

A VEIL OF ANONYMITY: PRESERVING ANONYMOUS SPERM DONATION WHILE AFFORDING CHILDREN ACCESS TO DONOR-IDENTIFYING INFORMATION

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As the author of an article about anonymous sperm donation, I cannot hide behind my own veil of anonymity: I was conceived through the use of donated sperm. By revealing this information I hope to become a more credible author, illuminating my own biases as I advocate for a national sperm donation model that

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affords children access to donor-identifying information¹ upon their eighteenth birthday while maintaining anonymity as a viable option for the donor. I do not aim to speak for all children conceived through the use of donated sperm; my opinions are distinctly my own. I do, however, wish to present a credible overview of the United States' approach to the regulation of donated sperm, discuss possible improvements to this paradigm, and highlight how anonymous sperm donation plays a crucial role in protecting gay and lesbian families.

I never had the desire to “know” my sperm donor. Unlike many children conceived using donated sperm,² I do not view my donor's identity as fundamental to my own. My lack of desire for a relationship with my donor does not mean, however, that I was not curious about his life and his decision to donate sperm. As a young girl, I remember asking my mothers to describe the process by which they “chose” my donor. I learned that they picked him from a book provided by the sperm bank—a menu of choices offering a glimpse of the child they would conceive. I requested from my parents a description of his physical characteristics and learned his hair color (brown), his height (approximately five feet nine inches), and the color of his eyes (green). I was particularly surprised to learn that at the time he donated sperm, he was employed as a professional dancer. Learning of this fact as a girl with no interest in dance revealed the vast differences between our identities. It made me view my donor as the mere vehicle by which I was born, rather than as my father. The secrecy of my donor's identity and being unable to transpose his known physical characteristics to a familiar face reinforced my view that he was not my parent. This outlook, largely aided by anonymity, diminished any desire I may have had for a relationship with him.

Anonymous donation policies have become the subject of heated debate in recent years, and some donor-conceived individuals have begun to argue for a “re-examination of the

¹ By “donor-identifying information,” I am referring to information regarding genetic heritage, occupation, and geographic location. I am not referring to information that would give children access to the donor's telephone number, email address, or home address unless the donor expressly consents to the sharing of this information at the time of the donation.

² Judith Graham, *Sperm Donors' Offspring Reach Out into Past*, CHI. TRIB. (June 19, 2005), http://articles.chicagotribune.com/2005-06-19/news/0506190276_1_sperm-donor-sperm-bank-dna-sample [<https://perma.cc/B7F8-6JB8>] (describing how many donor-conceived children seek donor-identifying information to obtain a more complete sense of identity).

anonymity that cloaks many donors,”³ criticizing the United States’ sperm donation model as perpetuating a system in which sperm banks are not held accountable for negligent donation policies. Highlighting this debate, *The New York Times* published an article in 2011 describing a man who had fathered 150 offspring by selling his sperm to a United States sperm bank.⁴ The article describes the Donor Sibling Registry⁵—a website that connects donor-conceived individuals with their biological siblings—and it argues that anonymity often perpetuates circumstances in which a single donor’s sperm is used to conceive a large number of offspring.⁶ It also describes a growing anxiety among certain parents and their donor-conceived children about “potential negative consequences of having so many children fathered by the same donors, including the possibility that genes for rare diseases could be spread more widely through the population.”⁷

In contrast to the view that anonymity shields sperm banks from accountability for negligent donation practices, this article argues that anonymous sperm donation is crucial to protect atypical family structures and the relationships within them. To support this argument, I explore different approaches to the sperm donation industry within the United States and Canada. Ultimately, I argue that Washington State’s recently enacted insemination law,⁸ which balances donor privacy with a child’s ability to seek basic donor-identifying information upon his or her eighteenth birthday, provides a model which other sperm donation policies should follow. As explained in the following sections of this article, anonymity is crucial to promote important pecuniary and privacy interests of the donor, and to protect the legal rights of families who rely on donated sperm to conceive a child. Anonymous donation must be preserved as a viable reproductive option in the United States, but a child should be able to pierce the veil of anonymity upon his or her eighteenth birthday if the donor has not expressly requested absolute anonymity at the time of donation.

Part I of this article describes regulated sperm donation as an

³ Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), <http://www.nytimes.com/2011/09/06/health/06donor.html>.

⁴ *Id.*

⁵ THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com> [<https://perma.cc/3728-SRL4>].

⁶ Mroz, *supra* note 3.

⁷ *Id.*

⁸ WASH. REV. CODE § 26.26.750 (2016).

economic contract in which anonymity plays a prominent role. It also explains that anonymous donation fosters crucial policy interests, promotes the ability of atypical family structures to produce offspring, and protects the legal rights of these families. Part II discusses the obstacles that opponents of anonymous sperm donation may face when attempting to enjoin anonymity polices through constitutional litigation. Part III explores the Canadian model of regulated sperm donation and describes recent developments in case law weakening donor anonymity. Part IV describes Washington State's legislation regarding sperm donation and argues that Washington's model adequately balances donor anonymity with a child's autonomy. The article concludes that sperm banks should provide offspring with basic donor-identifying information upon their eighteenth birthday. This approach would appropriately balance the child's desire for information with the donor's right to privacy.

I. AMERICAN SPERM DONATION: AN ECONOMIC TRANSACTION

The United States' sperm donation industry is a multi-billion-dollar business, and each year approximately 30,000 to 60,000 children in the United States are conceived using donated sperm.⁹ The total number of U.S. sperm banks providing anonymous donor samples remains a mystery,¹⁰ as sperm banks are largely free-market entities divorced from federal or state regulation.¹¹ While the Food and Drug Administration ("FDA") mandates specific record-keeping guidelines for sperm banks, the guidelines do not limit the number of children conceived through the use of a particular donor's sperm, and they are silent on the issue of donor anonymity.¹² In fact, the FDA permits sperm banks to dispose of donation records after ten years.¹³ In the absence of specific guidelines, United States sperm banks are free to maximize their donors'

⁹ Naomi Cahn, *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIM. LAW. 1, 5 (2011). The fact that this estimate spans a broad range reflects the reality that many sperm banks in the United States are unregulated entities. This lack of regulation makes it difficult to know exactly how many children are born through anonymous sperm donation each year.

¹⁰ See John K. Critser, *Current Status of Semen Banking in the USA*, 13 OXFORD J. HUM. REPROD. suppl. 2, 1998, at 55.

¹¹ See Amy Harmon, *Hello, I'm Your Sister. Our Father Is Donor 150*, N.Y. TIMES (Nov. 20, 2005), <http://www.nytimes.com/2005/11/20/us/hello-im-your-sister-our-father-is-donor-150.html>.

¹² 21 C.F.R. § 1271.270 (2016).

¹³ *Id.*

output, resulting in large numbers of children conceived from a single donor's sperm.

Many of those born through anonymous sperm donation do not have the opportunity to seek donor-identifying information.¹⁴ The paradigmatic approach to regulated sperm donation in the United States favors sealing donor information unless the donor expressly consents to its release at the time of the donation.¹⁵ Some sperm banks require mutual consent between an adult donor-conceived individual and the donor before the sperm bank will release donor-identifying information.¹⁶ Even if both parties consent to a release of identifying information upon the child's eighteenth birthday, a sperm bank might not provide a donor's information until the donor provides updated information to the bank, and if the donor cannot be found, the bank will not release his information.¹⁷ This approach might leave some donor-conceived individuals without access to basic donor-identifying information, even when the donor originally consented to its release.

Although many donor-conceived individuals face difficulties when attempting to access donor information directly from the sperm bank that provided the gamete, the Donor Sibling Registry is a database that allows them to locate information about their genetic roots¹⁸ by providing the opportunity to connect with biological siblings.¹⁹ Upon donating, each donor receives a unique identifying number, which the sperm bank shares with its prospective parent customers.²⁰ Once equipped with this number, one can use the Donor Sibling Registry to connect with others conceived by

¹⁴ See generally Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619 (2012).

¹⁵ See *id.* at 639; cf. Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 379 (2009) (“[M]ost sperm is donated anonymously in one of the two dozen commercial sperm banks in this country.”).

¹⁶ See, e.g., *Anonymous Donor Contact Policy*, CAL. CRYOBANK, <http://www.cryobank.com/Services/Post-Conception-Services/Anonymous-Donor-Contact-Policy/> [<https://perma.cc/8J24-MAYA>] (“While we are NOT opposed in principal to breaking anonymity between the donor and the adult child, it must be by mutual consent of both parties.”).

¹⁷ See R. Hertz et al., *Sperm Donors Describe the Experience of Contact with Their Donor-Conceived Offspring*, 2 FACTS, VIEWS & VISION OBGYN, no. 2, 2015, at 92, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498174/>.

¹⁸ See *Our History and Mission*, THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/about-dsr/history-and-mission> [<https://perma.cc/HU5F-GPSP>].

¹⁹ *Id.*

²⁰ JAMES M. GOLDFARB, *THIRD-PARTY REPRODUCTION: A COMPREHENSIVE GUIDE* 162 (2014).

the same donor. As people conceived through anonymous donation are becoming increasingly aware of the large number of half-siblings born from the same donor, many are calling for a re-examination of sperm bank anonymity policies.²¹

While there is a “growing body of research, largely conducted in the adoption field, [which] supports the argument that knowledge of one’s genetic background is crucial to the development of a sense of identity or self,”²² maintaining anonymity in the donation system is crucial to ensuring an adequate supply of sperm for atypical families.²³

A. *Anonymity Promotes Donation by Reducing Donor Anxiety About Future Contact.*

The virtues of anonymous donation cannot be ignored. Anonymous donation dismantles the donor’s status as a “father” and reinforces sperm donation as a formal economic contract meeting the pecuniary interests of the donor²⁴ and the social interests of the legal parents. Within this contract, anonymity is an essential component of the consideration that the sperm bank provides to the donor in exchange for his sperm. Treating sperm donation as an economic contract promotes donation by allowing men to donate for purely pecuniary reasons,²⁵ while remaining free from the obligations that accompany parenthood. Framing sperm donation as an economic transaction reinforces the view that the donor is not the legal parent of the child, and it provides incentives for men to donate sperm.

Anonymity also ensures an adequate supply of sperm by pro-

²¹ See Mroz, *supra* note 3.

²² Clark, *supra* note 14, at 621. Even in states such as New York, which mandates that sperm banks supply nonidentifying information about donors to facilities that perform assisted reproductive services, “[t]here is no mechanism in the regulations for offspring resulting from gamete and embryo donation to gain access to donor information directly.” See *Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, N.Y. DEP’T OF HEALTH, https://www.health.ny.gov/regulations/task_force/reports_publications/execsum.htm [<https://perma.cc/SWV7-MRHK>].

²³ See Pi, *supra* note 15, at 395.

²⁴ Ken R. Daniels et al., *Semen Donor Recruitment: A Study of Donors in Two Clinics*, 11 OXFORD J. HUM. REPROD., no. 4, 1996, at 747-48 (explaining that a majority of donors choose to donate for economic reasons).

²⁵ I am not suggesting that all men donate sperm solely for the purpose of payment. Certainly, many men donate sperm for altruistic and personal reasons. See Allison Brown, *Money Shots: College Students Profit, Help Infertile Couples by Donating Sperm and Eggs*, DAILY FREE PRESS, https://www.cryobank.com/uploadedFiles/Cryobankcom/_forms/pdf/news/DailyFreePressJan04.pdf [<https://perma.cc/8EVQ-LF77>].

protecting donors from moral opposition to sperm donation.²⁶ In the 1960s myriad state courts held that insemination using donated sperm was adultery on the part of the mother, and children conceived through the process were considered illegitimate.²⁷ These precedents painted sperm donation as an illegitimate means by which to conceive a child, and they shrouded the use of sperm donation in secrecy. In 1973, however, the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission) addressed sperm donation for the first time in the Uniform Parentage Act (“UPA”). The UPA provided that “[t]he donor of semen provided to a licensed physician for use in the insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”²⁸ The UPA helped to promote the legitimacy of sperm donation by codifying this approach in the states that adopted its language, thereby providing a legal means to create a family, albeit in very limited circumstances.

While the adoption of the UPA helped to legitimize donor insemination as a valid means to conceive a child, some donors still experience anxiety about offspring seeking a relationship with them.²⁹ This anxiety might discourage some donors from donating sperm if anonymity did not remain a viable option.³⁰

A man may be more likely to donate sperm when he is able to keep his choice hidden from the broader community. For example, the recent decrease in the supply of Britain’s donated sperm correlates to a ban on anonymously donated sperm.³¹ In 2005, Britain passed a law allowing donor-conceived individuals access to donor-identifying information upon their eighteenth birthday.³² In 2006, merely a year after the law was passed, only 307 people regis-

²⁶ See Pi, *supra* note 15, at 395.

²⁷ Thomas K. Sylvester, *The Case Against Sperm Donor Anonymity 4-5* (2007) (unpublished J.D. thesis, Yale Law School), <https://www.donorsiblingregistry.com/sites/default/files/images/docs/legal.pdf> [<https://perma.cc/XSM6-YNG8>].

²⁸ UNIF. PARENTAGE ACT § 5(b) (UNIF. LAW COMM’N 1973).

²⁹ See Vasanti Jadva et al., *Sperm and Oocyte Donors’ Experiences of Anonymous Donation and Subsequent Contact with Their Donor Offspring*, 26 OXFORD J. HUM. REPROD., no. 3, 2011, at 641-42.

³⁰ See generally Chris Whitman, *I Fathered 34 Children Through Sperm Donation*, GUARDIAN (Jan. 31, 2014), <http://www.theguardian.com/lifeandstyle/2014/jan/31/fathered-34-children-sperm-donation> [<https://perma.cc/YA32-WURZ>].

³¹ See Denise Grady, *Shortage of Sperm Donors in Britain Prompts Calls for Change*, N.Y. TIMES (Nov. 11, 2008), <http://www.nytimes.com/2008/11/12/health/12sperm.html>.

³² Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511 (Eng.), http://www.hfea.gov.uk/docs/ELC_Annex_B_Sept04.pdf [<https://perma.cc/8DB3-KESD>].

tered to donate sperm even though Britain requires at least 500 donors to provide sperm for approximately 4,000 women.³³

These statistics do not establish a direct causal link between donor anonymity and the supply of donated sperm; however, observations from doctors at the London Women's Clinic suggest a strong correlation. Dr. Kamal Ahuja, director of the London Women's Clinic, revealed that prior to 2005, approximately five to ten men would become donors for every hundred men contacted.³⁴ After the law's passage, that number dropped to fewer than five donors for every hundred men contacted.³⁵ The clinic had previously provided sperm to over sixty in vitro fertilization clinics each year but stopped in 2005 because it could "no longer spare the specimens."³⁶

The decline in the number of men donating sperm in Britain may be linked to donor fears regarding a child's ability to contact them in the future.³⁷ While a donor might choose to donate sperm for altruistic reasons as well as pecuniary reasons, the donor might still have a legitimate desire to foreclose future contact with the person conceived with his sperm. If a sperm bank could no longer ensure anonymity, the donor might be less likely to donate sperm for fear that offspring might desire a relationship with him.³⁸

B. Anonymous Donation Prevents Donors from Obtaining Standing to Assert Parental Rights.

Anonymity prevents donors from being considered the legal parent of a child conceived through the use of their donated sperm, even where artificial insemination statutes do not. For example, New York State's insemination statute³⁹ explicitly ensures that heterosexual, married couples have exclusive parental rights over children conceived with donated sperm if the insemination is performed by a licensed physician. Section 73 of the Domestic Relations Law ("DRL"), enacted July 21, 2008, states: "Any child born

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See, e.g., Whitman, *supra* note 30 (describing how the author received a negative reaction from his girlfriend when he shared with her that he had donated sperm).

³⁸ See Linda Villarosa, *Once Invisible Sperm Donors Get to Meet the Family*, N.Y. TIMES (May 21, 2002), <http://www.nytimes.com/2002/05/21/health/once-invisible-sperm-donors-get-to-meet-the-family.html> (describing the shock that Bob, a donor, experienced when contacted by his biological offspring and explaining that the "experience was so overwhelming that he is not sure he will do it again").

³⁹ N.Y. DOM. REL. LAW § 73 (McKinney 2016).

to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”⁴⁰ This statute abrogates the donor’s parental rights in cases where a child is born to a woman legally married to a man by providing that the husband is the legal parent of the child when the insemination is performed by an individual duly authorized to practice medicine and when the mother gives written consent.

DRL section 73, however, fails to protect atypical families and their children. The statute is silent with regard to the sperm donor’s status when the child is born to a non-married woman, or to a woman married to another woman, or where the insemination was performed by a person other than a licensed physician. The statute’s failure to expressly acknowledge these alternate scenarios elevates the rights of the sperm donor and exposes such families to legal parentage claims by the donor. In *Thomas S. v. Robin Y.*, New York’s First Department Appellate Division held that a sperm donor—who had provided sperm to two women in a committed lesbian relationship, was known to the child, and had spent time with the child—was a legal father with standing to seek visitation and an order of filiation.⁴¹ *Thomas S.* illustrates that courts are willing to recognize sperm donors as legal parents when a child knows the donor and has spent time with the donor. Based on this reasoning, the best way for atypical families to protect themselves from intrusive donors is to maintain anonymity.

More recently, in 2014 Judge Joan Kohout of the Family Court of Monroe County effectively held that New York’s insemination statute does not extend to a married same-sex couple when the biological father is known to the child. Explaining that the DRL section 73 marital presumption of legitimacy does not bar a biological father (who had limited contact with the child) from filing a paternity petition against same-sex parents who conceived through the use of his sperm,⁴² Judge Kohout reasoned that the marital presumption of DRL section 73 was meant to “protect[] the legitimacy of the child and assur[e] that the child had both a father and mother.”⁴³ She explained that under section 73 “there is no legal father” when same-sex female spouses use an *anonymous* sperm do-

⁴⁰ *Id.*

⁴¹ *Thomas S. v. Robin Y.*, 209 A.D.2d 298, 305-08 (N.Y. App. Div. 1st Dep’t 1994).

⁴² *Q.M. v. B.C.*, 46 Misc. 3d 594, 601-02. (N.Y. Fam. Ct. 2014).

⁴³ *Id.* at 598.

nor to conceive.⁴⁴ However, when same-sex spouses use a *known* sperm donor, the presumption of legitimacy would “effectively extinguish” the child’s “right to have a father.”⁴⁵ Judge Kohout’s decision highlights the important legal role that anonymity plays in the sperm donation process for same-sex parents: it effectively bars a donor’s standing to seek parental rights. This decision reveals that banning anonymous donation would allow donors to pursue legal parentage claims and subordinate the rights of non-biological mothers in same-sex relationships.

C. *Anonymity Is Crucial to Promote Relationships Within Atypical Family Structures.*

In addition to serving a donor’s altruistic and pecuniary interests, anonymity is necessary to support atypical family structures and to foster the relationships within them. Atypical family structures—such as lesbian parents, single mothers, or even heterosexual couples who cannot conceive without the assistance of reproductive technologies—often rely on alternative methods of reproduction to create a family, and many children conceived using donated sperm are born into these families.⁴⁶ Banning anonymous sperm donation in the United States likely would diminish the number of men willing to donate—as it seems to have done in Britain—and thereby harm atypical families hoping to conceive.

Anonymity also plays an important role in fostering relationships within atypical family structures by elevating the role of the non-biological parent while minimizing the role of the sperm donor. Couples who cannot conceive together have to make a conscious decision to become parents. For example, two women who seek “to create and co-parent a child could not do so accidentally or spontaneously. Instead, it would require a series of decisions and intentional actions.”⁴⁷ A non-biological mother who adopted her partner’s donor-conceived child might feel that her role as a parent is illusory if the child is able to locate his or her biological father, despite the conscious efforts of the non-biological parent to become a mother. In this sense, anonymity is critical to promoting the legitimacy of the non-biological mother’s parental status by dis-

⁴⁴ *Id.* at 599.

⁴⁵ *Id.*

⁴⁶ See Sheila M. O’Rourke, *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 BERKELEY J. GENDER L. & JUST. 140, 141 (2013).

⁴⁷ Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 137 (2014).

tancing the sperm donor, and thus minimizing the chances that the child will view the donor as a father.

Those who oppose anonymously donated sperm must think critically about alternative avenues to encourage donation for families who cannot conceive absent the assistance of reproductive technologies. To ensure an adequate supply of sperm for these families, and to ensure that their rights are protected beyond conception, anonymity must remain a viable option.

II. CONSTITUTIONAL CHALLENGES TO ANONYMOUSLY DONATED SPERM: A CHILD'S FUNDAMENTAL "RIGHT TO KNOW" DONOR-IDENTIFYING INFORMATION

Opponents of anonymous donation often ground their arguments in constitutional jurisprudence. However, constitutional law will fail to advance the interests of donor-conceived people. Instead of relying on the courts, advocates should use the media to encourage reformation of donation policies.

Many people conceived through the use of donated sperm argue that they have a fundamental constitutional right to know their genetic heritage through access to donor-identifying information.⁴⁸ However, challenging anonymous insemination policies through constitutional jurisprudence likely will fail for three reasons: (1) sperm banks cannot be considered state actors and thus are immune from constitutional scrutiny; (2) a plaintiff likely would be unable to establish standing to bring a constitutional claim; and (3) the Supreme Court is unlikely to recognize a substantive due process right to donor-identifying information for children conceived through artificial insemination.

A. *State Action Doctrine as an Impediment to Constitutional Challenges by Donor-Conceived Children*

Children conceived through artificial insemination likely cannot establish that sperm banks are state actors for purposes of enjoining anonymity policies using constitutional law. The relevant portions of the Constitution on which the opponents of donor anonymity would rely limit only the actions of state and government officials and do not limit the actions of private entities.⁴⁹ This "state

⁴⁸ See, e.g., Jennifer Ludden, *Donor-Conceived Children Seek Missing Identities*, NPR (Sept. 18, 2011, 4:01 AM), <http://www.npr.org/2011/09/18/140477014/donor-conceived-children-seek-missing-identities>.

⁴⁹ See U.S. CONST. amend. XIV, § 1 ("No *state* shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any *state*

action” doctrine effectively immunizes private actors from constitutional scrutiny.⁵⁰ An action performed by a private individual or entity is generally subject to constitutional review only if (1) the challenged act resulted from the exercise of a right or privilege having its source in state authority; and (2) the private party charged with the constitutional deprivation can be fairly characterized as a state actor.⁵¹

When determining whether the challenged act resulted from the exercise of a right having its source in state authority, the Supreme Court has asked whether the state provided the means that caused the deprivation of a constitutional right.⁵² For example, in *Lugar v. Edmonson Oil Co.*, the Court held that the right to peremptory challenges had its source in state authority because such challenges derived from federal statutes and case law.⁵³ Similarly, in *Shelley v. Kraemer*, the Court held that judicial enforcement of a racially restrictive covenant had its source in state authority because the judiciary derives its authority to adjudicate private contractual matters between parties from state and federal law.⁵⁴

Actions that take place in an intimate relationship, within the home, or between private individuals divorced from governmental regulation are generally considered private actions that do not have their source in state authority. Fewer than half of the states in the United States have enacted regulatory legislation regarding sperm banks, leaving a majority of states without a statute expressly granting sperm banks the authority to provide donated sperm.⁵⁵ Moreover, the amended 2002 UPA does not address the authority of sperm banks to enact anonymous donation policies, and instead merely provides guidelines for determining whether a donor is a legal parent in certain cases.⁵⁶ In fact, statutory research suggests that Washington State is the only state that has enacted a law requiring full disclosure of donor information upon the child’s eight-

deprive any person of life, liberty, or property without due process of law.”) (emphasis added).

⁵⁰ See generally *Civil Rights Cases*, 109 U.S. 3 (1883).

⁵¹ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

⁵² *Id.*

⁵³ *Id.* at 941-42.

⁵⁴ *Shelley v. Kraemer*, 334 U.S. 1, 19-22 (1948).

⁵⁵ See Pi, *supra* note 15, at 384 (“Only twenty-four states have created regulatory legislation addressing the operations of sperm banks.”); see also Christina M. Eastman, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 *MCGEORGE L. REV.* 371, 380 (2010) (explaining that only seven states have adopted the exact language of the 2002 amended UPA).

⁵⁶ See UNIF. PARENTAGE ACT § 702 (amended 2002).

eenth birthday.⁵⁷ Thus, the majority of sperm banks in the United States are unregulated and do not derive their right to provide anonymously donated sperm from statute or governmental authority.

A sperm bank's acceptance of anonymously donated sperm also fails the second "state action" prong because the bank cannot "in all fairness" be considered a state actor. In this part of the analysis, a court assesses the extent to which the state or federal government is entrenched within the private entity's actions. A court will look to whether the private party relies upon state governmental assistance and benefits, whether the party is performing an exclusive governmental function, and whether the alleged injury was aggravated in a unique way by incidents of governmental authority.⁵⁸

A private party that receives government funding and is intimately entangled with the state or federal government can be considered a state actor. In *Burton v. Wilmington Parking Authority*, the Supreme Court held that a private restaurant was sufficiently entangled with the State of Delaware so as to be considered a state actor and subject to constitutional scrutiny.⁵⁹ The restaurant was located on land owned by the City of Wilmington, and the owner utilized a publicly-owned parking garage for his patrons.⁶⁰ The Court noted that the "peculiar relationship" between the restaurant and the city-owned parking facility provided each entity with "mutual benefits" that sufficiently entrenched the City of Wilmington within the actions of the private restaurant.⁶¹

Unlike the parking garage in *Burton*, United States sperm banks are largely divorced from governmental regulations and do not receive significant state and federal funding.⁶² The FDA does mandate specific recordkeeping guidelines for sperm banks but many United States sperm banks are for-profit companies that do not receive state or federal funds.⁶³ Thus, sperm banks in the

⁵⁷ See WASH. REV. CODE § 26.26.750 (2016).

⁵⁸ See generally Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1389-90 (2006).

⁵⁹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

⁶⁰ *Id.* at 719.

⁶¹ *Id.* at 724.

⁶² See Critser, *supra* note 10, at 55.

⁶³ See generally Rene Almeling, *The Unregulated Sperm Industry*, N.Y. TIMES (Nov. 30, 2013), <http://www.nytimes.com/2013/12/01/opinion/sunday/the-unregulated-sperm-industry.html>; see also *Why Choose TSBC Above Other Sperm Banks?*, THE SPERM BANK OF CALIFORNIA, <http://donors.thespermbankofca.org/why-choose-tsbc> (explaining that TSBC is the only non-profit sperm bank in the United States).

United States cannot be considered sufficiently entrenched in state and federal government to be considered state actors.

Finally, sperm banks do not perform a function traditionally reserved to state and federal governments. The Supreme Court has recognized certain political and community establishment rights as traditional governmental functions, including the regulation of political primaries⁶⁴ and the ability to establish local communities.⁶⁵ However, a person's ability to reproduce derives from private and individual choices existing outside of governmental purview. In *Eisenstadt v. Baird*, the Supreme Court recognized that "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁶⁶ Assisted reproduction facilitated by a sperm bank cannot be considered a traditional governmental function because the Supreme Court has expressly recognized the decision to reproduce as a private choice that transcends governmental influence.

Moreover, the injury caused to children conceived through artificial donation—an inability to know their genetic heritage—is not aggravated in a unique way by incidents of governmental authority. Unlike in *Shelley v. Kraemer*, where the Court held that enforcement of a racially restrictive covenant would violate the Constitution because of the judiciary's involvement in the enforcement process,⁶⁷ no branch of government is involved in enforcing the anonymity policies of sperm banks located in the United States.

The government is simply not entrenched enough in sperm bank policies and regulations to meet the state action threshold for constitutional scrutiny. Therefore, the state action doctrine effectively immunizes sperm banks from constitutional suits.

B. Standing Doctrine as an Impediment to Constitutional Challenges by Donor-Conceived Children

Even if donor-conceived children could overcome the state action barrier, they likely could not establish standing to bring a federal constitutional claim to enjoin sperm bank anonymity policies. Standing doctrine, grounded in the Article III limitation that fed-

⁶⁴ *Terry v. Adams*, 345 U.S. 461 (1953).

⁶⁵ *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁶⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁶⁷ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

eral courts adjudicate only actual cases and controversies,⁶⁸ requires a plaintiff to assert a concrete injury that is fairly traceable to the challenged state action and likely to be redressed by the requested relief.⁶⁹

The inability to access donor-identifying information—such as current contact information, medical history, and physical characteristics—certainly would be considered a concrete injury for standing purposes.⁷⁰ However, a plaintiff challenging sperm bank anonymity policies likely would be unable to establish the requisite causation requirement necessary to show standing because the causal link is too attenuated.⁷¹ In *Allen v. Wright*, the Court denied standing to a class of plaintiffs suing the Internal Revenue Service (“IRS”) for granting tax-exempt status to racially segregated private schools, alleging that the IRS’s actions endorsed racial segregation in such schools.⁷² The Court noted that the causal link between the IRS’s conduct and the desegregation of schools was “attenuated at best” and the plaintiffs had not established that a “withdrawal of a tax exemption from any particular school would lead the school to change its policies.”⁷³ The Court further noted that it was “speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status.”⁷⁴ While I do not endorse the outcome in this particular decision, its reasoning reveals that the actions of third parties that contribute to the plaintiff’s injury may attenuate the causal chain to the point that standing is unavailable to the plaintiffs.

Using this same reasoning, a donor-conceived individual likely would not be able to establish that sperm bank anonymity policies directly cause the injury of being unable to obtain donor-identifying information because the donors themselves are third parties that attenuate the causal chain. In many sperm bank policies, the onus is on the donor to inform the banks of updated contact infor-

⁶⁸ *Allen v. Wright*, 468 U.S. 737, 750 (1984).

⁶⁹ *Id.* at 751.

⁷⁰ See generally *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981) (holding that adoptees do not have a fundamental right to examine their adoption records and implying, through the court’s adjudication on the merits, that the plaintiffs had standing).

⁷¹ See *Allen*, 468 U.S. at 739 (finding that respondents lacked standing to challenge the IRS’s implementation of its tax-exemption policies because, *inter alia*, causation was too attenuated).

⁷² *Id.* at 744-45.

⁷³ *Id.* at 757-58.

⁷⁴ *Id.* at 758.

mation, employment status, and medical information.⁷⁵ Even if a sperm bank allowed donor-conceived individuals to access donor-identifying information, it is speculative to assume either that the donor has properly informed the sperm bank of updated contact and personal information, or that the child would be able to locate the donor based on identifying information the donor provided eighteen years prior. Thus, the donor's responsibility to inform sperm banks of updated identifying information erodes the causal link between the bank's anonymity policy and the plaintiff's asserted harm of being unable to obtain donor-identifying information. This attenuation of the causal link makes it unlikely that opponents of anonymity policies could demonstrate standing to seek constitutional review of such policies.

C. Due Process Arguments as an Impediment to Constitutional Challenges by Donor-Conceived Children

In addition to state action and standing hurdles, plaintiffs likely would be unable to challenge anonymous sperm donation policies under substantive due process jurisprudence. The Supreme Court has articulated that the Due Process Clause of the Fourteenth Amendment protects fundamental rights that are deeply rooted in this nation's history and tradition and "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed," even when such rights are not expressly enumerated in the text of the Constitution.⁷⁶ The Supreme Court applies strict scrutiny to state action that intrudes upon fundamental rights and requires a compelling state interest and narrowly tailored means for such action to pass constitutional muster.⁷⁷

The Supreme Court has never deemed a right to know one's genetic heritage to be fundamental.⁷⁸ In *Alma Society v. Mellon*, a plaintiff class of adopted individuals filed suit to enjoin a New York statute that required the sealing of adoption records absent a showing of good cause for release.⁷⁹ The Second Circuit rejected the

⁷⁵ See generally Mark Ballantyne, Comment, *My Daddy's Name Is Donor: Evaluating Sperm Donation Anonymity and Regulation*, 15 RICH. J.L. & PUB. INT. 569 (2012).

⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁷⁷ *Id.*

⁷⁸ *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225, 1231-32 (2d Cir. 1979); see Kathryn J. Giddings, *The Current Status of the Right of Adult Adoptees to Know the Identity of Their Natural Parents*, 58 WASH. U. L. REV. 677, 696-97 (1980).

⁷⁹ *Alma Soc'y*, 601 F.2d at 1227.

plaintiffs' argument that the statute violated the Due Process Clause by infringing upon a right to learn the identity of one's genetic heritage, instead upholding it as legitimate to foster relationships between the adoptee and the adopted family and rationally related to achieve that goal.⁸⁰ In its holding, the Second Circuit essentially viewed anonymity as a tool crucial to fostering a relationship between the intentional adoptive parents and the child.⁸¹ The court also valued the relationship between the adoptive parents and the child over the child's alleged right to seek information about genetic heritage.⁸² The Supreme Court denied certiorari to review the Second Circuit's holding in 1979.⁸³ Two years later, the Illinois Supreme Court similarly held that the ability to seek information about one's genetic heritage was not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.⁸⁴ Because the Supreme Court denied certiorari to review both the decisions of the Second Circuit and the Illinois Supreme Court and has never formally ruled on the subject, it is unlikely that the Court will ever be willing to recognize a right to know donor-identifying information as fundamental under substantive due process jurisprudence.

By contrast, the Supreme Court has deemed fundamental the right of parents to the "care, custody, and control" of their children,⁸⁵ which includes the right of fit parents to make decisions for their children without government interference. The Court would likely hold that permitting minor children to receive donor-identifying information without their parents' consent infringes upon a parent's fundamental decision-making rights, because when a non-fundamental right conflicts with a fundamental right, the fundamental right prevails. For example, in *Troxel v. Granville*, the Court struck down section 26.10.160(3) of the Washington Revised Code, which provided authority for "any person" to petition for visitation

⁸⁰ *Id.* at 1233 (noting that the New York statutes, in providing for release of the information on a showing of good cause, "do no more than to take these other relationships into account").

⁸¹ *Id.* at 1232 ("[E]ven though appellants are adults we must assume that they are still part of their adoptive families, families still in existence as to each of them which might be adversely affected by the release of information as to the names of natural parents or the unsealing of the adoption records.").

⁸² *Id.*

⁸³ *Alma Soc'y, Inc. v. Mellon*, 444 U.S. 995 (1979).

⁸⁴ *In re Roger B.*, 418 N.E.2d 751, 754 (Ill. 1981) ("Although information regarding one's background, heritage, and heredity is important to one's identity, it does not fall within any heretofore delineated zone of privacy implicitly protected within the Bill of Rights.").

⁸⁵ *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000).

rights of a child whenever it might serve a child's best interest.⁸⁶ The Court held that the statute violated the Due Process Clause because it gave no weight to a "parent's estimation of the child's best interest"⁸⁷ and instead favored grandparent visitation at the expense of the parent's fundamental right. While *Troxel* presented the separate issue of grandparent visitation, the Court is equally likely to view a right to access donor-identifying information as infringing upon a parent's fundamental right to make decisions for his or her child by ignoring the parent's estimation of what is in the child's best interest.

Constitutional jurisprudence regarding state action, standing, and substantive due process presents serious constitutional hurdles for those seeking information about their donor's identity. Therefore, donor-conceived individuals should use the media to influence state legislatures to enact legislation regarding sperm donor anonymity policies. Such legislation could effectively balance a child's right to know with a donor's expectation of privacy without involving the courts.

III. CANADIAN CONSTITUTIONAL RECOGNITION OF DONOR-CONCEIVED CHILDREN'S "RIGHT TO KNOW"

While constitutional claims in the U.S. will likely fail to advance the interests of individuals who oppose anonymous donation, Canadian constitutional law might be more amenable to their arguments. In 2011 the Supreme Court of British Columbia, the province's superior trial court,⁸⁸ briefly held that anonymous donation policies violated the rights of donor-conceived children. While the Court of Appeal of British Columbia—the province's highest court—later overturned that decision, this section highlights how constitutional arguments have been tailored to advance the rights of donor-conceived children living outside of the United States.

Olivia Pratten, a citizen of British Columbia conceived through artificial insemination, sought access to records regarding her donor's identifying information from the doctor who had performed the insemination on her mother.⁸⁹ Pratten learned that

⁸⁶ *Id.* at 57.

⁸⁷ *Id.*

⁸⁸ *Supreme Court, COURTS OF B.C.*, http://www.courts.gov.bc.ca/supreme_court/ [<https://perma.cc/KLQ9-YAW4>].

⁸⁹ *Pratten v. British Columbia (Att'y Gen.)*, 2011 BCSC 656, para. 1-2 (Can. B.C.), *rev'd in part Pratten v. British Columbia (Att'y Gen.)*, 2012 BCCA 480 (Can. B.C.), <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf> [<https://perma.cc/EP54-5MJB>].

records related to her conception were destroyed pursuant to the rules of the College of Physicians and Surgeons of British Columbia, which authorized sperm banks to destroy records pertaining to artificial insemination six years after the last recorded entry.⁹⁰ Pratten brought a constitutional suit against the College of Physicians and Surgeons seeking to enjoin the record destruction policy.⁹¹ On appeal to the Supreme Court of British Columbia, Pratten argued that permitting adopted children to trace their genetic heritage under existing provincial legislation,⁹² while prohibiting donor-conceived children like her from accessing such information, violated her equal protection rights under section 15 of the Canadian Charter of Rights and Freedoms,⁹³ and her liberty and self-security rights under section 7 of the Charter.⁹⁴

Justice Adair, writing for the court, agreed with Pratten.⁹⁵ Justice Adair recognized that “donor offspring experience sadness, frustration, depression and anxiety—in other words, they suffer psychological and psychosocial difficulties—when they are unable to obtain information. They feel the effects both for themselves and, when they become parents, for their own children.”⁹⁶ Justice Adair ultimately concluded that by treating adopted children and donor-conceived children differently, the manner of their conception “gave rise to a difference in treatment that in turn caused social disadvantage by perpetuating prejudice or stereotyping,” in violation of section 15 of the Charter.⁹⁷ Justice Adair articulated the law as making a classification between adopted individuals and donor-conceived individuals, noting that while parents have an important interest in decision-making regarding the level of detail given to their donor-conceived children,⁹⁸ donor offspring are par-

⁹⁰ *Id.* at para. 2.

⁹¹ *Id.* at para. 4.

⁹² *Id.* at para. 3 (describing provincial legislation of British Columbia that mandates strict record-keeping guidelines regarding information about the biological origins and family history of adopted individuals).

⁹³ See Constitution Act, 1982, Schedule B, Pt. I, s. 15 (U.K.), reprinted in R.S.C. 1985, app II, no 44 (Can.) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

⁹⁴ *Pratten*, 2011 BCSC 656, at para. 7.

⁹⁵ *Id.* at para. 111.

⁹⁶ *Id.*

⁹⁷ See *id.* at para. 240-58; *id.* at para. 268 (“I conclude further that excluding donor offspring from the benefits and protections of the *Adoption Act* and *Adoption Regulation* creates a distinction between adoptees and donor offspring, and that distinction is based on . . . manner of conception.”).

⁹⁸ *Id.* at para. 111(h).

ticularly vulnerable because they do not have “the benefit of the kind of . . . legislative support provided to and for adoptees in B.C.”⁹⁹ The decision effectively favors a child’s interests in donor information over parental authority to control the child’s upbringing and the sperm donor’s right to reproductive privacy. This case highlights a growing movement outside of the United States that favors the rights of donor-conceived children over the privacy interests of the donor.

Pratten’s victory was short-lived. In 2012, the Attorney General appealed the decision to the British Columbia Court of Appeal, which overturned the lower court’s decision and held that the Charter of Rights and Freedoms “does not guarantee a positive right to know one’s past.”¹⁰⁰ The Court of Appeal implied that adoptees experience far greater negative effects from being unable to know information about their genetic heritage than do donor-conceived children. The Court relied on this theory when writing, “it is open to the Legislature to provide adoptees with the means of accessing information about their biological origins without being obligated to provide comparable benefits to other persons seeking such information.”¹⁰¹

Despite being overturned by the Court of Appeal, the decision of the Supreme Court of British Columbia reveals how equal protection jurisprudence can be used to advance the interests of donor-conceived children outside of the United States. Similar equal protection arguments likely would fail in the United States, however, because donor-conceived children likely would not be considered a suspect class under *Carolene Products*’ footnote four.¹⁰² Thus, U.S. courts would likely apply rational basis scrutiny to policies denying donor-conceived children access to their donor’s records. Under rational basis scrutiny, courts defer to the legislature’s purpose in enacting such policies, requiring only a legitimate state interest and means rationally related to effectuate such interest.¹⁰³ Under rational basis scrutiny, such policies would be upheld under the U.S. Constitution.

⁹⁹ *Id.* at para. 111(i).

¹⁰⁰ Pratten v. British Columbia (Att’y Gen.), 2012 BCCA 480, para. 7 (Can. B.C.) (internal quotation marks omitted), <http://www.canlii.org/en/bc/bcca/doc/2012/2012bcc480/2012bcc480.pdf> [<https://perma.cc/PEA4-ZQQR>].

¹⁰¹ *Id.*

¹⁰² United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (introducing the concept that discrimination against discrete and insular minorities warrants heightened judicial scrutiny).

¹⁰³ See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

IV. WASHINGTON STATE'S APPROACH TO SPERM DONATION: A
SUCCESSFUL BALANCE OF ANONYMITY AND PRIVACY

While anonymous donation policies promote crucial pecuniary, family unity, and privacy interests, donor-conceived children should be afforded access to some information about their genetic heritage upon their eighteenth birthday. The United States' sperm donation industry should model its policies after Washington State's newly enacted insemination law, which safeguards the rights of donor-conceived children while protecting a donor's choice to keep his information private. In this section, I argue that Washington's model effectively balances the rights of the donor-conceived individual with that of the donor, and therefore should serve as a prototype for donation policy across the United States.

In 2011, the Washington State legislature passed a law requiring full disclosure of donor-identifying information and medical history upon the child's eighteenth birthday.¹⁰⁴ Under this legislation, however, the donor can choose to keep his identifying information private by signing an affidavit of nondisclosure at the time of donation.¹⁰⁵ Even if the donor signs the nondisclosure affidavit, the child is entitled to receive information regarding the donor's medical history upon his or her eighteenth birthday.¹⁰⁶

Unlike the majority approach to artificial insemination, which presumes a right to anonymity unless the donor expressly consents to a release of his information, Washington's model presumes a right to donor-identifying information unless the donor affirma-

¹⁰⁴ The statute reads in its entirety:

(1) A person who donates gametes to a fertility clinic in Washington to be used in assisted reproduction shall provide, at a minimum, his or her identifying information and medical history to the fertility clinic. The fertility clinic shall keep the identifying information and shall disclose the information as provided under subsection (2) of this section.

(2)(a) A child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to identifying information of the donor who provided the gametes for the assisted reproduction . . . , unless the donor has signed an affidavit of nondisclosure with the fertility clinic that provided the gamete for assisted reproduction.

(b) Regardless of whether the donor signed an affidavit of nondisclosure, a child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to non-identifying medical history of the donor who provided gametes for the assisted reproduction that resulted in the birth of the child.

WASH. REV. CODE § 26.26.750 (2016).

¹⁰⁵ *Id.* § 26.26.750(2)(a).

¹⁰⁶ *Id.* § 26.26.750(2)(b).

tively withholds such information by signing the nondisclosure affidavit. By reversing the standard presumption, Washington's donation statute protects the rights of donor-conceived children prior to their conception. This is especially appropriate because it occurs at a time when the child cannot make his or her own decisions regarding a right to donor-identifying information. In addition, Washington's donation statute balances the right of the donor by allowing the donor to assert his privacy interests at the time of the donation. This model recognizes the virtues of anonymity by allowing the donor to make a decision about the release of his information, while permitting the child to obtain donor-identifying information (or at least medical history) upon his or her eighteenth birthday. Under this model, if a donor fails to sign the nondisclosure affidavit, he implies consent to a release of his information and thus permits access to basic identifying information without infringing upon his privacy rights.

Washington's statute admirably attempts to balance donors' rights with their offspring's interest in obtaining information about genetic heritage. However, the model continues to give donors complete decision-making power at the time of donation by affording them the right to sign a nondisclosure affidavit, thereby subjecting their offspring to a decision made before the date of their conception. While donor-conceived children are always afforded access to medical history information under this approach, it continues to subordinate the wishes of the child to that of the sperm donor. Nevertheless, the Washington model propels the industry in the right direction by presuming open donation and placing a hurdle—albeit a small one—in front of the donor if he wishes to maintain anonymity. Even if Washington's approach is more symbolic in nature than meaningful nationwide, it should be heralded as a step forward in the attempt to balance donor control and privacy with the legitimate identity interests of donor-conceived individuals.

V. CONCLUSION

In June of 2010, when I was 22 years old, I contacted the sperm bank that provided the gamete to my mothers and read my five-digit identifying number to an employee on the receiver. She put me on hold for approximately two minutes and then nonchalantly told me that my number matched that of a 16-year-old girl living in New York City—a half-sibling living in the same city as me. My first thought was how strange it felt to call this person my “half-

sister.” To me, she was just another person who shared my genetic heritage.

I decided to call the sperm bank again five years later in 2015 to verify the accuracy of that information in preparation for this article. I spoke to a doctor at the facility who told me that his records indicated the existence of one girl born from the particular gamete in 1989. I realized that he was describing me, although his records had an incorrect date of birth (I was born in 1988). I corrected my date of birth, and I asked him about a half-sister. He informed me that his records did not reflect her existence. When I relayed the information I had received five years prior, he told me that the company had moved facilities and reiterated the difficulty of maintaining accurate information about half-siblings due to lax reporting requirements. He also suggested that I check the Donor Sibling Registry because it was “entirely possible that another person was born from that same gamete.”

Hearing that the sperm bank’s records did not reflect the existence of a half-sibling after all—or at least could not conclusively establish her existence—highlighted the unfortunate role that anonymity plays in perpetuating a system of lax record-keeping practices. The doctor’s unconcerned tone of voice in relaying this information also reflected how anonymity decreases the importance of genetics in one’s perception of family. Most importantly, hearing this information made me realize that the people who raised me, including the family friends with whom I had shared Thanksgiving and Christmas for over twenty years, are the people who have contributed to my identity. This realization helped to temper the sadness and confusion I felt upon learning that I may not have a biological half-sister.

While a sperm donation model premised on anonymity certainly does have pitfalls, the benefits of this model still outweigh the negatives. Anonymity must be preserved as an option to protect non-traditional family structures and the relationships formed within them. States should consider creating sperm donation laws modeled on Washington State’s insemination statute, which balances a child’s request for basic identifying information with a donor’s fundamental right to privacy. The model should presume a right to donor-identifying information upon a child’s eighteenth birthday, yet should seal donor-identifying information if the donor expressly forbade such disclosure at the time of donation. Information related to medical history and genetic disposition should never be sealed from donor-conceived children.

Sperm donation, and the anonymity that cloaks many donors, has afforded me the opportunity to be born into a non-traditional family. It has also helped to develop my own sense of self by allowing me to choose my identity without the guidelines often imposed by genetics. Most importantly, it has taught me that I can choose to create a family with whomever I love.