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## The Reality of Assisted Reproductive Technology: A Call for the Prohibition of Donor Anonymity

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**The Reality of Assisted Reproductive Technology: A Call  
for the Prohibition of Donor Anonymity**

Gisell Mondragon

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## I. INTRODUCTION

When Angela Collins and Elizabeth Hanson decided to have a baby, they sought help from Assisted Reproductive Technology (ART).<sup>1</sup> Collins and Hanson went to Xytex Corporation (Xytex), a sperm bank in Atlanta, Georgia, and chose Sperm Donor 9623.<sup>2</sup> Xytex provided his portfolio, which described him as a healthy male who spoke four languages.<sup>3</sup> The donor purportedly had an IQ of 160, obtained a Master's degree in artificial intelligence, and was pursuing a PhD in neuroscience engineering.<sup>4</sup> Overall, Donor 9623 had a very impressive portfolio.

However, seven years after the couple had their baby, Hanson and several other mothers of Donor 9623's children<sup>5</sup> discovered Donor 9623 was not who they said they were.<sup>6</sup> In fact, a confidentiality breach by Xytex revealed that Donor 9623 was Chris Aggles, a college drop out with a criminal record and numerous hospitalizations.<sup>7</sup> Aggles also received diagnoses of bipolar disorder, narcissistic personality disorder, and schizophrenia.<sup>8</sup>

Additionally, it was revealed that Xytex had not verified the background information Aggles provided.<sup>9</sup> Nor did Xytex require Aggles to provide medical or criminal history.<sup>10</sup> Upon discovering this information, three families—including Collins and Hanson—filed lawsuits against Xytex.<sup>11</sup>

Collins and Hanson's experience with ART may seem startling, but it is not uncommon.<sup>12</sup> Sperm donors providing false information about their identity and background is just one of the numerous issues that arise

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<sup>1</sup> Kelly Fritsch & Anne McGuire, *Risk and the Spectral Politics of Disability*, 25 *BODY & SOC'Y* 4, at 29 (2019).

<sup>2</sup> *Id.* at 29.

<sup>3</sup> *Id.* at 29-30.

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

<sup>5</sup> See Sarah Zhang, *One Sperm Donor. 36 Children. A Mess of Lawsuits*, *THE ATLANTIC* (Sep. 11, 2020), <https://www.theatlantic.com/science/archive/2020/09/sperm-donor-identity-mental-health/616081/> [<https://perma.cc/23A3-3BCE>].

<sup>6</sup> Fritsch & McGuire, *supra* note 1, at 30.

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

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

<sup>9</sup> Naomi Cahn & Sonia Suter, *Sperm donation is largely unregulated, but that could soon change as lawsuits multiply*, *THE CONVERSATION* (Jan. 18, 2022), <https://theconversation.com/sperm-donation-is-largely-unregulated-but-that-could-soon-change-as-lawsuits-multiply-174389> [<https://perma.cc/255Q-8ZK6>].

<sup>10</sup> Norman et al, v. Xytex Corporation et al. (Norman III), 848 S.E.2d 835, 837 (Ga. 2020).

<sup>11</sup> Yanna Wang, *This couple says everything they were told about their sperm donor was a lie*, *THE WASHINGTON POST* (April 15, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/15/this-couple-says-everything-they-were-told-about-their-sperm-donor-was-a-lie/> [<https://perma.cc/5FV8-PPAV>]; See *supra* note 9.

<sup>12</sup> See Amy Dockster Marcus, *A Son's Death Raises Questions About Sperm Donor's Medical History*, *WALL ST. J.* (Jan. 19, 2022), <https://www.wsj.com/story/a-sons-death-raises-questions-about-sperm-donors-medical-history-52053a3c> [<https://perma.cc/8YVG-27ZV>]; Morgan Catherine York, *I Just Took a DNA Test—Turns Out, I'm 100% Breaching My Donor Anonymity Contract: Direct-to-Consumer DNA Testing and Parental Medical-Decision-Making*, 28 *IND. J. GLOB. LEGAL STUD.*, 293 (2021).

from the limited laws regulating ART.<sup>13</sup> In the United States, the rise of litigation resulting from “fertility fraud”<sup>14</sup> and many other claims is linked to the growing popularization of affordable consumer genetic tests, such as those offered on websites 23andMe<sup>15</sup> and ancestry.com.<sup>16</sup>

Many donor-conceived people (DCP) seek their biological parent by matching with genetic relatives through DNA databases using consumer genetic tests.<sup>17</sup> As a result, numerous DCP who have used consumer genetic tests have found their biological father and several of their half-siblings.<sup>18</sup> In fact, almost anyone can be linked to relatives based on genetic findings and the current databases.<sup>19</sup> It is not required for a donor to be listed in a DNA database for them to be recognized; if any of the donor’s family members are listed, a DCP can be led to their donor.<sup>20</sup>

For that reason, consumer DNA genetic tests have made it virtually impossible for donors to have any of the promised anonymity they had before.<sup>21</sup> In the United States, the rise of at-home genetic tests has compelled both states and reproductive tissue banks to begin setting narrower regulations.<sup>22</sup> A few states have adopted laws that require the disclosure of donor medical history and donor-identifying information when the offspring of the donor reaches the age of eighteen.<sup>23</sup>

As for reproductive tissue banks, some sperm donation clinics have revised their policies to make donors aware that the term “anonymous” donations only extends as far as the clinic not sharing a donor’s information, however, this does not eliminate the possibility that a donor may be recognized through different means.<sup>24</sup> Other clinics have adopted an “open ID” donor system.<sup>25</sup> An open ID system allows DCP to connect

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<sup>13</sup> See Deborah Goldman, *The Long-Term Harms of Anonymous Sperm Donation*, EPPC (Jan. 30, 2023), <https://eppc.org/publication/the-long-term-harms-of-anonymous-sperm-donation/> [<https://perma.cc/WK6Y-57FQ>].

<sup>14</sup> Cahn & Suer, *supra* note 10.

<sup>15</sup> See Nofar Yakovi Gan-Or, *Reproductive Dreams and Nightmares: Sperm Donation in the Age of At-Home Genetic Testing*, 51 LOY UNIV. CHI. L.J. 791, 791 (2020), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/luclj51&div=27&id=&page=> [<https://perma.cc/MB9Q-8Y97>].

<sup>16</sup> Karen Rotshenker-Olshinka & Michael H. Dahan, *Fertility care in the era of commercial direct-to-consumer home DNA kits: issues to ponder*, JOURNAL OF ASSISTED REPRODUCTION AND GENETICS (Feb. 26, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7125273/> [<https://perma.cc/KDW5-56B3>].

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.*

<sup>22</sup> Cahn & Suter, *supra* note 9.

<sup>23</sup> CAL. HEALTH & SAFETY CODE § 1644.3, Conn. Gen. Stat. § 46b-546, R.I. Gen. Laws § 15-8.1-905; Wash. Rev. Code § 26.26A.820. Disclosure of identifying information and medical history on request of a child conceived by assisted reproduction.

<sup>24</sup> Meghana Keshavan, ‘There’s No Such Thing as Anonymity’: With Consumer DNA Tests, Sperm Banks Reconsider Long-Held Promises to Donors, STAT (Sept. 11, 2019), <https://www.statnews.com/2019/09/11/c-consumer-dna-tests-sperm-donor-anonymity/> [<https://perma.cc/PWE7-LWQL>].

<sup>25</sup> *Id.*

with donors once they reach the age of eighteen, or sooner, if both parties agree to it.<sup>26</sup>

Angela Collins and Elizabeth Hanson's experience illustrates several ethical issues concerning the limited regulations around ART,<sup>27</sup> at the heart of which is sperm donor anonymity. This article discusses how the current regulation schemes in Washington State and at the federal level are inadequate to mitigate the ethical issues concerning ART—specifically, the sperm donorship industry. Although Washington State has enacted laws that allow disclosure of a sperm donor's identifying information, additional measures must be implemented to further regulate ART. Washington State's ART regulations should be amended to better address policy concerns regarding an individual's identity, including behavioral and health characteristics, and to better serve the interests of DCP and the intended parents.

Washington State should adopt regulations that prohibit anonymous sperm donorship and provide complete transparency between all parties involved in the sperm donation process. In addition, Washington State should address verification of donor-provided information and require reproductive tissue banks to conduct background checks to determine the accuracy of donor-provided information. Further, regulations at the federal level should address the number of offspring a single donor may have, making sure that there are clear, standard guidelines on how to track and keep record of DCP from the same donor.

The following section of this article, Part II, will lay out a brief introduction of ART and specific types of sperm donor techniques. Part III examines the ethical issues associated with donor anonymity. Part IV compares ART legislation from Washington to other states as well as ART legislation from the United States to other countries abroad. Finally, Part V of this article discusses the role of consumer genetic testing in the reproductive donorship industry and its implications on sperm donor anonymity.

## II. A BRIEF OVERVIEW OF ART AND SPERM DONATION TECHNIQUES

### A. *What Is ART?*

The Centers of Disease and Control Prevention (CDC) defines ART to “include all fertility treatments in which either eggs or embryos are handled.”<sup>28</sup> In short, ART is used to help treat infertility.<sup>29</sup> ART plays a significant role in our society by helping individuals achieve pregnancy

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<sup>26</sup> *Id.*

<sup>27</sup> See I. Glen Cohen, *THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS* 499-535 (Leslie Francis ed., 2016).

<sup>28</sup> *What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 8, 2019), <https://www.cdc.gov/art/whatis.html> [<https://perma.cc/G3KX-M3P5>] (hereinafter "CDC ART").

<sup>29</sup> *Assisted Reproductive Technology*, MEDLINE PLUS (Aug. 19, 2015), <https://medlineplus.gov/assistedreproductivetechnology.html> [<https://perma.cc/CM5P-QT6H>] [hereinafter "Medline Plus"].

in situations where it otherwise might not be possible.<sup>30</sup> For instance, ART allows those individuals with infertility or genetic conditions to have a child.<sup>31</sup>

ART includes fertility treatments that involve the handling of both sperm and eggs.<sup>32</sup> However, procedures where only sperm is handled, such as intrauterine insemination,<sup>33</sup> are not included under the CDC's definition of ART.<sup>34</sup> ART works by removing eggs from the ovaries and then mixing sperm with the egg to create embryos.<sup>35</sup> The embryos are then placed back into the intended parent's body.<sup>36</sup> The following portion of this article discusses several types of ART relevant to the sperm donation industry.

### 1. *In Vitro Fertilization (IVF)*

The most common and effective type of ART is in vitro fertilization (IVF).<sup>37</sup> IVF is a complex series of procedures where mature eggs are obtained from the ovaries and fertilized by sperm in a lab.<sup>38</sup> Once the eggs have been fertilized, a subsequent procedure is done to place one or several of the fertilized eggs (embryos) in a uterus, which is where the fetus(es) will develop.<sup>39</sup>

IVF treatment in humans dates back to 1978, when the first successful treatment was performed in England.<sup>40</sup> Since then, IVF has become a commonly accepted practice and technology has developed allowing access to expand worldwide.<sup>41</sup> This article will specifically discuss ART involving donated sperm through gamete and embryo donation.

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<sup>30</sup> Meaghan Jane & Manvinder Singh, *Assisted Reproductive (ART) Techniques*, NATIONAL LIBRARY OF MEDICINE (Aug. 15, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK576409/> [<https://perma.cc/UMN6-NDPS>].

<sup>31</sup> *Id.*

<sup>32</sup> Medline Plus, *supra* note 29.

<sup>33</sup> Intrauterine insemination (IUI) is a procedure where sperm is placed directly into the uterus, rather than placed externally outside of the uterus. See *IUI (Intrauterine Insemination)*, CLEVELAND CLINIC (March 3, 2022), <https://my.clevelandclinic.org/health/treatments/22456-iui-intrauterine-insemination> [<https://perma.cc/BV23-7PS4>].

<sup>34</sup> CDC Art, *supra* note 28.

<sup>35</sup> Medline Plus, *supra* note 29.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *In vitro fertilization (IVF)*, MAYO CLINIC (Sept. 1, 2023), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [<https://perma.cc/CE4K-LASY>].

<sup>39</sup> *Id.*

<sup>40</sup> Meaghan Jane & Manvinder Singh, *Assisted Reproductive (ART) Techniques*, NATIONAL LIBRARY OF MEDICINE (Aug. 15, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK576409/> [<https://perma.cc/UMN6-NDPS>].

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

## 2. *Gamete and Embryo Donation*

Gamete and embryo donations provide sperm, eggs, or embryos from another individual to help an intended parent conceive a child.<sup>42</sup> The intended parent in these types of donation processes is the person who will raise the child.<sup>43</sup> In the situation of embryo donation, there is no genetic link between the intended parent and the donor-conceived child.<sup>44</sup> However, an intended parent may maintain a genetic link to the child through sperm and egg donations.<sup>45</sup>

### III. ETHICAL ISSUES ARISING FROM DONOR ANONYMITY

There are several ethical issues raised by allowing anonymous sperm donorship in ART procedures, as outlined in the section above. The first ethical issue this section explores is the competing interests between the sperm donor and the DCP. The next section addresses the ethical issues stemming from the lack of regulations controlling the number of donor-conceived children a single donor may have. Finally, the last section discusses the issues arising out of insufficient verification of donor-provided information.

#### A. *Anonymous and Open Identification Donorship: Competing Interests*

The anonymity of sperm donors in the context of ART and the right of DCP to know their biological parents' identity is a controversial topic.<sup>46</sup> Advocates for donor open identification argue that donor anonymity violates fundamental rights.<sup>47</sup> Specifically, those opposing donor anonymity declare that the right to personal identity, the right to historicity, the right to know one's genetic background, and the right of one's free development of personality, are all fundamental rights violated by donor anonymity.<sup>48</sup>

On the other hand, those who advocate for donor anonymity argue that the fundamental interests, addressed by those in support of open identification, conflict with other interests, "such as maintaining peace

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<sup>42</sup> *Gamete (Eggs and Sperm) And Embryo Donation*, AM. AM. SOC'Y FOR REDPROD. MED., [https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/gamete-eggs-and-sperm-and-embryo-donation/#:~:text=What%20is%20gamete%20or%20embryo,raise%20the%20child\(ren\)\[https://perma.cc/9Z65-32ZL\]](https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/gamete-eggs-and-sperm-and-embryo-donation/#:~:text=What%20is%20gamete%20or%20embryo,raise%20the%20child(ren)[https://perma.cc/9Z65-32ZL]) (last visited Nov. 19, 2022) [hereinafter "Gamete"].

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> Mónica Bessa Correia, Guilhermina Rego & Rui Nunes, *The Right to Be Forgotten versus the Right to Disclosure of Gamete Donors' ID: Ethical and Legal Considerations*, 27 ACTA BIOETHICA (Jun. 2021), [https://www.researchgate.net/publication/352336431\\_The\\_Right\\_to\\_Be\\_Forgotten\\_versus\\_the\\_Right\\_to\\_Disclosure\\_of\\_Gamete\\_Donors'\\_ID\\_Ethical\\_and\\_Legal\\_Considerations](https://www.researchgate.net/publication/352336431_The_Right_to_Be_Forgotten_versus_the_Right_to_Disclosure_of_Gamete_Donors'_ID_Ethical_and_Legal_Considerations) [https://perma.cc/9726-67U7].

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

<sup>48</sup> *Id.*



and stability within the family in which they are integrated,”<sup>49</sup> as well as, “preserving privacy rights of those who have donated genetic material.”<sup>50</sup> The remainder of this section will discuss these competing interests in further detail.

### 1. *Donor-Conceived Individual Rights and Advocates for Donor Identity Disclosure*

As more democratic countries begin to recognize the fundamental right of DCP to know and learn their origins, several countries, such as Australia, Canada, and most European countries, have banned donor anonymity.<sup>51</sup>

However, the United States is still closer to prioritizing the donor’s privacy over DCP.<sup>52</sup> Advocates for donor identity disclosure demand a pivot towards prioritizing DCP rights, and point out that the failure to do so has endangered both the psychological and physical wellbeing of the donor offspring.<sup>53</sup>

Specifically, supporters of open identification stress that the right to know one’s origin encompasses the right to personal identity.<sup>54</sup> Personal identity characterizes an individual as their own person and differentiates them from any other person because of certain personal experiences.<sup>55</sup> Therefore, it is argued that the right to personal identity requires a person to be entitled to know the people who biologically determined their existence and that this right requires legal protection.<sup>56</sup>

### 2. *Donor Rights and Advocates for Donor Anonymity*

In contrast, support for donor anonymity is grounded in preserving other values, such as protecting a donor’s right to privacy.<sup>57</sup> In this context, the right to privacy is understood “as a right that refers to the limits of the realm of information to which others have access.”<sup>58</sup>

In addition, advocates for donor anonymity have argued, and experts have cautioned, that a shift departing from donor anonymity

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Alana Newman, *Should We Ban Donor Anonymity?*, INST. FOR FAM STUD. (Feb. 21, 2017), <https://ifstudies.org/blog/should-we-ban-donor-anonymity#:~:text=Anonymity%20has%20been%20banned%20in,people%20do%20not%20support%20anonymity> [<https://perma.cc/U7TU-HGPC>].

<sup>52</sup> Bryn Nelson & Austin Wiles, *A shifting ethical and legal landscape for sperm donation*, 130 CANCER CYTOPATHOLOGY AM. CANCER SOC’Y J 567 (Aug. 3, 2022), <https://acsjournals.onlinelibrary.wiley.com/doi/10.1002/ency.22626> [<https://perma.cc/AF9B-H4RX>].

<sup>53</sup> *Id.*

<sup>54</sup> Correia, Rego & Nunes, *supra* note 46.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Oliver Hallich, *Sperm Donation and the Right to Privacy*, 23 THE NEW BIOETHICS 107, 107 (Jul. 20, 2017), <https://pubmed.ncbi.nlm.nih.gov/28728474/> [<https://perma.cc/WE3F-8SET>].

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

could decrease the donation pool in fertility clinics.<sup>59</sup> A 2016 study by Professor Glenn Cohan of Harvard Law found that approximately 29 percent of current sperm donors asserted they would not donate their genetic material to sperm banks if the laws changed to require their names to be put on a registry available to DCP when they reach the age of majority.<sup>60</sup>

### 3. *Balancing Competing Interests*

To balance donors and DCPs competing interests, the law must address these issues and find a middle ground to protect the interests of both parties. One way of potentially protecting both parties' interests is to require open identification only after the law has been amended. Specifically, this approach will protect prior donors' anonymity and provide future, potential donors notice that their identity will be disclosed if they ultimately decide to donate. Additionally, donors will also have to consent to the release of their identifying medical history to sperm banks so as to not violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA).<sup>61</sup>

Although both the donor's right to privacy and DCP's right to identity are significantly important interests, regulating ART to prohibit anonymity prevails and should be prioritized over maintaining a system of anonymity. The prohibition of donor anonymity should prevail because a person is not obligated to donate and, therefore, has the ultimate decision not to do so if they are in opposition of identity disclosure. Ultimately, having an identity disclosure system guarantees a donor's right to identity will be addressed under ART regulations.

#### B. *Unlimited Children*

Another ethical issue arising from ART donor anonymity is the lack of regulation of the number of offspring a single donor may have, meaning donors may reproduce at astonishing numbers.<sup>62</sup> In the United States, there are no legal limits on how many donor-conceived children a donor may have.<sup>63</sup> At most, there are only guidelines from the American

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<sup>59</sup> Nelson & Austin, *supra* note 52.

<sup>60</sup> Glen Cohen, et al., *Sperm donor anonymity and compensation: An experiment with American sperm donors*, 3 J. OF LAW AND THE BIOSCIENCES 468, 470 (Nov. 23, 2016), <https://academic.oup.com/jlb/article/3/3/468/2433403> [<https://perma.cc/7TUX-NDSB>].

<sup>61</sup> Federal law that requires the protection of sensitive patient health information from being disclosed without the patient's consent or knowledge. See *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/php/publications/topic/hipaa.html#:~:text=The%20Health%20Insurance%20Portability%20and,the%20patient's%20consent%20or%20knowledge> [<https://perma.cc/7Y8C-BY3D>].

<sup>62</sup> Jacqueline Mroz, *The Case of the Serial Sperm Donor*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/health/sperm-donor-fertility-meijer.html#:~:text=A%20least%20one%20sperm%20donor,42%20of%20his%20half%20siblings> [<https://perma.cc/C82R-C6EL>].

<sup>63</sup> *Id.*

Society for Reproductive Medicine, recommending that a donor have twenty-five donor-conceived children in a population of 800,000 people.<sup>64</sup> However, although some sperm banks have policies in place to inquire whether donors have donated elsewhere before, there is no valid way to verify donor information regarding whether and how many times they have donated in the past.<sup>65</sup>

The lack of regulations limiting the number of donor-conceived children a donor may have has been asserted to be a disadvantage in the formal system of the sperm donation industry.<sup>66</sup> In some cases, donors have reported that they have over a hundred biological children using both sperm banks and online resources to donate.<sup>67</sup>

Some scholars have addressed their concerns in this area, stating the possibility of inbreeding between biologically related individuals is increased when donors have hundreds of children within relatively the same area.<sup>68</sup> Although donors with hundreds of biological children are likely not common, there are still concerns about the legal limits within the sperm donorship industry.<sup>69</sup>

Even those countries that do have legal limits frequently do not have an adequate way of verifying whether the limit is being followed.<sup>70</sup> This is due to the absence of a central donor registry that would track all of the donors and donor-conceived child births.<sup>71</sup> Specifically, the drawback in sperm banks maintaining a record of donors past donations is that donors may donate at several different clinics and through online sources but may not accurately report it when clinics ask whether they have donated in the past.<sup>72</sup>

Even if a sperm bank were able to obtain its own accurate record system, the sperm bank's records would still not likely be as reliable as a clinic's records and need to be integrated with other participants in the industry, as research has demonstrated that 27 percent of donors donate to several different clinics.<sup>73</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Guido Pennings, *A SWOT analysis of unregulated sperm donation*, 46 REPRODUCTIVE BIOMEDICINE ONLINE 203, 203 (Sep. 21, 2022), [https://www.sciencedirect.com/science/article/pii/S1472648322007076?casa\\_token=cVkJ13u8c8EAAAAA:TIBXDIGKJpwUa9DMNMTXnzcQ6Jd00iCqC30CUNtCw6UecYyUAoI3-Se7-hYVMzCC5skZMiA7Q](https://www.sciencedirect.com/science/article/pii/S1472648322007076?casa_token=cVkJ13u8c8EAAAAA:TIBXDIGKJpwUa9DMNMTXnzcQ6Jd00iCqC30CUNtCw6UecYyUAoI3-Se7-hYVMzCC5skZMiA7Q) [<https://perma.cc/3L72-NSCB>].

<sup>67</sup> See *supra* note 62.

<sup>68</sup> Gong D, Liu YL, Zheng Z, Tian YF & Li Z. *An overview on ethical issues about sperm donation*. ASIAN J ANDROL. (Nov. 11, 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3735320/> [<https://perma.cc/GJK9-8DQY>].

<sup>69</sup> Pennings, *supra* note 66.

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

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

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

<sup>73</sup> Wendy Kramer, *30k-60k US Sperm and Egg Donor Births Per Year?*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/a-call-to-to-stop-using-t\\_b\\_8126736](https://www.huffpost.com/entry/a-call-to-to-stop-using-t_b_8126736) [<https://perma.cc/3VNS-T6C3>].

### 1. Troubling Statistics

To demonstrate the shortcoming of an absent central donor registry, Wendy Kramer, co-founder and director of the Donor Sibling Registry, explained that in 1988 the Office of Technology Assessment estimated that 30,000 donor-conceived children were born that year.<sup>74</sup> Today, that 30,000 annual births figure “is still trotted out in academia, lectures, and the media.”<sup>75</sup> Kramer notes, however, that the 30,000 annual births figure is occasionally doubled, and a range of 30,000-60,000 annual donor-conceived births is used in its place.<sup>76</sup>

These estimates are alarmingly suspect when taking into consideration present circumstances in the sperm donor industry.<sup>77</sup> Specifically, the annual donor-conceived child birth figure has remained virtually unchanged over decades when the growth of the donor insemination industry has increasingly changed.<sup>78</sup> Put simply, because the number of formal sperm banks and the number of sperm donors has increased since the 1988 estimate, it is unlikely the 30,000 annual donor-conceived childbirth estimate is anywhere near accurate.<sup>79</sup>

Academia’s usage of the outdated 30,000 estimate, combined with the non-existent limit on the number of children a single donor may have, are both areas of great concern. The citizen’s desire for more reliable information and oversight within the nation’s sperm donor industry should motivate governments both at the federal and state level.

### C. Lack of Donor Verification

As Angela Collins and Elizabeth Hanson’s story illustrated, there needs to be a greater push in requiring sperm banks to properly verify the information sperm donors provide. Currently, there are no laws in place at the federal or state level that require any reproductive tissue clinic to conduct a background check on sperm donors.<sup>80</sup> Although many sperm banks have implemented policies requiring a background check, there are still gaps in the reliability of this process, as shown in the case of Xytex and Donor 9623.<sup>81</sup>

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<sup>74</sup> *Id.*

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

<sup>76</sup> *Id.*

<sup>77</sup> Rachel Arocho, Elizabeth B. Lozano & Carolyn T. Halpern, *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995-2017*, NATL LIBR. OF MED. (Jul. 29, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6765402/> [<https://perma.cc/JA2C-HUGX>].

<sup>78</sup> Kramer, *supra* note 73.

<sup>79</sup> Arocho, Lozano & Halpern, *supra* note 77.

<sup>80</sup> Ellen Trachman, *New York Proposes Donor-Conceived Person Protection Act*, ABOVE THE LAW (Jan 12, 2022), <https://abovethelaw.com/2022/01/new-york-proposes-donor-conceived-person-protection-act/> [<https://perma.cc/HBX6-4Y9G>].

<sup>81</sup> Cahn & Suter, *supra* note 9. Xytex Corporation assured intended parent(s) that it carefully screened all donors by reviewing their criminal history and family health history; however, this was proven to not be the case when intended parent(s) of donor 9623 discovered they were not who they said they were.

### 1. Fertility Fraud

Another issue connected to the lack of regulations concerning donor verification is the notion of “fertility fraud.”<sup>82</sup> Fertility fraud occurs when there is a misrepresentation of the source of sperm, eggs, or embryos used to treat infertility.<sup>83</sup> The rise of fertility fraud associated with ART corresponds with the rise of direct-to-consumer genetic tests, uncovering many fertility doctors who have conceived several offspring using DNA makeup instead of the intended samples (i.e., provided by a spouse, an unknown donor, or a donor the intended parent(s) have selected).<sup>84</sup>

The practice of fertility doctors using their genetic makeup to raise the likelihood of pregnancy, all while preserving their anonymity, is a new discovery.<sup>85</sup> In the past, discovering fertility fraud was difficult and rare, as sperm donor anonymity was the norm and direct-to-consumer genetic testing was not so readily available.<sup>86</sup>

In response to the increasing fertility fraud lawsuits, some state governments have legislated to address the legal issues in this area.<sup>87</sup> For example, Indiana became the first state in the United States to enact a law regarding fertility fraud.<sup>88</sup> Indiana’s senate bill, Fertility Fraud and Deception, legislates against a fertility doctor’s failure to obtain their fertility patient’s consent prior to utilizing their own DNA makeup in the ART fertilization process.<sup>89</sup> The Indiana law issues criminal and civil responses against healthcare providers who do not obtain their patient’s consent before fertilizing or transferring sperm, eggs, or embryos.<sup>90</sup>

Additionally, Texas passed a similar but stricter law against fertility fraud.<sup>91</sup> Under Texas law, fertility fraud is a sexual assault crime when a healthcare provider knowingly uses a source that a patient had not consented to.<sup>92</sup>

It is likely that other states will follow suit. However, both fertility fraud and the failure to conduct background checks on reproductive donors are still areas in the law that are unregulated, leaving credibility gaps for fertilization or sperm transfers. While prohibiting sperm donor anonymity may not be a foolproof solution to these issues, it would hold

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<sup>82</sup> See Dov Fox, Glenn Cohen & Eli Y Adashi, *Fertility Fraud, Legal Firsts, and Medical Ethics*, 134 WOLTERS KLUWER HEALTH, INC. 918, at 918 (Nov. 2019),

[https://journals.lww.com/greenjournal/FullText/2019/11000/Fertility\\_Fraud,\\_Legal\\_Firsts,\\_and\\_Medical\\_Ethics.4.aspx?casa\\_token=hOvxj\\_0qF0MAAAAA:t3IEpTHAxv4M8BKUZG\\_BsFfSjmqm3cWmMQXL0XjUTY2VTaN54F6NQBmwDus-dsJAGXTQGsaylLHSF2oKvPBlowcU5w](https://journals.lww.com/greenjournal/FullText/2019/11000/Fertility_Fraud,_Legal_Firsts,_and_Medical_Ethics.4.aspx?casa_token=hOvxj_0qF0MAAAAA:t3IEpTHAxv4M8BKUZG_BsFfSjmqm3cWmMQXL0XjUTY2VTaN54F6NQBmwDus-dsJAGXTQGsaylLHSF2oKvPBlowcU5w) [https://perma.cc/7FZD-PMDB].

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

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

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

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

<sup>87</sup> See IND. SB 174, fertility fraud and deception; see SB 1259, 86<sup>th</sup> LEG., REGULAR SESS. (Tex. 2019).

<sup>88</sup> Ind. SB 174.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> SB 1259, 86<sup>th</sup> Leg., Regular Sess (Tex. 2019).

<sup>92</sup> *Id.*

sperm banks more accountable and deter them from using these types of practices.

If anonymous sperm donations are allowed to continue, then intended parent must be able to rely on the clinics to do an adequate screening of donors, which should involve more than a simple questionnaire. However, abandoning sperm donor anonymity would be more effective in this situation, as donor disclosure will surely reveal who the sperm donor is and would impose liability on sperm banks if they were to provide misleading or false donor credentials.

#### IV. ART DONORSHIP REGULATIONS

Since 1992, Congress has not taken any action regarding ART.<sup>93</sup> For that reason, states have begun to legislate on their own.<sup>94</sup> The first piece of legislation this section will explore is Washington State's ART laws. The next part addresses other state ART laws, followed by a discussion of federal and foreign legislation.

##### *A. Washington State ART Legislation*

In 2011, Washington State passed a law requiring the disclosure of donor-identifying information and medical history when a donor-conceived individual reaches the age of eighteen.<sup>95</sup> With this bill, Washington became the first state in the U.S. to pass legislation making access to identifying donor information available.<sup>96</sup>

Washington's law is recognized as an open identity donation law.<sup>97</sup> This law guarantees DCP access to their donor's medical history and full name once the donor-conceived individual reaches the age of majority.<sup>98</sup> However, a donor may opt-out from their name being disclosed on a donor registry, as long as the donor explicitly and formally asserts that they would like to remain anonymous.<sup>99</sup>

Although a donor may choose not to disclose their name, a donor does not have a choice to opt-out of disclosing their non-identifying medical history.<sup>100</sup> Additionally, if a donor does not specifically opt-out, the donor's identifying information will only be provided to the donor-

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<sup>93</sup> See *The Fertility Clinic Success Rate and Certification Act*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/nass/policy.html> [<https://perma.cc/PZB3-F22R>] [hereinafter "FCSRCA"].

<sup>94</sup> See CAL. HEALTH & SAFETY CODE § 1644.3, CONN. GEN. STAT. § 46b-546, R.I. GEN. LAWS § 15-8.1-905; WASH. REV. CODE § 26.26A.820. Disclosure of identifying information and medical history on request of a child conceived by assisted reproduction.

<sup>95</sup> RCW § 26.26A.820.

<sup>96</sup> *What is Washington State's Open Identity Donation Law?*, SIMPLIFY (Jul. 15), <https://www.simplifyeggbank.com/blog/what-is-washington-states-open-identity-donation-law> [<https://perma.cc/C97C-8E5T>].

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

conceived child upon their request.<sup>101</sup> Washington law also requires participants in the reproductive donorship industry to obtain donor records permanently.<sup>102</sup>

### B. Other State ART Legislation

Other states have adopted similar laws to Washington, including California,<sup>103</sup> Rhode Island,<sup>104</sup> and Connecticut.<sup>105</sup>

Connecticut was the most recent state to transition to an open identification system and enacted the Uniform Parentage Act in 2022.<sup>106</sup> The Connecticut Parentage Act (CPA) ensures that all children have equal access to parentage “regardless of the circumstances of their birth or the marital status, gender, or sexual orientation of their parents.”<sup>107</sup> In sum, the CPA develops clear, accessible methods for establishing the legal parentage of children.<sup>108</sup>

Under the CPA, sperm banks are required to collect identifying information from donors and specify whether donors have agreed to identification disclosure.<sup>109</sup> Similarly, states that have previously legislated on the topic of donor identification, such as California and Rhode Island, allow disclosure of donor identification information upon request where no refusal from the donor is present.<sup>110</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> CAL. HEALTH & SAFETY CODE § 1644.3 (If there is no declaration from the donor refusing to disclose their identity, then according to Health and Safety Code 1644.3, the gamete bank “shall provide the child with identifying information of the donor who provided the gametes.”).

<sup>104</sup> R.I. GEN. LAWS § 15-8.1-905 (“On request of a child conceived by assisted reproduction who attains eighteen (18) years of age, a gamete bank or fertility clinic licensed in this state which collected the gametes used in the assisted reproduction shall make a good-faith effort to provide the child with identifying information of the donor who provided the gametes[.]”).

<sup>105</sup> CONN. GEN. STAT. § 46b-546.

<sup>106</sup> *The Connecticut Parentage Act: What You Need to Know Before January 1, 2022*, GLBTQ LEGAL ADVOCATES & DEFENDERS (Sep. 2021), <https://www.glad.org/cpa-prejan1/#:~:text=The%20Connecticut%20Parentage%20Act%20goes,have%20equal%20access%20to%20parentage> [<https://perma.cc/3MK7-NWZG>] [hereinafter “GLAD”].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> An Act Concerning Adoption and Implementation of the Connecticut Parentage Act, Pub. Act. No. 21-15, Substitute House Bill No. 6321 (2022), <https://www.cga.ct.gov/2021/act/pa/pdf/2021PA-00015-R00HB-06321-PA.pdf> [<https://perma.cc/FFD9-KK6>].

<sup>110</sup> CAL. HEALTH & SAFETY CODE § 1644.3 (If there is no declaration from the donor refusing to disclose their identity, then according to Health and Safety Code 1644.3, the gamete bank “shall provide the child with identifying information of the donor who provided the gametes.”). R.I. GEN. LAWS § 15-8.1-905 (“On request of a child conceived by assisted reproduction who attains eighteen (18) years of age, a gamete bank or fertility clinic licensed in this state which collected the gametes used in the assisted reproduction shall make a good-faith effort to provide the child with identifying information of the donor who provided the gametes[.]”).

Further, Colorado<sup>111</sup> and New York<sup>112</sup> recently made some headway in attempting to regulate ART. A proposed measure in New York would require reproductive clinics to gather and verify a donor's educational, medical, and criminal felony conviction history.<sup>113</sup>

The donor would be required to provide written consent authorizing the reproductive tissue clinic to collect information through obtaining all other medical records, school enrollment and graduate records, and criminal felony conviction history records.<sup>114</sup> If this law passes, the intended parent will be prohibited from using out-of-state reproductive tissue clinics unless the out-of-state clinic has certified that it has complied with all of the requirements under the New York Act.<sup>115</sup>

Additionally, the pending legislation would also provide the potential intended parent, those who have purchased reproductive tissue, and DCP with the right to obtain this information without identifying the donor.<sup>116</sup> Notably, the collection of this information would not disclose the donor's name, meaning that the donor's anonymity would be maintained, unlike open identification states like Washington.<sup>117</sup>

In New York, the Legislature drafted the proposed bill in part to address the issues surrounding the experience of legal parents of a donor-conceived children such as Laura and David Gunner.<sup>118</sup> The Gunnings' son passed away from an opioid overdose.<sup>119</sup> Shortly after their son's death, the Gunnings discovered their son's donor had been diagnosed with schizophrenia and passed away.<sup>120</sup> The donor did not disclose their diagnosis, history of mental illness, or record of hospitalizations for behavioral issues,<sup>121</sup> demonstrating the consequences resulting from a lack of donor verification.

Furthermore, Colorado has become the first state in the United States to ban anonymous sperm and egg donations<sup>122</sup> through the passage of the Donor-conceived Persons and Families of Donor-Conceived

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<sup>111</sup> See COL. SB 22-224. Donor-conceived Persons and Families of Donor-conceived Persons Protection Act will go into effect in 2025, where Colorado will prohibit reproductive donor anonymity in its entirety.

<sup>112</sup> See SB S7602A (NY 2021-2022). Donor-Conceived Person Protection Act": A current, proposed bill in which reproductive tissue banks will be required to collect and verify medical, educational, and criminal background information for all donors

<sup>113</sup> Caher & Suter, *supra* note 9.

<sup>114</sup> Ellen Trachman, *New York Proposes Donor-Conceived Person Protection Act*, ABOVE THE LAW (Jan. 12, 2022, at 5:17 pm), <https://abovethelaw.com/2022/01/new-york-proposes-donor-conceived-person-protection-act/> [<https://perma.cc/HBX6-4Y9G>].

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

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

<sup>117</sup> Cahn & Suter, *supra* note 9.

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

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

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

<sup>121</sup> *Id.*

<sup>122</sup> Amy D. Marcus, *What do the Donor-Conceived Have a Right to Know?*, WSJ (Jun. 2, 2022), <https://www.wsj.com/story/what-do-the-donor-conceived-have-a-right-to-know-cfef8ad4> [<https://perma.cc/D4B4-P455>]



Persons Protection Act.<sup>123</sup> The Colorado Act will take effect in 2025<sup>124</sup> and will create a legal right for DCPs to request and receive information about their donor's identity and medical history.<sup>125</sup>

The Colorado Act requires reproductive tissue clinics that provide the collection of sperm and eggs to maintain current medical records and the contact information of all donors.<sup>126</sup>

In addition, the Act requires that donors must consent to identity disclosure, raises the minimum age to twenty-one to donate, and sets a global limit on the number of families that can use a single donor.<sup>127</sup>

The U.S. Donor Conceived Council declared on Twitter that the global limitation on the number of families per single donor is “an effort to decrease a [donor-conceived person's] chance of being born into mega sibling groups (and all the negative effects that come along with that),”<sup>128</sup> addressing the ethical and legal issues surrounding the lack of a standard limitation.

Compared to New York's proposed and Colorado's newly passed legislation, Washington State still has work to do in passing more DCP-centered legislation. Although Washington was the first state, and remains one of the few, to allow donor identity disclosures upon the donor-conceived person's request and with the donor's permission, Washington State needs to maintain its progress in this area by looking towards other state legislatures who are addressing other issues that Washington has left untouched.

For that reason, Washington's ART legislation regarding donorship should be amended to adopt some of the features of New York's proposed and Colorado's current legislation. Specifically, Washington's legislation should be amended to require background verification checks, abolish donor anonymity outright, and provide some form of limitations on donor-conceived children per donor.

### C. Federal Legislation

At the federal level, sperm banks are regulated with the help of the American Association of Tissue Banks (AATB),<sup>129</sup> the U.S. Food and

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<sup>123</sup> Col. SB 22-224.

<sup>124</sup> Ivana Saric, *Colorado becomes first state to ban anonymous sperm and egg donations*, AXIOS (Jun. 1, 2022), <https://www.axios.com/2022/06/01/colorado-ban-anonymous-sperm-egg-donation> [<https://perma.cc/NX39-XDXS>].

<sup>125</sup> *Id.*

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

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

<sup>128</sup> U.S. Donor Conceived Council, @dccouncilusa, TWITTER (Jun 1, 2022, 2:57 AM), <https://twitter.com/dccouncilusa/status/1531937897062060033> [<https://perma.cc/AWB4-ZYPP>].

<sup>129</sup> *What Policies Govern Sperm Donation?*, STANFORD UNIVERSITY, <https://web.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/spermpol.htm> [<https://perma.cc/9GPF-U9F3>].

Drug Administration (FDA),<sup>130</sup> the CDC,<sup>131</sup> and the American Society for Reproduction Medicine.<sup>132</sup> These federal agencies have created their own guidance regarding the screening of tissue and donor recipients.<sup>133</sup> However, it is important to note that some agencies and organizations only provide guidelines and recommendations, not the regulations themselves.<sup>134</sup>

The last time Congress regulated ART, Congress enacted the Fertility Clinic Success Rate and Certification Act (FCSRCA).<sup>135</sup> The FCSRCA requires that all ART clinics report data on pregnancy success rates to the federal government, including the CDC, FDA, and the Clinical Laboratory Improvement Act (CLIA),<sup>136</sup> in a “standardized manner” by providing annual data for all procedures performed.

The three agencies at the federal level that regulate ART are the following: (1) the CDC, (2) the FDA, and (3) the Centers for Medicare and Medicaid Services (CMS).<sup>137</sup> First, the FCSRCA requires the CDC to use data provided by clinics that perform ART to publish and report annual clinic-specific success rates.<sup>138</sup> The purpose of the CDC’s report is to support the quality and reliability of fertility programs.<sup>139</sup>

Second, the FDA controls the approval and use of drugs, biological products, and medical devices in the ART industry.<sup>140</sup> The FDA also has jurisdiction over the screening and testing of reproductive tissues, arguably the most important role in regulating ART.<sup>141</sup> Specifically, the regulations issued by the FDA contain strict requirements for sperm and egg donations, in which the donor eligibility determination focuses on infectious risks such as sexually transmitted infections and diseases.<sup>142</sup>

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<sup>130</sup> *Guidance Regarding Gamete and Embryo Donation*, 115 AM SOC’Y FOR REPROD. MED. 1395, 1396 <https://www.asrm.org/practice-guidance/practice-committee-documents/guidance-regarding-gamete-and-embryo-donation-2021/> [<https://perma.cc/QQ96-XB9T>].

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

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See Oversight of Assisted Reproductive Technology*, AM SOC’Y FOR REPRDOD. MED., 3 (2021), <https://www.asrm.org/globalassets/asrm/asrm-content/about-us/pdfs/oversiteofart.pdf> [<https://perma.cc/HQ5M-44XM>]. “On the federal level, [only] three agencies regulate ART. The Centers for Disease Control and Prevention...The Food and Drug Administration...The Centers for Medicine and Medicaid Services (CMS).”

<sup>135</sup> *See FCSRCA*, *supra* note 94.

<sup>136</sup> FCSRCA, *supra* note 93; *See Oversight of Assisted Reproductive Technology, Executive Summary: Oversight of Reproductive Technology*, AM’ SOC’Y FOR REPROD. MED., (<https://www.asrm.org/about-us/media-and-public-affairs/public-affairs/oversight-of-assisted-reproductive-technology/>) [<https://perma.cc/G5YY-YNXA>] (last visited Nov. 6, 2023).

<sup>137</sup> ASEM, *supra* note 134.

<sup>138</sup> FCSRCA, *supra* note 93.

<sup>139</sup> ASRM, *supra* note 134.

<sup>140</sup> *Id.*

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

<sup>142</sup> ASRM, *supra* note 130, 1399.

Lastly, the CMS is responsible for implementing the Clinical Laboratory Improvement Act,<sup>143</sup> which protects the quality of laboratory testing.<sup>144</sup> Aside from these regulations, there is no other federal legislation regulating ART. For that reason, several of the ethical and legal issues surrounding ART are not covered at the federal level, leaving individual states and professionals in the industry to attempt to regulate ART on their own. In fact, the lack of a unified regulatory system in the United States has earned the country the title of the “wild west of the fertility industry” by scholars.<sup>145</sup>

In addition, the lack of ART regulation suggests the Legislature’s reluctance stems from the religious controversy surrounding reproduction without sex and sex without reproduction (i.e., the usage of contraceptives), which places lawmakers in a difficult position.<sup>146</sup> Specifically, conservative lawmakers fear regulating ART would legitimize the practice, while liberal lawmakers argue regulating ART would open the doors to restricting who can and cannot have a child.<sup>147</sup> For that reason, ART has been virtually untouched at the federal level, leaving those in the private sector and the ART industry to “figure it out” in terms of professional guidelines.<sup>148</sup>

#### D. Foreign Legislation

In contrast to the United States, the United Kingdom has national agencies designed to license and monitor procreation specialists.<sup>149</sup> The United Kingdom’s Human Fertilization and Embryology Authority (HFEA) has complete authority to regulate fertility clinics and projects that involve human embryos throughout the country.<sup>150</sup> Clinics and human embryo research centers must comply with the Human Fertilization and Embryology (HFE) Act of 1990 (as amended) and the 2008 HFE Act.<sup>151</sup>

In addition, unlike the United States, the United Kingdom’s HFEA sets a limit on how many families a single donor can create—10

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<sup>143</sup> The Clinical Laboratory Improvement Act are federal standards that apply to all facilities in the United States that test human specimens for health assessment or to diagnose, prevent, or treat disease. Clinical Laboratory Improvement Act of 1988, 42 U.S.C § 236A (2022).

<sup>144</sup> See ASRM, *supra* note 134.

<sup>145</sup> See Naomi Cahn, *UVA LAW PROFESSOR EXAMINES THE ‘WILD WEST’ OF THE FERTILITY INDUSTRY*, UVATODAY (Sep. 13, 2021), <https://news.virginia.edu/content/uva-law-professor-examines-wild-west-fertility-industry> [<https://perma.cc/PT2Y-CM2Y>]; Madeline Verniero, *The Wild West of Fertility Clinics*, THE REGULATORY REVIEW (Aug. 10, 2021), <https://www.theregview.org/2021/08/10/verniero-wild-west-fertility-clinics/> [<https://perma.cc/5M2H-ZT39>].

<sup>146</sup> Thomas Baldwin, *Reproduction without sex: social and ethical implications*, EMBO REPORTS (Nov. 23, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3512415/> [<https://perma.cc/3E86-YWJW>].

<sup>147</sup> UNIV. OF CAL. SAN DIEGO, SCH. OF ARTS AND HUMAN., DONOR 9623 AND THE STRANGE BUS. OF MAKING BABIES, (YouTube Feb. 3, 2021).

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

<sup>149</sup> *Id.*

<sup>150</sup> *How we regulate*, HFEA, <https://www.hfea.gov.uk/about-us/how-we-regulate/> [<https://perma.cc/9EAT-78U8>] (last visited Feb. 3, 2023).

<sup>151</sup> *Id.*

families—and abolishes sperm donor anonymity.<sup>152</sup> In 2005, the United Kingdom’s legislation switched from a system of lifelong donor anonymity to a system of donor identity release, requiring donors donating at a HFEA licensed clinic to agree to disclose their identity to DCP.<sup>153</sup>

Likewise, other countries have shown increasing interest in abandoning donor anonymity and thereby allowing DCP to learn about their origins.<sup>154</sup> For instance, Sweden pioneered abolishing donor anonymity at the national level, adopting sperm donor identification in 1985.<sup>155</sup> Countries that followed Sweden’s departure from donor anonymity include Austria, Finland, Germany, Iceland, the Netherlands, Norway, New Zealand, and the United Kingdom.<sup>156</sup> More recently, Portugal abandoned donor anonymity when the Portuguese Constitutional Court found that the law allowing donor anonymity was unconstitutional.<sup>157</sup>

The United States may improve its ART regulations by following a similar identity release system that many European countries have in place and, therefore, allow DCP to receive identifying information from their donor when they reach the age of eighteen. Removing donor anonymity will help mitigate some of the issues discussed in this article.

Additionally, the United States should adopt a unified system of ART regulations, creating a single federal authority that oversees ART, like HEFA’s role in the United Kingdom. Although creating a unified system within the United States will not happen overnight, progress should occur at the federal level in this area. Federal regulation should address the rights of DCP to know their origins and hold participants in the reproductive tissue industry accountable through regulation enforcement.

#### V. ANONYMITY IN A WORLD OF CONSUMER GENETIC TESTING

Until recently, donors were promised anonymity for years by sperm banks.<sup>158</sup> However, direct-to-consumer genetic testing has made it virtually impossible for a donor to be guaranteed anonymity.<sup>159</sup> Although several sperm banks have maintained their anonymous donor policies, anonymity has proven to be unfeasible as more and more DCP are using

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<sup>152</sup> *Sperm donation and the law - for donors*, HUM. FERTILISATION & EMBRYOLOGY AUTHO., <https://www.hfea.gov.uk/donation/donors/donating-your-sperm/sperm-donation-and-the-law-for-donors/> [<https://perma.cc/U2CW-42KV>] (last visited Feb. 3, 2023).

<sup>153</sup> *Id.*

<sup>154</sup> See Glen Cohen, et al., *Sperm donor anonymity and compensation: An experiment with American sperm donors*, 3 J. OF L. AND THE BIOSCIENCES 468, 472-473 (NOV. 23, 2016), <https://academic.oup.com/jlb/article/3/3/468/2433403> [<https://perma.cc/H22B-JGS3>].

<sup>155</sup> *Id.* at 473.

<sup>156</sup> *Id.* at 469.

<sup>157</sup> Judgment n.º 225/2018, 1st series—N.º 87—7nd May (2018).

<sup>158</sup> Keshavan, *supra* note 24.

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

genetic tests to find out their biological parents' identity, including those parents who never wished to be found in the first place.<sup>160</sup>

Consider the story of Danielle Teuscher, a mother in Oregon, who conceived a child using the help of a sperm donor from Northwest Cryobank, a Washington State sperm bank.<sup>161</sup> When Teuscher began the donorship process, Teuscher specifically asked Northwest Cryobank for an open identification donor.<sup>162</sup> Teuscher wanted a donor who would allow her to provide her child with the donor's identifying information once the child turned eighteen.<sup>163</sup>

A few years later, Teuscher signed her family up for 23andMe.<sup>164</sup> When Teuscher checked her family's results, she was shocked to see 23andMe matched her daughter to a close relative—the suspected mother of her daughter's biological father.<sup>165</sup> 23andMe indicated Teuscher's daughter's suspected grandmother was open to be contacted by relative matches on the direct-to-consumer genetic testing website.<sup>166</sup>

However, once Teuscher reached out to her daughter's possible grandmother asking if she would be open to meet,<sup>167</sup> Teuscher received a curt response declining the invitation to meet.<sup>168</sup> Shortly after, Teuscher received a cease-and-desist letter from Northwest Cryobank.<sup>169</sup> The letter stated Teuscher's use of the direct-to-consumer genetic test to contact the mother of her daughter's biological father was a violation of her contract with the sperm bank.<sup>170</sup> The alleged provision violated in the contract stated that Teuscher should not attempt to search for or contact the donor.<sup>171</sup>

Teuscher's story of using a direct-to-consumer genetic test and finding her daughter's biological close relatives is not unusual. In fact, this is becoming more common as direct-to-consumer genetic tests are becoming more accessible. This fact raises the question of whether sperm donors have a reasonable right to privacy when donating sperm, as direct-to-consumer genetic tests, like 23andMe and ancestry.com, can match you with close relatives with little to no effort. This question is further complicated by the fact that it does not make a significant difference whether a sperm donor has taken the genetic test themselves, as any of their relatives who have taken one will be in the system waiting to pop up in another relative's results. For that reason, it is not realistic

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

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

<sup>162</sup> Kara Rubinstein Deyerin, *An Update on Teuscher v. NW Cryobank*, SEVERANCE (Jun. 29, 2020), <https://severancemag.com/an-update-on-teuscher-vs-nw-cryobank/> [https://perma.cc/V24S-QH3Y].

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

<sup>164</sup> Keshavan, *supra* note 24.

<sup>165</sup> *Id.*

<sup>166</sup> Deyerin, *supra* note 162.

<sup>167</sup> Keshavan, *supra* note 24.

<sup>168</sup> *Id.*

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

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

<sup>171</sup> *Id.*

for donor anonymity to continue when DNA tests have become more accessible. Thus, a transition to donor identity disclosure is more reasonable than a nondisclosure system.

## VI. CONCLUSION

Although there is concern surrounding the transition from donor anonymity to a required Open ID system and its privacy implications, donor disclosure and stricter ART regulations have become the norm in many parts of the world, especially in Europe. In addition to a widespread transition, countries that have abolished sperm donor anonymity have mitigated privacy concerns through forms of notice, where future donors are provided adequate notice that their identifying information will be disclosed. .

Ultimately, the technological progress in ART has been enormous, assisting individuals to conceive globally. However, there are virtually no federal laws regulating ART. As a result, professionals in the industry and state legislatures have taken it upon themselves to regulate ART. Notably, Colorado and New York have passed or proposed laws that were unheard of in the United States.

Colorado became the first state to pass a law prohibiting anonymous sperm donors and granting DCP a right to learn about their identity upon turning the age of eighteen. New York's proposed bill seeks to hold reproductive tissue banks to a higher standard by requiring reproductive tissue banks to collect and verify medical, educational, and criminal background information from all donors.

While Washington State was once a pioneer in Open ID donor systems, its current regulation has gaps that Colorado and New York's ART regulatory attempts can fill. Specifically, if Washington wants to keep up with the effects that direct-to-consumer genetic tests have created and protect those who use ART, Washington must include Colorado's ban on donor anonymity and incorporate the New York bill's mandate that reproductive tissue banks collect and verify donor information. In doing so, Washington can address an individual's right to identity and protect those who receive donated reproductive tissue so that they can be informed about their donor's genetic makeup and history.