NOTES

WHO'S YOUR DADDY? DEFINING PATERNITY RIGHTS IN THE CONTEXT OF FREE, PRIVATE SPERM DONATION

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INTRODUCTION

Meet Trent Arsenault. By all accounts, he is a desirable bachelor: thirty-six years old, tall, blonde, gainfully employed in Silicon Valley, a U.S. Naval Academy graduate, and free of sexually transmitted diseases (STDs).[1] Like many Americans, he has his own website where visitors can view his baby photos, read about his hobbies and interests, and even learn about his personality traits.[2] But unlike most Americans, Trent describes himself as a "donor-sexual," donating his sperm to couples who, either through choice or necessity, are forgoing commercial sperm banks in their attempt to conceive a child.[3] He says he donates because "sperm donation is one more way he can help those in his community who may be in need."[4]

Surprisingly, Trent is not all that unique, as more and more men are willing to bypass the commercial market and donate their sperm for free instead.[5] Unlike commercial sperm banks, which are, at least, minimally regulated by the Food and Drug Administration (FDA), the free online market is currently entirely unregulated, although many donors will agree to submit to background checks and regular testing for STDs.[6] This market for free, private sperm donors has arisen to satisfy the demand for sperm during a time when artificial insemination by commercial sperm has become increasingly more expensive.[7] Cost is not the only issue, however: many individuals want their children to grow up knowing their natural fathers, which is not possible with commercial sperm

1. *See Trent's Profile*, FREE SPERM DONOR—N. CAL./S.F. BAY AREA, http://www.web.archie.org/web/20120717041727/http://www.trentdonor.com/ (last updated June 2, 2012) (accessed by searching www.trentdonor.com in the Internet Archive); *see also* Tony Dokoupil, *The Coffee Shop Baby*, NEWSWEEK, Oct. 10 & 17, 2011, at 45, 48.

2. *Trent's Profile*, *supra* note 1. Some of his hobbies and interests include hiking, organic food, promoting equality, and volunteering at church; he also describes himself as "[h]appy," "amazed by nature," and as having a "positive outlook [on] life." *Id.*

3. Dokoupil, *supra* note 1, at 48.

4. Rachel Lehmann-Haupt, *The Underground Market of Sperm Donors*, SLATE (Oct. 19, 2009, 6:40 AM), http://www.doublex.com/section/health-science/underground-market-sperm-donors.

5. *Id.*

6. *E.g.*, *id.*

7. *Id.*

because sperm banks require anonymity until the child is at least eighteen years old.[8]

This Note argues that free, private sperm donation serves a valuable societal purpose by allowing women and couples, who would not otherwise be able to conceive a child, to have the family they have always wanted. It does, however, raise legal issues that remain unsettled, particularly concerning the parental rights and liabilities of the sperm donor. It is up to either Congress or state legislatures to provide uniform rules governing a sperm donor's parental rights in order to protect intended parents and sperm donors from inconsistent laws and legal interpretations.[9] Because free, private sperm donation and the websites that facilitate it are likely protected under the Constitution's penumbra of privacy rights,[10] it is imperative that the legal rights of all parties involved are clearly delineated ahead of time to avoid potential controversies over a resulting child.

Moreover, this Note supports enactment by the legislature of a default rule that removes all paternal rights and liabilities from a private sperm donor who donates his sperm for free. This approach would, in effect, treat him as an anonymous donor and give parental rights to the intended parents, unless a written agreement exists to the contrary.[11] These written agreements should be presumed valid and enforceable in all states, unless a court finds an established parental relationship between the donor and the conceived child.

Part I of this Note discusses the background of artificial insemination, the evolution of the fertility industry in the United States, and the growing online market of private sperm donation. Part II

8. *See infra* Part II.B.

9. *See infra* Part III.

10. In-depth analysis of the constitutionality of banning free, private sperm donation, including the matching websites, is outside the scope of this Note. This Note presumes that the government will not be able to ban private sperm donation or the websites that facilitate it because free, private sperm donation could be considered a form of intercourse and is thus protected from governmental interference by the "right to privacy" derived from, and protected by, the "penumbras" of the Bill of Rights. *See generally* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing "the rights of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

11. *See infra* Part IV.A.

reviews the benefits and disadvantages of free, private sperm donation, ultimately concluding that although this type of donation serves a beneficial societal value, it has potentially devastating legal consequences to the parties involved. Part III of this Note then discusses relevant statutes and case law concerning parental rights of sperm donors, particularly as to how the unsettled law around these rights may affect free, private sperm donation. Finally, Part IV proposes solutions to the paternity issues implicated by free, private sperm donation.

I. BACKGROUND

In order to fully appreciate the rise in popularity of free, private sperm donation, it is important to understand the context in which it came about. This Part describes the history of donor-assisted reproduction and how it has developed into a multimillion dollar industry. This Part then explains the emergence of the free sperm donor market and how this type of sperm donation works.

A. History of Artificial Insemination

Infertility is a condition long recognized in our cultural heritage, plaguing millions of women and men as a silent and irreparable curse. In desperation, women have tried a multitude of remedies to conceive a child, from "dr[inking] potions of mule urine and rabbit blood [to] dous[ing] themselves with herbs believed to induce pregnancy."[12] Although artificial insemination (AI)[13] is typically thought of as a modern invention, some cultures were aware as early as the third century that a woman could be impregnated without having sexual intercourse.[14] The first recorded AI of a woman occurred over

12. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 8 (2006).

13. Artificial insemination comprises two different methods of infertility treatment: (1) artificial insemination by a husband's sperm (AIH), and (2) artificial insemination by donor sperm (AID). WILFRED J. FINEGOLD, ARTIFICIAL INSEMINATION 17 (2d ed. 1976). When this Note refers to AI, it is referring to artificial insemination by donor sperm.

14. *Id.* at 5 ("A Talmudic story of this period [about 220 A.D.] hints that the Hebrews were concerned about the academic possibilities of A.I."); *see also* NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 46 (2009) (stating that this knowledge was available in the second century).

two centuries ago in 1785, when noted Scottish anatomist and surgeon Dr. John Hunter[15] reported that he had successfully inseminated a London woman using her husband's sperm.[16] One hundred years later, Dr. William Pancoast performed the first AI on a woman using donor sperm in 1884.[17] AI did not begin to become widely accepted, however, until the 1940s when a desire to repopulate after World War II, advances in birth control, and a "liberalization of social norms" helped increase the popularity of the procedure.[18]

Most sperm banks originally began as nonprofit, in-house clinics for the treatment of male infertility.[19] Initially, these clinics used sperm only from their patients' husbands, storing and preserving the deposit for future use.[20] Although the market for this service was small at first, demand grew quickly for donor sperm from women who either had an infertile husband, a husband with a genetic disease, or no husband at all.[21] Sperm banks slowly began to respond to this demand by accepting donations from men with no relation to their patients, realizing in the process that there were numerous advantages to a more "impersonal system."[22] As Professor Debora Spar wrote in her book, *The Baby Business*,

> By moving toward the market—soliciting donors and paying them a nominal fee—the clinics could reduce their dependence on their patients' circles of friends and impose a more anonymous form of quality control. Using donated sperm, women (and

15. *See generally* WENDY MOORE, THE KNIFE MAN: THE EXTRAORDINARY LIFE AND TIMES OF JOHN HUNTER, FATHER OF MODERN SURGERY (2005).

16. CAHN, *supra* note 14, at 46.

17. *Id.* In fact, at this time, many people believed that using donor sperm from a man other than the woman's husband was immoral and the woman could be accused of adultery if she went through with the procedure. *Id.* Surprisingly, the first major case in the United States in which the court ruled that AI did not constitute adultery was not until 1968. *See* People v. Sorensen, 437 P.2d 495, 498, 501-02 (Cal. 1968) (ruling that AI was not adultery because the wife did not have sexual intercourse with the donor and, therefore, the child was legitimate and the husband was legally responsible for the child).

18. CAHN, *supra* note 14, at 46-47.

19. SPAR, *supra* note 12, at 35-36.

20. *Id.* at 36.

21. *Id.* ("In each of these cases, sperm banking solved a problem and created a market.").

22. *Id.*

> their husbands) wouldn't actually have to choose a *man* to father their child. They only had to choose his sperm.[23]

By the late 1980s, commercial sperm banks had become a common feature of the fertility landscape, with over 400 clinics in operation.[24] In 1987, the federal government conducted its first and only survey of the AI market, finding that roughly 11,000 physicians administered AI services to nearly 172,000 women, 22 percent of whom used commercially purchased semen.[25] By 2009, commercial sperm banks were part of a $75 million per year industry[26]—a remarkable progression from the nonprofit clinics that preceded them.

B. Sperm Donors and the Donation Process

At first, sperm donors were typically medical students, chosen for their physical and genetic characteristics, including their "knowledge of the physiology and anatomy of reproduction [which] apprised them of the seriousness of the donor's role in A.I."[27] Gradually, some sperm banks began specializing in providing high-quality sperm or recruiting particular types of donors, including so-called "genius sperm banks."[28] Others filled more unique roles by selling primarily to lesbian couples or offering more information to their recipients, such as photos, videos, or audio recordings of each donor.[29]

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23. SPAR, *supra* note 12, at 36.

24. CAHN, *supra* note 14, at 48.

25. OFFICE OF TECH. ASSESSMENT, U.S. CONG., OTA-13P-BA-48, ARTIFICIAL INSEMINATION PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY—BACKGROUND PAPER 8-9 (1988), *available at* http://www.fas.org/ota/reports/8804.pdf.

26. CAHN, *supra* note 14, at 43.

27. FINEGOLD, *supra* note 13, at 124; *see also* SPAR, *supra* note 12, at 37.

28. SPAR, *supra* note 12, at 37; David Plotz, *The "Genius Babies," and How They Grew*, SLATE (Feb. 8, 2001, 3:00 AM), http://www.slate.com/articles/life/seed/2001/02/the_genius_babies_and_how_they_grew.html. One such bank, the Repository for Germinal Choice, claimed that it "offered only the sperm of exceptional donors, including Nobel Prize winners and Olympic athletes." SPAR, *supra* note 12, at 37. Although the Repository for Germinal Choice is now closed, Plotz, *supra*, several traditional sperm banks now allow users to search their donor databases by educational achievement or profession of the donor. *See, e.g.*, FAIRFAX CRYOBANK, http://donorsearch.fairfaxcryobank.com (last visited Feb. 28, 2013).

29. SPAR, *supra* note 12, at 37; *see also* PAC. REPROD. SERVICES, http://www. pacrepro.com/ (last visited Feb. 28, 2013) (touting themselves as "[t]he most experienced sperm bank and insemination services for lesbian couples"); XYTEX CRYO INT'L, http://www.xytex.com (last

Reimbursement for sperm donation varies widely among clinics due to the lack of a set standard for reasonable compensation. For example, the Northwest Cryobank, located in Spokane, Washington, advertises on its website that sperm donors can earn as much as $1,000 a month for donating,[30] whereas the California Cryobank, located in Los Angeles, California, reimburses donors up to $1,200 a month with additional incentives such as movie tickets or gift certificates to those participants who expend "extra time and effort."[31] Generally though, men make between $50 and $100 per donation.[32]

C. Defining Free, Private Sperm Donation

The Assisted Reproductive Technology (ART) industry is constantly evolving and expanding.[33] Roughly one in six couples experience infertility in the process of starting a family and must seek medical treatment.[34] And as the number of alternative-lifestyle families rises, so will the need for assisted reproductive services by couples who cannot procreate naturally. Although sperm banks continue to be a valuable resource for couples experiencing male infertility, many people have begun to look elsewhere for sperm.

Recently, a new online market of free sperm donors has emerged for married heterosexual couples, gay[35] and lesbian couples, and single women unable to conceive children naturally. This market includes advertisements on Craigslist,[36] Yahoo Groups,[37] and websites

visited Feb. 28, 2013) (providing photos and audio files of donors).

30. *Sperm Donation*, NWCRYOBANK, https://www.nwcryobank.com/sperm-donation (last visited Feb. 28, 2013).

31. *California Cryobank Sperm Donor Compensation*, CAL. CRYOBANK, https://spermbank.com/cd_secure/newdonors/index.cfm?ID=4 (last visited Feb. 28, 2013).

32. Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 320 (2007).

33. Congress has defined ART as "all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and other specific technologies." Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-7 (2006).

34. Ruth Deech, *The HFEA—10 Years On, in* THE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY 21, 27 (Jennifer Gunning & Helen Szoke eds., 2003).

35. A gay couple would utilize AI through the use of a surrogate.

36. *See, e.g.*, *Free Sperm Donation*, CRAIGSLIST, http://montana.craigslist.org/m4w/3185327485.html (last visited Aug. 14, 2012) (on file with author).

37. *The Free Sperm Donors Group*, YAHOO! GROUPS, http://health.groups.yahoo.com/group/FreeSpermDonors (last visited Feb. 28, 2013). This group later became the Known

such as Sperm Donors Worldwide.[38] Unlike traditional sperm banks, these matching websites are entirely unregulated,[39] men do not receive compensation for their donations, and donors generally allow potential offspring to contact them.[40] Despite the lack of regulation, many donors agree to undergo STD testing, submit to background checks, and relinquish any paternal rights they have over conceived children.[41]

Beth Gardner, who became a fervent believer in the strategy while seeking free sperm online, launched the Known Donor Registry (KDR), formerly the Free Sperm Donor Registry.[42] KDR is a private sperm donor registry that allows donors and recipients to create online profiles; recipients then can search for a donor with desired characteristics.[43] Members control the amount of information that they share with different groups of users and can be contacted only through a secure form.[44] It is a kind of "moderated Craigslist,"[45] functioning like a dating site, but the women are listed as "recipients," and the men are listed as "donors."[46] Currently, KDR boasts more than 8,000 members, including roughly 400 donors, and claims to have facilitated a dozen pregnancies.[47] Most of KDR's users are lesbian couples or single women, but there is an active contingent of heterosexual couples as well.[48] KDR allows donors to give sperm through AI or Natural Insemination (NI), although it prefers donation through AI.[49] It also "prohibits nudity, dirty talk, cruising for casual sex, and any behavior that other members deem

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Donor Registry. *See* Dokoupil, *supra* note 1, at 46.

38. SPERM DONORS WORLDWIDE, http://www.sperm-donors-worldwide.com (last visited Feb. 28, 2013). This service also goes by the names FIDW and DIY Baby.

39. Lehmann-Haupt, *supra* note 4.

40. *See* Dokoupil, *supra* note 1, at 46.

41. *Id.*

42. *Id.*; *About Known Donor Registry*, KNOWN DONOR REGISTRY, http://www.knowndonorregistry.com/aboutkdr (last visited Feb. 28, 2013).

43. *About Known Donor Registry*, *supra* note 42.

44. *Id.*

45. J. Bryan Lowder, *Is Free, Private Sperm Donation a Good Idea?*, SLATE (Oct. 4, 2011, 3:18 PM), http://www.slate.com/blogs/xx_factor/2011/10/04/is_free_private_sperm_donation_a_good_idea_.html.

46. Dokoupil, *supra* note 1, at 46.

47. *Id.*; *About Known Donor Registry*, *supra* note 42.

48. Dokoupil, *supra* note 1, at 47.

49. *About Known Donor Registry*, *supra* note 42.

harassing."[50] KDR discourages anonymity, believing it is important that children be able to contact their biological fathers and potential siblings conceived using the same donor.[51] Additionally, in order to help recipients make informed choices, KDR provides testimonials, how-to articles, cost comparisons, and legal materials on the site.[52]

Another matching website is Sperm Donors Worldwide, a moderated, members-only service that enforces a strict "Behaviour Code" among its members in an attempt to ensure more genuine, safe, and responsible sperm donations.[53] Created in 2003, the site boasts that it is the sole sperm donation website to accept only AI donors—as opposed to NI donors—in order to reduce health risks and maintain emotional boundaries; it also does not allow donors to charge for their donations.[54] Like KDR, the founders of Sperm Donors Worldwide believe that donor-conceived children have a right to information about their biological origins and do not allow for anonymous donations to be offered or requested.[55] It also sells self-insemination kits for $30, which further reduces the cost associated with traditional AI by removing the need for a doctor to perform the procedure.[56]

Once a donor and potential recipient are matched, many donors submit to STD testing, interviews, reference checks, and additional questions the recipient may have before the insemination takes place.[57] Next, the parties schedule a time to meet to "transfer" the sample.[58] Venues can include anywhere from a hotel room to a Starbucks bathroom.[59] If the recipient is performing self-insemination, the donor will ejaculate in private and then hand the specimen over to the recipient, who then attaches the sperm-filled cup to her

50. Dokoupil, *supra* note 1, at 48.

51. *About Known Donor Registry*, *supra* note 42.

52. *Id.* There are also plans to expand the site to include an egg donor section as well. Dokoupil, *supra* note 1, at 48.

53. SPERM DONORS WORLDWIDE, *supra* note 38.

54. *Id.*

55. *Id.*

56. *Id.*

57. Dokoupil, *supra* note 1, at 46.

58. *Id.*

59. *Id.*

cervix as soon as possible, because fresh sperm is only viable outside the body for a couple of hours.[60]

II. SOCIETAL VALUE OF FREE, PRIVATE SPERM DONATION

A number of factors associated with AI using commercial sperm have contributed to the rise of free, private sperm donation as a viable alternative: the high cost of commercial sperm, the anonymity of commercial sperm donation, health concerns arising from minimal regulation of commercial sperm banks, and the lack of availability of commercial sperm to all potential recipients. This Part will examine these factors, ultimately concluding that free, private sperm donation provides a beneficial service to society.

A. Cost

The Supreme Court has described in dictum the right to procreate as "one of the basic civil rights of man."[61] But for millions of Americans, conceiving a child naturally is impossible. Fortunately, modern medicine has developed numerous "artificial" alternatives for people to have children. Commercially and medically, AI is a simple and straightforward way to confront male infertility.[62] However, AI with commercial sperm has become an exclusive and, in some cases, cost-prohibitive method of conception. A single vial of sperm can cost $700,[63] and, depending on insurance coverage, each round of AI performed by a doctor can cost over $1,000, with women typically needing to undergo numerous rounds of insemination before it is successful.[64]

Cost, therefore, is one major factor contributing to the rise of free, private sperm donation. In many states, insurance does not cover

60. ANNETTE BARAN & REUBEN PANNOR, LETHAL SECRETS: THE SHOCKING CONSEQUENCES AND UNSOLVED PROBLEMS OF ARTIFICIAL INSEMINATION 137 (1989) ("[F]resh sperm, to be effective, must be inseminated within two hours of ejaculation.").

61. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

62. SPAR, *supra* note 12, at 37.

63. The California Cryobank, for example, charges up to $650 for vials of anonymous donor samples and up to $750 for open donor samples. *See Pricing*, CAL. CRYOBANK, http://www.cryobank.com/services/pricing (last updated Jan. 2013).

64. Lehmann-Haupt, *supra* note 4.

infertility treatment;[65] in those states that do cover it, many require women to show that they have not been able to get pregnant naturally, making it difficult for nonmarried and lesbian couples to receive coverage.[66] Expanding insurance coverage of fertility treatments would still exclude most Medicaid recipients and millions of uninsured Americans; this is especially troubling since lower-income women are more likely to suffer from infertility than those in the middle class.[67] Even if insemination is covered, insurance caps can still result in thousands of dollars in out-of-pocket costs.[68] These costs show no signs of decreasing. For example, in order for a sperm bank to break even, it must sell roughly 10,000 units a year, which is difficult for smaller banks to maintain.[69] As these financial pressures mount, the sperm industry is likely to respond by raising prices on its reproductive services, effectively closing the market to more and more individuals. Consequently, it is not surprising that the availability of zero-to-no-cost insemination alternatives has prompted the growth of the online market of free sperm donation.

This is not to say that the commercialization of sperm donation has no societal value. Compensation is no doubt a large motivator for sperm donors in the United States,[70] where the donor pool is still large and donors can make up to $12,000 a year from their anonymous donations.[71] If compensation were removed, the potential shortage in samples could lead to dramatic increases in the cost of commercial sperm, meaning that even fewer women would be able to conceive children through AI. Charging recipients for sperm is also necessary due to the high costs associated with running a sperm bank, such as conducting health screening tests, reimbursing

65. *See, e.g.*, MONT. CODE ANN. § 33-22-1521(3)(b)(xii) (2011) (excluding artificial insemination or treatment for infertility in the required services covered by an association plan).

66. Dokoupil, *supra* note 1, at 47. For example, Maryland defines infertility for purposes of health insurance as a condition in which the patient or spouse has a history of infertility for at least two years, and it must be caused by one of the listed medical conditions. MD. CODE ANN., INS. § 15-810(c) (West 2012).

67. JANNA C. MERRICK & ROBERT H. BLANK, REPRODUCTIVE ISSUES IN AMERICA 54-55 (2003).

68. Dokoupil, *supra* note 1, at 47.

69. SPAR, *supra* note 12, at 39.

70. Merrick and Blank described one sperm donor as saying, "I did not [donate sperm] to get fifty cards on Father's Day; I did it for the money." MERRICK & BLANK, *supra* note 67, at 53.

71. Dokoupil, *supra* note 1, at 47.

donors, and collecting and storing sperm samples, along with other administrative expenses.[72]

Thus, this Note does not argue that the United States should forbid sperm banks from compensating donors or receiving payment in exchange for sperm samples; it merely suggests that there is a need for and value in enabling women to receive AI through private donation. Free, private sperm donation provides an attractive alternative to commercial sperm banks for those who cannot afford to use commercial sperm.

B. Issues Related to Anonymity

Unlike commercial sperm banks, websites that facilitate free, private sperm donation encourage donors to reveal their identities. Most private donors are willing to disclose personal information immediately to potential recipients and maintain limited contact with children they help conceive.[73] This is partly due to the fact that many women want their children to know their biological fathers.[74] In stark contrast to the open-disclosure culture of free, private sperm donation, commercial sperm donation is rooted in secrecy. Children conceived through sperm from anonymous donors have also expressed their dissatisfaction with the "closed-door policy" of commercial sperm banks,[75] as evidenced by websites such as Confessions of a Cryokid[76] and Anonymous Us,[77] where donor-conceived children can voice their unhappiness at feeling "half-adopted."[78] Studies indicate that "some donor children experience a

72. *Cf.* SPAR, *supra* note 12, at 39.

73. Dokoupil, *supra* note 1, at 46.

74. *See id.*

75. *Id.* at 47.

76. CONFESSIONS OF A CRYOKID, http://cryokidconfessions.blogspot.com (last visited Feb. 28, 2013).

77. THE ANONYMOUS US PROJECT, http://anonymousus.org (last visited Feb. 28, 2013).

78. Dokoupil, *supra* note 1, at 47. In response to the growing frustration with anonymity, the Donor Sibling Registry website was created in 2000 in order to provide a forum for donor offspring to find and contact their biological relatives. DONOR SIBLING REGISTRY, https://www.donorsiblingregistry.com (last visited Feb. 28, 2013). The site currently boasts a membership of nearly 38,000 people, averages more than 10,000 visitors each month, and has helped to connect over 9500 "half-siblings and/or donors." *Id.*

sense of loss" from not knowing who their biological fathers are or being able to form relationships with them.[79]

Anonymity originally stemmed from the desire to avoid "the shame of infertility."[80] Today, the primary arguments against identity disclosure derive from concerns about the supply of donors and their right to privacy. Sperm banks believe that if donors are not anonymous, men will refuse to donate due to fear of potential parental obligations or unwanted relationships later.[81] This worry may be unfounded, however. For example, in 1984, Sweden enacted legislation that mandated the release of a donor's identity once a child conceived by AI reached eighteen years of age.[82] Although the legislation raised concerns that the law would cause a severe decline in the supply of sperm donors,[83] the number of donations subsequently *increased*.[84] This same result occurred after New Zealand passed similar legislation.[85] Thus, although removing anonymity may at first have a negative impact on the number of sperm donors, the predictions of sweeping shortages in supply appear overstated.

Additionally, sperm banks have recently been under fire for their policies requiring anonymity until the child reaches the age of eighteen due to genetic diseases that have been passed from sperm donor to child. *ABC News* identified at least twenty-four children conceived with sperm from a donor who had a rare heart defect that, if inherited, could potentially kill his offspring without warning.[86] There have been lawsuits against sperm banks for "faulty" sperm acquired anonymously. In *Johnson v. Superior Court*, a family

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79. Naomi Cahn, *Reproducing Dreams*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CHEATING FAMILIES 147, 153 (Michele Bratcher Goodwin ed., 2010).

80. CAHN, *supra* note 14, at 223.

81. *See, e.g.*, Dokoupil, *supra* note 1, at 47.

82. LAG OM INSEMINATION (Svensk författningssamling [SFS] 1984:1140) (Swed.). Since Sweden first enacted its law, Austria, Switzerland, the United Kingdom, Norway, the Netherlands, and parts of Australia have abolished anonymity. *See* Lisa M. Luetkemeyer, *Who's Guarding the Henhouse and What Are They Doing with the Eggs (and Sperm)? A Call for Increased Regulation of Gamete Donation and Long-Term Tracking of Donor Gametes*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 397, 406 (2010).

83. CAHN, *supra* note 14, at 227.

84. *Id.*

85. *Id.*

86. Susan Donaldson James, *Sperm Donor's 24 Kids Never Told About Fatal Illness*, ABC NEWS (July 21, 2011, 2:02 PM), http://abcnews.go.com/Health/sperm-donors-24-children-told-fatal-illness-medical/story?id=14115344.

alleged that the sperm bank failed to tell them that their donor had a family history of kidney disease.[87] The court decided that the state interest outweighed the donor's right to privacy and ordered the sperm bank to turn over the donor's medical records.[88] Currently, only eighteen states have enacted legislation allowing a child conceived through an anonymous sperm donation to access donor records upon a showing of "good cause,"[89] a very ambiguous standard that remains relatively untested in the courts. The anonymity of donors, coupled with the lack of long-term record keeping and follow-up requirements, makes it difficult for sperm banks to warn families of flawed sperm and increases the likelihood that this sperm will continue to be sold even after problems arise.

Related to the issue of hereditary diseases is the potential for accidental incest resulting from the anonymity of donors. The *New York Times* reported sperm banks creating 150-child clusters around a single donor.[90] Many other countries, including England, Belgium, and Sweden, limit how many children a sperm donor can father in order to avoid accidental consanguineous conceptions.[91] The United States, however, has no such laws and instead merely has guidelines that the American Society for Reproduction Medicine (ASRM) issues, which recommend restricting conceptions by individual donors to 25 births per population of 800,000—a recommendation that is not enforced by law, has no tracking system in place, and does not require mothers of donor-conceived children to report their children's births.[92] Individual sperm banks may have policies

87. 95 Cal. Rptr. 2d 864, 867-68 (Ct. App. 2000).

88. *Id.* at 878.

89. Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125, 138 (1998); *see, e.g.*, COLO. REV. STAT. ANN. § 19-4-106(1) (West 2012) (stating that donor records may be accessed "only upon an order of the court for good cause shown").

90. Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), http://www.nytimes.com/2011/09/06/health/06donor.html.

91. For example, England currently limits donors to ten families. *See Donor Recruitment, Assessment, and Screening*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/498.html?fldSearchFor=donor%20limits#guidanceSection705011.3(i) (last visited Feb. 28, 2013).

92. AM. SOC'Y FOR REPROD. MED., RECOMMENDATIONS FOR GAMETE AND EMBRYO DONATION: A COMMITTEE OPINION 7 (2012), *available at* http://www.sart.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf.

in place to limit the number of children conceived per sperm donor, but the numbers vary wildly. For example, the Rainbow Flag Health Services sperm bank limits each donor to have children by only four to six different women;[93] other sperm banks allow a donor to produce children with ten different women;[94] still others have no limit at all.[95]

Although private donors, like their commercial counterparts, are not subject to legal limits on the number of offspring they can father, many of the free sperm donor websites keep track of the number of children each donor produces.[96] Because the donations are not anonymous, the information is more readily available to potential recipients. If these websites continue to gain popularity, it will be important for them to establish a formal registry that lists the number of children per donor, along with their geographic locations, to help avoid possible cases of incest and to help prevent the spread of genetic diseases among donor children by providing information as to where other related donor-conceived children live.

Some sperm banks have responded to the increased demand for less anonymity by offering sperm from "known" donors, usually at a steeper price.[97] For example, Rainbow Flag Health Services in Alameda, California promises potential clients that "your child will grow up without secrets. They will not grow up fantasizing that their 'father' is the lost King of Bavaria or Charles Manson."[98] This system of disclosure, however, is far from perfect: banks can choose any kind of identity-release policies they like, but outside of contract law, these programs are not bound by any legal obligations, and donors are not required to provide even their real names or updated medical information.[99] To complicate matters further, even if a commercial sperm bank donor has allowed a child to contact him, a

93. *See* RAINBOW FLAG HEALTH SERVICES, http://www.gayspermbank.com/ (last visited Feb. 28, 2013).

94. *See, e.g.*, *FAQs*, SPERM BANK OF CAL., https://www.thespermbankofca.org/content/faqs (last visited Feb. 28, 2013).

95. RAINBOW FLAG HEALTH SERVICES, *supra* note 93.

96. *See* KNOWN DONOR REGISTRY, http://www.knowndonorregistry.com (last visited Feb. 28, 2013).

97. *See Pricing*, *supra* note 63.

98. RAINBOW FLAG HEALTH SERVICES, *supra* note 93. Another sperm bank, Xytex Cryo International, provides its clients with photos and the names of their donors. XYTEX CRYO INT'L, *supra* note 29.

99. CAHN, supra note 14, at 121.

high likelihood exists that the child will never be able to find the donor because banks may keep records of their donations for only a limited number of years.[100]

Ultimately, participants in AI need to have identifying information about one another. It is in the child's best interests to know the identity of his or her genetic parents.[101] This need for genealogical and historical connections is the same for all people, no matter how one was conceived. Even the field of adoption, which once encouraged anonymity much like sperm donation, has begun to favor disclosure. Now, many adoptions are considered "open," meaning that the birth parents are known to the infant from the time that they are born but are not considered legal parents.[102] In response to concerns about children's needs, six states have gone so far as to pass disclosure laws for adoptees, and several others employ registries that allow adoptees to obtain nonidentifying information about their birth parents.[103] Children conceived with donor sperm have much of the same needs as adopted children: both groups need information on potential genetic health risks, and both have a psychological need to know where they came from.

C. Health Concerns

One of the strongest criticisms of free, private sperm donation is the lack of any regulation requiring health screenings of the donor and his sperm before the insemination occurs. Because infertility treatments have a substantial medical component, many people believe that the industry seems like a natural candidate for comprehensive government oversight. In many parts of the world, such oversight is already in place.[104] But in the United States, federal

100. *See id.* at 23.

101. *See id.* at 151 ("States should guarantee the release of [identifying information] to mature adults through laws that would preempt private agreements.").

102. *Id.* at 122.

103. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 891 & n.261 (2000).

104. The United Kingdom is one example of a country taking a more centralized regulatory approach to licensing and monitoring its infertility market. The Human Fertilisation and Embryology Act of 1990 (HFEA) sets standards to govern AI and assisted reproductive technologies and establishes a governmental agency to regulate ART providers and resolve legal issues through administrative rule making. Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).

regulation of ART is confined to a single piece of legislation—the Fertility Clinic Success Rate and Certification Act of 1992—which lacks meaningful enforcement mechanisms.[105] Professional organizations such as the American Fertility Society have promulgated standards of practice for assisted reproductive facilities, which, while valuable, do not have the force of law.[106]

The Food and Drug Administration (FDA) did not impose any requirements on sperm banks until 2005. Because sperm banks deal with biological tissue, they are now regulated as human cell, tissue, and cellular and tissue-based product (HCT/P) establishments and are thus subject to FDA oversight.[107] Pursuant to section 361 of the Public Health Services Act (PHS Act), the FDA requires that HCT/P businesses register with the FDA, list all HCT/P's under the establishment's control, and screen and test donors for communicable diseases such as HIV, Hepatitis B and C, and other sexually transmitted diseases.[108] However, the FDA does not require screening for genetic diseases.[109] Unfortunately, clinics dealing with reproductive tissue, such as sperm banks, are exempt from complying with requirements to track tissue or report adverse medical reactions,[110] and they are only required to maintain screening and test results for each donor for ten years.[111]

The PHS Act differentiates among three categories of reproductive donors—anonymous, directed,[112] and sexually intimate partners

105. *See* Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1 (2006); *see also* Luetkemeyer, *supra* note 82, at 407-08. The Act requires that all ART programs and clinics provide success rates annually to the Centers for Disease Control (CDC), although there are no meaningful consequences for failing to report this data. *Id.* at 408. It also compels the CDC to develop a model certification program for embryo laboratories to be implemented by interested states, although participation is purely voluntary and, to date, no state has adopted the program. *Id.*

106. MERRICK & BLANK, *supra* note 67, at 50.

107. Luetkemeyer, *supra* note 82, at 409.

108. 21 C.F.R. § 1271.1 (2012). It should be noted that the FDA's requirements are the minimum requirements mandated by the federal government; some states may have requirements that are more rigorous than these, such as sperm bank licensing mandates. AM. SOC'Y FOR REPROD. MED., *supra* note 92, at 1.

109. AM. SOC'Y FOR REPROD. MED., *supra* note 92, at 1.

110. Luetkemeyer, *supra* note 82, at 409-10.

111. AM. SOC'Y FOR REPROD. MED., *supra* note 92, at 7.

112. A directed reproductive donor is defined as "a donor of reproductive cells or tissue ... to a specific recipient, and who knows and is known by the recipient before donation. The term ... does not include a sexually intimate partner under § 1271.90." 21 C.F.R.

—subjecting each category to a different set of requirements before the sperm can be used.[113] Only anonymous donor sperm is required to undergo all relevant donor-eligibility screening and testing requirements.[114] Directed reproductive donors, or known donors, may contribute sperm under certain circumstances even if their sperm is considered ineligible after screening.[115] Their sperm is also exempted from the quarantine and six-month retesting requirements applicable to anonymous donations.[116] For sexually intimate partners, no testing or screening procedures are required.[117] A free, private sperm donor would most likely be considered a known donor under this regulatory scheme because the recipient has a chance to meet with the potential donor face-to-face, and therefore would not have to undergo extensive testing if both parties went through a fertility clinic.

Acquiring anonymous donor sperm through a commercial sperm bank is like a "roll of the genetic dice"[118] because no federal law requires that sperm banks screen for genetic diseases, despite the recommendation by the ASRM that banks test donors for certain genetic conditions when the donor has a family history of the disease.[119] As a result, hundreds of women have bought sperm carrying an array of serious diseases and genetic disorders.[120] In one case, a woman who was artificially inseminated with donor sperm gave

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§ 1271.3.

113. *Id.* § 1271.90.

114. *See id.* Anonymous sperm donors must pass all screening and tests required under sections 1271.75 and 1271.80. A new test specimen from these donors must be collected at least six months after their semen donation, and it must test negative for communicable diseases in order for the sperm donation to be eligible. The donation is quarantined until this retesting is complete. *Id.* § 1271.60(a).

115. *Id.* § 1271.90(a)(3).

116. *Id.* § 1271.85(d); AM. SOC'Y FOR REPROD. MED., *supra* note 92, at 7.

117. 21 C.F.R. § 1271.90(a)(2).

118. Jacqueline Mroz, *In Choosing a Sperm Donor, a Roll of the Genetic Dice*, N.Y. TIMES (May 14, 2012), http://www.nytimes.com/2012/05/15/health/in-sperm-banks-a-matrix-of-untested-genetic-diseases.html.

119. *Id.* Many banks, however, do go further than the FDA regulations and self-regulate by placing additional limits and rules on themselves. For example, the California Cryobank claims that its "strict donor qualification process eliminates over 99% of all applicants" and includes "[h]igh educational and physical standards, personal and family medical histories, multiple semen and blood analyses, genetic screening, and a series of extensive interviews." *Donor Selection*, CAL. CRYOBANK, http://www.cryobank.com/why-use-us/donor-selection (last visited Feb. 28, 2013).

120. Dokoupil, *supra* note 1, at 47.

birth to a child with cystic fibrosis, despite the assertion on the laboratory's website that all donors were tested for genetic conditions.[121] And the fact that commercial sperm donors can father a large number of children increases the chance that genetic conditions will be prevalent in the general population.[122]

Due to the lack of complete and uniform regulations, enforcement, and mandatory compliance, there are numerous health risks associated with sperm acquired through commercial sperm banks, despite additional STD and genetic testing that may be performed on each donation. As Sean Tipton, director of public affairs for the ASRM, has stated, "Human reproduction is an inherently risky proposition and it always will be, so it's impossible to remove all the risk and uncertainty of reproducing .... You'll never be able to catch everything."[123] Although free, private sperm donation is unregulated, the recipient can request that the donor complete STD and other medical tests, which can yield the same, or even higher, quality sperm as a sperm bank, but at a much lower cost.

D. Availability

ART is not available to everyone. Many gay and lesbian couples face tremendous difficulty in obtaining fertility services, even if they have the money to pay for it. The free market system in which fertility clinics operate often excludes these couples. Many clinics use a variety of criteria to screen patients, including an "appropriateness for parenthood" standard determined by what the clinic deems to be in the best interest of the child.[124] This "clinical gatekeeping" may exclude nontraditional families, such as single women or gay and lesbian couples.[125] According to a 2001 study, only 79 percent of ART clinics would provide services to unmarried women, and 74 percent would provide to lesbian couples.[126] Single men or gay

121. Mroz, *supra* note 118.

122. Dokoupil, *supra* note 1, at 47.

123. Mroz, *supra* note 118 (internal quotation marks omitted).

124. CAHN, *supra* note 14, at 135.

125. *Id.*

126. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHONOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 29 (2d ed. 2011) (citing Judy E. Stern et al., *Access to Services at Assisted Reproductive Technology Clinics*, 184 AM. J. OBSTETRICS & GYNECOLOGY 591 (2001)).

couples would likely encounter even more obstacles in obtaining these services.[127]

III. LEGAL ISSUES SURROUNDING FREE, PRIVATE SPERM DONATION

Advances in reproductive technology have made it possible for both traditional[128] and nontraditional families who otherwise would be childless to be parents. The law, however, has not developed in tandem with these medical advances and changing social circumstances, creating novel legal issues concerning parental rights and the status of "artificially" conceived children. This Part outlines the current federal and state statutes and case law concerning paternity as it relates to donor-conceived children and describes how inconsistencies in the law have important legal implications for artificial insemination with free, private donor sperm.

A. Paternity

1. Legal Landscape

Historically, legal fatherhood depended on whether the biological father was married to the mother;[129] only through marriage was a father thought to have "recognized his responsibility toward his children."[130] Often, the law deprived unwed natural fathers of paternity rights unless they lived with or developed bonds with their child.[131] Early cases dealing with families formed through artificial insemination struggled with whether the children were "legitimate" or whether the mother had committed adultery.[132] Modern courts are less concerned with the legitimacy of the resulting child and more concerned with defining the rights of the sperm, egg, or gamete providers.[133]

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127. *Id.*

128. A "traditional family" in the context of American family law refers to two married heterosexual adults who may have their own biological children or who have adopted children. *Id.* at 5.

129. ROSEMARIE SKAINE, PATERNITY AND AMERICAN LAW 35 (2003).

130. *Id.*

131. *See id.* at 36.

132. *See supra* note 17.

133. CAHN, *supra* note 14, at 74.

Under the United States' system of federalism, family law remains the domain of the states through their authority to protect health and regulate familial relations, medical practice, and contracts; thus, each state can develop its own set of laws to govern family law issues.[134] Consequently, no one federal law determines legal parentage, and, instead, states have enacted an array of laws that address issues dealing with AI: some limit who can use AI,[135] whereas others broaden the scope of individuals protected under AI-related statutes.[136] AI regulation has grown in a piecemeal and inconsistent fashion, as state legislatures and courts shape their own responses to new technologies and the legal issues associated with reproduction as legal conflicts arise.[137]

The Uniform Parentage Act (UPA) is the closest the United States has come to creating a uniform set of rules governing AI and the parentage issues surrounding it.[138] The UPA is a model statute and may be adopted by state legislatures on a state-by-state basis.[139] As first promulgated in 1973, the UPA contained a section dealing with the use of AI by married couples.[140] The Act provided that if a wife was artificially inseminated with donor semen under a physician's supervision, the husband gave his written consent, and the physician filed this consent with the state health department, then the husband, not the donor, was treated as if he were the natural father of the conceived child for legal purposes.[141]

By 1998, thirty states had adopted the UPA or something similar, with fifteen states eliminating the licensed physician require-

134. SUSAN L. CROCKIN & HOWARD W. JONES, JR., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 134 (2010); MERRICK & BLANK, *supra* note 67, at 50.

135. For example, Oklahoma prohibits the use of AI by anyone but married, heterosexual couples. *See* OKLA. STAT. ANN. tit. 10, § 553 (West 2012). Georgia makes it a felony for anyone other than a licensed physician to perform AI. *See* GA. CODE ANN. §§ 43-34-37, -42 (2012).

136. *See, e.g.*, OR. REV. STAT. ANN. § 109.239 (West 2012) (stating that the sperm donor is not considered the legal father of any child born through artificial insemination if he is not the mother's husband); *see also* UNIF. PARENTAGE ACT § 703 cmt. (amended 2002), 9B U.L.A. 355 (2001) (recognizing the interests of single people in using artificial reproductive technology).

137. MERRICK & BLANK, *supra* note 67, at 49; Luetkemeyer, *supra* note 82, at 407.

138. *See* UNIF. PARENTAGE ACT § 5 (repealed 2000), 9B U.L.A. 407 (2001).

139. CAHN, *supra* note 14, at 83, 85.

140. UNIF. PARENTAGE ACT § 5.

141. *See id.*

ment.[142] The Act, when initially created, had several shortcomings, however. It did not address potential legal issues concerning the rights of a divorced father, the standing of nonmarital fathers to sue for parental rights, or the parental status of sperm donors when the recipient was unmarried or was not inseminated by a licensed physician; nor did it address surrogacy and gestational agreements.[143] Ultimately, the Act applied only for children conceived through AI performed by a licensed physician on a married woman.[144]

The revised Uniform Parentage Act of 2000 clarified the legal parentage question that the first passage of the Act left unresolved. The updated UPA modernized itself by maintaining a gender-neutral stance on donation.[145] In addition, the language referencing married women and licensed physicians was removed in order to "provide[ ] certainty of nonparentage for prospective donors."[146] Unlike the former UPA, the language of the new UPA defines the rights of not only single women but also of unmarried heterosexual couples, whether or not those couples are intimately involved, so as to "reflect[ ] the concern for the best interests of nonmarital as well as marital children of assisted reproduction."[147] As for sperm donation, a donor is not a legal parent if conception occurred through AI and he did not intend to become a parent.[148] However, the revised Act still allows a donor to contest paternity if he can prove that he lived with the child within the first two years of the child's life and considered the child his offspring.[149] Despite the modernization of the Act and its clarification of several parentage issues, as of 2012, only nine states had incorporated a version of the revised UPA into their own state statutes concerning parentage.[150]

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142. Garrison, *supra* note 103, at 845-46.

143. CAHN, *supra* note 14, at 85-86.

144. *Id.*

145. *See* UNIF. PARENTAGE ACT § 702 cmt. (updated 2011), 9B U.L.A. 355 (2001).

146. *Id.* ("The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.").

147. *See id.* § 703 cmt.

148. *See id.* §§ 702-703.

149. *Id.* § 704.

150. These states include Alabama, Delaware, North Dakota, Oklahoma, New Mexico, Texas, Utah, Washington, and Wyoming; however, none have enacted the law verbatim. *See Enactment Status Map*, UNIFORM L. COMMISSION, http://uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited Feb. 28, 2013).

States have taken three different approaches when defining parental rights of sperm donors: some states have adopted statutes comparable to the 1973 UPA, providing that donors whose sperm is given to a physician for inseminating a married woman are not legal parents;[151] other states have laws similar to the revised 2000 UPA, which provide a gender-neutral intent and effect by specifying that no donor will be considered a parent, regardless of the marital status of the parties;[152] and finally, some states do not have a statute specifically concerning the parental status of sperm donors.[153]

Adding to the divergence of laws on this issue, even when a state has a statute on point, courts have occasionally disregarded the statute and applied an intent-based analysis or looked to parentage agreements when determining parental rights.[154] For example, in *T.M.H. v. D.M.T.*, the biological mother of a child, who donated her egg to her lesbian partner (and birth mother of the child), brought an action against the birth mother requesting a determination of parentage.[155] The biological mother challenged the constitutionality of Florida's state parentage statute that provided, "[t]he donor of any egg, sperm, or preembryo … shall relinquish all maternal or

151. *See, e.g.*, ALASKA STAT. ANN. § 25.20.045 (West 2012) (providing that "[a] child born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses" and not that of the donor); CAL. FAM. CODE § 7613(a) (West 2008); MINN. STAT. ANN. § 257.56 (West 2012).

152. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-106(2), (3) (West 2012) ("A donor is not a parent of a child conceived by means of assisted reproduction, except as provided in subsection (3) of this section.... If a husband ... consents to, assisted reproduction by his wife as provided in subsection (1) of this section, he is the father of the resulting child."); IDAHO CODE ANN. § 39-5405(1) (West 1998); KAN. STAT. ANN. § 38-1114(f) (West 1995) (stating that the default rule is that a sperm donor has no paternal rights, even if he is known to the mother, unless he and the mother have agreed otherwise in writing).

153. This includes about one-third of states: Georgia, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, New York, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia. *See Enactment Status Map*, *supra* note 150.

154. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005) (holding that a lesbian woman who provided her ova to her lesbian partner was not a "donor" of her ova, because "K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home"); *In re* R.C., 775 P.2d 27, 35 (Colo. 1989) (en banc) (refusing to apply statutory protection of recipient because parties had an oral agreement that donor's parental rights would be preserved). *But see* CAHN, *supra* note 14, at 89-90 (describing how courts sometimes refuse to apply parental agreements).

155. 79 So. 3d 787, 787 (Fla. Dist. Ct. App. 2011).

paternal rights and obligations with respect to the donation or the resulting children."[156] The court held that the statute violated her constitutionally protected parental rights to the child and granted parental rights to both women.[157]

2. Application of Paternity Laws to Commercial Sperm Donation

Paternity is generally not an issue when a married woman uses an anonymous donor's sperm and a licensed physician performs the insemination. Most states have laws that remove paternal rights from anonymous sperm donors and give them to the intended parents.[158] Moreover, anonymous sperm donors who donate to sperm banks sign donor consent agreements that relinquish any parental rights to a resulting child.[159]

Complications arise, however, when the woman knows the donor or is not married. Courts will generally grant sole rights to a woman who has complied with her state's AI laws, but most of these statutes do not protect unmarried women or do not apply when a licensed physician is not involved.[160] In construing these provisions, some courts have declined to protect single women trying to combat donor assertions of paternity due to public policy concerns about single parenthood.[161] As will be discussed below, a woman or couple

156. FLA. STAT. ANN. § 742.14 (West 2012).

157. *T.M.H.*, 79 So. 3d at 803.

158. *See* CAHN, *supra* note 14, at 89.

159. *See, e.g.*, *About Your Confidentiality and Anonymity*, CAL. CRYOBANK, http://www.spermbank.com/newdonors/index.cfm?ID=5 (last visited Feb. 28, 2013).

160. *See supra* note 151 and accompanying text.

161. *See, e.g.*, Straub v. B.T.T. *ex rel.* Todd, 645 N.E.2d 597, 601 (Ind. 1994) (holding that a man did have child support responsibilities for his naturally conceived child, even though the mother had induced him to impregnate her with a written statement releasing him from liability); C.O. v. W.S., 64 Ohio Misc. 2d 9, 12 (Ct. Com. Pl. 1994) ("Public policy supports the concept of legitimacy, and the concomitant rights of a child to support and inheritance.... A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action." (citations omitted)); Estes v. Albers, 504 N.W.2d 607, 609 (S.D. 1993) (holding that the state's AI statute was not followed when a man helped a woman conceive a child naturally after agreeing with her that he would not have child support obligations, and therefore found that the man did have parental rights). *But see* Steven S. v. Deborah D., 127 Cal. App. 4th 319 (2005) (holding that the state statute providing that sperm donors are not natural fathers applied, despite the fact that the donor and woman had engaged in sexual intercourse prior to the AI, because of the statute's absolute bar).

who uses donor sperm from one of the private donor websites does not have the legal protection that generally accompanies using anonymous sperm from a commercial sperm bank; specifically, a commercial sperm donor will not be granted parental rights over their child. Likewise, a free, private sperm donor is also not legally protected from claims for child support of any child he helps conceive.

3. Application of Paternity Laws to Private Sperm Donation

a. Failing to Comply with the Applicable Statute

In previous cases when a known sperm donor and recipient did not comply with their state's statute on artificial insemination, courts have held that the sperm donor is the legal parent and thus liable for child support.[162] As discussed earlier, many state statutes require that a licensed physician perform the AI in order for paternity rules to be enforced.[163] In one case, *Jhordan C. v. Mary K.*, the court awarded paternity rights to a man who had provided sperm to inseminate an acquaintance.[164] The woman performed the insemination at home, in violation of the state statute that required a licensed physician to perform the AI, so she could not rely on the statute to extinguish the donor's parental rights because the statute applied only if the semen was inseminated by a licensed physician.[165] This rule has enormous implications for free, private sperm donation because the AI is usually self-administered by the woman who is often unmarried. If the parties fail to involve a doctor, they may have no statutory remedies, and many courts may enforce parental liability on the sperm donor.

b. Distinction Between Known and Anonymous Donors

When a woman decides to self-inseminate with the sperm of a donor she found through a matching website, she also runs the risk that courts will apply the distinction between known and unknown

162. *See infra* note 172 and accompanying text.
163. *See supra* note 151 and accompanying text.
164. 179 Cal. App. 3d 386, 397 (1986).
165. *Id.*

sperm donors that has been prominent in the case law.[166] Many courts are reluctant to deny parental rights to known sperm donors if they request them due to the societal preference for two-parent families, as opposed to single parents.[167] Courts would most likely classify donors who offer their sperm for free on sites like KDR as known donors because they usually meet the recipient in person and, in many cases, allow ongoing, albeit limited, contact with the child. In this sense, they are more like directed donors than anonymous donors.[168] AI statutes do not expressly distinguish between anonymous and known donors, leading to complications when a woman uses a known donor. Intent is not as easily discernible for known donors as it is for anonymous donors, and the parties involved typically fail to adequately articulate their expectations prior to conception.

For example, in *Thomas S. v. Robin Y.*, the court awarded paternity rights to a known sperm donor who had formed a limited relationship with the conceived child and never signed a written agreement relinquishing his paternal rights.[169] In reversing the lower court's decision, the appellate court said that "[t]he notion that a lesbian mother should enjoy a parental relationship with [the child], but a gay father should not is so innately discriminatory as to be unworthy of comment."[170] The court effectively determined that the sperm donor's due process rights trumped what had been determined to be the best interest of the child by both the lower court and the court-appointed psychologist.[171] Most sperm banks provide protection for exactly this situation through anonymity contracts, but part of the appeal of private donation is the possibility

166. *See, e.g*, *C.O. v. W.S.*, 64 Ohio Misc. 2d at 11 ("The statute does not prevent a paternity adjudication where an unmarried woman solicits the participation of the donor, who was known to her, and where the donor and woman agree that there would be a relationship between the donor and child." (citations omitted)). *But see* Leckie v. Voorhies, 875 P.2d 521, 522 (Or. Ct. App. 1994) (finding known donor not entitled to legal recognition of paternity because he agreed not to assert paternity); McIntyre v. Crouch, 780 P.2d 239, 241, 243 (Or. Ct. App. 1989) (holding that the statute applies even when a physician does not perform insemination, the donor is not anonymous, and the recipient is unmarried).

167. *See* CROCKIN & JONES, *supra* note 134, at 140; *see also supra* note 166.

168. *See supra* notes 112-16 and accompanying text.

169. 618 N.Y.S.2d 356, 362 (App. Div. 1994).

170. *Id.* at 361.

171. *Id.* at 358, 362.

of the sperm donor maintaining a limited relationship with the child.

c. Written Agreements Are Important, but Not Necessarily Dispositive

Even when the parties agree on parenthood ahead of time, contracts that explicitly preclude rights for known sperm donors are not necessarily enforceable; courts may choose to invalidate these agreements on public policy grounds concerning the best interests of the child.[172] Some states recognize a donor's paternal rights only when he intends to become a parent to a resulting child or stipulates to such a right in written agreements,[173] but most states do not address this issue at all.

State courts have been inconsistent when enforcing the validity of prior oral or written agreements.[174] If a court finds that the sperm donor made an oral agreement with the recipient that he will have an active, decision-making role in the child's life with visitation rights—even if such an agreement is contrary to a statute—in many such cases the court will grant him custody so as not to violate his due process rights.[175] In *McIntyre v. Crouch*, an Oregon sperm donor successfully challenged an Oregon statute that cut off parent-child rights and responsibilities between sperm donors and their offspring.[176] The donor claimed that he donated sperm to a lesbian

172. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 682 (Cal. 2005).

173. *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-703 (West 2012) (stating that if a sperm donor intends to parent a child resulting from AI, he is the legal parent); D.C. CODE § 16-909(e)(2) (2012) (stating that a sperm donor is the legal father if there is a written agreement between him and the mother stating his intent to parent); KAN. STAT. ANN. § 38-1114(f) (West 2012) (same).

174. *Compare K.M. v. E.G.*, 117 P.3d at 682 (holding that a private contract could not cut off parental rights), *with In re* R.C., 775 P.2d 27, 35 (Colo. 1989) (en banc) (holding that a private contract that allows for parental rights could be enforced, overriding a state statute that cuts off parental rights). Although both courts found in favor of parental rights, they treated the parties' private contracts inconsistently. *See also* State Dep't of Human Servs. *ex rel.* K.A.G. v. T.D.G., 861 P.2d 990, 991 (Okla. 1993) (ruling that an unwed mother could not release the natural father of paternity rights, despite an agreement between the parties to the contrary, due to public policy concerns as to the best interests of the child).

175. *See, e.g.*, Elizabeth E. McDonald, Note, *Sperm Donor or Thwarted Father? How Written Agreement Statutes Are Changing the Way Courts Resolve Legal Parentage Issues in Assisted Reproduction Cases,* 47 FAM. CT. REV. 340, 344 (2009).

176. 780 P.2d 239, 245 (Or. Ct. App. 1989).

couple on the condition that he be allowed to retain contact with the child.[177] The court found that the law as applied to him could unfairly and unconstitutionally deprive him of fathering rights and that he should have the opportunity to prove any expectation of a parenting role between himself and the mother.[178]

A distinguishing case, however, is *In re K.M.H.*, in which the Kansas Supreme Court was highly deferential to a state statute that created a presumption that the sperm donor had no parental rights, despite his expectations to the contrary, if there was no written contract granting him such rights.[179] In the case, the mother brought a children-in-need-of-care petition against her sperm donor, seeking a declaration from the court that the donor was an "unfit" parent and asking for termination of his parental rights.[180] The donor requested a declaration of paternity and joint custody of the child.[181] He argued that he and the mother had an oral agreement before the birth that he would be involved in the child's life.[182] The issue before the court was a matter of first impression, and the court ultimately decided that Kansas's statute barring a presumption of paternity for sperm donors absent a written agreement to the contrary did not violate his equal protection or due process rights.[183]

In a Pennsylvania case, the existence of an oral contract protected the donor from a claim for child support. In *Ferguson v. McKiernan*, a woman was inseminated with the sperm of a known donor through a private donation made at a clinic.[184] The donor and mother initially agreed that he would relinquish visitation rights in exchange for her agreeing to not seek child support; however, the mother sought child support five years later.[185] The lower court initially found in her favor, applying the generally established rule that an individual cannot contract away child support obligations.[186]

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177. *Id.* at 241.
178. *Id.* at 245.
179. 169 P.3d 1025, 1043 (Kan. 2007); *see* KAN. STAT. ANN. § 38-1114(f) (West 2012).
180. *In re K.M.H.*, 169 P.3d at 1029.
181. *Id.*
182. *Id.* at 1033.
183. *Id.* at 1031, 1033, 1040-41.
184. 940 A.2d 1236, 1238 (Pa. 2007).
185. *Id.*
186. Ferguson v. McKiernan, 60 Pa. D. & C.4th 353, 363-64 (Ct. C.P. 2002), *aff'd*, 855 A.2d 121 (Pa. Super. Ct. 2004), *rev'd,* 940 A.2d 1236 (Pa. 2007).

The Pennsylvania Supreme Court, however, reversed and ruled that the contract was enforceable, finding that the insemination in this case was equivalent to an anonymous donation, and the donor should be protected from claims for support.[187]

Even more recently, and perhaps most relevant to free, private sperm donation, a New Mexico court found that an agreement between a woman and a known sperm donor releasing the donor of child support obligations was unenforceable because the contract allowed for the donor to assume a parental role in the child's life.[188] In *Mintz v. Zoernig*, a man provided sperm to a female friend, who inseminated herself without the assistance of a licensed physician.[189] Following the child's birth, the donor and woman agreed in writing that the donor would act as a male role model for the child, that the mother and her partner were to be the primary parents, and that the donor would have no financial obligations for child support.[190] The mother, however, eventually filed a paternity action, seeking child support.[191] The AI statute removing sperm donor parental rights and responsibilities did not apply because a physician was not involved in the insemination.[192] Additionally, because the donor had held himself out to be the father of the child, the court found that the contract was not enforceable and the donor should therefore assume the legal responsibilities of parenthood.[193]

These and similar cases suggest that courts are becoming more inclined to reject arguments that known donation and single motherhood are against public policy.[194] However, they also raise questions about whether agreements between single women or married couples and private sperm donors, without the protection of a statute, would be unenforceable. Free, private sperm donors generally allow recipients to remain in contact with them and sometimes even allow visitation with their conceived child. This

187. *Ferguson*, 940 A.2d at 1248.
188. Mintz v. Zoernig, 198 P.3d 861, 864 (N.M. Ct. App. 2008).
189. *Id.* at 862.
190. *Id.*
191. *Id.*
192. *Id.* at 863.
193. *Id.*
194. *See, e.g.*, L.A.L. v. D.A.L., 714 So. 2d 595, 596-97 (Fla. Dist. Ct. App. 1998) (per curiam) (refusing to grant parental rights to a known donor due to the prior agreement he had made with the intended parents to relinquish all rights).

contact is very limited, however, and would not be nearly as substantial as the relationship that formed between father and child in *Mintz*.

d. Decreasing Reliance on Biology to Determine Paternity

The law is increasingly recognizing factors other than biological connections, such as "de facto" parenthood, in determining parental rights.[195] The father's biological tie may not be dispositive, as courts are placing increasing emphasis on established and intended parenting relationships, in part to deal with the expanding definition of "family." In a series of four cases, the "unwed father cases,"[196] the Supreme Court developed a test that relied on three factors to help determine whether an unwed man had the constitutional right to become the legal father: "[His] biological relation to the child; his social relationship to the child; and his relation to the child's mother."[197] The Court proclaimed that unwed fathers could become legal fathers if they established meaningful familial relationships with their biological children.[198] Claims of parental rights by natural fathers of illegitimate children are given constitutional respect when those fathers have participated in the child's maintenance and care. Therefore, under the Court's "biology plus relationship" standard,[199] a free, private sperm donor whose only connection to the child is his DNA could potentially be denied his ability to successfully assert paternity.

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195. *See* Holtzman v. Knott, 533 N.W.2d 419, 437 (Wis. 1995) (recognizing a parent-like relationship that was not based on biology).

196. Michael H. v. Gerald D., 491 U.S. 110, 119-30 (1989) (upholding a statutory presumption of a child's legitimacy, irrebuttable by all but the marital couple, therefore refusing a natural father's claim of rights both to prove his paternity and to maintain a relationship with his daughter); Lehr v. Robertson, 463 U.S. 248, 261-62 (1983) (ruling that biological fatherhood is an important interest that deserves some protection, but that protection does not immediately translate to legal fatherhood if an unwed biological father failed to develop a relationship with the child); Quilloin v. Walcott, 434 U.S. 246, 254-55 & n.14 (1978) (holding that the biological father failed to develop a "legitimate" relationship with his child); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that an unwed father has a due process right to an individualized fitness assessment during a custody challenge).

197. JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 118 (1997).

198. *Id.*

199. *See, e.g.*, Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 433 (2007) (internal quotation marks omitted).

B. A New Notion of Family

The judiciary has begun to respond to and recognize the evolving face of the American family, even if legislatures have been less reluctant to embrace these changes.[200] As private donor insemination becomes more widely used by single women and same-sex couples, disputes will inevitably arise concerning the rights and obligations of the donors absent clear legal definitions of parenthood for intended parents—a problem exacerbated by the mobility of individuals and families and the inconsistency among state laws. Free, private sperm donation poses unique legal problems due to the limited relationships many donors maintain with their children and the fact that many states' statutes do not protect unmarried women or self-insemination.[201] Although recent decisions indicate that courts are more accepting of nontraditional families than they once were,[202] the lack of predictability on this issue illustrates the need for uniform legislation that addresses the modern procedures and parties involved, rather than outdated methods of conception.[203]

IV. RECOMMENDATIONS

A. How to Resolve Paternity Issues When Using Free, Private Sperm Donation

The inconsistency and variation among state statutes carry a steep price.[204] AI is a riskier process than it needs to be for intending parents, who do not know if their written agreements are fully enforceable;[205] it is even riskier for a donor, who may be financially liable if a mother tries to seek child support from him.[206] These risks could be reduced at either the federal or state level, or ideally through a combination of both. Limited federal regulation that addresses the rights of the sperm donor would be most proper.

200. *See supra* Part III.A.1.
201. *See supra* Part III.A.3.
202. CROCKIN & JONES, *supra* note 134, at 36.
203. *See id.*
204. *See* McDonald, *supra* note 175, at 340-41.
205. *See supra* Part III.A.3.c.
206. *See* CROCKIN & JONES, *supra* note 134, at 45 (describing a South Dakota case awarding child support to the mother in such an instance).

Individual states would still be free to approach AI as their citizens see fit, but their specific provisions would be grounded in a system that would clarify when, and under what conditions, AI would be permitted, and who is the legal parent of the conceived child. But if federal action is not possible due to congressional inaction or political concerns, then more certainty is needed at the state level. Clearly, state legislatures can contribute to the development of this area of law by drafting a comprehensive statutory framework of rights and liabilities affecting all parties involved in AI. Courts have even expressed their desire for such uniform legislation when dealing with cases concerning assisted reproduction.[207]

Free, private sperm donation creates unique paternity and custodial issues because of its lack of donor anonymity, its unregulated status, and the limited contact many donors have with their children.[208] As the private donor industry grows, new legal safeguards need to be designed and implemented that remove parental liability of donors while maintaining the possibility of limited contact between donor and child.

First, this Note supports a default rule in all states that would remove all paternal rights and liability for all donors unless the donor intends otherwise.[209] The majority in *Ferguson v. McKiernan* described the downside of presuming parental rights of the sperm donor:

> [I]t would mean that a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself

207. *See, e.g.*, Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 n.10 (Ct. App. 2002) ("Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions."); *In re* A.B., 818 N.E.2d 126, 131 (Ind. Ct. App. 2004) ("We encourage the Indiana legislature to help us address this current social reality by enacting laws to protect children who, through no choice of their own, find themselves born into unconventional familial settings.").

208. *See supra* Part III.A.3.

209. Some states have a similar default rule that presumes that a sperm donor is not the legal parent of a conceived child. *See supra* note 152. Other scholars have also suggested or supported such a default rule. *See, e.g.*, Charles W. Adamson, *Assisted Reproductive Techniques: When Is Sperm Donor a Dad?,* 8 WHITTIER J. CHILD & FAM. ADVOC. 279, 293-94 (2009).

> assured that he will never be able to seek custody of the child.... [T]o protect herself and the sperm donor, that would-be mother would have no choice but to resort to anonymous donation or abandon her desire to be a biological mother, notwithstanding her considered personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery.[210]

1. Model Statute

Additionally, a uniform model or law should be developed to clarify the legal status of children born as a result of sperm donated through one of the matching websites. In order to apply to free, private sperm donation, this model statute would need to be gender neutral, allow for AI by single women, and omit language requiring a physician to be involved in the insemination process. It should also clarify that it does not matter whether a donor is known or anonymous. An example of a possible statute could read as follows:

> MODEL STATUTE. RIGHTS OF DONORS TO ASSISTED REPRODUCTION
> 1. A donor is not the legal parent of a child conceived through assisted reproduction and shall have no rights, obligations, or interest with respect to the conceived child, except as provided in Subsection (2) of this provision.
> a. Donor is defined as an individual who provides eggs or sperm used for assisted reproduction to a recipient, with no intent to be the legal parent of the conceived child, whether the donor is known or anonymous to the recipient.
> b. Assisted reproduction is defined as a method of causing pregnancy other than sexual intercourse.
> 2. The donor may be the legal parent of a child conceived through assisted reproduction only if both parties execute a signed, written agreement before the conception takes place, indicating the donor's intent to parent.[211]

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210. 940 A.2d 1236, 1247 (Pa. 2007).

211. This language is based off of Article 7 of the amended 2002 UPA dealing with the status of children conceived using artificial reproduction. *See* UNIF. PARENTAGE ACT §§ 701-702 (amended 2002), 98 U.L.A. 355 (2000).

The gender neutral terms in this model statute, which would apply to both sperm and egg donors, afford room for flexibility and reinterpretation, and embrace a rational, modern understanding of family, parenthood, and parental rights. New parental rights and definitions of "family" could be created *precisely because* of the flexibility in the proposed law. Free, private sperm donors would be protected from parental liabilities under this law because it creates a default presumption against paternity and does not require that a licensed physician perform the AI, nor that the recipient be married.

2. Enforcing Written Agreements

In the meantime, courts should presume written agreements between recipients and donors concerning parental rights to be as valid, binding, and enforceable as any other contract.[212] Written agreements protect reproductive intent and have the added advantage of discouraging litigation, as individuals are more likely to resolve familial issues privately.[213] They also minimize misunderstandings and maximize procreative liberty by allowing the parties to make their own decision over such a fundamentally personal matter.[214] Professor Marjorie Schultz has advocated a contract-based analysis to parental rights of those who utilize ART, urging that "[w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[215] Recent cases show that courts are slowly recognizing the principle of contract between donors and recipients as a basis for establishing

212. The benefits of written agreements in child support cases have been well-documented in the family law literature. *See, e.g.*, McDonald, *supra* note 175, at 350.

213. *See id.*

214. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) ("Written agreements also provide the certainty needed for effective operation of IVF programs.... Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree.").

215. Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323.

the resulting parenting relations, despite a biological connection between the donor and child.[216]

When a woman uses sperm from a free, private sperm donor, she should always enter into a formal written agreement beforehand that documents her and the donor's intentions and expectations of the arrangement. Sound, signed agreements demonstrate intent and minimize misunderstanding.[217] The parties should agree at the outset to the kind of relationship that would extend between them and a conceived child. They could include a stipulation that allows the donor to maintain some form of limited contact with the child, but that stresses that this contact would not bestow paternal rights on the donor. The written form should clearly state that it is intended to be a binding agreement between the parties in the event of their future disagreement.

One criticism of enforcing written agreements is that it is inherently unfair and improper to allow individuals to contract away something as significant as legal parentage, especially if the unintended parent decides later that he wants to be the father.[218] Moreover, some critics argue that denying a biological father paternity rights goes against centuries of parentage and adoption law and leaves the determination of parentage unclear.[219] Although this Note argues that the intending parent or parents of children produced from AI should be the only ones who can exercise parental rights, and that contracts in which sperm donors waive their parental rights should be enforceable, this would not preclude a court from finding that the sperm donor has established the functional relationship of parenthood with any resulting child. This relationship, however, exists apart from the biological connection. If states are uneasy with letting individual parties form their own contract, the law could provide that an AI arrangement requires prior court approval before the initiation of the insemination, much like the UPA recommends for surrogacy contracts.[220] Another possibility to

216. *See* K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005) (holding that both the woman who donated her ova and her lesbian partner who carried the child were the child's parents); Elisa B. v. Superior Court, 117 P.3d 660, 673 (Cal. 2005) (enforcing the obligation of a woman who agreed to raise children with her lesbian partner to support those children).

217. *See* McDonald, *supra* note 175, at 350.

218. CROCKIN & JONES, *supra* note 134, at 384.

219. *See id.*

220. UNIF. PARENTAGE ACT § 801 (amended 2002), 9B U.L.A. 76-78 (2001).

help alleviate concerns could be the implementation of a mandatory waiting period after a child is born, during which the donor could rescind the agreement if he decides he does want a parental role in the child's life. Ultimately, the state's paramount interest should be the welfare of the child.

CONCLUSION

Advances in technology, along with an increase in single and same-sex parents, have resulted in a redefinition and broadening of the "American family."[221] It is time that the legal system catches up with the evolving medical possibilities and familial relationships of the last fifty years.[222] The Supreme Court has even acknowledged this social change, stating that "[t]he demographic changes of the past century make it difficult to speak of an average American family."[223]

It is up to the law to turn all babies, and those who make them, into legally recognized and legally protected families. The law must delineate who has parental rights to what forms of genetic or social offspring and under what conditions these rights can be effectively extended. At the moment, courts and legislatures are struggling to define and protect these new families and those who participate in creating them.[224] There is very little uniformity among states concerning the laws of gamete donation. State statutes are particularly discordant with defining family relationships established through unconventional methods of conception, such as free, private sperm donation.[225]

This Note has argued that free, private sperm donation fulfills a valuable role in society by allowing individuals to become parents who would otherwise not be able to have children of their own. Public interests are best served by having a consistent, bright-line rule concerning parental rights in cases of AI through free, private

221. Troxel v. Granville, 530 U.S. 57, 63-66 (2000).

222. Dr. Finegold made this very same point in his book, written almost fifty years ago, in 1964. FINEGOLD, *supra* note 13, at 64 ("The lag between the law and the scientific achievement of artificial impregnation has irritated lawyers as well as physicians.").

223. *Troxel*, 530 U.S. at 63.

224. *See* CROCKIN & JONES, *supra* note 134, at 2.

225. *See* McDonald, *supra* note 175, at 341.

sperm donation, so that intended parents can be assured of uncontested parenthood, sperm donors can be free of potential liability, and the best interests of the conceived child can be protected.

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