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Privacy vs. Identity Rights: A Call for the United States to Adopt the United Kingdom's "Open ID" System for Artificial Reproductive Technology

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PRIVACY VS. IDENTITY RIGHTS: A CALL FOR THE UNITED STATES TO ADOPT THE UNITED KINGDOM’S “OPEN ID” SYSTEM FOR ARTIFICIAL REPRODUCTIVE TECHNOLOGY

*Rachel L. Emerson**

ABSTRACT

In a world of readily-available home genetics tests, donor anonymity can no longer exist. Recognizing this reality, the United Kingdom has implemented a national controlling system, which oversees and regulates artificial reproductive technology. The United States, which currently has no such system, would benefit from implementing a similar solution. By forming an “Open ID” system, those individuals who choose to donate genetic material would know and understand the possibility of a donor-conceived child contacting them and would have enforceable legal protections in place to shield them from parental liability or obligations. While the United States decides what to do about donor anonymity, it is imperative that those individuals who have donated or plan to donate genetic material consider the inheritance implications and take measures to protect themselves through estate planning.

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I. INTRODUCTION

When Bryce Cleary, a middle-aged doctor from Corvallis, Oregon, logged on to ancestry.com in 2018, he never imagined finding a child he genetically fathered—let alone nineteen.¹ While attending medical school in 1989,² Cleary was approached by the fertility clinic staff at Oregon Health & Science University (“OHSU”) to donate sperm.³ When asked why he donated, Cleary answered, “at that time when you’re a first-year med student, you want to help everybody . . . [t]hat was the appeal to me. Why not? You’re doing a great thing for a couple.”⁴ Although Cleary did have some concerns, the idea that his sperm samples would be shipped to the East Coast and only used for

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1. Kyle Swenson, *Nineteen Children and Counting*, WASH. POST (Sept. 7, 2020, 5:15 PM), https://www.washingtonpost.com/national/sperm-donor-father-19-children/2020/09/07/97b6f8de-ba65-11ea-8cf5-9c1b8d7f84c6_story.html [<https://perma.cc/X7YE-2CUM>].
 2. Cleary’s only time outside the city of Corvallis was spent attending OHSU in Portland, Oregon. *Id.*
 3. Devon Haskins, *Oregon Doctor Says His Sperm Was Improperly Used to Father at Least 17 Children*, KGW (Oct. 3, 2019, 7:39 AM), <https://www.kgw.com/article/news/local/corvallis-doctor-sperm-ohsu/283-e8aca73f-aa81-4f07-bca1-183c25364c80> [perma.cc/D3DN-KHX9].
 4. Swenson, *supra* note 1.

five pregnancies, with the rest of the samples going to research, eased his mind.⁵

Roughly 30 years later, after signing up for an ancestry.com account, Cleary was contacted by two of his donor-conceived "children."⁶ This connection led to the introduction of 17 more of his donor "children," who had formed a private donor siblings Facebook group to connect with each other and Cleary.⁷ Cleary has since filed a lawsuit against OHSU.⁸ After the suit was filed, the University issued its only public comment to date, stating, "OHSU supports and adheres to patient privacy laws."⁹

However, who is really at fault here? The University's fertility clinic did not connect Cleary and his donor-conceived children, ancestry.com did.¹⁰ Everything that occurred in Cleary's story is legal in the United States.¹¹ The real question is, should it be?

Bryce Cleary's story of being found through an at-home genetics kit and contacted by his donor-conceived children may seem shocking,

5. *Id.*

6. *Id.*

7. *Id.*

8. Cleary's action against OHSU alleges fraud and intentional infliction of emotional distress. He has requested \$5.25 million in damages. Swenson, *supra* note 1.

9. *Id.*

10. Aimee Green, *Oregon Doctor Says His Donated Sperm Was Used to Father at Least 17 Children, Sues OHSU for \$5.25 Million*, THE OREGONIAN (Oct. 3, 2019, 1:04 PM), <https://www.oregonlive.com/news/2019/10/oregon-doctor-says-his-donated-sperm-was-used-to-father-at-least-17-children-sues-ohsu-for-525-million.html> [<https://perma.cc/CNX9-62WV>].

11. Rich Vaughn, *Is Sperm Donor Anonymity a Thing of the Past?*, INT'L FERTILITY L. GRP. (Oct. 30, 2020, 10:55 AM), <https://www.iflg.net/is-sperm-donor-anonymity-a-thing-of-the-past/> [perma.cc/U42A-UTBX].

but it is not unusual.¹² Websites such as ancestry.com¹³ and 23andMe¹⁴ are just two of the many services that offer at-home genetic testing that have the ability to connect donors with the child, or children, created from their donation. In the United States, “[t]he rise of consumer genetic tests . . . is forcing sperm donation clinics to confront the fact that it is now virtually impossible to guarantee anonymity to their clients.”¹⁵ Many clinics are changing their policies to clarify that the term “anonymous” donation means only that the clinic will not share their donor information, not that it cannot be discovered by other means.¹⁶ Other clinics are following a more European approach and allowing an “open-identity donor[s]” (“Open ID”) system.¹⁷ An Open ID system allows the donor-conceived child to receive non-identifying information about their donor at age sixteen and connect with the donor after they turn eighteen, or sooner, if both parties agree to it.¹⁸

Clery’s story demonstrates that there is a gap in the privacy regulations surrounding artificial reproductive technology (“ART”) and that United States laws have fallen behind the pace of technology. The use of ART continues to create issues concerning the reproductive rights of the intended parents, the identity rights of the resulting children, and the privacy rights of the gamete donors.¹⁹

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12. See Rachel Weiner, *Woman Sues After Learning ‘Anonymous’ Sperm Donor Was Her Own Fertility Doctor*, WASH. POST (Nov. 19, 2020, 12:15 PM), https://www.washingtonpost.com/local/legal-issues/fertility-doctor-lawsuit-michael-kiken/2020/11/19/b938acf2-2908-11eb-92b7-6ef17b3fe3b4_story.html [https://perma.cc/K287-3KLE]; Sunny Jane Morton, *One Man’s Successful Search for His Sperm-Donor Father*, FAMILYTREE, <https://www.familytreemagazine.com/birth-families/sperm-donor-search/> [https://perma.cc/25L3-NT9D]; Barbara McMahon & Sally Williams, *The Boy Who Went Looking for His Sperm Donor Dad—and Got One Heck of a BIG Surprise: He Had 25 Brothers and Sisters*, DAILY MAIL UK (Sept. 30, 2020, 5:02 PM), <https://www.dailymail.co.uk/femail/article-8790943/The-boy-went-looking-sperm-donor-dad.html> [https://perma.cc/8XBR-7WUL].
 13. Stephanie Pappas, *Genetic Testing and Family Secrets*, AM. PSYCH. ASS’N (June 2018), <https://www.apa.org/monitor/2018/06/cover-genetic-testing> [perma.cc/2ZK9-8D2S].
 14. *Id.*
 15. 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/consumer-dna-tests-sperm-donor-anonymity/> [perma.cc/QT3D-3BSD].
 16. *Id.*
 17. *Id.*
 18. *Id.*
 19. Bruce Hale & Stephen Page, *Whose Rights Are They, Anyway?*, 12 SCITECH L. 8, 8 (2016).

This Note argues that, as a social policy issue, the United States must learn from other countries, specifically the United Kingdom, to provide a unified and sustainable solution that balances the identity rights of a donor-conceived child and the protection of the privacy rights of gamete and embryo donors. This Note examines the implications of donated genetic material²⁰ on privacy issues, identity rights, legal rights, estate planning, and probate litigation. This Note also suggests how the United States could benefit from a national system of regulation as seen in the United Kingdom.²¹

Part II of this Note presents a brief overview of ART that is applicable to this paper. It provides a general understanding of ART using donors including gamete donation and embryo donation. It also provides a brief background on the legal systems that regulate ART in the United Kingdom and the United States.

Part III explains the necessary balance of the rights of a donor and the rights of a child, born from ART using donated genetic material. It also examines how the United Kingdom and United States value these rights differently in light of customs and societal norms, and how technological advances destroyed donor anonymity.

Part IV compares the United States' attempt to create a unified framework in the Uniform Parentage Act,²² Uniform Probate Code,²³ and American Bar Association state-regulated legislations,²⁴ with the

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20. While there are many forms of ART, this Note focuses on only those processes that involve donated genetic material. The Note does not explore issues of traditional surrogacy which may have some limited application on the issues proposed, but because it is so rarely used today, has little implications for this research. Posthumous gamete retrieval is also not included because those cases typically use a "donor" that is the deceased biological parent and therefore does not create the same issues of privacy and inheritance rights as typical gamete or embryo donation. *See generally About Surrogacy: What Is Traditional Surrogacy?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/#:~:text=Traditional%20surrogacy%20is%20now%20much,as%20they%20grow%20their%20families> [<https://perma.cc/5PBK-NKS4>]; Andrew Joseph, *'They Don't Want His Story to End': Efforts to Save the Sperm of the Deceased Come with Heartache and Tough Questions*, STAT (Mar. 13, 2019), <https://www.statnews.com/2019/03/13/postmortem-sperm-retrieval/> [<https://perma.cc/CB96-H24>].
 21. While child support is a relevant factor when analyzing issues of donated genetic material, it is beyond the scope of this paper and is not discussed further.
 22. UNIF. PARENTAGE ACT (2017), U.L.A. (2019).
 23. UNIF. PROB. CODE (amended 2020), U.L.A. (2013).
 24. *ABA Model Act Governing Assisted Reproduction [2019] Resolution*, AM. BAR ASS'N (Jan. 28, 2019), https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/art/resolution-111.pdf [<https://perma.cc/LLP4-EH6L>].

United Kingdom's Human Fertilisation and Embryology Authority ("HFEA") national regulations.²⁵ It proposes that Congress's Commerce Clause²⁶ may allow for a nationally-regulated system of ART in the United States, and recommends estate planning as an interim solution to individuals at risk while the United States determines a legislative solution.

Part V concludes that the states' legislative attempts will fail because of the voluntary nature of its systems, and that the United States would benefit by adopting even a single section of the United Kingdom's approach, the Open ID system. Eventually this would create a unified system for a national donor registry, thus protecting the privacy of donors and the identity rights of the donor-conceived child. Ultimately, Part V determines that estate planning in the United States is essential to dealing with the donor identity crisis of the internet age until an HFEA-like system can be achieved.

II. UNDERSTANDING HISTORY: THE SCIENCE AND SYSTEMATIC APPROACHES TO REGULATING DONATED GENETIC MATERIAL

A. *A Brief and Simplified Medical Overview of Artificial Reproductive Technology*

Artificial Reproductive Technology refers to the method of creating a child through means other than sexual intercourse.²⁷ ART includes "all fertility treatments in which both eggs and embryos are handled outside the body" and may involve the use of donated eggs, donated sperm, or previously frozen embryos.²⁸ This Note examines those children born as the consequence of ART that included the use of either donated sperm, eggs, or embryos. While there may be others,²⁹ the most

25. The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511 (Eng.).

26. U.S. CONST. art. 1, § 8, cl. 3.

27. Charles P. Kindregan Jr., *The Current State of Assisted Reproductive Law*, 34 FAM. ADVOC. 10, 11 (2011).

28. *Reproductive Health: Infertility FAQs*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/infertility/index.htm> [<https://perma.cc/G7BS-222V>].

29. On the cutting edge of ART is in vitro gametogenesis ("I.V.G."). I.V.G. strips the reproductive process of the need for sperm and egg from a man and a woman. While only successfully tested on mice, in theory I.V.G. could allow humans to manufacture their own eggs and sperm outside their body using only their skin cells to create a child. The implications of this technology mean that a same-sex couples could create a full genetic link to their own child. The issue still remains, however, if some genetic material is used outside of the intended parents, there may be lasting legal

relevant forms of ART for this Note are gamete donation and embryo donation.

1. Gamete Donation

Gamete donation is the process of using the sperm or egg of another person to help the intended parents to have a donor-conceived child.³⁰ "Intended parents" refers to the person or persons who are using ART to create a family and become the child's parents.³¹ In gamete donation, either donated sperm or egg is used in combination with the sperm or egg from the intended parent.³² This process preserves a genetic link to the donor-conceived child from at least one parent.³³ Donors may be friends or relatives of the intended parents, introduced through a reproductive center or donor bank, or may be completely anonymous.³⁴

2. Embryo Donation

Embryo donation differs from gamete donation because the combination of sperm and egg used has no genetic connection to the intended parents.³⁵ Most often, an embryo is created through in vitro

repercussions as to issues over inheritance or privacy barriers in accessing the child's genetic ancestry. *See generally* Debora L. Spar, *The Poly-Parent Households Are Coming*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/opinion/ivg-reproductive-technology.html?auth=login-facebook> [<https://perma.cc/G3WC-YJDN>].

30. Am. Soc'y for Reprod. Med., *Gamete (Eggs and Sperm) and Embryo Donation Fact Sheet*, REPRODUCTIVEFACTS.ORG, [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://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/NDB3-QDMH>].
31. *Intended Parent*, FERTILITYSMARTS (May 26, 2019), <https://www.fertilitysmarts.com/definition/1652/intended-parent/#:~:text=An%20intended%20parent%20is%20a,parent%20once%20it%20is%20born> [<https://perma.cc/23YW-KS2E>].
32. Am. Soc'y for Reprod. Med., *supra* note 30.
33. *Id.*
34. It should be noted that while individuals can donate without the use of a licensed physician, this can lead to increased issues of legal paternity and parental obligations. *See* Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 388 (1986) (holding that when no doctor is involved in sperm donation or in artificial insemination, the sperm was never "provided to a licensed physician" and therefore the donor fell outside statutory nonpaternity provisions). *See also* Am. Soc'y for Reprod. Med., *supra* note 30.
35. *Id.*

fertilization (“IVF”),³⁶ a process by which an egg is fertilized by sperm in a test tube outside the body. The embryo is then implanted in the intended mother.³⁷ The intended parents are still able to experience a biological connection to the donor-conceived child through pregnancy and birth.³⁸ Because the intended parents consequently raise a child to whom they are not genetically related, embryo donation may sound like adoption. However, embryo donation is recognized in ART as a donation because the donated embryo is a property right that is legally transferred to the intended parents.³⁹ When gestation is complete, the mother bears the donor-conceived child, the intended parents sign the birth certificate as any other parent would, and there is no need for the legal transfer of guardianship as in adoption.⁴⁰

B. ART Legislation and Regulations in the United Kingdom and United States

ART is regulated by state rather than federal law in the United States⁴¹ with some help from national agencies and organizations including the Centers for Disease Control and Prevention (“CDC”);⁴² the American Society for Reproductive Medicine (“ASRM”);⁴³ the Society for Assisted Reproductive Technology (“SART”);⁴⁴ the

36. Many couples who face infertility seek IVF treatments as it gives them the possibility of a child with their own genetic material. The embryos are extracted, fertilized, frozen and thawed for different rounds of implantation. However, a couple will usually harvest and fertilize more embryos than necessary and has the option to keep the excess or donate them. Embryo donation is also becoming more popular as it is currently significantly less expensive than IVF treatments. *See e.g., In Vitro Fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [<https://perma.cc/TZ5B-7BBY>].

37. *Id.*

38. Am. Soc’y for Reprod. Med., *supra* note 30.

39. *See generally* Jenni Millibank, et al., *Embryo Donation and Understanding of Kinship: The Impact of Law and Policy*, 32 HUM. REPROD. 133, 136 (2017).

40. *Surrogacy*, PREGNANCY BIRTH & BABY, <https://www.pregnancybirthbaby.org.au/surrogacy> [<https://perma.cc/W8ZZ-SC68>].

41. Kindregan Jr., *supra* note 27, at 11.

42. Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 421 (2005).

43. *Id.*

44. *Id.*

American College of Obstetrics and Gynecology (“ACOG”);⁴⁵ the Food and Drug Administration (“FDA”);⁴⁶ and the Department of Health and Human Services (“DHHS”).⁴⁷ By contrast, the United Kingdom uses the HFEA, a national agency that has complete authority over fertility clinics and human embryo research throughout the country.⁴⁸

1. United Kingdom

Sponsored by the Department of Health and Social Care, the HFEA regulates the fertility treatment and human embryo research in the United Kingdom.⁴⁹ The Human Fertilisation and Embryology Act of 1990⁵⁰ and the Human Fertilisation and Embryology Act of 2008⁵¹ (collectively, the “HFE Act”) statutorily outline the agency’s duties and roles.⁵² The HFEA’s primary duties include producing a Code of Practice, licensing and monitoring clinics that perform IVF and donor insemination, setting standards for clinics and research centers, providing information to the public, and keeping a register of information on donors, treatments, and children born through ART.⁵³ Not only does the HFE Act grant the HFEA authority to license and set standards, but the Act also grants HFEA the power to enforce the requirements.⁵⁴ The HFEA has the authority to “refuse, reevoke, or suspend a license”⁵⁵ and present violators to the Director of Public Prosecutions for retribution.⁵⁶

2. United States

In comparison with the United Kingdom, the United States has been left largely unregulated.⁵⁷ The law that most closely parallels the HFE Act is the U.S. Fertility Clinic Success Rate and Certification Act

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 420–21.

49. HUM. FERTILIZATION & EMBRYOLOGY AUTH., ANNUAL REPORT AND ACCOUNTS 2017–18, at 7 (2018).

50. Human Fertilisation and Embryology Act 1990, c. 37, § 8 (UK).

51. Human Fertilisation and Embryology Act 2008, c. 22, § 6 (UK).

52. HUM. FERTILIZATION & EMBRYOLOGY AUTH., *supra* note 49, at 7–8.

53. *Id.* at 8.

54. Human Fertilisation and Embryology Act 1990, c. 37, § 11 (UK).

55. Ouellette et al., *supra* note 42, at 428.

56. *Id.*

57. Hale & Page, *supra* note 19, at 8.

of 1992 ("FCSRCA"),⁵⁸ which mandates that fertility clinics submit ART success rate data and describes the responsibilities of the CDC regarding data reporting and licensing.⁵⁹ Unlike the HFEA in the United Kingdom, FCSRCA lacks any real authority to enforce the CDC data reporting and only outlines a voluntary system of licensing that has never been required.⁶⁰

Individual states have made more headway than the federal government in attempts to regulate ART.⁶¹ However, in the state's control, states have individual authority to decide whether or not to adopt a change to ART regulation.⁶² For example, the 2017 changes to the Uniform Parentage Act ("UPA")⁶³ which necessitated changes to the intestacy and class-gift provisions in the Uniform Probate Code's ("UPC"),⁶⁴ were adopted in its entirety by only 18 states, with other states adopting separate articles and sections of the UPC.⁶⁵ The attempts at regulating ART laws through the UPA, the UPC, and the American Bar Association ("ABA") regulations⁶⁶ will be discussed more fully in Part IV. Because no effective regulations have been implemented at the federal level, many state legislatures have opted to address ART issues on a case-by-case basis with little to no precedent.⁶⁷ This disjointed national response to ART causes more problems than it solves.

This lack of a unified system of regulation has earned the United States the label of the "Wild West of the fertility industry."⁶⁸ The Director of the Division of Medical Ethics at New York University's School of Medicine, Arthur L. Caplan, posits that one reason for the

58. Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263(a)(1)–(7) (2000).

59. *Id.*

60. Ouellette et al., *supra* note 42, at 422–23.

61. *Id.* at 423.

62. *Id.* at 432.

63. UNIF. PARENTAGE ACT (amended 2017) (UNIF. L. COMM'N 1973).

64. UNIF. PROB. CODE § 2-119(c) (amended 2019) (UNIF. L. COMM'N).

65. *Guide to Uniform and Model Acts 2019–2020*, UNIF. L. COMM'N, http://leg5.state.va.us/User_db/firmView.aspx?ViewId=5641&s=32 [<https://perma.cc/5A7R-7DHD>].

66. MODEL ACT GOVERNING ASSISTED REPRODUCTION [2019] RESOLUTION (AM. BAR ASS'N 2019).

67. Kindregan Jr., *supra* note 27, at 11.

68. Michael Ollove, *States Not Eager to Regulate Fertility Industry*, PEW CHARITABLE TRUSTS (Mar. 18, 2015), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/18/states-not-eager-to-regulate-fertility-industry> [<https://perma.cc/N9XC-VZ3D>].

lack of regulation is because ART runs into political controversy in the U.S.⁶⁹ ART “touches on abortion and also the creation of embryos, which politicians run away from because too many people still disagree about the right to use reproductive technologies,” including how much one should pay and ultimately who should pay.⁷⁰ The current “piecemeal approach” for ART in the United States relies on professional guidelines and the overall regulations of the medical practice.⁷¹

III. WHO’S YOUR DADDY: THE DIFFICULTY IN BALANCING DONOR ANONYMITY AND A CHILD’S IDENTITY RIGHTS

The difference in regulations is just one of the many ways to compare the United Kingdom’s and United States’ approaches to ART. Another glaring distinction deals with how each nation values and balances the rights involved in ART. The balance between the reproductive rights of the intended parents, the identity rights of the donor-conceived child, and the privacy rights of the gamete donor is extremely delicate.⁷² The United Kingdom sees aspects of these rights as positive rights, as seen in the national requirement of gamete donor records.⁷³ Alternatively, some rights are seen as negative rights, such as the fundamental right to reproduce without government interference in the United States.⁷⁴ Exploring the balance of these rights illuminates another key difference in the United Kingdom’s and United States’ respective approaches to regulating ART.

A. *Rights for the Donor-Conceived Child*

The rights of a donor-conceived child to know their origin are growing in much of Western Europe.⁷⁵ Both the 1989 U.N. Convention on the Rights of the Child (“CRC”)⁷⁶ and the Convention for the Protection of Human Rights and Fundamental Freedoms (“European

69. *Id.*

70. *Id.*

71. Lucy Frith, *Assisted Reproductive Technology in the USA: Is More Regulation Needed?*, 29 *REPRO. BIOMEDICINE* 516, 516 (2014).

72. Hale & Page, *supra* note 19, at 9.

73. *Id.*

74. *Id.* at 9.

75. *Id.* at 9.

76. Convention on the Rights of the Child art. 8, Nov. 20, 1989, 28 *I.L.M.* 1456, 1577 *U.N.T.S.* 3.

Convention on Human Rights”),⁷⁷ through decisions by the European Court of Human Rights (“ECHR”),⁷⁸ declare the rights of a child to know their origins.⁷⁹ Specifically, Article 8 of the CRC provides: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”⁸⁰ In addition, Article 8 of the European Convention on Human Rights states:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁸¹

However, this right to know one’s origin does not necessarily include the right to know one’s natural genetic parents. For example, in *Odièvre v. France*, the applicant was unable to obtain identifying information about her biological mother.⁸² She claimed Article 8 permitted her to seek an order for the release of information about her birth.⁸³ The ECHR held that, although Article 8 does protect a right to identity and personal development, “the preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.”⁸⁴ The Court concluded that because the applicant was already given access to non-identifying information about her biological parent, Article 8 was not violated.⁸⁵

77. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

78. Hale & Page, *supra* note 19, at 8.

79. *Id.* at 8–9.

80. Convention on the Rights of the Child art. 8, Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S. 3.

81. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

82. *Odièvre v. France* [GC], No. 42326/98, ¶ 24 (Feb. 13, 2003), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-60935%22%5D%7D> [<https://perma.cc/3MW8-9NA4>].

83. *Id.* ¶ 25.

84. *Id.* ¶ 29.

85. *Id.* ¶ 49.

In the United Kingdom specifically, children conceived through gamete donation have “statutory rights to access information about their donor.”⁸⁶ The HFEA Disclosure of Donor Information Regulations came into force on July 1, 2004.⁸⁷ The Regulations, made under the Human Fertilisation and Embryology Act of 1990,⁸⁸ prohibit gamete donor anonymity.⁸⁹ Donors enter both non-identifying information, such as the donor’s physical description, year and country of birth, and marital status, and identifying information, such as the donor’s name, birth date, and last known address, into the HFEA registry.⁹⁰

A donor-conceived child in the UK can apply for their donor’s non-identifying information at age sixteen and identifying information at age eighteen.⁹¹ The requirement for non-identifying information is based on a donor-conceived child’s right to know their own medical history, whereas the identifying information is based in the belief that knowing one’s origin is crucial to forming a healthy self-identity.⁹²

1. Medical

The right to know these non-identifying and identifying factors comes from the belief that “genetic origin is at least part of the individual’s identity.”⁹³ However, these non-identifying factors may provide more value to the individual, as they contribute to understanding their medical history and provide insight into their future health.⁹⁴

Before undergoing any medical procedure or assessment, one of the most common questions asked by physicians is “What is your family’s

86. Bethan Cleal & Natalie Gamble, *Mitochondrial Donation in the United Kingdom*, 12 SCITECH L. 18, 21 (2016).

87. The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511, art. 1, ¶ 1 (Eng.).

88. *Id.* at art. 1.

89. *Id.* at art. 2.

90. *Id.*

91. *Preparing to Access Non-Identifying Information About Your Donor and Donor-Conceived Genetic Sibling(s)*, HUM. FERTILISATION & EMBRYOLOGY AUTH. (Oct. 8, 2021), <https://www.hfea.gov.uk/donation/donors/information-for-past-applicants/preparing-to-access-non-identifying-information-about-your-donor-and-donor-conceived-genetic-sibling-s/> [<https://perma.cc/X3GN-4ZBR>].

92. An Ravelingien et al., *Open-Identity Sperm Donation: How Does Offering Donor-Identifying Information Relate to Donor-Conceived Offspring’s Wishes and Needs?*, 12 J. BIOETHICAL INQUIRY 503, 507 (Sept. 12, 2015), <https://pubmed.ncbi.nlm.nih.gov/24996630/> [<https://perma.cc/KL83-KYR3>].

93. Hale & Page, *supra* note 19, at 9.

94. *Id.*

medical history?"⁹⁵ It is generally accepted that family medical history can provide information to assess a person's vulnerability to common diseases, provide adequate screening for those diseases, and contribute to early treatment options.⁹⁶ The requirement to disclose non-identifying information was created to ensure donor-conceived children received all the information needed to lead a healthy life.⁹⁷

However, if a donor-conceived child does not have access to the genetic information of their donor parents, the child is not without options for seeking substantial relevant information. The parents who raise the child will have information on the family's lifestyle, culture, and environmental factors that can supplement the child's medical history.⁹⁸ In addition, the donor-conceived child may also undergo their own genetic testing to fill in the gaps left by their genetic donors. While the disclosure requirement is not the only option for acquiring information on a donor-conceived child's medical history, it is certainly the easiest option.⁹⁹

2. Self-Identity

The need for the release of identifying factors to donor-conceived children comes from a belief that genetics can play a role in the creation of one's self-identity.¹⁰⁰ While genetics can be a valuable tool in understanding one's medical history and future health, there is little evidence that it can create or fulfil one's self-identity.¹⁰¹ The fundamental moral right to know one's genetic origins is often assumed by international law instruments such as the CRC¹⁰² and the European

95. See *Family Health History*, CTRS. FOR DISEASE CONTROL & PREVENTION https://www.cdc.gov/genomics/famhistory/famhist_basics.htm [<https://perma.cc/56GL-AALT>]; *Why Is It Important to Know My Family Health History?*, U.S. NAT'L LIBR. MED.: MEDLINEPLUS <https://medlineplus.gov/genetics/understanding/inheritance/familyhistory/> [<https://perma.cc/22KS-R8TA>].

96. Inmaculada De Melo-Martín, *The Ethics of Anonymous Gamete Donation: Is There a Right to Know One's Genetic Origins?*, 44 HASTINGS CTR. REP. 28, 30–31 (2014).

97. See *id.*

98. *Id.* at 31.

99. See Mohammad Reza Sadeghi, *Coming Soon: Disclosing the Identity of Donors by Genealogical Tests of Donor Offspring*, 20 J. REPROD. & INFERTILITY 119, 119 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6670264/> [<https://perma.cc/L4GB-SPBX>].

100. Hale & Page, *supra* note 19, at 9.

101. *Id.* at 9.

102. G.A. Res. 44/25 (VII), Convention on the Rights of the Child (Nov. 20, 1989).

Convention on Human Rights,¹⁰³ but this moral right remains largely unjustified.¹⁰⁴

Those who support this position argue that knowing one's genetic origin can explain physical characteristics, talents, and interests, which all feed into self-identity.¹⁰⁵ University of Virginia law professor, Naomi Cahn, is one such supporter.¹⁰⁶ Cahn believes the United States "need[s] more regulation of assisted reproductive technologies to protect the rights of children," which should include donor-conceived children having the right to full medical and ethnical information, including country of origin, about their genetic parents.¹⁰⁷

While access to one's genetic parents can help create a sense of belonging and connection with the past, there is little evidence to show that donor-conceived children as a group suffer "genealogical bewilderment" that impedes them from creating healthy identities without this information.¹⁰⁸ With no real evidence that knowledge about one's genetic origin is necessary for a healthy life or successful sense of self, the question becomes whether these rights supersede that of donors' rights of autonomy.

B. Privacy Rights for the Donor

As a member of the United Nations, the United States has signed, but not ratified, the CRC, which spells out the right to know one's origin.¹⁰⁹ The failure to ratify the CRC may stem, in part, from strongly held beliefs in the right to privacy, autonomy, and a free market.¹¹⁰ The first sperm bank in the U.S. was created in 1952 in Iowa.¹¹¹ At the time, only 28% of the nation approved of artificial insemination.¹¹² Back then,

103. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

104. De Melo-Martín, *supra* note 96, at 29–30.

105. See Ravelingien et al., *supra* note 92, at 507.

106. Ollove, *supra* note 68.

107. *Id.*

108. Naomi R. Cahn, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 126 (2009).

109. G.A. Res. 44/25 (VII), *supra* note 102, at art. 8; *see also* Hale & Page, *supra* note 19, at 9.

110. LUISA BLANCHFIELD, CONG. RSCH. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 7, 9–10, 12, 14 (2015).

111. Alexis C. Madrigal, *The Surprising Birthplace of the First Sperm Bank*, THE ATLANTIC (Apr. 28, 2014), <https://www.theatlantic.com/technology/archive/2014/04/how-the-first-sperm-bank-began/361288/> [<https://perma.cc/DQ9S-ML5F>].

112. *Id.*

the idea of ART in humans elicited fear and skepticism.¹¹³ In addition to fear, infertility carried a stigma and shame that created the need for secrecy in sperm donation.¹¹⁴

In 2015, the estimated number of donor-conceived children who are born in the United States each year is between 30,000–60,000 from sperm donation and over 8,000 from egg donation.¹¹⁵ The stigma and shame of donation have slowly been replaced by millions of so-called “test tube babies.”¹¹⁶ In recent years, gamete donation has generated billions of dollars per year.¹¹⁷

1. Anonymity

While the concept of anonymity has been a key part of gamete donation since its inception, that may no longer be possible.¹¹⁸ The increase of consumer genetic tests such as ancestry.com and 23andMe is forcing sperm donation clinics in the U.S. to reconsider their anonymity policies.¹¹⁹ This change has transformed the term “anonymous” donation, which now means the bank or clinic will not share donor information. However, with the help of the internet and genetic testing, a donor-conceived child can find their donor “parent” all on their own.¹²⁰

While ART continues to make technological advances at a rapid pace, regulations and laws concerning ART have seen very limited improvements.¹²¹ The change to an Open ID system in the United Kingdom, specifically, has created a deficit in donors, who now fear losing their anonymity, incurring liability for child support, and other complications.¹²²

The unique issue for the United States is that there have been decades of donors like Bryce Cleary, who relied heavily on the

113. *Id.*

114. Keshavan, *supra* note 15.

115. Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4(3) LAWS 325, 354 (2015).

116. *Test-Tube Baby*, MERRIAM-WEBSTER (11th ed. 2020) (“[A] child produced from an egg that was fertilized outside of a woman’s body and then put back into the woman’s body to finish developing.”).

117. Michael J. Malinowski, *A Law-Policy Proposal to Know Where Babies Come from During the Reproduction Revolution*, 9 J. GENDER, RACE & JUST. 549, 549 (2006).

118. Keshavan, *supra* note 15.

119. *Id.*

120. *Id.*

121. Kindregan Jr., *supra* note 27, at 11.

122. Hale & Page, *supra* note 19, at 9.

anonymity of their donations and never imagined the child created with their genetic material would locate, let alone contact, them.¹²³ Because of the lack of uniform regulations and policies, some clinics in the United States have created contracts that explicitly state that donors are not legally the father or mother and have no rights or obligations towards the offspring; others have not.¹²⁴ However, even when a contract is created between two parties, allegedly absolving the donor of parental liability, courts have held those contracts as unenforceable because it is impossible to contract out of parental obligations.¹²⁵ With autonomy on its way out and unenforceable contracts failing to protect donors from parental liability, some clinics may be opting for an Open ID system similar to the United Kingdom.¹²⁶ This lack of uniform regulation may be unsettling for those donors who were promised anonymity and now learn that it can no longer be guaranteed.¹²⁷

2. Privacy

This loss of anonymity does not, however, necessitate a loss of privacy for those who have donated or plan to donate genetic material in the future. While maintaining anonymity may have prevented the disclosure of a name or identity in the past, the right of privacy may continue to protect those individuals who have donated from the intervention of others.¹²⁸ The booming sperm donation industry survives off donors like Bryce Cleary, who were promised impossible anonymity, but whose privacy may still be protected.

Many of these men donated when they were young and, after “experience[ing] fatherhood in real life,” wanted nothing to do with

123. Swenson, *supra* note 1.

124. Keshavan, *supra* note 15.

125. A recent Texas appellate court found a known sperm donor to be the legal father of the donor conceived child and awarded him custody rights and held him liable for child support. *See In re P.S.*, 505 S.W.3d 106, 109 (Tex. App. 2016).

126. Keshavan, *supra* note 15; *see also* Ashley Fetters, *Finding the Lost Generation of Sperm Donors*, THE ATLANTIC (May 18, 2020), <https://www.theatlantic.com/family/archive/2018/05/sperm-donation-anonymous/560588/> [<https://perma.cc/8X4T-QMDE>] (“[I]n 2011, Washington became the first state to enact legislation making [Open ID system] the default.”).

127. Ian Sample, *Teenager Finds Sperm Donor Dad on Internet*, THE GUARDIAN (Nov. 2, 2005, 8:42 PM), <https://www.theguardian.com/science/2005/nov/03/genetics.news> [<https://perma.cc/RB5M-HXYM>].

128. Richard Vaughn, *Is Sperm Donor Anonymity a Thing of the Past?*, INT’L FERTILITY L. GRP. (Oct. 30, 2020, 10:55 AM), <https://www.iflg.net/is-sperm-donor-anonymity-a-thing-of-the-past/> [<https://perma.cc/7EAZ-BMRP>].

their donor-conceived children.¹²⁹ Erin Jackson, founder of We Are Donor Conceived,¹³⁰ knows this all too well. After reaching out to her biological father and essentially receiving a “get lost” response, Jackson decided to create a support group and resource page for those like her.¹³¹ Founded in 2016, We Are Donor Conceived now has over 2,000 members.¹³² Its website hosts guides, personal testimonies, and videos for those donor-conceived children struggling to make sense of their identity with or without their “biological parent.”¹³³ While some reconnection stories may end with a cease-and-desist letter,¹³⁴ there are other stories like that of Peter Ellenstein who has met 20 of his donor-conceived children and regularly enjoys family dinners and traveling with them.¹³⁵

In either case, whether open to a relationship with the donor-conceived child or not, this Note contends that a donor should have a right to privacy.

IV. LESSONS FROM ACROSS THE POND: HOW A NATIONAL SYSTEM OFFERS MORE BENEFITS THAN DRAWBACKS

There are many lessons the United States can learn from the United Kingdom, specifically regarding a national uniform system with actual authority to regulate ART. A national system, like the HFEA, would allow the United States to keep a registry of donors and donor-

129. Zoe Heller, *Op-Ed: My Dad the Sperm Donor Wanted to Remain Anonymous*, L.A. TIMES (Jan. 26, 2020, 12:01 AM), <https://www.latimes.com/opinion/story/2020-01-26/opinion-sperm-donor-dad-offspring> [<https://perma.cc/X8Z6-SQEK>].

130. WE ARE DONOR CONCEIVED, <https://www.wearedonorconceived.com/> [<https://perma.cc/4LCU-3JWB>].

131. Elizabeth Chuck, *From Sperm Donor to “Dad”: When Strangers with Shared DNA Become a Family*, NBC NEWS (Nov. 17, 2019, 11:56 AM), <https://www.nbcnews.com/news/us-news/sperm-donor-dad-when-strangers-shared-dna-become-family-n937366> [<https://perma.cc/DV9J-LSWX>].

132. WE ARE DONOR CONCEIVED, *2020 We Are Donor Conceived Survey Report* (Sept. 17, 2020), <https://www.wearedonorconceived.com/2020-survey-top/2020-we-are-donor-conceived-survey/> [<https://perma.cc/44UL-QZUZ>].

133. WE ARE DONOR CONCEIVED, *supra* note 130.

134. Jacqueline Mroz, *A Mother Learns the Identity of Her Child's Grandmother. A Sperm Bank Threatens to Sue*, N.Y. TIMES (Feb. 16, 2019, 5:00 AM), <https://www.nytimes.com/2019/02/16/health/sperm-donation-dna-testing.html> [<https://perma.cc/9SYC-4CBF>].

135. Chuck, *supra* note 131.

conceived children.¹³⁶ The donor-conceived child would be able to apply for their donor's non-identifying information at age sixteen and identifying information after age eighteen. This system would protect both the child's identity rights, and the donor's privacy rights, as the registry could track those donors who desire to be contacted and those who prefer to remain uninvolved.

The UPA, UPC, and ABA have offered solutions and resources to create a unified framework for the United States,¹³⁷ but without any federal authority requiring the states to enact and enforce them, they remain only suggestions. The United States should follow the system of HFEA and have a single authority that creates a unified donor registry, regulates licensing, and sets standards in order to create an Open ID system for the United States. While this is no quick fix for the United States, one solution for those individuals who donated genetic material under the false pretenses of anonymity is estate planning.¹³⁸

A. *An American Attempt at a Uniform Framework*

The three most recent attempts to regulate a unified approach to ART in the United States are seen in the 2017 UPA updates,¹³⁹ 2019 UPC revisions,¹⁴⁰ and the adoption of the ABA Model Act Governing Assisted Reproduction 2019 update.¹⁴¹

1. Uniform Parentage Act

The Uniform Parentage Act of 1973 was enacted to "provide a comprehensive scheme for addressing issues of paternity, embryo ownership, and genetic testing."¹⁴² With changes in cultural views and technology, the UPA has been updated several times.¹⁴³ Its last update in 2017 included a new section that recognizes an intended parent as a legal parent of a donor-conceived child and provides that a donor is not

136. The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/151, art. 2, ¶ 1 (Eng.).

137. UNIF. PARENTAGE ACT (2017), U.L.A. (2019); UNIF. PROB. CODE (amended 2019) (UNIF. L. COMM'N); MODEL ACT GOVERNING ASSISTED REPRODUCTION [2019] RESOLUTION (AM. BAR ASS'N 2019).

138. Alexis S. Gettier & Margaret St. John Meehan, *The "ART" of Estate Planning: Assisted Reproductive Technology Issues to Consider*, 43 TAX MGMT. ESTS., GIFTS & TRS. J. 188, 191-92 (2018).

139. UNIF. PARENTAGE ACT (2017), U.L.A. (2019).

140. UNIF. PROB. CODE (amended 2019) (UNIF. L. COMM'N).

141. MODEL ACT GOVERNING ASSISTED REPRODUCTION [2019] RESOLUTION (AM. BAR ASS'N 2019).

142. Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 318 (2019).

143. UNIF. PARENTAGE ACT (2017), U.L.A. (2019).

a parent of a child conceived by means of ART.¹⁴⁴ However, only six states have enacted this update.¹⁴⁵ Eleven other states have enacted the 2002 UPA, either in part or whole, and have not yet conformed to the latest update.¹⁴⁶ It is unclear why so few states have enacted the UPA, but there is evidence that most states do not see this shift in ART and estate planning for the threat that it is and refuse to acknowledge the need for the changes or adoption of the UPA.¹⁴⁷

2. Uniform Probate Code

The Uniform Probate Code added Section 2-120 and Section 2-121 in 2008.¹⁴⁸ These sections were created to address issues stemming from assignment of parenting and inheritance issues related to ARTs.¹⁴⁹ The promulgation of the 2017 UPA created a need for a further round of revisions to the UPC's intestate and class-gift provisions, including a new definition for the term "heir."¹⁵⁰ Many of the provisions of the UPA are incorporated by reference into the UPC.¹⁵¹ This incorporation simplifies the code and gives a more national consensus for those States that choose to adopt either the UPC or UPA.¹⁵²

3. The ABA's Model Act Governing Assisted Reproductive Technology

Finally, the American Bar Association adopted the Model Act Governing Assisted Reproductive Technology ("Model Act") to address many of the legal issues left unresolved by the UPA or UPC.¹⁵³ Most

144. *See id.* § 609.

145. As of November 2021, Rhode Island, Connecticut, Maine, California, Vermont, and Washington are the only States to enact the UPA 2017 update. *Parentage Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> [<https://perma.cc/H7EL-8RRJ>].

146. Illinois, Maine, New Mexico, Alabama, Oklahoma, North Dakota, Utah, Delaware, Wyoming, Washington, and Texas enacted the 2002 UPA. *Parentage Act (2002)*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315> [<https://perma.cc/T3X8-MWX6>].

147. *See, e.g.*, Memorandum from Dan L. Miller, Pennsylvania House Rep., on H. B. 115, Pennsylvania House Rep. (Dec. 1, 2020) (on file with the Pennsylvania House of Representatives).

148. UNIF. PROB. CODE §§ 2-120, 2-121 (amended 2019) (UNIF. L. COMM'N).

149. Casolo et al., *supra* note 142 at 318–19.

150. UNIF. PROB. CODE § 1-201(20) (amended 2019) (UNIF. L. COMM'N).

151. *Id.*

152. *Id.* §§ 2-115, 2-118–121, 2-705, 3-703, 3-705.

153. Casolo et al., *supra* note 142, at 318.

notably, the Model Act clarified the legal interest of the parties involved in ART procedures.¹⁵⁴ The newly ratified 2019 Model Act is “the prime example of best practices and requirements for the safety of all the participants in an assisted reproduction arrangement” because it creates a flexible framework for regulating the legal rights, obligations, and protections of the various stakeholders involved in ART.¹⁵⁵

These three examples show that the United States can sacrifice some state-level autonomy for the benefit of clarification in the complex realm of ART. While states have the freedom to handle issues of ART in almost any way they see fit, the UPA, UPC, and ABA provide useful resources as a “starting point for national consensus.”¹⁵⁶ While the United States has not yet conformed to the United Kingdom’s HFEA model, it is one step closer to a uniform framework for ART.

B. The United States Needs a HFEA Open ID System

As donor anonymity becomes a thing of the past,¹⁵⁷ the United States should adopt similar Open ID regulations to the United Kingdom. This system would allow the donor-conceived child to access medical characteristics of the donor parent(s) before their eighteenth birthday and have the option to know the identity of the donor parent(s) after their eighteenth birthday.¹⁵⁸ An Open ID system would also promote some sense of donor privacy and reduce the shock and inheritance questions seen in the Bryce Cleary story.¹⁵⁹ In an Open ID system, those individuals who choose to donate would know and understand the possibility of a donor-conceived child contacting them, and would have enforceable legal protections in place to shield from parental liability or obligations.

1. Congress’s Commerce Clause Authority

A national solution sounds simple but would require the United States to adopt a federal system similar to the HFEA where a register

154. *Id.*

155. Rich Vaughn, *American Bar Association Ratifies 2019 ART Model Act*, INT’L FERTILITY L. GRP. (Jan. 29, 2019, 8:43 AM), <https://www.iflg.net/american-bar-association-ratifies-2019-art-model-act/#:~:text=The%20ABA%20began%20work%20on,the%20field%20of%20ART%20law> [<https://perma.cc/NL3Y-8LR2>].

156. Casolo et al., *supra* note 142, at 318.

157. Keshavan, *supra* note 15.

158. Andrew Hellman & Professor Glenn Cohen, *Prohibiting Sperm Donor Anonymity in the US and Possible Effects on Recruitment and Compensation*, BIONEWS (Apr. 3, 2017), https://www.bionews.org.uk/page_e_95954 [<https://perma.cc/4W36-2NDH>].

159. See *infra* Part V; see also Swenson, *supra* note 1.

of information can be kept and protected.¹⁶⁰ While the UPA, UPC, and ABA Model Act propose optional changes, the individual states control whether to adopt the systems proposed.¹⁶¹

While the states have pioneered regulating ART in the United States, a system of federal regulation is not inconceivable. The Supreme Court continues to uphold the right to procreate or not procreate as a fundamental right.¹⁶² This fundamental right, first seen in *Roe v. Wade*,¹⁶³ was again upheld in *Planned Parenthood v. Casey*¹⁶⁴ nineteen years later. This fundamental right to procreate is federally protected, and the ART clinics which buy and sell biological material, often crossing state lines, should be federally regulated. The strongest justification for federal regulation of this area is the Commerce Clause, which gives Congress the power to regulate matters of interstate commerce.¹⁶⁵

However, Congress's Commerce Clause powers are limited.¹⁶⁶ Congress must include explicit findings that the activity being regulated "substantially affect[s]" interstate commerce.¹⁶⁷ Under this line of thinking, *Wickard v. Filburn*¹⁶⁸ provides a rationale to regulate ART nationally under the Commerce Clause. *Wickard v. Filburn* introduced the "cumulative effect" theory, which expanded the Commerce Clause power.¹⁶⁹ The cumulative effect theory provides that Congress may regulate not only individual acts, but an entire class of acts that have a substantial economic effect on interstate commerce.¹⁷⁰ The ART industry already heavily implicates interstate commerce with intended parents traveling all over the world to find the perfect donor even shipping samples across state lines.¹⁷¹ There is no reason why the

160. See HUM. FERTILIZATION & EMBRYOLOGY AUTH., *supra* note 49.

161. See *supra* Section IV.A.

162. Meena Lal, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA HIGH TECH. L.J. 517, 537 (1997).

163. 410 U.S. 113 (1973).

164. 505 U.S. 833 (1992).

165. U.S. CONST. art. 1, § 8, cl. 3.

166. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

167. *Id.*

168. 317 U.S. 111,120 (1942).

169. *Id.* at 125.

170. Lal, *supra* note 162, at 538.

171. Ellen S. Fischer, *The 'Wild West' of Medicine: An Argument for Adopting the United Kingdom's 'HFEA' Framework, to Improve the Market for Assisted Reproduction in the United States*, 39 NW. J. INT'L L. & BUS. 201, 222 (2019).

United States federal government could not use the Commerce Clause to regulate ART and create a national system like the HFEA.

The role of commerce in the buying and selling of human genetic material is one of the most controversial topics in modern health policy.¹⁷² One example of the Commerce Clause power used appropriately is seen in Congress's National Organ Transplant Act in 1984.¹⁷³ In Title III, the Act indicates, "it shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."¹⁷⁴ The term "human organ" means the human "kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ specified by the Secretary of Health and Human Services by regulation."¹⁷⁵ The definition of "human organ" includes those organs also derived in any subpart thereof a fetus.¹⁷⁶ Consequently, it is not a stretch to think of a frozen embryo or donated genetic material as part of the "human organ" definition, transfer of which is barred by Congress's National Organ Transplant Act.

While the United States does not currently have unified national regulations for ART, the American Society for Reproductive Medicine argues ART is one of the most highly regulated medical practices in the U.S.¹⁷⁷ The ASRM was founded in 1944 as an organization purely dedicated to the development of the science of reproductive medicine.¹⁷⁸ The ASRM believes that (1) state regulations, such as medical licensing, continuing medical education, and disciplinary requirements; (2) federal regulations, such as the Fertility Clinic Success Rate and Certification Act ("FCSRCA"), mandatory reporting to the Centers for Disease Control ("CDC"), and Food and Drug Administration ("FDA") regulation of drugs; and (3) professional self-regulations, such as the "professional societies [of] ASRM and SART" (Society for Assisted Reproductive Technology) are more than enough to "develop ethical and practical guidelines" for ART.¹⁷⁹ Unfortunately, this thinking is

172. B. Björkman & S. O. Hansson, *Bodily Rights and Property Rights*, 32 J. MED. ETHICS 209, 209 (2006).

173. 42 U.S.C. § 273.

174. 42 U.S.C. § 274(e).

175. *Id.*

176. *Id.*

177. AM. SOC'Y FOR REPROD. MED., OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY 2 (2010).

178. *History of ASRM*, AM. SOC'Y FOR REPROD. MED., <https://www.asrm.org/about-us/history-of-asrm/> [<https://perma.cc/6L6C-G5J3>].

179. *Id.* at 5–6.

incorrect. While the United States may have a plethora of regulations, its implementation is ineffective, as those who violate these regulations, standards, and guidelines are rarely sanctioned.¹⁸⁰

An American HFEA system would allow for a singular authority to create uniform regulations throughout the country and see that they are upheld. It would allow for the creation of a unified donor registry and set the standards of creating an Open ID system for the United States, thus removing any ambiguity from the process and solving the issue of donor-conceived children finding their genetic parents on the internet. A unified system has been clearly demonstrated to be successful in the United Kingdom and therefore presents a successful option for the United States.

2. One Potential Problem for Open ID Systems

A conceivable consequence of an Open ID system is a decrease in donor participation, as seen in the United Kingdom.¹⁸¹ Harvard Law School bioethics professor I. Glenn Cohen conducted a study in 2016 which revealed about 29% of potential sperm donors said they would “refuse donating if their names were put on a registry.”¹⁸² The study suggested that prohibiting anonymous sperm donations in the United States would lead to a decline in the number of donors and that those who were still willing to donate would likely demand more compensation.¹⁸³

While on its face, a donor decline in the United States may not seem like an issue, the real problem arises when one shifts the focus from the United States to the global sperm market as a whole. The world's sperm market is primarily found in the United States and

180. Ollove, *supra* note 68; *see also* *UH Freezer Malfunction Update*, CLEVELAND.COM (Sept. 29, 2019), [https://www.cleveland.com/news/2019/09/uh-freezer-malfunction-update-more-than-150-families-settle-lawsuits-in-loss-of-embryos.html#:~:text=University%20Hospitals'%20main%20campus%20in%20Cleveland.&text=CLEVELAND%2C%20Ohio%20%E2%80%93%20More%20than%2020150,Center's%20fertility%20clinic%20last%20year%20\[https://perma.cc/9FFX-WVXP\]](https://www.cleveland.com/news/2019/09/uh-freezer-malfunction-update-more-than-150-families-settle-lawsuits-in-loss-of-embryos.html#:~:text=University%20Hospitals'%20main%20campus%20in%20Cleveland.&text=CLEVELAND%2C%20Ohio%20%E2%80%93%20More%20than%2020150,Center's%20fertility%20clinic%20last%20year%20[https://perma.cc/9FFX-WVXP]) (explaining a situation where a freezer malfunctioned at a local hospital, losing over 4,000 eggs and embryos. Most of the 150 families settled their lawsuits outside the courts and the hospital faced no other consequences.).

181. Keshavan, *supra* note 15.

182. Glenn Cohen et al., *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J.L. & BIOSCIENCES 468, 468 (2016).

183. Cohen's proposed solution to the decline in sperm donations is to pay each donor more per donation where anonymity is removed. His study found that participants would demand an additional \$60 to \$127 per donation, on top of the typical payment. *Id.* at 470.

Denmark.¹⁸⁴ The reason for this control over the global market is, in part, because of laws allowing anonymity for donors.¹⁸⁵

As Ayo Wahlberg, Professor at the University of Copenhagen, explains, “[t]he repeal of anonymity in many parts of the western world totally changed the game . . . [a]s soon as [anti-anonymity] legislation kicks in, numbers plummet.”¹⁸⁶

Most of the world now looks to the United States and Denmark for its sperm donations.¹⁸⁷ However, with the inability to guarantee anonymity, many sperm banks and clinics in the United States, including the country’s largest sperm bank, California Cryobank, changed their policy to only take non-anonymous donations going forward.¹⁸⁸ Currently, California Cryobank, has 308 anonymous donors: 116 “open donors,” who agree to be contacted through the bank as an intermediary, and 134 “ID disclosure” donors, who agree to direct contact if initiated by the offspring.¹⁸⁹ If Professor Wahlberg’s theory is correct, and a decline in donation occurs as anonymity is removed, not only the American market—but also the *global* market of sperm donation—will suffer.

C. Estate Planning Is Essential to Dealing with the Bigger Problem

With disagreements over a federally-regulated system and the possibility of sperm donation declining, it may take years or even decades for the United States to come to a unified national approach to regulating ART. In the meantime, donors who were promised anonymity in the past or those who are still considering donating genetic material before unified regulations are established, have a simple and easily accessible solution in front of them: estate planning.¹⁹⁰

184. Soo Youn, *America’s Hottest Export? Sperm*, THE GUARDIAN (Aug. 15, 2018, 6:00 AM), <https://www.theguardian.com/science/2018/aug/15/americas-hottest-export-sperm-fertility> [<https://perma.cc/2UPN-3X7V>].

185. *Id.*

186. *Id.*

187. Naina Bajekal, *Why So Many Women Travel to Denmark for Fertility Treatments*, TIME (Jan. 3, 2019, 6:58 AM), <https://time.com/5491636/denmark-ivf-storkklinik-fertility/#:~:text=And%20for%20those%20eager%20to,and%20exports%20more%20than%2090%25> [<https://perma.cc/YFS8-TVAD>]; Nellie Bowels, *The Sperm Kings Have a Problem: Too Much Demand*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html> [<https://perma.cc/9SV5-KSFZ>].

188. Youn, *supra* note 184.

189. *Id.*

190. Gettier & St. John Meehan, *supra* note 138, at 188.

As an expert in third-party assisted reproductive law, Judith A. Hoechst, Esq. strongly encourages others in her field to include estate planning when clients use ART.¹⁹¹ While many parents are reluctant to spend more money on estate planning after already paying large amounts for ART treatments, Hoechst explains that “[e]state planning at the time of contract formation . . . can help avoid litigation after death or at the time of divorce and ensure that clients’ intentions are protected.”¹⁹²

While Hoechst’s estate planning practice may protect the parents of a donor-conceived child,¹⁹³ little is done to legally protect the donor. The primary concern for donors is the lack of uniform contracts and laws, which may leave them exposed to legal parental obligations or duties, even after the donor-child turns eighteen.¹⁹⁴ Generally, if a parent-child relationship exists in any capacity, absent a clear contractual intent, the law presumes a non-marital child as part of the class of “descendants” or “children” in a decedent’s will.¹⁹⁵ If a donor is contacted by a donor-conceived child and inadvertently acknowledges the donor-conceived child as his own, that child is considered an “heir” and is legally entitled to inherit from both the donor’s estate as well as the child’s legally-recognized parents.¹⁹⁶

To avoid giving a donor-conceived child the unintentional right to inherit from their donor, those who have donated genetic material should update their estate plan.¹⁹⁷ A donor’s will should clearly identify who is considered a “child,” naming the children then living, children in utero, and posthumous children, and specifically disinheriting any children conceived through ART, whether known or unknown.¹⁹⁸

Nevertheless, intestacy and reproductive laws vary in each state. In California, for example, courts have held that genetic material is a

191. Judith A. Hoechst, *Fifty-Something and Pregnant: How ART Has Extended Fertility—and Generated New Legal Concerns for Parents and Children*, in 50 FAMILY ADVOCATE 6–7 (Am. Bar. Ass’n. 2016).

192. *Id.* at 7.

193. *Id.*

194. Casolo et al., *supra* note 142, at 330–31.

195. Sarah J. Khoury, *Era of ‘ART’ – The Impact of Assisted Reproductive Technology in Estate Planning*, 4 THE SPOTLIGHT 3 (2019).

196. Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 381 (2009).

197. HAAS & ASSOC., P.A., *Defining Child: Estate Planning Issues for Families with Children Born Through Assisted Reproduction Technology (ART)*, <https://carolinafamilylaw.com/child-estate-planning-children-born-assisted-reproduction-technology-art/> [https://perma.cc/GP9Z-ACDZ].

198. Hoechst, *supra* note 191, at 7.

unique type of property and donor intent should be heavily factored when making decisions about genetic material.¹⁹⁹ While state laws differ on a donor's parental rights, usually, if a child is conceived through artificial insemination and the donor is not married to the other intended parent, they will not have parental rights for or obligations to the donor-conceived child.²⁰⁰

In general, many state laws say that if conception occurs through artificial insemination, then there is an automatic presumption that the donor gives up his parental rights.²⁰¹ However, there are exceptions. In Pennsylvania, for example, genetic material determines legal parentage, meaning that if a DNA test shows the sperm donor is the father, then he will be considered the legal father—even if his name is not on the birth certificate.²⁰² In the last five years a Texas court held a known sperm donor for a lesbian couple as a legal father of the donor-conceived child, even though the parties signed a contract.²⁰³

Incorporating issues involving ART into a person's estate plan can cause some tension but it is prudent in cases with no explicit contracts surrounding donated genetic material. Where genetic material is involved, a person's wishes and intent should be clearly stated.²⁰⁴ This may include explicitly disinheriting any known or unknown children conceived through donated genetic material or ART.²⁰⁵ If a testator has previously donated, or plans to donate genetic material, using open-ended terminology such as "my children" in an estate plan can lead to will contests when administering an estate.²⁰⁶ To avoid ambiguity, a testator should individually name each child they wish to inherit under their estate. Even in jurisdictions where the donor-conceived child has little to no legal case, this small change can prevent a large headache

199. *Kievernagel v. Kievernagel*, 166 Cal. App. 4th 1024 (App. 3d Dist. 2008); *Hecht v. Super. Ct. L.A. Cnty.*, 16 Cal. App 4th 836, 850–51 (App. 2d Dist. 1993).

200. Sarah Tipton, *Does a Known Sperm Donor Have Any Parental Rights or Obligations?*, LEGALMATCH (June 28, 2018), <https://www.legalmatch.com/law-library/article/sperm-donor-parental-rightsobligations.html> [<https://perma.cc/6KDJ-PVP9>].

201. *Id.*

202. *Id.*

203. *In re P.S.*, 505 S.W.3d 106, 109 (Tex. App. 2016).

204. *Gettier & St. John Meehan*, *supra* note 138, at 189.

205. *Estate Planning for Your Embryos: Do You Have a Plan?*, THOMSON L. (Dec. 3, 2015), <https://cathompsonlaw.com/estate-planning-for-your-embryos-do-you-have-a-plan/> [<https://perma.cc/L6S8-UVGZ>].

206. HAAS & ASSOC., P.A., *supra* note 197.

in the future.²⁰⁷ Optimistically, in a few years, the United States will have a uniform solution, and there will be no need to rely on individual protections from the lack of federal regulations concerning ART.

V. CONCLUSION

In a world of readily-available home genetics tests, donor anonymity can no longer exist. As a result, the United States should learn from the United Kingdom's HFEA and create a controlling system that oversees and regulates artificial reproductive technology modeled after the HFEA. The solutions proposed by the UPA, UPC, and ABA will never work unless they are enacted by all American states, and the current trend suggests acceptance is unlikely. Even if the proposed systems are enacted, the United States would still lack a system of national authority and enforcement power like the HFEA.

Creating a unified federal system in the United States would also allow for a national registry to track donors, regulate clinics, and set the laws for the country. While an Open ID system may decrease the number of willing donors in the United States, it would prevent donors who were promised anonymity from being tracked down by a donor-conceived child through companies like ancestry.com. The unified laws would also protect gamete donors by establishing laws of legal parentage and obligations and create uniform agreements for the benefit of all the parties involved in ART. This solution does impact the emphasis on individual liberty and the free market that the United States holds so dearly, but it will allow for informed choices in the realm of health care where there is a lot on the line.

Author Alicia Ouellette captures this idea when stating, "Even within a libertarian model, autonomous consumers need reliable information on the quality of ART providers."²⁰⁸ ART is not just a business enterprise, it encompasses one of the most personal areas of health care, and the United States should take more consideration to ensure high standards of care for its citizens.

While these are not perfect solutions, it is important for the United States to begin to consider regulating these issues as more emerge every year. ART is growing and evolving at an exponential rate with very few laws in the United States restraining it. While the United States still struggles to find the right balance between the anonymity of the donor and the identity rights of a donor-conceived child, estate planning is essential for those individuals who have donated genetic material in the past or will consider donating genetic material in the future.

207. See generally Gettier & St. John Meehan, *supra* note 138, at 189.

208. Ouellette et al., *supra* note 42, at 446.