

TALK ABOUT A HUMAN RIGHTS
VIOLATION: HOW HETEROLOGOUS
ASSISTED REPRODUCTION HARMS
CHILDREN AND VIOLATES
INTERNATIONAL HUMAN RIGHTS LAW

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INTRODUCTION

Legally, heterologous assisted reproduction¹ violates international human rights law. Ethically, it compromises the welfare of children.

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¹ Assisted Reproductive Technology (ART) is a broad label that encompasses many medical procedures, including in vitro fertilization (IVF), donor insemination (DI), and intra cytoplasmic sperm injection, inter alia. *What Is Assisted Reproductive Technology (ART)?*, HEALTH-CARES.NET, <http://womens-health.health-cares.net/assisted-reproductive-technology.php> (last updated July 18, 2005). In vitro fertilization is defined as the medical procedure whereby "eggs are gathered from the woman's ovaries and mixed with the man's sperm in a dish in the laboratory." *In Vitro Fertilisation (IVF)*, BABYCENTRE <http://www.babycentre.co.uk/preconception/fertilitytreatments/ivf/> (last visited July 29, 2017). The resulting embryo/embryos is/are then transferred into a woman's uterus. *Id.* Donor insemination refers to the use of a third party's sperm to achieve conception outside the womb (in vitro fertilization) or inside the uterus (intrauterine insemination). *Donor Insemination*, BABYCENTRE, <http://www.babycentre.co.uk/preconception/fertilitytreatments/donorinsemination/> (last visited July 29, 2017). Intracytoplasmic sperm injection involves a "lab technician" who "isolates individual sperm

By focusing on the welfare of children as members of the human family and the international laws designed to protect children in particular, this article roots itself in an anthropology of the human person that attributes equal rights to all human beings. In this regard, the vulnerability of children is a primary reason to give them more protection than other persons, rather than less. Certainly, the inability of men and women to have children of their own can be a cause of immense suffering. Mindful of this suffering and the praiseworthy motivation to alleviate that suffering, there is, nevertheless, a real and pressing need to assess the consequences of heterologous ART² on the wellbeing of children.³ In this connection, although the complex and varied nature of different ART techniques that are available can make it difficult to discuss the effect of ART as a whole on children, the actual effect of ART on children is easier to evaluate when one considers that in vitro fertilization is the most commonly used ART.⁴

This article conclusively demonstrates that in both ethics and international law, heterologous ART should be prohibited by all states because it violates the rights of children, harms them, and prevents states

and injects them into individual eggs." *Fertility Treatment: Intracytoplasmic Sperm Injection (ICSI)*, BABYCENTRE, <http://www.babycentre.co.uk/preconception/fertilitytreatments/icsi/> (last visited July 29, 2017). The resulting embryo/embryos is/are, as in IVF, transferred into a woman's uterus. *Id.*

² Heterologous in vitro fertilization is universally understood to mean that the egg and sperm being used for fertilization, the gametes, are not from the man and woman who wish to raise the child, but rather, another man or woman donates a gamete, an egg or sperm, to allow for fertilization to take place, and possibly the birth of a child. If a man is donating a sperm, that sperm could be injected into the woman's egg inside her uterus (intrauterine insemination), but if a woman is donating her egg, the sperm would be used to fertilize that woman's egg outside her uterus (in vitro fertilization) and then transferred to "near the Middle Of The Endometrial Cavity." *Embryo Transfer Procedure For In Vitro Fertilization – IVF Advanced Fertility Center Of Chicago IVF Embryo Transfer Technique And Video*, ADVANCED FERTILITY CENTER OF CHICAGO, <http://www.advancedfertility.com/embryotransfer.htm> (last visited July 29th, 2017).

³ "Infertility is a very painful experience for couples, and sympathy for their situation is appropriate; however, this does not legitimize any and every treatment which might be provided." A submission by the Joint Bioethics Committee of the Catholic Bishops of England & Wales, Scotland, and Ireland to the Department of Health's consultation on the proposed review of the Human Fertilisation and Embryology Act (1990) (2005), Par. 11.

⁴ *Assisted Reproductive Technology (ART) and Pregnancy: What is ART-Assisted Reproductive Technology*, BELTINA.ORG, <http://www.beltina.org/health-dictionary/assisted-reproductive-technology-art-produce-pregnancy.html> (last visited Apr. 8, 2010).

from complying with international human rights law. In particular, Part I underscores how all heterologous ART—anonymous and non-anonymous—leads to these wrongs. Part II then explains how anonymous heterologous ART specifically does so.

I. HETEROLOGOUS ART, ANONYMOUS AND NON-ANONYMOUS, VIOLATES THE RIGHTS OF CHILDREN, HARMS THEM, AND PREVENTS STATES FROM COMPLYING WITH INTERNATIONAL HUMAN RIGHTS LAW

The means of a child’s conception affects the welfare of that child. Children conceived through heterologous ART are denied legal rights and harmed, especially when states permit or require anonymous donation of gametes. Likewise, states that allow heterologous ART violate international human rights laws.

A. Heterologous ART Violates the Right of Children to Be Cared for by Their Biological Parents in Accordance with the Convention on the Rights of the Child

International human rights law recognizes that children have the right to be cared for by their biological parents. Convention on the Rights of the Child (CRC), Article 7(1) specifies: “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know and be cared for by his or her parents* (emphasis added).”⁵ Although “parents” could theoretically refer to social parents recognized by the state, the couple that raises a child conceived by heterologous ART, there is clear evidence that “parents” was intended to reference biological parents,⁶ and

⁵ G.A. Res. 44/25, Convention on the Rights of the Child, (Nov. 20, 1989) (entry into force Sept. 2, 1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁶ “The ‘right to know’ your parents makes no sense unless these people are understood to be biological parents.” ELIZABETH MARQUARDT, NORVAL D. GLENN, & KAREN CLARK, MY DADDY’S NAME IS DONOR, A REPORT RELEASED INTERNATIONALLY BY THE COMMISSION ON PARENTHOOD’S FUTURE, 53, 2010, http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf.

that the Committee on the Rights of the Child understands the word “parents” in Article 7(1) to mean biological parents.⁷

With regard to the intention of the contracting states at the time the Convention on the Rights of the Child was drafted, the United Kingdom,⁸ the Czech Republic,⁹ Luxembourg,¹⁰ and Poland¹¹ all made reservations to the effect that anonymous births would continue to be recognized by these states despite their ratification of the Convention. If the term “parents” in Article 7(1) does not refer to biological parents, these reservations would be unnecessary. It is, therefore, clear that Article 7(1) was drafted to provide children with the right to know and be cared for by their biological parents.

This interpretation of Article 7(1) is also confirmed by the Committee on the Rights of the Child. The Committee’s 2002 Concluding Observations to the report submitted by Great Britain and Northern Ireland submits, “[T]he Committee is concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents. In light of [A]rticles 3 and 7 of the Convention, the Committee recommends that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.”¹² Here, the Committee is expressly linking the best interests of the child embodied in the Convention on the Child, Article 3,¹³ with the right of children to know

⁷ Cf. Barbara Ann Hocking and Michele Harvey –Blankenship, *A Right to Family Life? Tracing Fractured Family Identities Drawing Upon Law, Human Rights and Biology in THE CHALLENGE OF CONFLICT: INTERNATIONAL LAW RESPONDS*, 243-60, 255, (Ustinia Dolgopol & Judith Gardam, Eds., Martinus Nijhoff Publishers 2006).

⁸ Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, CRC/C/2/Rev.3, <http://www.refworld.org/docid/3ae6aeda4.html>, 29.

⁹ *Id.* at 15.

¹⁰ *Id.* at 23.

¹¹ *Id.* at 26.

¹² Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, Par. 31-32 (Oct. 9, 2002).

¹³ Convention on the Rights of the Child, *supra* note 119, Art. 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration,” <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

about their biological parents pursuant to the Convention on the Rights of the Child, Article 7(1). Even further, since the term “parents” in Article 7 refers to biological parents, children not only have the right to know about their biological parents, but according to the express terms of Article 7(1), children have the right to “be cared for” by their biological parents.

Therefore, states which allow heterologous ART violate the right of children to be cared for by their biological parents in accordance with Convention on the Rights of the Child, Article 7(1), thereby violating international human rights law. This violation applies equally to cases of anonymous and non-anonymous heterologous ART. The very intention of parents who use donor insemination is to separate the child who is so conceived from one of his or her biological parents. In sperm donation, the intention is to separate the child from his or her father, and in egg donation, the intention is to separate the child from his or her mother. This separation of the child from one of his or her parents is a legal violation of the child’s right to be cared for by both of his or her biological parents independent of any resulting harm to the child.¹⁴

However, since adoption also separates the child from his or her biological parents, some argue that heterologous ART must be accepted in principle because adoption is widely accepted in national legal systems.¹⁵ This attempt to equate adoption with heterologous ART ignores the vital differences between the two procedures.¹⁶ “Adoption is

¹⁴ In this connection, Article 12 of the European Convention on Human Rights provides for the right to “marry and found a family” cannot be interpreted to include the “right” to have children through heterologous ART because this would conflict with the right of children to be raised by their biological parents in accordance with the Convention on the Rights of the Child. Any construction of Article 12 which results in a derogation from an international convention to which a state is a party, including the Convention on the Rights of the Child, is not permissible according to the European Convention on Human Rights Article 53. There is, then, no basis for the argument that the right to “found a family” pursuant to Article 12 of the European Convention includes the right to use heterologous ART.

¹⁵ Adoption is defined as “the act of establishing a person as parent to one who is not in fact or in law his child.... Adoption is so widely recognized that it can be characterized as an almost worldwide institution with historical roots traceable to antiquity.” *Adoption*, BRITANNICA.COM, <https://www.britannica.com/topic/adoption-kinship> (last visited Jul. 29, 2017).

¹⁶ “In adoption, prospective parents go through a painstaking, systematic review. . . With donor conception, the state requires absolutely none of that. Individual clinics and doctors can decide what

a pro-child social institution that finds parents for children who desperately need them.”¹⁷ More precisely, adoption occurs once there has already been a violation of the child’s right to be cared for by his or her biological parents. The state, in an effort to correct that violation, places the child with another family to mitigate the harm done to the child.¹⁸ Thus, the very institution of adoption presupposes that children have a right to be raised by their biological parents. In contrast, heterologous ART contemplates the “planned separation of children from biological mothers and fathers before the children are even conceived.”¹⁹ In this case, there is no pre-existing violation of the child’s right to be raised by his or her biological parents because the child does not yet exist.²⁰ Rather, heterologous ART – the creation of the child with full knowledge that the child will be separated from one of his or her biological parents – is itself a violation of the child’s right to be cared for by those same biological parents.²¹ Consequently, whereas heterologous ART should be

kinds of questions they want to ask clients who show up at their door. They don’t conduct home studies. No contacts are interviewed. If you can pay your medical bills, they couldn’t care less about your finances. Is the relationship in which you plan to raise the child stable? Just say it is, and they believe you. Or do you plan to raise the child alone? Most clinics now say that’s fine, too. The end result is the same: A child who is being relinquished by at least one biological parent. But compared to adoption, the process could not be more lax.” MARQUARDT ET AL., *supra* note 6, at 72.

Consequently, whereas the best interests of the child is generally incorporated into the institution of adoption, safeguards to protect the interests of children are seemingly absent from the institution of heterologous assisted reproduction. Hague Conf. on Priv. Int’l Law, *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, art. 1(a), (May 1, 1995).

¹⁷ ELIZABETH MARQUARDT, *THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS*, 20, 2006, <http://americanvalues.org/catalog/pdfs/parenthood.pdf>.

¹⁸ “The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.” G.A. Res. 41/85, art. 13 (Dec. 3, 1986).

¹⁹ MARQUARDT ET AL., *supra* note 6, at 17.

²⁰ “Adoption functions as an institution, the purpose of which is to find parents for children who need them. Donor conception functions as a market, the purpose of which is to create children for adults who want them.” *Id.* at 73.

²² “Adopted children might wrestle with the sometimes painful knowledge that their biological parents, for whatever reason, could not or would not raise them. At the same time, they know that the parents who adopted them gave them a family and a home. By contrast, donor conceived children know that the parents raising them are also the ones who intentionally denied them a relationship with at least one of their biological parents. The pain they might feel was caused not by some distant birth parent who gave them up, but by the parent who cares for them every day.” *Id.* at 73.

prohibited by states in accord with the Convention on the Rights of the Child, adoption is in full compliance with that Convention.

B. The Psychological Harm Children Experience From Heterologous ART Requires the Prohibition of Heterologous ART in Accordance with the Convention on the Rights of the Child

In addition to violating the child's right to be raised by his or her biological parents, heterologous ART causes psychological harm to children regardless of whether the donation of gametes is anonymous or non-anonymous. Scientific studies indicate that children who were conceived artificially through any technique of anonymous heterologous ART have psychological health problems.²² In particular, denying children the right to know both biological parents creates an identity crisis.²³ This is clearly proved by donor-conceived children who frequently demand to know the identity of the donor responsible for their conception.

One such donor conceived child, Claire, "wants to know 'what half of me is, what half of me comes from.'"²⁴ Another donor conceived child, a fourteen-year-old girl, fears that her biological father whom she does not know may not even care that she exists.²⁵ Yet again, another young woman is perplexed by the method of her conception and relates, it "'made me feel strange to think that my genes were spliced together from two people who were never in love, never danced together, had never even met one another.'"²⁶ Again, another woman testifies that her

²² *Id.* at 20 (Providing various psychological problems associated with heterologous assisted reproduction).

²³ "It is indeed deemed an important element in one's psychological balance to know where one comes from." Cf. Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under The Convention on the Rights of the Child and the European Convention on Human Rights*, INT'L J. L., POL'Y & FAM., 137-159, 138 (2007).

"The right to know one's origins is a dimension of the broader right to ascertain and preserve one's identity," which encompasses "biological membership." *Id.* at 141.

²⁴ MARQUARDT ET AL., *supra* note 6, at 18.

²⁵ *Id.* at 19.

²⁶ Michael Cook, *Reproductive Technologies: The Pain of Anonymous Parentage*, MERCATORNET: NAVIGATING MODERN COMPLEXITIES (Jan. 27 2011), http://www.mercatornet.com/articles/view/the_pain_of_anonymous_parentage/.

desire to know her father has not diminished since she learned of his existence, despite the fact that she claims to not desire his love.²⁷

Even further, simply prohibiting anonymous sperm and egg donation will not fully resolve the many psychological problems resulting from heterologous ART.²⁸ When the couple raising a child does not tell the child that one of them is not his or her mother or father, that child will pick up on clues and begin to sense that something is being hidden.²⁹ Children conceived through sperm donation, for example, who are not told about their biological father “report a perceived loss of agency or self-efficacy because of the obstruction they faced in trying to search for and obtain identifying information about their donor fathers.”³⁰ This loss of agency can then result in “low self-esteem and feelings of isolation.”³¹ Conversely, when children conceived through sperm donation are told about their biological father, further psychological problems begin to emerge, particularly when the disclosure is sudden. The new revelation challenges the way in which a child perceives his or her existing identity.³² Consequently, the child can become angry at those who withheld this secret from him or her.³³ Moreover, when the child is not informed of his or her true identity for many years, the relationship between the child and his or her social family³⁴ can be negatively impacted. For example, the social father may be rather distant from the

²⁷ *Id.*

²⁸ “Compared to those raised by their biological parents, the donor conceived whose parents were always open with them are still significantly more likely to have struggled with substance abuse issues (18 percent, compared to 11 percent raised by their biological parents) and to report problems with the law (20 percent, compared to 11 percent raised by their biological parents).” MARQUARDT ET AL., *supra* note 120, at 58.

²⁹ Cf. A.J. Turner and A. Coyle, *What Does It Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counseling and Therapy*, 15 HUMAN REPRODUCTION 2041, 2049 (2000), <https://academic.oup.com/humrep/article/15/9/2041/2915461/What-does-it-mean-to-be-a-donor-offspring-The>.

³⁰ *Id.*, 2049-50.

³¹ *Id.*, 2050.

³² *Id.*, 2045.

³³ *Id.*

³⁴ The term “social family” refers to the couple raising the child, and any other siblings which live in the same household.

child, causing the child to experience rejection from whom he or she believes is his or her biological father.³⁵ Precisely because children do not know the reason for this distance and seeming rejection, they can easily blame themselves.³⁶ But even when children do not blame themselves, the seeming rejection they experience from their social father might threaten their “sense of security within their family context, leading to low self-esteem or self-worth.”³⁷ Moreover, it is estimated that more than half of donor children worry that pursuing a relationship with their biological father would anger or hurt the couple that raised them, their social parents.³⁸ Consequently, the negative psychological consequences which accompany heterologous ART are not limited to situations where children are not informed about their biological parents. Even when children are informed early on who their biological parents are, there is a continuing risk of psychological problems.³⁹ Such psychological consequences can only be construed as a result of heterologous ART itself. There is, thus, compelling evidence that heterologous ART causes psychological harm to children.

As the Convention on the Rights of the Child, Article 3 relates, “In *all actions* concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.” The particular application of this general standard to specific actions affecting children determines whether those actions violate the best interests of the child, and are therefore incompatible with international human rights law. Because of the psychological harm

³⁵ A.J. Turner and A. Coyle, *supra* note 30, at 2045.

³⁶ *Id.*

³⁷ *Id.*

³⁸ MARQUARDT ET AL., *supra* note 6, at 7.

³⁹ Early disclosure of a child’s biological parents simply reduces the risks of psychological harm, but does not eliminate those risks. Araceli Jimenez, Axini Sanchez-Gregorio, Vernica Calderon, & Robert Onick, *Artificial Reproductive Technology and Its Implication In The Offsprings Right to Know*, 1 YOUNG SCIENTISTS AND THE ETHOS OF CURRENT SCIENCE 3 (Fall 2007), <http://cstep.cs.utep.edu/research/ezine/Ezine-ArtificialReproductiveTechnologyandItsImplication.pdf> (last visited July 29, 2017).

heterologous ART causes children, it constitutes a violation of the Convention on the Rights of the Child.

According to the Convention on the Rights of the Child, children have the right to psychological health. Convention on the Rights of the Child, Article 24(1) specifies, "State parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." While this article does not define the term health, it is clear that "health" encompasses psychological as well as physical well-being. For instance, Convention on the Rights of the Child, Article 25 relates, "State parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement."

This article clearly presupposes that children have a right to psychological health as well as physical health, or there would be no need for the state to ensure a periodic review of the treatment provided to a child suffering from poor mental – that is, psychological health. Thus, the meaning of "health" in article 24(1) includes, *inter alia*, the right of children to psychological health. This expansive understanding of health is confirmed by the Committee on the Rights of the Child:

The Committee understands the concepts of 'health and development' more broadly than being strictly limited to the provisions defined in articles 6 (right to life, survival and development) and 24 (right to health) of the Convention. One of the aims of this general comment is precisely to identify the main human rights that need to be promoted and protected in order to ensure that adolescents do enjoy the highest attainable standard of health, develop in a well-balanced manner, and are adequately

prepared to enter adulthood and assume a constructive role in their communities and in society at large.⁴⁰

Since, then, children have the right to psychological health, and heterologous ART harms the psychological health of children by challenging their identity and self-worth, any method of heterologous ART is, therefore, contrary to the best interests of the child. Even further, the psychological harm which children are subject to as a direct result of heterologous ART cannot be justified on the basis that such harm advances the right of adults to procreative autonomy.⁴¹ Since the best interests of the child is a “primary consideration” in all actions concerning children, the right of children to psychological health cannot be subordinated to the procreative autonomy of adults. Consequently, both anonymous and non-anonymous heterologous ART should be prohibited by states because both types of ART cause psychological harm to children in violation of international treaty law.

II. THE DETRIMENTAL CONSEQUENCES OF ANONYMOUS HETEROLOGOUS ART IN PARTICULAR

Whatever legal and moral problems there are in ART, these problems are only amplified by the anonymity permitted by many state laws.

⁴⁰ Comm. on the Rights of the Child, General Comment No. 4 (2003) Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4, at 1 (2003), <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC4.pdf>.

⁴¹ Procreative autonomy is a reference to the choices of adults concerning reproduction. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court ruled that a state law prohibiting the sale of contraceptives was a violation of the right to marital privacy protected by the U.S. Constitution, even though such a right is not expressly set forth in the Constitution but must be deduced from the emanations of other rights which create penumbras. Thus, it was suggested that marital privacy was a “penumbral right.” Subsequently in *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court determined that the right to privacy (no longer understood within the marital context) also includes the right of a woman to have an abortion. It is important to note that the welfare of children is not incorporated into this analysis, coming as it does from an adults rights perspective.

A. Anonymous Heterologous ART Violates the Right of Children to Know Their Biological Parents in Accordance with the Convention on the Rights of the Child

According to the Convention on the Rights of the Child, children have the right to know their biological parents. CRC Article 8(1) relates, “State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” While some may contend that the reference to “family relations” refers to a social family, i.e., the family that raises a child rather than the biological family, this argument is untenable in light of CRC Article 29(1). Section (c) of this Article provides in pertinent part that State parties agree that the education of the child shall be directed to. . . [t]he development of respect for the child’s parents [] [and] his or her own cultural identity. . . .” It is impossible for the state to ensure that the education of children is directed to their cultural identity unless children first know their cultural identity. This cultural identity to which children have a right to know is, in turn, dependent upon a child’s biological parents. Thus, it is clear that the right of children to know their identity, including “family relations” pursuant to CRC Article 8(1), encompasses the right of children to know their biological parents.⁴²

Another argument which seeks to escape this conclusion is that because states only undertake to respect the right of the child to know family relations “as recognized by law,”⁴³ the state is not bound to ensure that children conceived through heterologous ART know their biological parents unless this family relation is recognized by national law. But this interpretation is untenable because the phrase “as recognized by law” is “understood to encompass national as well as international legal norms, so that national legal restrictions will not be permitted to contradict international obligations.”⁴⁴ Thus, the state cannot simply refuse to

⁴² “The child’s right to know [his or] her origins is now broadly recognized and respected.” Besson, *supra* note 23, at 138.

⁴³ Convention on the Rights of the Child, *supra* note 119, Art. 8(1).

⁴⁴ Cf. Besson, *supra* note 23, at 143.

recognize the biological parents of children conceived by heterologous ART as family relations. Furthermore, CRC Article 7(1) also provides the child with a right to know, if possible, his or her biological parents. Thus, the right of children to know their “family relations” in accordance with the Convention on the Rights of the Child Article 8(1) must be implemented at the state or national level and must include a child’s knowledge of his or her biological parents.

Given that children have a right to know their biological parents, there is, nonetheless, compelling evidence that children conceived through heterologous methods of ART are often denied the right to know one of their biological parents. One study, for example, showed that “86.5% of the parents who conceived using donor insemination had not and did not have plans to tell their child how they were conceived.”⁴⁵ Two other published studies “found that between 1980 and 1995, only 1-20% of parents planned to tell their child they used donor gametes to conceive.”⁴⁶ The laws of several European states not only permit donor anonymity, but require it.⁴⁷ Thus, the state is complicit in denying children their right to know their biological parents pursuant to Convention on the Rights of the Child, Article 8(1).⁴⁸ Therefore, all such

⁴⁵ Araceli Jimenez, Axini Sanchez-Gregorio, Vernica Calderon, and Robert Onick, *Assisted Reproductive Technology and Its Implication In The Offsprings Right to Know*, 3, 2018, https://www.researchgate.net/publication/237455636_Artificial_Reproductive_Technology_and_Its_Implication_In_The_Osprings_Right_to_Know.

⁴⁶ *Id.*

⁴⁷ Non-anonymous sperm donation is forbidden in 11 of 27 EU member states. For these 11 states, sperm donation must be anonymous, and children have no legal right to know their biological father. COMPARATIVE ANALYSIS OF MEDICALLY ART IN THE EU: REGULATION AND TECHNOLOGIES, SANCO/2008/C6/051, 28-29, https://ec.europa.eu/health/sites/health/files/blood_tissues_organ/docs/study_eshre_en.pdf. Furthermore, biomedical experts recommend, “The physician and the staff of the establishment using the techniques of artificial procreation shall maintain the anonymity of the donor and, subject to the requirements of the national law in legal proceedings, shall keep secret the identity of the members of the couple as well as the fact of artificial procreation.” *Report on Human Artificial Procreation: Principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI) (1989)*, Principle 13(1), <https://rm.coe.int/16803113e4>. However, states may choose to provide the child with the right to know the identity of his/her donor at an appropriate age. *Id.*, Principle 13(2).

⁴⁸ Even in an exceptional case where it was reasonably determined that providing a child with knowledge of his biological parents is contrary to the best interests of the child, the state should not

states which permit heterologous ART and require donor anonymity are in violation of the Convention on the Rights of the Child and are legally obligated to prohibit anonymous heterologous ART.

B. Anonymous Heterologous ART Violates the Right of Children Separated from Their Biological Parents to Maintain Personal Relations and Direct Contact with Them on a Regular Basis in Accordance with the Convention on the Rights of the Child

When children are denied the right to be raised by their biological parents, international human rights law still recognizes that children have certain rights in relation to their biological parents. Article 9(3) of the CRC relates, "State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." This article must be understood with reference to the right of children to be cared for by their biological parents pursuant to CRC Article 7(1). In particular, CRC Article 9(3) presupposes that the right of children to be cared for by their biological parents has been violated, and the evident purpose of the article is to ensure that even children separated from their biological parents retain certain rights in relation to those parents, that is, the right to have personal relations and direct contact. Given that children have the right to be cared for by their biological parents,⁴⁹ it would be illogical for the Convention to suddenly change the definition of "parents" from biological parents to social parents. Thus, CRC Article 9(3), when analyzed within the overall context of the Convention on the Rights of the Child, clearly mandates that children separated from their biological parents have a right to maintain personal relations and direct contact with them.

In the case of anonymous heterologous ART, children conceived through sperm or egg donation are separated from one of their biological

presume that telling a child about his/her biological parents is contrary to that child's best interests. Convention on the Rights of the Child, *supra* note 119, Article 8(1) provides that children have the right to know their "family relations," including their biological parents, because the legal presumption is that it is in the best interests of children to inform them about their biological parents.

⁴⁹ Convention on the Rights of the Child, *supra* note 119, Article 7(1).

parents and then denied knowledge of that parent. Therefore, when a child does not even know who his or her biological father or mother is, it is impossible for that child to “maintain personal relations and direct contact” with the unknown biological parent. Moreover, it cannot be said that the state “respects the right” of a child conceived through anonymous heterologous ART to “maintain personal relations and direct contact” with his or her biological parents when the state is the authority who either requires or permits anonymous sperm or egg donations. Through the force of law, states create a situation where children cannot “maintain personal relations and direct contact” with at least one of their biological parents because the identity of that parent is hidden from the child. Therefore, states who permit or require anonymous heterologous ART are complicit in denying children their right to “maintain personal relations and direct contact” with both biological parents in violation of the Convention on the Rights of the Child, Article 9(3).

However, this does not foreclose the possibility that in certain rare cases, it may be contrary to the best interest of the child conceived through anonymous heterologous ART to maintain contact with both biological parents. This would be the case, for example, if the sperm donor had a history of committing sexual crimes against children. Thus, the express language of CRC Article 9(3) provides an exception whereby children may legally be denied “personal relations and direct contact” with a biological parent if it is contrary to their best interests. This exception for the best interests of the child does not, however, mean that anonymous heterologous ART does not violate CRC Article 9(3). On the contrary, states which permit or require anonymous heterologous ART violate CRC Article 9(3) precisely because they presume that it is in the child’s best interests not to “maintain personal relations and direct contact” with one of his or her biological parents. Alternatively, such states simply subordinate the right of the child to “maintain personal relations and direct contact” to the alleged “right” of the donor parent to remain anonymous.⁵⁰ In contrast, CRC Article 9(3) creates a presumption

⁵⁰ Given that a man who fathers a child out of wedlock has no right to remain anonymous and will typically be required to help support his child financially in accordance with Convention on the Rights of the Child Article 27(4), it is unclear why a sperm or egg donor has the “right” to remain

that children have the right to “maintain personal relations and direct contact” with both biological parents.⁵¹ In order for a state to deny a child this right, that state must, of necessity, make a preliminary finding that it is not in the child’s best interests to “maintain personal relations and direct contact” with both biological parents. Clearly, in the case of anonymous heterologous ART, the state denies children so conceived the right to “maintain personal relations and direct contact” with one biological parent without even considering their physical and psychological needs – their best interests. This state action is in direct conflict with CRC Article 9(3). Thus, anonymous heterologous ART violates the right of children to “maintain personal relations and direct contact” with both biological parents pursuant to CRC Article 9(3), despite the exception that certain children may be denied this right in accordance with their best interests.

C. Anonymous Heterologous ART Causes Physical and Medical Harm to Children, Thereby Violating the Convention on the Rights of the Child and the International Covenant on Economic, Social, and Cultural Rights

In addition to causing psychological harm to children, anonymous heterologous ART also creates an unnecessary risk of physically harming children. In particular, donor children⁵² who do not know one of their biological parents often lack access to their medical family history and genetic heritage. Consequently, they are prevented from taking preventive measures to safeguard their health, and the possibility of

anonymous and neglect any responsibilities for his/her child. See Convention on the Rights of the Child, *supra* note 119, Art. 27 (4).

⁵¹ This presumption is evident from the sentence structure of Convention on the Rights of the Child, *supra* note 119, Art. 9(3). The exception for the best interests of the child follows the rule that a child has a right to “maintain personal relations and direct contact” with both biological parents. The exception is not then the rule, but a permissible deviation from the rule in particular cases. When states deny the right to “maintain personal relations and direct contact” with both biological parents to a whole class of children—those conceived through anonymous heterologous ART—on the basis that it is in the best interests of such children, without inquiring into the particular situation of each child, the best interests of the child exception swallows the rule and children are deprived of their rights to “maintain personal relations and direct contact” with their biological parents pursuant to the Convention on the Rights of the Child.

⁵² That is, children born as a result of heterologous ART, either from donated sperm or donated eggs.

diagnosing conditions which occur in these children is compromised.⁵³ For example, in 2006, “a sperm donor passed an extremely rare and dangerous genetic condition—severe congenital neutropenia⁵⁴—to five children born to four couples.”⁵⁵ Genetic testing confirmed that the mothers of the children did not have this genetic condition, so it had to have been transmitted via the sperm donor.⁵⁶ The donor was apparently unknown by the social parents and could not be traced by the sperm bank.⁵⁷ Thus, even after the sperm bank knew of the problem, there was a continuing risk of children continuing to contract severe congenital neutropenia. In addition, the number of children the donor fathered was unknown.⁵⁸

Despite the possibility of contracting severe congenital neutropenia or any other genetic conditions naturally, contracting such conditions via sperm or egg donations creates two particular risks: (1) The children affected by a genetic condition may have no access to medical history which can potentially assist in the treatment of their respective conditions; and (2) The social parents of the affected child may not know that their children contracted their medical problems from their sperm or egg donor. Consequently, the sperm or egg bank may very well use the same sperm or egg donor over and over again, resulting in many children with the same harmful, genetic condition.⁵⁹ These risks are completely avoidable by keeping adequate medical and genetic records for all sperm donors. Thus, while donor anonymity does not necessarily preclude children from learning their medical family history and genetic

⁵³ Vardit Ravitsky, “Knowing Where You Come From”: *The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, MINN. J. L. SCI. & TECH., 655-684, 671; 674 (2010), <http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1171&context=mjlst>.

⁵⁴ The absence of a particular type of white blood cell that makes one prone to leukemia.

⁵⁵ Ravitsky, *supra* note 167, at 673.

⁵⁶ Denise Grady, *Sperm Donor Seen as Source of Disease in 5 Children*, THE NEW YORK TIMES (May 19, 2006), <http://www.nytimes.com/2006/05/19/health/19donor.html>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Moreover, there is a risk that a donor may not even exhibit the signs of a genetic disease, but, nevertheless, be a carrier of a mutation that causes the disease. It would then be essential for sperm banks to do a DNA test of the donor to determine whether he is the carrier of a potentially harmful mutation.

heritage, there is, in practice, an increased chance that children will be deprived of their medical family history and genetic heritage because “the record-keeping practices of sperm banks, programs, and clinics vary greatly.”⁶⁰

Convention on the Rights of the Child, Article 24 provides in pertinent part, “(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health. . . Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. (2) State Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: . . . (f) to develop preventive health care” As already established, children are sometimes prevented by anonymous ART from taking preventive measures to safeguard their health. Since state parties have a legal obligation in accord with the Convention on the Rights of the Child to develop preventive health care for children,⁶¹ they must also have a corresponding obligation not to hinder children from accessing preventive health care. By enforcing a system of donor anonymity for sperm and egg donations, states are preventing many children from accessing preventive health care because these children are unable to access their full medical family history and genetic heritage. Not only is the state not assisting children in safeguarding their health, but here, in the case of anonymous ART, the state is actually functioning as an agent which helps prevent children from helping themselves, and which helps prevent their social parents from helping them. Even further, it cannot possibly be in the “best interests of children” for them not to have access to preventive healthcare. Consequently, when CRC Article 24, which provides that children have the right to health, including preventive healthcare, is read in conjunction with CRC Article 3, which provides that the “best interests of the child shall be a primary consideration” in all actions concerning children, it is clear that any state which enforces

⁶⁰ Vardit Ravitsky, *supra* note 167, at 673.

⁶¹ Another formulation of the duty of states with respect to the health of children is the following: states have a duty “to remove as far as possible the causes of ill-health.” *European Social Charter*, Turin (18.X.1961), Art. 11(1), available at <https://rm.coe.int/168007cf93>. This provision extends to the health of children and adults.

anonymous heterologous ART via sperm or egg donations is violating the child's right to health. This contravenes CRC Article 24(1) and, in particular, Article 24(2)(f).

Additionally, the International Covenant on Economic, Social, and Cultural Rights,⁶² Article 12 provides in pertinent part, "(1) The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the . . . healthy development of the child." The right to health provided for in this Covenant is, just as the right to health provided for in CRC, a right to the "highest attainable standard" of physical and mental health, and not simply a right to a certain minimum standard of physical and mental health. Thus, any action by a state which compromises the right of children to good health is a violation of the International Covenant. Since anonymous heterologous ART increases the chance that children will be unable to access their medical family history and genetic heritage—necessary information for preventive healthcare and helpful in the diagnosis of physical conditions—it, therefore, violates the child's right to health in accordance with Article 12 of the International Covenant on Economic, Social, and Cultural Rights.

D. Anonymous Heterologous ART Violates the Right of Children Not to Be Subjected to Arbitrary Interference with Their Families in Accordance with the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights⁶³

Moreover, anonymous heterologous ART violates the rights of children vis-à-vis their families in contradiction of the Convention on the Rights of the Child, as well as the International Covenant on Civil and Political Rights.

⁶² G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights, (Dec. 16, 1966) (entry into force Jan. 3, 1976).

⁶³ G.A. Res. 2200(A) (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966) (entry into force Mar. 23, 1976).

Convention on the Rights of the Child, Article 16 submits, “(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, *family*, or correspondence, nor to unlawful attacks on his or her honour and reputation. (2) The child has the right to the protection of the law against such interference or attacks (emphasis added).” This provision is so important that it is repeated again in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR affirms: (1) “No one [including children] shall be subjected to arbitrary or unlawful interference with his privacy, *family*, home, or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks (emphasis added).”

The exact wording of both provisions—Article 16 of CRC and Article 17 of the ICCPR—means that the state has an affirmative obligation to protect children against interference with their families. It is not sufficient that the state itself not interfere itself with the families of children, but it must attempt to prevent other parties from doing so by ensuring children “the protection of the law against such interference.”⁶⁴

Whereas children are legally entitled to the “protection of the law”⁶⁵ against “arbitrary”⁶⁶ interference with their families in accordance with CRC and the ICCPR, anonymous heterologous ART arbitrarily prevents children from knowing their biological parents and, thus, arbitrarily interferes with their families. Such interference is arbitrary because the method of a child’s conception—whether heterologous ART, homologous ART, or natural reproduction—should not affect the right of that child to know his or her biological parents.

The right to know “family relations,” including biological parents, is a right belonging to “the child” pursuant to CRC Article 8(1), that is, a right belonging to all children irrespective of how they were conceived. In fact, not only does the state not ensure that children have the right to know their biological parents, but it is precisely state laws requiring

⁶⁴ Convention on the Rights of the Child, *supra* note 119, Art. 16(2); International Covenant on Civil and Political Rights, *supra* note 177, Art. 17(2).

⁶⁵ *Id.*

⁶⁶ *Id.*

anonymous donation of sperm and eggs which prevent children from knowing their biological parents. Even if the social parents of a child would not tell the child of his or her donor even if they could legally do so, the state, nevertheless, acts as their accomplice by forbidding the disclosure of information that child has a right to know, the identity of the sperm or egg donor who is the biological parent of the child. Therefore, when anonymous gamete donation laws are coupled with the use of heterologous ART, the state arbitrarily interferes with the families of children in violation of both the CRC and ICCPR.

E. Anonymous Heterologous ART Undermines State Laws Prohibiting Half-Sibling Marriages, Creates a Risk of Unintentional Incest Harmful to Children, and Can Lead to Marriages that Violate International Human Rights Law

Even the internal consistency of state law, the validity of marriages, and the wellbeing of future children not yet conceived are negatively affected by anonymous heterologous ART.

Every country in Europe prohibits marriage between half-siblings, with the exception of Sweden.⁶⁷ But these laws presuppose that a person knows all of their siblings, including all of their half-siblings. Without a person knowing all of their siblings, it is impossible for him or her to ensure that when they marry, they are complying with the law.

In allowing or requiring anonymous heterologous ART, the state is enforcing a law which makes it impossible for children to know all of their siblings. Since the child conceived through heterologous ART has no legal right to know his or her biological father or mother, that child cannot know whether he or she has half-siblings which are biological children of the unknown biological parent. There is, then, a real risk that children conceived through heterologous ART in states which permit or require donor anonymity will unintentionally break the law by marrying a half-brother or half-sister.⁶⁸ Therefore, states prohibiting marriages

⁶⁷ Cf. Clare Murphy, *Incest: An Age-Old Taboo*, BBC NEWS (Mar. 12, 2007), <http://news.bbc.co.uk/2/hi/6424337.stm>.

⁶⁸ For instance, twins who were split up at birth unintentionally married each other without knowing that they were siblings. Cf. *Twins split up at birth married without knowing*, NEWS.COM.AU (MZR. 17,

between half-siblings but allowing anonymous heterologous ART are undermining their own laws. States cannot forbid the marriage of half-siblings and then deny children conceived through heterologous ART the right to know the identity of their siblings, including their half-siblings. This internal inconsistency in state law should, at the very least, be eliminated by the legal prohibition of anonymous heterologous ART.⁶⁹

Even if a child conceived through anonymous heterologous ART does not unintentionally marry a half-sibling, state laws requiring donor anonymity create a situation where that child may accidentally engage in incest—sexual relations with his or her half-sibling. Because the child does not know his or her biological parent, he or she cannot possibly know the identity of any half-siblings which are biological children of the donor parent. Without knowing the identity of half-siblings, a child is always at risk of unintentionally committing incest later in life.⁷⁰ The risk of incest is psychologically harmful to children, and if incest does occur, it increases the chance that any offspring conceived through incest will have physical or medical health problems.

As easily demonstrated, the risk of incest resulting from anonymous heterologous ART is not a mere hypothetical possibility, but a real concern which affects donor children. Forty-three percent of adult donor offspring agree with the statement, “I have feared having sexual

2009) <http://www.news.com.au/twins-split-up-at-birth-married-without-knowing/story-e6frfkp9-1111115302225>.

⁶⁹ Cf. MARQUARDT ET AL., *supra* note 6, at 77.

⁷⁰ There are European countries that already recognize the potential for anonymous heterologous ART to lead to accidental incest. “The Netherlands restricts the number of children from any individual donor to twenty-five. In Austria, a donor can only provide sperm to one clinic, and no more than three couples can use that sperm. In England, no more than ten families can use the same donor, although the number of children per family is unlimited.” Naomi Cahn, *Accidental Incest: Drawing The Line—Or The Curtain?—For Reproductive Technology*, HARV. J. L. & GENDER, Vol. 32, 59-107, 60-61, <http://www.law.harvard.edu/students/orgs/jlg/vol321/59-108.pdf>. By restricting the number of children that can be conceived from a particular donor, or alternatively, in the case of England, by restricting the number of families that can use the same donor, these states are lessening the chances that accidental incest will occur. In this connection, note that restrictions on the donation of gametes are recognized as being necessary by experts in the field of biomedical science. “The number of children born from the gametes of any one of the donor[s] shall be limited by national legislation or any other appropriate means.” *Report on Human Artificial Procreation, Principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI)* (1989), Principle 10, <https://rm.coe.int/16803113e4>.

relations unknowingly with someone I am related to.”⁷¹ By contrast, only sixteen percent of adopted adults and nine percent of those raised by their biological parents agree with this statement.⁷² Similarly, forty-six percent of donor offspring agree with the statement, “When I’m romantically attracted to someone I have worried that we could be unknowingly related.”⁷³ By contrast, only seventeen percent of adopted adults and six of those raised by their biological parents agree with this statement. Therefore, although fears of incest may affect adopted children who do not know their biological parents and the identity of any siblings, or children whose father remarried and had other children without their knowledge, there is, nevertheless, a disproportionately high number of donor children who live in fear of committing incest.

This fear donor children have of committing incest is especially significant given the phenomenon of “genetic sexual attraction.”⁷⁴ More particularly, it is evident that sharing a genetic make-up with someone may cause a great deal of similarity that can be very attractive if one does not know that the reason for the similarity is a genetic relation.⁷⁵ As a result of “genetic sexual attraction,” children conceived through anonymous heterologous ART have more to worry about than other children. Not only do such children worry that they themselves will unintentionally commit incest, but also that their children may unintentionally marry a first cousin.⁷⁶ Moreover, the risk of unintentional incest increases with the number of generations that donate sperm or eggs, so for children whose parents and grandparents donated sperm or eggs, the risk of incest is especially concerning.⁷⁷ Even if incest never

⁷¹ MARQUARDT ET AL., *supra* note 6, at 35.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*, n. 54.

⁷⁵ *Id.*, n. 54.

⁷⁶ *Id.* at 35.

⁷⁷ “Say you are a donor offspring in 2025, searching for your biological father or mother. If you even find him or her, there’s a good chance that he or she, too, was a donor offspring. You might have found your biological father or mother, but that parent in turn has no idea where he or she came from. That parent too is missing a biological father or mother—and lacking a relationship with or information about that whole side of their family. The fragmented families we see today are getting

occurs, legal systems that, as a result of permitting or requiring heterologous ART, place children in situations where they have cause to worry about unintentionally committing incest cannot possibly be in the best interests of children.⁷⁸

In addition to the psychological consequence that children conceived through heterologous ART justifiably worry about committing unintentional incest, there can be serious medical consequences if incest does occur. One Iranian study has, for example, found that “congenital malformations were three-and-a-half times more common in consanguineous versus nonconsanguineous marriages.”⁷⁹ The study also showed higher rates of miscarriage and stillbirth in previous pregnancies in the consanguineous marriage group.⁸⁰ The reason consanguineous unions increase the risk that children will suffer medical problems is because the majority of genetic disorders are transmitted through “recessive inheritance.”⁸¹ This means that in order for a child to be born with a disorder that is expressed, a disorder that affects the child’s medical health, he or she “must inherit two copies of the abnormal gene.”⁸² When the child’s mother and father are closely related, it is more likely that they will share an abnormal gene, and thus, there is a greater chance that the child will inherit the same abnormal gene from both parents, resulting in an autosomal recessive disorder⁸³ with all the accompanying medical complications.

broken into smaller and smaller pieces. By 2025, the child looking for shards of family history could find only splinters.” *Id.* at 36.

⁷⁸ “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Convention on the Rights of the Child, *supra* note 119, Art. 3.

⁷⁹ Z. Mosayebi and A.H. Movahedian, *Pattern of Congenital Malformations in Consanguineous Versus Nonconsanguineous Marriages in Kashan, Islamic Republic of Iran*, EASTERN MEDITERRANEAN HEALTH JOURNAL, Vol. 13, No. 4 (2007), 868-875, 870.

⁸⁰ *Id.* at 874.

⁸¹ *Consanguinity—Inbreeding*, HEALTHCENTRAL ENCYCLOPEDIA, <http://www.healthcentral.com/encyclopedia/408/219.html> (last visited July 29, 2017).

⁸² *Id.*

⁸³ “An autosomal recessive disorder means two copies of an abnormal gene must be present in order for the disease or trait to develop.” *Autosomal recessive*, MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/002052.htm> (last updated Apr. 5, 2018).

With respect to sexual unions between first cousins, in Britain's Pakistani community, where first cousin marriages account for over 50% of marriages, "children are 10 times more likely than the general population to suffer genetic disorders."⁸⁴ In particular, "[t]he medical risks of first cousin marriages include higher rates of infant mortality, birth defects, learning difficulties, hearing problems and metabolic disorders."⁸⁵ A 2002 study further documented that "[c]hildren of first cousin marriages . . . have serious genetic disorders or mental retardation about 1.7 to 2.8 percent more often than children of unrelated parents."⁸⁶ The medical risks are even more substantial when children are born to half-siblings. There is an eight to ten percent risk that children of half-siblings will inherit an autosomal recessive disorder.⁸⁷ In contrast, the children of third cousins have less than a one percent risk of inheriting an autosomal recessive disorder.⁸⁸ At the other end of the spectrum, children of full siblings have a thirty percent chance of inheriting an autosomal recessive disorder.⁸⁹ The closer the relation between two people, the more likely their children will inherit an autosomal recessive disorder. Consequently, children born to half-siblings are exposed to unnecessarily high risks of acquiring autosomal recessive disorders.

Therefore, anonymous heterologous ART affects the very relationships of children so conceived. Psychologically, there is a reasonable fear of incest. If incest does occur, the next generation of children may suffer from medical diseases which may have never occurred but for the state's willful concealment of a donor child's family relations. Neither the psychological fear of incest nor the medical

⁸⁴ Rebecca Lefort, *700 children born with genetic disabilities due to cousin marriages every year*, THE TELEGRAPH (22 August 2010), <http://www.telegraph.co.uk/news/health/news/7957808/700-children-born-with-genetic-disabilities-due-to-cousin-marriages-every-year.html>.

⁸⁵ *Id.*

⁸⁶ Scott Michels, *All in the Family: Where Does Incest Begin? No Clear Consensus on Whether Cousins Should be Allowed to Marry* (May 7, 2008), ABC NEWS (MAY 7, 2008), <http://abcnews.go.com/TheLaw/story?id=4799115&page=1>.

⁸⁷ Anand K. Saggar, Alan H. Bittles, *Consanguinity and Child Health*, PEDIATRICS AND CHILD HEALTH 18:5 (2008), 244-249, 245.

⁸⁸ *Id.*

⁸⁹ *Id.*

diseases which can result to future children advance the best interests of children, as required by CRC Article 3(1).

Because a child conceived by anonymous heterologous ART cannot typically know the identity of any half-siblings because he or she has no right to know his or her donor parent, such a child may enter into a marriage in violation of international human rights law.

In particular, ICCPR Article 23(3) provides, "No marriage shall be entered into without the free and full consent of the intending spouses." Although it is not clear exactly what "free and full consent" means, this phrase clearly presupposes that a person knows the identity of their future spouse before he or she enters into marriage. Otherwise, consent to marry an unidentified person is not freely or willfully given since the free choice of a spouse presupposes that one knows whom he/she is choosing to marry – the identity of the person he or she is marrying. Likewise, when a person does not even know the identity of his or her future spouse, his or her consent cannot reasonably be considered to be "full" or complete. At best, such a person engages in partial consent, and at worst, the "consent" given is devoid of any real content whatsoever. Consequently, for a marriage to be valid pursuant to ICCPR Article 23(3) and be in conformity with international human rights law, both parties to the marriage must know the identity of the person they are marrying.

While the concept of identity is, itself, an expansive concept, which may encompass various facets of a person's being, there are certain facets of a person that are central to his or her identity. For example, fundamental biological aspects of a person's identity such as a person's sex or genetic relations are central to his or her identity. Thus, a person's sex, male or female, is so incorporated into his or her identity that his or her spouse cannot be said to know the identity of that person without knowing whether that person is male or female. This is easily demonstrated when it is considered that a man who marries a woman does so with the implicit assumption that the person he is marrying is a woman. If the woman were actually a man, it is highly unlikely that the man would have agreed to the marriage, since this would fundamentally alter the biological identity of the person he contemplated marrying. Similarly, a person's blood relations are an important aspect of a person's biological identity. If a woman discovers that her husband is her half-sibling only after she marries him, that woman did not "consent" to the

marriage of her half-brother. Rather, she consented to marry a man whom she did not know was her half-brother, and had she known that the marriage would lead to incest, it is highly unlikely that she would have consented to marry her husband.⁹⁰ It is, therefore, clear that for a person to exercise “free and full consent” in deciding to marry a particular spouse, thus constituting a valid marriage in accordance with ICCPR Article 23(3), that person must know the identity of his/her future spouse, including fundamental biological aspects of the spouse’s identity, such as the spouse’s genetic relations.

Thus, because anonymous heterologous ART can result in accidental incestuous marriages between half-brothers and sisters which lack the “free and full consent” of both spouses who do not know they are half-siblings at the time of marriage, states which permit or require anonymous heterologous ART implicitly sanction marriages which lack “free and full consent.” Therefore, “free and full consent” being a necessary condition for valid marriages according to ICCPR Article 23(3), which is part of international human rights treaty law, states that permit or require anonymous heterologous ART are violating ICCPR Article 23(3) and international human rights law.

More particularly, when ICCPR Article 23(3) is interpreted in light of ICCPR Article 2(2), which provides that states have a legal duty to give effect to the rights recognized in the International Covenant on Civil and Political Rights, it is evident that states have a legal duty in accordance with ICCPR Article 23(3) to ensure that all marriages contracted in accordance with their laws are entered into with the “free and full consent” of both spouses. Thus, states violate Article 23(3) simply by permitting a marriage which lacks “free and full consent” to be recognized by their state laws, even if the state itself is not responsible for the lack of “free and full consent” which characterizes a marriage. Here, in the case of states permitting or requiring anonymous ART, such states

⁹⁰ Twins that were separated at birth and accidentally married each other later in life sought a civil annulment once they discovered that they were brother and sister. Cf. Fiona Barton, *Shock for the married couple who discovered they are twins separated at birth*, DAILYMAIL.COM (Jan. 11, 2008) <http://www.dailymail.co.uk/news/article-507588/Shock-married-couple-discovered-twins-separated-birth.html>.

not only allow marriages which lack the “free and full consent” of both spouses, but actually enforce a legal system which increases the likelihood of incestuous marriages which lack “free and full consent” by preventing children from knowing their donor parent and, by implication, knowing their half-siblings, thus aiding in the contracting of marriages which violate ICCPR Article 23(3) and international human rights law.

CONCLUSION

Accordingly, all heterologous ART, anonymous and non-anonymous, violates the right of children to be cared for by their biological parents in accordance with the CRC, and causes psychological harm to children. Anonymous heterologous ART, in particular, violates the right of children to know their biological parents in accordance with CRC, violates the right of children separated from their biological parents to maintain personal relations and direct contact with them on a regular basis in accordance with CRC, causes physical and medical harm to children, thereby violating the CRC and the International Covenant on Economic, Social, and Cultural Rights, and violates the right of children not to be subjected to arbitrary interference with their families in accordance with CRC and ICCPR. Moreover, anonymous heterologous ART undermines state laws prohibiting half-sibling marriages, creates a risk of unintentional incest harmful to children, and can lead to marriages that violate international human rights law. Therefore, all heterologous ART is contrary to international human rights law, especially the anonymous sort. Thus, states have a legal duty to prohibit all techniques used to achieve this procedure, including in vitro fertilization using donor sperm or donor eggs.