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NOTES

ARTIFICIAL INSEMINATION: RIGHT OF PRIVACY AND THE DIFFICULTY IN MAINTAINING DONOR ANONYMITY

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INTRODUCTION

An increase in infertility, a decline in the number of healthy infants available for adoption, and the desire to be genetically related to their own children forces many infertile couples to turn to the medical profession in order to start a family.[1] Sperm banks present such couples with one method by which they can conceive and raise the child they never thought possible.[2] Today, the use of assisted reproductive technology has greatly enhanced an infertile couple's ability to become parents.[3] Such technology is becoming extremely appealing as couples may hand-select certain genetic characteristics for their child from a pool of donor applicants and have sperm screened for genetic diseases and irregularities; therefore, the use of assisted reproductive technology has grown dramatically.[4]

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1. Hollace S. W. Swanson, *Donor Anonymity in Artificial Insemination: Is It Still Necessary?*, 27 COLUM. J.L. & SOC. PROBS. 151, 153 (1993). The number of American women of childbearing age who suffered from fertility problems jumped from 4.9 million to 6.1 million between 1988 to 1995, representing a twenty-five percent increase. Michael D. Lemonick, *The New Revolution in Making Babies; A Host of Breakthroughs—From Frozen Eggs to Borrowed DNA—Could Transform the Treatment of Infertility. But Tampering with Nature Can Be Risky*, TIME, Dec. 1, 1997, at 40.

2. According to the American Society for Reproductive Medicine, infertility affects more than six million Americans, half of whom are men. Leslie Milk, *Looking for Mr. Good Genes*, WASHINGTONIAN, May 1999, at 65. *See also* Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 266 (1997) (8.5% to twenty percent of married couples in the United States experience problems with fertility).

3. "In part, as a result of the freedom from regulation that came with constitutional protection, infertility services have been transformed from a small medical specialty to a four billion-dollar annual industry." Lori B. Andrews, *Reproductive Technology Comes of Age*, 21 WHITTIER L. REV. 375, 382 (1999).

4. *See* Bill Briggs, *Babies by the Book: Sperm, Egg Catalogs Just the Start*, DENVER POST, May 21, 1997, at G1 ("[p]rocuring a man's spare sperm . . . can take you on a shopping trip like no

Artificial insemination is just one method of assisted reproduction[5] and includes homologous insemination, which involves a husband or sexual partner's sperm, and heterologous insemination, which involves artificial insemination by donor (A.I.D.).[6] Donor insemination costs between $235 and $400 before medicine and blood work and is widely practiced.[7] In the United States alone, 20,000 to 30,000 babies are conceived each year by A.I.D.[8]

The increasing use of A.I.D. as a means of conception raises a host of

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other, to a place where the aisles are stocked with personalities, hair colors and skin tones"); Warren E. Leary, *Rules to Cover Human Tissue in Products*, N.Y. TIMES, Mar. 1, 1997, at A1 (sperm banks have followed voluntary guidelines and state laws in testing for hepatitis and H.I.V.); Marilyn Chase, *Sperm Banks Thrive Amid Debate Over Medical and Ethical Issues*, WALL ST. J., Apr. 2, 1987, at 1987 WL-WSJ 319194 ("[sperm] banks offer greater selection and accessibility, as well as higher safety because frozen sperm can be easily quarantined while donors are retested for disease"). In 1995 alone, 59,142 assisted reproductive technology (A.R.T.) procedures were performed in the United States. Nat'l Ctr. for Chronic Disease Prevention and Health Promotion, *1995 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports* (1997), *available at* http://www.cdc.gov/nccdphp/drh/arts/art_type.htm (last reviewed Jan. 10, 2000). In 1996, the number of A.R.T. procedures performed increased to 64,036, resulting in the birth of over 20,000 babies. Nat'l Ctr. for Chronic Disease Prevention and Health Promotion, *1996 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Report*, *available at* http://www.cdc.gov/nccdphp/dr/art96/sec1_q1.htm (last reviewed Jan. 10, 2000) (discussing other forms of reproductive technology). In 1997, approximately 71,826 A.R.T. procedures were performed, resulting in 17,054 deliveries of one or more living infants and 24,582 babies. Nat'l Ctr. for Chronic Disease Prevention and Health Promotion, *1997 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Report* (last reviewed Jan. 13, 2000) [hereinafter C.D.C. *1997 Nat'l Report*]. *See also* Fred Norton, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 793-94 (1999).

5. Artificial insemination can be accomplished by using frozen spermatozoa, which results in a sixty percent successful pregnancy rate, or by using freshly collected semen, which is successful ninety percent of the time. Microsoft Encarta Online Encyclopedia 2000, Microsoft Corporation, *"Artificial Insemination"* (1997-2000), *available at* http://encarta.msn.com/find/Concise.asp?ti=05FB4000. Artificial insemination is typically recommended for the treatment of male factor infertility and "unexplained" infertility. Anna Peris, *Therapies: Artificial Insemination*, *available at* http:/www.fertilitext.org/p2_doctor/AI.html (last visited Oct. 22, 2001).

6. Miller-Keane Medical Dictionary, *"Artificial Insemination,"* (2000), *available at* http://content.health.msn.com/content/asset/miller_keane_17380 (last visited Oct. 22, 2001).

7. *See* Milk, *supra* note 2, at 65. Recently, artificial insemination was cast into the public eye with an announcement by Melissa Etheridge and Julie Cypher that David Crosby was the father of their two children conceived by artificial insemination. Julie Rawe, *People*, TIME, Oct. 2, 2000, at 109. Many other individuals, including a priest in one reported incident, utilize artificial insemination. Marjorie Hyer, *A Need Examined, a Prayer Fulfilled; Unmarried Priest Bears Child by Artificial Insemination*, WASH. POST, Dec. 7, 1987, at A1.

8. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 845 (2000).

important legal questions of first impression. Scholars, courts, and state legislatures have already begun to address the effect of A.I.D. on the "traditional" family structure, the legal determination of parental rights in A.I.D., and the moral implications of A.I.D.[9] Yet, with the widespread access to sperm banks and fertility clinics, these reproductive technology centers continue to be the center of legal disputes.[10]

One such legal dispute involved Dr. Cecil Jacobson, a Virginia physician, who violated his agreements with patients to provide sperm from anonymous donors when he repeatedly artificially inseminated women with his own sperm for over ten years, resulting in the births of over seventy-five children.[11] In another dispute in Naples, Italy, Dr. Raffaele Magli was indicted for allegedly using sperm from only two donors to impregnate all of his patients, creating thousands of half-brothers and half-sisters among his patients.[12] Additionally, many women have claimed that fertility clinics negligently caused them to be impregnated with the sperm of men who were not their chosen donors.[13] More

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9. *See generally* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253; R. Alta Charo, *And Baby Makes Three—Or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231 (2000); Garrison, *supra* note 8, at 835; John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 413-20 (1991).

10. Over 335 fertility clinics are in operation in the United States. C.D.C., *1997 Nat'l Report*, *supra* note 4; *see also* Lemonick, *supra* note 1, at 40 (there are hundreds of fertility clinics around the world); Ian Fisher, *4 Charged in Illegal Sperm Bank*, N.Y. TIMES, Apr. 27, 1992, at B5 (Mount Sinai Medical Center employees charged with seventeen counts stemming from illegal sale of their semen to doctors, who then inseminated a dozen women).

11. Milk, *supra* note 2, at 65 (Dr. Jacobson was convicted on fifty-two counts of fraud and perjury). *See also* Byers, *supra* note 2, at 307-08; Norton, *supra* note 4, at 795.

12. Sandra Anderson Garcia, *Sociocultural and Legal Implications of Creating and Sustaining Life Through Biomedical Technology*, 17 J. LEGAL MED. 469, 494 (1996); Frances D'Emilio, *Gynecologist Accused of Abuse in "Test-Tube" Birth*, ASSOCIATED PRESS, Apr. 5, 1995, *available at* 1995 WL 4381894.

13. Norton, *supra* note 4, at 795-96. *See, e.g.*, Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 68 (Utah 1998) (noting that one of triplet infants had different coloring than mother's husband and was found to have been fathered by wrong sperm donor); Ann Davis, *High-Tech Births Spawn Legal Riddles*, WALL ST. J., Jan. 26, 1998, at B1 (describing lawsuit alleging that hospital used wrong sperm, resulting in interracial couple having white children); Dorinda Elliot & Friso Endt, *Twins—with Two Fathers*, NEWSWEEK, July 3, 1995, at 38 (one infant from set of twins conceived by assisted reproductive technology was discovered to have been result of another man's sperm wrongly used); *New Jersey Couple Sue Over an Embryo Mix-Up at Doctor's Office*, N.Y. TIMES, Mar. 28, 1999, at 45 (New Jersey couple sued a fertility clinic after several of their embryos accidentally were implanted in another of clinic's patients); *Sperm Mix-Up Lawsuit Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4 (describing a case in which a mother sued sperm bank Idant Labs, claiming they mistakenly substituted another man's sperm for her late husband's, which ultimately settled for $400,000); Mike Stobbe, *Alleged Mix-up Leads to Lawsuit*, FLA. TIMES-

recently, a couple claimed that a sperm bank falsely conveyed to them that the anonymous donor's sperm was thoroughly screened and free of genetic disease.[14] Subsequently, however, the conceived child developed Autosomal Dominant Polycystic Kidney Disease. Clearly, the conduct involved in these disputes represent legal issues which require the attention of and resolution by the courts.

However, with little precedence to follow, states have only just begun to develop law surrounding A.I.D.[15] Most states have enacted statutes allowing the use of artificial insemination with donor sperm, and thirteen of those statutes are modeled on the Uniform Parentage Act, which defines the parental rights of the parties involved.[16] Several states have specifically addressed the inheritance rights of children conceived by A.I.D.,[17] and some states have created legal obligations for testing sperm donations for H.I.V. prior to use.[18]

However, few authorities or court decisions address a sperm donor's right to remain anonymous in the course of an A.I.D. procedure and in the resulting child's life. At least eighteen states have enacted legislation permitting A.I.D. children to obtain sperm donor information based on a satisfactory showing of good cause or a similar standard.[19] In these states, courts must weigh the

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UNION, Sept. 1, 1997, at A5 (DNA tests revealed that twins conceived were not biologically related to the mother's husband, revealing that another man's sperm had been wrongly used); Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES, Mar. 9, 1990, at B2; Tracy Weber, *Suit Claimed Wrong Sperm Used at Saddleback Center*, L.A. TIMES, June 9, 1995, at A34 (mother inseminated with sperm of an unknown man, instead of with husband's donated sperm).

14. *See* Johnson v. Superior Court, 95 Cal. Rptr. 2d 864 (Ct. App. 2000), *review denied*, Aug. 23, 2000.

15. Laws governing the use of artificial insemination are largely nonexistent. *See* Garrison, *supra* note 8, at 838.

16. The Uniform Parentage Act provides that

> [i]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with sperm donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . . [and] the donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5(a)-(b), 9B U.L.A. 287, 301-02 (1994); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1120 n.237 (1998) (states that have modeled their legislation after the UPA include Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Washington, Wisconsin, and Wyoming).

17. Megan D. McIntyre, Comment, *The Potential for Products Liability Actions When Artificial Insemination by an Anonymous Donor Produces Children with Genetic Defects*, 98 DICK. L. REV. 519, 519-20 n.5 (1993) (Arkansas, Connecticut, Michigan, North Dakota, and Virginia).

18. *Id.* at 520 n.6 (Delaware, Georgia, Idaho, Indiana, Maryland, Montana, North Carolina, Ohio, Oklahoma, Rhode Island, and Wisconsin).

19. *See* Garrison, *supra* note 8, at 898-99; *see also* ALA. CODE § 26-17-21(a) (2001); CAL. FAM. CODE § 7613(a) (West 2001); COLO. REV. STAT. ANN. § 19-4-106(1) (West 2001); MO. ANN.

interests of the parties involved to determine what constitutes the good cause necessary to warrant disclosure. In a recent decision, *Johnson v. Superior Court*, the California Court of Appeals found that a sperm donor's constitutional right of privacy in maintaining anonymity was limited and, therefore, was outweighed by the state's interest in preserving a litigant's discovery rights in anticipation of litigation.[20] The effect of this decision is likely to be far reaching, greatly impacting the relatively new legal developments regarding assisted reproduction.

Part I of this Note examines the historical development of a right of privacy. It addresses the boundaries of the constitutional right to procreate and queries whether this fundamental right includes the right to reproduce with the aid of A.I.D. Part I outlines three theories that support the proposition that the right to procreate includes the right to use reproductive technology, as well as discusses the guarantees included within the right to procreate via A.I.D.

Part II explains the right of privacy in the context of discovery proceedings and discusses *Johnson*, the first case to address whether a sperm donor has the right to remain anonymous.[21] It examines the California Court of Appeals' rationale and final holding in which the court determined that a donor possesses merely a limited right of privacy[22] and that the state was justified in infringing upon the sperm donor's privacy interest.[23]

Finally, Part III of this Note addresses the potential impact of the *Johnson* ruling on the law of A.I.D. This Part examines the effects of the court's finding both that a sperm donor has a limited right to privacy and that promising anonymity in sperm donation contracts is contrary to public policy.[24] This Part also posits that such a decision jeopardizes a couple's right to procreate with A.I.D. Although A.I.D. participants may think that easier access to donor information and identity is beneficial, it may conversely be more harmful to the parties involved. It subjects the A.I.D. participant family to intrusion by the sperm donor and the state, thus infringing on the couple's right to rear a child independently, as guaranteed by the right of privacy.

STAT. § 210.824.1 (West 2001); MONT. CODE ANN. § 40-6-106(1) (2000); NEV. REV. STAT. ANN. § 126.061.1 (2001); N.M. STAT. ANN. § 40-11-6-(C) (Michie 2000); WIS. STAT. ANN. § 891.40(1) (West 2001); WYO. STAT. ANN. § 14-2-103(a) (Michie 2000).

20. 95 Cal. Rptr. 2d 864, 864 (Ct. App. 2000), *review denied*, Aug. 23, 2000. *See also* Associated Press, *Court Upholds Limit on Sperm Donors' Privacy*, L.A. TIMES, Aug. 25, 2000, at A15; Julie Brienza, *Sperm Donor Must Testify About Medical History*, TRIAL, Aug. 2000, at 82; Kevin Livingston, *Judge: Sperm Bank's Guarantee of Anonymity Is Not Ironclad*, RECORDER (San Francisco), May 23, 2000, at 4. The issue of sperm donor anonymity is faced world-wide. *See* John Carvel, *Sperm Donors Face Loss of Privacy*, GUARDIAN (U.K.), Dec. 27, 2000, *available at* 2000 WL 30814915 ("[England's] government is about to relax strict rules of confidentiality protecting the identity of sperm donors to allow their children to discover key facts about their genetic origins.").

21. *See Johnson*, 95 Cal. Rptr. 2d at 864.

22. *Id.* at 876.

23. *Id.* at 878.

24. *Id.* at 874-75 (finding such contracts unenforceable).

Part III also delves into the *Johnson* court's apparent presumption that sperm donors choose to donate merely for the financial gain, discounting the possibility that a desire to perpetuate a genetic likeness may instead be a donor's motivation.[25] This Part also speculates regarding *Johnson's* potential impact on the hypothetical situation in which a donor attempts to ascertain the identity and related information of the A.I.D. conceived child, the result of which might result in an infringement upon the child's privacy rights. This Part also examines the possibility that finding a limited right of privacy for donors creates a reluctance in men to donate. Finally, Part III highlights the fact that the *Johnson* decision improves the standards of genetic screening by providing participants of A.I.D. with the means necessary to successfully bring suit against sperm banks and hold them accountable for misrepresentations.

The *Johnson* decision went too far in limiting a sperm donor's right to remain anonymous; however, decisions like *Johnson* are necessary to develop and clarify the law concerning A.I.D. As courts begin addressing the issues of donor anonymity, individuals will be able to make more informed decisions about whether to donate sperm and families will be able to make more informed decisions about whether to conceive a child using this rapidly increasing reproductive technology.

I. HISTORICAL DEVELOPMENT OF THE RIGHT OF PRIVACY

A. The Zone of Privacy Encompasses the Right to Procreate

Griswold v. Connecticut gave explicit recognition to the constitutional right of privacy.[26] Justice Douglas, delivering the opinion of the Court, found that the right of privacy existed in the penumbras of the Bill of Rights[27] and determined that this right was grounded in the Due Process Clause of the Fourteenth Amendment and its concept of personal liberties and restrictions on the states.[28] In subsequent decisions, the Court articulated that the right of privacy protects personal rights that are deemed fundamental or implicit in our nation's concept of ordered liberty.[29] Found within this zone of privacy is the fundamental right

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25. *Id.* at 877.

26. 381 U.S. 479 (1965).

27. *Id.* at 483. *See also* Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting). These penumbras, which are unnamed rights, grow out of the specific fundamental guarantees granted in the Bill of Rights and create a constitutionally protected zone of privacy. The Court listed examples of specific guarantees in the Bill of Rights that create the zone of privacy, including the First Amendment's right of association, the Third Amendment's prohibition against quartering soldiers in any house without the owner's consent, the Fourth Amendment's right to be free from unreasonable search and seizure, and the Fifth Amendment's right to be free from self-incrimination. *See Griswold*, 381 U.S. at 484.

28. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (lower court alternatively found right of privacy to reside within Ninth Amendment's reservation of rights to the people).

29. *Id.* at 152.

to procreate.[30]

In *Griswold*, the Court found that the statute at issue, which prohibited the use of contraceptives, infringed upon a married couple's zone of privacy and was, therefore, invalid.[31] Subsequently in *Eisenstadt v. Baird*, the Court extended the zone of privacy to protect not only decisions by married couples about whether to bear a child, but also to protect an individual's decision whether to beget a child.[32] The court held that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."[33]

Thereafter, in the landmark case *Roe v. Wade*, the Court held that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[34] The Court established an unrestricted right for a woman to choose whether or not to terminate her pregnancy in the first trimester.[35] Subsequently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe*, again finding that the right to terminate a pregnancy belonged to an individual, as guaranteed by the right of privacy.[36] The Court found that "when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has deemed central to the right to privacy."[37] Thus, a woman now has the fundamental right to terminate her pregnancy while the fetus is in the pre-viability stage.[38]

In additional cases, the Court continued to emphasize the importance of the right to procreate, its existence as a fundamental right, and its protection by the right of privacy. In *Stanley v. Illinois*, the Court emphasized that "[t]he rights to conceive and to raise one's children have been deemed essential, basic civil

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30. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race").

31. 381 U.S. at 485.

32. 405 U.S. 438, 453 (1972) (Court struck down statute forbidding distribution of contraceptives to unmarried persons on Equal Protection grounds).

33. *Id.*

34. 410 U.S. at 153.

35. *Id.* at 163 (state's *legitimate* interest in the health of the mother becomes compelling only at end of the first trimester because until then, mortality in abortion may be less than mortality in normal childbirth).

36. 505 U.S. 833, 927 (1992).

37. *Id.* In *Casey*, however, the Court rejected the trimester framework of *Roe*, replacing it with a viability standard. *See id.* at 877.

38. *See id.*; *infra* note 44 and accompanying text. In addition to contraception, procreation, and marital relations, the right of privacy also extends to protect the right to marry a person of one's own choosing and the liberty to direct the raising of one's own children. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (childrearing).

rights of man, and rights far more precious . . . than property rights."[39] The Court indicated "[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[40] In *Carey v. Population Services International*, the Court held that "the Constitution protects individual decisions in matters of childbearing from unjust intrusion by the State," again stressing the importance of personal freedom to make decisions in matters of procreation.[41]

The constitutional right of privacy, however, is not absolute.[42] It exists only in the absence of a compelling state interest to the contrary. Therefore, the government may not infringe upon the fundamental right of privacy interest *unless* the infringement is narrowly tailored to serve a compelling state interest.[43] For example, the state's interest in protecting a mother's health or the potential life of a fetus is compelling enough to justify state regulation of abortion at the pre-viability stage of pregnancy, provided that such regulation does not place an undue burden on the mother's right to choose abortion.[44]

Furthermore, the right to procreate may be viewed as a negative right in that it exists as an individual's right to be *left alone* in making decisions surrounding whether to reproduce.[45] However, it is not clear whether this negative right to reproduce extends to an entitlement to reproduce in any possible way. Therefore, the right to gain access to a sperm clinic and the entitlement to use assisted reproductive technologies present important issues in the rising use of assisted reproduction.

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39. 405 U.S. 645, 651 (1972) (the Court struck down a statute that automatically deprived unwed fathers of custody of their children upon their mothers' deaths) (citations and internal quotation marks omitted).

40. *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

41. 431 U.S. 678, 687 (1977).

42. *See id.* at 686; Roe v. Wade, 410 U.S. 113, 155 (1973); *Stanley*, 405 U.S. at 656.

43. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Reno v. Flores, 507 U.S. 292, 302 (1993); United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

44. *See Casey*, 505 U.S. at 878 (an undue burden exists if purpose or effect of a law "is to place a substantial obstacle in the path of a woman seeking abortion before the fetus attains viability").

45. *See* Katz v. United States, 389 U.S. 347 (1967) ("a person's general right to privacy—his right to be let alone by other people") (emphasis omitted); *Scouting the Frontiers of the Law: Lawyres [sic] and Judges Are Venturing into Uncharted Territories Where Medicine and the Law Intersect. Bioethics Can Be Their Guide*, TRIAL, Sept., 1999, at 24 [hereinafter *Scouting the Frontiers of the Law*]; Rao, *supra* note 16, at 1079 ("privacy is the quintessential negative right—a right to be free from governmental interference"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (the right of privacy is not freedom to perform affirmative acts, but rather freedom from having one's life completely determined by the state).

B. The Constitutional Right to Procreate Using A.I.D.

Courts have only seldom addressed the constitutionality of state restrictions on assisted reproductive technologies.[46] The few cases that confront the issue of whether a married couple possesses the right to procreate by means of artificial insemination involve prison inmates.[47] These decisions uniformly find that inmates (whether married or single) do not possess the right to reproduce by means of artificial insemination using even their own sperm.[48] These decisions, however, are confined to the penal context and therefore leave unclear whether there is a right to procreate via artificial insemination outside of prison.

Many scholars posit that the Constitution protects the right to reproduce with the aid of technology.[49] There are three theories that support the proposition that the constitutional right to procreate includes the right to reproduce with the aid of A.I.D. First, existing paternity, custody, visitation and artificial insemination statutes and case law imply the existence of a such a constitutional right. Second, scholars argue that intimate association guarantees this constitutional right. Finally, right of privacy cases support such a constitutional right.

1. Existing Paternity, Custody, Visitation, and Artificial Insemination Statutes and Case Law Imply the Existence of a Constitutional Right to Procreate Using A.I.D.—A.I.D. cases and certain statutes that involve custody and visitation rights of the resulting child "imply that there may be a right to use artificial insemination to conceive a child, even if there is no corollary right exclusively to parent the resulting child."[50] Many states have adopted statutes modeled after the Uniform Parentage Act, which provides that when a married woman is impregnated by a donor's sperm under the supervision of a licensed physician and with the consent of her husband, the husband is legally declared the natural father of the child.[51] These statutes sever the donor's paternity rights only when the woman is married and inseminated by a physician. A married woman who is artificially inseminated with a donor's sperm without her husband's knowledge or consent lacks the right to have her husband declared the legal father of the child.[52]

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46. Rao, *supra* note 16, at 1081.

47. *Id.* at 1081-82 (summarizing existing case law pertaining to prisoners and denial of their right to procreate by means of artificial insemination).

48. *Id.* at 1082.

49. *See id.* at 1081 & n.10 (referring to JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 38-39 (1994), which argues that procreative liberty encompasses right to use a wide variety of reproductive technologies and every practice necessary to procreate should receive constitutional protection).

50. *Id.* at 1082.

51. *Id.* at 1120 n.237 (Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Washington, Wisconsin, and Wyoming).

52. *See id.*; *see also In re* the Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 126 (Ill. App. Ct. 1996) (court declined to declare husband the legal father because doing so would violate husband's right not to procreate); *cf.* R.S v. R.S., 670 P.2d. 923, 928 (OR 1983) (holding that

However, seven states sever a donor's rights with regard to paternity and other responsibilities if the procedure is performed under a doctor's supervision or through a sperm bank, even when the woman is single.[53] Thus, in these jurisdictions, the instances in which a woman may be subject to a paternity action in which the court may legally declare the semen donor to be the father are limited to those where she was impregnated artificially without the aid of a licensed physician.

In *Jhordan v. Mary K.*, the court specifically addressed the constitutionality of statutes modeled after the Uniform Parentage Act and their infringement on a woman's right of procreative choice.[54] In *Jhordan*, the statute at issue provided that where a physician performs artificial insemination, the sperm donor is barred from asserting parental rights.[55] However, the court found the statute to be inapplicable because the woman impregnated herself at home without the aid of a physician and, therefore, granted declaration of paternity and visitation rights to the sperm donor.[56] The woman argued that limiting the applicability of the statute to situations in which a licensed physician performed the procedure violated her fundamental right of procreative choice.[57] The court rejected this argument and found that such a statute did not forbid self-insemination, impose restrictions on a woman's right to bear a child, or preclude personal selection of a donor.[58] Rather, the statute merely spoke to the legal status of the donor's paternity. The *Jhordan* court's findings imply that a statute which does, in fact, forbid self-insemination, impose restrictions on a woman's right to bear a child, or preclude personal selection of a donor, may violate a woman's right to procreate. Thus, the state is prohibited from imposing the restrictions noted by the *Jhordan* court because the effect would be to restrict an individual's right to bear children. Moreover, in order to impose such restrictions, the state must provide a compelling state interest and narrowly tailor the statute. In this context, the fundamental right to procreate, which is constitutionally protected by the right of privacy, includes the right to use A.I.D.

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husband who orally consents that his wife be artificially inseminated with donor sperm for the purpose of producing a child of their own is estopped from denying that he is the father of that child); *In re* Baby Doe, 353 S.E.2d 877, 879 (S.C. 1987) (holding that "husband's knowledge of and assistance in his wife's efforts to conceive through artificial insemination constitute his consent to the procedure," rendering him the legal father). *But see* K.S. v. G.S., 440 A.2d 64 (N.J. Super. Ct. Ch. Div. 1981) (once given, consent may be revoked before pregnancy occurs provided there is clear and convincing evidence of revocation).

53. *See* John E. Durkin, Comment, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. H. L. & POL'Y 327, 338 nn.83-84 (1994) (California, Colorado, New Jersey, Washington, Wyoming, Oregon, and Texas).

54. 224 Cal. Rptr. 530, 531 (Ct. App. 1986).

55. *Id.* (citing CAL. CIV. CODE § 7005(b) (West 1975)).

56. *See* 224 Cal. Rptr. at 537-38.

57. *Id.* at 536-37.

58. *Id.* at 537.

2. Intimate Association Guarantees the Constitutional Right to Procreate Using A.I.D.—The second theory from which support can be found that the constitutional right of privacy encompasses the right to procreate by means of A.I.D. focuses on the couple's act of intimate association. Under this approach, individuals who become involved in close, intimate relationships possess privacy rights against the state.[59] Privacy, in this context, is the negative right to be free from interference from the government in these intimate associations.[60] Therefore, when procreation with the aid of A.I.D. occurs within the confines of a close and personal association, it is afforded constitutional protection by the right of privacy.

The theory of associational right of privacy is supported by precedent. Many cases support the proposition that the constitutional right of privacy creates immunity from governmental interference when individuals are in an intimate and consensual relationship.[61] Furthermore, cases indicating that the right of privacy does not protect unrelated and distant individuals imply that intimate and close associations are necessary for the right of privacy to attach.[62]

Under the intimate association theory, the right of privacy extends to protect not only marital and biological relationships, but nontraditional associations as well.[63] Because the right of privacy protects procreation when it occurs within the confines of a close and personal association, then if a husband and wife, or alternatively an unmarried but intimately involved couple, chose to procreate

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59. Rao, *supra* note 16, at 1079 (discussing theory of relational right of privacy).

60. *Id.* at 1078.

61. *Id.* at 1078, 1097-98. *See, e.g.* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (quotation omitted) (zoning ordinance precluding grandmother from living with her two grandsons was deemed unconstitutional because "cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter'"); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (relying in part on right of privacy, Court ruled that state could not require Amish parents to send their children to public school beyond eighth grade); Griswold v. Connecticut, 381 U.S. 479 (1965) (Court ruled that prohibiting use of contraceptives infringed upon a married couple's zone of privacy); *supra* note 32 and accompanying text; Poe v. Ullman, 367 U.S. 497, 539, 552 (1961) (Harlan, J., dissenting) (the Court dismissed a challenge to a Connecticut law criminalizing use of contraceptives for lack of justiciability because law had not been enforced; however, Justice Harlan determined the law to be an intolerable unjustified invasion in area of most intimate concerns of a married couple, finding that nothing could be more intimate than a husband and wife's marital relations). *But cf.* Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (Court upheld a Georgia statute criminalizing homosexual sodomy, denying constitutional protection of right of privacy because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .").

62. *See* Rao, *supra* note 16, at 1097-98; *see also* Roberts v. United States Jaycees, 468 U.S. 609, 618-619 (1984) (Court ruled that members of a same-sex club were not protected by the right of privacy from state anti-discrimination laws, finding that intimate associations merit protection because they create a buffer between individual and the state); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (college roommates' living arrangements are not protected by the right of privacy).

63. Rao, *supra* note 16, at 1105.

with the aid of A.I.D., that choice must be afforded protection by the right of privacy.

Despite the fact that A.I.D. generally occurs in the presence of a third-party physician, the act of procreation does not lose its status as an act of an intimate association.[64] In *Paris Adult Theatre I v. Slaton*, the U.S. Supreme Court held that "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office; . . . or as otherwise required to safeguard the right to intimacy involved."[65] Thus, the right of privacy protects A.I.D. when a married or intimately associated couple uses reproductive assistance because it is performed within the context of an intimate relationship.

3. Right of Privacy Cases Support the Constitutional Right to Procreate Using A.I.D.—Finally, existing constitutional right of privacy cases support the constitutional right to procreate with the aid of A.I.D. Such cases support the proposition that an individual's decisions regarding procreation are protected from state intrusion. As A.I.D. is a form of procreation, it logically follows that the right of privacy must also encompass the fundamental right for a person to choose to conceive a child with the aid of such reproductive technology.[66] Furthermore, constitutional right of privacy cases establish that the right of privacy protects family autonomy from state intrusion in matters of conception and childrearing.[67] Therefore, using A.I.D. in order to create a family elevates this method of procreation to a constitutionally protected level.

First, the Supreme Court's decision in *Skinner*[68] supports the proposition that an individual possesses the right to procreate outside marriage by focusing on the importance of procreation both to an individual and to society as a whole.[69] The Court found the challenged statute, which allowed sterilization of convicted felons, to be unconstitutional because it deprived them "of a right which is basic to the perpetuation of a race—the right to have offspring."[70] The Court, however, did not indicate that procreation is *only* protected when traditional methods of

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64. *See id.* at 1105 n.5 (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 n.8 (1980), who finds that "a concern to protect the freedom [of intimate association] lies behind many of the Supreme Court's . . . decisions in the areas of marriage, procreation, and parent-child relations").

65. 413 U.S. 49, 67 (1973).

66. *See* Durkin, *supra* note 53, at 340-41; *see also* Michelle L. Brenwald & Kay Redeker, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 653 (1999) (there are no limitations placed upon the process of conceiving a child naturally, therefore, assisted reproduction should be analogous).

67. Patricia A. Kern & Kathleen M. Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right To Be a Single Parent Through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. REP. 251, 260 (1982).

68. 316 U.S. 535, 536, 541 (1942).

69. *See* Durkin, *supra* note 53, at 340.

70. *Skinner*, 316 U.S. at 536.

conception are used. Therefore, pursuant to the boundaries of *Skinner*, because A.I.D. does represent a form of conception,[71] the right of privacy must protect procreation accomplished with the aid of this assisted reproduction technology.

Furthermore, the ruling in *Eisenstadt*[72] supports the proposition that an individual's right to make decisions about procreation derives from the individual's interest in autonomy, "regardless of the person's marital status."[73] The concept of individual autonomy directs that a person should be allowed to control her own body as she pleases, as long as she does not bring harm to others. In addition, *Roe* supports the proposition that a woman has the fundamental right to terminate her pregnancy.[74] From this trio of cases, it is clear that a person has the fundamental right to prevent pregnancy with the use of contraceptives, to terminate pregnancy by abortion, and to ultimately make decisions in matters of conception. These rights indicate that an individual has the fundamental right to control one's own reproductive system. Included within this right to control one's own reproductive system is the right to conceive with the aid of reproductive technology, including A.I.D.

Furthermore, the Court's decisions establish that the right of privacy protects family autonomy from state intrusion in matters of conception and childrearing.[75] The right to procreate is concerned with "the reproductive rights of the prospective *rearing* parents."[76] Thus, the objective of rearing a child and establishing a family elevates the right to procreate to a constitutionally protected fundamental right.[77] Just as a couple using the traditional means of conception does so out of a desire to rear a child and establish a family, so too does a couple that seeks A.I.D.

The right of privacy prevents a state from intruding unnecessarily upon the private relationship and concerns of a couple and, therefore, their right to procreate via assisted reproduction.[78] Women must "be able to choose among . . . the various reproductive alternatives . . . [for] [p]rotecting women's constitutional rights to privacy and procreation is the highest priority."[79] Therefore, a state must present a compelling interest to justify placing restrictions

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71. "[T]here is nothing artificial about inseminating a woman, [therefore] artificial insemination aptly describes a process that is merely an alternative to insemination through sexual intercourse." Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 467 n.24 (1990).

72. 405 U.S. 438, 453 (1972).

73. Durkin, *supra* note 53, at 341.

74. 410 U.S. 113, 153 (1973).

75. *See generally* Kern & Ridolfi, *supra* note 67.

76. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 829.

77. *See id.*

78. *See* Kern & Ridolfi, *supra* note 67, at 260.

79. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodificiation of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 158 (1997).

on an individual's access to new reproductive technologies, including A.I.D.[80] A complete state ban on access to reproductive technologies would deprive an infertile couple of its only chance to procreate.[81]

C. Limits on the Guarantees of the Right to Procreate Using A.I.D.

Assuming the right of privacy protects conception that takes place with the assistance of donated sperm under one of the aforementioned theories, this right does not also include the right to use gametes from unwilling individuals, nor the right to maintain an exclusive relationship with the resulting child.[82] Furthermore, the right of privacy may not encompass the right to *buy* or *sell* sperm or other gametes, even if they are necessary for procreation within the context of an intimate association.[83] In this context, procreational services become commodities, merely goods and services, and may be regulated or proscribed altogether by states. Moreover, by bringing a third-party stranger into the intimate procreative relationship, the couple diminishes "the privacy of their association and simultaneously enhanc[es] the state's interest in protecting these other individuals, who become potential parties to the relationship and whose own interests may diverge from those of the couple."[84] Thus, in this setting the state gains wholesale power to intervene and regulate or proscribe gestational markets.

In addition, the right of privacy does not protect one's right to procreate if it conflicts with or is opposed by another person's right *not* to procreate. In *Davis v. Davis*, the court implied that a donor's interest outweighed the interests of the state, finding that "the state's interest in potential human life is insufficient to justify an infringement on the gamete-provider's procreational autonomy . . . [because] no other person or entity has an interest sufficient to permit interference."[85] Thus, the state lacks the power to intervene in assisted reproduction and may do so only to regulate or proscribe it if the state finds that the use of particular methods pose a threat to the resulting children.[86]

Although the ability to purchase semen from an anonymous donor may not be a guaranteed right, if it is allowed by the state, it is unlikely that the sperm

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80. Such justifications may include that A.I.D. is not in a child's best interest if the woman is unmarried, that single parent families burden state resources, and that the state needs to act in order to discourage illegitimate births. Kern & Ridolfi, *supra* note 67, at 253.

81. Garrison, *supra* note 8, at 855.

82. Rao, *supra* note 16, at 1084.

83. *Id.* at 1117. *See also Scouting the Frontiers of the Law*, *supra* note 45, at 25 (right to reproduce does not include right to get into a sperm clinic, in vitro fertilization program, or surrogate mother program).

84. Rao, *supra* note 16, at 1117.

85. 842 S.W.2d 588, 602 (Tenn. 1992) (court found that right of privacy encompasses both the right to procreate and right to avoid procreation and here, husband's right not to procreate outweighed his former wife's right to procreate).

86. *See* Rao, *supra* note 16, at 1117 n.224.

donor will interfere with the relationship of the mother and her resulting child.[87] The donor's anonymity will most likely preclude any donor attempts to enter the relationship. Anonymity is likely to prevent the existence of conflicts among the parties to the protected relationship, providing all involved a shield from state intrusion under the right of privacy.[88] Therefore, the couple is able to conceive and raise a child free from intrusion by the sperm donor. Moreover, if the donor's identity remains anonymous, the couple is further shielded from intrusion by the state in promoting the interests of the anonymous donor in seeking to establish a relationship with the resulting child.

If artificial insemination is performed with a known donor, however, the establishment of a relationship between the child conceived and the sperm donor, who is the biological father, may be in the child's best interests.[89] Thus, the state may choose to preserve the sperm donor's relationship with the child, valuing such a relationship more highly than maintaining the right to privacy and integrity of the family who obtained artificial insemination. In this context, a family who uses A.I.D. to conceive a child is not able to raise their child free from intrusion by the state, which is claiming to promote the best interests of the child. Thus, guarantees of the right to procreate using A.I.D. are subject to limitations.

II. THE MOST RECENT CASE TO ADDRESS A SPERM DONOR'S RIGHT OF PRIVACY IN A DISCOVERY PROCEEDING

Recently the California Court of Appeals addressed whether the identity of an anonymous sperm donor should be disclosed in a discovery proceeding.[90] The *Johnson* decision sets an initial precedent for donor anonymity because it is the first case in the nation to directly address a donor's right of privacy in artificial insemination.

Similar to many other states, California's "constitutional right of privacy is broader and more protective of privacy than the implied federal constitutional right of privacy interpreted by federal courts."[91] Therefore, right of privacy

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87. *Id.* at 1120. *But see* ROBERTSON, *supra* note 49, at 38-39 (finding a constitutional right to purchase sperm, eggs, and gestational services).

88. *See* Rao, *supra* note 16, at 1099, 1106-07 (relational right of privacy protects formation and preservation of family-like relationships in absence of any conflict within biological family, thus right of privacy shields activities of only those who are allied against the state from governmental intrusion); Kern & Ridolfi, *supra* note 67, at 260 (constitutional cases establish that right of privacy prevents a state from intruding unnecessarily upon private relationships and concerns of family unit).

89. *See infra* notes 135-37 and accompanying text; *Scouting the Frontiers of the Law*, *supra* note 45, at 24 (although people have the right to reproduce and raise families, "we do want to look out for the interests of children who are going to come into the world").

90. *See* Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 871 (Ct. App. 2000), *review denied*, Aug. 23, 2000.

91. Planned Parenthood Golden Gate v. Superior Court, 99 Cal. Rptr. 2d 627, 636 (Ct. App.

analysis in the context of artificial insemination under California law is likely to be extended to other states. Since the *Johnson* court faced such an important issue in the context of a discovery proceeding, it is important to examine the law with regard to the right of privacy in a discovery proceeding before discussing the outcome of the case.

A. Right of Privacy as a Means to Preclude the Disclosure of One's Identity in Discovery Proceedings

Generally, discovery proceedings allow a party to obtain the identity and location of all persons having knowledge of any discoverable matter.[92] This applies equally to the discovery of information from nonparties and parties to a pending suit.[93] However, a privilege or other right may preclude the right to discover certain information about a person.[94] Such privileges include the right to be free from self-incrimination, the attorney-client privilege, the marital communications privilege, the spousal testimonial privilege, and the physician-patient privilege, which is recognized by many states.[95] A right that may further preclude discovery is a guarantee of anonymity in a contractual agreement, provided that such a contract does not conflict with public policy. Finally, the right of privacy may preclude discovery.

Whether a recognizable privacy interest precludes disclosure during discovery depends upon the balance of competing interests at issue. The right of civil litigants to discover relevant facts must be balanced against the privacy interests of the person subject to discovery.[96] As previously discussed, a compelling countervailing state interest may outweigh a person's right to privacy. However, in a discovery proceeding, "[t]he least intrusive means should be utilized to satisfy the state's countervailing interest."[97] Thus, a person's right of privacy in a discovery proceeding may not be infringed upon in the absence of

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92. *See* FED. R. CIV. P. 26(b)(1); *see also Johnson*, 95 Cal. Rptr. 2d at 871.

93. *See* FED. R. CIV. P. 26(b)(1).

94. *See id.*

95. *See* U.S. CONST. amend. V; FED. R. EVID. 501; U.S.C.S. FED. R. EVID. (2001) (Commentary) (virtually every state has legislatively recognized a physician-patient privilege). *See also* Jaffe v. Redmond, 518 U.S. 1 (1996) (Court recognized psychotherapists-patient privilege under federal law); Trammel v. United States, 445 U.S. 40 (1980) (privilege against adverse spousal testimony); Fisher v. United States, 425 U.S. 391 (1976) (attorney client privilege); United States v. Lofton, 957 F.2d 476 (7th Cir. 1992) (marital communications privilege). *See generally* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 695 (1996).

96. *Johnson*, 95 Cal. Rptr. 2d at 878 (citing Vinson v. Superior Court, 43 Cal. 3d 833, 842 (1987)).

97. Planned Parenthood Golden Gate v. Superior Court, 99 Cal. Rptr. 2d 627, 636 (Ct. App. 2000) (convenience of means and cost will not merely satisfy the "compelling interest" test because if it did, expediency, rather than compelling interests, would represent overriding value).

compelling state interests.

B. Outcome of Johnson v. Superior Court[98]

In *Johnson*, Sperm Donor No. 276 fully disclosed his family medical history to California Cryobank, Inc.[99] This medical history included red flag indicators of the possible presence of Autosomal Dominant Polycystic Kidney Disease (A.D.P.K.D.) in the donor's family. Thus, the doctors at Cryobank possessed information indicating that Donor No. 276's sperm could be at risk of genetically transferring a kidney disease to any resulting children.

A husband and wife, Ronald and Diane Johnson, went to Cryobank to use the services of A.I.D. in order to conceive a child. The couple signed a confidentiality agreement providing that "Cryobank shall destroy all information and records which they may have as to the identity of said donor, it being the intention of all parties that the identity of said donor shall be and forever remain anonymous."[100]

Cryobank assured the Johnsons that the sperm from the anonymous sperm donor had been genetically tested and screened for diseases and irregularities, and that the sperm was healthy.[101] Mrs. Johnson was artificially inseminated and, thereby, conceived a child. Six years later, however, the child was diagnosed with A.D.P.K.D. The court established that the donor genetically transmitted the A.D.P.K.D. to the child, since neither parent had any history of the disease in their families.[102] The parents filed a claim against the sperm bank alleging professional negligence, fraud, and breach of contract, asserting that the sperm bank falsely represented that the sperm had been tested and screened and was free of infectious and genetically transferable diseases.

During the course of the proceedings, the Johnsons asserted the right to depose the sperm donor and to obtain his identity and all of his medical information.[103] The trial court quashed the deposition subpoena, ruling that the sperm donor had a privacy interest in remaining anonymous, which was heightened by the confidentiality agreement signed by the Johnsons and Cryobank.[104] The court further found that the petitioners had not demonstrated a compelling state interest that outweighed the donor's right to remain anonymous.[105] Finally, the trial court determined that the donor would not provide any new insight into the child's medical condition.[106]

The Johnsons appealed, and the court of appeals ordered the trial court to

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98. 95 Cal. Rptr. 2d at 864.
99. *Id.* at 868.
100. *Id.* at 867.
101. *Id.*
102. *See id.* at 868.
103. *Id.* at 867.
104. *Id.* at 870.
105. *Id.*
106. *See id.*

vacate its order and grant petitioners' motion to compel discovery.[107] However, the court of appeals recommended that the trial court grant an alternative order to protect the donor's identity to the fullest extent possible.[108] Limited attendance at the deposition and the use of the name "John Doe" in the transcript were two methods suggested by the court.[109]

Thus, the child conceived by A.I.D. and her parents could compel the donor's deposition and production of documents to discover information relevant to the action because such discovery might produce the identity and location of a person holding information relevant to the case. The court further determined that a privilege or right did not exist to preclude discovery of the sperm donor's identity.

First, the physician-patient privilege did not apply to prevent disclosure of the donor's identity because Donor No. 276 did not consult a physician for diagnosis or treatment of a physical or mental ailment.[110] Instead, the donor visited Cryobank for the sole purpose of selling his sperm. Thus, the sperm donor was not able to assert this privilege in order to preclude discovery of his identity.

In addition, the court found that Cryobank's confidentiality agreement with the Johnsons did not preclude disclosure of the donor's identity.[111] The court acknowledged that the donor had standing as a third-party beneficiary via the contract between the Johnsons and Cryobank. Furthermore, all parties agreed that the donor's identity and related information be kept confidential.[112] However, the court nevertheless found that the contract went too far by "precluding disclosure of the donor's identity and related information under *all* circumstances."[113] Thus, the contract conflicted with public policy and was found to be void.[114] The court held that "a contract that completely forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the best interests of the child."[115]

Furthermore, the court found that the donor's limited constitutional right to privacy did not preclude disclosure of the donor's identity.[116] The Court began by determining that the donor possessed a legally recognized privacy interest because the medical history of any person clearly falls within the recognized zone of privacy.[117] However, the court found this interest to be a limited privacy

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107. *Id.* at 879.
108. *See id.* at 878.
109. *Id.*
110. *Id.* at 872.
111. *See id.* at 872-73.
112. *Id.* at 873.
113. *Id.* (emphasis in original).
114. *Id.* at 875.
115. *Id.*
116. *See id.* at 878-79.
117. *Id.* at 878.

right, basing its decision on two reasons. First, California state law provides that "[a]ll papers and records pertaining to the insemination . . . are subject to inspection only upon an order of the court for good cause shown."[118] The court reasoned that this statutory language revealed an intention by its framers to create a limited privacy interest for sperm donors.[119]

Second, the court found that the donor did not possess a reasonable expectation of privacy under the circumstances.[120] Cryobank routinely told its sperm donors that non-identifying medical history and related information could be disclosed to the purchasers of the sperm. Furthermore, the court found that the donor's expectation "was substantially diminished" by his own conduct.[121] In light of the donor's clear connection with Cryobank involving commercial transactions of over 320 semen deposits, the court found it unreasonable for the donor to expect that his genetic history and identity would never be disclosed. The connection between the donor and the sperm bank was not only substantial; it was also likely to affect the lives of many people because of its potential to contribute to the creation to the human life. Therefore, the court found any expectation the donor had that his privacy would be completely protected was unreasonable.[122] Thus, while the donor possessed a legally recognized privacy right, the right was limited.

The court next addressed the issue of whether the discovery sought by the Johnsons exceeded the boundaries of the donor's limited privacy interests.[123] The Johnsons sought the donor's deposition to learn all of the relevant facts he disclosed to Cryobank, including his medical history and any indications of the presence of the hereditary kidney disease A.D.P.K.D. The Johnsons also sought access to all of the donor's records pertaining to his family's medical history of A.D.P.K.D. and related symptoms. The information requested by the Johnsons included not only the identity and medical history of the donor, but also that of his family. Therefore, the court found that such broad discovery requests constituted a serious invasion of the donor's privacy.[124]

However, despite the Johnson's discovery request constituting a serious invasion of the donor's privacy, the court held that such an invasion of privacy

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118. *Id.* at 876 (quoting CAL. FAM. CODE § 7613 (West 1994)).

119. *See id.*

120. *Id.* at 877. *See also* Rosales v. City of Los Angeles, 82 Cal. Rptr. 2d 149 (2000) (peace officer has no expectation of privacy concerning personnel records in litigation by third party against employee due to officer's conduct); Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994) (athletes have diminished expectation of privacy with regard to observation during urination and medical information relevant to drug testing); People v. Martinez, No. H021193, 2001 WL 357789, at *6 (Cal. Ct. App. 2001) (citing *Johnson* case and parenthetically describing its holding as: "sperm donor has reduced expectation of privacy concerning disclosure of nonidentifying medical information").

121. 95 Cal. Rptr. 2d at 878.

122. *Id.*

123. *Id.*

124. *Id.*

was justified by compelling state interests.[125] These state interests included requiring parties to comply with properly served discovery requests, seeking the truth in court proceedings, and ensuring those injured by the actionable conduct of others receive full redress of those injuries.[126] Furthermore, the Johnsons demonstrated that the donor was the only witness who could reveal the nature and extent of the information he had disclosed upon donating his sperm to Cryobank. Such information was crucial to the Johnsons because in order for them to make a successful case against the sperm bank, they had to prove that the sperm donor had disclosed warning symptoms indicating that his sperm could potentially carry A.D.P.K.D. Such information would provide the evidentiary link necessary to prove that Cryobank knowingly misrepresented that the sperm used in the artificial insemination was free from genetic diseases.[127]

III. EFFECTS OF THE *JOHNSON* DECISION

A. Abolishing the Guarantee of Sperm Donor Anonymity in Artificial Insemination

The *Johnson* decision sets precedent in donor anonymity law because it is the first case to directly address a donor's right of privacy in A.I.D. However, the decision makes it potentially difficult to protect a donor's right of privacy in maintaining anonymity. By finding that a sperm donor possesses merely a limited right to privacy, the *Johnson* court opened the door to infringing upon a donor's anonymity in order to promote something less than a compelling state interest. In the future, merely important or even rational state interests may suffice to outweigh the sperm donor's mere *limited* right to privacy.

Of course, certain interests should qualify as justified infringements of the donor's anonymity. A child conceived by A.I.D. who has developed a genetic disease should have the ability to ascertain the donor's identity to gain information about the donor's family medical history, since such information could lead to early disease detection and a more positive prognosis. Such information is critical considering that hereditary disorders, which may not develop until years later, can be life-threatening if not properly diagnosed and treated.[128] One may posit that access to merely medical records and not the donor's identity would suffice; however, "many times the medical histories of

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125. *Id.*

126. *Id.*

127. *Id.*

128. "[Adoptive] [c]hildren with physical or genetic disorders underwent painful and sometimes hazardous testing[,] . . . experienced delayed recovery, or suffered permanent disability" that may have been avoided had the birth parents' medical information been available or revealed to the adoptive parents. D. Marianne Brower Blair, *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests*, 33 TULSA L.J. 177, 257-58 & nn.477-78 (1988). A child with familial polyposis, for example, will develop symptoms late in childhood and experience carcinoma of the colon if left untreated. *Id.* at 258 n.478.

donors are superficial, incomplete, or extremely outdated[,]" making contact with the donor himself essential.[129] Additionally, the donor's identity and medical history should be revealed if a child conceived by A.I.D. needs a bone marrow or kidney transplant since finding a biological relative may mean the difference between life and death.[130] Such infringements on the donor's right of privacy are warranted because these disclosures could save the A.I.D. child's life, thus promoting truly compelling interests.

However, the *Johnson* court did not infringe upon the donor's anonymity to enable the Johnsons to obtain additional information about the child's disease in order to treat or diagnose the child. Rather, the court did so to enable the Johnsons to gain the necessary information to build a successful lawsuit against the sperm bank, placing more importance upon the Johnsons' ability to create a legal defense than on the sperm donor's right of privacy. The court emphasized the state's interest in "ensuring that those injured by actionable conduct of others receive full redress of those injuries."[131] However, in *Johnson*, the sperm donor was not the party responsible for the actionable conduct; it was the sperm bank who falsely represented that the sperm had been screened and was free of infectious and genetically transferable diseases. Nonetheless, the court deemed the Johnsons' discovery interests compelling, warranting an invasion into the donor's privacy.[132]

However, a court's desire to ensure that an efficient and just legal process occurs may not outweigh the need to create safe methods and means of conception for infertile couples. The constitutionally protected rights to procreate and raise a family have been held to demand the utmost priority.[133] Therefore, while the court in *Johnson* found the discovery interests to be compelling, thus supporting its decision that disclosure of the donor's anonymity was justified, in the future, merely important or even rational state interests may suffice to warrant disclosure of the donor's anonymity.

Whether a recognizable privacy interest precludes disclosure during discovery depends upon a balance of the competing interests at issue. The need for civil litigants to discover relevant facts must be "balanced against the privacy interests of the persons subject to discovery."[134] By determining that the sperm

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129. Kristen E. Koehler, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 330 (1996); *Johnson*, 95 Cal. Rptr. 2d at 875 (situations may require the disclosure of the donor's identity in order to obtain the needed genetic and medical information).

130. *See* Swanson, *supra* note 1, at 175; *Johnson*, 95 Cal. Rptr. 2d at 875 (court found "[i]n some situations, a person's ability to locate his or her biological relative may be important in considering lifesaving transplant procedures").

131. *Johnson*, 95 Cal. Rptr. 2d at 878.

132. *Id.* (compelling state interests included: making parties comply with properly served discovery requests, seeking truth in court proceedings, and ensuring those injured by actionable conduct of others receive full redress of those injuries).

133. *See* Kerian, *supra* note 79, at 158 (protecting one's "constitutional rights to privacy and procreation is the highest priority").

134. *Johnson*, 95 Cal. Rptr. 2d at 878 (citing Vinson v. Superior Court, 43 Cal. 3d 833, 842

donor's privacy interest was limited, however, the court of appeals in *Johnson* tipped the scale in favor of the party seeking to discover information about the sperm donor. Therefore, the party needs only to have an interest more compelling than the sperm donor's *limited* privacy interest to warrant disclosure and infringement of the donor's right to remain anonymous.

In future decisions, therefore, less compelling interests may suffice to outweigh the donor's privacy interest. For example, courts may find that a child's desire to learn about his or her parental roots and family heritage are important enough to infringe upon a donor's anonymity because these are important interests to promote the well being of a child.[135] Many psychologists claim that the inability to discover one's biological roots may be quite harmful to a child, resulting in insecurity and an underdeveloped sense of identity.[136] Thus, the desire of an A.I.D. child to establish contact with his or her biological father may also be deemed an important state interest justifying infringement on donor anonymity because it promotes a child's interest in developing a relationship with his or her biological father.[137]

As a result, courts and legislatures may determine that children conceived by

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(1987)). *See also* Planned Parenthood Golden Gate v. Superior Court, 99 Cal. Rptr. 2d 627, 643 (Ct. App. 2000) (disclosure of information which is essential to fair resolution of lawsuit may properly be compelled).

135. Many people believe it is important to recognize a child's birthright to obtain heredity information. *See* N.P.R.: Morning Edition, *Analysis: California Supreme Court Ruling on the Anonymity of a Sperm Donor That Could Affect Fertility Clinics Nationwide*, Aug. 25, 2000, *available at* 2000 WL 21481375. Many adult adoptees have a compelling psychological need for information about their heritage. *See* Blair, *supra* note 128, at 247.

136. *See* Swanson, *supra* note 1, at 178-79 (this psychological problem has been classified as "genealogical bewilderment"); Blair, *supra* note 128, at 247 n.415 (effects of "genealogical bewilderment" may include a state of confusion and uncertainty in adoptees who become obsessed with questions regarding their biological roots or identity crisis in adopted adolescents manifested by social and psychological dysfunction); Carvel, *supra* note 20 ("there is evidence of confusion and insecurity among children who have been told they were conceived by artificial insemination, but denied further information about their biological parent . . . .").

137. Many A.I.D. children desire information regarding their biological fathers when they become adults. *See* Margaret R. Brown, *Whose Eyes Are These, Whose Nose?*, NEWSWEEK, Mar. 7, 1994, at 12 (discussing an adult conceived by A.I.D. who desires information about her biological father); David Noonan & Karen Springen, *When Dad is a Donor*, NEWSWEEK, Aug. 13, 2001, at 46-47 (discussing two children conceived by A.I.D. who are now adults hunting for their biological fathers and noting "there is the growing desire among donor children to unravel the mystery of their origins"); Peggy Orenstein, *Looking for a Donor to Call Dad,* N.Y. TIMES, June 18, 1995, § 6 (Magazine), at 1 (reporting accounts of A.I.D. children who want to obtain information about their biological fathers). *See also* Melissa Fletcher Stoeltje, *Adopted Teens Seek Answers*, HOUS. CHRON., May 28, 1997, at 1 (sixty-five percent of adopted adolescents teenagers say they want to meet their birth parents); Karen M. Thomas, *The Donor Connection: Families Are Chipping Away at the Tboos [sic] and Secrecy that Once Surrounded Artificial Insemination*, DALLAS MORNING NEWS, Nov. 23, 1997, at 1F.

A.I.D. have the same informational needs as adoptive children.[138] This may lead to the enactment of A.I.D. laws analogous to current adoption laws, which allow the discovery of biological parent information by adoptive children.[139] Alternately, in the absence of legislation, courts may develop common law that closely imitates adoption laws, allowing disclosure of donor identity and easy access to revealing information about the donor. Such situations would create a trend for additional infringements on a donor's right of privacy, making it much more difficult for a donor to remain anonymous.

Furthermore, additional state interests promoting what is best for the A.I.D. child may be found to constitute the necessary interest to justify infringement on donor anonymity. Because sperm donors are allowed to donate numerous times at a sperm bank, one sperm donor may father numerous children in the same geographic area. There are no laws that regulate the number of children a donor can father; however, the American Fertility Society, recognizing the severity of such a problem, has recommended a ten-pregnancy limit for populous areas and less than ten pregnancies for less-populous areas.[140] However, sperm banks and physicians are not required by law to adhere to this limit. Anonymity, therefore, may lead to half-siblings unknowingly mating and subsequent genetic difficulties in conceived children[141] illustrating another interest that may suffice to outweigh that of the donor's limited right of privacy.

Thus, the *Johnson* decision paves the road for courts and legislatures to make it extremely difficult to protect a donor's right of privacy in maintaining anonymity in artificial insemination. As a result, a sperm donor increasingly faces the potential loss of his anonymity.

Furthermore, the court in *Johnson* eliminated the guarantee of donor anonymity by abolishing the ability to ever contractually promise anonymity in sperm donation contracts. Therefore, the recipients of A.I.D. may not even provide by contract that the donor's identity will never be revealed. The court reached this result by ruling that "a contract that completely forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the bests interest of the child."[142] Despite the clear intention of all parties involved to keep the identity of the donor anonymous, the court voided the contract by finding that the confidentiality contract went "too . . . far [by] precluding disclosure of the donor's identity and related information under *all*

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138. Garrison, *supra* note 8, at 898.

139. *Id.* at 899 (adoption records are kept on file for generations, allowing adoptive families to have enough information about adoptive child's biological information to satisfy their own psychological needs).

140. *See* Swanson, *supra* note 1, at 177. *See, e.g.*, Briggs, *supra* note 4, at G1.

141. *See* Durkin, *supra* note 53, at 338 n.82 (citing Ann T. Lamport, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization,* 14 AM. J.L. & MED. 109, 116-17 (1988)).

142. Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 875 (Ct. App. 2000), *review denied,* Aug. 23, 2000.

circumstances. . . .[143]

Therefore, confidentiality agreements, which are so prevalent in sperm bank services, even if they articulate intent by *all* parties involved to maintain anonymity, will, pursuant to *Johnson's* direction, violate public policy and, therefore, be void. Thus, the recipients of A.I.D. lose the ability to provide by contract that the donor's identity or the identity of their child will never be revealed.

In contradiction to the *Johnson* court's ruling, it might be in the best interests of society if the sensitive issues surrounding assisted reproduction were dealt with by contracts, thereby forcing all parties involved to reflect upon their procreative intentions prior to insemination.[144] Such forethought may, in fact, act as a cautionary measure, ensuring parties enter such situations fully aware of the potential consequences involved. Regardless, the court found such contracts to be void as against public policy, thereby abolishing contract as a means to guarantee donor anonymity. Thus, by limiting a sperm donor's right of privacy and abolishing the opportunity of A.I.D. recipients to contractually promise privacy, the court in *Johnson* has made donor anonymity difficult to maintain.

B. Jeopardizing the Ability of the Couple Utilizing A.I.D. to Conceive and Raise a Family Free from Intrusion

Many families who conceive by means of A.I.D. assume that easier access to a sperm donor's identity promotes the well-being of their child and family. The ability to obtain medical and genetic information without dispute is extremely appealing. However, finding a limited right of privacy for the sperm donor, while it appears to be beneficial to the A.I.D. child and family, may in fact result in more harm than benefit to the family and child.

The guarantee of anonymity protects the child conceived by A.I.D., the parents who participated in A.I.D., and the sperm donor who donated his gametes for A.I.D. from emotional distress.[145] An A.I.D. child's desire to learn about his parental roots and heritage and to establish contact with his or her biological father has the potential to strain the existing family unit. Acting on these desires would not be an option if donor anonymity were guaranteed and, as a result, the familial unit of the couple who participated in A.I.D. would be preserved. Furthermore, donor anonymity shields families from a donor's claims of inheritance rights and involvement in the issues of the child's paternity and legitimacy.[146]

Moreover, anonymity is important to a family desiring to keep their decision to resort to A.I.D. secret.[147] The family may fear shame or ridicule if such

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143. *Id.* at 873 (emphasis in original).

144. *See* Brenwald & Redeker, *supra* note 66, at 629-30.

145. *See* Swanson, *supra* note 1, at 171.

146. *See id.*

147. *See* Garrison, *supra* note 8, 897 n.284 (citing Julian N. Robinson et al., *Attitudes of Donors and Recipients to Gamete Donation*, 6 HUM. REPROD. 307, 308 (1991), who wrote that

information were revealed within their nuclear and extended families or community. Alternatively, the family may just want others to believe the child is the offspring of the husband. Furthermore, the couple's religion may even forbid use of assisted reproduction. Thus, one's religious beliefs may cause all parties involved in the artificial insemination process to maintain secret identities in order to shield themselves from criticism.[148] In addition, the couple may choose not even to reveal the use of A.I.D. to their child conceived by such means.[149] Finally, a later reappearance by the sperm donor might drastically disrupt a family who had made such privacy decisions and greatly impact their unity and image in the community.

However, some scholars posit that societal attitudes to A.I.D. have changed radically, resulting in a greater willingness on the part of sperm donors and family recipients of A.I.D. to relinquish their secrecy and anonymity.[150] "[T]he growing numbers of couples who use A.I.D. and their openness about it, testify to society's growing acceptance of the procedure.... Thus, participants' demand for donor anonymity has weakened considerably over time."[151]

Yet, eliminating the threat of reappearance by the biological father and disruption of the family remains a critical aspect of maintaining donor anonymity in order to promote a family's interests. Choosing an anonymous donor will most likely preclude any of his attempts to enter into a relationship with the child conceived so that all of the parties involved are shielded from state intrusion under the right of privacy.[152] The best way to ensure that the donor is not able to later claim paternity or establish a relationship with the child is to maintain donor anonymity.[153] If the donor remains anonymous, the couple artificially

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eighty-five percent of parents "stated that they would conceal the nature of their offspring's conception"); Noonan & Springen, *supra* note 137, at 46 ("some couples went so far as to use one doctor to get pregnant and another to deliver the baby, without telling the second doctor how the child was conceived"); *see also* Milk, *supra* note 2, at 65 ("[e]ighty percent of the married couples who came to the Fairfax Cryobank want a donor who looks like the husband. . . . [because] the husband planned to tell no one—not even immediate family—that the child wasn't his"); Jim Nolan, *Banking on Birth; More and More Women Take the Mate Out of Mating by Seeking Out Sperm Donors*, THE SPOKESMAN-REV. (Spokane, Wash.), Aug. 17, 1998, at B3 ("[h]eterosexual couples confronted with male infertility almost always seek a donor who matches the physical characteristics of the husband").

148. Swanson, *supra* note 1, at 164.

149. Noonan & Springen, *supra* note 137, at 46 ("following World War II, embarrassed couples who used donor insemination rarely told anyone where their babies come from, including the children themselves").

150. *See id.* ("the presumption was that infertile men couldn't handle more-open door insemination", but "now the social terrain has shifted dramatically" and stigmas and secrecy are falling away); Swanson, *supra* note 1, at 168-70.

151. Swanson, *supra* note 1, at 171.

152. *See* Rao, *supra* note 16, at 1117.

153. States that have enacted laws modeled after the U.P.A. which sever unknown donors' rights with regard to the child conceived, accomplish such safeguards for the A.I.D. participant

inseminated is shielded from intrusion by the state in promoting the interests of the anonymous donor to foster a relationship with the child. Therefore, the couple is able to conceive and rear a child free from intrusion by the sperm donor.

If the identity of the sperm donor is revealed, however, the donor may be included within the relationship protected by the right of privacy.[154] A state may find that establishing a relationship between the conceived child and the sperm donor, who is the biological father, is in the child's best interests.[155] Thus, the state may choose to preserve the sperm donor's relationship with the child, valuing such a relationship more than maintaining the integrity of the family who obtained artificial insemination and a right to privacy in that transaction. In such an instance, a family who uses A.I.D. to conceive a child is not able to raise their child free from intrusion by the state, as intrusion would be justified under the rubric of the best interests of the child.

The possibility that a sperm donor may indeed desire to establish a claim of paternity or a relationship with his biological child is a potential threat to the recipient family.[156] While the court in *Johnson* presumed that sperm donors are motivated to donate merely for financial incentives, this may not always be the case. In *Johnson*, the court specifically made note of the fact that the donor had deposited over 320 specimens of his semen with Cryobank, earning over $11,000.[157] From this, the court established that the donor's relationship with Cryobank was a substantial commercial transaction.[158] However, a donor's decision to donate may be based on his desire to ensure the advancement of his genetic likeness despite, for whatever reason, his inability to do so otherwise.[159] If so, his later desire to contact a resulting biological child may be likely. Furthermore, a donor may initially be motivated to donate for financial gain, but

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family. However, many scholars negatively critique such laws because they belittle and trivialize "the importance of fathers or send[] the message to society that biological fatherhood does not entail corresponding responsibility." Michael L. Jackson, *Fatherhood and the Law: Reproductive Rights and Responsibilities of Men*, 9 TEX. J. WOMEN & L. 53, 91 (1999).

154. *See* Rao, *supra* note 16, at 1117.

155. *See infra* notes 135-37 and accompanying text.

156. *See* Noonan & Springen, *supra* note 137, at 47 (discussing one man who anonymously donated sperm thirty-five times two decades ago and is currently searching for his offspring).

157. Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 867 (Ct. App. 2000), *review denied* Aug. 23, 2000.

158. *Id.*

159. One existing sperm bank specializes in the artificial insemination of sperm donated by Nobel laureates and Olympic champions and does not even pay its donors for their specimens. *Owner of "Genius" Sperm Bank Pleased by Results*, N.Y. TIMES, Dec. 11, 1984, at A17. Robert Graham is the founder of the Repository for Germinal Choice in Escondido, California, a sperm bank which draws sperm from the brightest one percent of scientists, businessmen, and professionals, including Nobel laureates. *See* Christopher Goodwin, *"Nobel Sperm Bank" Babies . . . and How They Grew: Case Histories Vary as Children of Wealthy Man's "Genius" Project Come of Age*, TORONTO STAR, Jan. 16, 2000, at BS1; Chase, *supra* note 4.

may later find himself desiring to maintain a relationship with his biological child. Thus, his desire to intrude upon the recipients of A.I.D. will pose a real threat to the A.I.D. child and family.

Another critical question raised by the *Johnson* decision addresses whether the *child's* right of privacy is also compromised. Assume, for example, that years after providing a donation, a sperm donor develops a rare hereditary disease of which he had been unaware of his predisposition. In this hypothetical, one must query whether the sperm donor will be afforded the same opportunity to obtain the identity of the child conceived by artificial insemination in order to convey pertinent medical information that may save the child's life through early detection.

If a court were to extend the decision in *Johnson* to address this question, it would have to find that the child conceived by A.I.D. had a limited right to privacy, just as the sperm donor did, employing the rationale that it is in the A.I.D. child's best interest for the donor to obtain his identity in order to contact the child and inform him of the disease. Revealing the child's identity promotes the state's compelling interest of protecting the child's life as well as the lives of any offspring the child might already have had. This compelling interest in promoting the A.I.D. child's life, safety, and well-being, as well as those of his offspring, would outweigh his own right to privacy. Furthermore, the state would have a compelling interest in preventing the A.I.D. child from further transmitting any genetic defects.[160] The state could take the steps necessary to prevent the spread of infectious diseases by helping to avoid the transmission of genetic defects.[161] Therefore, under this rationale, the A.I.D. child should be notified, which would only be possible if the sperm donor is able to contact him directly or indirectly, justifying any infringement on the A.I.D. child's right of privacy.

Alternatively, assume that after providing a sperm donation, the donor himself conceives a child naturally. Assume also that this child is born with, or later develops, a rare heredity disease. Under an extension of *Johnson*, the donor should be able to obtain the identity of the A.I.D. child to either inform him or caution him to be tested or, in the alternative, to learn whether the A.I.D. child has already contracted the same disease and gain information about his condition or possible treatments. Under this scenario, such information may save the life of the sperm donor's own naturally born child. The state would again have a compelling interest in promoting the natural child's life, safety, health, and well being, and these interests would outweigh the A.I.D. child's right of privacy, justifying disclosure of his identity to the sperm donor.

This same reasoning can similarly be applied to a situation where a naturally born child is in need of a bone marrow or kidney transplant. It may be critical for the donor to contact the A.I.D. child, who may be the only available match to save the life of the donor's naturally born child. Saving the naturally born child's life is clearly an important state interest. Once again, the A.I.D. child's

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160. Swanson, *supra* note 1, at 175.

161. *Id.* at 184.

right of privacy would be outweighed by a compelling state interest, justifying disclosure of his identity to the sperm donor.

Thus, while many families think that easier access to a sperm donor's identity promotes the well-being of their A.I.D. child and family, such access may produce correlating harmful effects. Finding a limited right of privacy for the sperm donor, although it appears to be beneficial to the A.I.D. recipient family, may actually result in more harm than benefit. Consequently, a couple is no longer able to use A.I.D. in order to conceive and raise a family free from intrusion by the donor. Thus, the *Johnson* decision, in limiting a donor's ability to maintain anonymity, has also jeopardized the ability of A.I.D. participants to conceive and raise a family free from intrusion by the anonymous donor and the state.[162]

C. Reducing the Amount of Sperm Donors

Finding that sperm donors possess merely a limited privacy interest may also reduce the number of sperm donors. "[P]otential loss of anonymity might conceivably have a significant impact on donor decision making."[163] Men may be less likely to become donors if they feel they are faced with the prospect that in the future, someone could show up on their doorstep claiming to be their biological child.[164] If never having their identity revealed is of paramount concern to sperm donors, doctors need to be able to guarantee donor anonymity to insure a continuous donor pool.[165]

The willingness of a man "to donate his semen is critical to the continued availability of AID as a means of conception."[166] If men are dissuaded from participating in the A.I.D. procedure, the results may include elimination of A.I.D. altogether or alternatively lead to an increase in costs of the procedure so that only the wealthy could afford it.[167] Any action that would impair access to A.I.D. detracts from a couple's right to reproduce.[168] It is the state's duty not to enact laws that discourage donors because doing so would amount to infringing upon an individual's right to procreate with the aid of reproductive technologies. Thus, if the loss of donor anonymity does indeed limit the supply of sperm available for A.I.D., then disclosure of the donor's identity would interfere with potential parents' right to procreate.[169]

However, many scholars assert that an increased potential for loss of

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162. *See* Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 864 (Ct. App. 2000), *review denied* Aug. 23, 2000.

163. Garrison, *supra* note 8, at 900.

164. Milk, *supra* note 2, at 65.

165. Kern & Ridolfi, *supra* note 67, at 253.

166. McIntyre, *supra* note 17, at 545.

167. *See id.*

168. *See* Swanson, *supra* note 1, at 181.

169. *Id.*

anonymity will not lead to a reduction in the amount of sperm donors,[170] with which the *Johnson* court agrees.[171] However, donors characteristically expect to remain anonymous upon donation, with a majority of sperm donors overwhelmingly favoring strict anonymity.[172] Many potential donors surveyed reported they would not choose to donate if their anonymity was not maintained.[173] Therefore, the threat of a diminished supply of sperm donors is a substantial risk associated with the judicial finding that a donor merely possesses a limited right to privacy, and must be considered in the enactment of

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170. *See id.* at 171-72 (there will not be shortage of sperm donors if anonymity is not guaranteed, and concern that "lack of donor anonymity will render the practice of AID impossible seems outdated"); Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 661 (1991) (reporting that seventy-five percent of donors surveyed at a California sperm bank were willing to provide identifying information to their child once they have reached the age of majority); Garrison, *supra* note 8, at 900 n.295 (citing Patricia P. Mahlstedt & Kris A. Probasco, *Sperm Donors: Their Attitudes Toward Providing Medical and Psychosocial Information for Recipient Couples and Donor Offspring*, 56 FERTILITY & STERILITY 747, 749-52 (1991), who indicate that sixty percent of the surveyed artificial insemination donors at two centers in Texas and Louisiana reported they were willing to meet with or provide identifying information to their biological child at age eighteen); Robin Herman, *When the "Father" Is a Sperm Donor: A New Look at Secrecy*, WASH. POST, Feb. 11, 1992, Health at 10 (directors at a sperm bank that offer donors a choice between anonymity and openness claim that it is no more difficult to recruit donors for open program than for program guaranteeing anonymity).

171. Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 878 (Ct. App. 2000), *review denied*, Aug. 23, 2000 ("[W]e question Cryobank's contention that without complete confidentiality its business will suffer because it will be unable to attract donors. Research on the subject suggests that confidentiality is generally more of a concern to doctors than to donors").

172. Koehler, *supra* note 129, at 332-33. *See also* Carvel, *supra* note 20 (England's public health minister states that allowing children to learn identity of their biological parents will "deter donors who might reasonably fear they could be pursued by large numbers of unknown offspring seeking emotional and financial support. . . . Doctors and infertility support groups are concerned that relaxation of confidentiality rules could discourage potential donors . . . ."); Garrison, *supra* note 8, at 900 n.295 (citing Mark V. Sauer et al., *Attitudinal Survey of Sperm Donors to an Artificial Insemination Clinic*, 34 J. REPROD. MED. 362, 363 (1989), who indicate that survey of sperm donors at a California clinic revealed that seventy-one percent favored anonymity); Elizabeth L. Gibson, *Artificial Insemination by Donor: Information, Communication and Regulation*, 30 J. FAM. L. 1, 28 (1991-92); *Court Upholds Limit on Sperm Donors' Privacy*, *supra* note 20, at A15 (Cryobank's attorney fears the *Johnson* decision may scare away donors); Noonan & Springen, *supra* note 137, at 47 (sperm banks with "yes"-donor programs, in which donors agree in advance to let any offspring track them down when the children reach eighteen, report that most donors still prefer anonymity).

173. *See* Garrison, *supra* note 8, at 900 n.295 (citation omitted) (only twenty percent of the active donors at a Danish infertility clinic reported a willingness to continue donating if current rules of anonymity were revoked); Robinson et. al, *supra* note 147, at 30 (only fifteen percent of potential sperm donors surveyed in 1991 at two British artificial insemination centers would choose to donate if their anonymity were not maintained).

state laws. The state must not infringe upon the right to procreate with the aid of reproductive technologies. Thus, if the loss of donor anonymity does indeed limit the supply of sperm available for A.I.D., then the *Johnson* decision interferes with potential parents' right to procreate.

D. A Redeeming Effect of the Johnson Decision: Decreasing the Number of Children Born with Genetic Diseases

Finding that sperm donors possess merely a limited right of privacy may positively have the effect of reducing the number of children born with genetic diseases. By granting parties permission to depose the sperm donors, the court has created a means by which the participants of A.I.D. can obtain the necessary information to successfully bring a lawsuit against sperm clinics. The court has given parties the means to hold sperm banks accountable for misrepresentations. Participants of A.I.D. are no longer without recourse for false assurances that the sperm used in the insemination procedure was free from genetic defects.

Now that A.I.D. participants have access to a sperm donor's identity and related records, the threat of litigation is more of a reality to sperm banks. More vulnerable to attacks alleging misrepresentation, sperm clinics will be forced to screen both sperm donors and their donated gametes more carefully in order to avoid liability.[174] Sperm clinics will also be more reluctant to falsely convey that there are no signs of hereditary diseases in donor sperm when, in fact, the donor revealed such signs to the sperm bank upon donating. Knowing that the participants will be able to depose the sperm donor, who will reveal the information he conveyed at the time of donation, sperm banks face increased susceptibility to meritous claims against them for false representation. Thus, an increased focus on genetic screening, and a reduction in the willingness to misrepresent the health of the sperm may lead to a reduction in the number of A.I.D. children born with genetic diseases.

Furthermore, to avoid litigation in the future, sperm clinics may implement policies that will encourage their sperm donors to more fully disclose hereditary information, thereby increasing donor screening processes. Under the current system, sperm donors are paid for their donations only if their semen has been first deemed acceptable for insemination, which creates monetary incentives for the donor to withhold information upon donation.[175] By implementing a new system in which donors are paid for their sperm regardless of its quality, the sperm bank would eliminate the incentive for sperm donors to misrepresent or withhold information and hence improve the likelihood that genetic diseases could be detected by the sperm bank. The donor would disclose more information, enabling sperm banks to perform more focused testing for the

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174. Regulations requiring screening of sperm for A.I.D. is not as thorough as it should be to protect participants. Many states merely require donors to screen potential donors for H.I.V., and a few require additional screening for other sexually transmitted diseases and genetic disorders. *See* Garrison, *supra* note 8, at 838 n.7.

175. McIntyre, *supra* note 17, at 523.

diseases that the donor indicates might be applicable. While such a policy may increase the sperm bank's initial expenses, it is likely that a reduction in the costs associated with litigation over misrepresentations will balance out such initial expenses.

Not only would the sperm clinic be able to eliminate the incentives for sperm donors to misrepresent or withhold information, it would also be able to impose serious consequences on sperm donors who provide inaccurate or incomplete information at the time of donation. The *Johnson* decision enables the A.I.D. family to gain access to the sperm donor identity and medical records. The sperm bank, as the opposing party to the litigation, would also gain access to donor information. Therefore, sperm banks would be afforded the opportunity to hold its donors liable for such misrepresentations. Thus, the *Johnson* court's decision would enable sperm banks to hold its sperm donors accountable for the conveyance of false medical information.

However, it is important to emphasize that the ultimate responsibility of genetic screening lies with the sperm banks. Mere reliance on donor questionnaires is an unreasonable and inadequate screening method. Thus, regardless of the extent to which a donor reveals his medical history, the duty to thoroughly screen each donation must remain fully upon the sperm bank.[176] A sperm donor may disclose the medical history to the fullest extent possible, yet be unaware that he is carrying a defect or disease.[177] Therefore, the clinic has a duty to ask questions that effectively prompt complete disclosure of a donor's medical history to test sperm for diseases beyond that which the donor indicates might be applicable.[178]

By granting access to sperm bank records regarding donors, the *Johnson* court has given participants of A.I.D. the means necessary to hold sperm banks accountable for their misrepresentations or negligent screening procedures. Consequently, sperm clinics are forced to place more emphasis on their genetic testing and screening procedures and to represent the health of the sperm more accurately in order to avoid the threat of litigation. Such improvements in the screening and testing procedures of sperm banks will most likely decrease the number of A.I.D. children born with genetic diseases or defects.

CONCLUSION

The law surrounding A.I.D. is in its early phases of development; however,

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176. *See id.* at 527.

177. A study of A.I.D. screening practices revealed that ninety percent of the sperm donors failed to identify genetic defects in their family history, and even sperm donors with medical training failed to report over two-thirds of their family disorders. *See id.* at 527 n.26 (citing M. Chrystie Timmons et al., *Genetic Screening of Donors for Artificial Insemination*, 35 FERTILITY & STERILITY 451, 453, 455 (1991)).

178. *See* McIntyre, *supra* note 17, at 545 ("it is more practical to place the burden of detecting genetic defects on the AID practitioner than on donors who are likely to be unfamiliar with the intricacies of genetics").

the *Johnson* court sets precedent in addressing legal issues of first impression for the area of donor anonymity. Unfortunately, *Johnson* has the effect of abolishing the guarantee of sperm donor anonymity, which may jeopardize the ability of A.I.D. recipients to use the procedure to conceive and raise a family free from donor and state intrusion. Additionally, as a result of finding that a donor possesses merely a limited right to privacy, sperm banks may be forced to deal with a reduction in the number of men willing to donate.

However, the *Johnson* decision has provided A.I.D. participants with the means necessary to successfully bring suit against a sperm clinic and hold it accountable for misrepresentations. This increased accountability may lead to improved genetic screening standards and, therefore, less A.I.D. children born with genetic disorders.

Although the effects of the *Johnson* ruling are likely to be far reaching, the *Johnson* decision, and others like it, are necessary to develop the law of A.I.D. Although the *Johnson* decision went too far in limiting a sperm donor's right to remain anonymous, clarifying the issues involved in A.I.D. will allow individuals to make more informed decisions about whether to donate their sperm and permit families to make more informed decisions about whether or not to conceive a child using this rapidly increasing assisted reproductive technology.