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THE CASE FOR AN UNREGULATED PRIVATE SPERM DONATION MARKET

Jacqueline M. Acker*

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I. INTRODUCTION

Social networking is the new frontier for women seeking donor sperm.¹ Sperm donors and sperm-seekers with increasing frequency are meeting online, opting to forego using a sperm bank and instead choosing private donation.² However, the Food and Drug administration is attempting to regulate this burgeoning industry. Recently, the agency “raided the bedroom of a private sperm donor, Trent Arsenault, threatening him with jail time and a \$100,000 fine for ‘manufacturing’ donor sperm without the proper safety checks.”³ The “safety checks” which Arsenault allegedly failed to make are based on federal regulations requiring that seven days or more before each donation, anyone who gives sperm must submit to blood tests for diseases such as HIV, hepatitis B and C, and syphilis.⁴ Arsenault has donated his sperm to fifty sperm-seekers, who are mostly lesbian couples. Despite being a virgin, Arsenault

¹ Tony Dokoupil, *The Coffee Shop Baby*, NEWSWEEK, Oct. 10 & 17, 2011, at 44, available at <http://www.thedailybeast.com/newsweek/2011/10/02free-sperm-donors-and-the-women-who-want-them.html>.

² *Id.*

³ *Id.*

⁴ Erin Allday, *Sperm Donor in Fremont Feeling Heat from Feds*, S.F. CHRON., Dec. 19, 2011, <http://www.sfgate.com/health/article/Sperm-donor-in-Fremont-feeling-heat-from-feds-2411681.php>; see also Dokoupil, *supra* note 1.

has been tested at least five times in recent years, including for the abovementioned diseases.⁵

Arsenault is not the only person who may be affected by this crackdown. Another individual who could be impacted is Beth Gardner, creator of the Known Donor Registry (formerly the Free Sperm Donor Registry), which has 5,802 members.⁶ This registry is an online hotspot for people seeking and donating gametes including sperm. In response to the FDA's regulation of private sperm donor Trent Arsenault, a Jane Doe plaintiff recently filed suit against the Food and Drug Administration and Health and Human Services to protect her right to receive privately donated sperm.⁷

Sperm-seekers should have the right receive privately donated sperm since there are many risks associated with sperm bank donation. For example, offspring could inherit genetic diseases or have a proclivity toward mental illness, or mothers might contract sexually transmitted infections (STI's). Also, offspring could accidentally engage in incest, or the bank might mix up the sperm and use the wrong product resulting in the creation of a genetically different child than expected. Further, legal issues may arise due to the lack of clarity regarding parental rights.

Some of the benefits of private donation as an alternative to the cryobank include the minimal financial cost, and potential access to the donor's past and future medical history and test results. The sperm-seeker or child may contact the donor if a latent genetic defect becomes apparent, and tracking donor offspring would be easier, preventing consanguinity. The sperm-seeker may meet the donor in person, and the child may have the opportunity to meet his or her biological father or potential half-siblings. The benefits of unregulated private sperm transactions outweigh the risks, which are not so substantial that they warrant an intrusion into a woman's right to choose the method of her impregnation.

This paper explores the risks and benefits of private and institutionalized sperm donation, and discusses why private sperm donation should not be regulated, allowing a woman to have the right to choose her insemination method. First, I will explain what private

⁵ Allday, *supra* note 4; Trent Donor, *STD*, TRENT DONOR, <http://trentdonor.org/std> (last visited May 29, 2012).

⁶ *About Known Donor Registry*, KNOWN DONOR REGISTRY, <http://known-donorregistry.com/aboutkdr> (last visited Apr. 10, 2012). The statistic does not only reflect sperm donors, as the Known Donor Registry also helps connect egg donors with egg seekers.

⁷ Complaint, *Doe v. Hamburg, et al.*, No. 3:12-cv-03412-EMC (N.D. Cal. filed July 2, 2012).

sperm donation is, and why it is becoming more prevalent. I will argue that a woman should have the right to choose the donor, and that a woman should have access to information about him and her children. I will investigate many of the potential risks of private and institutionalized sperm donation, including genetic diseases, STD's and STI's, consanguinity, and paternity identification. Finally, I will argue that the private gamete or sperm donation market should remain unregulated for reasons anchored in both individual liberty and the minimization of public health consequences resulting from the current institutionalized structure. As Beth Gardner said, "If it's legal to go to a bar, get drunk, and sleep with a random stranger, then it can't possibly be illegal to provide clean, healthy sperm in a cup."⁸

There are risks and benefits to private and institutionalized sperm donation. The method of sperm donation a woman chooses should be her choice, not the FDA's.

II. WHAT IS PRIVATE SPERM DONATION?

Although sperm donation for human conception dates as far back as the 18th century, acceptance of the practice has been slow.⁹ It wasn't until over a hundred years later, after technology developed that allowed sperm to be frozen, that sperm donation became culturally acceptable.¹⁰ The development of the ability to freeze sperm in the mid-20th century gave rise to the need for sperm banks, and also to vast opposition to sperm donation.¹¹ Some critics went so far as labeling a woman an adulterer if she used donated sperm to conceive, even if her husband consented to the procedure. Many states passed laws stating that children conceived using donated sperm were illegitimate. However, in 1965, the California Supreme Court held that children born from artificial insemination were not illegitimate.¹²

Freezing sperm was not the preferred method of storing it at first. However, factors such as the high demand for sperm, the convenience of frozen donations, and the discovery of HIV, made freezing sperm the favored storage practice by the 1980's.¹³ Many

⁸ Dokoupil, *supra* note 1 (quoting Beth Gardner).

⁹ Sonia Fader, *Sperm Banking: A Reproductive Resource*, CAL. CRYOBANK, (1993), available at <http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

professional associations discouraged the use of fresh sperm because of the risk of HIV.¹⁴ Thanks to the development of the Internet, the face of sperm donation is changing again; today many people are opting to forgo using sperm banks, instead choosing private donation.

Private, or “directed” sperm donation occurs when a sperm donor provides his sperm to a sperm-seeker. Sperm-seekers are usually single women and lesbian couples, but they may also be heterosexual couples with fertility difficulties such as low sperm count or sterility.¹⁵ Private sperm donation transactions are becoming more popular for several reasons. First, the financial cost is lower when compared to using a sperm bank, or “cryobank.” Second, in a private transaction, donors and sperm-seekers may set their own terms regarding paternity and release of identity.¹⁶ Persons seeking sperm donors have access to more information than ever via the Internet and can easily connect with potential donors.¹⁷ Finally, in private transactions, potential mothers can avoid risks associated with sperm banks, and increase their chances of successful fertilization.

A. Private Donation is Less Expensive Than Institutional Donation

The costs of seeking donation through sperm banks are high compared to the minimal or nonexistent costs of private donation. For example, after divorcing her husband at age thirty-nine,

¹⁴ *Id.* (“A year later, in response to this new threat, the American Association of Tissue Banks began discouraging the use of fresh semen among its member sperm banks. In February 1988, the American Fertility Society (now, the American Society for Reproductive Medicine), the Food and Drug Administration, and the Center for Disease Control all recommended that only frozen semen be used for DI, in conjunction with a minimum 6 month quarantine period.”).

¹⁵ Known Donor Registry, *supra* note 6.

¹⁶ GAY AND LESBIAN PARENTING 17-18 (Deborah F. Glazer & Jack Drescher eds., 2001) (discussing both egg and sperm donors; “The question of whether to use a known or unknown donor often introduces issues related to triangulation. Among couples who have rejected the idea of having a known donor, most have stated very clearly their concern about having a third adult, and a man in particular, disrupt the equilibrium and primacy of their family constellation. A frequent worry was of jealousy and the fear that the non-biological mother would have less status than would the donor. Some couples, out of desire for the child to have a male figure in their lives, choose to use known donors. For these couples, the experience has ranged from wanting the donor to be more involved, to, less often, finding themselves in legal conflict over the rights of the various parties. In most cases, in families who do engage known donors, the choice has been a successful one.”).

¹⁷ *Id.*

Melissa's desire for children led her to search for a sperm donor.¹⁸ She chose "Finn" from the Scandinavian Cryobank office in New York City—his sperm cost \$1,250 for five vials.¹⁹ Additionally, Melissa paid \$15,000 for in vitro fertilization, hormone drugs, and doctor consultations.²⁰ The process was a success: Melissa is the proud mother of twin boys.²¹ However, not everyone enjoys Melissa's success, nor can they afford repeat treatments. It comes as no surprise after reviewing the financial costs of Melissa's fertilization that the fertility industry in the United States is worth approximately \$3.3 billion.²²

Beth Gardner and her spouse chose a different method: directed donation. After disappointing and expensive experiences at sperm banks, Beth and her spouse sought out a sperm donor via the Internet. Frustrated with the lack of web portals for meeting sperm donors, Beth started a website, the Free Sperm Donor Registry (now known as the Known Donor Registry), which has expanded to include egg donation.²³ Through the registry, Beth and her partner found their perfect match and welcomed a baby girl on June 19, 2012 and plan on conceiving again. The registry facilitates the meeting of sperm-seekers and donors, while striving to "[e]ducate donors and recipients on safe and legal procedures, [e]ncourage Artificial Insemination (AI) over "Natural Insemination" (NI, i.e. sex), [a]dvocate for the rights of donor-conceived children, [s]trongly discourage permanently anonymous donation and parental secrecy, and [k]eep it [assisted conception] free."²⁴ Instead of regulating private donation, Beth Gardner proposes:

creat[ing] a distinct set of guidel[ines] on how to engage in private donation as safely as possible ... [which] could be as simple as recognizing private donor-recipient relationships as "intimate" and therefore exempt from the regulations governing sperm donations, or

¹⁸ Mary Crane, *Sperm for Sale*, FORBES.COM, (Feb. 9, 2007, 12:00 PM), http://www.forbes.com/2007/02/09/spermbank-fertility-fda-ent-manage-cx_mc_0209bizoflovesperm.html.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* Due to the unregulated market for donor sperm, the figure may not be exact.

²³ Known Donor Registry, *supra* note 6. See also Sunny Antrim et al., *Free Sperm Site Founder Has Baby Girl, Trying for No. 2*, ABC 20/20 (Aug. 2, 2012), <http://abcnews.go.com/Health/shes-client-free-sperm-site-founder-baby-girl/story?id=16905317>.

²⁴ *Id.*

the development of some form of universal checklist or consent form that sets out each party's risks and responsibilities.²⁵

Some critics of private donation worry that sperm-seekers may not have the financial resources to raise a child if they do not have the resources to pay for sperm from a bank.²⁶ However, many sperm-seekers are simply bound by economic circumstances. For example,²⁷ a young married couple that has fostered over sixty children could not have children together due to an irreversible vasectomy. Artificial insemination did not work. After finding knowndonorregistry.com, the couple began speaking with a potential donor. Both the donor and sperm-seekers are educated, nice, and loving—they are the kind of people one would expect to be exemplary parents.²⁸ In addition, the couple clearly has the resources to raise a child born from donated sperm when they have fostered over sixty children.

B. *Private Donation Increases the Donor Pool*

Although there are many reasons, financial and otherwise, why women might choose private donation over institutional donation, the drive for men to donate their sperm privately may not be so obvious. Donor men have cited a number of reasons, ranging from altruism, to a desire to spread their genes, to “kinky sex.”²⁹ An example of an “altruistic” donor is Trent Arsenault, the donor whose home was raided by the FDA. Some men feel as if they are bestowing their genetics onto society as a gift. For example, one of the potential donors with whom Beth Gardner and her spouse spoke said his IQ was in the “99.8th percentile” . . . and that he would like to “propagate [his] genes, and help support the society of tomorrow by combating dysgenic reproductive trends.”³⁰ Other donors' intentions are quite different. One potential donor said

²⁵ Lauren Vogel, *Age, Sex, Location . . . Sperm Count?*, 187 CMAJ E347 (Apr. 17, 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3328535/>.

²⁶ Editorial, *The FDA and the Sperm Donor*, L.A. TIMES, Dec. 22, 2011, <http://articles.latimes.com/2011/dec/22/opinion/la-ed-sperm-20111222>.

²⁷ Sunny Antrim et al., *From Hotel Rooms to Coffee Shops: New World of Online Sperm Donation*, ABC 20/20, Jan. 13, 2012, <http://abcnews.go.com/Health/sperm-donation-hot-spots-coffee-shops-hotel-rooms/story?id=15343381#TxXT76VWq8A>.

²⁸ *Id.*

²⁹ Dokoupil, *supra* note 1.

³⁰ *Id.*

that he has “little interest in even a stone-cold fox if she isn’t going to get pregnant,” evidencing almost fetish-like intentions towards sperm donees.³¹ It is these donors on whom critics of private sperm donation tend to focus.

Although the above-mentioned reasons might motivate a man to donate to a sperm bank, many donors have reservations about donating through an institution because they worry about the potential release of personal information. The anonymity they seek is not anonymity from their offspring, however; it’s anonymity from the government and anyone who may use the information in an improper manner. Instead of releasing his name to an institution or agency, a private donor can reveal his identity to whomever he wants, without limitation.³²

Other potential donors feel guilty about not participating in the lives of their biological children and wish to play a more active role in their children’s lives. As refraining from such participation is often a precondition for donating to a sperm bank, these potential donors may forego donating. However, through private donation, a donor may alleviate this guilt by entering into an agreement with the donee that he may maintain a relationship with the children.

C. *The FDA’s Regulatory Reach*

Recently, government regulation of sperm donation has increased. In what may be the most sensational public event that related to sperm donation, the FDA ordered Trent Arsenault, a private donor, to “cease manufacture” of sperm—the first order it had ever directed at an individual sperm donor.³³ Arsenault appealed the FDA’s ruling, arguing that private donation is a form of sex, and thus, is not subject to governmental regulation.³⁴ Similarly, in reaction to the increase in private donor websites, Canada’s public health department recently warned, “the distribution of fresh semen [for assisted conception] is prohibited.”³⁵

D. *Women Lack Equitable Access to Institutionalized Donation*

The option to choose between private donation and institutionalized donation is essential for maintaining reproductive freedom. Throughout European and American history, the medical

³¹ *Id.*

³² Jamie Grifo, *A Rush to Pass Laws*, N.Y. TIMES, Sep. 13, 2011, <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/well-intentioned-regulators-can-harm-patients>.

³³ Dokoupil, *supra* note 1.

³⁴ *Id.*

³⁵ *Id.*

profession has often dictated women's reproductive choices.³⁶ This trend has played out in the world of sperm donation such that some options are not available to every consumer. For example, sperm banks may choose to only allow heterosexual married women to obtain sperm, leaving lesbian couples and single women without the same number of fertility options.³⁷ Many insurance companies will only pay for fertility treatments if a woman can prove she has not been able to get pregnant. This policy disables lesbians and single women from obtaining insurance benefits for In Vitro Fertilization (IVF) or ART procedures.³⁸ In essence, a woman's reproductive freedom is limited by her lack of a male partner. In a study observing IVF, many ART professionals admitted that they would refuse to treat women who were not married or in a "long term heterosexual relationship" because they were concerned about bringing a child into a non-traditional familial relationship.³⁹ This limitation occurs even though lesbians and single parents compose up to 60% of the market for sperm in the United States.⁴⁰

Discrimination in ART practices is not limited to lesbians and single women. There are discrepancies in the use of ART among women of different ethnic backgrounds in the United States.⁴¹ Non-Hispanic white females are the most likely to use ART; they use it twice as often as Hispanic women and four

³⁶ M. M. Peterson, *Assisted Reproductive Technologies and Equity of Access Issues*, 31 J. Med. Ethics 280 (2004).

³⁷ *Id.*

³⁸ Dokoupil, *supra* note 1, at 46.

³⁹ Peterson, *supra*, note 36, at 282 ("Steinberg's study of attitudes held by ART medical staff found that there was a common belief that, inherent in their medical responsibilities, IVF professionals were obliged to use their 'common sense' about facilitation of 'appropriate' reproduction and in the judgment of parenting ability. The vast majority of respondents admitted that they would refuse to treat women who were neither married nor living in a long term heterosexual relationship out of concern for the potential child's need to have an appropriate family unit that included both male and female parents. This provides confirmation that many ART medical professionals feel entitled to exercise power over the reproductive autonomy of their referred potential clients, denying some women freedom of procreative choice by electing to reinforce entrenched ideologies about the family unit and sexuality.") (citing G. COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (1985); Deborah Lynn Steinberg, *A Most Selective Practice: The Eugenic Logic of IVF*, 20 WOMEN'S STUD. INT'L F. 33 (1997); A. Stuhmcke, *Lesbian Access to In Vitro Fertilisation*, 7 AUSTL. GAY & LESBIAN L. J. 15 (1997)).

⁴⁰ Jay Newton-Small, *Frozen Assets*, TIME, Apr. 16, 2012, at 48.

⁴¹ Peterson, *supra* note 36.

times more often than black women.⁴² The reasons for this are not completely understood.⁴³ Moreover, “[a]ge, income, and education level are also positively correlated with use of infertility services,”⁴⁴ although infertility rates are the highest in the lowest socioeconomic groups.⁴⁵ In essence, those with the fewest infertility problems use ART the most often. Private donation allows groups discriminated against by ART professionals to have more equitable access to resources.⁴⁶

Women of lower socioeconomic status who are unable to afford to use a cryobank or who are turned away because of their sexuality or marital status may be fueling the private donation increase.⁴⁷ Having the option of private donation is essential for maintaining reproductive freedom and equal access to methods of conception.

E. *Technological Advancements Exacerbate this Lack of Access*

Breakthroughs in recent technology include at-home sperm tests,⁴⁸ articles dictating the best foods to consume to increase

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (citing CONTEMPORARY ISSUES IN BIOETHICS (TL Beauchamp et al. eds., 5th ed., 1999)).

⁴⁵ *Id.* (citing JA Robertson, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994)). (“Lower fertility rates may be due to ‘poverty, poor nutrition, and increased rates of infectious diseases and sexually transmitted diseases such as chlamydia.’”)

⁴⁶ Beth Littrell, *Bias Against Gays and Lesbians*, N.Y. TIMES, Sep. 14, 2011, <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/fertility-industry-victimizes-gays-and-lesbians>. This also helps gay men turned away from sperm donation on the basis of their sexual orientation.

⁴⁷ Peterson, *supra* note 36, at 281 (“‘Procreative liberty’, as defined by Robertson, is the widely accepted fundamental individual right to either have or avoid having children. This entails reproductive freedom as a negative person right, meaning that the person ‘violates no moral duty in making a procreative choice and other persons have a duty not to interfere with that choice’. Thus, the ideal of ‘procreative liberty’ for some women often cannot be realised unless they ‘qualify’ of have the necessary means to access all available treatments for infertility. It is a valid interpretation to suggest that denial of procreative choice equates to denial of basic personal respect and dignity. Individuals or couples that experience infertility often experience guilt, low self esteem, disappointment, depression, increased rates of relationship conflict, and sexual dysfunction.”) (citing Robertson, *supra* note 45; Luke A. Boso, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool*, 110 W. VA. L. REV. 843 (2008)).

⁴⁸ Katie Moisse, *Sperm Test to Hit Drugstore Shelves*, ABC NEWS (Feb. 8, 2012), <http://abcnews.go.com/blogs/health/2012/02/07/sperm-test-to-hit-drugstore-shelves/>.

male fertility,⁴⁹ and even the creation of artificial testes and viable sperm.⁵⁰ These breakthroughs all center around solving male infertility, which will help heterosexual infertile couples conceive children. As these technologies become more popular and more financially obtainable, there will be fewer infertile heterosexual couples. Thus, in the future, single women and lesbian couples will demand more sperm than heterosexual couples. However, lesbians and single women are often discriminated against by sperm banks and may not have enough supply to meet their demand due to discriminatory practices.⁵¹ Therefore, they may be forced to turn to private donation.

F. *Fresh Sperm Increases Chance of Conception*

The likelihood of pregnancy increases when freshly ejaculated semen is used instead of cryogenically frozen sperm because the freezing process affects sperm motility and morphology.⁵² However, fresh sperm may not be repeatedly tested for Sexually Transmitted Infections (STI's) and Sexually Transmitted Diseases (STD's) like frozen sperm. Therefore, many states require sperm to be frozen before use (in the context of sperm banks).⁵³ This practice prevents women from using fresh sperm, which would increase their chances of becoming pregnant.

III. PRIVATE DONATION AND REPRODUCTIVE FREEDOM

Women should have the right to choose the father of their child in person without having to use a sperm bank for the insemination

⁴⁹ Charles Bankhead, *Sperm Quality Linked to Dietary Fat*, MEDPAGE TODAY (Mar. 13, 2012), <http://www.medpagetoday.com/urology/urology/31641>.

⁵⁰ Rivka Borochoy, *New Hope for Infertile Men*, ISR. MINISTRY OF FOREIGN AFF., Feb. 12, 2012, http://www.mfa.gov.il/MFA/InnovativeIsrael/Hope_infertile_men-Feb_2012.htm.

⁵¹ Littrell, *supra* note 46 (“Guadalupe Benitez was denied infertility treatment by a clinic in California because she is a lesbian; the California Supreme Court ruled that the doctors’ actions were illegal under the state’s antidiscrimination law.”).

⁵² 50 AM. JUR. 2D *Trials* § 1 (1994).

⁵³ *Id. citing* 10 NYCRR § 52-58.5(d) (1992) (“In New York, e.g., statutory provisions require that semen specimens intended for AID be placed in labeled semen containers and kept frozen in liquid nitrogen and stored continuously in a suitable freezer reserved for semen until artificial insemination is effected. The New York scheme additionally requires that the frozen semen be quarantined for six months, and after such time, and prior to the release of the semen for artificial insemination, the donor must be retested for the HIV virus that causes AIDS, as well as evidence of other STDs.”) (internal citation omitted).

process. One of the benefits of private donation is the ability to meet sperm donors in person to assess personality. Not all donors have altruistic reasons for donation, and private donation gives a potential mother the agency to screen out candidates she doesn't like.⁵⁴ After meeting privately, the donor and sperm-seeker could then use a sperm bank, although the financial costs and mistakes that sperm banks make still may deter some participants.

A. Women Should be Able to Choose to Disclose Paternity to Their Children

In the United States, most sperm banks guarantee donors' anonymity. However, many donors and sperm-seekers do not want the donor to remain anonymous. Allowing private donation to co-exist with anonymous institutionalized donation benefits all parties involved: women will be able to choose how much information the child will have about his or her father, donors who wish to remain anonymous may, and donors who do not wish to remain anonymous have that option as well.

Currently, no jurisdiction in the United States requires the release of donor information to donor children, although there has been a push in several other countries to allow children to gain access to donor information upon reaching maturity.⁵⁵ For example, in European countries and in Australia, laws have been enacted allowing donor-conceived children to retrieve information about their genetic fathers.⁵⁶ One purpose of these laws is to facilitate healthy familial relationships; disclosing the donor's information to the child is thought to create "open and honest communication" with children and to respect the child's autonomy.⁵⁷ Upon reaching maturity, Swedish donor-conceived children have the right to gain information about their fathers *and* to learn their identities.⁵⁸

⁵⁴ Vogel, *supra* note 25, at E328 ("Many women are attracted to private donation because it allows them to meet potential sperm donors in person, and screen for personality and other characteristics that are difficult to judge from sperm bank profiles. . . . [T]he parties can also customize the level of contact they propose to maintain after a child is conceived. . . . [This] eliminates the longing to meet the donor when they're older and the child is obviously able to say 'I have a dad,' making them no different from the kids at school.") (internal quotation marks omitted).

⁵⁵ Dokoupil, *supra* note 1, at 47.

⁵⁶ Dan Gong et al., *An Overview on Ethical Issues About Sperm Donation*, 11 ASIAN J. ANDROLOGY 645 (2009), available at <http://www.nature.com/ajajournal/v11/n6/full/ajajournal200961a.html>.

⁵⁷ *Id.*

⁵⁸ *Id.* (citing C. Gottlieb et al., *Disclosure of Donor Insemination to the Child*:

In Australia, practices are similar, except that the law expands to all gamete donors, and the child must either reach maturity, or an age where he or she can fully comprehend his or her decision before learning the donor's information.⁵⁹ Some programs even allow open-identity between donors and their genetic offspring due to the donor's desire to be identified.⁶⁰ A similar policy in the United States would help attain many of the goals of private donation, but it is not widely used.

Although these types of policies arguably benefit children and familial relationships, they have caused a sharp decrease in the number of sperm donors in those countries.⁶¹ Therefore, it is harder for potential mothers to find donor sperm to create the children whom the laws were made to protect.⁶² Donors dropped by 86% in anticipation of such a law in the United Kingdom.⁶³ The sperm-bank industry in the United States, like its European and Australian counterparts, would likely experience a drastic decrease in

The Impact of Swedish Legislation on Couples' Attitudes, 15 HUM. REPROD. 2052 (2000), available at <http://humrep.oxfordjournals.org/content/15/9/2052>).

⁵⁹ *Id.* (citing L. Frith et al., *UK Gamete Donors' Reflections on the Removal of Anonymity: Implications for Recruitment*, 22 HUM. REPROD. 1675 (2007), available at <http://humrep.oxfordjournals.org/content/22/6/1675>).

⁶⁰ *Id.* (citing D.A. Greenfeld, *The Impact of Disclosure on Donor Gamete Participants: Donors, Intended Parents and Offspring*, 20 CURRENT OP. OBST. GYN. 265 (2008). See also M. Crawshaw, *Prospective Parents' Intentions Regarding Disclosure Following the Removal of Donor Anonymity*, 11 HUM. FERTILITY 95 (2008) (discussing the impact of disclosure on donor gamete participants: donors, intended parents and offspring)).

⁶¹ *Id.* at 46 ("Many women also believe their donor-conceived children have a right to know their fathers, something most sperm banks have resisted, fearing such openness would scare off potential donors. Even banks that do reveal dads' identities will do so only when a child turns [eighteen].").

⁶² Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 380-81 (2009) ("Attention from scholars and the current international trend toward exposed donation may hasten, or at the very least trigger, a similar movement in the United States as the solution to the risks just mentioned. As Part IV will argue, the answer to the call for regulation of sperm donation is not the outright elimination of anonymity. Not only is it logical that requiring exposed donation will attract fewer donors, many countries that have taken this route have experienced varying degrees of scarcity in donated sperm. This may result in an undue burden on procreation, as well as 'fertility tourism' which would circumvent any U.S. oversight.") (citation omitted).

⁶³ *Id.*

donation following the implementation of donor information disclosure laws.⁶⁴

Donations have dropped drastically in reaction to the passage of these laws because often donors want to remain anonymous. Many donors want to make money without consequences, or do not want to be involved in the lives of the children produced from their sperm.⁶⁵ Some sperm banks offer, for an additional cost, a list of donors who wish to remain in contact with their genetic offspring.⁶⁶ However, until this program is more widespread and affordable, the right of mothers to choose between a private, open transaction and the anonymity of institutionalized donation should not be precluded.

Donor information release laws and the resulting decrease in sperm donation has had an unintended consequence: sperm tourism. Women from countries where sperm donor information is released are going to other countries without these laws to obtain sperm. If similar laws were enacted in the United States, such laws could potentially ruin a multi-billion dollar industry. For this reason, private donation should not be regulated by the FDA so that it may exist as an alternative to institutionalized donation, allowing donors and donees to choose whichever process they prefer.⁶⁷

In fact, the fertility industry in the United States is successful because of its *lack of regulation* that occurs simultaneously with over-regulation in foreign markets.⁶⁸ The lack of regulation in the United States allows for an open market where consumers dictate the market flow.⁶⁹ More regulation will likely reduce the size of the industry by limiting the availability of consumer choices that have

⁶⁴ Crane, *supra* note 18.

⁶⁵ *Id.*

⁶⁶ *Id.* (“To gain an edge with customers, most sperm banks were conducting these tests even before the FDA mandated them. Now, outfits like Fairfax Cryobank and California Cryobank are offering donor-consent lists containing names of donors who voluntarily agree to be contacted by their genetic offspring. [To cover the cost of tracking donors, most of these banks charge more for sperm from donors on their consent lists.]”).

⁶⁷ Charles A. Sims, *A Private-Sector Problem*, N.Y. TIMES, Sep. 13, 2011, <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/the-fertility-industry-can-solve-donor-concerns>.

⁶⁸ David Plotz, *Lawlessness Has Had Its Upsides*, N.Y. TIMES, Sep. 13, 2011, <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/the-lack-of-regulation-has-been-a-boon> (discussing the author's perspective regarding why there is currently a lack of regulation of sperm donation generally: “Conservatives, skeptical of regulation, were glad to leave fertility alone, and let it grow into a profitable marketplace. Liberals, normally fond of regulation, were leery of doing anything to dictate women's reproductive choices. The result was an open field.”).

⁶⁹ *Id.*

led to its success.⁷⁰ The United States controls 65% of the global sperm market and even exports sperm to many countries, including Venezuela, Kenya and Thailand.⁷¹ For the market to retain its vitality, private donation must remain unregulated, especially if institutionalized donation becomes more regulated.

B. National Registration will Solve neither Private nor Institutional Donation Problems

Many supporters of regulation call for the creation of a national sperm donor registry, believing this will solve problems such as potential inheritance of genetic diseases, over-donation by one donor, and consanguinity. Although the registry might help tame some of these problems, it is not feasible to create an accurate and complete registry. Even if it were feasible, the consequences of the creation of a registry may outweigh the benefits.

One of the hurdles to creating national donor registries is “forging a consensus regarding content, access, privacy, and financial responsibility.”⁷² Currently, cryobanks have multiple policies catering to a variety of consumers. It is unlikely that they will all agree to participate in the registry if their interests are not represented. Other problems include enforcement. It would be difficult for the FDA to ensure that every sperm donor and sperm bank complied. Such a mandatory registration policy would be logistically and financially difficult to enforce, but a volunteer policy would not guarantee compliance. Moreover, if banks were required to submit donor names to the registry, it may prompt a drastic decrease in donations.

As previously illustrated, laws in Europe and Australia requiring that donors’ information be revealed to donor-conceived children after they reach the age of maturity have caused a sharp decrease in the number of sperm donors. These countries import

⁷⁰ Recently, the world’s largest sperm bank began turning down red-headed donors due to low demand. What if there was someone specifically seeking a redheaded donor? They would not have that option at that bank, and potentially would have to turn to private donation. Megan Gibson, *The World’s Largest Sperm Bank is Turning Down Redheads*, TIME, Sep. 19, 2011, <http://newsfeed.time.com/2011/09/19/the-worlds-largest-sperm-bank-is-turning-down-redheads/>.

⁷¹ Newton-Small, *supra* note 40, at 50 (“Thus far, sperm banking is a microcosm of a fertility industry that in the U.S. alone has expanded from \$979 million in 1988 to a projected \$4.3 billion in 2013.”).

⁷² *Id.*

more than 90% of their sperm.⁷³ Although donors have anonymity until their offspring reach maturity in Europe and Australia, some fear the laws to the degree that even their anticipation causes a decrease in the number of donations. The number of donors in the United States would likely decrease as well if donor information were to be collected in a national registry.

IV. PRIVATE AND INSTITUTIONAL DONATION RISKS

A. *Institutional Risks Solved by Private Donation*

The use of the wrong sperm or eggs (gametes) in insemination procedures is a risk unique to institutionalized sperm donation.⁷⁴ In some cases, the use of the wrong material is accidental; in others it is purposeful. In *Shin v. Kong*, a physician covertly inseminated a patient with his own sperm instead of the patient's husband's sperm.⁷⁵ The husband later sued the physician for intentional infliction of emotional distress after discovering that the physician was the biological father of his child. His lawsuit was not successful because the court held that the physician did not purposely inflict distress on him. This situation would be less likely to occur in private donation because fewer people would handle the material, and it would likely be used immediately as most private sperm-seekers prefer fresh sperm.

Reproductive clinics have lost or accidentally destroyed pre-embryos.⁷⁶ In a tragic case, a couple decided to conceive a child

⁷³ *Id.*

⁷⁴ *Robert B. v. Susan B.*, 109 Cal. App. 4th 1109, 135 Cal. Rptr. 2d 785 (6th Dist. 2003), *review denied*, (Sept. 10, 2003).

⁷⁵ 50 Am. Jur. 2d *Trials* § 1 (1994) (citing *Shin v. Kong*, 95 Cal. Rptr. 2d 304 (Ct. App. 2000), *cert. denied* (July 19, 2000)).

⁷⁶ RESTATEMENT (SECOND) OF TORTS § 323 (1965); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. Ct. App. Div. 1 2005) ("Couple could sue reproductive clinic for the negligent loss or destruction of their pre-embryos under a provision of the Restatement adopted in Arizona, which applied to one who failed to exercise reasonable care after agreeing to render services to protect another's person or things; in alleging that clinic destroyed or lost five frozen pre-embryos, couple could maintain an action for harm resulting from the loss of 'things.' Couple sufficiently pled cause of action for breach of bailment against reproductive clinic in order to withstand motion to dismiss, after clinic allegedly lost or destroyed couple's pre-embryos; couple submitted three written agreements that allegedly evidenced a bailment contract between the parties, including 'consent regarding in vitro fertilization services,' 'consent regarding thawing of cryopreserved embryos,' and 'request for transfer of cryopreserved embryo or semen specimens and assumption of risk.'").

through artificial insemination before the husband succumbed to cancer. However, unreasonable storage practices by the sperm bank resulted in the wrong sperm being inseminated into the woman. The couple was surprised to find out the child did not have the husband's genetic material, and the husband died before the couple could undergo further ART procedures. The husband never lived to see the birth of his biological child due to an avoidable error.⁷⁷

Another husband and wife suffered when a clinic failed to use the husband's sperm to fertilize the wife's eggs, and the clinic was uncertain whether the husband's sperm or wife's eggs had been accidentally given to someone else.⁷⁸ The couple worried that "they may have natural children or half children that they were unaware of, and [] they feared their child's natural father may someday claim rights to [the] child, thereby interfering with their rights and relationship as her parents."⁷⁹ These situations would not occur in private donation where only one person's sperm is available during the insemination process.

There are many risks for the donor, sperm-seeker (and her partner), and donor-conceived children in both private and institutional sperm transactions. There is the possibility that the sperm donor will transmit STD's and STI's to the sperm recipient, her partner, and offspring, which could lead to death.⁸⁰ Moreover, the donor could pass undisclosed genetic and/or mental diseases to the offspring. Some perils, however, are unique to procurement of sperm through an institution, including negligent semen storage,⁸¹ increased likelihood of accidental consanguinity, or the risk of accidentally producing large numbers of offspring.⁸²

B. *The Disadvantages of Institutionalized Sperm Donation*

Another force behind the popularity of private donation is the increase in information about problems in the sperm bank industry. For example, blogs, news stories, and medical studies have recently discussed the impact of sperm donation on children. Many of these sources focus on the detrimental effects and hardships that

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *Andrews v. Keltz*, 15 Misc. 3d 940, 838 N.Y.S.2d 363 (Sup. 2007)).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Newton-Small, *supra* note 40, at 52.

⁸² Matthew Lee and Selcan Hacaoglu, *Italy: Libyan Opposition Will Be Recognized*, U-T SAN DIEGO (July 15, 2011), <http://www.utsandiego.com/news/2011/jul/15/italy-libyan-opposition-to-be-recognized/?ap>.

anonymous sperm donation may have on donor-conceived children. The increasing prevalence of this material may be augmenting the number of sperm-seekers who opt for private donation. A recent medical study found that most children born from assisted conception do not have information about their donor, even if they view their donor as their biological father and have searched for him.⁸³ Many of these children either support the release of the donor's identity or of detailed information about him that does not identify him by name.⁸⁴ Rachel Pepa, a blogger and cryo-baby, wrote that she has a sense of "worthlessness" knowing that her donor "sold" the genetic material that was used to conceive her.⁸⁵ If a private sperm donor had donated the sperm that helped to conceive Ms. Pepa, she might feel differently because she might know the identity of her biological father.

Recently, film, literature, and non-fiction works have touched upon the impact of ignorance about their parentage on children. The Academy Award nominated film *The Kids Are All Right* chronicles the journey of two children conceived through artificial insemination as they become acquainted with their biological father, a sperm donor. Grandparents have written testimonials about exclusion from knowing their grandchildren due to the anonymity of cryobank donation, and the loss they feel.⁸⁶ A recent feature story in the *New York Times* followed a woman who used DNA testing to search for her family after finding out she was adopted.⁸⁷

The attention that some publicized court cases involving cryobanks receive may also cause some women to seek private

⁸³ Patricia P. Mahlstedt et al., *The Views of Adult Offspring of Sperm Donation: Essential Feedback for the Development of Ethical Guidelines within the Practice of Assisted Reproductive Technology in the United States*, 93 FERTILITY AND STERILITY 2236, 2237-44 (2009), available at <http://www.ncbi.nlm.nih.gov/pubmed/19285663>.

⁸⁴ *Id.*

⁸⁵ Rachel Pepa, *Putting a Price on Egg and Sperm Donations*, THE GUARDIAN, Oct. 27, 2011, <http://www.guardian.co.uk/lifeandstyle/2011/oct/27/egg-and-sperm-donations-price> ("Did my donor care about the child he was bringing into existence or did he just want the money, which, for a medical student, would undoubtedly have come in handy? As he was anonymous it is unlikely I will ever find him and have that question answered. What I do know is, as far as I am concerned, he sold me for 15 pieces of silver—sorry, pounds—and I'm left with a big hole where a father should have been and a sense of worthlessness.").

⁸⁶ Alison Motluk, *My Scattered Grandchildren*, THE GLOBE AND MAIL (Sep. 13, 2009), <http://www.theglobeandmail.com/life/family-and-relationships/my-scattered-grandchildren/article1286201/>.

⁸⁷ Rachel L. Swarns, *With DNA Testing, Suddenly They Are Family*, N.Y. TIMES (Jan. 23, 2012), <http://www.nytimes.com/2012/01/24/us/with-dna-testing-adoptees-find-a-way-to-connect-with-family.html?pagewanted=all>.

sperm donation over institutionalized donation. For example, in *Unruh-Haxton v. Regents of University of California*, the court held that the theft and sale of eggs for financial gain was not actionable because the statute of limitations had passed, and could not be tolled for intentional torts.⁸⁸ Donors want control over how their gametes and sperm are used—especially if they are used for third-party financial gain, rather than to make children. Cases like this one may cause sperm-seekers to distrust sperm banks, therefore increasing the desire for private transactions.

C. Risks of Genetic Diseases in Institutional Donation

Despite being regulated by the FDA, donation through a sperm bank or other institution still carries risk. Sperm carrying various genetic diseases and disorders has been sold to hundreds of women in the United States in recent years.⁸⁹ For example, in 2011, ABC News discovered “at least [twenty-four] donor-children whose father had a rare aorta defect that could potentially kill his offspring at any minute.”⁹⁰ In Michigan in 2006, five children were diagnosed with a rare blood disease called severe congenital neutropenia (SCN) that requires “daily injections” to “prevent infection” and puts the children “at risk for leukemia.”⁹¹ The children all had the same father—a sperm donor who donated to the International Cryogenics sperm bank.⁹² One doctor theorized that because none of the children’s mothers carried SCN, the sperm donor must have been the carrier. When the sperm bank could not locate the

⁸⁸ *Unruh-Haxton v. Regents of University of California*, 76 Cal. Rptr. 3d 146 (2008); see also CAL. CIV. PROC. CODE § 340.5 (West 1970) (“Claims for fraud, conversion, and intentional infliction of emotional distress arising from allegations that doctors from whom plaintiffs received fertility treatments at clinic stole patients’ eggs and pre-embryos and sold them for financial gain, related to wrongful intentional conduct and thus were not governed by statute of limitations in Medical Injury Compensation Reform Act (MICRA) for actions against a health care provider based upon professional negligence.”).

⁸⁹ Dokoupil, *supra* note 1, at 45.

⁹⁰ Jennifer M. Vagle, *Putting the “Product” in Reproduction: The Viability of A Products Liability Action for Genetically Defective Sperm*, 38 PEPP. L. REV. 1175, 1236 (2011) (citing Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES, June 6, 2006, at F5, available at 2006 WLNR 9651819).

⁹¹ *Id.* at 1176 (“Although SCN only affects one in five million children, there is a fifty percent chance that an affected child will pass the gene defect to future offspring.”).

⁹² *Id.*

father,⁹³ it disposed of the rest of his samples.⁹⁴ Although the bank disposed of the sperm, it did not contact the other children of the donor to inform them of the dangers of SCN, reasoning that “even if other children had developed the disease, their families would already know it.”⁹⁵ The donor was left without the option to release information to his children, and the children were not notified that they might be carriers of a deadly disease.⁹⁶ In contrast, some private donors, such as Trent Arsenault, a private sperm donor, readily provide their genetic records on the Internet.⁹⁷

In another case, *Paretta v. Medical Offices for Human Reproduction*, a child was born with cystic fibrosis, a disease that must be carried by both parents to be inherited by the child. Although the sperm bank facility that Mr. and Mrs. Paretta used knew the egg donor was a carrier of cystic fibrosis, it failed to inform the plaintiffs of the donor's condition. Mr. Paretta's sperm was used in the insemination process, but his sperm was not tested for the disease. He was also a carrier for cystic fibrosis.⁹⁸ There is a similar case pending in Texas.⁹⁹

Many of these problems might have been prevented had the donor and sperm-seekers chosen private donation. For example, the mother and donor would have been able to contact each other about any medical events. Additionally, there would not be “remaining samples” of diseased genetic material that would need to be destroyed, and the donor would be less likely to have provided sperm to create so many offspring.¹⁰⁰

The tragedy in *Paretta* was that the parents were not able to contact the donor directly, but had to rely on a third party to do it for them. The Paretts relied on the bank's assurances that the

⁹³ *Id.* (The bank could not test the donor's sperm without his consent).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Vogel, *supra* note 25, at E347. (“But interspersed among action shots of Arsenault biking in China and scuba diving in Hawaii are snapshots of his sexual health records, genetic testing results and the [fifteen] children he's fathered since hanging up a shingle in 2006 as a ‘free sperm donor.’”) (citations omitted).

⁹⁷ Benjamin Wallace, *The Virgin Father*, NEW YORK MAGAZINE, Feb. 5, 2012, <http://nymag.com/news/features/trent-arsenault-2012-2/index5.html> (providing a biography of Trent Arsenault and his journey to becoming a sperm donor).

⁹⁸ *Paretta v. Med Offices for Human Reprod.*, 760, N.Y.S.2d 639 (N.Y. Sup. Ct. 2003).

⁹⁹ Newton-Small, *supra* note 40, at 52.

¹⁰⁰ Additionally, if it happened that the sperm was not only defective, but was mixed up with another man's sperm, children could continue to be born with the genetic defects.

donor did not suffer from any diseases, which was technically true since the donor was only a carrier. Had the Paretas been able to contact the donor directly instead of being forced to trust the facility's veracity, it is more likely that they would have known the donor's carrier status.¹⁰¹

D. *Risks of Genetic Diseases in Private Donation*

Private donation is not without risks. As mentioned previously, many of the risks of institutionalized donation are also present in private transactions. These include the potential that donors will transmit STD's and STI's to the recipient, donor-conceived offspring, and sexual partner(s) of the recipient, as well as the possibility that the offspring will inherit undisclosed genetic and/or mental diseases.¹⁰²

One risk in both private and institutionalized donation is having a "rogue" sperm donor. For example, in the United Kingdom because there is a limit on the number of times a donor may donate to an institution, many men turn to private sperm donation to bypass the law.¹⁰³ Their reasons range from already having reached the maximum number of institutionalized donations to altruistic purposes.¹⁰⁴ Either way, some of these donors have questionable intentions and online identities—many have sexually graphic screen names and perverse motivations.¹⁰⁵ However, there are many donors who go out of their way to provide sperm for a cause they deem worthy, and who take steps to ensure the donation is safe.¹⁰⁶ A prospective mother may find comfort in having met her donor in person to assess his intentions herself.¹⁰⁷

E. *The Advantages of Private Donation*

Many proponents of private donation do not believe individuals and sperm banks should be regulated under the same laws;

¹⁰¹ DAVID ARMSTRONG, *REVOLUTION AND WORLD ORDER* 301-11 (1993) (emphasizing that revolutionary regimes take advantage of international law to "gain benefits" from the international system).

¹⁰² 50 Am. Jur. 2d *Trials* § 1 (1994).

¹⁰³ Emma John, *Conceivable Ideas: Meet the Modern Sperm Donor*, THE OBSERVER (June 26, 2010), <http://www.guardian.co.uk/lifeandstyle/2010/jun/27/jennie-withers-co-parents-fertility>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Some sperm banks like the Fairfax bank may look at video interviews

they argue that private donors are safer. Often, people do not share as much information with their intimate partners as private sperm donors and sperm-seekers share.¹⁰⁸ For example, Trent Arsenault puts his blood type, genetic test results, STD test results, and sperm count online for potential donees to see.¹⁰⁹ If private donation becomes illegal, then sperm-seekers will be forced to rely on institutions to screen out potential donors with genetic diseases instead of seeing the results with their own eyes.¹¹⁰

If a sperm-seeker has the option to choose private donation, she will be able to choose a donor without genetic diseases. There are many publicly accessible guidelines available through which the sperm-seeker could facilitate her decision. For example, a savvy sperm-seeker may see that many guidelines require donors to provide detailed medical histories, so she could require the donor to provide his. The history could indicate a genetic disease. The power to see the medical history is important since many sperm banks do not require detailed medical histories.¹¹¹

One sperm-seeker and her partner in Canada have experimented with both private and institutionalized donation. "She and her partner spent more than \$10,000 conceiving their first child via a licensed sperm bank." When they decided to have another child, they used private sperm donation instead of institutionalized donation. They stated: "[w]e go into it with our eyes wide open, *know what our risks are* and make the decision based on the information we're provided and what our guts tell us."¹¹² Women are capable of making their own reproductive decisions, and should have the option of continuing to do so.

Other cautions a sperm-seeker may take include requiring her sperm donor to continue to provide her with new additions to his medical history. This would be useful in the event that the donor has a latent genetic defect that was not found through initial genetic testing. After obtaining new information about his medical history

with sperm donors. This is a step in the right direction for institutions, but it may not be enough comfort to someone looking for the father of her children. See Newton-Small, *supra* note 40, at 51.

¹⁰⁸ Vogel, *supra* note 25.

¹⁰⁹ Donor, *supra* note 5.

¹¹⁰ Unless the donor-seeker does not find a "private" donor and then use an institution for the transfer of the sperm. Although this is an option, it does not have the benefits of strictly private donation such as saving money.

¹¹¹ Rachel Lehmann-Haupt, *Mapping the God of Sperm*, NEWSWEEK (Dec. 15, 2009), <http://www.thedailybeast.com/newsweek/2009/12/15/mapping-the-god-of-sperm.html>.

¹¹² Vogel, *supra* note 25, at E347.

the donor could stop providing sperm, and the sperm-seeker could take reasonable steps to protect her children from the disease. The third-party sperm bank would not control the flow of information between the donor and donee, preventing occurrences like the severe congenital neutropenia case in Michigan where the bank refused to tell the donor's children about their father's genetic defect.

Another cheap method to screen sperm donors, private and institutionalized, is to require prospective donors to complete a detailed family history. This method may be effective in preventing the use of sperm from those predisposed to passing on genetic disorders.¹¹³ Donors (and sperm-seekers) may opt to get one comprehensive genetic screening test in their lifetime. In the near future, hopefully between 2016 and 2017, a complete genetic sequencing test may be done for less than \$1,000.¹¹⁴ This information can then be available to sperm-seekers. These genetic tests could be more useful than the current medical history report for detecting genetic diseases.¹¹⁵

Some sperm donors, like Arsenault, put all of their medical test results and personal information on display, *and* practice celibacy. A Canadian student who is a free sperm donor has

taken greater precautions in preparing to become a private donor than even most recipients require. In addition to screening for sexually-transmitted infections, he has undergone genetic testing, conferred with a lawyer about his responsibilities to recipients and any resulting children, and sought to determine whether there is a maximum number of children a donor may have per population. And like Arsenault, [he] abstains from sex.¹¹⁶

Another option available to the sperm-seeker is to ask for a comprehensive genetic questionnaire to be completed.¹¹⁷ These

¹¹³ Robert G. Brzyski, *Start with Some Hard Questions*, N.Y. TIMES, Sep. 13, 2011, available at <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/before-regulation-the-fertility-industry-some-hard-questions>.

¹¹⁴ CRACKING YOUR GENETIC CODE (PBS television broadcast Mar. 28, 2012), available at <http://www.pbs.org/wgbh/nova/body/cracking-your-genetic-code.html>.

¹¹⁵ U.S. DEP'T OF ENERGY, GENE TESTING (2010), available at http://www.ornl.gov/sci/techresources/Human_Genome/medicine/genetest.shtml#testsavailable.

¹¹⁶ Vogel, *supra* note 25.

¹¹⁷ There is the risk that the donor does not know his genetic history, or does

questionnaires may provide equal insight to the risk for some genetic diseases since many are inheritable.¹¹⁸

One Court alluded to the benefits of sperm bank deregulation, reasoning that because the sciences of reproductive technologies are constantly in flux and improving, banks should not become totally regulated.¹¹⁹ However, the court said that instead of full deregulation, the system should allow both private and institutionalized donation.

V. STD AND STI RISK IN INSTITUTIONALIZED AND PRIVATE DONATION

A. *Current Regulations*

There are laws in many states that regulate the testing of sperm and sperm donors for STD's and STI's. For example, Oklahoma requires the sperm and/or donor to be tested before insemination, and it is illegal to donate sperm, or to procure it if the donor tests positive for HIV.¹²⁰

B. *STD and STI Risk in Institutionalized Donation*

Some institutions, *but not all*, test both the donor and the sperm for STD's and STI's.¹²¹ Truly, "there is little uniformity among sperm banks as to the screening practices they employ to determine

not list every known disorder.

¹¹⁸ Yaniv Heled, *The Regulation of Genetic Aspects of Donated Reproductive Tissue—the Need for Federal Regulation*, 11 COLUM. SCI. & TECH. L. REV. 243, 270-72 (2010), quoting AM. ASS'N OF TISSUE BANKS, STANDARDS FOR TISSUE BANKING (10th ed. 2002) [hereinafter *AATB Guidelines*] (According to the AATB, donors who have family members or themselves have any condition which could pose a risk of genetic diseases "greater than the risk in the general population," should be disqualified. The Guidelines state that if there is a risk of "Tay-Sachs disease, thalassemia, sickle cell anemia or CF in the donor's medical history, family history or ethnic background, the donor should be tested for such conditions.").

¹¹⁹ *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (2007) ("The absence of a legislative mandate coupled to the constantly evolving science of reproductive technology and the other considerations highlighted above illustrate the very opposite of unanimity with regard to the legal relationships arising from sperm donation, whether anonymous or otherwise. This undermines any suggestion that the agreement at issue violates a 'dominant public policy' or 'obvious ethical or moral standards' (citations omitted) sufficient to warrant the invalidation of an otherwise binding agreement.").

¹²⁰ Okla. Stat. Ann. tit. 63, § 2151.1 (West 1988).

¹²¹ 50 Am. Jur. 2d *Trials* § 1 (1994).

the acceptability of semen to be used for artificial insemination.”¹²² There are no uniform laws regulating sperm banks, and many of the laws that are in place are unclear.¹²³ This is problematic for a sperm-seeker who relies on the institution to comprehensively test the donor and/or donor sperm for disease and does not conduct her own investigation.

C. STD & STI Risks and Benefits Common to both Private and Institutionalized Donation

Some institutions use questionnaires to screen donors based on their past sexual history, drug use, and more before spending money on testing for disease.¹²⁴ This same process could be accomplished by private sperm-seekers to narrow down the pool of potential donors, thereby preventing unnecessary testing expenditures. The downside to relying on these questionnaires is that the donee is reliant on the donor’s truthfulness or awareness of his medical status.¹²⁵ However, if used properly as the first step in screening potential donors, and in addition to actual testing, this process would effectively screen out some infected donors.¹²⁶

Although the risk of dishonesty applies to all types of donation practices, in private, free donation transactions the donor does not have a financial incentive to lie. Most, if not all, private sperm donors do not sell their sperm, they provide it for free, whereas a male donating to a sperm bank may make up to \$500 per expulsion. Potentially, such a donor could make about \$30,000 a year.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Heled, *supra* note 118, at 277-78 (“Moreover, the current scheme of self-regulation relies primarily on the diligence and integrity of practitioners as well as on donors volunteering pertinent information about their medical history and that of their families. However, practitioners operate in a highly competitive market that creates strong financial incentives that do not necessarily coincide with the best interest of DRT recipients and DRT children. Potential donors’ answers regarding their medical history and that of their families are also often insufficient to properly evaluate the genetic risks they might pose. Furthermore, the financial benefit to donors accompanied by the absence of a clear legal duty to accurately disclose such information might render the current screening practices—which rely mostly on questioning of potential donors—unreliable because they create an incentive for potential donors to hide negative medical facts about themselves and their families. As a result, a significant number of the many thousands of children born every year from DRT are exposed to a heightened risk of having severe genetic diseases which could have been avoided through proper genetic screening.”) (citations omitted).

¹²⁶ *Id.* at 267-70.

A college graduate may make at least \$60 per ejaculate.¹²⁷ It is unlikely that a donor would be so bashful that he would not disclose his purposes for donating to a sperm-seeker.¹²⁸

Many critics of private sperm donation state that it should be regulated because donors may have bad intentions. However, this risk is not singular to private donation: it has been well documented in institutionalized donation as well. Between 1976 and 1986, Dr. Cecil Jacobson (“The Sperminator”) used his own sperm to “impregnate up to seventy-five of his patients.”¹²⁹ Worse, he needlessly “treated” patients with “useless drug injections, and he performed needless . . . uterus scrapings, on patients who mistakenly believed they were pregnant.”¹³⁰ Because the risk of abuse is found in every kind of donation, private donation should not suffer. In fact, in private donation, women meet donors and screen them for such egocentric intentions themselves.

D. Risk of Consanguinity in Institutionalized and Private Donation

Another risk common to all kinds of donation is consanguinity. There is a potential for accidental consanguinity among children of sperm donors, because of such factors as large numbers of offspring produced by single donors, and donor anonymity.¹³¹

In September of 2011, the *New York Times* published an article about single sperm donors who have fathered hundred(s) of children through sperm banks.¹³² The *ABA Journal* ran a similar article about an attorney whose donations resulted in the birth of at least seventy-five children.¹³³ *Time Magazine* reports that one British donor has over 1,000 children.¹³⁴ Even in states like Texas, which do not have sperm banks, siblings are born to different families in

¹²⁷ Dokoupil, *supra* note 1.

¹²⁸ *Id.*

¹²⁹ Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227, 242 (2001).

¹³⁰ *Id.* (“In early 1992, Jacobson was convicted on thirty-three felony counts of mail fraud, ten counts of wire fraud, four counts of travel fraud, and six counts of perjury.”) (internal citations omitted).

¹³¹ Brzyski, *supra* note 113.

¹³² Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sep. 5, 2011), <http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all>.

¹³³ Debra Cassens Weiss, *Lawyer Learns He Has at Least 75 Children*, A.B.A. J., Sep. 27, 2011, http://www.abajournal.com/news/article/lawyer_learns_he_has_at_least_75_children/.

¹³⁴ Newton-Small, *supra* note 40, at 51.

the same metropolitan areas through sperm imported from outside the state.¹³⁵

The possibility of consanguinity is not the only danger that arises from one donor providing sperm to many mothers; an increase in otherwise rare genetic diseases may result from over-donation. Although this article has already discussed the risks of passing on genetic diseases through various sperm donation practices, the possibility of consanguinity between offspring with genetic diseases warrants another look. Ricki Lewis, author of *The Forever Fix: Gene Therapy and the Boy Who Saved It*, argues that without limits on the number of offspring a man may have through sperm donation, there is a higher risk of passing on recessive diseases due to the increased chances of consanguinity.¹³⁶ The grandchildren of the sperm donor may be at a higher risk than his children. This is due to the fact that as time passes and the biological children of the donor procreate and their children procreate, there will be more people carrying a dangerous recessive gene. Because there are more carriers, there is a higher likelihood that consanguinity will result in the birth of a child with two sets of recessive genes, a child who has the genetic disease.¹³⁷ Eventually, this would lead to the disease becoming more common.

One commonly proposed solution is a system for disclosing sperm donor information and creating limits on the numbers of offspring each donor may have. Currently, the United States does not limit the number of offspring a donor may produce, despite advocacy in favor of such a policy from the American Society for Reproductive Medicine.¹³⁸ Wendy Kramer, the creator of the Donor Sibling Registry, which also connects donors with their children,

¹³⁵ Kimberley King, *Some Call for Regulation of Sperm Banks*, NBC DFW (Oct. 26, 2011), <http://www.nbcdfw.com/news/health/Some-Call-for-Regulation-of-Sperm-Banks-132567433.html>.

¹³⁶ Anneli Rufus, *Are Sperm Banks Unethical?*, ALTERNET (Oct. 13, 2011), www.salon.com/2011/10/13/sperm_bank_ethics/ (“A recessive disease is one that requires both parents to be carriers: Each parent has the mutation, but also a functioning copy of the gene in question too, so he or she is not sick. For a rare disease—say, one that affects one in 10,000 people, or even rarer—the chance of two people being carriers is very low. But if two people are half-siblings, and the sperm donor is a carrier of a recessive disease—and we probably all are—then each partner has a one-half chance of inheriting the mutation. . . [t]wo unwitting half-sibs bearing a child with a recessive disease such as cystic fibrosis or Tay-Sachs “would be the short-term risk. Longer term, more people in the population would be carriers and, over time, certain inherited diseases would become more common.”).

¹³⁷ *Id.*

¹³⁸ *Id.*; see also Newton-Small, *supra* note 40, at 51.

argues for more regulation when she claims, "we don't know how many kids are born for any one donor, who they are, where they are, if they have any sicknesses, any genetic illnesses . . . [t]here's no way to upload and share medical information amongst people who have used the same donor."¹³⁹

Sperm-seekers and donors may prevent their offspring from engaging in accidental consanguinity by continuing to communicate after donation has occurred. Websites such as DonorSiblingRegistry.com may help to prevent consanguinity as well. The website allows donors, donor-conceived children, and the parents of donor-conceived children to sign up using the identifiers that sperm banks gave them. The donor's number matches his child(ren)'s number. Many fathers have met their children, and over 9,000¹⁴⁰ half-siblings, at least,¹⁴¹ have met using the registry. However, the registry relies on people signing up to match families, and many sperm donors wish to remain anonymous.

Allowing private donation also prevents consanguinity. One reason that some donors have many children is because sperm-seeker banks often use one sperm emission for numerous separate insemination procedures.¹⁴² Further, institutions rely on the sperm-seekers to report their successful pregnancies. Because it is unlikely that each emission by a private donor would be used to father more than one child, private donation could prevent the creation of abundant children from one sperm donor, thereby helping to reduce cases of accidental incest.

There are sometimes legal limits on the number of children sperm donors may produce, but not on how many children a parent may raise. For example, the Duggar family has nineteen children, which is more than Arsenault, a sperm donor, has.¹⁴³ Parents that raise many children may help to reduce consanguinity because consanguinity is unlikely to occur among children that know each other. In private donation, half-siblings could potentially know each other as well.¹⁴⁴ For this reason, private donation is safer than

¹³⁹ *Id.*

¹⁴⁰ DONOR SIBLING REGISTRY, www.donorsiblingregistry.com (last visited Oct. 16, 2012) (The DSR has connected at least 9574 half-siblings (and/or donors) with each other. The total number of registrants, including donors, parents and donor conceived people, is 38134).

¹⁴¹ *Pi*, *supra* note 62.

¹⁴² IDANT LABORATORIES, (<http://www.idant.com/SemenBank/FAQ.aspx> (last visited Oct. 10, 2012)).

¹⁴³ JIM BOB & MICHELLE DUGGAR FAMILY, <http://duggarfamily.com/content/family> (last visited Oct. 10, 2012).

¹⁴⁴ Donor Sibling Registry, *supra* note 140 (As mentioned above, the

most institutionalized donation practices, and should remain an option for women.

VI. PATERNITY ISSUES IN INSTITUTIONALIZED AND PRIVATE SPERM DONATION

A. Current Laws

Many sperm donors choose to use institutions to shield themselves from legal parental responsibilities. Fifteen states have statutes stating that sperm donors are not considered “fathers” to their children if the sperm is “provided to a licensed physician for use in artificial insemination of a married woman, other than the donor’s wife.”¹⁴⁵ It is unclear whether these statutes would also protect private donors.

Other states’ laws are more favorable to the donor. These states do not require the sperm to be given to a physician to shield the donor from paternal obligations, and they also prevent a donor from asserting paternal rights against mothers of children conceived through the use of donated sperm.¹⁴⁶ However, these states still require that sperm be given to a married woman, and that her husband’s consent must be obtained.¹⁴⁷ This raises another issue:

Donor Sibling Registry may also help those who have already used sperm banking find each other and prevent consanguinity).

¹⁴⁵ Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 387 (2012).

¹⁴⁶ *Id.*

¹⁴⁷ CAL. FAM. CODE § 7613 (West 2012). (“(a) If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband’s consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon’s failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown. (b) The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.”); *see also* ALA. CODE § 26-17-702 (2009) (“A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction. A married couple who,

lesbian couples and single women are less likely to obtain sperm in these states because they will not be protected from donors suing to obtain paternity rights.¹⁴⁸ Some argue that these laws “limit the possibility of social change by controlling the medical advances that may enable such a change.”¹⁴⁹ Both sets of laws aim to erase any conflicts over paternity between a donor and a married heterosexual couple. However, the laws are outdated: many of the women seeking donor sperm are single women or lesbian couples.

The Uniform Parentage Act prevents donors who provide sperm to single women and lesbian couples from having any paternal rights; the child(ren) will not have a legally recognized father.¹⁵⁰ However, the UPA has not been widely adopted. Sperm donors in some states are not liable for support unless they sign agreements with mothers attesting that they will support the child(ren).¹⁵¹

In the Pennsylvania case *Ferguson v. McKiernan*, litigants addressed contracting out of parental rights in sperm donation.¹⁵² The issue was whether a sperm-seeker and sperm donor could “enter into an enforceable agreement under which the [known] donor provides sperm in a clinical setting for IVF and relinquishes his right to visitation with the resultant child(ren) in return for the mother’s agreement not to seek child support from the donor.”¹⁵³

In a hypothetical situation like the one Beth Gardner proposed, in which two people have a brief sexual encounter resulting in the birth of a child, both parties must provide child support. In

under the supervision of a licensed physician, engage in assisted reproduction through use of donated eggs, sperm, or both, will be treated at law as if they are the sole natural and legal parents of a child conceived thereby.”). The Alabama Code was “redrafted to continue the prior Alabama practice of protecting a donor from parental responsibilities in only limited situations. See, former ALA. CODE § 26-17-21 (1975). This eliminates the potential created in the Uniform Parentage Act of having a child intentionally created who would have no legal father.” *Id.*, Editor’s Note.

¹⁴⁸ This is just one of many examples of how single women and lesbians do not have the same access to sperm as heterosexual, married women.

¹⁴⁹ Peterson, *supra* note 36 (citing Stuhmcke, *supra* note 39; Anita Stuhmcke, *Limiting Access to Assisted Reproduction: JM v. QFG*, 16 AUSTRL. J. FAM. L. 245 (2002)).

¹⁵⁰ UNIF. PARENTAGE ACT § 5 (1973).

¹⁵¹ N.H. REV. STAT. ANN. § 168-B:11 (1991) (“A sperm donor may be liable for support only if he signs an agreement with the other parties to that effect.”); see also CONN. GEN. STAT. ANN. § 45a-775 (West 2007) (An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D.).

¹⁵² *Ferguson v. McKiernan*, 940 A.2d 1236, 1241 (2007).

¹⁵³ *Id.*

cases like this, the parties cannot contract out of providing child support. This differs from the situation in *Ferguson*, where a sperm donor and sperm-seeker utilize a sperm bank for the purposes of creating a child and making money. In this case, the Court held that sperm donors are not obligated to the resulting offspring, reasoning that the parties intended, and did, form a binding and valid agreement. Further, the parties made the agreement outside of a romantic relationship, “taking sexual intercourse out of the equation” and tried to preserve anonymity for the donor. This lawsuit has implications for private donations as well, where all of the same contractual elements could be met.

The *Ferguson* court tried to protect women from being forced to choose anonymous donors. If the parties did *not* have a right to contract out of paternity, the court reasoned, donors would be discouraged from providing sperm, and women would not want to risk donor paternity lawsuits. A woman would be unable to assure the sperm donor that he would “never be subject to a support order” and he would not provide her with the assurance that he would “never ... seek custody of the child.”¹⁵⁴ The court held that distinguishing between sperm donation and brief sexual encounters would leave a woman with no other choice than to seek anonymous donations or to “abandon her desire to be a biological mother.”¹⁵⁵ The court noted “[t]here is simply no basis in law or policy to impose such an unpleasant choice, and to do so would be to legislate in precisely the way ... this [c]ourt has no business doing.”¹⁵⁶

Much of the *Ferguson* court’s language supported a woman’s right to choose her children’s father. It stated that some women have a “personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery.”¹⁵⁷ The court understood that a woman should have the option of choosing a non-anonymous donor, and that the ability to contract out of paternity preserves this option.

Critics may argue that the *Ferguson* ruling impairs the rights of donor-conceived children to get support from or to meet their biological fathers, and therefore the ruling would not be in the children’s best interests. Although the children in *Ferguson* would not receive support from the donor, the court reasoned that “[a]bsent the parties’ agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous

¹⁵⁴ *Id.* at 1246.

¹⁵⁵ *Id.* at 1247.

¹⁵⁶ *Id.* at 1247-48.

¹⁵⁷ *Id.*

sperm donor, who neither party disputes would be safe from a support order.”¹⁵⁸

Though the *Ferguson* case involved a sperm bank, the court's reasoning applies to private donation as well. Although the court's ruling weighed heavily in favor a woman's right to choose her method conception, it still overlooked the benefits of private donation as an alternative to using a sperm bank, as well as the financial burdens and risks of genetic mistakes that can potentially arise from using a sperm bank.

B. *The FDA Should not Regulate Private Donation*

The FDA has recently threatened to fine and imprison Trent Arsenault, a private sperm donor, for refusing to follow the FDA's guidelines for sperm manufacturers.¹⁵⁹ Proponents of more regulation of private sperm donation hailed the decision. However, regulation of private sperm donors would create a large financial cost for the FDA, an organization with already limited resources.¹⁶⁰ Arsenault was the first private donor threatened with fines and imprisonment¹⁶¹ for “manufacturing” sperm, but what if all private donors were? There are over 6,000 members belonging to the Known Donor Registry, a service that helps private gamete donors meet potential sperm-seekers.¹⁶² It is unlikely that the FDA has the administrative or financial resources to regulate all private donors.

If the FDA were to regulate private donation of sperm, it is unclear how far reaching such regulation would become. The regulations may eventually extend to fining women who seek donated sperm, and other invasions of the private right to conceive free from governmental interference. Some scholars have suggested that the FDA may not be the appropriate regulator of private donation. Ann Althouse, Professor of Law at the University of Wisconsin¹⁶³ claims that the FDA has the power to regulate private sperm donation under the Commerce Clause. She equates sperm banks to

¹⁵⁸ *Id.* at 1248.

¹⁵⁹ Dokoupil, *supra* note 1.

¹⁶⁰ Heled, *supra* note 118, at 270-72.

¹⁶¹ Ann Althouse, *Trent Arsenault—Devoted Sperm Donor, Virgin Father—Hounded by the FDA*, ALTHOUSE (Feb. 7, 2012), <http://althouse.blogspot.com/2012/02/trent-arsenault-devoted-sperm-donor.html>.

¹⁶² Known Donor Registry, *supra* note 6.

¹⁶³ Ann Althouse, *About Ann Althouse*, ALTHOUSE, <http://althouse.blogspot.com/p/about-ann-althouse.html> (last visited Oct. 10, 2012).

marijuana growing operations, stating that the federal government can similarly regulate sperm activity:

[b]ecause it regulates the sperm bank business and this is like the way it can regulate growing one marijuana plant even one that isn't intended for the commercial market? But marijuana is a commodity, and—as the Supreme Court said in *Gonzales v. Raich*—“the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Professor Althouse argues that the FDA can regulate private donation because the sale of sperm by sperm banks is lucrative, and private donation, in the aggregate, can interfere with sperm bank profits. However, sperm is not the same as marijuana or other commodities covered under the Commerce Clause; each specimen is a natural function of the human body, made by a living and breathing person, and used to create another life. Creating a child is a personal and intimate act, as *Arsenault* has argued, and sperm donation is a private sexual matter, and therefore the federal government should not regulate private donation.¹⁶⁴ Production of sperm is an inherent characteristic and an intrinsic part of being a male human, and unlike marijuana, which is strictly a commodity. For these reasons, the FDA should not be allowed to regulate private sperm donation under the Commerce Clause.

C. Current Guidelines for Institutions that are Useful to Private Sperm-seekers

The American Society of Reproductive Medicine (ASRM) and the American Association of Tissue Banks (AATB) have created non-mandatory¹⁶⁵ guidelines explaining how to prevent the spread of genetic and sexually transmitted diseases in sperm donation transactions.¹⁶⁶ The sanction for noncompliance of a sperm bank with the AATB Guidelines is withdrawal of accreditation

¹⁶⁴ *Dokoupil, supra* note 1. *See also* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Cruzan v. Mo. Dep’t. of Health*, 497 U.S. 261 (1990); *Roe v. Wade*, 410 U.S. 113 (1973), *modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Griswold v Connecticut*, 381 U.S. 479 (1965).

¹⁶⁵ Heled, *supra* note 118, at 270-72.

¹⁶⁶ *Id.*

“upon a determination . . . that significant non-compliance, such as repeated violations, one or more egregious violations, uncorrected violations or deliberate falsehoods, have occurred.”¹⁶⁷ The regulation is very loose, and many aspects of donation that it seeks to regulate, such as STD's, genetic diseases, and fertility, are all things that many private donors, such as Arsenault, regularly make public. However, women seeking private sperm donations might use such guidelines to help determine if particular donors are safe.

Legislators and agencies such as the FDA are usually reluctant to regulate human reproductive issues.¹⁶⁸ The CDC, FDA, and many states agencies currently do not even regulate testing for genetic diseases in gametes, focusing instead on the potential for spreading STD's and STI's.¹⁶⁹ New York and Ohio are the only states that require genetic testing for diseases.¹⁷⁰ New York requires tissue banks to meet such qualifications, but not private donors.¹⁷¹ However, private parties may self-monitor through relatively inexpensive tests. The statute, as a public document, may even act as a guideline to private parties, lessening the need for regulation. Ohio has laws that cover when and how sperm may be used for “non-spousal artificial insemination.”¹⁷² The laws require that certain healthcare professionals follow the statutes, but do not state that private parties must meet the requirements. Many of the requirements are similar to those provided in the AATB guidelines.¹⁷³ New

¹⁶⁷ *Id.* (internal citation omitted).

¹⁶⁸ *Id.* at 248.

¹⁶⁹ *Id.* at 255.

¹⁷⁰ *Id.* at 250-58.

¹⁷¹ N.Y. COMP. CODES R. & REGS. TIT. 10, § 52-8.5 (1991).

¹⁷² OHIO REV. CODE ANN. § 3111.91 (West 2000).

¹⁷³ *Id.* (“(A) In a non-spousal artificial insemination, fresh or frozen semen may be used, provided that the requirements of division (B) of this section are satisfied.

(B)(1) A physician, physician assistant, clinical nurse specialist, certified nurse practitioner, certified nurse-midwife, or person under the supervision and control of a physician may use fresh semen for purposes of a non-spousal artificial insemination, only if within one year prior to the supplying of the semen, all of the following occurred:

(a) A complete medical history of the donor, including, but not limited to, any available genetic history of the donor, was obtained by a physician, a physician assistant, a clinical nurse specialist, or a certified nurse practitioner.

(b) The donor had a physical examination by a physician, a physician assistant, a clinical nurse specialist, or a certified nurse practitioner.

(c) The donor was tested for blood type and RH factor.

Hampshire requires that sperm donors must be medically evaluated before making a donation.¹⁷⁴ The statute seems to cover all artificial insemination, whether done through an institution or in a Starbucks bathroom. It is also arguably overbroad, in that it could apply to every sexual act that could inseminate a woman.

These laws mostly apply to sperm banks, and not to private donors. Similar to the way a person might look at the nutritional guidelines before eating at a fast food restaurant, a private sperm-seeker could look to these laws as guidelines on how to find a donor, become pregnant, and retain custody of her child. Simply because a product has the potential to be detrimental to health does not mean that it must be regulated. If we have the choice to eat Big Macs, french fries and to drink soda despite knowing that they are always unhealthy, then women should have the option to assume the risk of private sperm donation, especially because every sample of sperm does not carry STI's or genetic diseases.

D. *Lawsuits are a Potential Avenue for "Regulation"*

In some states, a donee may file a lawsuit against a donor or sperm bank under the wrongful life theory. California, Washington, and New Jersey allow claimants to bring wrongful life actions for

(2) A physician, physician assistant, clinical nurse specialist, certified nurse practitioner, certified nurse-midwife, or person under the supervision and control of a physician may use frozen semen for purposes of a non-spousal artificial insemination only if all the following apply:

(a) The requirements set forth in division (B)(1) of this section are satisfied;

(b) In conjunction with the supplying of the semen, the semen or blood of the donor was the subject of laboratory studies that the physician involved in the non-spousal artificial insemination considers appropriate. The laboratory studies may include, but are not limited to, venereal disease research laboratories, karyotyping, GC culture, cytomegalo, hepatitis, kem-zyme, Tay-Sachs, sickle-cell, ureaplasma, HLTV-III, and chlamydia.

(c) The physician involved in the non-spousal artificial insemination determines that the results of the laboratory studies are acceptable results.

(3) Any written documentation of a physical examination conducted pursuant to division (B)(1)(b) of this section shall be completed by the individual who conducted the examination.”)

¹⁷⁴ N.H. REV. STAT. ANN. § 168-B:10 (2011) (“No semen shall be used in an insemination procedure unless the sperm donor has been medically evaluated and the results, documented in accordance with any rules adopted by the department of health and human services, demonstrate the medical acceptability of the person as a sperm donor.”).

recovery of damages for medical treatment and therapy.¹⁷⁵ Most other jurisdictions do not allow wrongful life actions even when a donor-conceived child in question suffers from a genetically inherited impairment.¹⁷⁶ Courts that do not recognize wrongful life actions because “general damages in such cases are impossible to measure, since the damages to be calculated would be the difference between the child’s life with defects or disease, and the utter void of nonexistence.”¹⁷⁷ Cases brought under a wrongful life theory have not been successful. However, in states that do not recognize wrongful life actions, wrongful death cases have been brought successfully when a mother or her child has passed away due to an STI or STD such as HIV contracted through infected sperm provided to her from a cryobank.¹⁷⁸

In *Johnson v. Superior Court of Los Angeles County*, a cryobank in California knew that the donor had a genetic disorder and still accepted him as a donor, but did not inform the sperm-seeker of the defect.¹⁷⁹ The bank stated that it had screened the sperm. Because of this misstatement, a child was born with the disorder that the sperm donor carried.¹⁸⁰ The complaint stated that the donor could have fathered as many as 1,600 children through the sperm bank.¹⁸¹ A private donor is unlikely to sire so many children because usually in private donations, one sample will be used to produce only one child, in contrast with institutionalized donations, where one sample is used many times. If the mother in *Johnson* had chosen a private sperm donor, her child may not have inherited a genetic disease. She would not have relied on a cryobank, and would have been able to screen donors herself for genetic disease. Even if the sperm-seeker had chosen the genetically “deficient” sperm, then she would be less likely to use limited judicial resources, because, as the primary decision making party, she would not have grounds to sue, unless the donor had concealed

¹⁷⁵ 50 AM. JUR. 2D *Trials* § 1 (1994).

¹⁷⁶ *Id.*

¹⁷⁷ Heled, *supra* note 118, at 262-63.

¹⁷⁸ *Id.* (“Where negligence of the sperm bank consisting of unreasonable donor HIV screening practices results in the transmission of AIDS to the recipient wife or her child causing death, an action for wrongful death brought against the sperm bank is an appropriate remedy. A wrongful death action would permit the survivors of the AIDS victim to recover for losses occasioned by the sperm bank’s negligence. As a rule, wrongful death actions sound in negligence and involve the same elements as negligence actions.”) (internal citation omitted).

¹⁷⁹ *Id.* at 270-72.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*, at 264.

information from her. In such a case, it might be more difficult for a mother to sue a sperm bank than a private donor for defective material because donor records kept by sperm banks are secret and confidential. This may not be an issue in private donation, because the sperm-seeker has the option of requiring donor genetic tests and disclosure of medical records.

VII. CONCLUSION

Private sperm donation is becoming more prevalent for multiple reasons. It is less financially burdensome to potential recipients than institutionalized donation, information about all types of sperm donation is more readily and easily accessible to donees, and many men prefer private donation. Lesbian couples and single women use private donation because they lack equitable access to institutionalized sperm donation. Further, the media has recently increased the visibility of private donation. Finally, fresh sperm is more likely to result in pregnancy than the frozen sperm which sperm bank institutions are required to use.

Despite, or perhaps because of, the increasing prevalence of private sperm donation, the FDA recently cracked down on Trent Arsenault, a private sperm donor, ordering him to “cease manufacture” of sperm. This poses a critical question: should private donation be regulated like institutionalized sperm donation, or should women have the right to choose between unregulated private, and regulated institutionalized, donation?

There are several reasons why private donation should not be regulated. Women have more power over whether their children learn the identity of their biological father, and the sperm donor can choose to identify himself. Both participants can decide whether the sperm donor should have access to the child, or whether he should pay child support.

In response to the outcry against some of the problems that come through institutionalized procreation, many call for the creation of a national registry of sperm donors. They argue that this would prevent the spread of genetic or sexually transmitted diseases, and would limit the number of children one donor could create. Even if a national registry would help solve some of these problems, it would be nearly impossible to create and enforce, and would likely trigger a decrease in sperm donations.

There are risks and benefits associated with both institutionalized and private donation. Potential problems include the spread of genetic or sexually transmitted diseases, and conflicts

over paternity. These risks are often shared with institutionalized donation. Some of the risks associated solely with institutionalized donation include confusion of sperm samples in the insemination process, accidental disposal of tissue, improper maintenance of samples, and the increased potential for consanguinity. Because private donation reduces or eliminates these issues, it should remain an option for women.

The FDA should not regulate private donation. However, the guidelines promulgated by the FDA and other institutions can be used by private sperm-seekers to screen potential sperm donors. When a private sperm transaction goes awry, a lawsuit should be the appropriate method to resolve the issue. None of the risks of private donation warrant an intrusion into a woman's right to choose between private and institutionalized donation. Many of the women choose private donation because they are unable to access sperm banks, due to gender and sexual orientation discrimination, and/or the high financial cost of institutionalized donation. Some women want to have more power to choose a sperm donor and to decide how her children will interact with him. Others do not trust sperm banks to perform the requisite tests and to use the correct sperm in the insemination procedure. The FDA should not force these women to bend to its will. Sperm-seekers should be allowed to choose their sperm donor and method of insemination. After all, "[i]f it's legal to go to a bar, get drunk, and sleep with a random stranger, then it can't possibly be illegal to provide clean, healthy sperm in a cup."¹⁸²

¹⁸² Dokoupil, *supra* note 1 (quoting Beth Gardner).