm banks maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible.¹⁴³ According to ASRM October 2012 recommendations, in a population of 800,000, a limitation of a single donor to no more than twenty-five children would avoid any “significant increased risk of inadvertent consanguineous conception.”¹⁴⁴ Further, with regard to the records of each donor, the

135. Pi, *supra* note 10, at 386.

136. *About our Donors*, CRYOGENIC LABORATORIES, available at <http://www.cryolab.com/aboutDonors.shtml> (last visited Oct. 1, 2013).

137. *Donor Health Updates*, NW CRYOBANK, available at <https://www.nwcryobank.com/donor-health-updates/> (last visited Oct. 1, 2013).

138. *Id.*; see Ballantyne, *supra* note 6, at 580.

139. *Free Genes Included With Your Purchase*, NW ASSOCIATION FOR BIOMEDICAL RESEARCH (2007), available at www.nwabr.org/education/pdfs/Cases/Genes_Included.doc (last visited Oct. 1, 2013) [hereinafter “Free Genes”]; See Mroz, *supra* note 116; Ballantyne, *supra* note 6, at 581.

140. Pi, *supra* note 10, at 387.

141. Ballantyne, *supra* note 6, at 580.

142. *Id.*

143. *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, ASRM (Oct. 16, 2012), available at [http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete\(1\).pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf) (last visited Oct. 1, 2013).

144. *Id.*

ASRM opines that a subsequent follow-up evaluation of the donor should be undertaken so as to avoid any adverse outcomes including inheritable diseases identified pre-conceptually or postnatally.¹⁴⁵

Similarly, the American Fertility Society (AFS) and the American Association of Tissue Banks (AATB) issue non-binding guidelines that emphasize the importance of genetic testing.¹⁴⁶ For example, the AFS recommends that donor records of genetic history be made available on an anonymous basis at the request of the recipient and the resulting child(ren).¹⁴⁷ Moreover, the AFS recommends ten pregnancies per donor, or even less than that if the pregnancies are a part of a smaller geographic subgroup of the general population. The AATB sets out similar recommendations.¹⁴⁸

e. Courts

American courts have similarly failed to address the regulation of AID. Although no court has directly faced the issue of anonymity, the case of *In re K.M.H.*, decided by the Supreme Court of Kansas in 2007, indirectly upheld donor anonymity.¹⁴⁹ There, the Court upheld a Kansas statute, which provided the following:

The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.¹⁵⁰

In response to the Equal Protection challenge, the court found that the statute served two legitimate governmental objectives: (1) "encouraging men who are able and willing to donate sperm . . . by protecting the men from later unwanted claims for support from mothers or the children;"¹⁵¹ and (2) protecting "women recipients as well, [by] preventing the potential claims of donors to parental rights and responsibilities."¹⁵²

Further, in its Due Process analysis, the Court recognized "the continued evolution in regulation of artificial insemination in this and

145. *Recommendations for Gamete and Embryo Donation*, *supra* note 143.

146. Pietrzak, *supra* note 118, at 128-29.

147. *Id.* at 128.

148. *Id.* at 128-29.

149. *See generally In re K.M.H.*, 169 P.3d 1025 (Kan. 2007).

150. *Id.* at 1029.

151. *Id.* at 1039.

152. *Id.*

other countries.”¹⁵³ In particular, the Court noted that Britain and the Netherlands now ban anonymous sperm donations, which “formally recognize[s] the *understandable desires* of at least some children conceived through artificial insemination to know the males from whom they have received half of their genes.”¹⁵⁴ However, the Court held that “in weighing the interests of all involved” as well as the policies that are furthered, the legislation was constitutional.¹⁵⁵ It is worth mentioning that the best interests of the child were only appropriately discussed in Judge Hill’s dissenting opinion.¹⁵⁶

In sum, the phrase, in the child’s “best interests” is really a nullity with respect to AID cases.

IV. LEGAL PROBLEMS

The fertility industry is booming.¹⁵⁷ Today, women in the U.S. shop for “sperm donors in online catalogs in much the same way as they might shop for a date through a matchmaking service . . . a piece of furniture[,] or potential car.”¹⁵⁸ And, the evolution of the Internet has only made “sperm shopping all the easier.”¹⁵⁹ Potential mothers can simply log onto sperm banks’ websites and plug in a picture of her husband, or Brad Pitt, and facial-recognition software will look for, and locate, the closest possible donor match.¹⁶⁰ Moreover, customers can compare donors’ heights and weights, ethnicity, physical traits, educational and professional accomplishments, view baby pictures, and listen to an audiotape of the donor expounding the meaning of life and why sperm donation appealed to him.¹⁶¹

153. *In re K.M.H.*, 169 P.3d at 1041.

154. *Id.* (emphasis added).

155. *Id.* at 1042.

156. “I raise my hand and ask a different question. Who speaks for the children in these proceedings? As applied by the majority in this case, this generative statute of frauds slices away half of their heritage. A man who was once considered a ‘putative father’ in the initial child in need of care proceeding is now branded a mere ‘semen donor.’ The majority offers the children sympathy. But is this in their *best interests*? The trial court never got to the point of deciding the *best interests* of the children because it was convinced that such a consideration was barred by the operation of [the statute] to a known donor . . . only the voices of the mother and ‘semen donor’ are heard.” *Id.* at 1051 (Hill, J., dissenting) (emphasis added).

157. Marquardt, *supra* note 8, at 5.

158. *Id.* at 16.

159. See generally Swink & Reich, *supra* note 14, at 858 (arguing that the Internet has increased the availability of, and the market for, donor sperm to a larger audience “than ever imagined”).

160. Newton-Small, *supra* note 1, at 51.

161. Marquardt, *supra* note 8, at 16.

It is not only women in the U.S. who can access these catalogues, though. Financial analysts call sperm a “growth sector” in the American economy – and it is actually one of the few in which the U.S. is running a significant trade surplus.¹⁶² The U.S. currently exports sperm to at least 60 countries, including Venezuela, Kenya, and Thailand.¹⁶³ As of late 2005, ABC News reported that the top four sperm banks in the U.S. controlled 65% of the global market.¹⁶⁴ And the second largest U.S. facility – Fairfax Cyrobank – says 10% of its sales are exports, and the third largest – Xytex Cryo International – does more than a third of its business abroad.¹⁶⁵

The reason is that in the U.S., anonymity is still permitted. As previously established, in contrast to U.S. donors, other countries do not permit their donors to remain anonymous. Consequently, the U.S. now views itself as a “destination[] for couples [and single mothers] who wish to circumvent stricter laws.”¹⁶⁶ Accordingly, several countries, including Canada and Sweden, are some of U.S. sperm banks’ biggest customers.¹⁶⁷ Indeed, Canada imports 90% of its sperm.¹⁶⁸

However, with no regulations defined in the U.S. – the number one exporter of sperm¹⁶⁹ – we find ourselves in the “Wild West” phase of global sperm sales,¹⁷⁰ confronted with a plethora of legal issues.

A. Parental Ties

“My Daddy’s Name is Donor” was the first study to conduct an in-depth investigation into the psychological effect of being a donor child. The 2010 study, which surveyed a sample of 485 donor children between the ages of eighteen and forty-five years old, yields startling

162. “There’s talk that America can’t make anything anymore . . . Asia now controls vast sectors of the international high-tech business. Our foreign-trade deficit has ballooned to a record annual rate of \$425 billions. But whatever economic problems America may have, we can at least raise our fists and tell the world with pride that we are the No. 1 exporter of sperm.” Wolf, *supra* note 2.

163. Newton-Small, *supra* note 1, at 50.

164. *Id.* This number has presumably gone up considering the overall increase in the market, and the varying restrictions placed by countries.

165. *Id.*

166. Marquardt, *supra* note 8, at 5.

167. Alex Dickinson, *The Daily Exclusive: The Seed of a Trend*, DAILY, (May 29, 2012), available at <http://www.thedaily.com/page/2012/05/29/052912-news-sperm-bank-exports-1-3/> (last visited Mar. 4, 2013).

168. Newton-Small, *supra* note 1, at 50.

169. Wolf, *supra* note 2.

170. Newton-Small, *supra* note 1, at 51.

results.¹⁷¹ First, the study reveals that young adults conceived through sperm donation experience profound struggles with their origins and identities.¹⁷² For instance, a majority of donor-conceived adults – a full 65% – agree that their sperm donor is half of who they are.¹⁷³ Similarly, 53% of donor offspring agree that it hurts when they hear other people talk about their genealogical background.¹⁷⁴

Second, the study suggests that AID itself is psychologically detrimental to donor children.¹⁷⁵ For example, the study reveals that donor offspring are twice as likely as those raised by biological parents to have problems with the law.¹⁷⁶ Moreover, the study reveals that donor offspring are 1.5 times more likely than those raised by biological parents to report mental health problems; and twice as likely to report substance abuse problems.¹⁷⁷ This point is further elaborated by Katrina Clark, a child conceived through AID:

[E]motionally, many of us are not keeping up. We didn't ask to be born into this situation, with its limitations and confusion. It's hypocritical of parents and medical professionals to assume that biological roots won't matter to the "products" of the cryobanks' service, when the longing for a biological relationship is what brings customers to the banks in the first place. We offspring are recognizing the right that was stripped from us at birth – the right to know who both our parents are.¹⁷⁸

Finally, and perhaps most importantly, the study suggests that donor children disfavor anonymous donation.¹⁷⁹ In fact, nearly two-thirds of grown donor offspring support the right of offspring to have non-identifying information about their biological father, to know his identity, to have the opportunity to form some kind of relationship with him, to know about the possible existence of half-siblings conceived with the same donor, and to have the opportunity to form a relationship with those potential half-siblings.¹⁸⁰ Moreover, donor offspring whose

171. Marquardt, *supra* note 8, at 19.

172. *Id.* at 7.

173. *Id.* at 7, 21, 109.

174. *Id.* at 7, 28.

175. *Id.* at 37-38.

176. Marquardt, *supra* note 8, at 9, 115.

177. *Id.*

178. Katrina Clark, *My Father was an Anonymous Sperm Donor*, WASH. POST (Dec. 17, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501820.html> (last visited Oct. 6, 2013).

179. Marquardt, *supra* note 8, at 11-12.

180. *Id.*

parents kept their origins a secret (so that the donor found out the truth in an accidental or unplanned way) were 51% more likely to report depression or other mental health issues, 36% more likely to struggle with substance abuse, and 29% more likely to have had problems with the law.¹⁸¹

B. Health

The failure of the FDA to require that sperm donors be screened for genetic diseases has produced abysmal and permanent consequences.

For instance, sperm donor “F827” “aced” all the tests: he was healthy; he said his parents and grandparents were healthy; and, under a microscope, his chromosomes looked “perfect.”¹⁸² Accordingly, he turned out to be quite prolific, and his deposits to a Michigan sperm bank in the 1990s produced *eleven* children. However, his “deposits” also carried with them an extremely rare disease.¹⁸³

Severe Congenital Neutropenia (“SCN”) is a disease that normally affects one in five million individuals.¹⁸⁴ As such, when Dr. Laurence Boxer, the director of pediatric hematology and oncology at the University of Michigan in Ann Arbor, was presented with five cases within four families in Michigan, “there was clearly something amiss.”¹⁸⁵ SCN is an “extremely serious blood disease,” and it can be fatal for children under three years of age.¹⁸⁶ Additionally, patients who contract this disease are highly vulnerable to infections and prone to leukemia.¹⁸⁷ Moreover, all persons infected with this disease need expensive daily shots to augment their immune system.¹⁸⁸

Dr. Boxer soon determined that all four families had used donor sperm, and the same donor at that: F827. However, the anonymity of the donor was protected by his legal arrangement with the sperm bank.

181. Marquardt, *supra* note 8 at 12, 112. Although they fared better than those whose parents tried to keep it a secret, those children who say their parents were always open about their origins, still exhibit an elevated risk of negative outcomes. *Id.* at 12-13.

182. Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES (June 6, 2006), available at <http://www.nytimes.com/2006/06/06/health/06opin.html?pagewanted=all> (last visited Oct. 1, 2013).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Grady, *supra* note 182.

188. *See id.*

As such, the bank was unable to release the donor's name, nor did they have any way to contact him.¹⁸⁹ Despite it being seemingly obvious that F827 was the carrier of SCN, an "ethics panel ruled that his remaining specimens could not be tested without his permission."¹⁹⁰ Accordingly, Dr. Boxer and his colleagues proceeded with advanced genetic testing without using the donor's specimens, and concluded that the donor carried a mutation of the gene involved in causing SCN.¹⁹¹

Similarly, after being unable to conceive a second child, Sharine and Brian Kretchmar of Yukon, Oklahoma also elected the path of AID.¹⁹² However, after their baby boy, Jaxon, failed to have a bowel movement in the first day or so after birth, doctors knew something was wrong.¹⁹³ Jaxon immediately underwent surgery, and the doctors returned with terrible news: Jaxon had cystic fibrosis.¹⁹⁴ It was later discovered that not only did Mrs. Kretchmar carry the gene for cystic fibrosis (a fact previously unknown to her), so, too, did the Kretchmars' donor.¹⁹⁵

The Kretchmars' lives have been irrevocably changed as a result of their son's illness. Cystic fibrosis is a progressive disorder that causes thick, sticky mucus to build up in the lungs and digestive track.¹⁹⁶ Accordingly, everyday Jaxon must take more than twenty pills, needs several nebulizer treatments, and must regularly don a special vest that shakes his torso to help loosen the congestion in his body.¹⁹⁷ The life expectancy of someone with cystic fibrosis is about thirty-seven years.

Sadly, these situations are not unique: a donor in California passed on a hereditary kidney disease; a donor in the Netherlands who fathered eighteen children was later found to have a serious neurological disease that his offspring have a fifty-fifty chance of inheriting;¹⁹⁸ and ten children inherited a deadly heart defect known as hypertrophic cardiomyopathy.¹⁹⁹ In fact, in households everywhere, children conceived with donated sperm are suffering from serious genetic

189. See Grady, *supra* note 182.

190. *Id.*

191. *Id.*

192. Mroz, *supra* note 116.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Mroz, *supra* note 116.

198. Grady, *supra* note 182.

199. Mroz, *supra* note 116.

conditions inherited from men they have never met.²⁰⁰ Though hundreds of cases have been documented, it is likely that there are “thousands more.”²⁰¹

C. *Accidental Incest*

Given the failure to regulate the gamete industry, sperm banks in the U.S. are primarily self-regulating entities. Although some individual banks have elected to limit the number of donations or births per donor, this decision is left to individual sperm banks.²⁰² Typically, a single sperm donation is divided up into multiple donations and sold to numerous recipients.²⁰³

Moreover, apart from voluntary guidelines issued by professional organizations, sperm banks are not required to report the number of live births per donor.²⁰⁴ Rather, sperm banks are solely required to report “pregnancy success rates achieved by such program through each assisted reproductive technology.”²⁰⁵ This means that even *if* a bank were to impose a regulation that limited the number of donations per donor, the donor could go elsewhere.²⁰⁶ As such, a sperm donor can be the biological parent of several children, and the possibility of accidental incest between donor siblings becomes a genuine concern. If that donor is considered a “prime candidate,”²⁰⁷ the likelihood becomes even stronger. And, in the U.S., beyond any voluntary resources (i.e. Donor Sibling registry), donor children have “absolutely no way of knowing how many of them actually share the same biological parent.”²⁰⁸

The chances of accidental consanguinity have become increasingly unsettling. Cynthia Daily and her partner used a sperm donor to conceive a baby eight years ago, with hopes that their son would eventually get to know some of his half siblings – “an extended family

200. Mroz, *supra* note 116.

201. *Id.*

202. Pi, *supra* note 10, at 389.

203. Grady, *supra* note 182.

204. Pi, *supra* note 10, at 389; see Michelle Dennison, *Revealing Your Sources: The Case For Non-Anonymous Gamete Donation*, 21 J. L. & HEALTH 1, 15-16 (2008).

205. 42 U.S.C. § 263a-1 (a)(1) (2011).

206. Dennison, *supra* note 204, at 15 (explaining that “there is no requirement that banks engage in “cross-clinic information sharing”).

207. “Almost every clinic reports having a most-requested donor, whose gametes are so popular with prospective parents that the clinic (and the donor) has trouble keeping up with the demand.” *Id.*

208. *Id.* at 16.

of sorts.”²⁰⁹ So, Ms. Daily searched a Web-based registry created to help connect children fathered by the same donor.²¹⁰ And, as the years went on, Ms. Daily watched the number of children in her son’s group grow.²¹¹ Today, there are 150 children in this group, all conceived from the same donor, and more on the way.²¹²

As such, it is obvious why parents of some of those children now fear that their sons and daughters could one day unknowingly meet up with their half siblings and commit incest. Accordingly, parents have taken measures to hopefully avoid this type of incident: “My daughter knows her donor’s number for this very reason . . . she’s been in school with numerous kids who were born through donors. *She’s had crushes on boys who are donor children.* It’s become part of [her] sex education.”²¹³ However, the aforementioned case of engaging in “sex ed” with one’s daughter is not the “norm.”

In actuality, most mothers who get their sperm elsewhere quite often do not tell their child that their biological father is anyone other than the parent raising them.²¹⁴ Further, even the child’s pediatrician may not be told the truth, as parents “simply, and grossly inaccurately, report their own family and medical histories as the child’s.”²¹⁵ As such, the question is not what will happen *if* persons engage in accidental consanguinity, but rather, what will happen *when* they do. Should these donor children *really* be the ones to blame?

V. CONCLUSION: MOVING FORWARD

In light of these problems, it is clear that the U.S. should follow the lead of Sweden and other nations (including Britain, the Netherlands, and Switzerland), and end the practice of anonymous AID.

Primarily, the concern as to whether this regulation would lead to decreased donations is without merit. Though, even if it were to decrease, the real issue is whether the children’s right to know trumps the donor’s right to privacy. And, if the U.S. were operating on a system of “best interests” of the child, then the answer would undoubtedly be yes – the interest of the child trumps the interest of the

209. Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), available at <http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all> (last visited Feb. 13, 2013).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (emphasis added).

214. Marquardt, *supra* note 8, at 16.

215. *Id.*

donor – always. Studies show that AID causes direct psychological harm to donor children, even more so when those donors are anonymous. Consequently, something needs to be done to help curb those detrimental effects.

In terms of helping those born before the law is changed, a national registry system should be enacted. At minimum, this registry system should provide current AID children unrestricted access to medical information and help them find their biological kin, when mutually agreeable. Moreover, if donor children request medical information about their biological father where good cause is shown (i.e. when it is medically necessary), this information should be made immediately accessible, and efforts to ascertain it should be undertaken by the government.

Moving forward, the U.S. should enact a national health registry system of record keeping to which all banks and “donees” can access. Doctors of donor children should be required to provide any adverse medical updates of these patients to the system. Further, parents and sperm recipients should be required to update this health registry system. Although one could argue that this may place a “high burden” on parents, it is *necessary* to curtail the spread of genetic diseases. So, too, should sperm banks be required to keep detailed records of AID donors, and provide any other updates that may have slipped through the cracks. Also, this registry should be designed to alleviate any fears of an accidental incestuous relationship, and minimize psychological harm experienced by donor-conceived children.

To further reduce the possibility of consanguinity, limits should be placed on the number of children that can be conceived through one donor. More specifically, as suggested by ASRM, in a population of 800,000, a limitation of a single donor to no more than twenty-five children would avoid any significant risk of inadvertent consanguineous conception.²¹⁶ However, if the population were much smaller, the number of children would necessarily need to be proportionally decreased. Accordingly, sperm banks should maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible, and update them in a system to which all banks can gain access. By keeping such records, this would

216. *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, ASRM (Oct. 16, 2012), available at [http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete\(1\).pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf) (last visited Oct. 1, 2013).

eliminate the possibility for the proliferation of one donor's sperm in several banks.

In sum, this seemingly impenetrable veil of secrecy and anonymity in the practice of AID must be eradicated.