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# Comments: What's Yours Is Ours? Gamete Donation in the Marital Context: Why Courts and Legislatures Should Not Interfere with an Individual's Fundamental Right to Privacy

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# WHAT'S YOURS IS OURS? GAMETE DONATION IN THE MARITAL CONTEXT: WHY COURTS AND LEGISLATURES SHOULD NOT INTERFERE WITH AN INDIVIDUAL'S FUNDAMENTAL RIGHT TO PRIVACY

## I. INTRODUCTION

In August 2012, a woman from Surrey, England, ignited a worldwide debate when she wrote to the Human Fertilisation and Embryology Authority demanding that sperm donation requirements include consent of the donor's spouse.<sup>1</sup> Arguing that her husband's sperm should be treated as a joint "marital asset," the woman quoted her marital vow: "All that I am is yours."<sup>2</sup> The woman admitted that she was appalled when she learned that her husband had donated his sperm without her consent.<sup>3</sup> She feared that her husband's sperm "may already have been used to father children who in 18 years' time may come knocking on [their] door, disrupting family life and unsettling [their] own children."<sup>4</sup>

In 2005, an English law was enacted that gave all children born through sperm donation the right to trace their biological father when they reach adulthood, solidifying this woman's concerns.<sup>5</sup> Although United States courts have not yet made a similar ruling,<sup>6</sup> the practice of open gamete donation<sup>7</sup> and the availability of registries allowing children born through gamete donation to contact donors and half-siblings make donor-child contact more likely than ever before.<sup>8</sup> Because of this, courts and legislatures should consider the rights of

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1. Tamara Cohen, *Wife Whose Husband Became Secret Sperm Donor Calls for Change in the Law to Require Partners' Consent*, DAILY MAIL (Aug. 26, 2012 6:34 AM), <http://www.DailyMail.co.uk/news/article-2193780/>.
  2. *Id.*
  3. *Id.*
  4. *Id.*
  5. See Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born from Gamete Donations in the United States*, 45 FAM. CT. REV. 116, 121 (2007).
  6. *Id.*
  7. "Donor gametes" are donated egg and sperm cells that are used to create embryos, allowing parents to give birth to children through assisted reproduction. *Id.* at 117.
  8. Jean Benward et al., *Maximizing Autonomy and the Changing View of Donor Conception: The Creation of a National Donor Registry*, 12 DEPAUL J. HEALTH CARE L. 225, 227-28 (2009).

the donor spouse and the effect that a child born outside of the marriage through gamete donation may have on existing family life when a married person donates gametes.<sup>9</sup>

This Comment explores the potential advantages and disadvantages of United States courts and legislatures requiring spousal consent before gametes are donated.<sup>10</sup> First, this Comment describes how public policy views marriage as a partnership and favors sharing between spouses.<sup>11</sup> Second, this Comment looks at the procedures, guidelines, and regulations of gamete donation to determine the industry's possible effect on marital life.<sup>12</sup> Third, this Comment considers the arguments for and against requiring spousal consent prior to gamete donation.<sup>13</sup> Finally, this Comment suggests that courts and legislatures honor the fundamental right to privacy by not requiring spousal consent before gametes are donated, based on the "slippery slope" that spousal consent may cause by inhibiting other personal decisions and the negative impact that spousal consent would have on the gamete donation industry.<sup>14</sup>

## II. PUBLIC POLICY VIEWS MARRIAGE AS A PARTNERSHIP

The right to marry is a fundamental Constitutional right<sup>15</sup> that has historically been characterized by the "three goods" of procreation, fidelity, and life-long commitment.<sup>16</sup> The Supreme Court has described marriage as:

[A] coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>17</sup>

Marriage is not "a union of economically separate individuals, with each acquiring property for themselves, and not for the marital

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9. *See id.* at 238–39.

10. *See infra* Parts V–VI.

11. *See infra* Part II.

12. *See infra* Part III–IV.

13. *See infra* Parts V–VI.

14. *See infra* Part VII.

15. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

16. Lynn D. Wardle, *What is Marriage?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53, 79 (2006).

17. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

unit.”<sup>18</sup> Rather, marriage has become viewed as a “shared enterprise, a joint undertaking, that in many ways is akin to a partnership.”<sup>19</sup> It is expected that within this partnership, spouses will share resources, responsibilities, and risks, which in turn will encourage commitment, gender equality, and joint childcare responsibilities.<sup>20</sup> This partnership ideal creates a public policy notion of promoting sharing behavior between married spouses.<sup>21</sup>

It is important to note that “sharing principles do function in a large majority of marriages and . . . the generally applicable law should further and protect the majority expectations of sharing. Most spouses expect to pool resources, to share property and to benefit from each other’s earnings.”<sup>22</sup> Although the partnership principle is primarily used to determine the division of assets at the dissolution of a marriage,<sup>23</sup> it is equally important for courts and legislatures to determine whether public policy also encourages spouses to share the decision of deciding whether to donate gametes, and furthermore, whether spousal consent should be required when doing so.

### III. THE HISTORY OF GAMETE DONATION

#### A. Donation Procedures

Approximately 40,000 children are born in the United States each year with the use of donated sperm and eggs.<sup>24</sup> Sperm donation has been available since 1945, while egg donation was first successfully used for conception in 1984.<sup>25</sup> These practices, as well as all other

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18. Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM. LAW. 335, 336 (2003).

19. Ellen J. Beardsley, *The Revised UPC Elective Share: Missing Essential Partnership Principles*, 13 QUINNIPIAC PROB. L.J. 225, 229 (1998) (quoting *Med. Bus. Assocs., Inc. v. Steiner*, 588 N.Y.S.2d 890, 894 (N.Y. App. Div. 1992)).

20. Martha M. Ertman, *Marriage as a Trade: Bridging the Public/Private Distinction*, 36 HARV. C. R.-C.L. L. REV. 79, 103 (2001).

21. Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 199 (1987).

22. Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455, 461 (2003).

23. Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 148 (2004).

24. Julie L. Sauer, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 924–25 (2009).

25. *Id.* at 925, 928.

artificial reproductive technologies, rapidly gained popularity after the birth of the first “test-tube baby,” Louise Brown in 1978.<sup>26</sup>

The donation process for a male is very different than for a female.<sup>27</sup> When a male chooses to donate sperm, he must first provide a detailed medical history and a semen sample that undergoes various testing and screening procedures to ensure that his semen meets the sperm bank’s standards.<sup>28</sup> Once it is determined that his semen has a high sperm count and is free of any inheritable or infectious diseases, he may contract to donate.<sup>29</sup> The donor typically agrees to produce samples one to two times per week for a year,<sup>30</sup> and is compensated \$100 to \$350 per vial.<sup>31</sup>

However, when a woman donates her eggs, she must complete a medical process far more extensive than sperm donation.<sup>32</sup> After finishing medical history questionnaires, medical screening, and psychological screening to determine that she meets the donation bank’s requirements, the woman begins taking medicine that stops the normal functioning of her ovaries.<sup>33</sup> She then completes hormone injections over the next four weeks to stimulate the ovaries to create more eggs than usual.<sup>34</sup> After blood tests and ultrasounds show that the donor is responding positively to the injected hormones, the eggs are harvested and surgically removed from the woman through transvaginal ovarian aspiration.<sup>35</sup> The entire process takes approximately six weeks and the woman is paid between \$5,000 and \$8,000 for the cycle.<sup>36</sup>

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26. Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 6–7 (2008). Louise Brown was the first child conceived through in vitro fertilization with the use of her father’s sperm and mother’s egg. Marsha Garrison, *The Technological Family: What’s New and What’s Not*, 33 FAM. L.Q. 691, 692 (1999).

27. See Mary Kate Kearney, *Identifying Sperm and Egg Donors: Opening Pandora’s Box*, 13 J.L. & FAM. STUD. 215, 224–26 (2011).

28. *Id.* at 225. Typical standards include screening for communicable diseases and providing a semen sample that is frozen and then thawed to determine its semen parameters. *Id.*; Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 COLUM. J. GENDER & L. 1, 1 (2012).

29. Byrn & Ireland, *supra* note 28, at 1.

30. Anetta Pietrzak, *The Price of Sperm: An Economic Analysis of the Current Regulations Surrounding the Gamete Donation Industry*, 14 J.L. & FAM. STUD. 121, 130 (2012).

31. Kearney, *supra* note 27, at 225.

32. *Id.*

33. See Sauer, *supra* note 24, at 926.

34. *Id.*

35. *Id.* at 926–27.

36. *Id.*

*B. The Gamete Donation Industry*

While the donation procedures and pay between sperm and egg donors vary, the general application process and regulations of the gamete banks are similar.<sup>37</sup> Overall, the donation industry prides itself on being very selective when choosing donors,<sup>38</sup> and bases its practices on factors including “cultural value, price, supply, and demand.”<sup>39</sup> Sperm and egg banks “must ‘recruit ‘sellable’ donors who provide ‘high quality’ gametes to recipients who ‘shop’ different . . . banks.”<sup>40</sup> Typically, donors must be in their early twenties to mid-thirties, well educated, and in good health.<sup>41</sup> In order to meet customer demand, gamete banks allow donee-parents to “pick and choose” gametes by viewing donor profiles to find which donor best meets their list of qualifications.<sup>42</sup> Donor profiles at a minimum include “detailed, non-identifying information about the potential donor’s characteristics and medical history.”<sup>43</sup> To keep up with market competition, many gamete banks have begun to include more identifying information, such as “audio interviews, childhood pictures, adult pictures, silhouettes, and staff impressions of the donor.”<sup>44</sup>

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37. *See id.* at 926–29.

38. Byrn & Ireland, *supra* note 28, at 1.

39. Pietrzak, *supra* note 30, at 129–30.

40. *Id.* at 130 (quoting Rene Almeling, *Selling Genes, Selling Gender Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 325 (2007)).

41. *See* Sauer, *supra* note 24, at 926; *see also* Kearney, *supra* note 27, at 225; Pietrzak, *supra* note 30, at 131; *Becoming a Donor*, THE WORLD EGG BANK, <http://www.theworldeggbank.com/donors-qualifications.html> (last visited Nov. 21, 2013) (including requirements that egg donors be between 18–30 years old and in good mental and physical health); *Become a Sperm Donor*, CAL. CRYOBANK, <http://www.cryobank.com/Services/Become-a-Sperm-Donor/> (last visited Nov. 21, 2013) (including requirements that the sperm donor be between the ages of 19–38, in good health, and attending a university or holding some advanced degree); *Egg Donor Information: Requirements for Donor*, EGG DONATION CTR. OF DALLAS, INC., <http://www.eggdonorcenter.com/dnreq.html> (last visited Nov. 21, 2013) (including requirements that the egg donor be between the ages of 18–29, be in good health, and have an SAT score of at least 1100 and a G.P.A. of at least 3.0).

42. Pietrzak, *supra* note 30, at 131.

43. Dennison, *supra* note 26, at 11–12.

44. Andrea Mechanick Braverman, *How the Internet is Reshaping Assisted Reproduction: From Donor Offspring Registries to Direct-to-Consumer Genetic Testing*, 11 MINN. J. L. SCI. & TECH. 477, 485 (2010).

Sperm and egg banks also allow the donor to choose between closed and open donation.<sup>45</sup> When a donor chooses to remain anonymous, he or she contracts to giving the client only non-identifying information, and relinquishes all control of the donated sample.<sup>46</sup> He or she will never know whether the sample was used to conceive a child.<sup>47</sup> However, if a donor chooses an open donation, he or she allows the gamete bank to give identifying information to children born from the sample if requested.<sup>48</sup>

Although most donors choose to remain anonymous,<sup>49</sup> there has been a recent movement towards open donation.<sup>50</sup> Other countries have banned the use of anonymous gamete donors, including Sweden, Austria, Germany, Switzerland, New Zealand, the Australian states of Victoria and Western Australia, the Netherlands, Norway, and the United Kingdom.<sup>51</sup> These countries relied on a child's right to know his or her biological parentage, the best interests of the child, and the importance of knowing one's medical history to support these laws.<sup>52</sup> Although these laws have resulted in a smaller supply of available gametes after implementation, it has been argued that the resulting donor profile is more favorable.<sup>53</sup> While anonymous donors "were predominantly students donating for financial gain . . . [,] post-legislation donors are older men in their late 30s or 40s, married with children, motivated by a desire to help infertile couples."<sup>54</sup> Sperm banks in the United States also offer higher pay to donors who choose open donation, further enticing donors to choose open donation over closed donation.<sup>55</sup>

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45. See Byrn & Ireland, *supra* note 28, at 1–2.

46. See *id.* at 2; see also Sauer, *supra* note 24, at 929.

47. Sauer, *supra* note 24, at 929.

48. Dennison, *supra* note 26, at 12.

49. Sauer, *supra* note 24, at 929.

50. See Braverman, *supra* note 44, at 485; Dennison, *supra* note 26, at 11.

51. Ilke Turkmendag et al., *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L J. L. POL'Y & FAM. 283, 284 (2008).

52. *Id.* at 284, 289, 291.

53. *Id.* at 288.

54. *Id.*

55. See *Donor Semen*, CAL. CYROBANK, <http://www.cryobank.com/Services/Pricing> (last visited Nov. 21, 2013) (stating that the price per vial of semen donated by an open donor costs \$100 more than a vial of semen donated by an anonymous donor); *Fees*, FAIRFAX CRYOBANK, <http://www.fairfaxcryobank.com/Fees2013.shtml> (last visited Nov. 21, 2013) (including prices for additional services to prospective donees, including costs for personal profiles, audio interviews, and childhood photographs of open donors). Egg donation websites typically do not state whether there is a greater cost for the use of an open donor's eggs or to view identifying information. See *Fees*, THE WORLD EGG BANK, <http://theworldeggbank.com/fees.html> (last visited Nov. 21, 2013).

#### IV. THE CURRENT LEGAL REGULATION OF GAMETE DONATION.

Today, regulation of the gamete industry in the United States is fairly undeveloped, especially in comparison to other countries, and is considered governed by laissez-faire economics.<sup>56</sup> There is no state or federal law that enforces or prohibits anonymous or open gamete donation.<sup>57</sup>

The Food and Drug Administration (F.D.A.) requires gamete banks to register with the F.D.A. and to list their address, functions, and the type of tissues handled.<sup>58</sup> Its Donor Eligibility Rule requires gamete donors to complete a physical examination, a medical history interview, and to be free of any infectious diseases.<sup>59</sup> If a donor is found to have a risk factor or evidence of an infectious disease, he or she is ineligible to donate.<sup>60</sup> However, the F.D.A. does not concern itself with any genetic abnormalities.<sup>61</sup> Its Good Tissue Practice rule calls for periodic inspections of gamete banks to ensure compliance with these rules.<sup>62</sup> The Center for Disease Control publishes an annual report solely on the success rates of fertility clinics.<sup>63</sup> No federal law exists concerning how many times a person can donate gametes, how many children can be conceived through the use of one donor, payment, or whether spousal consent is required for a married donor.<sup>64</sup>

Most state laws enacted regarding gamete donation discuss paternity issues and are based on the Uniform Parentage Act (UPA).<sup>65</sup> Some states have adopted the 1973 version of the UPA, which states that when a married woman is inseminated with donor sperm and

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56. See Dennison, *supra* note 26, at 8–10; Pietrzak, *supra* note 30, at 122.

57. Sauer, *supra* note 24, at 931.

58. Pietrzak, *supra* note 30, at 124.

59. *Id.*

60. *Id.*

61. *Id.* at 125.

62. *Id.*

63. Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 206–07 (2009).

64. *Id.* at 207.

65. Pieterzak, *supra* note 30, at 125. The Uniform Parentage Act was created by the National Conference of Commissioners on Uniform State Laws in 1973. This Act fostered the use of donated gametes, stating that when a wife is artificially inseminated by a physician with donor sperm and her husband consents, the husband shall be treated as the natural father of the resulting child. See Dennison, *supra* note 26, at 6.

conceives a child, her husband is considered the natural father.<sup>66</sup> Some have adopted the 2002 version of the UPA, which states that a donor is not a parent of a child conceived through assisted reproduction, and cannot sue or be sued regarding parental rights and obligations.<sup>67</sup> Others do not have any statute to protect donors from incurring the rights and responsibilities of a legal parent, and common law applies.<sup>68</sup> Only two states, Ohio and New York, have gone beyond the F.D.A.'s Donor Eligibility Rule to require more extensive screening of gamete donors for genetic risk factors.<sup>69</sup>

Although the American Society for Reproductive Medicine and the American Association of Tissue Banks offer guidance on some of these issues for donors and gamete banks, their recommendations are merely persuasive.<sup>70</sup> Therefore, the gamete industry is usually left to decide what is best for its practice, and will often allow the parent's private choice to conceive a child to develop the market at will.<sup>71</sup>

## V. ARGUMENTS IN FAVOR OF REQUIRING SPOUSAL CONSENT BEFORE GAMETES ARE DONATED

There are many arguments that favor requiring spousal consent for gamete donation.<sup>72</sup> Not only does public policy favor spousal consent

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66. See Pieterzak, *supra* note 30, at 125. These states include Minnesota, Missouri, Montana, and Nevada. See *id.* at 126. The states of California, Illinois, New Jersey, and Wisconsin have relied on the 1973 UPA but have removed the word "married" or made similar changes to grant more rights to unmarried women and sperm donors. *Id.* New Hampshire, Ohio, and Oregon have statutes regarding gamete donation that are essentially the same as the 1973 UPA. *Id.*

67. *Id.* These states include Colorado, Delaware, North Dakota, Texas, Utah, Washington, and Wyoming. *Id.* The states of Alabama, Connecticut, Florida, Idaho, New Mexico, and Virginia have statutes that have the same effect as the 2002 UPA. *Id.* at 126–27.

68. *Id.* at 127. These states include Georgia, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia. *Id.* Alaska, Arizona, New York, North Carolina, and Tennessee have not adopted a version of the UPA, but their state statutes include gamete donation regulations by stating that "a child conceived through artificial insemination and born to a married couple is the natural and legitimate child of both parents." *Id.* It is important to note, however, that if the woman using artificial insemination is not married, the gamete donor may face future liability for parental responsibility. *Id.*

69. *Id.* at 127–28.

70. See Cahn, *supra* note 63, at 207.

71. See Pieterzak, *supra* note 30, at 131.

72. See Guido Pennings, *Partner Consent for Sperm Donation*, 11 HUM. REPROD. 1132, 1132–33 (1996) (indicating sexual exclusivity and adultery, family composition, and procreational exclusivity as reasons for spousal consent for gamete donation).

based on the strong views regarding marriage as a partnership, but it is also much easier today to find donors, open or anonymous, than in the past.<sup>73</sup> These conceived children may enter into donors' lives unannounced, affecting their marriage and family lives.<sup>74</sup> The gamete donation industry is not well-equipped with thorough regulations to handle these issues.<sup>75</sup>

#### A. Public Policy Favors Marriage Mentality of Sharing

There is currently a movement encouraging courts to change their perceptions on the legal status of gametes.<sup>76</sup> In *Davis v. Davis*, a divorcing couple sought to determine the property rights of frozen pre-embryos that were created during their marriage.<sup>77</sup> The court determined that pre-embryos are not persons or property, but occupy an "interim" category that entitles them to "special respect," due to their potential for human life.<sup>78</sup> Because of this, disputes should be resolved by looking to the preferences of the parents, and then to any prior agreement.<sup>79</sup> Finally, the relative interests should be weighed, and the party seeking to avoid parenthood should prevail if the other party has a reasonable possibility of achieving parenthood by other means.<sup>80</sup>

The principles established in this case led the court in *Hecht v. Superior Court* to determine that the sperm cell is also an "interim

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73. See *id.* at 1134; see also *About Xytex*, XYTEX CRYO INT'L SPERM BANK <http://www.xytex.com/sperm-bank-get-started/> (last visited Sept. 21, 2013) (illustrating how a simple internet search will allow you to search sperm donors by race, height, and eye color, and access thousands of sperm donors).
74. See Robin Romm, *All His Children: A Sperm Donor Discovers his Rich, Unsettling Legacy*, THE ATLANTIC (Oct. 26, 2011, 3:59 PM), <http://www.theatlantic.com/magazine/archive/2011/12/all-his-children/308714/> (detailing how the mother of a child conceived with donor sperm created a public blog praising the quality of the donor's sperm and included the donor's baby pictures in the post).
75. DNA testing is making donors easier to trace, and sperm donor websites have varying levels of preparedness to deal with this reality. See Rachel Lehmann-Haupt, *Are Sperm Donors Really Anonymous Anymore? DNA Testing Makes Them Easy to Trace*, SLATE MAGAZINE (Mar. 1, 2010, 9:36 AM), [http://www.slate.com/articles/double\\_x/doublex/2010/02/are\\_sperm\\_donors\\_really\\_anonymous\\_anymore.single.html](http://www.slate.com/articles/double_x/doublex/2010/02/are_sperm_donors_really_anonymous_anymore.single.html).
76. See Ernest Waintraub, *Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell*, 11 QUINNIPIAC HEALTH L. J. 1, 1 (2007).
77. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).
78. *Id.* at 597.
79. *Id.* at 604.
80. *Id.*

category” between persons and property, and deserving of “special respect.”<sup>81</sup>

However, the scientific research used to support the court’s decision in *Hecht* may not be persuasive. Sperm cells are living entities, but cannot create the potential for life on their own.<sup>82</sup> Sperm “do not produce proteins that aid in its protection and further development. Sperm only produce materials that are specific to fertilization.”<sup>83</sup> Therefore, a sperm’s value “is not inherent because it is not, and cannot develop into, a person . . . [It] arises from its potential to create a person after fertilization, growth, and birth.”<sup>84</sup> Because of this, many scholars have argued that sperm should instead be recognized as property.<sup>85</sup>

If the legal status of sperm were changed from an interim category deserving of “special respect” to property, today’s public policy could favor the requirement of spousal consent for gamete donation. Public policy encourages the philosophy that marriage is a joint partnership.<sup>86</sup> It is expected that partners share their property with one another, and that each party is acting in a way that benefits the marriage.<sup>87</sup>

Therefore, when a married person is a gamete donor, it could be argued that when he or she donates sperm or eggs, although the property is only coming from one party, the implications of this decision affect both partners to the marriage.<sup>88</sup> This decision will affect the financial situation of the parties, the amount of time they can spend together, their sex lives, and possibly their family if a conceived child is able to make meaningful contact with the donor. The property can thus be presumed as being created for the benefit of the marriage, and as a joint venture in which both parties have an interest. Not only does spousal consent comply with public policy, but it also ensures that the parties make a meaningful decision together as to what is best for their marriage.

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81. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993); Waintraub, *supra* note 76, at 5.

82. See Waintraub, *supra* note 76, at 10.

83. *Id.*

84. *Id.* at 11.

85. *Id.* at 12.

86. See *supra* text accompanying note 19.

87. See *supra* text accompanying notes 20–21.

88. See *infra* text accompanying notes 111–14.

*B. It is Easier to Find Donors Today Than in the Past*

It is easier to find a gamete donor today than ever before,<sup>89</sup> as there has been a growing trend towards open donation.<sup>90</sup> With this, fertility clinic clients are receiving more identifying information about the donor, including his or her name, personal history, photographs, and medical background.<sup>91</sup> Many parents are now choosing to disclose to their children that they were conceived with donated sperm or eggs.<sup>92</sup> Some open donations even allow for continuous contact with the family after the conception of the child.<sup>93</sup> If a parent chooses to give this information to his or her child, it would be relatively easy for the child to locate the donor and make contact.<sup>94</sup>

Although most gamete donations today are closed donations,<sup>95</sup> it is foreseeable that federal or state law could change to ban closed adoptions.<sup>96</sup> In 1989, the United Nations Convention on the Rights of the Child deemed the right to know one's parent as a "fundamentally important human right."<sup>97</sup> Many other countries have relied on the best interests of the child, the need for medical history, and a child's right to know of his or her biological parent, plus the overwhelming need for greater regulation in the gamete donation industry, to justify outlawing closed donation.<sup>98</sup> These arguments may be strong enough to impose laws favoring open donation in the United States as well.<sup>99</sup> If children were to receive more identifying information about their biological parents, it would be easier to track the parent down.<sup>100</sup>

Even if the United States did not change its gamete donation policy, it is still possible to find a closed donor with the non-

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89. See Braverman, *supra* note 44, at 486–87.

90. See *supra* text accompanying notes 49–51.

91. Braverman, *supra* note 44, at 485.

92. *Id.*

93. 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>.

94. Braverman, *supra* note 44, at 486–87.

95. Elizabeth Siberry Chestney, *The Right to Know One's Genetic Origin: Can, Should, or Must a State that Extends this Right to Adoptees Extend an Analogous Right to Children Conceived with Donor Gametes?*, 80 TEX. L. REV. 365, 366 (2001).

96. Many scholars have written articles urging the federal legislature to ban closed gamete donation. See, e.g., Cahn, *supra* note 63, at 205; Chestney, *supra* note 95, at 368; Dennison, *supra* note 26, at 3.

97. Dennison, *supra* note 26, at 8.

98. See *supra* text accompanying notes 51–52.

99. See *supra* text accompanying notes 49–55.

100. See Braverman, *supra* note 44, at 486–87.

identifying information that is given to parents by the fertility clinic.<sup>101</sup> In 2005, a donor-conceived teenager infamously discovered his biological father with the use of his date and place of birth, Internet search engines, and a mail order DNA kit.<sup>102</sup> Once he found out the donor's name, the teen was able to make contact with his father within ten days' time.<sup>103</sup>

The advent of donor registry sites also allows donors and donor-conceived children who are willing to communicate to provide identifying information in hopes of contacting others who are biologically related to them.<sup>104</sup> One of the most popular sites, Donor Sibling Registry, has connected more than 9,747 half-siblings and donors with one another, and has enlisted 38,218 members as of January 2013.<sup>105</sup>

Furthermore, at least eighteen states have enacted laws that allow donor-conceived children to receive identifying information about their biological parents via court order if they are able to show "good cause."<sup>106</sup> Courts must weigh the interests of the child in accessing the donor's identifying information with the donor's interest in privacy.<sup>107</sup> While a mere curiosity to know one's genetic origins is not sufficient to meet the "good cause" standard, courts will generally permit the court order if there is a compelling medical reason.<sup>108</sup> One court has even gone so far as to hold that a donor's "reasonable expectation of privacy in his identity was substantially diminished by his own conduct" of frequent donations to the clinic which amounted to "a substantial commercial transaction likely to affect the lives of many people."<sup>109</sup> Because of this, "it would be unreasonable for . . . [the donor] to expect that his genetic and medical history, and possibly even his identity, would never be disclosed."<sup>110</sup>

Based on recent donation trends, emerging state law, and the availability of donor registry websites, it is apparent that now, more

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101. See Dennison, *supra* note 26, at 1–2.

102. *Id.*

103. *Id.* What happened after contact was made between the donor and child was not made public. *Id.* This story highlights many of the concerns regarding anonymity, or lack thereof, in the gamete industry today. *Id.*

104. *Id.* at 12.

105. *Id.*; THE DONOR SIBLING REGISTRY, <http://www.donorsiblingregistry.com> (last visited Nov. 21, 2013).

106. Dennison, *supra* note 26, at 11. These states include Alabama, California, Colorado, Missouri, Montana, Nevada, and New Mexico. *Id.* at 11 n.80.

107. *Id.* at 11.

108. See Sauer, *supra* note 24, at 939–42.

109. Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 877 (Cal. Ct. App. 2000).

110. *Id.*

than ever before, donor-conceived children have a stronger possibility of finding their biological parent.<sup>111</sup> It can be inferred that if a child finds his or her biological parent, he or she will also want to make contact.<sup>112</sup> This contact will not only affect the donor and donor-conceived child, but will also implicate the donor's family life with the addition of a new "child" to the family.<sup>113</sup> While this interaction could be positive, negative, or neutral on existing family life, public policy favoring the shared responsibilities of marital life suggests that a donor's spouse should be aware of this possibility.<sup>114</sup> To ensure that the married couple has made a careful, deliberate decision regarding the donation process and the possibility of later contact with the donor-conceived child, the spouse should also be required to consent to the use of the donated sperm or eggs.

### C. *Gamete Industry Policies and the Law Today*

It is apparent that the gamete donation industry prefers to take a laissez-faire approach when regulating its procedures.<sup>115</sup> The industry typically does not implement a guideline until it determines such a guideline has been requested based on market demand.<sup>116</sup> The industry has taken no steps to further protect its clients other than what has been mandated by the FDA, which has proven to be of very little guidance.<sup>117</sup> What the industry has not yet realized, however, is that by requiring the spousal consent of gamete donors, it could actually better meet the needs of people involved in the donation process: the donor, the client, and the resulting child.

Gamete donors are mostly young and motivated by financial compensation, instead of altruism.<sup>118</sup> Because of this, it is likely that a donor is not thinking about the possible repercussions of his or her decision, and how the decision may affect their family life over a decade or two later. The present trend towards open donation in the gamete donation industry could lead to new policies that retroactively

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111. See Braverman, *supra* note 44, at 486–87.

112. See, e.g., Dennison, *supra* note 26, at 1–2 (describing one person's efforts to find his birth parents).

113. See, e.g., Turkmendag et al., *supra* note 51, at 291 (discussing the social implications of discovering an unknown family or offspring).

114. See *supra* Part II.

115. See *supra* Part IV.

116. See *supra* Part IV.

117. See *supra* Part IV.

118. See Kearney, *supra* note 27, at 224, 226.

allow recipients to learn identifying information about a closed donor, which the donor believed would remain anonymous.<sup>119</sup>

By requiring spousal consent, the industry will ensure that a gamete donor has given more thought to the process than if the donation had been completed without the acknowledgement of the spouse. It will do more to prepare the donor and his or her family for any future regulation that the industry deems fit based on the market supply and demand. Further, it may lead to older men and women donating with the desire to help families, instead of for financial compensation.<sup>120</sup> This evolution towards a new, more altruistic donor profile may be preferable to the standard donor today.<sup>121</sup>

A well-informed, prepared donor is more marketable to a prospective client than an uneducated, uninformed donor. Parents using donated gametes have begun to shift towards disclosing to their children their genetic origins.<sup>122</sup> This has led to clients requesting more information on the donors, which the clinics have willingly provided.<sup>123</sup> Some clients have even gone so far as to seek open arrangements.<sup>124</sup> With these specific demands, it would likely make clients feel more comfortable with their decision if they were not only sure that the donor was agreeing to future contact, but also his or her family was willing to allow further communication. Spousal consent would allow fertility clinic clients to have greater confidence in what they have contracted for with donors.

Most children born from donated gametes have expressed frustration about the lack of information they have about their biological parent.<sup>125</sup> The most common reasons for wanting to know

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119. Other countries have not permitted their open donation laws to apply retroactively. *See, e.g., Turkmendag et al., supra* note 51, at 286 (explaining that after April 1, 2005, donors of sperm, eggs, or embryos in the United Kingdom would be unable to preserve their anonymity, as those born after April 1, 2005 from donated sperm, eggs, or embryos may obtain donor identifying information at age eighteen). However, at least one United States court has held that a donor has a substantially diminished expectation of privacy based on the fact that fertility clinics tell donors that non-identifying medical history and information is disclosed to the client, and that frequent donations are a “substantial commercial transaction likely to affect the lives of many people.” *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 877 (Cal. Ct. App. 2000). Therefore, it would not be unreasonable for the gamete donation industry to retroactively disclose donor information to its clients if it were the market demand.

120. *Turkmendag et al., supra* note 51, at 288.

121. *Id.*

122. *Braverman, supra* note 44, at 485.

123. *Id.*

124. *Id.*

125. *Dennison, supra* note 26, at 13.

more information about the biological parent include the desire to know family health history, concerns regarding possible incest between donor siblings, and the psychological need to know one's biological origins.<sup>126</sup> It is apparent that children have a desire to reach out to their biological parents, and with the advent of home DNA kits and donor-sibling registry sites, connections are being made now more than ever before.<sup>127</sup>

As previously stated, requiring spousal consent allows the donor to make the donation decision in a family setting, hopefully causing him or her to consider the very real possibility of a donor-child finding the family at some point in time.<sup>128</sup> This conversation would better prepare the donor for any future child-initiated contact, which would be in the best interests of the child.<sup>129</sup>

## VI. ARGUMENTS AGAINST REQUIRING SPOUSAL CONSENT BEFORE GAMETES ARE DONATED

While there are strong arguments in favor of requiring spousal consent before gametes are donated, there are just as many important, and more compelling, reasons why donors should not need their spouses' consent. Not only may laws requiring spousal consent impose constitutional concerns, but it could also lead to a dangerous pattern of extending this consent to other personal decisions. Further, it may cause many negative implications in the gamete donation industry.

### A. *The Fundamental Right to Autonomy*

Privacy is recognized as a fundamental constitutional right under the Due Process Clause.<sup>130</sup> This right can be diminished by a person's actions,<sup>131</sup> making it plausible that a gamete donor may not

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126. *Id.* at 14–17.

127. *See supra* Part V.B.

128. *See supra* Part V.B.

129. One child born with the assistance of an anonymous sperm donor has stated that he “didn’t ask to be born into this situation, with its limitations and confusion. It’s hypocritical of parents and medical professionals to assume that biological roots won’t matter to the ‘products’ of the cryobanks’ service, when the longing for a biological relationship is what brings customers to the bank in the first place.” Dennison, *supra* note 26, at 17.

130. U.S. CONST. amend. XIV § 1; *Roe v. Wade*, 410 U. S. 113, 152–54 (1973).

131. *See* Dennison, *supra* note 26, at 21 (citing *Hill v. Nat’l Collegiate Athl. Ass’n*, 26 Cal. Rptr. 2d 834, 856–57 (Cal. Ct. App. 1994) (“The extent of a privacy interest is not

have a reasonable expectation of privacy against a resulting child if courts or legislatures were to require open donations and ban closed donations.<sup>132</sup> However, even though public policy views marriage as a partnership,<sup>133</sup> it may be unreasonable to assume that this marital commitment would lead to a diminished expectation of privacy and require a donor to inform his or her spouse.<sup>134</sup>

There is no existing case law that discusses requiring spousal consent when donating gametes. However, there has been one case from the Supreme Court of Washington regarding a frozen pre-embryo dispute between a divorcing couple that may offer some guidance.<sup>135</sup> In *Litowitz v. Litowitz*, a couple contracted with a fertility clinic to create and store pre-embryos with the use of the male spouse's sperm and a donated egg.<sup>136</sup> The court stated in dicta that because the wife was not biologically related to the pre-embryos, the sole reason she had a right to access the pre-embryos was because she had signed a contract with her husband and the fertility clinic in regard to their disposition.<sup>137</sup> Therefore, the court implied that if there had not been a contractual right to the pre-embryos, the husband's right to privacy would have controlled the outcome of the dispute.<sup>138</sup> His right to procreate would have trumped his wife's interest solely because he had a biological connection to the pre-embryos, and she did not.<sup>139</sup>

Even if the *Litowitz* court incorrectly stated that the right to privacy requires a biological connection to protect one's constitutional interest to pre-embryos, and rather intent should be the determining factor, as suggested by other cases,<sup>140</sup> there is still a strong argument that requiring spousal consent for gamete donation would be

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independent of the circumstances. Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy . . . customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.'')).

132. See *supra* Part V.B.

133. See *supra* Part II.

134. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U. S. 52, 70–71 (1976) (finding that a husband does not have the unilateral authority to prevent his wife from procuring an abortion if she chooses to do so).

135. See *Litowitz v. Litowitz*, 48 P.3d 261, 262–63 (Wash. 2002).

136. *Id.* at 267–68.

137. *Id.*

138. *Id.* at 267.

139. *Id.*

140. Lainie M. C. Dillon, *Conundrums with Penumbra: The Right to Privacy Encompasses Non-Gamete Providers who Create Preembryos with the Intent to Become Parents*, 78 WASH. L. REV. 625, 642–45 (2003).

unconstitutional because the other spouse is not part of the donation process.<sup>141</sup>

If “the right of privacy means anything, it is the right of the individual, *married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>142</sup> In *Planned Parenthood of Central Missouri v. Danforth*, the Supreme Court held that it was unconstitutional to require spousal consent for a woman to receive an abortion.<sup>143</sup> The Court recognized that a husband has a strong interest in a married couple’s pregnancy and the decision to get an abortion should ideally be made by both the husband and wife.<sup>144</sup> The effects of an abortion could be “profound,” both physically and mentally, and “possibly deleterious” to the marriage.<sup>145</sup>

However, because the woman physically bears the child and is more “directly and immediately” affected by the pregnancy, the Court stated that the balance must be in the wife’s favor to not require consent.<sup>146</sup> The Court further reasoned that it would be difficult for “the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, . . . [to] be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.”<sup>147</sup>

In *Danforth*, the Supreme Court stated spousal consent for an abortion was unconstitutional even though the male spouse’s biological material and intent were also involved.<sup>148</sup> Therefore, it is likely that the Supreme Court would extend this same reasoning to a gamete donor, whose spouse’s biological material and intent is not concerned, and would find it unconstitutional to require spousal consent for gamete donation.

### *B. The Slippery Slope*

One major implication of courts categorizing gamete donation as requiring spousal consent is that it may lead to the regulation of other personal decisions. The fertility industry views a parent’s ability to

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141. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976).

142. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

143. *Danforth*, 428 U.S. at 69.

144. *Id.* at 71.

145. *Id.* at 70.

146. *Id.* at 71.

147. *Id.*

148. See *id.* at 69.

conceive as a private choice, free from government intrusion, which allows the market to develop based on price, supply, and demand.<sup>149</sup> Therefore,

the only basis for a successful defence [sic] of gamete-donation is the outright denial that the donor is in any way personally present through his genetic contribution. We must regard the sperm and ovum rather in the same light as we would regard a donated kidney, as human material but not as personally human. Bodily spare parts are exchangeable because, although they belonged to someone in particular, and grew at the *behest* of his genetic constitution, they do not convey his genetic individuality.<sup>150</sup>

By viewing gametes in this context, comparable to any other body part, who is to say that requiring spousal consent would not then reasonably extend to a kidney donation, enlisting as an organ donor on a driver's license, or to cosmetic surgery? Due to a person's fundamental right to privacy, such requirements would be taking spousal consent too far. Courts should fear this very real possibility of a "slippery slope," where spousal consent would be required for any decision regarding a married person's body. Not only could this lead to a decline in gamete donations,<sup>151</sup> but also a decline in marriage as well.<sup>152</sup>

### C. *Implications in the Gamete Donation Industry*

One concern with requiring spousal consent is that it may decrease the availability and quality of donated gametes.<sup>153</sup> A donor may decide that gametes are not worth donating if he or she has to tell a spouse, or the couple may decide together that it is not best for their family. After the United Kingdom and the Australian states of Victoria and Western Australia created laws that required open gamete donations, there was an initial donor shortage.<sup>154</sup> This led to fertility clinics accepting less than ideal donors, long waiting lists, and the beginnings of a semen market on the Internet, which posed

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149. Pietrzak, *supra* note 30, at 131.

150. Turkmendag et al., *supra* note 51, at 291.

151. There are many problems that would arise as a result of decreased gamete donations. See *supra* Part V.B.

152. Marriage has historically been viewed by United States courts as an important, "sacred" relationship. See *supra* Part II.

153. See Turkmendag et al., *supra* note 51, at 284.

154. *Id.* at 284, 288.

safety concerns.<sup>155</sup> The shortage also made it less likely for clients to find a donor with characteristics similar to themselves.<sup>156</sup>

While this did lead to an older, “more ethical” donor profile in these countries, semen volume and motility decrease with age, making the sperm less likely to fertilize an egg.<sup>157</sup> By the time a woman is thirty, only ten percent of the eggs she was born with are left in her body.<sup>158</sup> The quality of the eggs has also deteriorated, increasing the likelihood of chromosome dysfunction and mutations.<sup>159</sup> The covering around the eggs also becomes thicker and blocks sperm, decreasing the chance of fertilization.<sup>160</sup> Therefore, aged donors are less desirable for both the gamete industry and its clients.<sup>161</sup>

By adding even more regulations to an already difficult application process and donation procedure,<sup>162</sup> it is likely that there would be a decrease in donors similar to the United Kingdom and Australia, and the same resulting problems would arise in the United States. It could then be argued that requiring consent is unconstitutional because it imposes a burden on parental reproductive choice.<sup>163</sup> There would be no value of a “child who is never conceived because of the reluctance of gamete donors to take on a long-term commitment from which they may reasonably only expect to derive emotional costs rather than benefits.”<sup>164</sup>

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155. *Id.* at 284.

156. *Id.* at 295.

157. *Id.* at 288.

158. Roger Fortuna & Suzan Clarke, *For Women Who Want Kids, 'the Sooner the Better': 90 Percent of Eggs Gone by Age 30*, ABC NEWS (Jan. 29, 2010), <http://abcnews.go.com/GMA/OnCall/women-fertility-falls-lose-90-percent-eggs-30/story?id=9693015>.

159. *Eggs, Fertility, and Age: How it Works*, PARENTING, <http://www.parenting.com/article/eggs-fertility-and-age-how-it-works> (last visited Nov. 21, 2013).

160. *Id.*

161. See Turkmendag et al., *supra* note 51, at 288.

162. See *supra* Part III–IV.

163. See Dennison, *supra* note 26, at 19. In *Eisenstadt*, the Supreme Court held that “[i]f the right of privacy means anything, it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

164. See Turkmendag et al., *supra* note 51, at 305.

## VII. SUGGESTION TO THE COURTS AND LEGISLATURES

It is apparent that there is a strong need for greater regulation in the gamete donation industry.<sup>165</sup> There are no federal or state laws stating whether gamete donations should be open or closed, how many times a person may donate gametes, how many children can be conceived from the same donor gametes, or how payment of donors should be handled.<sup>166</sup> Many laws that are in existence still leave open the question of legal responsibility of gamete donors for their conceived biological children.<sup>167</sup> While there are many regulations that United States courts and legislatures could provide for gamete donors and purchasers, they should refrain from requiring spousal consent to donate.<sup>168</sup> Any regulation requiring spousal consent would surely be found to be unconstitutional, as seen in *Danforth*.<sup>169</sup> Equally important, it could cause the gamete donation industry to resort to providing lower quality gametes for its clients.<sup>170</sup>

Therefore, instead of depending on courts and legislatures to provide regulations, the clients of the gamete donation industry should take it upon themselves to determine whether requiring spousal consent is important to them. Due to the laissez-faire economics of the donation industry, fertility clinics would be willing to provide spousal consent to purchasers who wanted this characteristic in a donor.<sup>171</sup> If demand were great enough, the gamete donation industry would surely create a larger supply of this type of donor for its clients, just as it has created a larger supply of donors giving more self-identifying information.<sup>172</sup> As it has in the past, the gamete donation industry will continue to self-regulate in order to meet the needs of its clients, making it unnecessary for United States courts and legislatures to intrude on a person's fundamental right to privacy.

## VIII. CONCLUSION

As fertility success rates continue to increase, more donor-conceived children are being born than ever before.<sup>173</sup> With this is

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165. See *supra* Part IV.

166. See *supra* Part IV.

167. See *supra* Part IV.

168. See *supra* Part VI.

169. See *supra* text accompanying notes 143–48.

170. See *supra* Part VI.C.

171. See *supra* Part III.B.

172. See *supra* Part III.B.

173. Sauer, *supra* note 24, at 954.

the increased possibility that donors and donor-conceived children will make contact with one another. These new forming relationships will not only affect the parties involved, but also the families of the donor and the donor-conceived child. With no present federal or state law, or even case law, relevant to the issue of spousal consent in the gamete donation context, family units may become overwhelmed with the addition of new members and possibly torn apart. However, the fundamental right to privacy trumps any interest a spouse may have in gamete donation. Therefore, United States courts and legislatures should continue to refrain from making decisions for the gamete donation industry, and allow the industry to regulate itself and determine on its own when spousal consent is favorable or necessary.

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\* J.D. Candidate, May 2014, University of Baltimore School of Law. I would like to especially thank Professor Leigh Goodmark for her advice and guidance as I prepared this Comment.