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Caveat Vendor. Potential Progeny, Paternity, and Product Liability Online

Dawn R. Swink and J. Brad Reich*

I. INTRODUCTION

Recently a fifteen-year-old boy decided to track down his genetic father.¹ He sent a swab of his own saliva to an online DNA lab.² He waited nine months for initial results to return.³ He then gathered additional information from his mother about his sperm donor father (year of birth, hometown, and surname) and commissioned an online investigation service to determine the true match.⁴ Within ten days, the boy met his biological father.⁵ Is this an isolated case? No. With the recent explosion of genetic inheritance information avail-

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1. See Joshua Glen, *Sperm Bank Job*, BOSTON GLOBE, Nov. 13, 2005, at E3, available at http://www.boston.com/news/globe/ideas/articles/2005/11/13/sperm_bank_job.

2. Alison Motluk, *Anonymous Sperm Donor Traced on Internet*, NEW SCIENTIST, Nov. 3, 2005, at 6, available at <http://www.newscientist.com/article.nsf?id=mg18825244.200>. "The boy paid FamilyTreeDNA.com \$289 for the initial DNA test." *Id.* This service "compares the user's Y chromosome—which passes from father to son virtually unchanged—against a database of Y chromosomes from other men." Sam Lister, *Sperm Donor Father Identified Using Internet*, TIMES ONLINE, Nov. 2, 2005, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article585839.ece?token=null&offset=0. Although this genetic father had never submitted his DNA to the FamilyTreeDNA.com site, all that was needed was for someone in the same paternal line to be on file. *Id.*

3. In the interim, two men who were both using the same website to trace their family trees contacted the boy. See Lister, *supra* note 2 ("[T]he similarities in Y chromosomes between the teenager and the two other men revealed a 50 percent chance that all three had the same father, grandfather or great-grandfather."). The two men contacting the boy shared similar last names, which provided the boy with perhaps his most vital clue. See Motluk, *supra* note 2, at 6.

4. Motluk, *supra* note 2, at 6 (stating that the boy used Omnitrace.com to "purchase the names of everyone that had been born in the same place on the same day").

5. See Glen, *supra* note 1, at E3.

able on the Internet, any sperm donor, including the average undergraduate student who “trades his sperm for beer money,” could be found just as easily.

This Article contends that the Internet has increased the availability of, and the market for, donor sperm to a larger audience than ever imagined, resulting in significant and previously unimagined problems and concerns. Medical technology and the Internet have combined to make the identity of any sperm donor⁶ more readily available, lifting the cloak of anonymity that many donors once enjoyed.⁷ While a sperm donor’s identity is much more ascertainable, his legal liability for both paternity and product—the donated sperm—is uncertain. This uncertainty implicates important legal issues, especially as the “first generation”⁸ of Internet sperm donor fathers and their children begin looking for each other online. Part II of this Article recognizes that reproduction most often results from coitus between opposite sex parents, but also shows that the three most popular methods of artificial insemination account for more than one million births worldwide and that this number is likely to increase. Part III discusses the Internet’s impact on assisted reproduction. The Internet has increased the level of information available on virtually any subject,⁹ and more significantly for purposes of this

6. Although the common term is sperm “donor,” most deposits are not truly donated. In general, males are paid a small sum in exchange for their efforts or somehow compensated for their travel or other expenses. The vast majority of sperm donors are, more accurately, “sperm sellers.”

7. This trend should continue. Genetic genealogy websites and their databases are expected to grow. For example, FamilyTreeDNA.com is running 2400 projects to trace particular surnames and has a database of more than 50,000 Y chromosome signatures. In Salt Lake City, Utah, The Sorenson Molecular Genealogy Foundation is “compiling its database of genetic markers representing 500,000 individuals with confirmed pedigrees going back at least four generations.” Lister, *supra* note 2.

8. Without a doubt, sperm donor dads and their children have attempted to find one another in the past. “First generation” refers to the unique way in which the parties are investigating, identifying, locating, and communicating with one another using the Internet as the primary tool. See Tony Allen-Mills, *Meets Sperm Donor No. 150, Your Daddy*, LONDON TIMES, Feb. 18, 2007, <http://donorsiblingregistry.com/londontimes.pdf>; see also Jennifer Wolff, *What is a Father: The Genetic Parent*, BEST LIFE, May 16, 2007, <http://donorsiblingregistry.com/whatisafather.pdf>. See generally The Donor Sibling Registry, <http://www.DonorSiblingRegistry.com> (last visited Aug. 27, 2007) (facilitating “mutual consent contact between people born from anonymous sperm donation”).

9. See, e.g., eHow, <http://www.ehow.com>, (giving information on such topics as how to milk a goat or how to stay awake while racing in the Iditarod); see also HowStuffWorks, Inc., <http://www.HowStuffWorks.com> (providing access to bizarre facts and explanations of how things work).

Article, it allows prospective buyers and sellers to locate each other and engage in commerce with previously unheard of speed and convenience. As a result, finding a sperm donor, seller, or the identity of a sperm donor or seller, is quite simple.¹⁰

Part IV reviews statutory regulations on sperm and sperm donors. Although the federal government classifies sperm as a tissue, its regulation of the sale and distribution of sperm is limited only to detecting communicable diseases prior to insemination. In addition, the majority of states have no laws addressing sperm or sperm donors. As a result, the buying or selling of sperm is virtually unregulated.

Part V discusses “known,” “unknown,” and “identified” sperm donors, and the potential liability of each category. Specifically, this Part addresses whether or not donors and recipients can contract away potential child support obligations. We will see that there is no uniform answer and, as a result, piecemeal equitable remedies are used to provide a subjective, “fair as they see it” ending, regardless of the parties’ intentions, promises, or contracts.

Finally, Part VI shifts the focus from paternity liability to product liability. Specifically, this Part addresses potential breach of contract, strict product liability, and negligence causes of action against online sperm sellers. The Article concludes with four specific recommendations to reign in the unknown liabilities of selling sperm online but, until such time as those recommendations are implemented, sperm donors and sellers are wise to heed the maxim, *caveat vendor*.¹¹

II. IN THE BEGINNING . . .

Traditionally, conception occurs through intercourse between a male and female. Assisted Reproductive Technology (“A.R.T.”) is the umbrella term applied to the various medical technologies used to create conception through means other than coital reproduction. A.R.T. developed, and is developing, because an increasing number

10. An Internet search using the key word “sperm” generates over 20,200,000 web “hits.” Google Search Engine, Sept. 30, 2007. As donor-children become curious about their genetic dads, it is becoming “common” to place a query on an Internet registry to try to track down a man known only as “Donor No. 46.” See Virginia Linn, *Sperm Donation Process Moving Toward More Openness in Identifying Fathers*, PITTSBURGH POST-GAZETTE, Aug. 24, 2005, <http://www.post-gazette.com/pg/05236/558606.stm>.

11. Translated, “Let the Seller Beware.”

of people cannot conceive a child through intercourse.¹² While A.R.T. covers a broad spectrum of reproductive strategies,¹³ three are most common. The first two are forms of Artificial Insemination (“A.I.”),¹⁴ but they differ based on who provides the sperm. In Artificial Insemination by Husband (“A.I.H.”), the husband is the do-

12. “The number of infertile people is still growing, [reports] Joseph C. Isaacs, president of Resolve, the national infertility association.” Carey Goldberg, *In Vitro Field Facing Slowdown*, BOSTON GLOBE, Nov. 14, 2005, http://www.boston.com/yourlife/health/women/articles/2005/11/14/in_vitro_field_facing_slowdown/. Federal figures show that there were 7.3 million infertile people in 2002, compared to over six million in 1995. *Id.*; see also U.S. DEPT OF HEALTH AND HUMAN SERV., CTR. FOR DISEASE CONTROL AND PREVENTION, FERTILITY, FAMILY PLANNING, AND WOMEN’S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH 7 (1997), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_019.pdf (reporting that an estimated 6.1 million American women aged 15–44 years reported having some impaired ability to have children in 1995, compared with 4.9 million in 1988); William D. Mosher et al., *Fecundity & Infertility in the United States: 1965–82*, in VITAL AND HEALTH STATISTICS, NAT’L CTR. FOR HEALTH STATISTICS 32 (1993) (reporting that 2.1 million married couples face infertility issues and an estimated 9.3 million women are using some form of infertility services), available at http://www.cdc.gov/nchs/data/series/sr_16/sr16_011.pdf.

13. Varieties of assisted reproductive technologies currently exist and are widely used to achieve conception. Such techniques include gamete intrafallopian transfer (“GIFT”), zygote intrafallopian transfer (“ZIFT”), embryo transfer and, increasing, surrogacy and egg donation. See generally JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 99 (1994) (describing the GIFT and ZIFT process and general Artificial Insemination by Donor procedures); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 (1985) (discussing the reproduction technologies of artificial insemination, *in vitro* fertilization, embryo transfer, and surrogate mothering). Medical advances have even transformed modern reproductive technology to the extent that today lesbian couples can conceive children with a biological or genetic relationship to both parents. See, e.g., *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1135 (Mass. 2001). It should be noted that the legal issues surrounding egg donors somewhat mirror the legal issues of sperm donors; however, substantial differences exist that would exceed the scope of this Article.

14. A.I. is the least intrusive A.R.T. procedure. A.I. takes previously ejaculated sperm and implants it into a woman’s cervix or uterine lining. There are several forms of the insemination process. The most common is standard vaginal insemination. Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women’s Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN’S L.J. 185, 191 (2003). In this method, a woman inserts semen into her vagina where the sperm swims into her cervix, uterus, and finally to the fallopian tubes to meet an ovum for fertilization. A more efficient method of insemination is known as “intrauterine insemination” (“I.U.I.”). Here, fresh semen is placed in a centrifuge where the sperm are “washed,” extracted from the semen, and inserted directly into a woman’s uterus via a long, sterile catheter syringe. KJM TOEVS & STEPHANIE BRILL, THE ESSENTIAL GUIDE TO LESBIAN CONCEPTION, PREGNANCY, AND BIRTH 304–05 (2002). This procedure does not require a physician, but does require substantial training. Lezin, *supra*, at 191. I.U.I. is considerably more expensive than standard vaginal insemination but the odds of conception are higher. *Id.*

nor. In Artificial Insemination by Donor ("A.I.D."), the donor is someone other than the recipient-mother's husband.¹⁵ The identity of this donor may or may not be known to the recipient(s).¹⁶ The third most common form of A.R.T. is In Vitro Fertilization ("I.V.F.").¹⁷ Both forms of A.I. and I.V.F. require sperm donors, but A.I. can take place in one's own home,¹⁸ while I.V.F. requires a physician's or clinician's assistance for actual insemination.

It is difficult for most to grasp the evolution, depth, and breadth of the current A.I. market. The first documented case of A.I. occurred in the United States in 1866.¹⁹ By 1941, approximately 10,000 babies had been born as a result of A.I. techniques.²⁰ Be-

15. A.I.D. is a highly controversial and emotionally-charged subject. See Note, *Eugenic Artificial Insemination: A Cure For Mediocrity?*, 94 HARV. L. REV. 1850 (1981). To many, the concept of selecting "superior" or desirable physical characteristics through A.I.D. is unacceptable and reminiscent of the efforts made in Nazi Germany to create a so-called "Master Race." The Roman Catholic Church has vigorously opposed A.I.D. See Congregation for the Doctrine of Faith, *Donum Vitae (Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation)* Feb. 22, 1987, at II.1 available at <http://www.priestsforlife.org/magisterium/donumvitae.htm>. Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple are "morally illicit" as such techniques betray the spouses' "right to become a father and a mother only through each other." *Id.* at II.a.1. The use of donor sperm for artificial insemination is altogether prohibited by the Catholic Church on the grounds that a) it involves masturbation (prohibited because it lacks the sexual relationship called for by the moral order) and b) it is adulterous in that it is contrary to the unity of marriage. *Id.* at II.a.2. The artificial insemination of an unmarried woman or widow, whoever the donor may be, "cannot be morally justified." *Id.* Italy's current law bans donations of sperm and eggs, defines life as beginning at conception, and allows fertility treatment only to married heterosexual couples using sperm obtained from the husband using needle aspiration rather than masturbation. See Ian Fisher & Elisabetta Povoledo, *In Political Step, Pope Confronts Law on Fertility*, N.Y. TIMES, May 31, 2005, at A1, available at <http://www.nytimes.com/2005/05/31/international/europe/31italy.html>.

16. See *infra* note 63.

17. I.V.F. (literally meaning "in glass") is an A.R.T. procedure requiring both a sperm donor and a physician's/clinician's assistance for implantation. The process begins with hormonal stimulation of a woman's ovaries to produce multiple eggs. The eggs are surgically removed and placed in a glass petri dish. Sperm are then introduced to the eggs. If successful, the sperm fertilizes the eggs and upon an eight-cell stage, the "pre-embryo" is transferred back to the woman's uterus by cervical catheter. See Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 681 (2000).

18. Because vaginal insemination is simple and does not require formal training, many women are "self-inseminating" at home. See Lezin, *supra* note 14, at 193. Professionals refer to this as the "turkey-baster method." Lezin, *supra* note 14, at 191.

19. See Brent J. Jensen, *Artificial Insemination and the Law*, 1982 BYU L. REV. 935, 938.

20. *Id.*

tween 1941 and 1963, approximately 1000–1200 children were conceived annually using A.I.²¹ The first commercial sperm bank began operating in 1970.²² By 1987, more than 11,000 physicians²³ were using donors from more than 400 sperm banks,²⁴ at a time when there was a success rate of less than ten percent.²⁵ By 1993, more than 80,000 women per year used A.I., resulting in more than 30,000 births.²⁶ The industry was then at \$164 million per year.²⁷ The current estimate is that more than one million children worldwide have been conceived using A.I. and I.V.F. procedures²⁸ and an estimated 50,000 babies are conceived annually using some form of A.R.T.²⁹ Reproductive fertility is currently an estimated three billion dollar industry³⁰ with couples investing up to \$200,000 to achieve pregnancy.³¹ In light of the recent and tremendous explosion of A.I.

21. *Id.*

22. See Mark S. Frankel, *Human-Semen Banking: Social and Public Policy Issues*, 1 *MAN & MED.* 289, 289 (1976).

23. See U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, *ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES.: SUMMARY OF A 1987 SURVEY—BACKGROUND PAPER 8* (Linda Starke ed., 1988), available at http://govinfo.library.unt.edu/ota/Ota_3/DATA/1988/8804.PDF [hereinafter OFFICE OF TECH. ASSESSMENT].

24. Judith Gaines, *A Scandal of Artificial Insemination*, *N.Y. TIMES*, Oct. 7, 1990, § 6 (Magazine), at 23.

25. Alexander N. Hecht, *The Art of Conception*, 35(2) *THE JOURNAL* 8, 10 (1996). There is some dispute regarding actual numbers. They may be even higher than generally acknowledged. See, e.g., OFFICE OF TECH. ASSESSMENT, *supra* note 23, at 3. The 1988 Congressional study reported that during 1986–87 over 172,000 women in the U.S. were artificially inseminated with semen supplied by a sperm bank and gave birth to an estimated 65,000 babies. *Id.* Of these, 30,000 babies were born to couples who were biologically incapable of having their own children and therefore used donor sperm. *Id.* The remaining 35,000 babies were born to fertile couples which used semen deposited by the husband. *Id.* Perhaps several hundred babies were born to single, unwed mothers utilizing A.I. procedures. *Id.* The study's findings were based upon interviews with 1473 physicians who performed artificial inseminations nationwide and fifteen participating sperm banks. *Id.*

26. Hollace S.W. Swanson, *Donor Anonymity in Artificial Insemination: Is it Still Necessary?*, 27 *COLUM. J.L. & SOC. PROBS.* 151, 152 (1993).

27. Gaines, *supra* note 24, at 23.

28. Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 *AM. J.L. & MED.* 285, 288 (1993).

29. See Search for Female Egg Donors Turning into Lucrative Business, *KVOA News 4* television broadcast, May 30, 2006, available at http://www.kvoa.com/Global/story.asp?S=4963577&nav=menu216_8.

30. *Id.*

31. See LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 22 (1999).

activity, an important question must be answered: How did so many would-be sperm recipients find so many would-be sperm suppliers?

III. . . . THEN CAME THE INTERNET

In 1995, most people banked in person at their local branches.³² They sent greeting cards through the U.S. Postal Service using the newly re-introduced “self-stick” postage stamp³³ that cost thirty-two cents.³⁴ Most long-distance communication took place by telephone, and less than one in seven people in America used the Internet.³⁵ Eleven years later, two out of three individuals in the United States utilize the internet.³⁶

It is quite possible that no single technological discovery has had a more profound impact on all aspects of modern life than the Internet. For better or for worse, it has transformed the way we communicate, how, when, and where we work, and how we utilize our free time. As of March 2007, within the United States alone, over 200 million people were using the Internet for various reasons.³⁷ It is staggering to note that, anywhere in the world, at any given time, an estimated 1,114,274,426 people are using the Internet.³⁸ A recent survey revealed that approximately one in six American adults go online for the specific purpose of buying or selling.³⁹ That translates to approximately twenty-five million American sellers reaching a previously unattainable global audience. Clearly, the Internet provides a

32. See U.S. FED. RESERVE, BULLETIN, U.S. CONSUMERS AND ELECTRONIC BANKING, 1995–2003, at 5–6 (Winter 2004), available at http://www.federalreserve.gov/pubs/bulletin/2004/winter04_ca.pdf (citing a 2001 Survey of Consumer Finances, where more than three out of four participating households reported dealing in person with their bank).

33. THE COLUMBIA ENCYCLOPEDIA *Postage Stamp* (6th ed. 2006), available at <http://www.encyclopedia.com/html/p1/postages.asp>.

34. U.S. Postal Comm’n, History of First-Class Stamp Rates, <http://www.prc.gov/rates/stamphistory.htm> (last visited October 16, 2007).

35. Steve Almasy, *The Internet Transforms Modern Life*, CNN.COM, Oct. 10, 2005, <http://www.cnn.com/2005/TECH/internet/06/23/evolution.main/index.html>.

36. *Id.*

37. See Internet World Stats, Internet Usage Statistics for the Americas, <http://www.internetworldstats.com/stats2.htm> (citing <http://www.nielsen-netratings.com/>) (last visited June 7, 2007). This is an increase of 121% since 2000. *Id.*

38. See Internet World Stats, Internet Usage Statistics: The Big Picture—World Internet Users, <http://www.internetworldstats.com/stats.htm> (last visited June 7, 2007).

39. See Amanda Lenhart, *Memo: Selling Items Online*, PEW INTERNET & AM. LIFE PROJECT, Nov. 27, 2005, http://www.pewinternet.org/pdfs/PIP-SellingOnline_Nov05.pdf.

cyber-market for business owners and individuals, whereby previously unknown and unreachable sellers can identify, meet, and do business with previously unknown and unreachable buyers.

The Internet has had a profound impact on the business of baby-making in several ways. First, it has changed the approach many prospective recipients take when choosing sperm. In the not-too-distant past, would-be recipients relied on physicians' recommendations for sperm donors.⁴⁰ Frequently, a physician recommended a specific sperm bank. Almost as often, the would-be recipient chose that source likely because (a) she was unaware that other sources existed; (b) if there were other sources she had no access to them; or (c) other "potential sources" were not contributing sperm because they did not know there was a ready market for such product. Today, however, recipients no longer just look for sperm donors; the Internet allows them to attempt to "customize." Thousands of websites now allow prospective recipients to sort through donor profiles by ethnic background, medical history, and a vast array of physical and personal characteristics⁴¹ from the comfort of their living rooms.⁴² As examples, one prospective recipient might look for signs of a high

40. See TOEVS & BRILL, *supra* note 14, at 129–45. Historically, all donor insemination was anonymous, as physicians encouraged married couples using donor insemination to pretend that their children were biologically related to the husbands; see also Debora L. Spar, THE BABY BUSINESS 22 (2006) ("In the 1950s, childless couples rushed to their doctors with unprecedented speed."). By the 1980s, a stream of private clinics and medical schools steadily entered the fertility trade. *Id.* at 28.

41. See, e.g., Virginia Linn, *Sperm Donation Process Moving Toward More Openness in Identifying Fathers*, PITTSBURGH POST-GAZETTE, Aug. 24, 2005, <http://www.post-gazette.com/pg/05236/558606-114.stm> ("You can hear his voice on an audio tape. See his baby and childhood photos. Read essays written in his own handwriting. Learn about his favorite movies, books, music and hobbies. You can even find a donor who is a close match to your own facial features.").

42. See Mary Crane, *The Business of Love, Sperm for Sale*, FORBES.COM, Feb. 9, 2007, http://www.forbes.com/entrepreneurs/2007/02/09/spermbank-fertility-fda-ent-manage-cx_mc_0209bizoflovesperm.html (Prospective parents can search for everything about a donor—from his profession to his hair color—using a bank's online donor catalogue); How to Buy and Sell Sperm, http://www.ehow.com/how_109189_buy-sell-sperm.html (last visited Oct. 4, 2007) (instructing visitors to "Choose your guy, call the bank and order your sperm. Have it shipped directly to your doctor's office, or to your home if your partner or a midwife will be doing the honors."); see also Rusty Dornin, *Surfing for Sperm: Reproduction in Cyberspace*, CNN.COM, July 24, 1998, <http://www.cnn.com/HEALTH/9807/24/cyber.sperm/> ("[T]he Internet makes shopping for donor dads easier."). In fact, "Cyberspace is rapidly becoming a lucrative place for sperm banks to advertise." *Id.* San Francisco's Pacific Reproductive Systems has been online since 1977 and increased its business twenty-five percent the first year it went online. *Id.*

I.Q.,⁴³ while another may screen for a genetic propensity towards cancer.⁴⁴ It is entirely possible that recipients are now selecting donors so that their progeny may have a certain height, hair color, eye color, or athletic or academic aptitude, as opposed to the traditional justification that they simply had sperm for reproduction.

Second, the Internet perfectly caters to a new and remarkably assertive demographic audience, single women. Decades ago, radical feminists “were single, [but] they had no vision of single life.”⁴⁵ Today, thanks in part to the women’s movement, the sexual revolution, and an increasing level of financial self-sufficiency, women are more comfortable choosing to remain single.⁴⁶ American society prefers that a child be born to a man and woman legally married to each other.⁴⁷ It is no secret that procreation has historically been used to promote the institution of marriage⁴⁸ and that marriage is used to promote procreation.⁴⁹ However, a growing population of single

43. See, e.g., Polly Morrice, *The Genius Factory: Test-Tube Superbabies*, N.Y. TIMES, July 3, 2003, § 7, at 22, available at <http://www.nytimes.com/2005/07/03/books/review/03/MORRICE.html> (discussing the 1980 establishment of Robert Graham’s Repository for Germinal Choice, better known as the “Nobel Prize Sperm Bank”).

44. *Id.*

45. Rachel Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 266 (2004) (quoting E. Kay Trimberger, *The New Single Woman* 12 (Jan. 7, 2004) (unpublished manuscript, on file with author)).

46. *Id.* at 283–84 (“In short, singlehood has arrived.”). According to the 2000 Census, women living alone accounted for more than fifty-eight percent of one-person households. See JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, *AMERICA’S FAMILIES AND LIVING ARRANGEMENTS 2000: POPULATION CHARACTERISTICS*, P20-537 (2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf>.

47. The American legal system reflects this preference. E.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003) (“Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage.”).

48. American law inherited the English common law treatment of illegitimacy that imposed harsh penalties on children of unwed parents. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA* 197 (Univ. of N.C. Press 1985). Describing this system, one scholar noted, “[t]he bastard had no recognized legal relations with his or her parents, particularly not those of inheritance, maintenance, and custody. Nor did the illicit couple have any rights or duties toward their spurious issue.” *Id.*

49. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (“The main justification . . . for societal recognition and protection of . . . marriage is procreation, perpetuation of the race.”); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (“[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.”). Perhaps marriage between heterosexual couples was used to promote procreation “because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world.”

women are now having children “by choice.”⁵⁰ This group is primarily comprised of non-married, career, heterosexual women and once-married, now-divorced, heterosexual women for whom childbearing was a lesser priority in earlier years.⁵¹ Many of these women recognize that their fertility will not last forever.⁵² For them, the Internet has marketed a plentiful,⁵³ available, and, frequently most importantly, relationshipless⁵⁴ supply of sperm. At a cost of \$200-\$600 per vial (plus shipping),⁵⁵ A.I. is becoming “the Plan” for these women.⁵⁶ The Internet, combined with the societal factors previously discussed, has helped to break the stigma that once surrounded

See Goodridge, 798 N.E.2d at 961–62.

50. Although an increase of “single moms by choice” has been happening quite apart from the Internet, the Internet is accelerating that development. U.S. Census statistics reflect that approximately 150,000 women with college degrees and children under eighteen have never been married and are the only adult in their household. *See* U.S. Census 2000, <http://www.census.gov/prod/2002pubs/p70-82.pdf>. Unmarried women having children reached a record high of almost 1.5 million births in 2004, up 4 percent from 2003. *See* Brady E. Hamilton, *Preliminary Births for 2004*, National Center for Health Statistics, Division of Vital Statistics, Jan. 2005. “Throw in an array of new reproductive technologies . . . and the advent of the Internet, where soon-to-be moms can go ‘shopping’ for donors, and you get a whole new kind of baby boom.” Crane, *supra* note 42.

51. *See* Amanda Riley-Jones, *Mothers Without Men*, GUARDIAN (U.K.), June 10, 2000, <http://www.guardian.co.uk/weekend/story/0,3605,329611,00.html>.

52. *Id.*

53. A recent Google search run on August 23, 2007 using the terms “sperm for sale” displayed over forty individuals or banks advertising sperm for sale online. For examples of such advertisements, *see* California Cryobank Sperm Bank, <http://www.cryobank.com>; Sperm Bank, <http://www.SpermBankListings.com>; SpermCenter.com, <http://spermcenter.com>; and Sperm Bank Directory.com, <http://www.SpermBankDirectory.com>.

54. Physicians have been reluctant, or outright refused, to coordinate sperm donors for single heterosexual women, single lesbians, or lesbian couples. *See infra* notes 60–61 and accompanying text. ManNotIncluded.com was the world’s first online sperm donor service designed primarily to help lesbians and single women become parents in the United Kingdom. *See Internet Sperm Bank for Lesbians*, BBC NEWS, Health section, June 24, 2002, <http://news.bbc.co.uk/1/hi/health/2062212.stm>.

55. *See, e.g.*, Cryogenic Laboratories, Inc., Roseville, MN, fee chart, <http://www.cryolab.com/Default.aspx?section=policies&page=fees> (last visited Feb. 9, 2006). Costs may vary, however. *See, e.g.*, SpermCenter.com, *How Much Does Sperm Cost?*, <http://www.spermcenter.com/sperm-cost.htm> (noting that prices vary between \$200-\$600, depending on the bank, type of donor used and type of professional services supplied); *see also* Jennifer Schmidt, *Pieces of the DNA Puzzle*, LIFESTYLE, Aug. 27, 2006, at 1E, available at http://www.donorsiblingregistry.com/media/pieces_of_the_dna_puzzle.pdf.

56. *See* Amy Harmon, *First Comes the Baby Carriage*, N.Y. TIMES, Oct. 13, 2005, at G1, available at <http://www.nytimes.com/2005/10/13/fashion/thursdaystyles/13BANKS.html> (quoting Melissa Singer, a member of Single Mothers by Choice who had a donor-inseminated child, as saying “It’s not necessarily Plan B anymore, it’s just the plan”).

unwed mothers. Single women are increasingly open to the idea of having children without being married,⁵⁷ and they are purchasing sperm for that purpose.⁵⁸

Third, the Internet enables single women, opposite-sex couples, and same-sex couples to seek out alternative sources of sperm.⁵⁹ This is particularly important to same-sex couples because many of them claim that physicians arbitrarily discriminate against them based on sexual orientation.⁶⁰ Other physicians openly discriminate based on the combination of sexual orientation and marital status and refuse to inseminate unmarried, lesbian women.⁶¹ The Internet enables more donors to reach more prospective buyers, including those who would never have been buyers if wholly dependent upon a physician's recommendation.⁶² Although in most cases sperm vials are delivered either to the physician of choice or to the purchaser, some sperm purchasers are also sharing sperm among themselves.⁶³

57. See Deborah Apton, *More Women Choosing Single Motherhood*, <http://abcnews.go.com/Nightline/story?id=1995278&page=1> (last visited Feb. 28, 2006) (indicating that doctors now "consult with a growing number of single women looking to tackle motherhood alone" and that "35 percent of women between the ages of 18 and 29 said they would definitely or probably consider having a baby without being married or in a serious relationship").

58. *Id.* ("California Cryobank, one of the largest sperm banks in the country, reports that single women make up 32 percent of the clients who buy sperm from its bank.")

59. Later reports on the 1988 Congressional survey conducted by the U.S. Office of Technology Assessments reported that of the 30,000 successful pregnancies resulting from donor insemination, about 8600 of those women were unmarried, and of those, around 1700 reported being lesbians. See OFFICE OF TECH. ASSESSMENT, *supra* note 23, at 288.

60. Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 150 (2000) ("The most common and the most significant barrier that gays and lesbians face when trying to access reproductive technologies is physician discrimination and refusal to provide treatment.")

61. See *N. Coast Women's Care Med. Group v. Superior Court*, 37 Cal. Rptr. 3d 20 (Cal. Ct. App. 2005) (involving two physicians' refusal to perform A.I. on an unmarried lesbian patient in a state that protects sexual orientation); see also Lizette Alvarez, *Spreading Scandinavian Genes Without Viking Boats*, N.Y. TIMES, Sept. 30, 2004, at A4, available at <http://www.nytimes.com/2004/09/30/international/europe/30sperm.html> (noting that Denmark law prohibits "unmarried women from buying sperm from a doctor").

62. "The fastest growing markets for sperm banks are lesbians and single women." See Alvarez, *supra* note 61.

63. For instance, eleven mothers recently met online using the site DonorSiblingRegistry.com. The women discovered they had all used sperm from the same Donor 401. "The women grew so close after chatting online about their lives and kids, that [one mom] sent an extra vial of the donor's material to [another] so [the recipient] could have a second child who'd be a full sibling to her son." Todd Venezia, *Sperm Sisters: 11 Moms Bond Over Shared*

Fourth, Internet communication has created unanticipated social and family issues. For instance, donor half-siblings are finding each other.⁶⁴ Not only are they e-mailing one another,⁶⁵ but also in some cases they are having “family” reunions without “dad.”⁶⁶ In addition, some donors want to find the children they have sired, if for no other reason than curiosity. Increasingly, sperm donors are also voluntarily registering on a variety of sites such as DonorSiblingRegistry.com⁶⁷ hoping that their offspring will contact them.

As previously discussed, the Internet attracts a number of donors who are willing to trade sperm for cash.⁶⁸ These men likely view such sale as the ultimate no strings attached transaction and send their goods into multiple jurisdictions without contemplating the potential legal consequences. Most men probably do not know that when

⁶⁴Donor 401, N.Y. POST, Mar. 1, 2006, at 21.

⁶⁴. Various websites exist solely or partially for this purpose. See, e.g., <http://www.donorsiblingregistry.com>; see also Steve Kroft, *Sperm Donor Siblings Find Family Ties*, CBS NEWS – 60 MINUTES, Mar. 19, 2006, <http://www.cbsnews.com/stories/2006/03/17/60minutes/main1414965.shtml> (“Most of these children grow up never knowing their biological father—but now, with the help of sperm bank records and the Internet, some of them are finding half-brothers and half-sisters they never knew they had, who were sired by the same anonymous donor, forging family ties they never knew existed.”).

⁶⁵. Donor-conceived siblings, who sometimes describe themselves as “half-adopted,” can provide clues about their unknown common father that allegedly make each other feel “whole,” even if only in the form of providing additional physical details. See Amy Harmon, *Hello, I’m Your Sister, Our Father is Donor 150*, N.Y. TIMES, Nov. 20, 2005, at 1, 34, available at <http://www.nytimes.com/2005/11/20/national/20siblings.html>.

⁶⁶. See Venezia, *supra* note 63 (“[T]he Internet is spawning a new type of sisterhood—between women who share the same sperm donor.”).

⁶⁷. DonorSiblingRegistry.com is a nonprofit organization and website. It was founded in 2000 as a public outlet for donors to find their children, and vice-versa. In 2002, there were thirty-seven members, and media outlets began to take note, including talk show invitations from Oprah, Good Morning America, and CBS’ Good Morning. See The Donor Sibling Registry News, <http://www.donorsiblingregistry.com/news.php> (last visited Feb. 28, 2007). The site allows parents and offspring to enter contact information and search for their biological “other” by sperm bank and donor number. The Donor Sibling Registry, Browse by Clinic, <http://www.donorsiblingregistry.com/ListFacilities.php> (last visited Aug. 27, 2007); The Donor Sibling Registry, Search the Registry, <http://www.donorsiblingregistry.com/Search.php> (last visited Aug. 27, 2007). The vast majority of the site’s 1001 current matches are between half-siblings. See Harmon, *supra* note 65.

While it seems that it may be more important to children than fathers to learn identity or form relationships, this may not always be the case. See Marilyn Gardner, *Sperm Donors No Longer Bank on Anonymity*, CHRISTIAN SCI. MONITOR, Mar. 30, 2005, at 11 (A donor was quoted as saying, “As the years have passed, I feel even more strongly that I don’t want to be anonymous . . . I cannot think of anything more exciting than to meet a child conceived as a result of my donation and to share my background with them.”).

⁶⁸. See *supra* note 6.

they advertise their wares online, make contact with the prospective parents, and/or ship their product through interstate commerce,⁶⁹ they are potentially availing themselves to the rules of foreign jurisdictions regarding parental liability.⁷⁰ Many may assume that the Internet renders them anonymous, but such assumptions are incorrect⁷¹ because the Internet merges the categories of “known”⁷² and “unknown”⁷³ donors. As these categories change, so do the rules for donor child support obligations.⁷⁴ In sum, the Internet has created a host of concerns and liability issues for would-be donors, so . . . *caveat vendor*.

IV. STATUTORY REGULATION OF SPERM AND SPERM DONORS

A. Federal Regulation

The federal government oversees assisted reproduction and genetic testing through three agencies within the Department of

69. See, e.g., *Donor Sperm from Sperm Bank Available Free*, Sept. 18, 2005, <http://www.spermvials.com>; *Donor's "contract,"* <http://www.spermvials.com/contract.txt> (on file with author). In fact, it is quite easy to “order online” and have vials shipped to the client's home for self-insemination. See, e.g., *At Home Insemination*, FERTILITYPLUS, <http://www.pinelandpress.com/faq/homeinsem.html>. This ignores the recommendations set forth under the Uniform Parentage Act (1973) and the Uniform Parentage Act (as amended 2002). Those Acts indicate that when a prospective donor first provides his sperm to a licensed physician, the donor, as a matter of law, is not treated as the child's natural father. See *infra* notes 81, 83.

70. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part).

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

Id.

71. As discussed above, the Internet makes it relatively simple to identify a sperm donor, but some countries have made it even easier. See *supra* text accompanying notes 1–5. The United Kingdom recently banned anonymous sperm donors. See Louise Gray, *Couples Could be Treated in Fertility Ships*, THE SCOTSMAN, Sept. 17, 2005, at 23. Perhaps not unexpectedly, UK fertility clinics now claim there is a “severe” shortage of sperm donors. *Id.*

72. See *infra* note 95.

73. See *infra* note 96.

74. See *infra* notes 95–97.

Health and Human Services: the Food and Drug Administration (FDA), the Centers for Medicare and Medicaid Services (CMS),⁷⁵ and the Center for Disease Control (CDC). The FDA classifies sperm as a “tissue” in the “human cells, tissues or cellular or tissue-based products” group.⁷⁶ The sole FDA regulation addressing online sperm buying and selling merely requires that all “establishments” engaged in the collection, processing, storage and distribution of human gametes (sperm and ova) or embryos have their donors screened and tested for H.I.V., Hepatitis B & C, Chlamydia trachomatis and Neisseria gonorrhoea.⁷⁷ Despite widespread awareness that artificial insemination can be a lethal vector for the spread of infectious and genetic diseases,⁷⁸ there is a shocking absence of federal laws regulating sperm banks and artificial insemination practitioners.⁷⁹ On the federal level, no regulatory agency oversees individual donors or sperm banks in their day-to-day business practices, nor has the government enacted a uniform body of federal regulatory legislation, despite the pleas that such legislation is desperately needed.⁸⁰

75. Laboratory testing is largely governed by the CMS. See 21 C.F.R. § 1271.55, .80 (2006).

76. See *id.* § 1271.3(d)(3).

77. *Id.* § 1271.85(a), (c).

78. See Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES, June 6, 2006, at F5 (reporting that donors are not tested for genetic diseases; noting that while the American Association of Tissue Banks accredits sperm banks that meet its standards, few banks participate in that program); see also Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823, 832 (Summer 1997); Alexander N. Hecht, Article, *The Wild, Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227, 238 (2001).

79. On May 25, 2004, the FDA issued a draft Guidance Document, advising the banning of men who have had sex with other men within the past five years from being sperm donors. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE FOR INDUSTRY 14 (2004), available at <http://www.fda.gov/cber/gdlns/tissdonor.pdf>; see also Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products, 69 Fed. Reg. 29,786 (May 25, 2004). Guidance documents do not have the force of law but these “recommendations” have caused widespread controversy and misunderstanding. Compare *FDA to Implement Gay Sperm Donor Rules*, USA TODAY, May 5, 2005, http://www.usatoday.com/news/health/2005-05-05-sperm-donors_x.htm?POE=click-refer; with Rainbow Flag Health Services, <http://www.gayspermbank.com> (actively recruiting homosexuals as donors).

80. See generally Ginsberg, *supra* note 78 (arguing that federal statutes are the only way to consistently regulate aspects of sperm donorship). But see Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 22 (“Legal regulation might well limit access, both by banning certain people from participating in the market (such as single women or gay people), and by imposing requirements that

B. Uniform Parentage Acts

The National Conference of Commissioners on Uniform State Laws influences the formulation of state laws regarding parentage and paternity rights. The most important Uniform Act addressing non-marital children is the Uniform Parentage Act ("U.P.A.") approved in 1973.⁸¹ The U.P.A. is accepted in nineteen states, with many others enacting significant portions of the model act.⁸² The U.P.A. states 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.⁸³ As a matter of law, therefore, the sperm donor has no paternal rights or responsibilities, even though he is the biological father of the child.⁸⁴

The U.P.A. was followed by the Uniform Parentage Act of 2000 (as amended in 2002) ("U.P.A. 2002"). The U.P.A. 2002 directly addressed assisted reproduction cases.⁸⁵ As with the original statute, the U.P.A. 2002 holds that "a donor is not a parent of a child conceived by means of assisted reproduction."⁸⁶ Only seven states have enacted the U.P.A. 2002, and none of them without change.⁸⁷

could result in price increases that would practically exclude many people from parenthood.").

81. See UNIF. PARENTAGE ACT (2001), 9B U.L.A. prefatory note (2001).

82. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1120 n.237 (1998) (explaining that states that modeled their legislation after the U.P.A. include Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Washington, Wisconsin, and Wyoming).

83. The 1973 Uniform Parentage Act states:

[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. . . . [T]he 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 (1973), 9B U.L.A. § 5(a)-(b) (2001). Seven states (California, Colorado, New Jersey, Washington, Wyoming, Oregon, and Texas) sever a donor's rights with regard to paternity to single women if the procedure is performed "under a doctor's supervision or through a sperm bank." John E. Durkin, Comment, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. HEALTH L. & POL'Y 327, 338 & nn.83-84 (1994).

84. UNIF. PARENTAGE ACT (1973), 9B U.L.A. § 5(a)-(b).

85. UNIF. PARENTAGE ACT (2002); see, e.g., Article 7, "Child of Assisted Reproduction" and Article 8, "Gestational Agreement."

86. *Id.* § 701.

87. Those states are Delaware, DEL. CODE ANN. tit. 13 §§ 8-701 to 707 (2006); North

C. Individual State Regulation

Mandatory state regulations have not kept pace with the proliferation of sperm donors and sperm banks, and professional memberships and certifications are largely aspirational.⁸⁸ Only twenty-four states have any form of legislation concerning the day-to-day medical practices of semen screening and storage.⁸⁹ Thirty-four states have statutory laws addressing A.I.D.⁹⁰ Of those, nineteen states have

Dakota, N.D. CENT. CODE §§ 14-20-59 to 66 (2006); Oklahoma, OKL. STAT. tit. 10 §§ 551 to 556 (2006); Texas, TEX. FAM. CODE ANN. §§ 160.701 to 707 (Vernon 2006); Utah, UTAH CODE ANN. §§ 78-45g-701 to 707 (2006); Washington, WASH. REV. CODE ANN. §§ 26.26.705 to 740 (West 2006); and Wyoming, WYO. STAT. ANN. §§ 14-2-901 to 907 (2006). Two states, Maine and Illinois, have bills pending on this issue. See Lawyers.com, The Uniform Parentage Act of 2002, <http://family-law.lawyers.com/paternity/The-Uniform-Parentage-Act-of-2002.html> ("Illinois and Maine were introducing the law in their legislatures in 2006.").

The first draft of a "Model Act" has also been published. See Sara Cotton et al., *Model Assisted Reproductive Technology Act*, 9 J. GENDER, RACE & JUST. 55 (2005). To our knowledge it has not yet been reduced to final form or adopted by any state. *Id.* at 97.

88. Sperm banks may be "members of" or "accredited by" entities such as the American Society for Reproductive Medicine (ASRM), the Society for Assisted Reproductive Technology (SART) or the American Association of Tissue Banks (AATB). See Kerry Cork, Comment, *Test-Tube Parents: Collaborative Reproduction in Minnesota*, 22 WM. MITCHELL L. REV. 1535, 1537 n.13 (1996).

Those organizations recommend practices and guidelines. See *id.* A sperm bank gains membership or accreditation by paying an annual fee and adhering to those recommendations. See *id.* In reality, these types of organizations lack mechanisms to police and enforce, so individual donors and banks may not follow them. *Id.*

89. Those states are California, CAL. HEALTH & SAFETY CODE § 1635.1 (West 2007); Delaware, 16 DEL. CODE ANN. tit. 16, § 2801 (2007); Florida, FLA. STAT. ANN. § 381.0041 (West 2007); Georgia, GA. CODE ANN. § 44-5-151 (2007); Idaho, IDAHO CODE ANN. § 39-5408 (2007); Illinois, 20 ILL. COMP. STAT. ANN. 2310/2310-325 (2000); Indiana, IND. CODE ANN. § 16-41-14-16 (West 2007), Iowa, IOWA CODE ANN. 141A.7 (West 2007), Kentucky, KY. REV. STAT. ANN. § 214.625 (West 2007); Louisiana, LA. REV. STAT. ANN. 40:1062.1 (2007); Maryland, MD. CODE ANN., HEALTH-GEN § 18-334 (West 2007); Michigan, MICH. COMP. LAWS ANN. § 333.16273 (West 2007); Montana, MONT. CODE ANN. § 50-16-1008 (2001); New Hampshire, N.H. REV. STAT. ANN. § 168-B:10 (2007); New York, 45 N.Y. PUB. HEALTH LAW § 2781 (McKinney 2005); North Carolina, N.C. GEN. STAT. ANN. § 130A-148 (West 2007); Ohio, OHIO REV. CODE ANN. § 3111.91 (West 2007); Oklahoma, OKLA. STAT. ANN. tit. 63, § 2151.1 (West 2007); Oregon, 52 OR. REV. STAT. § 677.370 (West 2005); Rhode Island, R.I. GEN. LAWS § 23-1-38 (2007); Washington, WASH. REV. CODE ANN. § 70.24.105; West Virginia, W. VA. CODE ANN. § 16-3C-2 (West 2007); and Wisconsin, WIS. STAT. ANN. § 252.15 (West 2007).

90. See ALA. CODE § 26-17-21 (2006); ALASKA STAT. § 25.20.045 (2006); ARIZ. REV. STAT. ANN. § 25-501 (2006); ARK. CODE ANN. § 9-10-201 (2006); CAL. FAM. CODE § 7612 (West 2006); COLO. REV. STAT. ANN. § 19-4-106 (West 2006); CONN. GEN. STAT. ANN. § 45a-774 (West 2006); FLA. STAT. ANN. § 742.11 (West 2006); GA. CODE ANN. § 19-7-21 (West 2005); IDAHO CODE ANN. § 39-5405 (2005); 750 ILL. COMP. STAT. ANN. 40/1 to

adopted laws based on the original U.P.A.⁹¹ These regulations are state-specific, so laws vary significantly from state-to-state, and at least one author argues that state regulations are not adequate to safeguard aspects of sperm donorship.⁹²

In states that have statutory A.I.D. laws, but where factual circumstances fall outside the statute's language, traditional family common law principles control.⁹³ In states that have no statutes ad-

40/3 (West 2005); KAN. STAT. ANN. § 23-129 (2005); MD. CODE ANN., EST. & TRUSTS § 1-206 (West 2006); MASS. GEN. LAWS ch. 46, § 4b (2006); MICH. COMP. LAWS ANN. § 333.2824 (West 2005); MINN. STAT. ANN. § 257.56 (West 2006); MO. ANN. STAT. § 210.824 (West 2005); MONT. CODE ANN. § 40-6-106 (2006); NEV. REV. STAT. § 126.061 (2006); N.H. REV. STAT. ANN. § 168-B:3 (2006); N.J. STAT. ANN. § 9:17-44 (West 2006); N.M. STAT. ANN. § 40-11-6 (West 2005); N.Y. DOM. REL. LAW § 73 (McKinney 2005); N.C. GEN. STAT. § 49A-1 (2006); N.D. CENT. CODE § 14-20-60 (West 2007); OHIO REV. CODE ANN. § 3111.88 (West 2006); OKLA. STAT. ANN. tit. 10, § 551 (West 2006); OR. REV. STAT. § 109.239 (2005); TENN. CODE ANN. § 68-3-306 (2006); TEX. FAM. CODE ANN. § 160.703 (Vernon 2005); VA. CODE ANN. § 20-158 (2006); WASH. REV. CODE ANN. § 26.26.705 (West 2007); WIS. STAT. ANN. § 891.40 (West 2005); WYO. STAT. ANN. §§ 14-2-901 to 14-2-907 (2006).

Of those thirty-four states, fifteen have statutes that address A.I.D. only in the context of marriage. See ALA. CODE § 26-17-21; ALASKA STAT. § 25.20.045; ARIZ. REV. STAT. ANN. § 25-501; FLA. STAT. ANN. § 742.11; GA. CODE ANN. § 19-7-21; KAN. STAT. ANN. § 23-129; MD. CODE ANN., EST. & TRUSTS § 1-206; MASS. GEN. LAWS ANN. ch. 46, § 48; MICH. COMP. LAWS ANN. § 333.2824; MINN. STAT. ANN. § 257.56; MO. ANN. STAT. § 210.824; NEV. REV. STAT. § 126.061; N.Y. DOM. REL. LAW § 73; N.C. GEN. STAT. § 49A-1; TENN. CODE ANN. § 68-3-306.

In the remaining thirteen states, unmarried women using A.I.D. are expressly or implicitly addressed. See ARK. CODE ANN. § 9-10-202; CAL. FAM. CODE § 7612; COLO. REV. STAT. ANN. § 19-4-106; CONN. GEN. STAT. ANN. § 45a-774; IDAHO CODE ANN. § 39-5405; 750 ILL. COMP. STAT. ANN. 40/3; MONT. CODE ANN. § 40-6-106; N.J. STAT. ANN. § 9:17-44; N.M. STAT. ANN. § 40-11-6; OHIO REV. CODE ANN. § 3111.95; OR. REV. STAT. § 109.239; VA. CODE ANN. § 20-158; WIS. STAT. ANN. § 891.40; WYO. STAT. ANN. § 14-2-103.

91. These states are Alabama, California, Colorado, Delaware, Hawaii, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Washington, and Wisconsin (citations omitted).

92. See generally Ginsberg, *supra* note 78.

93. An increasingly common example is lesbians who want to experience motherhood. See Alvarez, *supra* note 61. In the past, most lesbians with children had their children while married and before they discovered or revealed they were lesbians. See 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, 461 n.2 (1990). More recently, many lesbians have utilized A.I.D. to create families. See Alvarez, *supra* note 61. Because the current state of the law affords more weight to biology than intent, "the legal outcome as to the assignment of parental status may contradict and frustrate the original intentions of the AID participants." Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 538 (1994); see also David Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125 (2006) (discussing the struggles courts and legislators have faced in trying to

dressing A.I.D., traditional family common law principles also control.⁹⁴ The absence of a well-developed, uniform common and statutory law, poses problems for sperm donors and banks. As we will discuss in the next two sections, donors may have child support obligations for their progeny, while both donors and banks may face liability for the sperm product itself. It is unlikely that either donors or banks are aware of the potential magnitude of these risks and it is also unlikely, especially given the lack of existing law, that there will be clear answers to these questions in the near future.

V. SPERM DONORS AND PATERNITY

Currently, there are no known paternity cases involving individual “cyberspace” sperm donors and online purchasers. However, at least one sperm donor case illustrates the uncertainty online donors face regarding their potential parental support obligations.

A. Can a Sperm Donor Contract Away Potential Support Obligations?

Donors and recipients can attempt to circumvent or supplement state paternity statutes by using contracts. Such contracts record the parties’ intent regarding subsequent support obligations. There are three common classifications of sperm donors, “known,”⁹⁵ “un-

adapt parentage law to the changing realities of the non-traditional American family).

94. These states include Delaware, the District of Columbia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and West Virginia (citations omitted).

It may be that legislatures willingly abdicate authority in this matter. See Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 SETON HALL LEGIS. J. 103, 104 (1998) (“Legislative inaction caused largely by social, ethical, and legal concerns has left the task of creating a new legal paradigm to the judiciary.”).

95. A “known” donor is a sperm donor that is familiar with the prospective mother. Generally the known donor is providing sperm as a favor, not for compensation. Courts tend to order child support more often from known donors, regardless of any intent of the adult parties or contracts to the contrary. This may be attributable to the perception that the parties had some sort of “relationship,” or at least a “willing encounter.”

Traditionally, there is an informal presumption that known donors contributed their semen for insemination, regardless of whether either party actually “intended” the creation of a child. See *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579 (Ill. App. 1 Dist. Feb. 22, 2005). In *Phillips*, Defendant Dr. Richard Phillips was ordered to pay \$800 a month in child support for a child he knew nothing about to his former lover, Dr. Sharon Irons. Phillips alleged that Irons “secretly kept semen after they had oral sex, then used it to get pregnant.” The court sided with Irons in holding “that when Phillips ‘delivered’ his sperm, it was a gift—an absolute and irrevocable transfer of title to property from a donor to a donee.” The court rea-

known”⁹⁶ and the hybrid, “identified.”⁹⁷ Historically, many donors wanted to be unknown because they did not want parental rights or obligations. Consequently, they sold sperm to sperm banks, which required the donors to waive parental rights and release the bank from other liabilities. Today, however, individual donors are not donating anonymously, but instead are attempting to contract away parental rights and responsibilities. How valid are these contracts? More specifically, how enforceable are these contracts when an “unknown” donor arguably becomes “known”? An analysis of *Ferguson v. McKiernan*⁹⁸ reveals that parental liability can exist even when the donor and recipient attempt to contract away parental rights.

Plaintiff Ivonne Ferguson and Defendant Joel McKiernan met as co-workers and began a physical relationship, even though Ferguson was married to another man at the time.⁹⁹ McKiernan never used condoms during intercourse because Ferguson claimed to be using the Norplant device for birth control.¹⁰⁰ In fact, unknown to the defendant, the plaintiff had had a tubal ligation, thus rendering her sterile.¹⁰¹ Although their mutual affection began to wane, the plaintiff suggested to the defendant that she wanted to conceive a child using

soned, “[T]here was no agreement that the original deposit would be returned upon request.” See also *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996); *Sperm: The “Gift” That Keeps on Giving*, MSNBC, Feb. 24, 2005, available at <http://www.msnbc.msn.com/id/7024930>. *S.F. v. State ex rel. T.M.* involved a biological father ordered to pay child support and maintain medical coverage insurance for a child conceived while he was passed out drunk. 695 So. 2d at 1187. Despite testimony supporting the father’s allegations that non-consensual intercourse had occurred (the mother told one witness that this act had “saved her a trip to the sperm bank”), *id.* at 1188, the court held that any wrongful conduct on the part of the mother should not alter the father’s duty to provide support for the child. *Id.* at 1189; see also *Faske v. Bonanno*, 357 N.W.2d 860, 861 (Mich. App. 1984) (disallowing misrepresentation of contraceptive protection as a defense).

96. An “unknown” or “anonymous” donor is a sperm donor whose identity or other personal contact information is undisclosed to either the prospective mother or to the child.

97. An “identified” donor is a male who donates sperm understanding that any resulting child is given the donor’s personal contact information and personal identification (name, address, city of birth, date of birth, etc.) once the child reaches the age of eighteen. In general, “identified” status does not impose support liability.

98. 60 Pa. D. & C.4th 353, 355–56 (Pa. Com. Pl. 2002), *aff’d*, 855 A.2d 121 (Pa. 2004), *aff’d*, 581 Pa. 629, 868 A.2d 378 (Pa. Super. Ct. 2005).

99. *Id.* at 354.

100. Interestingly, had the plaintiff conceived at that point, the defendant’s legal obligations would have been clear. See *id.* at 363 (“[W]e [the court] would have had no difficulty . . . [in finding] the defendant liable.”).

101. *Id.* at 356.

his sperm.¹⁰² The defendant immediately declined to conceive a child through sexual intercourse. Subsequently, the plaintiff consulted with several doctors and discovered that although she could not reverse her tubal ligation, she was a candidate for I.V.F.¹⁰³ Plaintiff then requested that defendant donate his sperm for the purposes of artificial insemination, thus removing him as a “natural father” and using him as a “sperm donor.” The parties orally contracted for the defendant to voluntarily and anonymously donate his sperm to the I.V.F. procedure, and for his release from any rights to the children or any obligation to pay child support.¹⁰⁴ In other words, the defendant would be treated as an “unknown” donor, even though his identity was actually known to the recipient.

Twin boys were conceived through in vitro fertilization.¹⁰⁵ Both before and after the twins’ birth, the plaintiff never told anyone of the defendant’s identity; in fact, she went to great lengths to conceal any information about the twins’ father.¹⁰⁶ She even named her ex-husband as the “father” on the twins’ birth certificate. The defendant saw the children several times, but never acknowledged himself to be their biological father, provided gifts, made financial payments for the children’s support, or assumed any parental identity.¹⁰⁷ The plaintiff later experienced financial difficulty and, after randomly discovering the defendant’s telephone number, filed an action against him for child support.¹⁰⁸ The defendant was ordered to pay \$1500 per month in child support. The defendant appealed, arguing not only that the parties’ contract released him from financial liability, but also that it specified that he was to be treated as an anonymous sperm donor.¹⁰⁹

This case is important because the two parties intended and contracted for the known donor to be treated as an unknown donor and

102. *Id.*

103. *Id.* at 357.

104. *Id.* at 356.

105. *Id.* at 354–55. The plaintiff’s divorce was finalized on June 27, 1994. *Id.* at 355.

106. *Id.* at 356–62. For example, numerous charts, papers, and forms were completed without the defendant’s knowledge or presence, plaintiff lied to hospital personnel and to her physicians claiming that her ex-husband wanted the baby, and plaintiff actually brought in a different male to the insemination process and represented him as her “husband, the donor.” *Id.*

107. *Id.* at 358.

108. *Id.*

109. *Id.* at 356.

released him from all parental obligations. The court found the oral contract between the parties to be valid.¹¹⁰ Further, the court agreed that “the fact that [the donor] was not totally anonymous in the end did not change the contractual nature of his relationship with the plaintiff.”¹¹¹ However, the court held the contract to be unenforceable under Pennsylvania’s long-standing precedent that “[n]o other party, albeit a parent, can bargain away a child’s support rights.”¹¹² In other words, at least in Pennsylvania, a child has a common law right to child support from both biological parents which cannot be contracted away.¹¹³

From a sperm donor’s perspective this decision is scary. If a donor’s sperm is purchased online, shipped through interstate commerce, and subsequently used to inseminate an unmarried woman in Pennsylvania, or if the child is born in Pennsylvania (though not conceived there), the donor could face liability for child support, regardless of any previously executed contract. Furthermore, this risk is not limited to a single state,¹¹⁴ particularly when contractual validity is evaluated in light of the “best interests of the child”¹¹⁵ or when

110. *Id.* at 359–60.

111. *Id.* at 364.

112. *Id.* The court noted the “despicable” actions of the plaintiff for all of her misrepresentations, but “it is the interest of the children we hold most dear.” *Id.*; see also *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000).

113. While this case did not address it, and we have not yet found any that have, the court’s rationale would also seem to require both biological parents to contribute other support, such as post-secondary educational subsidization.

114. For another case where a court found a pre-conception contract releasing a sperm donor from support obligations void as against public policy, see *Straub v. B.M.T.*, 645 N.E.2d 597 (Ind. 1994). *But see* *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989) (upholding agreements between donors and recipients); *In re R.C.*, 775 P.2d 27 (Colo. 1989). For a related topic, see Robert Kraimer, *Preconception Fertilization Agreements: Valid or Void*, 35 U. LOUISVILLE J. FAM. L. 595, 605 (1997) (arguing that if such a contract is held to be void, the donor should be able to pursue indemnification from the recipient).

115. See Ertman, *supra* note 80, at 23 (“Generally, however, contracts affecting children are not enforceable in the way that most contracts are enforceable, primarily because the State has an interest in safeguarding the best interests of children that trumps the parties’ intentions.”). *But see* Schiff, *supra* note 93, at 550–51 (arguing that there is a significant difference between potential parental obligations when a child is created through coital procreation and A.I.). “[A.I.] . . . on the other hand, provides considerable opportunity before conception for individuals and couples to exercise a high degree of choice and control over the procreative process and to negotiate the roles they wish to assume in that process.” *Id.* at 551. “This distinction—namely, the centrality and intentionality in [A.I.]—demands that the parties’ intentions be taken far more seriously than they are in the present, largely biological based legal model.” *Id.*; see also Kraimer, *supra* note 114, at 600 (“Courts have held that parties may not contract away child support obligations . . . [but] Preconception fertilization agreements are

such agreement may work to the “detriment of the child.”¹¹⁶ Perhaps more importantly, if this contract between mother and donor was invalid because it denied children their support rights, then the reasoning behind this decision should also nullify a contract between a man and a sperm bank seeking to limit a donor’s future support obligations when a bank collects and sells his sperm.

VI. THE BUSINESS OF SPERM: WARRANTY, STRICT LIABILITY, AND NEGLIGENCE

The previous discussion focused on paternity liability for sperm donors whose donation results in the conception and birth of a healthy child, but what about product liability for sperm donors? What happens when sperm fails to result in conception, or it does result in conception, but the child has genetic abnormalities caused by the sperm itself? No one disputes that sperm is a product that has the potential to create life; however, on the open market, sperm is a “good” that is bought and sold in the course of interstate commerce.¹¹⁷ As such, we must address the potential applicability of war-

distinguishable because the parties enter these agreements before the child’s conception.”).

116. See, e.g., *Erwin L.D. v. Myla Jean L.*, 847 S.W.2d 45, 47 (Ark. Ct. App. 1993) (holding as unenforceable a mother’s promise not to pursue paternity determination and child support since “the duty of child support cannot be bartered away permanently to the detriment of the child”); *Paul M. v. Teresa M.*, 818 S.W.2d 594, 595 (Ark. Ct. App. 1991) (noting that the duty of support cannot be relinquished to the detriment of the child).

117. To date, we are unaware of any case that defines sperm as a “good” under Article 2 of the U.C.C., but at least one court has found that a property right exists in sperm. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993). Although the Hecht court looked at this issue within the confines of a will contest, there is a call to extend the Hecht decision. See, e.g., William Boulier, *Sperm, Spleens and Other Valuables: The Need To Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Jennifer Long Collins, *Hecht v. Superior Court: Recognizing a Property Right in Reproductive Material*, 33 U. LOUISVILLE J. FAM. L. 661 (1995). Additionally, at least two authors have argued that the U.C.C. should govern the sale of sperm. See Heather J. Blum, *Tort Liability as the Result of the Transmission of HIV Through Artificial Insemination*, 4 ALB. L.J. SCI. & TECH. 333, 354 (1994); Anita M. Hodgson, *The Warranty of Sperm: A Modest Proposal To Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Purposes*, 26 IND. L. REV. 357 (1993).

Additionally, both sperm and blood are defined as tissues and there is no doubt that blood can fall under the purview of the U.C.C. See, e.g., *Comty. Blood Bank v. Russell*, 196 So. 2d 115, 118 (Fla. 1967) (Roberts, J., concurring).

A transaction whereby a blood bank, which is engaged in the business of collecting and distributing blood, transfers title to the commodity to a patient for a consideration, is unquestionably a “sale”, whether tested by the law in effect at the time of the transaction . . . or by the new Uniform Commercial Code.

ranty and strict liability. In addition, we must also consider what happens when a sperm bank makes mistakes such as destroying stored sperm or distributing stored sperm to the wrong recipient. These situations are increasingly common and require us to evaluate them in light of potential negligence liability. The following subsections analyze potential claims under breach of warranty, strict product liability, and negligence theories.

A. Breach of Warranty

1. Express warranties

Pursuant to Article 2 of the Uniform Commercial Code (“U.C.C.”), any oral or written promise regarding a good can create an express warranty.¹¹⁸ Specifically, statements assuring that the good, sperm, has been screened for, and is free from contagious diseases (e.g., H.I.V., Hepatitis B, or syphilis) constitute express warranties.¹¹⁹ In fact, many fertility clinics attempt to distinguish themselves by promoting such standards in their web advertising.¹²⁰

Id. (citations omitted); *see also* Carter v. Inter-Faith Hosp. of Queens, 304 N.Y.S.2d 97 (1969) (holding that a commercial blood sale is governed by the U.C.C.). *But see* Perlmutter v. Beth David Hosp., 123 N.E.2d 792 (N.Y. 1954) (finding that an agreement between a patient and a hospital for a blood transfusion was primarily an agreement for “services” and not for the sale of a good).

118. “Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.” U.C.C. § 2-313(1)(a) (2003).

119. It may be that these promises are regularly broken. One study, though possibly dated, revealed that many physicians failed to adequately screen donors for diseases and many screenings were limited to merely questioning donors about common familial diseases. *See* Martin Curie-Cohen, et al., *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 586 (1979). It is possible that physicians have engaged in more rigorous screening in intervening years, but there are few safeguards to ensure such practices. *See* Cork, *supra* note 88. The Curie-Cohen research was published in 1979, but even by 1988, few sperm banks performed chromosomal tests for genetic disorders. *See* OFFICE OF TECH. ASSESSMENT, *supra* note 23, at 67.

120. *See, e.g.*, Cyros International Website, <http://www.scandinaviancryobank.com> (last visited Sept. 6, 2006) (“Safe, effective sperm worldwide; Rigorous testing. . . . We . . . offer the reassurance of a donor screening and testing regime so strict, only 8% of applicants are accepted into our program.”); Fairfax Cryobank Website, www.fairfaxcryobank.com/infecdisase.aspx (last visited Apr. 12, 2006) (“Fairfax Cryobank makes the most extensive use of any sperm bank of PCR [Polymerase Chain Reaction] technology to test for infectious diseases. All donor specimens are quarantined for six months. The donor must then . . . be retested for a panel of infectious diseases before his specimens can be released from quarantine.”).

Online sperm marketing is replete with express warranties focusing on sperm quality.¹²¹

Some sperm banks and donors are also specifically warranting attributes or qualifications of donors through donor profiles,¹²² and they may actually be warranting more than they expect. While they may believe that they only warrant that a donor has certain characteristics, they may actually be warranting characteristics of any resulting child. As previously discussed, an express warranty is created by an oral or written promise, but it can also be created when a sample or model becomes “part of the basis of the bargain.”¹²³ If a photograph or biography of a sperm donor constitutes a model,¹²⁴ the person purchasing sperm may expect that any resulting child would have the model’s characteristics. Most reasonable people recognize that it is possible that a child’s characteristics may differ greatly from those of a genetic parent, but it is not well settled that reliance on an express warranty must be reasonable.¹²⁵

121. See Fairfax Cryobank Website, *supra* note 120 (warranting that all sperm will meet set criteria for motility and total motile cells).

122. See, e.g., Tom Gorman, *Measure of Success Elusive for Sperm Bank*, L.A. TIMES, Apr. 12, 1992, at B1.

Mr. “Orange/Red” is a “graduate student involved in genetic research,” a fair skinned, golden-blond, 6-foot-4, 225 pounds with Austrian ancestry. “Very handsome, a superb physique, warm, happy, and confident. He enjoys martial arts and ping-pong, plays the piano proficiently and comes from a long line of talented, professional individuals and has the energy and ambition to match his exceptional gifts.”

Id.

123. Article 2 of the Uniform Commercial Code (“U.C.C.”) sets forth the basis for express warranty liability arising out of a contract for the sale of goods. See U.C.C. § 2-313(1) (2002).

A seller who makes an affirmation of fact or promise relating to the goods or who supplies a description, sample or model of the goods that becomes part of the basis of the bargain makes an express warranty that the goods will conform to that affirmation of fact, promise, description, sample or model.

Id.

124. To our knowledge, this issue has not been decided by any court. It is impossible to accurately predict how a court would be likely to rule as the U.C.C. provides no guidance for determining what constitutes a model.

125. See James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2100 n.31 (1998).

In many states there are cases taking irreconcilable positions regarding whether reliance by the buyer is required for express warranty liability. While some cases from each of the following jurisdictions require reliance, there are others in most of these jurisdictions that grant recovery without explicitly mentioning reliance. See, for example, in Maryland: *Worm v. American Cyanamid Co.*, Civ. A. No. HAR 90-1424,

1992 WL 368062, at *5 (D. Md. Nov. 30, 1992) (“[T]he court would have to find that such representations induced the Worms to purchase Scepter. . . [B]ecause the literature upon which the [p]laintiffs rely did not exist in 1987 and [p]laintiffs therefore could not have relied on it . . . it did not become part of the basis of the bargain.”); Illinois: Stamm v. Wilder Travel Trailers, 358 N.E.2d 382, 385 (Ill. App. Ct. 1976) (“[C]ases under the present day Commercial Code . . . require a reliance by the buyer upon the promise, affirmation or description.”); *cf.* Adolphson v. Gardner-Denver Co., 553 N.E.2d 793, 798 (Ill. Ct. App. 1990) (“[T]he trial court was not obligated to accept the plaintiff’s argument that the sales brochure created an express warranty . . . given the fact that Adolphson testified that he did not rely on the sales brochure. . . .”). *But see* Weng v. Allison, 678 N.E.2d 1254, 1256 (Ill. App. 1997) (citation omitted) (“[T]he trial court’s ruling that the statements of the seller could not have been part of the basis of the bargain simply because no reasonable persons could have relied upon those statements was erroneous. The trial court misconstrued the role of reliance in determining whether an affirmation of fact or description is part of the basis of the bargain. Affirmations of fact made during the bargain are presumed to be part of the basis of the bargain unless clear, affirmative proof otherwise is shown It is not necessary, therefore, for the buyer to show reasonable reliance upon the seller’s affirmations. . . .”); New York: Scaringe v. Holstein, 477 N.Y.S.2d 903, 904 (N.Y. App. Div. 1984) (citation omitted) (“A necessary element in the creation of an express warranty is the buyer’s reliance upon the seller’s affirmations or promises.”); Pilch, Inc. v. L & L Started Pullets, Inc., No. 84 Civ. 6513 (CSH), 1987 WL 9430, at 4 (S.D.N.Y. Apr. 9, 1987) (citation omitted) (“[I]n order to succeed on an express warranty theory under [2-313], it is necessary for the purchaser to plead and prove that the written promotional literature in question was furnished to buyer prior to the purchase, and relied upon him [sic] in making the purchase.”); Shapiro Budrow & Assocs., Inc. v. Microdata Corp., No. 84 Civ. 3589 (CBM), 1986 WL 2756, at *7 (S.D.N.Y. Feb. 24, 1986) (quoting Eddington v. Dick, 386 N.Y.S.2d 180, 181 (City Court, Geneva County, 1976)) (“In order to make out a cause of action for breach of express warranty, the buyer must demonstrate by a preponderance of the evidence, 1) an affirmation of fact or promise by the seller; 2) the natural tendency of the said affirmation or promise was to induce the buyer to purchase goods; 3) [t]hat the buyer purchased goods in reliance thereon. . . .”); *cf.* Tecnoclima, S.p.A. v. PJC Group of New York, Inc., No. 89 Civ. 4437 (CSH), 1993 WL 404109, at *7 (S.D.N.Y. Oct. 1, 1993) (“[T]he finder of fact could determine that Circle relied on the specifications in assessing the marketability of the boiler/burner combination. Such a finding would support a claim for breach of express warranty.”). *But see* CBS Inc. v. Ziff-Davis Publ’g Co., 553 N.E.2d 997, 1001 (N.Y. 1990) (citation omitted) (“[T]his view of ‘reliance’—i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties—reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right [to damages] for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled.”); Rogath v. Siebenmann, 129 F.3d 261, 264 (2d Cir. 1997) (quoting Galli v. Metz, 973 F.2d 145, 151 (2d Cir. 1992) (emphasis in original) (“Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract, the buyer

should be foreclosed from later asserting the breach . . . unless the buyer expressly preserves his rights under the warranties On the other hand, if the seller is not the source of the buyer's knowledge, e.g., if it is merely "common knowledge" that the facts warranted are false . . . , the buyer may prevail in his claim for breach of warranty"); Massachusetts: *Sprague v. Upjohn Co.*, Civ. A. No. 91-40035-NMG, 1995 WL 376934, *3 (D. Mass. May 10, 1994) (citation omitted) ("[I]n an express warranty claim, plaintiff must show reliance on such warranty."); *Stuto v. Corning Glass Works*, Civ. A. No. 88-1150-WF, 1990 WL 105615, *5 (D. Mass. July 23, 1990) ("[T]his court believes that some minimum of reliance is a required element of a breach of express warranty claim. . . ."). *Cf.* *Roth v. Bay-Stel's Hair Stylists, Inc.*, 470 N.E.2d 137, 138 (Mass. App. 1984) (noting that "[t]he hairdresser testified that he had read the information printed on the box, and, relying on it, he recommended its use to Judith Roth"); *Hannon v. Original Gunite Aquatech Pools, Inc.*, 434 N.E.2d 611, 617 (Mass. 1982) (noting that "[t]he trial judge found that Hannon relied on Aquatech's brochure"); *Jacquot v. Wm. Filene's Sons Co.*, 149 N.E.2d 635, 637 (Mass. 1958) (noting that "Mrs. Jacquot . . . relied upon these express warranties"). *But see* *Wechsler v. Long Island Rehabilitation Ctr. of Nassau, Inc.*, No. Civ. A. 93-6946-13, 1996 WL 590679, at *22 (Mass. Super. Ct. Sept. 4, 1996) ("The trustee is not required to establish that in connection with a specific account receivable it purchased, Towers relied on the factual truth of each of the representations and warranties; what must be shown is that Towers relied on the fact of the warranties, that is, the promise itself that the representations and warranties were true. . . ."); Kentucky: *Overstreet v. Norden Lab., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) (citation omitted) ("A warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product."); Nebraska: *Vlasin v. Shuey*, No. A-91-324, 1993 WL 61875, at *1 (Neb. Ct. App. Mar. 9, 1994) ("Nebraska case law has long held that the assertion of a fact or promise by a seller concerning goods, which is relied upon by the buyer and which tends to induce the buyer to purchase the goods, is an express warranty."); *Hillcrest Country Club v. N.D. Judds Co.*, 461 N.W.2d 55, 61 (Neb. 1990) (citation omitted) ("This court has held that '[s]ince an express warranty must have been "made part of the basis of the bargain," it is essential that the plaintiffs prove reliance upon the warranty.')."; *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 366 N.W.2d 424, 428 (Neb. 1985) (citation omitted) ("Since an express warranty must have been 'made part of the basis of the bargain,' it is essential that the plaintiffs prove reliance upon the warranty."); Indiana: *Royal Bus. Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34, 44 n.7 (7th Cir. 1980) (citation omitted) ("The requirement that a statement be part of the basis of the bargain in order to constitute an express warranty 'is essentially a reliance requirement. . . .'); Kansas: *Ray Martin Painting, Inc. v. Ameron, Inc.*, 638 F. Supp. 768, 772 (D. Kan. 1986) (citation omitted) ("Whether the statements about the coating ability of the Amerlock created an express warranty depends on whether they were 'part of the basis of the bargain' which, under Kansas law, requires some type of reliance on the part of the buyer."); Mississippi: *Global Truck & Equip. Co., Inc. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 652 (N.D. Miss. 1986) ("Given the express language used in UCC section 2-313 and the majority of the cases holding that the buyer must both be knowledgeable of and rely on the affirmation of fact before an express warranty is created, the court concludes that the plaintiff failed to prove by a preponderance of the evidence that the statements contained in the Palmer brochure were relied upon by Randall prior to or contemporaneously with the making of the contract between Global and Palmer.

Given the state of the law, banks and donors that fail to meet promised standards of sperm quality would certainly face liability for breaching expressed warranties.¹²⁶ Banks or donors who make a promise of resulting characteristics through a model, and fail to deliver those characteristics, would also face liability for breach of express warranty.

2. Warranty of merchantability

“Unless excluded or modified, a warranty that the goods shall be merchantable is [automatically] implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”¹²⁷ “Merchantable” means the goods “are fit for the ordinary purposes for which [they] are used.”¹²⁸ The U.C.C. defines a merchant as

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.¹²⁹

Consequently, a sperm bank is a merchant for purposes of the U.C.C., while an individual donor would be a merchant if he regularly sells sperm, regardless of whether he receives the money from a sperm bank or from an individual buyer.

Therefore, recovery under the theory of breach of express warranty is also precluded.”); Washington: *Casper v. E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 909 (E.D. Wash. 1992) (citation omitted) (“If, in fact, Mr. Warr assured Brad Casper that Velpar could be applied safely during November or December of 1990, and Mr. Casper relied upon that affirmation of fact in deciding to have PureGro treat his fields, an express warranty was created.”).

Id.

126. It is quite possible that the donor could have engaged in fraudulent activity as well, either by falsifying personal characteristics or by leading the recipient to believe sperm met quality standards when it did not.

127. U.C.C. § 2-314 (2003).

128. *Id.* § 2-314(2)(c).

129. U.C.C. § 2-104(1) (1999). This is somewhat peculiar because the implied warranty of fitness for a particular purpose, discussed next, applies to all sellers. *See id.* § 2-315.

Sperm banks and donors appear to have little to fear when it comes to the issue of breach of warranty of merchantability because that warranty only requires that sperm be “reasonably fit” for its ordinary use (for purposes of this Article, that use is attempted conception). This warranty creates no promise of measurable sperm quality. It does not promise a resulting child, much less one with specific characteristics; it simply promises that the sperm provided is reasonably fit for the purpose of procreation. Absent extreme circumstances¹³⁰ it seems unlikely that many banks or donors would breach this warranty.¹³¹

3. Warranty of fitness for a particular purpose

An implied warranty of fitness for a particular purpose can exist “where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.”¹³² Responsible banks and donors currently have little to fear from this warranty because, presently, sperm satisfies only the general purpose of attempted procreation, not any specific purpose of creating specific characteristics in a resulting child. Reproductive science has not advanced to the point where it can control specific aspects of reproduction.¹³³ However, it is advancing, and, if the time comes when it can control those types of characteristics, banks and donors should recognize that asking prospective clients to designate a donor’s personal characteristics can create a warranty of fitness for a particular purpose. A reasonable prospective recipient could view such questions as a “checklist” for the desired characteristics of the resulting child. In other words, such a recipient could view the questions as akin to a menu, and she would expect to get what she ordered. Banks and donors currently ask recipients for these

130. Obvious examples would be providing sterile sperm or sperm damaged during collection, storage, or transportation to such an extent that it cannot be used to conceive.

131. It may also be the case that sperm donors are protected by legislation. South Carolina has a statute stating that “The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale, procurement, processing, distribution, or use of human tissues. . . .” S.C. CODE ANN. § 44-43-10 (2005). As previously discussed, the FDA classifies sperm as a tissue, although the South Carolina statute does not specifically include or exclude sperm.

132. U.C.C. § 2-315 (2003).

133. For example, it cannot yet control characteristics such as eye or hair color, intelligence, or athleticism.

types of designations¹³⁴ but, for now, they remain attempts to discern preferences, not actionable promises.¹³⁵

B. Strict Product Liability

The tort of strict product liability has a simple rationale; it recognizes that products can cause harm or injury to users and that manufacturers, sellers, and distributors are in better positions to absorb the cost of these injuries than end-users.¹³⁶ Strict product liability has specific elements that an injured party must satisfy to recover. While these elements have been discussed collectively and separately, all discussions encompass the following:

1. There must be a product¹³⁷ that causes an injury. The product must be sold in the same condition, or substantially the same condition, as when it reaches the consumer or user.¹³⁸

134. See, e.g., Fairfax Cryobank Website, <http://www.fairfaxcryobank.com/cryo/shoppingcart/search.cfm> (last visited Sept. 9, 2006) (asking preferences for race, ethnicity, eye color, hair color, hair type, height, etc.).

135. This is a different conclusion than what we discussed under possible breach of express warranties, see text accompanying notes 118–26, because it is a different cause of action. An express warranty is made by the seller to the buyer. As previously discussed, a seller could warrant a resulting child's characteristics by showing the would-be sperm purchaser a "model" of the donor. If the child did not have the model's characteristics then the seller, arguably, breached its express warranty.

A warranty of fitness for a particular purpose is actually created by the buyer, when he or she causes a seller to know that the buyer is relying on the seller's expertise in making a purchase decision. See *supra* text accompanying note 122. Admittedly it is an assumption, but we assume that a sperm seller who is aware that a would-be buyer is relying on their expertise would inform the would-be buyer that there is no guarantee that a child will have the characteristics of the donor. We also understand that a seller may know of a buyer's particular purpose (buyer said that buyer wants the sperm of a six foot, red-haired, green-eyed saxophonist because buyer wants a child that will grow up to be a six foot, red-haired, green-eyed saxophonist) but does not inform the buyer that a child conceived using the donor's sperm may not have these characteristics. In that case there is a breach of warranty of fitness for a particular purpose; there may also be breach of express warranty created by the model, and civil and criminal fraud.

136. See, e.g., *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 57–58 (N.M. 1995) The court cited four primary policies supporting imposition of strict product liability: (1) placing the cost of injuries caused by defective products on the manufacturer, who is in a better position to pass the true product cost onto all distributors, retailers, and consumers of the product; (2) relieving the injured plaintiff of onerous burden of establishing the manufacturer's negligence; (3) providing full chain of supply protection; and (4) in the interest of fairness, providing relief against the manufacturer who, while perhaps innocent of negligence, cast a defective product into the stream of commerce and profited thereby.

137. Courts have defined "product" very broadly. See MARSHALL S. SHAPIRO, *THE LAW OF PRODUCT LIABILITY* 7.03[1] (4th ed. 1990).

2. The product must contain a defect and the defective condition must make the product “unreasonably dangerous.”¹³⁹ “Unreasonably dangerous” means “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”¹⁴⁰ There are three potential types of defects: manufacturing, design, and warning.¹⁴¹

3. Finally, the plaintiff must prove actual injury caused by the product. An injury is actual harm or loss to the party’s person, land, or chattel.¹⁴²

Although it is undisputed that sperm can cause damage to the recipient, or a resulting fetus or child,¹⁴³ this does not automatically mean that strict product liability is a viable cause of action in this context. In order to assess the potential liability under this doctrine, we must determine if the three strict product liability elements can be satisfied. A 2000 California state case, *Johnson v. Superior Court*,¹⁴⁴ provides a partial template for this analysis.¹⁴⁵

Johnson was not based on strict product liability, so we must begin by addressing a question it did not: is sperm a product? A product is defined as “[a]nything produced by human or mechanical effort or by a natural process.”¹⁴⁶ It is also defined as a “commodit[y] offered for sale.”¹⁴⁷ Sperm is created by a natural process in the male

138. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

139. See *id.* § 402A(1) (“One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . .”).

140. See *supra* note 138, cmt. i.

141. See generally William Powers, Jr., *A Modest Proposal To Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639 (1991).

142. See FRUMER AND FRIEDMAN, 1-8 PRODUCTS LIABILITY 8.01[4] (2004).

143. See, e.g., Laurence Mascola & Mary E. Guinan, *Screening to Reduce Transmission of Sexually Transmitted Diseases in Semen Used for Artificial Insemination*, 314 NEW ENG. J. MED. 1354, 1354 (1986) (“Sexually transmitted organisms have been transmitted during artificial insemination by donor, and such transmission can cause . . . disease in the recipient woman and may harm the fetus or newborn.”).

144. 95 Cal. Rptr. 2d 864 (Cal. Ct. App. 2000). In *Johnson*, a husband and wife who had a child by artificial insemination brought suit against the medical professionals who facilitated conception.

145. *Johnson* only provides a partial template because the causes of action were negligence, fraud, and breach of contract it did not specifically address strict product liability.

146. Especially for Teachers, Terms and Theory: Investment Game Terms, http://www.economicadventure.org/teachers/glossary_pope.cfm (last visited Oct. 12, 2007).

147. Wordnet Search, <http://wordnet.princeton.edu/perl/webwn> (search “product”).

body and it is frequently sold by individual donors or sperm banks to recipients. Sperm is therefore a product, and the first requirement is satisfied.

The second element is that the sperm had a defect that made it unreasonably dangerous. In *Johnson* the plaintiffs claimed that the sperm was defective because (a) it came from a donor with a family history of kidney disease, and (b) the resulting child suffered from that type of kidney disease.¹⁴⁸ A product is defective when it is dangerous beyond the expectations of an ordinary user.¹⁴⁹ If an ordinary user would not expect donor sperm to carry a strong predisposition toward congenital kidney disease, then the sperm is defective. In *Johnson*, the defects could be both manufacturing and warning.

Finally, there must be an actual injury or loss to person or property caused by the defective sperm. At a minimum, a child who is born with severe kidney disease has experienced, and will experience, several legally recognized and compensable injuries: she has been damaged in her enjoyment of life, has suffered and will suffer physical and mental pain, has endured past medical expenses, and is likely to incur future medical expenses.

Given this analysis, we can conclude that sperm is a product and that it can contain an unreasonably dangerous defect that can produce an injury. Strict product liability can be triggered by online sperm donation, thus sperm banks and donors have significant reason to fear this cause of action.

C. Negligence

Recently, there have been suits alleging that sperm banks were negligent in storing or disseminating sperm. The claims have involved two different contentions. In the first lawsuit, a donor wanted his sperm stored and distributed to a specified recipient, but the bank failed to meet these obligations.¹⁵⁰ For purposes of this Article, we will call these "lost sperm" cases because, even if the purchaser

148. See *Johnson*, 95 Cal. Rptr. 2d, at 867-68.

149. See *supra* text accompanying 139-40.

150. See, e.g., *Stanton v. Univ. of Tex. Health Scis. Ctr.*, 997 S.W.2d 628 (Tex. App. 1998); *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998); see also Dorinda Elliot & Friso Endt, *Twins—with Two Fathers: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38; Barbara Kantrowitz & David Kaplan, *Not the Right Father*, NEWSWEEK, Mar. 19, 1990, at 50; Michael Lasalandra, *Woman, Ex and Hospital Settle over Sperm Mixup*, BOSTON HERALD, Aug. 27, 1998, at 12.

utilized the sperm for conception, the purchaser was not the intended recipient. In the second case, a child was born with a birth defect attributable to sperm that adequate testing or screening should have removed.¹⁵¹ This situation is not limited to sperm banks and could encompass individual sperm donors. We will call these “defective sperm” cases.

1. Lost sperm cases: parents(s) seeking recovery for parent(s)

While lost sperm cases have gained recent publicity, the legal issue is not new. In 1985, Fred Skolnick contracted with a sperm bank to store his sperm because he had a form of cancer that would eventually render him unable to reproduce.¹⁵² His wife, Julia, was then inseminated with what the couple thought was Fred’s sperm. The resulting child was bi-racial, even though both Fred and Julia were Caucasian. Julia brought suit against her gynecologist and the sperm bank alleging negligence. Reportedly, the parties settled both claims for \$400,000.¹⁵³ In 1985, the Skolnick situation was atypical, not necessarily because of the cause of action, but because the dispute became public. Although there is a dearth of case law on this topic, this does not mean that the situation is uncommon.¹⁵⁴ As one author astutely opined, “. . . it is more likely that the lack of precedent is attributable to quiet, out-of-court settlements designed to prevent anxious consumers from discovering the risks involved in the [transaction and] procedure.”¹⁵⁵

Apparently, that anxiety is no longer sufficient to keep injured customers quiet,¹⁵⁶ but are they likely to recover under a theory of negligence in lost sperm cases? In order to answer this question we

151. See, e.g., *Johnson*, 95 Cal. Rptr. 2d at 867-68.

152. See Ronald Sullivan, *Mother Accuses Sperm Bank of Mixup*, N.Y. TIMES, Mar. 9, 1990, at A16.

153. See Ronald Sullivan, *Sperm Mix-up is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4.

154. As an analogy, a representative of the In Vitro Fertilization clinics in the United Kingdom estimates that one in one thousand I.V.F. embryos are implanted into the wrong woman. See Lois Rogers, *Women Given Wrong Embryos at IVF Clinics*, SUNDAY TIMES (London), Nov. 12, 2000, at 4.

155. Hodgson, *supra* note 117, at 358. The same author contends that even if such mistakes commonly occur, they would be largely unnoticed in situations less immediately obvious than the birth of a biracial baby. *Id.*

156. For a comprehensive history of A.R.T. “mix-up” cases and events, see Leslie Bender, “To Err is Human” ART Mix-ups: A Labor-Based, Relationship Proposal, 9 J. GENDER RACE & JUST. 443, 446-53 (2006).

must review the traditional elements of negligence: duty, breach, proximate causation, and harm to determine potential liability.

Frequently, medical professionals and sperm banks are co-defendants in lost sperm cases. While medical professionals performing insemination have a well-established legal duty,¹⁵⁷ the legal duty of sperm banks is uncertain.¹⁵⁸ This uncertainty is the direct result of a lack of uniform laws governing the sperm industry. As previously discussed, only a minority of states regulate sperm screening and storage.¹⁵⁹ Statutes create legal duties, but the majority of states have no such statutes. Without a clearly defined duty, it is very difficult to prove a resulting breach.¹⁶⁰

Unlike duty, a plaintiff can easily establish proximate cause in a lost sperm case. When sperm did not reach the intended recipient and additional sperm from that donor is not available, the contention is that but for the sperm bank's failure to provide the appropriate sperm to the appropriate recipient, conception from that particular sperm donor would have been possible. In a case where a provider delivered sperm to the wrong recipient, and conception resulted, the contention is that but for the bank's failure to provide the sperm to the intended recipient, the resulting child would not exist.

157. For example, in New York, a physician has a duty to use reasonable care and exercise the degree of skill and knowledge that is ordinarily possessed by physicians in the community. See *Pepe v. United States*, 599 F. Supp. 798, 802 (E.D.N.Y. 1984); *Pike v. Honsinger*, 49 N.E. 760, 762 (N.Y. 1898); *Zellar v. Tompkins Cmty Hosp*, 508 N.Y.S.2d 84, 86 (N.Y. App. Div. 1986).

158. As one author argues, "it is hard to accept that an artificial insemination practitioner, sperm bank, and sperm donor owe no duty of care whatsoever to the child whose conception they are actively seeking . . . [B]ecause of the nature of artificial insemination, courts might be inclined to find a duty to the [then] unconceived child and thus might theoretically entertain claims brought on that child's behalf after its birth." See Megan D. McIntyre, *The Potential for Products Liability Actions when Artificial Insemination by an Anonymous Donor Produces Children with Generic Defects*, 98 DICK. L. REV. 519, 538 (1993). For an analogous case, see *Huddleston v. Infertility Ctr. of Am., Inc.*, 700 A.2d 453, 460 (Pa. Super. Ct. 1997) (holding that a surrogacy business had a special relationship with the parties and, therefore, owed a duty to protect the resulting child from foreseeable risks).

159. See *supra* note 89 and accompanying text.

160. There is also the possibility that a sperm bank could assert a "state of the art" defense, admitting it had a duty to act reasonably and did so, but alleging that medical technology existing at the time of the donation and transfer was not sufficient to reveal any pre-existing defect in the sperm. See McIntyre, *supra* note 158, at 544 ("The state-of-the-art defense is properly invoked only if there was *no technologically feasible way* of discovering the defect in the semen. In these particular cases, the state-of-the-art defense acts as an absolute bar to negligence."). The viability of this defense then depends on the type of defect and the technology available at the time of donation and transfer.

Harm is the most problematic element in lost sperm claims because a court has to determine whether (a) a party or couple has suffered actual damage and (b) if so, how to calculate such damage. As discussed under causation, lost sperm damages could arise in two different scenarios. The first is where the opportunity to procreate using a specific donor is foreclosed because sperm was lost and the donor cannot produce more. The second scenario is where a recipient received and utilized sperm from someone other than the anticipated donor, resulting in the birth of a healthy baby.

To date, no final decisions address sperm bank liability when sperm is lost and the donor cannot produce more. Nonetheless, two potentially analogous embryo cases may prove helpful. In the first, the provider contaminated the embryos making them unusable.¹⁶¹ In the second, the storing hospital lost or destroyed the stored embryos.¹⁶² The court denied recovery in the first case because it held that the donors were unable to establish a requisite physical injury.¹⁶³ In the second case, the court allowed recovery based on emotional distress.¹⁶⁴ While this represents, admittedly, a very small sample of cases, it appears that the majority of jurisdictions would follow the rationale of the first case because most jurisdictions do not allow recovery absent physical injury.¹⁶⁵ Assuming that courts continue to follow this rationale, it is unlikely that sperm banks will be liable when stored sperm is lost.

At least one author criticizes the basis for damages in the second lost sperm scenario, where sperm from someone other than the designated donor resulted in conception and birth of a healthy child.¹⁶⁶

161. See *Doe v. Irvine Scientific Sales Co.*, 7 F. Supp. 2d 737, 741–42 (E.D. Va. 1998).

162. See *Frisina v. Women and Infants Hosp. of R.I.*, No. Civ. A. 95-4037, 2002 WL 1288784 (R.I. Super. May 30, 2002).

163. See *Doe*, 7 F. Supp. 2d at 741.

164. See *Frisina*, 2002 WL 1288784, at *10.

165. See *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (refusing to allow plaintiffs to pursue emotional distress damages based on improper transfer of pre-embryos absent physical harm or exceptional circumstances). *But see Jeter & Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1273 (Ariz. Ct. App. 2005) (“While a party cannot bring a claim for negligent infliction of emotional distress based merely on the negligent destruction of property, a party can recover damages for emotional distress arising from the tortious loss of property if the emotional distress is unrelated to the pecuniary loss.”) (footnotes omitted). See generally Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury*, 9 J. MED. & L. 55 (2005).

166. See generally Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Ge-*

And while the suit did not assert a negligence cause of action, at least one court held that a couple whose healthy child was conceived using lost sperm was not entitled to recovery.¹⁶⁷ This decision is not surprising when this type of lost sperm claim is juxtaposed with the “wrongful birth” cause of action.

The parents of an impaired child can bring wrongful birth actions for the emotional and financial damages that they have and will suffer as a result of the birth of that child.¹⁶⁸ At least one author contends that wrongful birth cases have had some judicial support and acceptance.¹⁶⁹ If this assertion is true, it could increase the likelihood that a court will award damages in lost sperm cases resulting in healthy birth because, at base, both wrongful birth and this type of lost sperm case seek damages resulting from birth of a child. However, there are two significant differences between the two claims that make it unlikely that such a court will award such damages in lost sperm cases. First, in a wrongful birth claim the child is impaired,¹⁷⁰ while in a lost sperm case the child is not. Second, the assertion that wrongful birth is judicially acceptable is true,¹⁷¹ but it is

netics and Race in Defining Relationships After Reproductive Technological Mistakes, 5 DEPAUL J. HEALTH CARE L. 15 (2002).

167. See Chris Snow, Note, *Harnicher v. University of Utah Medical Center: Fertility Treatment and the Duty of Care*, 2 J. L. FAM. STUD. 63 (2000) (addressing the tort of “negligent infliction of emotional harm” and denying recovery as plaintiffs could not prove the requisite element of resulting “bodily harm” as part of their injury and damage). *But see* Chambliss v. Health Scis. Found., 626 S.E.2d 791 (N.C. Ct. App. 2006) (affirming a North Carolina jury award of compensatory and punitive damages to a woman who was inseminated with lost sperm).

168. See Timothy J. Dawe, Note, *Wrongful Life: Time for a “Day in Court,”* 51 OHIO ST. L.J. 473, 476 (1990).

169. See McIntyre, *supra* note 158, at 539–40:

The child’s mother would have a better chance of recovering if she brings a products liability claim in her own right, seeking damages based on a wrongful birth theory. The wrongful birth claim enjoys far greater judicial acceptance than wrongful life because it does not define the wrong as the child being given life, but rather as the denial of the mother’s right to choose to abort or to never even initiate the pregnancy. Thus, if the mother can show that she would not have carried the child to term or that she would not have consented to the insemination if she had known the truth about the sperm donor’s medical history, many courts may award her compensation for wrongful birth.

170. Wrongful birth damages are predicated on the existence of a congenital defect. See, e.g., *Hall v. Dartmouth Hitchcock Med. Ctr.*, 899 A.2d 240, 245 (N.H. 2006) (“[T]he injury in a wrongful birth claim [is] the ‘negligent invasion of the parental right to decide whether to avoid the birth of a child with congenital defects.’” (quoting *Smith v. Cote*, 513 A.2d 341, 348 (N.H. 1986))).

171. As of 2002, twenty-two states recognized wrongful birth. See Kelly E. Rhinehart,

also misleading. Some state courts have refused to recognize wrongful birth causes of action absent statutory creation.¹⁷² Some state legislatures have even passed laws refusing to recognize wrongful birth causes of action.¹⁷³ Only one state, Maine, statutorily recognizes wrongful birth, and it only recognizes a limited cause of action.¹⁷⁴ Even where wrongful birth exists, there is still a highly pragmatic consideration when it comes to assessing damage because “[j]uries would have an extremely difficult time trying to calculate how much the life of a disabled child is worth.”¹⁷⁵ If it is difficult for a jury to calculate damages to parents based on the birth of a disabled child, it seems even more difficult to calculate damages to parents for the birth of a healthy child. Finally, this type of claim seeks damages for birth and subsequent child rearing expenses, and such damages are seldom awarded.¹⁷⁶ In the end, it is unlikely that claimants will be successful in lost sperm cases because, regardless of which scenario the claim falls under, they are highly unlikely to satisfy the requisite elements.¹⁷⁷

The Debate Over Wrongful Birth and Wrongful Life, 26 LAW & PSYCHOL. REV. 141, 153 (2002).

172. See, e.g., *Etkind v. Suarez*, 519 S.E.2d 210 (Ga. 1999).

173. See, e.g., MINN. STAT. § 145.424(2) (1997).

174. See ME. REV. STAT. ANN. tit. 24, § 2931 (1997).

175. Monique Ann-Marie Croon, Note, *Taylor v. Kurapati: The Court of Appeals of Michigan's Decision of Refusing To Recognize the Tort of Wrongful Birth*, 5 DEPAUL J. HEALTH CARE L. 317, 339 (2002).

176. Many courts refuse to award these types of damages because they are too speculative. See *Johuson v. Univ. Hosps. of Cleveland.*, 540 N.E.2d 1370, 1376 (Ohio 1989) (“Another rationale is that the cost of child-rearing would be too speculative to measure with any certainty.”). See generally Sara J. Johnson, *Tort Actions Against Third Persons Based on Relationship*, 59 AM. JUR. 2D *Parent and Child* § 92 (1987).

177. There is a possible third scenario under this subsection, and it combines the two lost sperm scenarios previously discussed. Sperm could be lost and delivered to an incorrect recipient, who then uses it to conceive a child who is impaired. We could not find any record of this occurring, and we have no sense of how common this scenario might be, but we have to assume it could happen. If it did occur, it would suffer the same fate as the other lost sperm scenarios and for many of the same reasons. First, legal duties of the bank or donor are uncertain. Second, that uncertainty makes proving breach difficult or impossible. Third, proximate causation may be extremely difficult to establish because birth defects may be caused by many sources other than the sperm. See *infra* text accompanying note 180. Finally, it is extremely difficult for juries to value the harm created by the birth of an impaired child. See *supra* text accompanying note 175.

2. Defective sperm: children seeking recovery for impaired existence

The prior discussion focused on claims brought by parents, or would-be parents, to recover damages. There is also the possibility that a child could bring suit against a sperm bank or donor alleging that it used defective sperm in his or her conception.¹⁷⁸ The child could proceed under the traditional cause of action of negligence, or the more specific claim of wrongful life. As we will discuss, while juries may be strongly emotionally affected by either claim, the plaintiff will have a variety of problems satisfying the legal elements in either situation.

a. Traditional negligence. The elements of duty and breach raise the same concerns previously discussed: because the specific legal duties of sperm banks are largely uncertain, resulting breach is difficult to prove.¹⁷⁹ Proximate causation is extremely problematic. A child must prove, by a preponderance of the evidence, that there is a direct causal link between the provided sperm and the resulting condition. Such a link is extremely difficult to establish because

The majority of genetic and nongenetic birth defects occur as the result of spontaneous mutations such that causation cannot be attributed to either biological parent. Also, birth defects are often caused by nongenetic factors, such as toxic exposure, smoking, alcohol consumption, and drug use by the mother during her pregnancy. Finally, it is always possible that a defect exists in the genes of the recipient mother.¹⁸⁰

However, if the child can establish causation, damages for harm should be much more readily available than in a lost sperm case. At a minimum, a child should be entitled to ordinary compensatory damages such as physical and emotional suffering and past and future medical expenses. Additionally, depending on the conduct of the sperm bank or the donor, these compensatory damages could provide the basis for punitive damages.¹⁸¹

178. Depending on state law, it is likely that such action would be brought by the parents on behalf of the child.

179. There would be an obvious exception if a state's law required a sperm bank to conduct testing or screening and the bank (a) did not do so or (b) did so, but not in a "reasonable manner."

180. McIntyre, *supra* note 158, at 537.

181. Punitive damage recovery may not be possible in some jurisdictions. See Kenneth Ofgang, *Sperm Bank Protected as "Health Care Provider," Court Rules*, METROPOLITAN NEWS CO., Sept. 3, 2002, at 1 ("A sperm bank is a 'health care provider,' entitled to special statutory

Much like lost sperm cases, claimants asserting negligence claims are not likely to succeed due to their inability to satisfy the elements. Consequently it does not appear that donors and sperm banks currently have much to fear from this claim.

b. Wrongful life claims. Wrongful life is a more specific claim under the general umbrella of negligence. It is made by, or on behalf of, an impaired child asserting that he or she would have avoided that impaired existence, either through parental choice not to conceive or through an abortion, but for the negligence of a defendant.¹⁸²

Wrongful life has the same elements previously discussed under negligence: duty breach, proximate causation and harm. The first three elements continue to suffer the same deficiencies. The legal duties of sperm banks and donors are uncertain, making breach difficult to prove.¹⁸³ Even if these two elements could be satisfied, proximate causation will be difficult to establish because the majority of birth defects result from spontaneous mutations not attributable to either biological parent, nongenetic factors, or a defect existing in the genes of the recipient mother.¹⁸⁴

Only three states currently recognize a cause of action for wrongful life. We contend that this lack of acceptance is, at least partially, a product of courts' inability to address the legal issue of harm, separate from a moral or societal issue:

In wrongful life claims . . . the child usually asserts as "general" damages the pain and suffering he will endure during his lifetime as a result of the defect, but presumably less the benefits he will derive from his existence, if any. This "net burden" is then measured not against the value of a "normal" life, but against the nullity of non-existence.¹⁸⁵

The response has been that:

protection from punitive damage claims.").

182. See Dawe, *supra* note 168, at 475.

183. *But see id.* at 477 ("With few exceptions modern courts have had little trouble accepting the elements of duty and breach in wrongful death cases."). It should be noted that the author cites only one case, *Albala v. City of New York*, 429 N.E.2d 786 (N.Y. 1981), in support of this contention.

184. See *supra* note 158 and accompanying text.

185. See Dawe, *supra* note 168, at 479-80.

Courts have consistently refused to recognize claims for wrongful life because of the deep-seated ethical dilemma involved. Few courts have been willing to say that children, no matter how severely impaired, would have been better off had they never been born. "One of the most deeply held beliefs in our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life."¹⁸⁶

So, in essence, courts have held "that life itself cannot constitute injury."¹⁸⁷ As a result the harm element cannot be satisfied when there is a birth, even the birth of an impaired child. Even if courts recognize the wrongful life cause of action, a claimant would find it very difficult to establish any of the first three elements, and the fourth may be judicially impossible. Additionally, the public policy considerations underpinning these decisions are so strong that some states have actually prohibited wrongful life claims altogether.¹⁸⁸

VI. CONCLUSION

Technological advances sometimes create as many problems as they alleviate. The Internet and reproductive technologies have advanced, and are advancing, in a cyber-symbiotic fashion. As a result of these ongoing developments we advise that the wisest course of action for sperm sellers is to proceed with caution. Admittedly, it must seem a bit scary for a sperm seller to be told to beware, but that is the best advice in light of the current law (or lack thereof). Having said that, we would be remiss if we did not make the following recommendations for the future.

Paternity has always been the province of the individual states.¹⁸⁹ It should remain so, not only because of states' rights issues, but also

186. McIntyre, *supra* note 158, at 539 (quoting *Berman v. Allan*, 404 A.2d 8, 12 (N.J. 1979)).

187. See Deanna A. Pollard, *Wrongful Analysis and Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 328 (2004).

188. See, e.g., *Doolan v. IVF Am. (MA), Inc.*, No. 99-3476, 2000 Mass. Super. LEXIS 581, at *8-12 (Mass. Super. Ct. Nov. 20, 2000) (rejecting a tort claim brought on behalf of a child born with cystic fibrosis against a fertility clinic for negligence in genetic screening of IVF embryos before implantation because it amounted to a claim for wrongful life not recognized in Massachusetts); see also Fred Norton, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 818-43 (1999) (arguing for liability in such cases).

189. See *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and

because states are responsible for the welfare of their children.¹⁹⁰ Will this force Internet sperm donors to learn their potential paternity liability in fifty different domestic jurisdictions? Yes. Will most do so? No.

Sometimes states have to protect their citizens from themselves. Individual states should require sperm banks to disclose to donors that (a) their sperm may be used to conceive one or more children, (b) if children are conceived the donor may be held financially responsible for support of those children as determined by the laws of the state, (c) the donor's sperm may be used to conceive children in another state or states, and (d) the donor may be financially responsible for support of such children as determined by the laws in that state or those states.

Sperm is a product and should be a "good" for purposes of the U.C.C.; accordingly, U.C.C. warranties should apply to manufacturers, sellers, and distributors of sperm. It is appropriate to borrow logic from the doctrine of strict product liability here, at least for purposes of illumination. Businesses must do more than merely place their products on the market and reap resulting profits—because their products can hurt people. Those manufacturers, sellers, and distributors are in a better position to pay for injuries caused by their products than are product users. Sperm can cause serious injuries and sperm sellers should be legally accountable when their goods do so.¹⁹¹

not to the laws of the United States.”).

190. The annual cost of child support in the United States is staggering. In 2000, the Administration for Children and Families of the Department of Health and Human Services reported national collections of child support of \$17.9 billion. See ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, FY 2000 PRELIMINARY DATA PREVIEW REPORT, 3.6 TOTAL COLLECTIONS (2001), available at <http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch03.html#N79A1>. This amount may vastly underestimate total child support paid because it only calculates payments made pursuant to court order through child support agencies. As a result, it does not include child support not paid through an agency or not paid pursuant to court order. See also Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29, 35–36 (2003).

191. There is an additional benefit to bringing sperm under the auspices of the U.C.C. As previously discussed, the sperm industry is largely unregulated, and many legal issues, such as warranties, have yet to be addressed. There is a well-developed, and constantly developing, body of U.C.C. case law that could guide courts in addressing sperm-based issues in the future.

Sperm is widely viewed as a commodity for sale.¹⁹² As previously discussed, many sperm transactions take place online and involve multiple states. Congress should use its commerce clause authority to regulate the sale, transfer, and physical storage of sperm and mandate screening for communicable diseases, including AIDS and HIV.¹⁹³ In turn, those federal standards should clarify and codify the legal duties of sperm sellers. That clarification would decrease uncertainty for both sperm sellers and buyers regarding the tort of negligence.¹⁹⁴

We are only now meeting the first generation of Internet sperm donors and their resulting children. There is no reason to think that the number of sperm sellers, buyers, and resulting issues will decrease; in fact, the opposite seems inevitable. The future will require much more discussion on this important topic; perhaps it will even bring consistent and comprehensive laws and solutions. Until then, *caveat vendor*.

192. See Hodgson, *supra* note 117, at 373.

193. It is logical that the federal government, and governments worldwide, would be concerned about the risk of HIV and AIDS being spread through sperm, much as they have been concerned about the spread through blood. See generally Francine A. Hochberg, *HIV/AIDS and Blood Donation Policies: A Comparative Study of Public Health Policies and Individual Rights Norms*, 12 DUKE J. COMP. & INT'L L. 231 (2002).

194. Individual states could certainly pass legislation creating requirements above federal standards through their police powers.

