GAMETE DONORS AND MISTAKEN IDENTITIES: THE IMPORTANCE OF GENETIC AWARENESS AND PROPOSALS FAVORING DONOR IDENTITY DISCLOSURE FOR CHILDREN BORN FROM GAMETE DONATIONS IN THE UNITED STATES

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The technological advent of artificial reproduction has resulted in a substantial increase of children born from gamete donation. Studies conducted overseas, particularly in the United Kingdom, have explored the controversy as to whether or not such children have the right to know the identity of their donor parents. This article discusses the consequences of donor disclosure and donor privacy for both the parents and children. Currently, there is a lack of U.S. state legislation on the issue. While studies remain inconclusive, research indicates that counseling for the parties involved and the promulgation of state statutes may be beneficial.

Keywords: donors; gamete donation; artificial reproductive technology; identity; disclosure; right to know

I. INTRODUCTION

“Where Do We Come from? What Are We? Where Are We Going?” is one of Paul Gauguin’s most famous works of art. This painting illustrates what Gauguin perceived to be the three phases of one’s life, each informed and invoked by a response to the preceding question. This Note will address how the legal community might respond to the first and most crucial question; “Where do we come from?” It will address the needs of children who are not only the subject of such works of art, but who are also the product of ART (Artificial Reproductive Technology)¹ and other forms of donor-assisted conception. This Note will evaluate a child’s right to know the identity of his/her genetic, if not legal parent, and will support the notion that a child be provided with identifying information about his/her donor(s). With this knowledge, children conceived through ART can approach the next phases of their lives with security in their identities and origins.

Specifically, this Note advises states to promulgate legislation which encourages legal parents to tell their children about the circumstances of their conception and to provide them with a means for accessing identifying information about their genetic parents. Section II of this Note provides a brief introduction and background information about gamete donation. Section III delves into recent medical and psychological literature addressing both the pros and cons of providing donor identifying information to a child. Section IV discusses recent legislation in foreign countries concerning a child’s right to identifying information.
information about his/her donor, as there is currently no U.S. state or federal legislation on the issue. Section V addresses state legislation on adoption in the United States for the purposes of comparison in promulgating legislation to address gamete donor children. Lastly, Section VI, in recognition of the controversial nature of the issue, recommends proposals a state legislature may enact to either prepare for future disclosure or to reduce the potential for future lawsuits. This section further considers and proposes how a state should approach the creation of legislation that provides children with identifying information about their donors.

II. GAMETE DONATION: AN OVERVIEW

In recent years, there have been a growing number of children born through assisted reproduction using donor egg and sperm, also referred to as “donor gametes.” Donor gametes are collected and used in artificial reproduction processes such as donor insemination, egg donation, and embryo donation. Donor insemination is a process whereby a woman is inseminated with the sperm of a man who is not her husband or partner, and the resulting child is genetically related to the mother but not to the father who raises the child. The United States does not track donor insemination. However, in the United Kingdom alone, it has been estimated that, by 2012, more than 45,000 children will have been born through donor insemination; the substantially larger population in the United States suggests even greater numbers.

Egg donation is similar to donor insemination in that the child is genetically related to only one parent. However, in this case, it is the mother with whom the child lacks a genetic link. Egg donation is a much more complex and intrusive procedure than donor insemination, and it involves in vitro fertilization techniques. The Center for Disease Control and Prevention estimated that, by 1999, more than 3,000 births per year in the United States resulted from egg donation. Unlike donor insemination, where the donor is usually anonymous, egg donors are more often relatives or friends of the parents and may remain in contact with the family as the child grows up.

Embryo donation involves spare embryos that commonly result after in vitro fertilization. Many couples having resorted to technological means of conception and attained the desired family, or given up on fertility treatment, never use the remaining embryos. Such couples are faced with the dilemma as to whether or not the embryos should be discarded or donated to other infertile couples. Unlike mere egg or sperm donation, the child is not genetically related to the recipient couple.

To complicate the deceptively simplistic nature of assisted conception are the parties involved in the child’s conception, the donor(s) and their recipient(s). In addition to the use of a surrogate, other relevant factors which may further confuse the nature of assisted conception include the relationship (biological or legal) of the parties and the status thereof, as well as the sexual orientation of the parties. Surrogacy involves a woman bearing a child for another woman, such that the mother who gives birth to the child and the commissioning mother who anticipates parenting the child are not the same. Two types of surrogacy are partial or genetic surrogacy and full, nongenetic surrogacy. Partial surrogacy occurs where the surrogate mother and the commissioning father are the genetic parents of the child. In full surrogacy, both the commissioning father and mother are the genetic parents. The surrogate can include any number of people such as the mother’s acquaintance, friend, sister, daughter, aunt, cousin, niece, or someone anonymously chosen. Donor insemination
can similarly involve the sperm of the commissioning husband’s acquaintance, friend, relative, or someone anonymously chosen. The categories of donors can be broken down even further to distinguish between egg and sperm donors and commissioning mothers and fathers who are single, dating, or married. They can also be subdivided based on the sexual orientation of the parties on either end of the donor exchange.

The overall lack of regulation concerning the parties to donor-assisted conception reveals that the potential circumstances surrounding the child’s birth and life are dynamic and practically unquantifiable. These complications generate a need for an innovative approach to the legislation of gamete donation as there are many options for conception available to infertile individuals and couples as well as homosexuals. The unique circumstances surrounding this type of conception further suggest the need for a child to have identifying information about his or her genetic donor, as discussed in greater detail in Section III of this Note.

III. BALANCING A CHILD’S RIGHT TO KNOW WITH DONORS’ INTERESTS

In recent years, children who have been informed that they were born of assisted conception have expressed an interest in knowing the identity of their genetic parents. Similar to the arguments that adopted children be provided with access to identifying information as to their genetic origins, children, law professors, psychologists, and members of the general public have argued that children born through assisted conception have the right to know their origins, and that such a right overrides the concerns of the participating gamete donors. This interest, in some cases, has resulted in children finding out about their genetic parents and half-siblings and meeting previously unknown members of their genetic family. The newsworthy outcomes have been positive, and the arguments set forth favoring identifying information and the possibility of such reunions strongly suggest that states entitle such children to identifying information.

A. REASONS FOR REVEALING A CHILD’S GENETIC BACKGROUND

Two reasons commonly given to support the notion that knowledge of one’s genetic origin is a right are that identifying information is considered essential to human well-being, both physical and mental, and that people have the right to know the truth of their origins. It has also been argued that donor offspring can be harmed by being denied knowledge about their genetic origin. However, much of the evidence on harm caused by not knowing one’s origins is based on adoption literature and the comparison may not be warranted or justifiable. Donor offspring may be said to be in a very different position than an adopted child; they have not been abandoned by their genetic parents, and it is common in gamete donation for the child to be biologically related to a member of the couple. Even those who argue for openness also recognize that a lack of knowledge regarding the identity of one’s donor or the circumstance of one’s conception is not certain to cause psychological problems. However, regardless of whether a child is in fact harmed, some agreement exists that donor offspring have the right to the truth concerning their conception and origins. Family therapy practitioners have also stated that openness and honesty are preferred to basing family life on deception and secrecy which can cause stress and anxiety. There is also the more obvious issue of children raised by homosexual couples who are bound to know
they were artificially conceived, as might also be the case with children raised by single parents.\textsuperscript{29} Many homosexual couples choose to tell their children, and it seems right that the child has access to identifying information.\textsuperscript{30} Furthermore, if children raised by homosexuals are permitted to know of their genetic origins, it may be presumed that the same right be extended to all children who are the product of such reproductive means.

A 2002 study addresses other important arguments that have been set forth for why a child should know of his/her genetic background.\textsuperscript{31} First, parents may have told people other than the child about the nature of the child’s genetic origins,\textsuperscript{32} which creates a genuine risk that the child will find out from someone other than the parent.\textsuperscript{33} It is commonly thought it is best that the parents are the informers.\textsuperscript{34} Second, research on adopted children, who are in a similar position to children born of gamete donation, benefit from information about their genetic parents.\textsuperscript{35} Third, the recent advances in medical technology have led to claims that offspring who are uninformed about their conception could be greatly disadvantaged medically by relying on false genetic and medical history.\textsuperscript{36} People who are unaware of their genetic origins may construct an incorrect family history, which could result in the inappropriate treatment for their own children.\textsuperscript{37} Moreover, the possibility of incest exists through the marriage of a brother and sister who are unaware of the relationship between them.\textsuperscript{38}

In addition to literature discussing the apparent need for a child to know of his/her genetic makeup, there have also been studies and suggestions concerning how a parent might communicate with a child to inform him/her of his/her genetic origins and method of conception.\textsuperscript{39} One approach is called the “family-building approach.”\textsuperscript{40} This approach emphasizes “us” as a family instead of “you” as a child; the child is thus presented with the information concerning how “they” as a family were created.\textsuperscript{41} Moreover, while the choice is inevitably left to the parents on how to address the issue, it would appear beneficial for any family to entertain suggestions concerning how to broach the topic with the assistance of such specialists as psychologists, social workers, and counselors to assist with determining when the child should know and how they are to be told. In this way, the determination can be made on a child-by-child basis.

\section*{B. REASONS NOT TO DISCLOSE A CHILD’S GENETIC BACKGROUND}

Many counterarguments offer compelling reasons for not telling a child about the gamete donation.\textsuperscript{42} Researchers have argued that it is actually not in the child’s best interest to know.\textsuperscript{43} Studies have revealed that, among donor insemination practitioners, there is the fear that telling a child about his or her conception could cause both social and psychological problems.\textsuperscript{44} There is also the concern that, if parents told their child about the assisted conception, and thus, other family members found out, the extended family might disapprove of, or even reject, the child.\textsuperscript{45} The possibility of the child’s school friends and acquaintances finding out and teasing the child is also a concern.\textsuperscript{46} Additionally, parents are apprehensive about their own social well-being and the stigma attached to infertility and the potential for the change in relationship between the nongenetic legal parent and the child.\textsuperscript{47} Some parents prefer to abstain from telling children because they are unsure about the best time and method of telling them.\textsuperscript{48} Furthermore, some parents emphasize the greater importance of the social, rather than biological, aspects of parenting and therefore believe there is no need to tell the child about his/her genetic background.\textsuperscript{49}

Yet another issue is the privacy rights of the legal parents and their own interest in keeping the information confidential.\textsuperscript{50} Moreover, given the genetic relation to one parent, and
the overall nature of gamete donation, parents can easily conceal the method of the child’s conception.\textsuperscript{51} There is also the issue of the desire of the parents to mimic a natural family as illustrated by the large number of couples who decide not to tell their children about his or her conception.\textsuperscript{52} In Europe, a study of assisted reproduction families revealed that none of the participating parents had told their children of the method of their conception.\textsuperscript{53} A Dutch study found that 74\% of donor insemination parents did not plan to tell their child how he/she was conceived.\textsuperscript{54} In the United States, a study in the early 1990s found that approximately 73\% of parents would not tell their child.\textsuperscript{55} A Swedish study determined that, despite legislation permitting children to receive identifying information when sufficiently mature, 89\% of the parents had not informed the children of the circumstances of their birth.\textsuperscript{56} Yet another study comparing homosexual and heterosexual approaches to anonymity found that, while heterosexual couples retained an interest in mimicking the traditional family and thus did not want to tell the child, most homosexual couples were in fact planning to tell their child.\textsuperscript{57} In addition, 40\% of the couples in the study wanted the identity of the donor to be registered.\textsuperscript{58}

The issue of donor anonymity, a child’s right to know, and whether a child possesses or deserves such right is far from settled. Lawmakers are confronted with the competing interests of donors, children, and their parent(s). The studies yield greater discourse than any definitive resolution. However, in the context of growing societal interest and the increasing amount of participants in donor-assisted conception, there is a developing trend toward nonanonymity. There is strong support for a child’s right to know both based on their requests and the potential benefits of such information. The next section discusses how the competing interests of the parties are met in foreign countries’ legislation and how greater openness in the United States should proceed based on current adoption legislation and in response to this trend.

\textbf{IV. THE DEVELOPING TREND IN FOREIGN LEGISLATION FAVORING IDENTITY DISCLOSURE}

Internationally, a majority of countries endorse anonymous gamete donation.\textsuperscript{59} Countries such as France, Denmark, and Norway do not permit donor offspring to receive any information about their conception.\textsuperscript{60} However, in recent decades, many societies have begun to place greater emphasis on children’s rights.\textsuperscript{61} Concomitantly, there has been a trend toward allowing children access to identifying information about their gamete donors/genetic parents.\textsuperscript{62}

In 1984, Sweden was the first country to remove anonymity of gamete donors.\textsuperscript{63} It permitted the child to find out the identity of his/her sperm donor.\textsuperscript{64} In 1992, following the passage of federal legislation on medically assisted reproduction, Austria also began to allow children to gain identifying information for their sperm donor.\textsuperscript{65} Notably, both of these laws address only sperm donors—as both countries do not allow egg donation.\textsuperscript{66} In the same year, Switzerland incorporated an article into its constitution that guarantees a child access to data concerning his/her lineage and entitles the child to receive identifying information about the donor.\textsuperscript{67} In Australia, two jurisdictions reviewed their legislation on reproductive technology and have since abolished donor anonymity.\textsuperscript{68} In 2000, Holland passed a new law that permits only nonanonymous sperm donation and requires sperm banks to recruit nonanonymouse donors.\textsuperscript{69}

Iceland does not exclude anonymous donations entirely but instead permits anonymous and nonanonymous donation to coexist.\textsuperscript{70} Donors are permitted to choose whether they
would like to donate anonymously or not. If the donor elects anonymity, then the clinic must respect his choice, and information about the donor is neither given to the recipient couple nor the resulting child. Otherwise, the clinic keeps a file on the donor, and any child that is conceived can, upon reaching the age of eighteen, request to see this file and obtain the name of the donor.

The most recent legal consideration and development on the subject of donor anonymity was addressed in the United Kingdom. On January 22, 2004, the government announced that children who are born from donated sperm, eggs, or embryos are to be given the right to trace their biological parent. This legislation was passed nonretroactively and became effective post April 1, 2005. It permits donor-conceived children access to the identity of their genetic parents once they reach the age of eighteen. However, donors have no financial or legal obligations to their offspring, and they will not be obliged to meet them.

In 1989, the United Nations sponsored a Convention on the Rights of the Child that was the most rapidly ratified convention on human rights. The right to know one’s parents was one of the rights seen as fundamentally important. Those arguing in favor of identifying donors have advanced the argument that a child’s right to know one’s parent encompasses the right of a child to know the identity of his/her gamete donor. Thus, legislatures in countries such as Australia acknowledge that young people have moral claims to know their genetic identities and that these claims should be converted to legal rights.

The United States has no legislation at either the federal or state level that either prohibits or enforces anonymous gamete donation. Instead, non-legally binding professional guidelines are used to regulate gamete donation; societies such as the American Society for Reproductive Medicine make recommendations regarding the issue. Currently, anonymity is still endorsed, but there has been increased discussion and debate on the subject with the lack of a strong consensus. Moreover, changing sperm bank policies suggest a response to the societal interest in the nonanonymity of donors that may warrant the reversal of the recommended guidelines. For example, the Sperm Bank of California offers anonymous and nonanonymous sperm donation in which both the donor and the couple can choose the type of donation they would like to give or receive. Nearly all of the children conceived thus far through this program have been informed by their parents about their donor conception.

V. U.S. ADOPTION LEGISLATION: STATES’ GRANT OF ACCESS TO GENETIC INFORMATION FOR ADOPTEES

The adoption process is entirely regulated by state statute. The state, federal, and, in some cases, international laws that govern the adoption process have made it complex; it is a legal process by which a set of parents, usually the birth parents, is replaced by another set of parents, who thereby become the legal parents and assume the rights and responsibilities of the natural parents. A hallmark of adoption is the legal severance of ties between the birth parents and biological siblings who are not included in the new family formed with the adopted child. In recent years, there have been several arguments advanced by researchers that the situations surrounding children who are the product of donor offspring are sufficiently similar to adopted children to warrant the same state recognition of both groups. While this comparison provides the minimum amount of support states should provide gamete donor children, they are entitled to more. This Note will proceed to examine adoption legislation and states’ methods of giving adoptees information and the extent thereof, if at all. In reviewing the states’ allowance of access to identifying information, this
section addresses the inadequacies of adoption legislation. It also evaluates how these children created by donor assistance, for whom this Note favors a right to know the identity of their donor, should or might find out about their genetic origins.

In 1994, the Uniform Adoption Act was passed. It encouraged the confidentiality of adoption records that many states required at the time. The Act required adoption records to be sealed for 99 years and permitted information identifying the parties to be released only through a mutual consent registry or on a court order necessitated because of medical need. However, the law did provide for the release of nonidentifying medical and other relevant information to the adoptive parents prior to the adoption. Moreover, despite the overall implications of this Act, there has been a new trend embraced by more recent adoption legislation that favors openness based on the child’s best interest. This trend has led to fewer restrictive state statutes.

Advances in adoption legislation have led to numerous results. Different procedures established in a number of states grant adoptees contact with their genetic relatives provided certain prerequisites are met. Some form of a mutual consent registry may be found in over 20 states. Additionally, more than 15 states have chosen so-called “search and consent” procedures involving an intermediary, and a few states have opted for completely open records.

Mutual consent registries allow people directly involved in the adoption to register their consent to meet and exchange a certain amount of information. One parent’s consent is enough in certain states, whereas in others, mutual consent of both biological parents is needed for the release of identifying information. Mutual consent registries are passive; unless an adoptee and a biological relative have filed a formal consent for the release of identifying information, it will not be released. Although a party interested in the donor has filed a consent form for information disclosure, the state agency will not seek out donor parties who have not registered to ask if they are willing to have their identities released. Furthermore, because the mutual consent registry functions passively, biological relatives and adoptees may not know of the existence of such a registry nor that they may consent to the disclosure of identifying information. Congress has repeatedly considered the creation of a national mutual consent registry that would permit adoptees and biological parents to register in a single place; however, Congress has not enacted this measure, forcing state registries to operate at the individual state level.

In addition to the passivity of the mutual consent registries, other problems exist. Mutual consent registries have been unsuccessful not only in publicizing their existence but also in matching registrants. Typically, the registries are underfunded and understaffed with only a few of them on the Internet. There is also the problem of an adoptee who does not know whether he or she was born or adopted in a particular state, in which case the child would be unable to use that state’s registry. As mentioned, the problem of relocation is also an issue, as there is minimal, if any, communication between states. For example, a biological parent who registers in New York may not be contacted if her child is registered in New Jersey. Lastly, there is the expense of the system which incurs fees for applicants using the registry, the possibility that the registrant be required to undergo counseling, and the possibility that the registration form could require information that is unavailable to the registrant.

Confidential intermediary systems go beyond mutual consent registries and enact search and consent procedures. They were designed to counter the passivity of mutual consent registries and facilitate an exchange between adopted children and their adoptive parents. According to these statutes, when an adoptee or a biological parent(s) request identifying
records, the state then has an affirmative duty to search for and request consent from the other parties to the adoption for the release of identifying information.\textsuperscript{117} If a party either denies consent or cannot be found, the adoptee applicant can petition the court to open the records under the traditional good cause standard.\textsuperscript{118} If both parties consent, intermediaries can help to arrange the meetings of adoptees and their birth relatives.\textsuperscript{119}

The confidential intermediary system, while more active than the mutual consent registries, is still problematic.\textsuperscript{120} Similarly, the lack of publicity for this process is an issue.\textsuperscript{121} Expense is also a problem, especially as it becomes the state’s responsibility to search for the parent such that the diligence and the resources available for the inquiry determine whether or not the parent is found and largely correlate with the expenditure.\textsuperscript{122} Furthermore, a birth parent’s refusal to consent basically ends the process and prevents the adoptee from access to any information.\textsuperscript{123} A refusal might be a result of the fact that, at the time the biological parent is initially contacted by an intermediary, he or she is not prepared for or expectant of such a request for contact and will not be given any support or counseling in making his or her choice to remain unidentified.\textsuperscript{124} Also, as the intermediary is only used for initial contact, the party may later change his or her mind.\textsuperscript{125} Another issue is the fact that the restrictive conditions that these programs may include make it difficult to use.\textsuperscript{126} The Oklahoma registry, for example, is not available to an adoptee who knows of a minor biological sibling because of the fear that the sibling’s information will also be revealed.\textsuperscript{127} Lastly, an adoptee has to be registered for at least 6 months before she can apply.\textsuperscript{128}

Alaska and Kansas allow adult adoptees access to their original birth certificates based on request without any judicial or administrative hearing.\textsuperscript{129} Other states also have open-record statutes which differ in detail, including, Minnesota, Washington, Vermont, Delaware, Oregon, and Tennessee.\textsuperscript{130} Oregon’s statute provides an adopted person of age 21 or older to be issued a certified copy of his or her unaltered, original, and unamended certificate of birth.\textsuperscript{131} It also provides that the birth parent has the right to file a Consent Preference Form which affords the parent one of three options, including: (1) to be contacted, (2) to be contacted through an intermediary, or (3) not to be contacted and, instead, to file an updated medical history.\textsuperscript{132} Tennessee grants an adult adoptee the right to see his or her amended birth certificate and a right to see all records pertaining to the adoption.\textsuperscript{133} This right is granted to parents, siblings, lineal descendants and ancestors, and legal representatives.\textsuperscript{134} It also establishes a contact veto for the birth parents such that, if filed, none of the people who are entitled to the information in the adoptee’s record may contact that birth parent.\textsuperscript{135} If it is violated, the person is subject to criminal penalties, however, the law provides for a veto for contact only, not the release of the birth parent’s identity.\textsuperscript{136}

The open adoption legislation is problematic in that it has been constitutionally challenged by the birth parents, albeit unsuccessfully.\textsuperscript{137} In 1996, the Sixth Circuit considered a challenge to the Tennessee statute that allows adult adoptees access to their birth records but requires adoptees to honor the contact veto filed by a biological relative.\textsuperscript{138} The biological parents argued that their privacy rights were violated because, at the time of the adoption, the state had promised them confidentiality.\textsuperscript{139} They also argued that it would be disruptive to the new life that the parents created.\textsuperscript{140} It was further suggested that parents who put their children up for adoption would be more inclined to choose abortion over adoption if they lost their guarantee of privacy with respect to their decision.\textsuperscript{141} It was asserted that such a statute violates an individual’s right to avoid disclosure of confidential information that concerns personal issues.\textsuperscript{142} The Sixth Circuit concluded that the Tennessee legislature had resolved a conflict between the public nature of births and the competing interest of the parents in concealing the circumstances of the birth.\textsuperscript{143} It dismissed the
plaintiffs’ claim that it infringed their right to marry and raise children, and the reproductive privacy claim, in doubt that it burdened the adoption process. Lastly, it concluded that any constitutionally protected right to avoid the disclosure of private information was not broad enough to include the interests sought to be protected.

From the information stated above, one can conclude not only that the same services could be adapted to children who are the product of gamete donation, but that legislation permitting open records is capable of sustaining constitutional challenges. However, while extending the same legislation for adoptees to gamete donors seems like a logical approach given the similarities of the children, the same obstacles faced in adoption legislation would then exist in the realm of assisted conception legislation concerning donor anonymity. Furthermore, notably at issue with all existing legislation concerning adoption is its emphasis on broaching the issue of one’s identity and receiving information upon the child’s maturation into adulthood. Arguably, it postpones and probably encourages the parties to defer important issues to a later date when safeguards against litigation and potential conflicts could be addressed or forewarned at an earlier stage. It also neglects to require that every child be informed that they are adopted, and thus, the same legislation would not necessarily guarantee that children who are the product of gamete donation would be aware of the circumstances of their birth. Lastly, the legislation fails to ensure that every child know of the potential for access to their records nor does it guarantee that the parties receive counseling both at the time the adoption agreements are formed and once the parties attempt to contact either party. For these reasons, while an extension of the same rights may be a starting point, it is an inadequate resource for children of gamete donation to promote and guarantee information concerning the circumstances of their birth. Thus, the next section attempts to address how the adoption systems provided may be changed or improved to conform to the needs of children born of assisted conception and similarly protected and enforced by creating new legislation.

VI. THE CREATION OF AND CHANGES TO CURRENT STATE LEGISLATION FOR THE CHILDREN CONCEIVED BY GAMETE DONATION

States should, at minimum, extend the rights of adoptees to donor gamete children. In this way, the interests of gamete donor children, who are in a position substantially similar to that of adopted children and have similar requests for information, would be met. In addition, all states should also, or in lieu of extending such rights, put in place a system similar to that imposed in the United Kingdom in 1990 with the Human Fertilisation and Embryology Act. The Act established an authority to keep a confidential register of all donors and all people receiving licensed treatments. The stated purposes of this holding of records were three-fold: (1) so a donor can be traced in the event a child had a hereditary disorder so that further donations were prevented, (2) so donor offspring could discover if they were entering into a prohibited relationship with their intended spouse, and (3) so that if attitudes toward anonymity subsequently changed, this holding of information would make future access possible. Similarly, the United States should impose legislation concerning regulations of records for those aforementioned purposes, and perhaps most importantly, for the third reason.

As stated in Section III, there is a lack of conclusive evidence about the overall effects of donor anonymity, and despite the argument that children have the right to know the identity of their biological parents, changes in legislation need to address concerns of all
parties involved. There have been many suggestions concerning how best to approach the interests of all parties in permitting greater or entire openness of information concerning a donor gamete’s conception. Some of these approaches mimic adoption legislation, while others are specific to assisted conception. In this manner, a child’s right to knowledge of conception is heeded with the possibility that it is but a starting point for the allowance of complete and total access to information.

A prominent recommendation addressing the concerns of both parties that serves as a good intermediate leaning toward nonanonymity is a policy that would allow participants to choose between an anonymous and a nonanonymous donation program. In this way, both parties would be allowed to choose whether or not anonymity was desired. This type of program exists in Iceland and at the Sperm Bank of California, both discussed above. However, while such legislation does incorporate the interests of both parties, there still remains the problem concerning the fact that not all gamete-donated children are afforded the same right to information, regardless of the amount and type offered. Moreover, complete openness similarly faces the issue of no formal mechanism to inform the children, such that, regardless of the nonanonymity, the child might still not be informed.

States attempting to follow policy arguments advanced in this Note and permit identifying information to be released for children born of gamete donation face several considerations. Should the child be allowed to or prevented from contacting the parent? Should the genetic parents have a reciprocal right to contact the child? What protection should there be for the donors? What theory or approach should the state endorse for informing the child? How should the state ensure that a child is told; who should be the parent, the state, a counselor, or some combination? When should the child find out; what is the age of maturity? Do they permit the parties to contract around such a right? Does the child have the right to know that he/she has half-siblings? How does their right to be contacted, if any, fit in? How does the state ensure that it maintains an adequate number of sperm donors? Should the legislation be enforced retrospectively? What theory or approach should the state endorse for informing the child? How should the state ensure that it maintains an adequate number of sperm donors? Should the legislation be enforced retrospectively? For ethical reasons, and to limit a child’s confusion, should a brother be permitted to donate sperm to his sister? States also might need to change legislation concerning surrogacy agreements, concerning who can be a surrogate and who takes custody of the child. For example, it appears that a child who was intended to go to the commissioning and genetic couple, but ends up with the surrogate might not be a case where the child should know. While there is not one answer or necessarily a right response to any of the above questions, it is clear that the overriding concern of children receiving identifying information can be met. Moreover, states’ responses can be guided not only by international legislation, adoption legislation, psychological literature, but more importantly the states’ own beliefs as to what is appropriate. For purposes of uniformity, it might be best for the states to collaborate to draft legislation similar to the Uniform Parentage Act but for assisted conception, addressing not only donor anonymity, but even larger issues presented by reproductive procedures.

Some states may choose not to permit identifying information, but regardless of their choice, it is important, even more so in the event that they do, to provide and mandate counseling to the parties involved in assisted conception during the preliminary stages, and post-conception for both the recipient parent(s) and child. As there are no real rules as to how a child should be informed, appropriate counseling can help in this arena. Counseling can ease the anxiety of the parties, facilitate decision making, and help ensure that issues are
resolved at the earliest possible stage—a study concluded that counseling and follow-up procedures should be made available to all parties.\textsuperscript{165} To ensure that parties receive counseling and better regulate gamete donation and the procedures of donor insemination and in vitro fertilization, state governments might create a governmental agency to monitor the clinics.\textsuperscript{166} In turn, the agency could make counseling required for parties involved in the donation and receipt of gametes and create appropriate guidelines.\textsuperscript{167} Thus far, New Hampshire is the only state with a statute requiring that, where in vitro fertilization and preembryo transfer are performed, the woman must receive counseling and provide written certification thereof to the health care provider performing the procedure.\textsuperscript{168} The husband, if the recipient is married, must also receive appropriate counseling and written certification of the non-medical counseling.\textsuperscript{169}

\section*{VII. CONCLUSION}

Addressing how children born of donor assistance are to receive identifying information is complex and necessitates an evaluation of all legislative proposals concerning ART. However, such difficulties do not warrant the states’ current nonaddress of the issue.\textsuperscript{170} Children born from donor gametes have expressed a valid interest that deserves greater attention, continued research of the subject, and ultimately legislative attention.\textsuperscript{171} While the Uniform Status of Children Assisted Conception Act was promulgated in 1989, it did not address a child’s right to know about his or her assisted conception.\textsuperscript{172} In light of rapidly developing technology that potentially will allow the contribution of more than one third party to a child’s conception, it is important that states evaluate how to approach the issue of a child’s right to know. Legislation permitting open-adoption records has been upheld as constitutional and state legislation that allows identifying information for donor-conceived children is likely to be upheld as well. States should promulgate legislation favoring a child’s right to know the identity of his or her genetic parent or, at least in the alternative, regulate records concerning artificial technology in the event of future legislation and medical dilemmas. Lastly, state laws should require counseling whether via social workers, psychologists, or other specialists to fully inform the parties of the potential psychological and legal consequences of their actions to promote both the child’s best interests and to deter future litigation.

\section*{NOTES}

1. Assisted Reproductive Technology has generally referred to methods used to achieve pregnancy by artificial or partially artificial means where sexual intercourse does not take place. However, there are a plethora of definitions that are largely inconsistent; while some do include artificial insemination, many do not. Thus, for the purposes of this article, ART is referred to only in the Introduction. It is also worth noting that ART, as defined by the President’s Council Bioethics, can and does incorporate the use of donor embryos. \textit{The President’s Council on Bioethics, Reproduction & Responsibility, The Regulation of New Biotechnologies} 24 (2004).


3. \textit{Id.}

4. \textit{Id.}

5. \textit{Id.}

6. \textit{Id.}

7. \textit{Id. While sperm donation has been widely practiced for many years to assist conception involving couples with an infertile male partner, in vitro fertilization, providing for infertile women to receive donated eggs, has only been available since 1983.}
8. Id.
9. Id.
11. Id.
12. Id. Moreover, the implantation and clinical pregnancy rates for donated embryos seem to be more promising than the use of separate gamete donations or in vitro fertilization.
13. Id.
14. Surrogate mothers do not always relinquish custody to the commissioning mother. Circumstances exist where the surrogate mother takes custody of the child depending on the circumstances surrounding the birth and relevant state law. This idea will be discussed in greater detail in Section III of this Note.
16. Id.
17. Id.
18. Id.
20. See Amy Harmon, *Hello, I'm Your Sister. Our Father is Donor*, N.Y. TIMES, Nov. 20, 2005 at 1. Two genetic daughters, ages 15 and 16 born from the same sperm donor and different mothers, connected through the Donor Sibling Registry, a Web site that allows parents and offspring to enter their contact information and search for others by sperm bank and donor number. The article also states that this half-sibling hunt is motivated by the fact that the donors have chosen not to have their identity released. See also *Seeds of Doubt*, THE TIMES (UK), Nov. 26, 2002, at 7 (discussing a man's search for the identity of his biological father. He wrote to a man who he suspected to be his father after searching obsessively for his genetic father in the hope of discovering him. Ultimately he learned his father passed away a year earlier). See generally PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY, ISSUE 2, EVIDENCE (2004) (citing several stories throughout concerning gamete donor children and their desire to meet their genetic parents and the actual meetings).
21. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 822. See also Michelle, *supra* note 22, at 5 (noting that the moves to ensure access to genetic information in New Zealand was at least partly fueled by social and political anxiety about unregulated autonomous motherhood. Figures citing the high proportion of single women and lesbian couples using ART have led some to believe that access to records is important because of the nontraditional family type and the potential lack of the child's social father. In this manner, such knowledge is seen necessary to compensate).
32. This is always the case when it is within the family.
34. Id.
35. Id.
36. Id.
37. Id. See also Ruth Landau, *Opinion: The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere*, 13 HUM. REPROD. 3268, 3268 (1998) (agreeing that if there is no reliable knowledge of either paternity or maternity, then no prediction can be made of the risk of their transmitting
a diversified list of genetic disorders, especially recessive conditions that may manifest only when a genetic defect is passed from both of the parents).

38. Landau, supra note 37, at 3268.


40. Id. at 1793.

41. Id.

42. Frith, supra note 22, at 822.

43. Id.

44. Id. Golombok, supra note 2, at 444 (There is the parental concern that disclosure would upset their child and would have an adverse effect on parent–child relationships. They are afraid that the child may feel less love for, and potentially reject the non-genetic parent. Furthermore, there is concern about a negative reaction from the grandparents who might not accept the child as his or her own).

45. Frith, supra note 22, at 822.

46. Id. See also Maggie Kirkman, Sister-to-Sister Gestational “Surrogacy” 13 Years on: A Narrative of Parenthood, J. REPROD. INFANT. PSYCH. 135, 144–45 (2002) (This article details the experience of a genetic/legal mother who had her sister gestate her child produced with her egg and a donor’s sperm. The child, a girl, was raised by her mother and her legal (not genetic) father and was told about her conception. The child reported that she didn’t remember being told, but that the information she received did not have the assumed negative effects that one would expect of a child with such knowledge. She stated that she is not bewildered about her existence and feels “normal.” She also stated that she considers her legal father as “my dad.” Concerning her nicknames at school, she relates herself to just another kid who is bullied for superficial reasons, and thus, demonstrated her maturity and the security she has concerning her conception. Lastly, she advocates IVF and children similarly conceived).

47. Frith, supra note 22, at 822.

48. Golombok, supra note 2, at 444.

49. Id.

50. Frith, supra note 22, at 822.

51. Id.

52. Id.

53. Id.

54. Id.

55. Id.

56. Id.

57. Id.

58. Id.

59. Frith, supra note 22, at 818.

60. Id.

61. Id. at 820.

62. Id. at 819.

63. Id. Daniels, supra note 39, at 1794. Shortly thereafter, Sweden experienced a decline in the recruitment of donors, however, numbers have since built up again.

64. Frith, supra note 22, at 819.

65. Id.

66. Id.

67. Id.

68. Id. Victoria, for example, passed the Infertility Treatment Act in 1995 which allows children access to the identity of their gamete donors.

69. Id. Interestingly, a two-year transition period was granted during which anonymous donors were still permitted due to concerns over the possible falling number of donors.

70. Id.

71. Id.

72. Id.

73. Id.


75. Id.

76. Id.

77. Id. Thus, the first application for such identifying information will come into effect post 2023.

79. Frith, supra note 22, at 820.

80. Frith, supra note 22, at 820.

81. Id.

82. Id. at 819.

83. Id. See Joanna E. Scheib et al., Choosing Between Anonymous and Identity-Release Sperm Donors: Recipient and Donor Characteristics, 10 Reprod. Tech. 50, 50 (2000) (There are many donor insemination programs in the United States that offer recipients information about their sperm donors, including health-related information and blood type. Information is also available concerning a donor's physical appearance, including height and weight. Some programs release information about the donor's interests, pastimes, and education; however all information is non-identifying, and in almost all, donors are anonymous).

84. Frith, supra note 22, at 819.

85. Frith, supra note 22, at 819. See also Scheib, supra note 84, at 50 (noting that in addition to The Sperm Bank of California, the Pacific Reproductive Services is the only other DI program in North America in which a donor can opt for "identity-release" wherein he agrees to have his identity released to the offspring upon request of the child 18 years old or above).

86. Id.

87. Id. See also Kief, supra note 94, at 3. See also Landau, supra note 37, at 3268 (noting two obvious differences between the two; 1. the intervention of a third party in the preconception phase and 2. for adoption, social workers are involved whereas in assisted conception, the third party is the physicians).

88. Golombok, supra note 2, at 444.

89. Katheryn Katz, Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donations, 18 Wis. Women’s L.J. 179, 211 (Fall 2003).

90. Id.

91. Id.

92. See Elizabeth S. Chestney, The Right to Know One’s Genetic Origin: Can, Should, or Must a State that Extends this Right to Adoptees Extend an Analogous Right to Children Conceived with Donor Gametes? 80 Tex. L. Rev. 365 (2001); see also Landau, supra note 37, at 3268 (noting two obvious differences between the two; 1. the intervention of a third party in the preconception phase and 2. for adoption, social workers are involved whereas in assisted conception, the third party is the physicians).

93. It is beyond the scope of this article to consider whether or not adopted children have the right to know the identity of their genetic parent(s).


95. Id.

96. Id.


98. Chestney, supra note 92, at 376, 380.


100. Voss, supra note 97, at 287.

101. Id.

102. Id.

103. Id.

104. Id.


106. Id.

107. Id.


110. Id.

111. Id.

112. Id.

113. Id.
114. Id. at 164–65. An example of such dilemmas is the situation surrounding a football player, Tim Green. Born and adopted in New York, he decided to search for his biological parents and attempted to register with New York’s registry. However, his adoptive parents needed to provide him with a waiver to do so. Initially, this dissuaded him because he did not want to offend them. However, he decided to do so, and described in detail the negative effect the request had on his adoptive mother. He stated that from her words, body language, and tone of voice, it was clear that she was devastated.

115. Id. at 165.

116. Id.

117. Id.

118. Id.

119. Id.

120. Id.

121. Id.

122. Id.

123. Id. at 166.

124. Id.

125. Id.

126. Id.

127. Id.

128. Id.

129. Voss, supra note 97, at 288.

130. Id.

131. Chestney, supra note 92, at 369.

132. Id.

133. Id. at 371.

134. Id.

135. Id.

136. Id.

137. Cahn, supra note 105, at 168–69.

138. Id. See generally Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997).

139. Cahn, supra note 105, at 169.

140. Id.

141. Id.

142. Id. at 170.

143. Id.

144. Id.

145. Id. at 170–71.

146. Frith, supra note 22, at 818. This Act was set forth during the period in the United Kingdom during which donor offspring could not be given information that identified the individual whose gametes were used.

147. Id.

148. Id.


150. Id. at 823. However, there remains the more problematic issue, confronted regardless of whether the child or parent opts for anonymity, which is the donor who desires to be nonanonymous and the inquiring child.

151. Id.

152. Id.

153. Id.

154. Id.

assertion of the rights of parenthood, they are often ambiguous and silent with regard to unmarried donees. Furthermore, the statutes do not mention a child’s assertion of contribution. See also Sheryl Gay Stolberg, Quandary on Donor Eggs: What to Tell the Children?, N.Y. TIMES, Jan. 18, 1998 at 1 (Oklahoma, Texas, and Florida have enacted legislation regarding egg donation, but only to clarify that donors do not have rights or duties with respect to raising the child).

156. See generally Daniels, supra note 39.
157. Golombok, supra note 31, at 966 (Information obtained from adoption literature, and the little that is known about individuals conceived by donor insemination who found out about their conception in adulthood suggest that the consequences of disclosure in the early years are likely to be more positive than discovering it in adulthood).
158. Golombok, supra note 2, at 451.

159. See Guido Pennings, Commentary: Commentary on Craft and Thornhill: New Ethical Strategies to Recruit Gamete Donors, 10 REPROD. MED. ONLINE 307, 307–08 (2005) (suggesting that findings of diminishing numbers of sperm donors should be considered cautiously. He states that the surveys that have been conducted involved the existing donor pool in which the donors were preselected in favor of current legislation and that newly recruited donors might not have the same attitude. Second, he states that it is possible that groups with different characteristics and motives might be enticed to participate in a procedure that includes identifiability. He further suggests that action could be taken to reward donors for their lack of anonymity to compensate for that cost).

160. See The Ethics Committee, American Society for Reproductive Medicine, Family Members as Gamete Donors, 80 FERTILITY & STERILITY 1124, 1124–25 (2003). This article discusses collaborative reproduction involving a family member in the arrangement. It notes that while familial collaboration offers many advantages over non-family donors, it can present unique problems because of the closeness of the family relations including issues of apparent incest or consanguinity, undue influence to participate, and confused parentage for the resulting children. Admittedly, however, no published studies or case reports exist to describe the outcomes of such arrangements. While the Ethics Committee responsible for this report finds that there are many cases that are ethically acceptable, some do raise serious issues and arguably should not occur. They note the need for attention paid to issues of consanguinity, risks of undue influence on decisions to participate, and the chance that the arrangement in question will cause uncertainty about lineage and parenting relations. See also Guido Pennings, Ethics: Incest, Gamete Donation by Siblings and the Importance of the Genetic Link, 4 REPROD. MED. ONLINE 13 (2001) (discussing new applications in the field of assisted reproduction and citing a case in the United States in which a 51-year old lesbian woman asked that her brother be considered as a designated sperm donor. A multidisciplinary team of physicians, lawyers, and the Ethics Committee of the center were involved in the evaluation of the case to consider the psychological and legal problems. Ultimately, she conceived in a singleton pregnancy).

161. Should relatives and friends be permitted? Fiona MacCallum et al., Surrogacy: The Experience of Commissioning Couples, 18 HUM. REPROD. 1334, 1334 (2003) (for example, in Israel, it is illegal for the surrogate mother to be a relative of the commissioning couple. However, the study in this article suggests that whether or not the surrogate was anonymous did not effect the parties desire to tell the child of the surrogacy agreement. Thus suggesting that legislation concerning the relation of the parties in surrogacy may not need to change).

162. See generally Ardis Campbell, Determination of Status as Legal or Natural Parents in Contested Surrogacy, 77 A.L.R. 5th 567 (2005) (discussing various cases that consider whether or not the traditional surrogate mother may have parental rights. It suggests that cases arise where the surrogate may choose to keep children conceived with the intended father’s sperm and that the genetic father might, upon such circumstances, not want to raise the child).


165. Id. See also Alanna Winter & Judith C. Daniluk, A Gift from the Heart: The Experiences of Women Whose Egg Donations Helped Their Sisters Become Mothers, 82 J. COUNSEL. & DEV. 483, 492 (2004) (In a study involving 3 women whose egg donations resulted in the birth of children for their sisters, it highlighted the counseling and support needs of known donors throughout the process, and its responsibility for positive outcomes).

166. Harvard Law Review Association, Developments in the Law—Medical Technology and the Law, 103 HARV. L. REV. 1525, 1541 (1990). This article recommends a governmental agency designed specifically for in vitro fertilization procedures. It also points to the additional benefits of establishing a governmental regulatory agency such as the possibility of curing defects within the lack of uniform and accurate reporting of the success rates at the clinics, the lack of information about the technique, and guidelines. Moreover, mandatory counseling
ensured by such an agency also provides the benefit of preparing the parties for the procedure and the ramifications thereof, and is similarly required by couples considering adoption.

167. Id.

168. N.H. Rev. Stat. Ann. § 168-B:18 (1990) (In part, the statute provides: “I. A nonmedical evaluation . . . on each party by a psychiatrist, psychologist, pastoral counselor or social worker, who is licensed, certified, or authorized . . . Each party shall waive any privilege against disclosure of confidential communications and disclose a copy of the findings to the other parties prior to entering the contract . . . shall be filed with the court by each party, unless good cause is shown. II . . . nonmedical evaluation shall determine the party’s suitability . . . by considering: (a) The ability and disposition of the person being evaluated to give a child love, affection and guidance. (b) The ability of the person to adjust to and assume the inherent risks of the contract. III. A home study of each party . . . conducted by a licensed child placing agency or the department of health and human services to assess the ability and disposition of the person to provide the child with food, clothing, shelter, medical care and other basic necessities. A copy of the findings shall be filed with the court by each party”).

169. Id.

170. See Elizabeth Marquardt, The Revolution in Parenthood, The Emerging Clash Between Adults Rights and Children’s Needs, INST. FOR AMER. VALUES, at 33 (2006) (“Until we better understand and prioritize the needs of the children, no legislatures, courts, or commissions, should . . . support intentionally denying unborn children knowledge of and a relationship with their own mother and father. Rather, they should concentrate their energies on rigorous inquiry and active debate about the needs of children and the role of mothers and fathers in their lives . . . The well-being of the world’s children calls us to act . . . right now . . . we must be willing to launch . . . a[n] urgent debate about the well-being of children born in an age that is rapidly redefining the meaning of parenthood . . . ”)


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