




2008

# Revealing Your Sources: The Case for Non-Anonymous Gamete Donation

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## Recommended Citation

Michelle Dennison, Revealing Your Sources: The Case for Non-Anonymous Gamete Donation, 21 J.L. & Health 1 (2007-2008)

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REVEALING YOUR SOURCES: THE CASE FOR NON-ANONYMOUS GAMETE DONATION

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I. INTRODUCTION: THE END OF ANONYMITY?

In late 2005, a very enterprising teenager sent shockwaves through the sperm bank world when he tracked down his biological father using a mail-order DNA kit and a couple of online search engines.<sup>1</sup> His biological father was a sperm donor who

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<sup>1</sup>Alison Motluk, *Anonymous Sperm Donor Traced on Internet*, Newscientist.com, November 3, 2005, <http://www.newscientist.com/article.ns?id=mg18825244.200>. See also Betsy Streisand, *Who's Your Daddy?*, U.S. News and World Report, February 5, 2006, <http://www.usnews.com/usnews/health/articles/060213/13donor.htm>.

had contracted with the fertility clinic to remain anonymous.<sup>2</sup> As such, the teen had access to very little information about him, only the date and place of the man's birth.<sup>3</sup> But the teen wasn't deterred. He took a swab of the inside of his cheek, popped it into a vial and mailed it off to FamilyTreeDNA.com, an online genealogy DNA-testing service, which compared his DNA to other DNA samples on file. The testing located two men with Y chromosomes similar to his own. Neither man was his father, but because the male Y chromosome is passed from father to son virtually unchanged, the similarities between their Y chromosomes suggested that all three shared the same father, grandfather or great-grandfather. More importantly, the two men had the same surname. The teen then turned to Omnitrace.com, where he was able to purchase a list of all the people who had been born in the same place and on the same day as his donor. One man on the list had the same surname as the two men from the DNA registry, and within 10 days the teen had made contact with his biological father.<sup>4</sup>

What happened next between the teen and his donor dad wasn't made public, but his story is illustrative of the major questions facing anonymous gamete donation today.<sup>5</sup> Largely self-regulating fertility clinics in the United States have long operated under the paternalistic assumption that preserving the anonymity of gamete donors is best for all parties involved in the process.<sup>6</sup> Recipients of donated gametes, especially heterosexual couples, may want to present the donor-conceived child to the world as their own biological child, avoid any erosion of their parental rights, and protect the child from any potential stigmatization that might come from revealing the child's true biological origins.<sup>7</sup> Gamete donors, many of them young and not necessarily motivated out of pure altruism,<sup>8</sup> may want to avoid the imposition of parental responsibilities or the potential risk of a resulting donor child derailing their future.<sup>9</sup> But despite these concerns, is anonymity truly the best choice for all

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<sup>2</sup>Motluk, *supra* note 1.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>Streisand, *supra* note 1.

<sup>6</sup>*Id.*

<sup>7</sup>Glenn McGee, Sarah-Vaughan Brakman, & Andrea D. Gurmankin, *Gamete Donation and Anonymity*, 16 HUMAN REP. 2033, 2035 (2001); *see also* Ken Daniels, *Donor Gametes: Anonymous or Identified?*, 21 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS AND GYNAECOLOGY 113, 115-118 (2007).

<sup>8</sup>One man gave the following reasons for donating: "I was totally penniless and I needed a small regular income with which to continue [my] job search. The alternative was to become an accountant but more interesting jobs take time to get. I don't really mind about contributing to conception although perhaps I would prefer not to)." Ken Daniels, *The Social Responsibility of Gamete Donors*, 8 J. COMMUNITY APPLIED SOC. PSYCHOL. 261, 261 (1998). One current donor at the California Cryobank was a bit more succinct. When asked why he wanted to donate, his answer was simply "Money." California Cryobank, *Donor Essay 431*, available at <http://www.cryobank.com/search/pdfs/essay/431.pdf> (last visited September 3, 2007).

<sup>9</sup>Daniels, *supra* note 7, at 118-19; *see generally* Motluk, *supra* note 1 (imagine how surprised the donor was when a teenager claiming to be his son showed up on his doorstep).

involved? A confluence of recent events, including technological advances making DNA tracing more accessible, a 2000 California Court of Appeals decision that weakened donor privacy rights,<sup>10</sup> an increase in vocal donor-conceived children, and the trend towards openness in adoption laws, suggests that there is a growing need to reexamine this policy of anonymity.

This article argues that both legislating the end of anonymous gamete donation and allowing current children of anonymous gamete donation the ability to access identifying information about their donors is in the best interests of all parties involved in the donation process. Recipient-parents<sup>11</sup> and donor-conceived children will benefit from having increased access to their donor's health information. Records access, including access to a donor's identifying information, will help donor-conceived children avoid potential incest and what is sometimes termed in adoption cases "genealogical bewilderment." Finally, banning anonymous donation will give potential gamete donors the ability to make a truly informed decision before donating, because, as evidenced by the teenager and his DNA kit, it is nearly impossible for anonymity contracts to truly guarantee that anonymity.

Part I of this article begins with a discussion of why the use of donor gametes for reproduction has historically been enveloped in such secrecy, and how that secrecy has gradually begun to erode. Part II looks at the movement towards non-anonymous donation in other countries and examines how this movement has taken hold in this country. Part III considers the interests of the donor-conceived children, the recipient-parents, and the donors. It makes the comparison between donor-conceived children and adoptees, and also discusses how a donor's right to privacy is potentially diminished by the very act of donating. The article will conclude with a proposal for legislation that would prevent future donor anonymity, mandate better record-keeping, and extend the "for good cause" standard that many states currently apply to adopted children in records access cases to donor-conceived children.

One important note: there are essentially two steps involved in the donor-conceived child's ability to discover the identity of his or her gamete donor.<sup>12</sup> The first is telling the child the circumstances surrounding the child's conception.<sup>13</sup> The second is in the child's ability to access information about the gamete donor,

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<sup>10</sup>Johnson v. Superior Ct., 80 Cal. App. 4th 1050 (Ct. App. 2000). See *infra* note 154.

<sup>11</sup>Use of the word "parent" in this article will mean the person who is intended to be the legal parent of the child. "Recipient" is used interchangeably with "parent" since the person who receives the donated gamete is usually the person who intends to be the legal parent of the child. (This obviously excludes surrogacy cases, which are beyond the scope of this article.)

<sup>12</sup>An in-depth discussion of the child's right to be told that they were conceived via donor gamete can be found in the following articles: Lucy Frith, *Beneath the Rhetoric: The Role of Rights in the Practice of Non-Anonymous Gamete Donation*, 15 *BIOETHICS* 473, 473-484 (2001) [hereinafter Frith, *Beneath the Rhetoric*]; Robin Rowland, *The Social and Psychological Consequences of Secrecy in Artificial Insemination by Donor (AID) Programmes*, 21 *SOC. SCI. MED.* 391, 391-96 (1985); see also Patricia Hershberger, Susan Klock & Randall Barnes, *Disclosure Decisions Among Pregnant Women Who Received Donor Oocytes: A Phenomenological Study*, 87 *FERTILITY & STERILITY* 288, 288-96 (2007).

<sup>13</sup>Frith, *Beneath the Rhetoric*, *supra* note 12, at 476.

including donor-identifying information.<sup>14</sup> While the second step is clearly dependent on the first—donor-conceived children must first be told *where* they came from before they can proceed to find out *who* they came from—this first step of initial disclosure about conception is, in my opinion, a decision that should be left only to the parents of the child.<sup>15</sup> Although disclosure to the child is a highly recommended part of the gamete donation process,<sup>16</sup> statutorily requiring a parent to disclose information about the child’s conception would open the door for additional infringements on parental privacy rights, which have always been heavily protected by the states.<sup>17</sup> Therefore, despite its obvious importance to the policy changes proposed in this article, the topic of initial disclosure to the child is outside the scope of this discussion. But because parents are increasingly encouraged to make this initial disclosure to their donor-conceived children, the assumption is made that disclosure is or will soon be the norm, and this article will instead focus on the second issue presented: the donor-conceived child’s right to access identifying information about his or her gamete donor.

## II. THE EVOLUTION OF ATTITUDES TOWARDS THE USE OF DONOR GAMETES

The use of donor gametes<sup>18</sup> for conception has been surrounded by secrecy and anonymity from the very beginning.<sup>19</sup> One of the first recorded instances of donor insemination (DI), the use of donated sperm for fertilization, is perhaps an extreme example:

Dr. William Pancoast . . . while teaching a class at Jefferson Medical College in 1884, discussed a situation in which the male in a couple was discovered to be azoospermic and the female was found to be perfectly capable of bearing children. The students in the class suggested that a “hired man” be called in to solve the problem. Dr. Pancoast then took a semen sample from the “best looking member of the class” and inseminated the woman without her consent and while she was

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<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>See Ethics Comm. of the Am. Soc’y for Reprod. Med., *Informing Offspring of their Conception by Gamete Donation*, 81 FERTILITY STERILITY 527, 527-31 (2004) [hereinafter Ethics Comm.]. It should also be noted that the choice to disclose the use of a donor is one that affects primarily heterosexual couples—for single people and homosexual couples, the use of a donor is a bit more obvious. This could give rise to a discussion of the disparate rights of donor-conceived children based on their parentage, but that is beyond the scope of this article.

<sup>17</sup>See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (Recognizing the right of an individual to “contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience”).

<sup>18</sup>Since the use of donor oocytes is a relatively new procedure, most of this article’s discussion on the history of the use of and attitudes towards donor gametes necessarily centers on donor insemination.

<sup>19</sup>Daniels, *supra* note 7, at 114.

anaesthetized. The doctor later reluctantly told the husband and was relieved to find he approved of the doctor's actions, but suggested that his wife not be told.<sup>20</sup>

All the participants involved in the process of gamete donation initially seemed to have something they wanted to hide: donors did not want to be revealed to the parents or to the child; parents did not want to reveal the use of a donor to the child or to anyone else beyond their doctor; and, as evidenced by Dr. Pancoast, sometimes even the doctor did not even want to reveal the use of donor gametes to the parents.<sup>21</sup>

The secrecy associated with the use of donor gametes stems perhaps from the social attitudes of the late 19th and early to mid 20th centuries.<sup>22</sup> At the time, infertility itself was stigmatized as a sort of personal failure, and use of any kind of assisted reproductive technology (ART) for conception was viewed with extreme skepticism.<sup>23</sup> The use of donated sperm in the DI process was particularly subject to controversy. The practice was unequivocally condemned by both the Catholic Church and the Church of England, and it stirred up great alarm in contemporary philosophers and moralists.<sup>24</sup> A professor in Virginia summed up his rather vehement opposition in a 1948 article that called for the end of DI altogether: “[o]ur social order is built on the nucleus of the family growing from the marriage of one man and one woman for life to the exclusion of all others. Why should a society built on such foundations...[be] weakened by recognition of a practice which is unnecessary and to say the least, legally and socially problematical?”<sup>25</sup>

One of the reasons the use of donated sperm caused so much controversy was that it was seen as tantamount to adultery.<sup>26</sup> This was reflected in a divorce case that came before the Ontario courts in 1921, in which the wife, in an attempt to avoid charges of adultery, claimed to have undergone artificial insemination with donor sperm without her husband's consent.<sup>27</sup> The presiding judge chose not to believe the wife's claim, but stated that even if she truly had become pregnant via artificial insemination, she still would have been found guilty of adultery.<sup>28</sup> Although the

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<sup>20</sup>*Id.*

<sup>21</sup>*Id.* The current reasoning for donor and parental secrecy will be discussed later in the article. See *infra* Section IV.B.C. Secrecy from the doctor is fortunately illegal. See generally *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES, Mar. 1, 1992, available at <http://nytimes.com> (“A federal jury today convicted an infertility specialist on 52 counts of fraud and perjury for artificially inseminating unwitting patients with his own sperm and for telling patients they were pregnant when they were not.”)

<sup>22</sup>Daniels, *supra* note 7, at 114-16.

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

<sup>24</sup>Joseph H. Greenberg, *Social Variables in Acceptance or Rejection of Artificial Insemination*, 16 AM. SOC. REV. 86, 87. (1951). As an interesting historical side note, this article also stated that DI caused “visionary eugenicists” to “[hail] the prospects for a brave new world of super-people.” *Id.* This was listed as a point in favor of DI. *Id.*

<sup>25</sup>J. G. P., *Artificial Insemination versus Adoption*, 34 VA. L. REV. 822, 824 (1948).

<sup>26</sup>Daniels, *supra* note 7, at 115.

<sup>27</sup>G.W. Bartholomew, *Legal Implications of Artificial Insemination*, MOD. LAW REV. 236, 238 (May 1958).

<sup>28</sup>*Id.* at 239.

final decision did not require it, the judge felt the need to include in the ruling his opinion of DI, stating that “sexual intercourse [with anyone other than the spouse] is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which [introduces a false strain of blood into the family] would therefore be adulterous.”<sup>29</sup>

Adding to the moral unease associated with DI were uncertainties about the legal implications for the donors, the recipients and the resulting children.<sup>30</sup> For many years, the children conceived through DI were considered illegitimate.<sup>31</sup> A 1954 opinion from the Superior Court of Cook County went so far as to say that DI was “contrary to public policy and good morals . . . A child so conceived is not a child born in wedlock and is therefore illegitimate. As such, it is the child of the mother and the father has no right or interest in said child.”<sup>32</sup> Obviously, these social pressures and legal opinions all fed into the general desire to keep the use of donated sperm as much of a secret as possible.<sup>33</sup>

Evidence that attitudes were slowly beginning to change, at least in the United States, appeared in the mid-1960’s when Georgia became the first state to pass a statute legitimizing children conceived by DI, on the condition that both the husband and wife consented in writing.<sup>34</sup> In 1968, the California Supreme Court became among the first to rule that a DI child was legitimate, and not the product of an illicit or adulterous relationship.<sup>35</sup> Shortly thereafter, in 1973, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Parentage Act, which included a provision that stated if a wife was artificially inseminated with donor semen under a physician’s supervision, and with her husband’s consent, the law should treat the husband as if he were the natural father of the DI child.<sup>36</sup>

While these legal events played a major role in changing the public attitude towards DI, it was the 1978 birth of the first “test-tube baby,” Louise Brown, that

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<sup>29</sup>*Id.*

<sup>30</sup>Daniels, *supra* note 7, at 115.

<sup>31</sup>See *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963); *see also Doornbos v. Doornbos*, 139 N.E.2d 844 (Ill. App. Ct. 1956).

<sup>32</sup>Bartholomew, *supra* note 27, at 240-41.

<sup>33</sup>Daniels, *supra* note 7, at 116.

<sup>34</sup>See GA. CODE ANN. § 19-7-21 (West 2007) (“All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination.”).

<sup>35</sup>*People v. Sorensen*, 437 P.2d 495, 501 (Cal. 1968). The court further stated that “Adultery is defined as the voluntary sexual intercourse of a married person with a person other than the offender’s husband or wife. It has been suggested that the doctor and the wife commit adultery by the process of artificial insemination. Since the doctor may be a woman, or the husband himself might administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may be even dead, is equally absurd.” *Id.* at 501.

<sup>36</sup>Uniform Parentage Act § 5(a) (1973).

was arguably the biggest catalyst for the shift in the way all ART methods in general were viewed.<sup>37</sup> Brown's birth served as a very public announcement of the successful use of in-vitro fertilization, and it signaled the beginning of wider acceptance of the use of ARTs.<sup>38</sup> As more and more ART methods were developed, they were accompanied by extensive media coverage, which invariably included personal stories of successful treatment, and started a faster erosion of the stigma associated with both infertility and the use of many "unconventional" methods of reproduction, including gamete donation.<sup>39</sup>

### III. CURRENT REGULATION OF GAMETE DONOR ANONYMITY

Many countries, sensing this shift in attitude towards ART methods and realizing the potential need for regulation in this area, have established committees to report and advise on how developments in ART might best be managed.<sup>40</sup> These committee reviews have, of course, included gamete donation. The discussion invariably has centered on donor anonymity because, although the actual use of donated gametes for assisted reproduction has gained fairly widespread acceptance, as stated earlier, the prevailing industry view is that the gamete donor should remain anonymous.<sup>41</sup> One researcher even commented that donor semen should be regarded as "material from an anonymous testis, the donor actually being a non-person."<sup>42</sup> In fact, in the majority of countries that allow gamete donation still endorse, and in some cases require, donor anonymity.<sup>43</sup> However, as more and more donor-conceived children (some even joined by their parents) have started to speak up and demand access to information about their donors, and as donors themselves have started to come forward, there has been a discernible trend in recent years to allow donor-conceived children access to information about their gamete donor. This trend has been reflected both by changing laws in a number of foreign countries,<sup>44</sup> and changing private regulation here in the United States.

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<sup>37</sup>Daniels, *supra* note 7, at 115.

<sup>38</sup>*Id.* see generally Robin Marantz Henig, PANDORA'S BABY 134 (2004).

<sup>39</sup>Daniels, *supra* note 7, at 116. See generally Lindsey Gruson, *First American 'Test Tube' Twins Are Born On L.I.*, N.Y. TIMES, Mar. 25, 1983, available at <http://nytimes.com>.

<sup>40</sup>Daniels, *supra* note 7, at 115.

<sup>41</sup>*Id.* at 116.

<sup>42</sup>Daniels, *supra* note 7, at 118

<sup>43</sup>Lucy Frith, *Gamete Donation and Anonymity, The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 818-19 (2001) [hereinafter Frith, *Gamete Donation and Anonymity*]. France, Denmark and Norway do not allow donor offspring access to any information about their conception. *Id.*

<sup>44</sup>"[N]one of the countries, which have adopted a policy of non-anonymous donation, have formalised a system for ensuring that children know how they were conceived; the decision to inform the child of the nature of its conception is left to the parents." Frith, *Beneath the Rhetoric*, *supra* note 12, at 477.



*A. Current Anonymity Regulation Abroad*

Sweden became the first country to legally regulate gamete donation in 1985 when it removed the anonymity of sperm donors.<sup>45</sup> Law No. 1140 allows donor-conceived children in Sweden to receive identifying information about their sperm donor when “sufficiently mature.”<sup>46</sup> Under this law, children are able to not only access the identity of the donor, but also information about hair color, physique and profession.<sup>47</sup> The law stemmed from the application of studies of the welfare of adopted children and of their wishes to learn about their biological roots to the similar desires of donor-conceived children.<sup>48</sup>

Shortly thereafter, in 1989, the United Nations Convention on the Rights of the Child recognized the “right to know one’s parents” as a fundamentally important human right.<sup>49</sup> This convention was, at that point, the most widely and rapidly signed convention on human rights in the history of the United Nations.<sup>50</sup> This “right to know one’s parents” has been viewed by many proponents of disclosure to include the right to know one’s gamete donors, and has since served in several countries as the basis of laws to that effect.<sup>51</sup> As one delegate claimed, “[i]ncreased knowledge and a gradual shift in attitudes has enabled us to acknowledge that in our contemporary culture young people have strong moral claims to know their genetic identities. It is now time for these moral claims to be converted to legal rights.”<sup>52</sup>

Donor-conceived offspring in Austria were granted access to identifying donor information after the passage of federal legislation on medically assisted procreation

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<sup>45</sup> Claes Gottlieb, Othon Lalos & Frank Linblad, *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples’ Attitudes*, 17 HUM. REPROD. 2052, 2052 (2000).

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

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* This study of parental attitudes towards disclosure in Sweden notes that while donor-conceived children have the right to identifying information about their donor, there is no indication in the law about who is supposed to tell the child that they are the product of sperm donation. *Id.*

<sup>49</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 820; *see also* Michael Freeman, *The New Birth Right?*, 4 INT’L J. CHILD. RTS 273, 285 (1996). Article 7, § 1 of the Convention on the Rights of the Child provides that “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” Further support of donor disclosure might also be found in Article 8, §§ 1-2, which state that “[s]tate [p]arties 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. 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.” Convention on the Rights of the Child, G.A. Res. 44/25, at 3, U.N. GAOR, 44th Sess., 61st mtg., U.N. Doc. A/RES/44/25 (Dec 5, 1989).

<sup>50</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 320.

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

<sup>52</sup>*Id.*

in 1992.<sup>53</sup> That same year, Switzerland amended its constitution by referendum to guarantee donor-conceived children the right to access “data concerning [their] lineage” and the ability to receive identifying information about the child’s donor.<sup>54</sup> Germany, The Netherlands, Holland, New Zealand, Western Australia, Southern Australia, and Victoria, Australia all have passed similar legislation that abolishes donor anonymity and entitles donor-conceived children to receive identifying information about their donor.<sup>55</sup> In a variation, Iceland permits both anonymous and non-anonymous donation.<sup>56</sup> Donors who do not want any information released to the recipient or the resulting child must, however, specifically request anonymity.<sup>57</sup> If the donor does not request anonymity, then the Icelandic clinic can release identifying information to the offspring when the child reaches the age of eighteen.<sup>58</sup>

After years of extensive review of the existing laws and open consultation with both the public and fertility clinics, the United Kingdom moved to ban gamete donor anonymity in 2004.<sup>59</sup> Originally, the United Kingdom’s Human Fertilisation and Embryology Authority (HFEA), the body that regulates the country’s gamete donation process, kept a record of all registrations, treatments and outcomes resulting from reproductive techniques, but these records were all kept confidential.<sup>60</sup> Before the passage of the 2004 law, donor-conceived children could request non-identifying information about their donors and could find out if they were related to a person with whom they wish to have children or marry.<sup>61</sup> The new law provides that donor-conceived children can, at the age of eighteen, request both identifying and non-identifying information about their donor from the HFEA.<sup>62</sup> Donors have no financial or legal obligations to the resulting children and the law imposes no

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<sup>53</sup>*Id.* The laws in Sweden and Austria both only involve sperm donation as oocyte donation is not allowed in either country. *Id.* at 819.

<sup>54</sup>*Id.*

<sup>55</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 819. *See also* Freeman, *supra* note 49, at 285.

<sup>56</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 819.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>Christopher De Jonge and Christopher L.R. Barratt, *Gamete Donation: A Question of Anonymity*, 85 FERTILITY & STERILITY 500 (2006).

<sup>60</sup>The HFEA Register—For Donors, Human Fertilisation & Embryology Authority, <http://www.hfea.gov.uk/en/1213.html> [hereinafter The HFEA Register—For Donors (last visited April 27, 2007)]. The HFEA Register was started in 1991. *Id.*

<sup>61</sup>The HFEA Register—For Donors, *supra* note 60. This information is still, fortunately, available to donor-conceived children who cannot access identifying information because of the non-retroactivity of the 2004 law. *See* Human Fertilisation and Embryology Act, 1990, c. 37, §§ 31-37.

<sup>62</sup>The HFEA Register—For Donors, *supra* note 60. Donors themselves also have access to some information about the children that resulted from their donation, including the number of children born, the number of girls and boys, and the years they were born. *Id.*

requirement to reciprocate any contact with the children.<sup>63</sup> The law was passed non-retroactively and took effect on April 1, 2005.<sup>64</sup>

*B. Anonymity Regulation in the United States*

While infertility rates appear to be holding steady in the United States,<sup>65</sup> affecting 13-14% of reproductive-aged couples, the demand for infertility services such as gamete donation has increased substantially.<sup>66</sup> The increased demand for gamete donation in particular may stem from a number of factors, including the current trend for people to wait until they are older to attempt to conceive, and the growing numbers of gay and lesbian couples and single women who want to have biological children of their own.<sup>67</sup> It is estimated that 30,000 children are born each year in the United States from anonymous sperm donation and another 5300 born from oocyte donation.<sup>68</sup> Yet even with these significant numbers there is currently no federal or state legislation that either prohibits or enforces anonymity in gamete donation.<sup>69</sup>

Many of the existing laws surrounding the use of ARTs (including, of course, gamete donation) in the United States take a laissez-faire approach.<sup>70</sup> For the most part, those who wish to utilize ARTs and can afford it have the ability to try whatever services fertility clinics offer, and fertility clinics have the ability to offer whatever services interest their clients.<sup>71</sup> With the exception of a number of FDA screening requirements for certain genetic and communicable diseases, existing laws almost exclusively center around the parentage of children born through ART methods, providing in almost all cases that the recipients of the donated gamete are the legal parents of the donor-conceived offspring and that the donor has no parental rights or obligations.<sup>72</sup> Many contend that the use of ARTs falls under the

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<sup>63</sup>FAQs for Donors, Human Fertilisation & Embryology Authority, <http://www.hfea.gov.uk/en/1205.html> (last visited Sept. 7, 2007).

<sup>64</sup>DeJonge & Barratt, *supra* note 59, at 501.

<sup>65</sup>See Markku Sallmen, et. al., *Has Human Fertility Declined Over Time?: Why We May Never Know*, 16 EPIDEMIOLOGY 4, 494 (2005) (suggesting that recent studies that indicate changes in fertility rates may return biased numbers because they fail to take into account the increased use of contraception and the availability of abortion in their methodology.)

<sup>66</sup>John C. Petrozza, M.D., et al., *Assisted Reproduction Technology*, EMEDICINE July 20, 2006, <http://www.emedicine.com/med/topic3288.htm> (last visited July 20, 2006).

<sup>67</sup>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>.

<sup>68</sup>CDC, *2004 Assisted Reproductive Technology (ART) Report*, Centers for Disease Control and Prevention, 2004, available at <http://www.cdc.gov/ART/ART2004/>.

<sup>69</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 821. Regulation comes from professional guidelines, which are non-legally binding. *Id.*

<sup>70</sup>Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 413 (2004).

<sup>71</sup>*Id.*

<sup>72</sup>See ALASKA STAT. § 25.20.45 (2006); CAL. FAM. CODE § 7613(a) (West 2007); FLA. STAT. ANN. § 742.14 (West 2007); GA. CODE ANN. § 53-2-5 (West 2007); 750 ILL. COMP. STAT. ANN. § 40/2 (West 2007); N.J. STAT. ANN. § 9:17-44(a) (West 2006); N.M. STAT. ANN.

constitutionally protected category of privacy in reproductive choice, therefore justifying this *lassiez-faire* regulation.<sup>73</sup>

A small number of states have attempted to pass legislation that would introduce greater legislative control over gamete donation. One legislator in Virginia recently presented a bill that would completely prohibit anonymous gamete donation.<sup>74</sup> The bill would have required that the identity of the donor of any gamete used in conception be “noted in the health record” of the woman receiving the gamete.<sup>75</sup> The bill never made it out of the legislative subcommittee, having been resoundingly voted down, 6-1.<sup>76</sup> A recently proposed Michigan bill would require licensed fertility clinics to provide sperm donors with the option to sign a contract that would authorize the clinic to reveal the donor’s information to the child who was conceived through the artificial insemination process.<sup>77</sup> The information could not be released to the parents of the donor-conceived child, and would only be released once the child has reached the age of eighteen.<sup>78</sup> The bill was introduced in early 2006, and as of early 2007, was still awaiting discussion in sub-committee.<sup>79</sup> But there are at least eighteen states that have enacted legislation that will permit donor-conceived children to obtain gamete donor information on court order, based on a satisfactory showing of “good cause” or a similar standard.<sup>80</sup> In these states, the courts must weigh the interests of the parties involved to determine what meets the “good cause” standard that would warrant disclosure, and determine what information should exactly be disclosed. The importance of these statutes to this article’s suggested policy changes will be discussed in the final section of this article.

Although the legal steps taken have been virtually non-existent, the movement towards non-anonymous gamete donation has, however, made a noticeable impact in the private sector. Almost all fertility clinics in the United States now offer detailed, non-identifying information about the potential donor’s characteristics and medical

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§ 40-11-6 (West 2007); OR. REV. STAT. ANN. § 109.239 (West 2007); VA. CODE ANN. § 20-158 (West 2007).

<sup>73</sup>Appleton, *supra* note 70, at 413.

<sup>74</sup>H.D. 412, 2006 Gen. Assemb., 2006 Sess. (Va. 2006). The bill was introduced by Delegate Robert G. Marshall who was inspired to write the bill after seeing a child wearing a shirt that said “My dad’s name is Donor” and thinking, “That’s pathetic.” Dena Potter, *Bill Would End Anonymity of Future Sperm Donors*, THE WASHINGTON TIMES (Jan. 29, 2007).

<sup>75</sup>H.D. 412, 2006 Gen. Assemb., 2006 Sess. (Va. 2006).

<sup>76</sup>*Identity of Sperm Donors to Remain Confidential*, CBS 6-WTVR, Richmond, Va. (Feb. 1, 2007), available at <http://www.wtvr.com/Global/story.asp?S=6004357&nav=0hBe>.

<sup>77</sup>H.R. 5605, 93rd Leg., 2006 Sess. (Mi. 2006).

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

<sup>79</sup>Michigan Legislature Website (2006), <http://www.legislature.mi.gov> (search “Bill Number” for “House Bill 5605”). Most likely, it died in committee.

<sup>80</sup>*See*, ALA. CODE § 26-17-21(a) (2007); CAL. FAM. CODE § 7613(a) (2007); COLO. REV. STAT. ANN. §19-4-106(1) (West 2007); MO. ANN. STAT. §210.824.01 (West 2007); MONT. CODE ANN. §40-6-106(1) (2006); NEV. REV. STAT. ANN. § 126.061.1 (West 2007); N.M. STAT. ANN. § 40-11-6(C) (West 2007).

history.<sup>81</sup> Even more notable is the growing number of clinics that have begun to offer recipients the choice of gametes from donors who agree to be identified.<sup>82</sup> In many of these programs, the donor signs a contract that allows the clinic to release identifying information to any resulting children at a later date if the child requests it.<sup>83</sup> The Sperm Bank of California, for instance, claims to be one of the first fertility clinics to institute an “Identity-Release Program,” which provides adult donor-conceived offspring with the option of learning their donor’s identity.<sup>84</sup> Donors to the Sperm Bank can choose if they want to be identified in the future, and recipient parents have the ability to choose anonymous or “Identity-Release” gametes for conception.<sup>85</sup> Other clinics, such as the Rainbow Flag Health Services, offer exclusively non-anonymous gamete donation, and require the recipient-parent to contact the donor soon after the child’s birth.<sup>86</sup>

Donors, parents, and donor-conceived children have also taken their own steps to initiate contact. Many have created websites stating their willingness to communicate and provide any information that might be desired from any party.<sup>87</sup> One of the first and perhaps the most comprehensive of these websites is the Donor Sibling Registry, which attempts to match donor-conceived children with both their gamete donor and potential half-siblings.<sup>88</sup> The site allows parents, children and donors to enter their contact information and search for others by fertility clinic and donor number.<sup>89</sup> As of mid-2007, the Donor Sibling Registry reported 9,247 members and more than 3809 matches between half-siblings or donors.<sup>90</sup>

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<sup>81</sup>Ethics Comm., *supra* note 16, at 529.

<sup>82</sup>It is also interesting to note that many of these clinics pay more and charge more for non-anonymous gametes. California Cryobank charges an extra \$100 per vial if a recipient would like to purchase “open donor” (non-anonymous) sperm, and compensates donors an extra \$700 for committing to contact with the resulting children. *See* Ethics Comm., *supra* note 16, at 529; *see also* Donor Semen Fee Schedule, California Cryobank, [http://www.cryobank.com/fees\\_ds.cfm?page=9](http://www.cryobank.com/fees_ds.cfm?page=9) (last visited April 24, 2007); CCB Open Donors, California Cryobank, <http://www.cryobankdonors.com/newdonors/index.cfm?ID=19> (last visited April 24, 2007). Donors receive \$200 when they qualify for the program and an additional \$500 when they pass their final blood test. *Id.* They still only receive the regular fee of \$75 per “deposit.” *Id.*

<sup>83</sup>Ethics Comm., *supra* note 16, at 529.

<sup>84</sup>Identity-Release Program, The Sperm Bank of California, [www.thespermbankofca.org/idrelease.html](http://www.thespermbankofca.org/idrelease.html) (last visited April 27, 2007).

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

<sup>86</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 821; Rainbow Flag Health Services Home Page, <http://www.gayspermbank.com> (last visited Sept. 8, 2007). Rainbow Flag Health Services informs the mother of the sperm donor’s identity when the child is three months old and asks that the mother contact the donor before the child’s first birthday. *Id.*

<sup>87</sup>Ethics Comm., *supra* note 16, at 529.

<sup>88</sup>Donor Sibling Registry Home Page, <http://www.donorsiblingregistry.com> (last visited Sept. 4, 2007).

<sup>89</sup>*Id.* A recent series in the New York Times recounted how donor siblings born from California Cryobank’s Donor 150 made contact with each other through the registry. Amy Harmon, *Sperm Donor Father Ends His Anonymity*, N.Y. TIMES, Feb. 14, 2007, *available at*

## IV. ANONYMITY: TRULY THE BEST CHOICE FOR EVERYONE INVOLVED?

Even though there has been a noticeable movement in favor of non-anonymous gamete donation, where donor-conceived children are able to access identifying information about their donors, anonymous donation is still both the norm and the method preferred by most donors and parents.<sup>91</sup> But is this really the best choice for the donor-conceived child? Or even, in light of ever-evolving technology, the donor? An examination of the interests and rights of all the parties involved in the gamete donation process—the children, the parents and the donors—reveals that the arguments in favor of this preference for anonymity may be on shaky ground, and that mandated non-anonymity should become the new norm.

A. *Donor-Conceived Children's Interests in Non-Anonymous Gamete Donation and the Ability to Access Donor Information*

Many donor-conceived children have expressed frustration and anger about their lack of information about their gamete donor, and the fact that the parents and donors have contracted away the child's ability to access this information.<sup>92</sup> Suzanne Rubin, one of the first donor-conceived children to publicly address the issue, has written:

Artificial insemination sounds wonderful in the textbooks, but what it can do to human lives is something else. By encouraging very young, very immature and very shortsighted males to become sperm donors, you are creating countless triads of husband and wife and donor. Unfortunately, the missing component is the child. No one considers how the child feels when she finds that her natural father was a \$25 cup of sperm. The fantasies revolve around what the donor was thinking while he was filling the cup. There is no passion, no human contact...just cold calculation and manipulation of another person's life.<sup>93</sup>

Obviously, donor-conceived children who share this point of view would like to see the current system of anonymity come to an end. But even those who are not quite as diametrically opposed to the practice of gamete donation itself would still like to be able to have more information about their donors.<sup>94</sup> The reasons donor-

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<http://www.nytimes.com>. Donor 150 happened to read the initial story in the Times and made contact with the children as a sort of "Valentine's Day gift" to them. *Id.*

<sup>90</sup>Donor Sibling Registry Home Page, <http://www.donorsiblingregistry.com> (last visited Sept. 4, 2007).

<sup>91</sup>Sexual orientation appears to be the greatest determinant of which recipient parents will choose anonymous or non-anonymous gametes. Tracy Hampton, *Anonymity of Gamete Donations Debated*, 294 J. AM. MED. ASS'N 2681, 2682 (2005). One recent study showed that 68% of homosexual couples chose non-anonymous gametes. *Id.* Another recent study found that the vast majority of heterosexual couples chose anonymous gametes. *Id.*

<sup>92</sup>*Id.* One donor-conceived child stated "Nobody has the right to withhold information about us from us . . . We are human beings. And if we are not allowed to know who we are and where we come from, we will be angry." *Id.*

<sup>93</sup>Rowland, *supra* note 12, at 395. Obviously, some inflation in the price of sperm has happened since this letter was written. See Donor Semen Fee Schedule, California Cryobank, [http://www.cryobank.com/fees\\_ds.cfm?page=9](http://www.cryobank.com/fees_ds.cfm?page=9) (last visited April 24, 2007).

<sup>94</sup>Streisand, *supra* note 1. One article notes that donor-conceived children "aren't interested in money or even an ongoing relationship. Finding their fathers is more about understanding a look, a mannerism, similar tastes, a connection." *Id.*

conceived children point to for wanting to end gamete donor anonymity can be divided into three main categories: health concerns, consanguinity concerns, and psychological concerns.

### 1. Health Concerns

Compelling arguments have been made in favor of disclosure if the donor-conceived child's health is at risk.<sup>95</sup> As genetics have started to play a larger role in the diagnosis and treatment of disease, it is becoming increasingly crucial to have information about one's genetic history.<sup>96</sup> Disclosure proponents argue that donor-conceived children should have access to their donor's information in order to determine if there is a chance that they will develop certain genetically inherited diseases, or in order to make diagnosis and treatment of existing diseases easier.<sup>97</sup> If information about their donor is not available, the child risks being misdiagnosed, or the child could forego important medical care or undergo unnecessary medical treatment.<sup>98</sup>

On the other hand, recipients already have increased access to non-identifying information about prospective donors, including detailed family health histories.<sup>99</sup> "I've been married to my wife for 38 years and she doesn't even know as much about me as parents know about their donors with our long-form medical history," claims the founder of California Cryobank, a sperm bank that offers the recipient-parents the ability to view the donor's self-completed medical history records before choosing a donor.<sup>100</sup> It is therefore arguable that the health concern for wanting donor identity disclosure can be alleviated with a combination of more stringent screening of donors and careful selection on the part of the parent.<sup>101</sup>

Additionally, advances in decoding the human genome have increased the accessibility of comprehensive genetic testing.<sup>102</sup> Today, donated gametes are screened more than ever before for an even greater variety of inheritable diseases and characteristics.<sup>103</sup> This screening is presumably a more effective method of gaining knowledge about genetic predispositions for certain diseases than individual donor

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<sup>95</sup>De Jonge & Barratt, *supra* note 59, at 501.

<sup>96</sup>McGee et al., *supra* note 7, at 2034.

<sup>97</sup>De Jonge & Barratt, *supra* note 59, at 501.

<sup>98</sup>McGee et al., *supra* note 7, at 2034-35.

<sup>99</sup>*See generally* California Cryobank Donor Catalog, California Cryobank, <http://www.cryobank.com/catalog/indexb.CFM> (last visited Sept. 2, 2007) (long donor profile contains extensive (albeit self-reported) donor family health history; available to prospective recipients for a fee).

<sup>100</sup>Mary Crane, *The Business of Love: Sperm For Sale*, FORBES, Feb. 9, 2007 available at <http://www.forbes.com>.

<sup>101</sup>There is definitely an argument here for pre-conception genetic counseling, although that could verge into designer baby issues, and is really off-topic.

<sup>102</sup>De Jonge & Barratt, *supra* note 59, at 501.

<sup>103</sup>*Id.*

identification could ever provide, since donors themselves may be limited in their knowledge of their own family health history.<sup>104</sup>

Despite these advances, many professional medical associations still recommend that fertility clinics both maintain accurate, updated and detailed donor records and have these donor records available for release to donor-conceived children. For example, the American Society for Reproductive Medicine's 2006 Guidelines for Gamete and Embryo donation require that clinics keep permanent records of donor screening and selection data, donor examinations and clinical outcomes, which are to serve as a future medical resource for any resulting children.<sup>105</sup> The American Medical Association calls for maintaining permanent records with identifying and non-identifying health and genetic screening of gamete donors<sup>106</sup> and the American Association of Tissue Banks has published data collection and record keeping standards for sperm banks.<sup>107</sup> Even in light of the current level of screening performed by clinics and the increased accessibility of genetic testing, by calling for the availability and the release of donor information, medical experts lend credence to the argument that consideration of the donor-conceived child's health is still a strong reason for ending donor anonymity.

## 2. Consanguinity Concerns

Although it may sound initially far-fetched, incest between donor siblings actually proves to be a genuine concern for donor-conceived children. As was already noted above, there is very little federal or state regulation in the donor industry, so the clinics themselves are essentially self-regulating.<sup>108</sup> This means that the clinics are free to choose whether or not they want to set limits on the number of times that a donor can make a "deposit." One gamete donor can therefore be the biological parent of multiple children.<sup>109</sup> This is especially true in the case of sperm donors, where a single donation can be divided up and sold to numerous recipients.<sup>110</sup>

To illustrate, 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.<sup>111</sup> A recent search on Donor Sibling Registry showed that one particular donor, number 1476 of the Fairfax Cryobank, is the biological father of at least 36 children, all born between 2002 and 2007—and these

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<sup>104</sup>*Id.*

<sup>105</sup>Practice Comm. of the Am. Soc'y for Reprod. Med., *2006 Guidelines for Gamete and Embryo Donation*, 86 FERTILITY STERILITY S38, S42-S45 (2006).

<sup>106</sup>Ethics Comm., *supra* note 16, at 529.

<sup>107</sup>*Id.* A number of other countries, including those that still allow anonymous donation, have maintained national registries of donors that serve as a mechanism for tracking a donor should the child inherit a disease. De Jonge & Barratt, *supra* note 59, at 501. The United Kingdom, for instance, has maintained a national registry since 1991. *Id.*

<sup>108</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 821.

<sup>109</sup>*See* Grady, *supra* note 67.

<sup>110</sup>*Id.*

<sup>111</sup>*See* Gina Kolata, *Psst! Ask for Donor 1913*, N.Y. TIMES, Feb. 18, 2007, available at <http://nytimes.com>.



are just the children (or, in this case, the recipient-parents of the children) who have voluntarily come forward to register on the site.<sup>112</sup> Because of the lack of current record-keeping, it may be impossible to know how many other half-siblings exist.

In addition, even if one clinic limits the number of donations, there are no regulations regarding cross-clinic information sharing, so there is nothing that would prevent that same donor from going to another clinic and making donations there. “I could fill a banquet hall with my children,” said one donor, who, like many medical students in the ’60s and ’70s donated sperm to help cover living expenses.<sup>113</sup>

In the United Kingdom, incest between donor siblings was such a concern before anonymity was banned that donor children were able to contact the Human Fertilisation and Embryology Authority’s (HFEA) Registry to verify that they were not biologically related to the person they intended to marry or with whom they intended to have children.<sup>114</sup> But here in the U.S., beyond voluntary resources like Donor Sibling registry, donor children have absolutely no way of knowing how many of them actually share the same biological parent. Prohibiting anonymity would completely eliminate this problem, as it would allow donor-conceived children to know exactly who their genetic parents are, and will prevent unwitting incest.<sup>115</sup>

### 3. Psychological Concerns

Another compelling reason for granting donor-conceived offspring access to identifying information is the argument that information about one’s biological and genetic history is considered essential to the child’s mental health. A useful comparison to make when considering this argument is between donor-conceived children and adopted children. Adoption research has shown that strong feelings of insecurity can arise in adoptees because they lack information about one or more biological parent.<sup>116</sup> One researcher defined adoptees as “genealogically bewildered” and argued that “a genealogically bewildered child is one who either has no knowledge of his natural parents or only uncertain knowledge of them. The ensuing state of confusion and uncertainty fundamentally undermines his security and affects his mental health.”<sup>117</sup> Courts have recognized this “bewilderment” in cases where

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<sup>112</sup>Donor Sibling Registry, <http://donorsiblingregistry.com/Search.php> (search “Facility Details: Fairfax Cryobank,” for “Donor ID #: 1476”).

<sup>113</sup>Streisand, *supra* note 1.

<sup>114</sup>The HFEA Register—For Donors, *supra* note 60.

<sup>115</sup>A recent study in *Nature* suggested that humans have an innate ability to detect close kin and have, for lack of a better word, a built-in “gag reflex” towards sexual involvement with genetic relatives. Debra Lieberman, John Tooby, & Leda Cosmides, *The Architecture of Human Kin Detection*, 445 *NATURE* 727 (2007). However, it seems a bit ridiculous for donor siblings to be forced to rely on this “sixth sense” to avoid an incestuous relationship...

<sup>116</sup>Freeman, *supra* note 49, at 289.

<sup>117</sup>H.J. Sant, *Genealogical Bewilderment in Children With Substitute Parents*, 37 *BRIT. J. MED. PSYCHOL.* 133, 136 (1964). *But see* Michael Humphrey & Heather Humphrey, *A Fresh Look at Genealogical Bewilderment*, 59 *BRIT. J. MED. PSYCHOL.* 133, 139 (1986) (arguing that this “bewilderment” and its resulting psychological traumas might be greater when the adoptee and the adoptive parent have an unsatisfactory relationship). However, the degree of bewilderment is not really the issue here—the issue is that the bewilderment exists.

adoptees have been granted the right to access identifying information about their biological parents because the adoptee has demonstrated that the lack of this information has caused him or her psychological harm.<sup>118</sup> In one such case, the adoptee presented testimony from her psychologist that the adoptee “has felt an enormous void as though a part of her is incomplete.”<sup>119</sup> The court held that if the adoptee were able to prove this allegation in a hearing, she would be entitled to have her adoption records opened and identifying information released.<sup>120</sup>

This definition of “genealogical bewilderment” easily extends to donor-conceived children because they too are lacking information about one or more biological parents.<sup>121</sup> While there has not yet been the same amount of research conducted on children who are the product of gamete donation as there has been on adoptees, a number of studies that have been conducted have reached the same conclusion as those that have studied adoptees: namely, that for their own well-being, donor-conceived children need to know about their background.<sup>122</sup> “I’m here to tell you that emotionally, many of us are not keeping up,” said one teenager, whose biological father was an anonymous donor.<sup>123</sup> “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.”<sup>124</sup>

The increasing popularity of websites such as Donor Sibling Registry can be seen as evidence that donor-conceived children have a strong psychological need to learn about their biological origins. As was noted earlier, most of the matches on these websites are between half-siblings who share a donor-parent, but even these connections provide children with some clue as to their biological identity, even

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<sup>118</sup>*See In Re: Application of Hayden*, 435 N.Y.S.2d 541 (Sup. Ct. 1981).

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

<sup>120</sup>*Id.*

<sup>121</sup>Obviously, adoptees are more likely to be searching for information about both biological parents, whereas donor-conceived children are usually searching for only one. But the number of “missing” parents shouldn’t really matter—the issue is that the child is missing a biological link. *See Freeman, supra* note 49, at 281; Rowland, *supra* note 12, at 392.

<sup>122</sup>Freeman, *supra* note 49, at 289. Studies have also shown that there is the risk of a greater psychological impact on both the child and the parent when the parent chooses not to disclose to the child that the child was donor-conceived in the first place. *Id.* “Non-disclosure creates family tension . . . by creating an environment where an uncomfortable and fundamental lie must be concealed . . . Family secrets give rise to touchy, problematic zones in the family’s communication, which may be detected by the shunning reactions they arouse when approached in conversation . . . The tension associated with maintaining the secret, combined with these shunning responses, can have a detrimental psychological impact on the child, whose natural curiosity prompts him to ask ordinary questions about the family story.” McGee et al., *supra* note 7, at 2034.

<sup>123</sup>Katrina Clark, *My Father Was an Anonymous Sperm Donor*, WASH. POST, B01, Dec. 17, 2006, available at <http://www.washingtonpost.com>.

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

when it is just physical resemblance.<sup>125</sup> Donor-conceived children have found that meeting siblings is a way to ease their anger and frustration about their inability to learn more information about their donor.<sup>126</sup> Other children have said that finding half-siblings provides them with clues to “make themselves feel whole.”<sup>127</sup> One child, who was able to locate six half brothers and sisters, said that finding her half-siblings was “the best thing in the world.”<sup>128</sup>

Other countries have cited concerns about the psychological and emotional health of donor-conceived children as a major impetus for banning donor anonymity. For instance, the United Nations Convention on the Rights of the Child, which again serves as a basis for donation regulation in several countries, stated that preserving the mental health and well-being of children is one of its major goals.<sup>129</sup> In the United Kingdom, a central theme of the HFEA’s new regulations banning anonymity is the emotional health of the donor-conceived child.<sup>130</sup>

### B. Parental Concerns About Non-Anonymous Gamete Donation

As was noted in the introduction, a donor-conceived child’s ability to access information about his or her donor is entirely dependent on the recipient-parent telling the child about the circumstances of his or her conception in the first place. Parents have expressed concerns about both the initial disclosure to the child<sup>131</sup> and the child’s ability to learn about the donor. Because the question of initial disclosure is outside the scope of this article, the discussion here will again focus only on the parental concerns that arise from the child’s ability to access the donor’s information.

If anonymous gamete donation were no longer allowed, and if the donor-conceived children were able to access donor information, some parents are concerned that the donor may impose on their autonomy by attempting to gain

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<sup>125</sup>Amy Harmon, *Hello, I’m Your Sister. Our Father is Donor 150.*, N.Y. TIMES, Nov. 20, 2005, available at <http://www.nytimes.com>.

<sup>126</sup>*Id.*

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

<sup>128</sup>*Id.*

<sup>129</sup>Convention on the Rights of the Child, G.A. Res. 44/25, at 1, 3, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (Dec 5, 1989).

<sup>130</sup>De Jonge & Barratt, *supra* note 59, at 501.

<sup>131</sup>Parents cite several reasons for choosing not to tell their children about the use of a donated gamete:

[i]t is seen as a way to ensure that the non-genetic parent is perceived as equally connected to the child[;] to ensure that the child grows as strong a bond with [the non-genetic] parent as with the genetic parent[;] to maintain the appearance of a ‘normal’ family; to avoid distressing the child with the truth of [the child’s genetic] origin[;] and to allow the non-genetic parent’s [potentially stigmatizing] infertility . . . to remain unknown to others.] It is primarily (and a bit obviously) heterosexual couples who choose to maintain this secrecy. McGee et al., *supra* note 7, at 2034. Many of these concerns do not apply to homosexual couples or single women, as an alternative explanation of the child’s conception is not as readily available for them. See Daniels, *supra* note 7, at 121.

visitation, or other parental rights.<sup>132</sup> But as laws in roughly two-thirds of the states grant no parental rights nor assign any responsibilities to the donors, these fears are relatively unfounded.<sup>133</sup> In most cases, recipient-parents are considered the legal parents of the resulting child.<sup>134</sup>

The major parental argument against outlawing anonymous gamete donation is that it might pose a threat to their constitutionally protected right to reproductive choice.<sup>135</sup> Anonymity proponents worry that a lack of anonymity could discourage potential donors.<sup>136</sup> To back this theory, they point to studies that indicate that a majority of donors questioned would not donate if they knew there was potential for their identity to be revealed.<sup>137</sup> Fewer donors would obviously lead to a steep decline in gamete availability, which would then reduce the availability of this reproductive option for parents.<sup>138</sup> Depending on how drastic of a reduction occurs, it could then be argued that a ban on anonymous donation is unconstitutional because it imposes an undue burden on parental reproductive choice.<sup>139</sup> This argument finds footing in the Supreme Court's decision in *Eisenstadt v. Baird*, which states that "[I]f the right to privacy means anything, it is the right of an individual...to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>140</sup>

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<sup>132</sup>See *Meyer*, 262 U.S. at 399. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>133</sup>See, e.g., ALASKA STAT. § 25.20.45 (2006); CAL. FAM. CODE § 7613(a) (West 2007); FLA. STAT. § 742.14 (2007); GA. CODE ANN. § 53-2-5 (2007); 750 ILL. COMP. STAT. 40/2 (2007); N.J. STAT. ANN. § 9:17-44(a) (West 2006); N.M. STAT. § 40-11-6 (2007); OR. REV. STAT. § 109.239 (2007); VA. CODE ANN. § 20-158 (2007); see also UNIFORM PARENTAGE ACT § 5(b) (1973).

<sup>134</sup>See, e.g., ALASKA STAT. § 25.20.45 (2006); 750 ILL. COMP. STAT. 40/2 (2007); N.M. STAT. § 40-11-6 (2007); see also UNIFORM PARENTAGE ACT § 5(b) (1973).

<sup>135</sup>See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>136</sup>Hampton, *supra* note 91, at 2682.

<sup>137</sup>One recent survey of current anonymous donors in Western Australia suggested that there would be a 50% decline in potential sperm donors if anonymity were lifted. Kate M. Goodman, et al., *Potential Sperm Donors', Recipients' and Their Partners' Opinions Towards the Release of Identifying Information in Western Australia*, 21 HUM. REP. 3022 (2006). A similar study of anonymous egg and sperm donors in the United Kingdom revealed that 39% of the donors would not donate if anonymity were lifted. Sixteen percent were unsure. Hampton, *supra* note 91, at 2682.

<sup>138</sup>There is also the economic concern of fertility tourism to consider. The fertility industry in the United States could lose a lot of money to foreign operations that still allow anonymous donation if anonymity were banned here. The U.S. fertility industry is worth about \$3.3 billion dollars, with sperm banks alone pulling in an estimated \$75 million each year. Mary Crane, *The Business of Love: Sperm For Sale*, FORBES, Feb. 9, 2007 available at <http://www.forbes.com>.

<sup>139</sup>A "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms." *Griswold v. Connecticut*, 381 U.S. 479, 485, (1965)

<sup>140</sup>*Eisenstadt*, 405 U.S. at 447.

However, there has been no supporting proof that there would be such a burdensome drop in gamete availability in the first place. In fact, looking at the results in other countries, the opposite is proving true. While a number of the countries that now mandate disclosure experienced an initial decline in donors once the anonymous donations were banned,<sup>141</sup> many now report that donor numbers returned to the pre-ban rates.<sup>142</sup> Sweden, for instance, as the first country to ban anonymous donation, noted a sharp decline in both the number of donors and the demand for donor sperm, but saw these numbers completely reverse after just a few years.<sup>143</sup> Even the studies touted by critics of identity disclosure can be called into question because the studies only took into account the attitudes of people who were recruited specifically as anonymous donors.<sup>144</sup> Donors recruited specifically as non-anonymous donors would obviously not have the same reservations as those who donated under the promise of anonymity.<sup>145</sup> What many of these countries have noted is a change in the type of donors that come forward: where donors in the past were mostly young and single, donors now tend to be older, married and with families of their own.<sup>146</sup>

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<sup>141</sup>After Victoria, Australia banned anonymous gamete donation, an IVF clinic in Melbourne took the unusual (and possibly over-dramatic) step of asking all male Parliament members to donate sperm to replenish the clinic's dwindling supplies. BBC News, *Australian MP's Sperm in Demand*, BBC NEWS ASIA-PACIFIC, Jan 13, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4170869.stm>.

<sup>142</sup>Hampton, *supra* note 91, at 2682.

<sup>143</sup>Ken Daniels and Othon Lalos, *The Swedish Insemination Act and the Availability of Donors*, 10 HUM. REP. ROD. 1871 (1995).

<sup>144</sup>Hampton, *supra* note 91, at 2682.

<sup>145</sup>Studies have suggested alternative methods of recruiting donors if anonymity is going to be banned, including rewarding donors with "thank you" notes from the recipients, rather than with money. See Guido Pennings, *Commentary on Craft and Thornhill: New Ethical Strategies to Recruit Gamete Donors*, 10 REP. BIOMED. ONLINE 307, 308 (2005) available at [www.rbmonline.com](http://www.rbmonline.com). To combat the potential loss of donors once anonymity was banned, the United Kingdom's Department of Health began a campaign in 2005 to raise public awareness of the need for gamete donation. Entitled "Give Life Give Hope" the campaign is targeted at men between the ages of 28-45 and women between the ages of 28-35. United Kingdom Dept. of Health, *New Campaign Asks You to "Give Life, Give Hope" to Those With Fertility Problems*, [http://www.dh.gov.uk/en/Publicationsandstatistics/Pressreleases/DH\\_4102044](http://www.dh.gov.uk/en/Publicationsandstatistics/Pressreleases/DH_4102044) (Jan. 26, 2005). Realizing the need to diversify, the Department of Health started a program to also attract younger donors called "Give a Toss." The website is filled with facts, interactive games and double entendres. Give a Toss Homepage, <http://www.give a toss.com> (last visited Sept. 5, 2007).

<sup>146</sup>Frith, *Gamete Donation and Anonymity*, *supra* note 43, at 823. Frith also notes that both the increased age of donors and the willingness to be identified has raised some new concerns. "Older" sperm poses possible quality issues as there could be a higher risk for congenital abnormalities. Donors who are willing to be identified are also suspected of having a strong desire to be overly involved in the child's life, which recipient-parents may wish to avoid. *Id.* On the other hand, older donors tend to have thought through the consequences of donation, and may be more open to the idea of having a relationship with resulting children, if the children so desire. *Id.*

Additionally, even if there were a permanent reduction in the availability of donor gametes, which again seems unlikely, it may be difficult to prove that the reduction rises to the level of an unacceptable burden on reproductive choice. Ending anonymous donation does not remove this as a reproductive choice altogether; it merely regulates it.

### C. Donor Concerns About Non-Anonymous Gamete Donation

Donor anonymity has always been thought to be of paramount importance to the gamete donation process.<sup>147</sup> In the early 1980's, one clinic owner commented of sperm donors:

"...an occasional person will not be considered if he seems unusually interested in the progeny that may be produced from his semen. The absolute anonymity of [the] donor is considered essential in this country and all donors must be prepared to donate semen without any follow up on its use or results."<sup>148</sup>

Gamete donors have essentially been viewed as a means to an end. Donors provide a "service," and in exchange receive payment and the promise of anonymity.<sup>149</sup> That is the entire extent of the donor's involvement in the process. If this promise of anonymity were lifted, donors argue that they would have additional involvement forced upon them, and would be open to the risk of paternity/maternity suits, or be required to make maintenance payments, or have their estates depleted by inheritance claims brought by the children who resulted from their donation.<sup>150</sup> This is, of course, the exact opposite of the parental fear that the donor will become overly involved in the child's life, but, like the parental fear of involvement, the donor fear of obligation is, or can easily be, alleviated by state legislation.<sup>151</sup>

Where donors express a real concern about donor-conceived children being granted the ability to access donor information lies in the donors' right to privacy. The right to privacy is, of course, a recognized constitutional right,<sup>152</sup> but it is a right that can be diminished by a person's actions.<sup>153</sup> Precedent for the level of protection granted to a donor's right to privacy was set by the California Court of Appeals in *Johnson v. Superior Court*, where the court held that donor information from an anonymous donor could be disclosed under certain circumstances.<sup>154</sup> As is the case

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<sup>147</sup>*Id.* at 118-19.

<sup>148</sup>*Id.* This quote actually came from a doctor in Australia, where anonymous donation has now been banned.

<sup>149</sup>Daniels, *supra* note 7, at 118.

<sup>150</sup>Freeman, *supra* note 49, at 287.

<sup>151</sup>*See generally supra* note 71, which lists several state statutes that prevent the donor from being assigned any parental rights or responsibilities.

<sup>152</sup>U.S. CONST. amend. XIV § 1.

<sup>153</sup>Hill v. Nat'l Collegiate Athletic Assn., 26 Cal. Rptr. 2d 834, 856-57 (1994) ("The extent of a privacy interest is not independent of the circumstances. Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy...customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.")

<sup>154</sup>*Johnson v. Superior Ct.*, 80 Cal.App. 4th 1050, 1056-57 (Ct. App. 2000).

in many other states, California's constitutional right to privacy provides more protection than even federal privacy laws, so the analysis of the donor's right to privacy in *Johnson* might very well be similarly applied by these other states.<sup>155</sup> The decision in *Johnson* affects the donor's privacy rights in two ways: it establishes that donors can have a diminished expectation of privacy and that contractual protection of a donor's information may not be sufficient to prevent its disclosure.

#### 1. Donor's Diminished Expectation of Privacy: *Johnson* and Beyond

In *Johnson*, a donor-conceived child and her parents were involved in an action against the fertility clinic from which they purchased the donor's sperm.<sup>156</sup> The child was born with a genetically transmitted kidney disease, and the parents claimed that the fertility clinic falsely claimed to have fully tested and screened the sperm.<sup>157</sup> The family asked the court to compel both the deposition of the donor and the production of the donor's fertility clinic records in order to assist them in their discovery.<sup>158</sup> Due in large part to a state statute that grants access to insemination records for "good cause shown," the court recognized that the donor did indeed have a privacy interest in the disclosure of his identity and personal information, but that the privacy right was limited because the legislature clearly intended for records access in certain situations.<sup>159</sup> The court then granted the family's disclosure request, stating that the donor's expectation of privacy in this situation was "substantially diminished."<sup>160</sup> The reasoning was twofold: first, the fertility clinic "routinely told its sperm donors that non identifying medical history and related information could be disclosed to the purchasers of the sperm."<sup>161</sup> The court said these warnings "naturally lessen[ed] the donor's expectation that non identifying information [would never] be revealed. . . ."<sup>162</sup> Second, the court said that the donor's "reasonable expectation of privacy in his identity was substantially diminished by his own conduct."<sup>163</sup> According to the court, the donor's frequent donations to the clinic amounted to "a substantial commercial transaction likely to affect the lives of many people" and because of that, it would be "unreasonable for [the donor] to expect that his genetic and medical history, and possibly even his identity, would never be disclosed."<sup>164</sup>

The circumstances that diminished the donor's expectation of privacy in *Johnson* are similar to the circumstances that surround almost every gamete donation. In an

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<sup>155</sup>Planned Parenthood Golden Gate v. Superior Ct., 99 Cal. Rptr. 2d 627 (Ct. App. 2000).

<sup>156</sup>*Johnson*, 80 Cal. App. 4th at 1056-57.

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* at 1055.

<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>*Id.*

<sup>162</sup>*Id.*

<sup>163</sup>*Id.*

<sup>164</sup>*Id.* at 1069-70. While the *Johnson* court specifically stated that the donor's identity should be "protected to the fullest extent possible," it did not rule out the possibility that the donor's identity could be revealed at some point. *Id.* at 1073.

effort to attract additional customers, many fertility clinics are offering more and more information about their donors to potential gamete purchasers. Going far beyond just a brief donor profile that gives height, weight, education and interests, parents can now request donor baby photos, answers to in-depth questionnaires, audio interviews with the donor, facial feature analyses, and reports on the clinic staff's impression of the donor.<sup>165</sup> Because donors knowingly provide all of this information to the fertility clinics, they are well aware that this information is available and accessible to potential buyers. Additionally, though the donor in *Johnson* had donated on numerous occasions,<sup>166</sup> it is arguable that even one donation could be considered "a substantial commercial transaction likely to affect the lives of many people" since one gamete donation can be divided up, sold to multiple recipients, and result in multiple children.<sup>167</sup> But even if only one child results from a gamete donation, it is still the result of a "commercial transaction" that affects the life of another—the donor child.

## 2. Contractual Protection of Donor Privacy

The *Johnson* court also examined the contract between the parents and the clinic that expressly prohibited disclosure of the donor's identity and related information under any and all circumstances.<sup>168</sup> Again, because of the state statute that grants access to insemination records for "good cause shown," the court noted that the legislature must have intended for donor records to be accessible in some situations.<sup>169</sup> The court found that the donor could be a third party beneficiary to the confidentiality contract, but that the contract itself, by forbidding release of any of the donor's information at any time, was contrary to public policy.<sup>170</sup>

*Johnson* is an important decision in favor of non-anonymity because, by finding that a sperm donor possesses only a limited right to privacy that cannot be enhanced by a contract that contravenes public policy, the court opened the door to imposing on a donor's anonymity in a variety of situations. While the interest that outweighed the donor's diminished privacy right in *Johnson* was a medical one, the court's decision implied that the overriding concern is the best interest of the child.<sup>171</sup> Therefore, the health, consanguinity, and psychological concerns donor-conceived

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<sup>165</sup>See generally California Cryobank Donor Catalog, California Cryobank, <http://www.cryobank.com/catalog/indexb.CFM>; Donor Information, Fairfax Cryobank, <http://www.fairfaxcryobank.com/donorinfo.aspx?menu=4&turn=on>.

<sup>166</sup>According to the record, he "deposited over 320 specimens of semen with [the clinic]," for a payment of \$11,000. *Johnson*, 80 Cal. App. 4th at 1069-70.

<sup>167</sup>Oocyte donation may also be considered a "substantial commercial transaction" because the oocyte donor is usually compensated substantially more than a one-time sperm donor.

<sup>168</sup>*Johnson*, 80 Cal. App. 4th at 1069.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 1066-67. The court also reiterated that "contracts contrary to public policy are unlawful and unenforceable." *Id.* at 1065.

<sup>171</sup>"[A] contract that completely forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the best interests of the child." *Id.* at 1067.



children cite as reasons for donor disclosure may be able take precedence over the donor's limited right to privacy in future cases.

One additional consideration not addressed in *Johnson* but that nevertheless arises in the context of a contract that promises donor anonymity is its true guarantee. Even if a confidentiality contract was held to be enforceable and not against public policy, and even if the fertility clinic does not disclose any of the donor's identifying information, there are ways to circumvent the contract. As evidenced by the teenager with the mail order DNA kit,<sup>172</sup> medical and technological advances are making it increasingly easy to trace people. "A year ago, I felt sure that I could protect a donor's anonymity. I'm not so sure anymore," commented one fertility clinic owner.<sup>173</sup> Contracts promise donors anonymity by preventing access to fertility clinic records. But because these contracts do not take into account the increasing ability to discover the donor's identity without these records, the donors are being lulled into a false sense of security. They believe that their identities are protected, but in reality, they too might be visited by an enterprising teenager of their (literal) own. Donors would be shielded from these potentially unwelcome surprises if anonymous gamete donation were no longer allowed. If they know that the resulting children have the ability to access donor information, donors are at least forewarned that they might be contacted in the future. Ending anonymous gamete donation is therefore arguably in the best interests of the donors.

#### IV. PROPOSED LEGISLATION

In light of the above arguments, it is clear that, going forward, anonymous donation should be prohibited altogether, and that current donor-conceived children should, in some situations, have the ability to access donor information. I would therefore propose the following legislation that would accomplish both of these goals.

Under this proposed legislation, future anonymous donation of gametes would be prohibited. All fertility clinics that provide donated gametes would be required to keep records that associate the gamete donor with the gamete recipient. Donor-conceived children would be allowed access to their donor's identifying information, including, but not limited to: the donor's current name and name at birth, if different;<sup>174</sup> the donor's birth date; the donor's birthplace; the donor's last known address; and the donor's health records as provided to the clinic. This should provide the child with enough information to locate their donor, should they so choose. Clinics would not be required to facilitate contact between the donor and the child, but should be required to periodically contact donors to confirm the donor's address and any other changes in the donor's information, including any changes in the donor's health. These records would have to be maintained by the clinic for a specified period of time, preferably for the lifetime of the donor-conceived child.

This identifying information would be accessible at any time by the donor-conceived child once he or she reaches the age of eighteen, and the donor-conceived

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<sup>172</sup>Motluk, *supra* note 1.

<sup>173</sup>Streisand, *supra* note 1.

<sup>174</sup>For instance, an egg donor who later marries and takes her spouse's last name.

child is the only one who will have the ability to access these records.<sup>175</sup> Since eighteen is the age at which people are legally recognized as adults, it makes sense to impose this age limit to avoid any potential conflicts with the parental right to raise the child as the parent sees fit. If the child is younger than eighteen, then access should be allowed for good cause shown, the standards for which will be discussed below. Allowing only the donor-conceived child access to these records respects both the child's privacy and the parent/child relationship by preventing the donor from having any unwanted contact with the child. It also respects the donor's privacy to some extent by preventing the recipient-parent from intruding on the donor's family life.<sup>176</sup> As is already the case in most states, the recipient would be the recognized legal parent of the child and the donor would have no parental rights or obligations at any point in time.<sup>177</sup> Counseling, provided by the clinic through a program approved by the state, for both the donors and the recipient-parents should be mandatory before beginning the gamete donation/purchase process, so that both parties fully understand the future implications of this legislation, and give their informed consent.

Importantly, this legislation would not be retroactive. Because many current donors donated under a contractual agreement of anonymity, that contract should be respected to the fullest extent possible. However, since there are a growing number of ways to circumvent these contracts, fertility clinics would be strongly encouraged to inform all their current and former donors of advances in medicine and technology that may make promises of donor anonymity obsolete.

This prospective statute will obviously not grant current donor-conceived children full freedom to access their donor's information. But since access should be a recognized ability, I would propose that all current donor-conceived children whose donors are anonymous be allowed records access for good cause shown.

As was noted earlier, there are presently at least eighteen states that do grant records access to donor-conceived children for good cause shown.<sup>178</sup> However, the vast majority of states presently have statutes that permit adoptees access to sealed adoption records, which include identifying information, for good cause shown.<sup>179</sup>

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<sup>175</sup>Non-identifying donor information should be available at any point, as it currently is at most fertility clinics.

<sup>176</sup>It is the recipient-parent who, in most cases, has contractually agreed not to make contact with the donor, and it is fair to uphold this agreement.

<sup>177</sup>*See* ALASKA STAT. § 25.20.45 (2006); CAL. FAM. CODE § 7613(a) (West 2007); FLA. STAT. ANN. § 742.14 (West 2007); GA. CODE ANN. § 53-2-5 (West 2007); 750 ILL. COMP. STAT. ANN. § 40/2 (West 2007); N.J. STAT. ANN. § 9:17-44(a) (West 2006); N.M. STAT. ANN. § 40-11-6 (West 2007); OR. REV. STAT. ANN. § 109.239 (West 2007); VA. CODE ANN. § 20-158 (West 2007).

<sup>178</sup>*See*, ALA. CODE § 26-17-21(a) (2007); CAL. FAM. CODE § 7613(a) (2007); COLO. REV. STAT. ANN. § 19-4-106(1) (West 2007); MO. ANN. STAT. § 210.824.01 (West 2007); MONT. CODE ANN. § 40-6-106(1) (2006); NEV. REV. STAT. ANN. § 126.061.1 (West 2007); N.M. STAT. ANN. § 40-11-6(C) (West 2007).

<sup>179</sup>*See*, for instance, ALA. CODE § 26-10A-31(c) (2007); ALASKA STAT. § 25.23.150(b) (2006); ARK. CODE ANN. § 9-9-217(a)(2)(A) (West 2007); COLO. REV. STAT. § 19-4-104 (West 2007); D.C. CODE § 16-311 (2007); FLA. STAT. ANN. § 63.162(3)(d) (West 2007); GA. CODE ANN. § 19-8-23(a) (2006); HAW. REV. STAT. ANN. § 578-15(b)(1) (West 2006); ILL.

Because of the similarities between adoptees and donor-conceived children in this situation—they are both searching for information about biological parents—I argue that, at the very minimum, courts in each state should apply the “good cause” standard that they use in adoption records cases to gamete donor records cases.<sup>180</sup> Adoptees have been able to meet the good cause standard by demonstrating a sufficient medical or psychological need,<sup>181</sup> therefore, these should also be sufficient good causes for donor-conceived children.

Ideally, however, I argue that states should apply a good cause standard that is somewhat less stringent than what they apply in adoption cases, making it easier for donor-conceived children to gain access to identifying information about their donor. There are simply not as many compelling reasons for maintaining anonymity in donor cases as there are for maintaining anonymity in adoption cases. A number of cases have discussed what they term the “tragic circumstances” that sometimes accompany adoption—a rape, a teenage mother—and the fact that giving up a child for adoption is usually an agonizing decision for a biological parent to make.<sup>182</sup> One court said that the biological parents deserve a “fresh start” and that their right to privacy should not be infringed upon.<sup>183</sup> The state wanted to make sure that the biological parents made the right decision for their child with minimal risk of future repercussions for this decision.<sup>184</sup> But these same concerns do not exist in the case of

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COMP. STAT. ANN. 750/50-18(c) (West 2007); MASS. GEN. LAWS ANN. ch. 210 § 5c (2006); MICH. COMP. LAWS ANN. § 710.67(1) (West 2007); N.H. REV. STAT. ANN. § 170-B:23(II) (2007); N.J., STAT. ANN. § 9:3-52(a) (West 2007); N.M. STAT. ANN. § 32A-5-8 (West 2007); N.Y. DOM. REL. LAW § 114 (McKinney 2007); OKLA. STAT. tit. 10, § 7505-1.1(B) (2007); R.I. GEN. LAWS § 23-3-15 (2006); S.C. CODE ANN. § 20-7-1780 (2006); TENN. CODE ANN. § 36-1-138 (West 2007); TEX. FAM. CODE ANN. § 108.003 (Vernon 2007); W. VA. CODE ANN. § 48-22-702(a) (West 2007); WIS. STAT. ANN. § 48.93(1d) (West 2007). There are also two states that currently grant adoptees the right to discover the identity of their birth parents without having to meet a “good cause” or similar standard. Oregon states that “any adopted person, age 21 or older and born in the state of Oregon, shall be issued a certified copy of his/her unaltered, original and unamended certificate of birth...” OR. REV. STAT. ANN. § 432.240(1) (West 2007). Tennessee gives the adoptee the right to see his or her unamended birth certificate and all records pertaining to his or her adoption. TENN. CODE ANN. § 36-1-127 (West 2006).

<sup>180</sup>For an in-depth discussion of adoptee rights versus donor-conceived child rights, see Elizabeth S. Chestney, *The Right to Know One’s Genetic Origin: Can, Should or Must a State that Extends this Right to Adoptees Extend and Analogous Right to Children Conceived with Donor Gametes?* 80 TEX. L. REV. 365, 368-69 (2001).

<sup>181</sup>See *In Re: Application of Hayden*, 106 Misc.2d at 852 (records access granted for psychological health of child); *Matter of Estate of Dodge*, 413 N.W.2d 449 (Mich. Ct. App. 1987) (where child thought she was previously unknown heir to automobile manufacturer’s estate, psychological need constitutes good cause for records access, but no claim to share of estate); but see *Linda F. M. v. N. Y. Dept. of Health*, 418 N.E.2d 1302 (N.Y. 1981) (Adopted woman did not demonstrate sufficient psychological harm; more than “mere desire” to see records is needed to constitute “good cause”).

<sup>182</sup>See *In re Janice Assalone*, 512 A.2d 1383 (R.I. 1986); *Matter of Dixon*, 116 Mich.App. 763, 323 N.W.2d 549 (Mi. 1982); *In re Roger B.*, 84 Ill.2d 323, 418 N.E.2d 751 (Ill. 1981); *Appl. Annetta Louise Maples*, 563 S.W.2d 760 (Mo. 1978).

<sup>183</sup>*Appl. Annetta Louise Maples*, 563 S.W.2d at 763.

<sup>184</sup>*Id.*

gamete donation. Donors make the conscious choice to donate, and recipient-parents make the conscious choice to conceive a child in this manner. There are no “tragic circumstances” surrounding either the conception or the birth of the child. It is a contracted-for agreement from start to finish. Donors and recipient-parents do obviously have recognized privacy rights, and those should be respected to an extent, but not at the expense of the mental and physical well-being of the resulting child. Since donors voluntarily enter into these contracts before the conception of a child, the donor’s right to privacy should be given less deference than the privacy rights of a parent who gave an existing child up for adoption. Therefore, donor-conceived children should ideally be able to meet the good cause standard with a little more ease than adoptees.

#### V. CONCLUDING THOUGHTS

Anonymous gamete donation should come to an end, and donor-conceived children should have the right to access identifying information about their gamete donors. It is in the best interests of all the parties involved. Donor-conceived children get the benefit of being able to learn about their biological and genetic history. Recipient-parents could benefit from having donor information more readily available in case their minor child falls ill and the parent needs the donor’s medical history in order to assist the diagnosis. Donors benefit from being fully informed about the future implications of their donations and can choose not to donate if they are not open to the possibility of being contacted by a resulting child in the future.

But what can happen when the donor-conceived child and the donor actually meet? A recent series in the New York Times recounted how donor siblings who all shared California Cryobank’s Donor 150 as a donor made contact with each other through the Donor Sibling Registry.<sup>185</sup> Donor 150, Jeffery Harrison, happened to read the initial story in the Times and made contact with the children. “‘It’s a short life,’ he said, ‘and these children need to have some kind of resolution. I thought I could send a little valentine, kind of, to everyone, just saying hello.’”<sup>186</sup> Once California Cryobank’s most popular donor, Mr. Harrison expressed some misgivings that his donor children might be disappointed by his now humble circumstances as a dog walker. Said one of the children, “‘He’s sort of a free spirit, and I don’t care what career he has. I got to talk to his dogs.’”<sup>187</sup>

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<sup>185</sup>Amy Harmon, *Sperm Donor Father Ends His Anonymity*, N.Y. TIMES, Feb. 14, 2007, available at <http://www.nytimes.com>.

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

<sup>187</sup>*Id.*