I. INTRODUCTION

Lindsay Cooper is a twenty-six-year-old graduate student studying to become a physician's assistant. By the fall of her second year, Lindsay had accumulated $150,000 in debt due to loans for her education, living expenses, two credit cards, and a recent loan needed to make her car lease payments. After weeks of passing an advertisement seeking "dreammakers" conveniently posted on a bulletin board down the hall from her anatomy classroom, Lindsay made a few telephone inquires and decided to become an egg donor. Eight weeks, ten doctor's visits, and twenty-eight hormone injections later, Lindsay underwent a minor surgical procedure whereby a cycle of her eggs were extracted from her body and she received $8000 for her "time and labor." Fortunately, Lindsay experienced only minor side effects during her treatment and was able to schedule her doctor's visits around her classes. In fact, the process went so well that she returned to the clinic ten months later to donate another cycle of eggs.

Lindsay enjoyed being able to help an infertile couple have children, but admits that donating her eggs was a service she pro-
vided in order to pay off some of her debt.\textsuperscript{8} Like any young adult, Lindsay hopes to have a successful and meaningful career and one day plans to marry and have children of her own.\textsuperscript{9} She admits that she has never really thought about how she would feel if twenty years from now she were contacted by her donor offspring.\textsuperscript{10} "Before I began the process, I signed an agreement that I was to be an anonymous donor," Lindsay explained.\textsuperscript{11} She also acknowledged that she would not have donated eggs through a program that did not allow her to donate anonymously.\textsuperscript{12} Lindsay was unaware that in some countries donor offspring are allowed to access information about their donor's identity upon reaching the age of majority.\textsuperscript{13} In reflecting on the subject, Lindsay commented that she understands the desire to know where one comes from, but believes it is problematic:\textsuperscript{14}

In donating my eggs I gave up the right to know if there is a child out there that has my genetic makeup—and that is something I will never get back. . . . I can imagine it might be easier to make the case for a child, but we are talking about the same right. . . . If I cannot have children one day and want to find out if there is a child out there that is genetically linked to me, I cannot. . . . I do not see how a child can be given the right to find out my identity if I am denied the right to find out theirs.\textsuperscript{15}

This Comment focuses on a specific legal issue which has yet to be addressed by state or federal legislators: whether donor offspring should have the right to access information regarding the identity of their egg or sperm donor upon reaching the age of majority. This delicate issue will likely surface in the near future because many donor offspring are now approaching majority age.\textsuperscript{16} Increased adoption law litigation and recent enactment of state laws allowing for the opening of sealed records provides a preview of what legal issues may

\textsuperscript{8} Id. See Steven R. Lindheim, Michael Frumovitz & Mark V. Sauer, Recruitment and Screening Policies and Procedures Used to Establish a Paid Donor Oocyte Registry, 13 HUM. REPROD. 2020 (1998). In a survey of egg donor patients who participated in gamete donation programs at the Center for Women's Reproductive Care at Columbia University, ninety percent of donors reported financial compensation was their number one reason for participation. Id.

\textsuperscript{9} Interview with Lindsay Cooper, supra note 1.

\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} Id.

\textsuperscript{13} Id.

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Interview with Lindsay Cooper, supra note 1.

See infra Part II (establishing that children created through egg donation are currently twenty-five years old or younger, whereas children created through sperm donation may be much older).
arise in the area of gamete donation. Legal commentators in support of open adoption records have asserted that arguments in favor of disclosure can be made for both donor offspring and adopted children as both desire to learn about their biological parents. Moreover, the passage of laws either permitting or requiring such disclosure in the near future will likely lead to a large volume of litigation.

Part II of this Comment introduces the reader to the in vitro fertilization (IVF) medical procedure and provides descriptions of the egg donation and sperm donation processes. Part III sets forth the current state of the law with regard to assisted reproductive technology and gamete donation. Part III also examines various state laws on disclosure of identifying information in the adoption law context, as well as common arguments made in favor of opening sealed records as sources of guidance for legislators faced with the possible future task of crafting laws regarding disclosure of donor identity in the gamete donation context. In addition, Part III considers approaches taken by other countries concerning regulation of assisted reproductive technologies, focusing particularly on those countries that have enacted laws allowing or disallowing the disclosure of donor identity.

Part IV suggests that laws permitting or requiring disclosure of donor identity should not be enacted, focusing primarily on the competing interests of the parties involved in an IVF procedure using donor eggs and/or sperm, such as: the donor's privacy interest and reasonable expectation to maintain an anonymous status, the child's interest in finding out information about him or herself, and the intended parents' interest in making familial decisions about how to raise their children without unwarranted state interference. In addition, Part IV sets forth practical and legal consequences which might result if such laws are enacted and examines the flaws inherent in arguments favoring enactment of laws permitting or requiring disclosure of donor identity. Part IV ultimately contends that the issue of disclosure of donor identity should be analyzed as a public policy matter, rather than as a constitutional issue, as courts have not yet ruled as to whether the interests at issue are "fundamental" rights. Therefore, Part IV introduces factors legislators should consider.

17 "Open adoption records" refers to a position some states and countries have taken whereby they do not maintain closed (or sealed) records in order to keep adoption information confidential. See Nancy S. Ashe, The Open Records Debate (2008), http://www.adopting.org/adoptions/the-open-records-debate-2.html (last visited Feb. 5, 2009). Rather, such states or countries allow adult adoptees to access identifying information about their birthparents (the laws vary). Id.

18 See infra Part III.A.

19 See infra Part IV.
when weighing the competing interests, ultimately demonstrating that legislation permitting or requiring disclosure of donor identity would be an inappropriate exercise of state police power.

Finally, Part V offers an alternative approach to regulating the sensitive issue of disclosure of donor identity without enacting a law permitting or requiring such disclosure, acknowledging the need to devise a solution that is best for all parties and one that is not solely beneficial to adults at the expense of children. It contends that it would be more appropriate to address this issue on a case-by-case basis given the unique competing interests at stake rather than through sweeping legislation. Ultimately, this Comment contends that while a child created through gamete donation has a right, as a matter of policy, to access general information about his or her heritage and medical history, this right should not include access to the donor’s identity. Allowing for such access would violate the donor’s privacy interest and reasonable expectation of anonymity, and would also generate problems for all the parties involved, our society in general, and the future of medical science.

II. BACKGROUND

Infertility is generally defined as “a disease of the reproductive system that impairs one of the body’s most basic functions: the conception of children,” through unprotected sexual intercourse after a certain period of time. Several possible causes of infertility problems are attributable to factors affecting both males and females. In fact, one out of every seven couples trying to conceive children experience difficulty. In 2002, seven percent of married couples (2.1 million) re-

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21 Among couples being tested for infertility problems, forty percent of problems are generally found to be associated with male factors, forty percent with female factors, ten percent with both male and female, and ten percent of such problems remain unexplained. N.Y. STATE TASK FORCE ON LIFE AND THE LAW, QUESTIONS AND ANSWERS ABOUT INFERTILITY AND ITS TREATMENT 8 (1998) [hereinafter QUESTIONS AND ANSWERS ABOUT INFERTILITY]. According to medical research, there is less known about male infertility than female infertility and the specific cause of male infertility is identified in only about twenty percent of cases. N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20, at 29 (citing R.S. Swerdloff et al., Infertility in the Male, 103 ANNALS INTERNAL MED. 906 (1985)).

ported that they had not used contraception in twelve months and the woman had not become pregnant. In addition, approximately 1.2 million out of 62 million women (two percent) of reproductive age had an infertility-related medical appointment within the year. Fortunately, medical advancements in the field of reproductive technology have enabled infertile couples and individuals to explore several treatment options in pursuit of their dream to conceive children that are in some way biologically connected to them.

IVF, the most common type of assisted reproductive technology (ART), involves removing oocytes from a woman’s ovaries for fertilization outside her body. The surgically removed eggs are then mixed with spermatozoa (sperm) in a Petri dish in the laboratory. In the event fertilization leads to embryo formation, the resulting embryos are transferred into the woman’s uterus through the cervix. If the transfer is successful, the embryo will implant itself into the uterine wall as if natural conception had occurred. This procedure can be performed with eggs and sperm from the patient couple—the intended parents—or with donor eggs and/or donor

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24 Id.
25 Victoria Clay Wright et al., Assisted Reproductive Technology Surveillance: United States, 2004 (2007), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5606a1.htm?_s_cid=ss5606a1_e (establishing that in 2004, more than 49,000 infants were born in the United States from a type of assisted reproductive technology).
26 See FAQ About Infertility, supra note 20 (explaining “in vitro” is Latin for “in glass”).
27 ART refers to “[a]ll treatments or procedures that involve surgically removing eggs from a woman’s ovaries and combining the eggs with sperm to help a woman become pregnant.” QUESTIONS AND ANSWERS ABOUT INFERTILITY, supra note 21, at 71.
28 An “oocyte” is an “immature ovum, an egg cell.” STEDMAN’S MEDICAL DICTIONARY, supra note 3, at 1263.
29 See QUESTIONS AND ANSWERS ABOUT INFERTILITY, supra note 21, at 72.
30 “Spermatozoa” is defined as “the male gamete or sex cell that contains the genetic information to be transmitted by the male, exhibits autokinesia [automatic movement], and is able to effect zygosis [the union of gametes to form a zygote] with an ovum.” STEDMAN’S MEDICAL DICTIONARY, supra note 3, at 1666.
31 See FAQ About Infertility, supra note 20.
32 “Embryo” is defined as “[i]n humans, the developing organism from conception until approximately the end of the second month; developmental stages from this time to birth are commonly designated as fetal.” STEDMAN’S MEDICAL DICTIONARY, supra note 3, at 581.
33 QUESTIONS AND ANSWERS ABOUT INFERTILITY, supra note 21, at 71.
When donor eggs are used, the resulting embryo is transferred either into the intended mother of the child—if she can carry the pregnancy—or into a surrogate carrier. This Comment focuses exclusively on IVF procedures involving donor gametes whereby the gestational carrier is the intended mother. Thus, the donor offspring referred to in this Comment will have been carried in the womb of the intended mother although the child may or may not be genetically related to her.

It is estimated that in the United States about 40,000 children are born each year through the use of donor eggs and/or donor sperm. In *Orford v. Orford*, a Canadian court held that a physician and a woman committed adultery when the physician employed the method of artificial insemination to impregnate the woman. 58 D.L.R. 251, 258 (1921). The court found "the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of 'adultery.'" *Id.* The United States courts adopted this view in *Doornbos v. Doornbos*, finding that because the woman had not been inseminated by her husband, the child was "illegitimate" and the husband was therefore not the legal parent. 139 N.E.2d 844, 844 (Ill. Ct. App. 1956). This reasoning was highly criticized and later abandoned. See *People v. Sorenson*, 437 P.2d 495 (Cal. 1968) (holding that artificial insemination does not constitute adultery). The Uniform Parentage Act was later enacted to eliminate the legal distinction between "legitimate" and "illegitimate" children in the ART context. See *Unif Parentage Act* § 702 (amended 2002), 9B U.L.A. 295 (2000).

A "surrogate" carrier is a woman who carries the embryo for the term of the pregnancy and gives birth to the child. See *ART: A Guide for Patients*, supra note 34, at 12. A surrogate carrier can be a genetic/gestational surrogate meaning that she is both the genetic mother (her eggs are used) and the gestational mother (she carries the baby). *Id.* A surrogate can also be purely gestational in that she serves as a carrier of an embryo that consists of egg and sperm extracted from two other people (the intended parents). *Id.* In this situation, the surrogate carries the embryo for the term of the pregnancy and gives birth to the child, but she has no biological connection to the child. *Id.* A gestational surrogate (surrogate carrier, but not her eggs) has no legal rights to the child upon birth whereas a genetic/gestational surrogate (surrogate carrier and her eggs) has waived such rights contractually, although such contracts may or may not be found enforceable depending on which state law governs. See *N.Y. State Task Force Recommendations*, supra note 20, at 84–85; CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 506–09 (2006); see also *Stedman's Medical Dictionary*, supra note 3, at 1737 (defining "surrogate" as "a person who functions in another's life as a substitute for some third person such as a relative who assumes the nurturing and other responsibilities of the absent parent").

A "gamete" is "[a]ny germ cell, whether ovum [egg] or spermatozoon [sperm]." *Stedman's Medical Dictionary*, supra note 3, at 725.

Likewise, the donor offspring may or may not be related to the gestational carrier's male partner or husband depending on whether his sperm or donor sperm was used.
Donor eggs and donor sperm are commonly used in IVF procedures to facilitate pregnancy when a female or male has a problem producing or cannot produce gametes because of an infertility issue, age, or other factor, such as when one partner has an inheritable genetic disease. Today, donor eggs and donor sperm are also used when a person wishes to conceive a child as a single parent, or when a gay or lesbian couple decides to conceive a child through the use of donor eggs or sperm. In the event both partners have infertility problems that limit their ability to use their own eggs or sperm, donor embryos may also be used in the IVF process. In fact, several programs in the United States now offer embryo donation/adoption programs for couples that have undergone IVF treatment and for couples with infertility problems.

A. Egg Donation

The first successful delivery of a child created through the use of a donor egg occurred in 1984. Since then, the practice of egg do-

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40 See Centers for Disease Control and Prevention, 2004 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 52 (2004), available at http://www.cdc.gov/ART/ART2004/508PDF/2004ARTIntro-NationalSum_t508.pdf. Figure forty shows that in 2004, the percentage of ART patients using donor eggs increased dramatically at age thirty-nine and that ninety-one percent of women over age forty-seven used donor eggs. Id. This reflects the reality that many women in the modern age are waiting to have children because they are more involved in their careers. Because of this, age has become a major factor in female infertility problems causing these women to use donor eggs if they want to be able to conceive a child.
41 QUESTIONS AND ANSWERS ABOUT INFERTILITY, supra note 21, at 43.
42 Id.; N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20, at 74.
43 See ART: A GUIDE FOR PATIENTS, supra note 34, at 12. Some IVF programs allow infertile couples that have undergone IVF treatment to donate their unused frozen embryos to other infertile couples once they have become pregnant. See N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20, at 299. This is an alternative to disposing of the embryos altogether. Id.
44 See Embryo Connection, http://www.embryoconnection.org (last visited Jan. 5, 2009) (providing information about medical and legal issues in the field of embryo adoption provided by the National Embryo Donation Center in Knoxville, Tenn.). The National Embryo Donation Center allows couples that have undergone IVF to donate their embryos to the non-profit organization allowing other infertile couples the opportunity to adopt such embryos. See National Embryo Donation Center, http://www.embryodonation.org/donation.html (last visited Feb. 8, 2009). Because the embryos are frozen, there is only a twenty to twenty-five percent chance of pregnancy per transfer as some embryos do not survive the freeze/thaw process. Id.
45 AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 4 (2006) [hereinafter THIRD PARTY REPRODUCTION]. In 1984, Louise Brown, the first test-tube baby, was named "one of the ten most prominent people of the
nation in conjunction with IVF has grown tremendously. In 2004, approximately twelve percent of all ART cycles were performed with the use of donor eggs or embryos. In general, egg donors range from age twenty to their mid-thirties, are healthy, and are both height and weight proportional. Donors can be either anonymous or non-anonymous, as some recipients prefer to use eggs from a relative or close friend. The majority of egg donors in the United States are anonymous donors who are recruited specifically for egg donation.

In selecting egg donors, programs generally require donors to complete extensive medical questionnaires indicating sexual history, substance abuse, and psychological history, while also requiring donors to undergo a medical screening for communicable infections, diseases, and inheritable diseases, as well as a psychological screening.

Once selected, the process of egg donation is not easy. Egg donation is a time-consuming procedure, and the process for one cycle can last up to six weeks. The procedure involves taking medication to stop the ovaries' normal functioning, followed by hormone injections, which stimulate the ovaries to produce a greater number of eggs than a normal cycle. During the administration of medication,
a donor must have regular blood tests and ultrasound examinations to allow doctors to monitor the number of ovulated eggs and determine how the donor is responding to the hormones. Once the eggs are harvested, they are removed from the donor's ovaries through a minor surgical procedure called transvaginal ovarian aspiration, which ordinarily lasts approximately thirty minutes. After the eggs are retrieved, the donor loses control over them and is not entitled to find out whether her eggs resulted in the birth of a child. Upon completion of the cycle, egg donors are compensated between $5000 and $8000 for their time, effort, and discomfort.

As set forth above, through the process of IVF, extracted eggs are fertilized with sperm from either the recipient's partner—the intended father—or another donor in a laboratory. Once embryos are formed, the embryos are transferred into the recipient's uterus in the hope of resulting in a successful pregnancy. The recipient, the
"gestational carrier," will carry the embryo to term and give birth to the child.62

B. Sperm Donation

Unlike egg donation, which is still a relatively new procedure, sperm donation has been practiced since 1945.63 However, since the emergence of the AIDS virus in the mid-1980s, artificial insemination has generally been performed with frozen and quarantined sperm that has been screened and tested for communicable diseases.64 Some states—for example, New York—allow the quarantine and screening requirement to be waived when the donor is the regular sexual partner of the recipient.65 Most sperm donation agencies require donors to be between the ages of twenty-one and forty.66 Like egg donors, sperm donors must undergo screening and testing procedures prescribed by the sperm bank, agency, or hospital before being selected to be a donor.67 Prior to being selected, donors must provide detailed medical information for at least two generations of family members and undergo a blood analysis and a physical examination that tests for sexually transmitted diseases.68 In addition, the donor must provide a sample of sperm, which is frozen and thawed to allow for post-freezing/thawing semen parameters.69 The semen specimen is provided by means of self-masturbation and donors gen-

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61 A "gestational carrier" is defined as "a woman who carries an embryo that was formed from the egg of another woman. The gestational carrier usually has a contractual obligation to return the infant to its intended parents." QUESTIONS AND ANSWERS ABOUT INFERTILITY, supra note 21, at 72.

62 Id. at 52.

63 See THIRD PARTY REPRODUCTION, supra note 45, at 9.

64 "Artificial Insemination"—also referred to as assisted or intrauterine insemination—is a "medical procedure used to treat male factor infertility . . . or to assist women with no male partner achieve pregnancy. Assisted insemination requires that semen be obtained from the male, and then placed in the woman's reproductive tract using an injection device." DAAR, supra note 48, at G-1.

65 See THIRD PARTY REPRODUCTION, supra note 45, at 9; N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20, at 235. The FDA and ASRM guidelines recommend that sperm be quarantined for at least six months before being used in a procedure. See THIRD PARTY REPRODUCTION, supra note 45, at 9.

66 N.Y. COMP. CODES R. & REGS. tit. 10, § 52-8.5(d) (2008); see N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20, at 277 n.270.

67 N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20, at 245–54.

68 Id.

69 See THIRD PARTY REPRODUCTION, supra note 45, at 10. According to FDA regulations, infectious disease testing must be performed and documented as negative within seven days of all sperm donations. Id.

70 Id.
erally receive between $100 and $350 per vial, with two to three vials needed per cycle.  

Like egg donors, the majority of sperm donors choose to be anonymous donors, but there are non-anonymous donors as well. As with egg donation, once sperm is donated, the anonymous sperm donor relinquishes any right to control the specimen or to learn whether or not a child is conceived with his sample. In most situations, sperm donors enter into private contracts with sperm banks, programs, and hospitals to be treated as anonymous donors. Some sperm donors also enter contracts to relinquish parental rights and avoid parental liability. While courts generally uphold such contracts if they appear to represent the clear intent of both parties and do not violate any fundamental public policy, there are circumstances where courts may find paternity rights. Usually, this occurs when the sperm donor has a relationship with the intended mother or child, but claims to be an anonymous donor to escape being liable for child support. Most states have enacted laws to address paternity for children born to married women from artificial insemination where the husband consents to be the father of the child.


72 See THIRD PARTY REPRODUCTION, supra note 45, at 9.

73 There is no federal law that establishes these restrictions. Rather, this issue is governed by state law, or if a state does not have a law, it is governed by private contract law. See KINDREGAN & McBRIEN, supra note 36, at 41-44.

74 It is unclear whether contracts guaranteeing anonymity to sperm donors would be upheld in court or whether they would be found void as against public policy. However, it is likely that a court would honor the intent of the parties and allow the donor to remain anonymous in the absence of some compelling reason for disclosure or any law permitting such disclosure. But see KINDREGAN & McBRIEN, supra note 36, at 46 (stating that “[a] sperm bank cannot absolutely guarantee a donor that he will always remain anonymous”).

75 Id. at 41-42.

76 Id. at 42.

77 See, e.g., Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 398 (Cal. Ct. App. 1986) (finding sperm donor could be awarded visitation rights to a child when he provided semen directly to the mother who self-inseminated and did not comply with state statute regarding artificial insemination and non-paternity); C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio 1994) (finding paternity rights when an unmarried woman solicited a donor known to her and promised donor that he will have no relationship with the child).

78 See KINDREGAN & McBRIEN, supra note 36, at 37-41.

79 See, e.g., MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1994). Other states have statutes that specifically state that a donor is not a parent. See, e.g., COLO. REV. STAT. § 19-4-106(1)-(3) (2008); 13 DEL. CODE ANN. tit. 13, § 8-702 (Supp. 2008); TEX. FAM.
Because sperm donation has been around for a longer period of time than egg donation, courts have had the opportunity to rule on many cases involving disputes over paternity and other legal issues involving sperm donors. It is likely that in the future, courts will be influenced by such rulings in deciding legal issues involving egg donation, embryo donation, and other reproductive technology cases. However, the different nature of the procedures may pose new challenges to application of rulings within the egg and embryo donation context.

Medical technologies in the field of assisted reproduction have advanced rapidly, allowing infertility services to be more obtainable to a greater number of people. As is usually the case, the law is slow to accommodate this innovative medical technology. Perhaps this slow development of law is due to the inherent political and religious controversies implicated in the field of infertility. Regardless of the reason, the legal issues associated with this field continue to emerge as the family unit becomes less traditional, forcing the law to adapt accordingly.

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80 See KINDREGAN & McBRIEN, supra note 36, at 29–71 (explaining the basics of sperm donation and the case law that has developed as a result of the practice).

81 As of 2003, there were over 400,000 surplus cryopreserved embryos in the United States. Debra Rosenberg, The War over Fetal Rights, NEWSWEEK, June 9, 2003, at 40. As such, embryo adoption supporters are trying to educate infertile couples about the possibility of adopting an embryo. See KINDREGAN & McBRIEN, supra note 36, at 108 (citing David I. Hoffman et al., Cryopreserved Embryos in the United States and Their Availability for Research, 79 FERTILITY & STERILITY 1063 (May 2003)).

82 Cytoplasmic egg donation is another medical procedure used today, which may be used to increase the possibility that a woman will become pregnant. KINDREGAN & McBRIEN, supra note 36, at 76 n.3. More specifically, the procedure allows genetic material from a more fertile woman to be transferred into the eggs of the woman trying to become pregnant. Id. A child produced from this procedure would thereby have two genetic mothers. Id. It is beyond the scope of this Comment to address issues of disclosure of identifying information in this situation. However, this shows how enactment of laws on the issue of donor disclosure could influence future medical procedures in the field of ART.

83 For example, it is well recognized that egg donation is a more invasive procedure than sperm donation, and given the fact that an egg donor may or may not also be a gestational carrier, the legal issues that arise could be different than those that have been addressed in the sperm donation context. Also, embryo donation presents new legal issues in that multiple parties are involved.

84 KINDREGAN & McBRIEN, supra note 36, at 8.
III. STATE OF THE LAW TODAY

Many commentators and legal scholars have argued that there is a pressing need for legislatures to address legal issues concerning donor offspring because such children have reached the age of majority, or will be reaching this age in the near future, and many will likely inquire about their rights to find out the identity of the donor that assisted in their conception. Children created through egg donation are currently twenty-five years of age or younger, while children created through sperm donation may be much older. While some state and federal statutes have been enacted in the area of ART concerning mandates for insurance coverage, reporting of pregnancy success rates from ART programs, registration of reproduction programs, and regulation of issues involving maternity and paternity, legislation governing this rapidly growing industry is sparse. Of particular interest for the purpose of this Comment is the fact that there is currently no state or federal law that expressly prohibits or enforces the anonymity of gamete donation. Instead, medical practitioners are left with only legally non-binding professional guidelines that provide recommendations and laws governing privacy with regard to medical records.

85 See infra Part IV.
86 See supra Part II.A, B.
87 See KINDREGAN & McBRIEN, supra note 36, at 201 nn.35-40 (citing ARK. CODE ANN. § 23-86-118(a) (2004); § 23-79-510; MD. CODE ANN., INS. § 15-810 (West 2004); 215 ILL. COMP. STAT. 5/356-m (2005); CAL. INS. CODE § 10119.6(a) (West 2004); HAW. REV. STAT. § 431:10A-116.5(a) (2004); TEX. INS. CODE ANN. § 1366.003 (Vernon 2004)).
88 See id. at 197 (citing Fertility Clinic Success Rate and Certification Act of 1992, 42. U.S.C. § 263a (2000)).
89 See id. at 196. The Food and Drug Administration requires all U.S. reproduction programs to be registered. See id. (citing Robert W. Rebar & Alan H. DeCherney, Assisted Reproductive Technology in the United States, 350 NEW ENG. J. MED. 1603, 1603-04 (2004)).
91 Some states have attempted to regulate the ART field in terms of medical evaluations for gamete donors or recipients and regulations of surrogacy, but the majority of the ART field is highly unregulated. See KINDREGAN & McBRIEN, supra note 36, at 207-13.
93 See, e.g., N.Y. STATE TASK FORCE RECOMMENDATIONS, supra note 20; AM. SOC’Y FOR REPROD. MED., COMPENDIUM OF ASRM PRACTICE COMMITTEE AND ETHICS COMMITTEE REPORTS (2007) (publishing annual professional guidelines for medical practitioners).
donors in the area of gamete donation as such legislation is premature and improper.

If state legislatures were to consider enacting laws on this subject, where would they look for guidance? Commentators who support enacting laws permitting or requiring disclosure of donor identity urge legislatures to be guided by trends in U.S. adoption law and a purported "developing trend in foreign legislation favoring identity disclosure." However, as demonstrated below, whether such trends actually exist is questionable at best. Others contend that the absence of legislation might be advantageous because it allows the field of ART to grow without state interference, giving courts "an opportunity to develop law as needed."  

A. Adoption Law

In the context of adoption law, the United States has seen a great deal of change in the past ten years, as several states have reconsidered policies on sealed records, and some have enacted laws allowing identifying information to be made available to adult adoptees. In addition, several bills are under consideration in various states addressing the issues of disclosure of identifying information and provision of original birth certificates to adult adoptees. However, the majority of states maintain that the identity of the birth parents will remain confidential, and sealed records will be unsealed only for

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94 See Elizabeth Siberry Chestney, Note, 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, 376 (2001) (citing Lori B. Andrews & Nanette Elster, Adoption, Reproductive Technologies, and Genetic Information, 8 HEALTH MATRIX 125, 147-48 (1998) (establishing that some states now have open records and other states have established consent registries or provide for confidential intermediaries)).


96 KINDREGAN & McBRIEN, supra note 36, at 196.

97 JOHN YEH & MOLLY YEH, LEGAL ASPECTS OF INFERTILITY 142 (1991). "Adoption is defined as 'the overall legal process by which a parent who is not the natural parent of a child becomes legally recognized as that child's parent.' Id. (quoting Comment, Advertising for Adoption Placement: Gray Market Activities in a Gray Area of Constitutional Protection, 25 DUQ. L. REV. 129, 129 (1986)).


“good cause shown,” determined by the court. In states that require a court order for individuals to obtain sealed records, some courts have stated that an “expectation of confidentiality arising from an adoption statute is constitutionally protected as a right of privacy.” Further, despite challenges brought by adoptees arguing that sealed adoption records violate the First, Thirteenth, and Fourteenth Amendments, courts have consistently held that access to adoption records is not a fundamental right.

Among those states that have reconsidered their position on sealed records in the adoption law context, some have enacted laws that apply prospectively while others have laws that apply retroactively. The specifics of the laws vary greatly. For example, some states allow for the original birth certificate—with the original birthparents’ names listed—to be given to the adoptee. Some states provide this right, but also provide the birth parent with a veto right (if exercised, the adoptee cannot get the records). Some states allow for identifying information to be given to adult adoptees, but give birthparents a contact veto which, if exercised, prevents the adoptee

100 See Doe v. Ward Law Firm, P.A., 579 S.E.2d 303, 306 (S.C. 2003) (finding adoptive parents established “good cause” as to why releasing information pertaining to a child’s adoption was in the child’s best interest as the child had medical and psychiatric problems); Bradey v. Children’s Bureau of South Carolina, 274 S.E.2d 418, 422 (S.C. 1981) (finding that Bradey’s mere desire to access information about his biological parents does not constitute “good cause” to unseal the records in light of the fact that he has been raised by his adopted family in a healthy environment).

101 Despite some legal commentators’ argument that there seems to be a trend moving towards favoring open disclosure in the United States, the majority of states do not allow adoptees to obtain this information without a court order. See FREUNDLICH, supra note 98, at 10 n.3.


103 See YEH & YEH, supra note 97, at 156; see, e.g., In re Roger B., 418 N.E.2d 751, 753-54 (Ill. 1981) (holding that adoptees have no constitutional right to see their adoption records and determine their biological origin); Fineberg v. Suffolk Div. of the Probate and Family Court Dep’t, 644 N.E.2d 264, 265 (Mass. App. Ct. 1995) (stating that curiosity about biological roots is not enough to show good cause and thereby denying adult adoptee access to her adoption records).

104 See Am. Adoption Cong., supra note 99 (establishing that Tennessee’s law, TENN. CODE ANN. § 36-1-127 (2004), allowing access to sealed records, was applied retroactively). Maine’s law, 22 MRSA §2768 (2009), allowing such access was applied prospectively as of January 1, 2009. Id.

105 See FREUNDLICH, supra note 98, at 10-11; see also Am. Adoption Cong., supra note 99.


107 Id. (citing Delaware [Ann. Code Tit. 13, 923]).
from being able to make any attempt to contact the birth parent.\textsuperscript{108} Meanwhile, other states allow parents to file a "non-binding Contact Preference Form."\textsuperscript{109} Also, some states provide for total open disclosure,\textsuperscript{110} while others provide for disclosure only upon court order.\textsuperscript{111} In addition, as of September 2007, some states allow adult adoptees born before or after a certain date to access their original birth certificates unless the birthparent(s) has filed a non-consent form.\textsuperscript{112}

Those commentators who argue that donor offspring should have the right to access identifying donor information maintain that gamete donation is similar enough to adoption such that the same arguments for disclosure are applicable.\textsuperscript{113} One commentator even questions whether it is unconstitutional as a violation of the Equal Protection Clause for states to have legislation allowing adult adoptees to obtain identifying information about their birth parents but not have a similar law on this subject for donor offspring.\textsuperscript{114} However, an equal protection challenge would likely fail because a court could find that there are enough differences between adoptees and donor offspring that they would not be considered "similarly situated persons."\textsuperscript{115} Because donor offspring may have similar interests in obtaining identifying information about their donors as adoptees have in accessing information about their birth parents, it is appropriate to consider adoption law to facilitate the debate, but it should not be conclusive.\textsuperscript{116}

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\textsuperscript{108} Id. (citing Alabama [Ala. Code § 22-9A-12(c)-(d)], Tennessee [Ann. Code §§ 36-1-128; 36-1-129]).
\textsuperscript{109} Id. (citing Alabama [Ala. Code § 22-9A-12(c)-(d)], Colorado [Rev. Stat. § 19-5-305]).
\textsuperscript{111} FREUNDLICH, supra note 98, at 33 n.3 ("In approximately 29 states, the District of Columbia, American Samoa, Guam, and Puerto Rico, a court order continues to be required for an adult adopted person to gain access to his/her original birth certificate.").
\textsuperscript{113} See infra Part IV (discussing specific arguments as to why adult adoptees should have access to identifying information about their birth parents).
\textsuperscript{114} See Chestney, supra note 94, at 378.
\textsuperscript{115} See F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (establishing that the Equal Protection Clause requires that persons similarly situated be treated similarly).
\textsuperscript{116} See infra Part IV.
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B. Regulation of Gamete Donation in Other Countries

Outside the United States, several countries have actively sought to regulate the field of ART, and some have enacted laws on the issue of anonymous gamete donation. According to the Council of Europe Steering Committee of Bioethics Report, the following countries allow donor offspring to be provided with the identity of the donor: Austria, Germany, Iceland, Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and Canada. For example, in Norway, section 2-7 of the Norwegian Law on the Human-Medical use of Biotechnology states: "A person born in consequence of Assisted Reproduction with the use of donor sperm has the right to identifying information on the sperm donor at the age of 18 years. A donor register shall assist the child in this matter." More recently, the United Kingdom enacted similar legislation on donor anonymity under the Human Fertilisation and Embryology Authority (HFEA), which was applied prospectively beginning April 1, 2005.

Although many countries do not have laws governing this issue, some commentators argue that there is a trend moving toward open disclosure in Europe and other countries. This is debatable because several countries currently have statutes that prevent donor offspring from receiving identifying information about the donor, including Belgium, Denmark, Estonia, Finland, France, Georgia, Greece, Latvia, Poland, the Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, and Israel. While the laws vary, some seem

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117 See Frith, supra note 92, at 819. In 1984, Sweden was the "first country to remove the anonymity of gamete" donation by enacting Law No. 1140, which allowed donor children "to find out the identity of their sperm donor" when sufficiently mature. Id. Other countries followed by enacting similar legislation. Id.
121 See Frith, supra note 92, at 819. Other countries that have enacted legislation include Holland, two jurisdictions in Australia (Victoria, Western Australia), and New Zealand. Id.
122 COUNCIL OF EUROPE, supra note 118, at 69; see also Ruth Landau, The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere, 13 HUM. REPROD. 3268, 3268 (1998) (arguing that Israel’s refusal to provide donor children with a right to their “genetic identity” is inconsistent with Israel’s
to leave little room for interpretation on this controversial issue. For example, according to the Indian Council of Medical Research, in India, "the child born through the use of donor gametes [i.e., sperm or eggs] will not have any right whatsoever to know the identity of the genetic parents."\textsuperscript{123}

If state legislators were to consider whether to enact laws on the issue of disclosure, it is possible that they may consider what other countries have done, but it is unlikely. The United States places greater emphasis on individual liberties than some other countries and is hesitant to interfere with people's fundamental rights. Because our government is less inclined to regulate people's personal lives and family decisions than governments of other countries, it may be inappropriate to look to international law when considering this issue.

In analyzing whether state legislatures will be influenced to pass laws pertaining to disclosure of donor identity because other countries have done so, it is also important to recognize that many countries treat adoption law and the issue of sealed records very differently than the issue is treated in the United States. In fact, unlike the United States, many countries never had a closed-records system in place for adoption records.\textsuperscript{124} For example, Norway\textsuperscript{125} has never recognized closed adoption records.\textsuperscript{126} Because adult adoptees have always been able to access information about their birthparents, Norway's treatment of the disclosure of donor identity to donor offspring seems to be consistent with its policy on the issue of disclosure. Therefore, it may be impractical for state legislators to consider the approaches other countries, like Norway, have taken on adoption,
since the majority of states in the United States are governed by closed-record statutes. 127

It is more likely that state legislatures will draw parallels between similar issues raised in American family law and more specifically, American adoption law. Even if state legislators were to consider the approaches some countries have taken with regard to permitting disclosure of donor identities, there is no real evidence that a trend toward open disclosure, as referenced above, really exists. There seems to be an equal number of countries, if not more, that refuse to allow donor offspring to receive identifying information. 128

IV. STATE LAWS PERMITTING OR REQUIRING DISCLOSURE OF DONOR IDENTITY SHOULD NOT BE ENACTED

Arguments that laws should be enacted permitting or requiring disclosure of donor identity are ill-advised. Commentators who support the enactment of such laws routinely justify their position by pointing to the child's "right to know where they came from" without looking at the full picture. 129 Conveniently, commentators fail to disclose the fact that no court has ever declared that donor offspring have a fundamental right to access identifying information about donors. 130 The reality is there are at least three parties 131 involved in an

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127 In addition, it may also be impractical because in some countries there is a recognized "right" on behalf of the child to access such information whereas the United States has yet to recognize any fundamental "right" to this information despite some legal commentators' arguments that it should. See, e.g., United Nations Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3, 47 (establishing that "the child 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"). The United States has yet to sign the convention. REVOLUTION IN PARENTHOOD, supra note 123, at 16 & 36 n.32.

128 See supra Part III.B.

129 See, e.g., Baines, supra note 95, at 118; Chestney, supra note 94, at 365; Frith, supra note 92, at 820; Amy Shelf, Note, A Need to Know Basis: Record Keeping, Information Access, and the Uniform Status of Children of Assisted Conception Act, 51 Hastings L.J. 1047, 1071 (2000).

130 See, e.g., Baines, supra note 95, at 118 (discussing a child born through gamete donation's general right to know "the truth concerning [his or her] ... conception and origins," but omitting the fact that there is no fundamental right to such knowledge in the United States). Further, as support for this proposition, a commentator erroneously cites a source from the United Kingdom, which does recognize such a right. See id. at 118 n.27.

131 As noted throughout this Comment, there are potentially many other interests involved in an IVF procedure related to parties such as the doctor, egg donation or sperm donation program, surrogate carrier, and the State.
IVF procedure, each of whom has very different interests—none of which have been recognized as "fundamental."\textsuperscript{132}

The child's interest involves individual autonomy, a desire to know his or her biological mother or father, and a longing not to be denied identifying information when the child was never a party to the original arrangement.\textsuperscript{133} The donor, on the other hand, has an interest in maintaining anonymity.\textsuperscript{134} The donor may have entered into a private contract guaranteeing that his or her identity would remain confidential.\textsuperscript{135} In many cases, the promise of confidentiality plays an essential role in the donor's decision to donate gametes.\textsuperscript{136}

Lastly, the intended parents have an interest in raising their children and making personal family decisions without unwarranted state interference.\textsuperscript{137} Perhaps on the surface these interests fall within recognized fundamental rights such as the right to privacy,\textsuperscript{138} the right to procreate, and the right to keep the family together.\textsuperscript{139} However, no court has yet ruled that any of these specific interests fall within the realm of the aforementioned constitutional rights, and it is unlikely that a court would deem any of these interests to be fundamental rights at this time. Further, it is not useful to view the competing interests as possibly within the purview of the general right to privacy

\textsuperscript{132} While case law has given some indication of what liberties the Supreme Court deems to be "fundamental," much is left to be determined. In determining whether a right is fundamental, one may look to whether the right is enumerated in the Constitution (an express right) or has been deemed "fundamental" by the Supreme Court (an implied right). See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 795 (2006). At times, courts also look to history and tradition as a means of deciding what rights not mentioned in the Constitution are nevertheless "fundamental." Id. If a right is recognized as "fundamental," the government cannot infringe on this right unless "its action is necessary to achieve a compelling government purpose." Id. at 792.

\textsuperscript{133} See infra Part IV.A-1.

\textsuperscript{134} See infra Part IV.A-2.

\textsuperscript{135} See generally KINDREGAN & MCBRIEN, supra note 36, at 295-301.

\textsuperscript{136} See supra Part I (establishing that Lindsay Cooper would not donate eggs at a program that would not accept anonymous donors).

\textsuperscript{137} See infra Part IV.A-3.

\textsuperscript{138} While there is a fundamental right to privacy and within that right, an ability to control certain private information about oneself, it is not all-encompassing. See CHEMERINSKY, supra note 132, at 855. The State may utilize its broad police power to enact laws to serve the interests of its citizens, even though those laws have some effect on individual liberty or privacy, so long as they are reasonable. See id. at 677-89. If a state law intrudes on a right that is not recognized as "fundamental," strict scrutiny review is not applicable. Id. at 794. While there is generally more deference shown to the State in this situation than when a recognized "fundamental" right is at issue, the court may still find the law invalid. See id. at 678.

\textsuperscript{139} Id. at 792.
because it is difficult, if not impossible, to rank the competing inter-
estests of the parties in order of importance.40

For the reasons set forth above, the issue of disclosure of donor
identity should not be characterized as a constitutional issue. Rather,
it is more appropriate to evaluate the competing interests as a public
policy matter, balancing the interests of the parties and also taking
into consideration factors such as the legal and practical conse-
quences likely to result from the enactment of laws permitting or re-
quiring disclosure of donor identity. An analysis of the competing in-
terests suggests that the issues involved in one IVF procedure are
truly unique and different from the next. Thus, a sweeping law on
the issue of disclosure of donor identity applicable to all donor
offspring is inappropriate. Legislatures should not respond to this
sensitive issue by enacting laws that appear to provide a short-term so-
lution to a complicated issue with the potential to harm all three par-
ties in the long run.

A. Competing Interests Between Parties Involved in an IVF Procedure

1. The Child's Interest

Advocates for laws permitting or requiring disclosure of donor
identity argue that children created by means of ART have an interest
in finding both their genetic heritage and the identities of their gen-
etic parents.141 In addition, a child may desire an opportunity to in-
itiating a relationship with a genetic parent or to find out whether he or
she has any siblings. While the above-referenced interests may be
considered legitimate, they should be balanced against the donor's

40 If a court found that a donor has a fundamental right to donate gametes an-
onymously, the State would likely be unable to demonstrate a compelling need to in-
terfere, and a law permitting or requiring disclosure of donor identity would fail.
However, it is unlikely that a court would recognize this right as "fundamental" at
this time because the law is still rather undeveloped in the area of assisted reproduc-
tion and courts have yet to recognize whether assisted reproduction is itself a funda-
mental right. See Daar, supra note 48, at 137. But see John A. Robertson, Children
ning that ART is a fundamental right). Also, courts will likely be hesitant to recog-
nize a donor's right to donate gametes anonymously because it potentially encourag-
es commoditization of the body. Therefore, because none of the specific competing
interests addressed in this Comment have been deemed "fundamental," an analysis
of the interests as a matter or public policy is more appropriate.

141 See Chestney, supra note 94, at 365. For purposes of this Comment, the author
uses the term "genetic parent" as opposed to "birth parent" because the Comment is
not referring to parents who gave birth to their children. Rather, the Comment is
referring to donors that are genetically related to the child, but did not carry or give
birth to the child.
interest in maintaining anonymity. Commentators who support the enactment of general laws providing donor offspring with the right to access identifying information argue that such knowledge is necessary to a child’s positive upbringing and that states should implement such legislation to do what is in the “best interest” of these children. There are several problems with this argument.

First, this argument is flawed because it relies on the assumption that disclosure of the donor identity to the child is in the best interest of all donor offspring. There is no evidence that knowledge of identifying information is necessary to the well-being of donor offspring, nor is there evidence that knowledge of such information is always beneficial. In support of their position in favor of disclosure, commentators often draw parallels between donor offspring and adoptee children and attempt to impute the same line of reasoning as to why knowledge of biological information is necessary to children. However, unlike adoptees, donor offspring are in most cases biologically related to one of their parents. Therefore, the argument that such children need to find out where they came from is not as strong in the ART context. This argument also ignores the fact that donor offspring are likely to have been raised in a positive and nurturing family environment. Knowledge of the donor’s identity might not be beneficial for the child if such knowledge causes tension between the child and his or her intended parents.

The argument that laws permitting or requiring disclosure of donor identity are in the “best interest” of donor offspring is also problematic because it overemphasizes genetics and underemphasizes the bonds created by a lifetime of nurturing from the child’s actual caregivers (intended parents). According to one psychologist, “[a] genetic relationship is not essential for good social parenting or the satisfactory social and emotional development of children.” Disclosure laws might also have a negative effect on future generations of donor offspring as they could encourage donor offspring to seek to
establish relationships with donors at the expense of potential harm to the child’s family when donor offspring might never have wanted such information.\(^{149}\) Such laws suggest that knowledge of this identifying information is necessary to a donor offspring’s wellbeing, which is problematic.

Knowledge of a donor’s identity might also stigmatize the child\(^{150}\) and could have other negative consequences if, for example, a donor offspring contacts his or her donor and is rejected. It is unrealistic to expect that donors who agreed to be anonymous donors would welcome disclosure laws.\(^{151}\) In fact, it is likely that donors would not react positively if confronted by donor offspring later in life.\(^{152}\)

Second, it is erroneous to maintain that the State has an obligation to give donor offspring the right to access identifying information about donors. Enacting a state law on this issue requires the State to interfere and affirmatively assert that it has a strong interest\(^{153}\) that outweighs the interest of the donor in maintaining his or her anonymous status, essentially giving the donor offspring a positive right.\(^{154}\) As set forth above, many advocates for laws allowing for disclosure of donor identity urge state legislators to look to adoption law for guidance.\(^{155}\) However, the State plays a very different role in

\(^{149}\) See Naomi Cahn & Jana Singer, Adoption, Identity, and the Constitution: The Case for Opening Closed Records, 2 U. PA. J. CONST. L. 150, 186 (1999). “Genetic essentialism” has been defined as the “concept that a person is the sum of her genes and that behavior can be predicted based on genetic information.” Id. Doctors and psychologists routinely stress that society places too great an emphasis on genetic connections as defining the relationship between parent and child. For example, a person is not half his or her mother and half his or her father. Rather, a person contains an entirely different genetic makeup that is unique to that person.


\(^{151}\) See supra Part I.

\(^{152}\) Lindsay Cooper did not tell her mother or boyfriend about donating eggs. Id. In turn, one can imagine that she would not react positively to being confronted by her donor offspring in the future. It is also important to recognize that this reaction could be rather detrimental to a child in search to find out who he or she is, only to be rejected.

\(^{153}\) The State would need to show it has a compelling interest if the court recognized the donor’s right to maintain an anonymous status as a fundamental right. See CHEMERINSKY, supra note 132, at 792.

\(^{154}\) The U.S. Constitution protects negative rights as opposed to positive rights. Id. at 551–53. A negative right is a right to be left alone and to not have the State interfere with a right one already has whereas a positive right is one that is given by the State. See DeShaney v. Winnebago Cty. Dep’t. Soc. Servs., 489 U.S. 189 (1989). In the scenario addressed by this Comment, the State has not acted and is not obligated to act as what is being asked for is a positive right.

\(^{155}\) See supra Part III.A.
adoption law than it does in gamete donation. The State is already involved in adoption proceedings because "adoption is a state-created process and status." Therefore, it is easier for the State to show that it has a strong interest in regulating identifying information about adoptee birthparents than to show it has a compelling interest in regulating gamete donation. In the gamete donation context, the State has not acted. The State has not denied donor offspring the right to find out their genetic origin. Rather, it has merely left itself out of an already crowded contractual relationship. Advocates for disclosure cannot simply point to the fact that the State has been able to show that it has a strong interest in regulating disclosure of such information in the adoption law context to support an argument that states will be able to establish a strong interest in the context of gamete donation.

Aside from some of the more obvious interests previously addressed, donor offspring may have rather specific and distinct interests at different points in time. For example, at some point a child might have an interest in contacting the donor if he or she needs a bone marrow transplant or perhaps is in need of financial support. This Comment does not suggest that a child would be able to assert a claim for bone marrow or financial aid. Rather, the examples illustrate that the specific interests of each donor offspring child are unique, and in some cases a child's interest in finding out identifying information about the donor may be more than to satisfy mere curiosity and perhaps in certain limited circumstances this interest would override the donor's interest to remain anonymous. Proper adjudication of these cases must involve balancing the individual child's interests against his or her donor's interest in privacy. In forming a balancing test, it may be appropriate for legislatures to look to how some courts have decided whether "good cause" is shown to permit adoptees to access their original birth certificate.

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156 Cahn & Singer, supra note 149, at 190.

157 The majority of states still recognize a sealed records system for such records and only allow adoptees to access identifying information about their birthparents for "good cause shown." See supra Part III.A.

158 See Doe v. Ward Law Firm, P.A., 579 S.E.2d 303, 306 (S.C. 2003) (finding adoptive parents established "good cause" as to why releasing information pertaining to child's adoption was in the child's best interest as child had medical and psychiatric problems); Bradey v. Children's Bureau of South Carolina, 274 S.E.2d 418, 422 (S.C. 1981) (finding that Bradey's mere desire to access information about his biological parents does not constitute "good cause" to unseal the records in light of the fact that he has been raised by his adopted family in a healthy environment); supra Part III.A.
2. The Donor’s Interest

Perhaps the strongest argument against the enactment of laws allowing donor offspring to access identifying information about donors is that such laws violate the donor’s privacy interest and reasonable expectation to maintain anonymity and confidentiality. In becoming an egg or sperm donor, the donor generally participated in a medical procedure in exchange for payment. In doing this, donors did not decide to become parents. While some donors become donors because of a genuine desire to help a family conceive children, others are motivated solely by the financial incentive.

Either way, donors who enter programs as anonymous donors have a reasonable expectation that their identity will not be made available to potential donor offspring. Legislators must balance this strong interest against the child’s interest in wanting to learn the identity of the donor.

While advocates for laws permitting or requiring disclosure of donor identity maintain that donor offspring want to know the identity of the donor, one can presume that knowledge of a donor’s identity is really only a small part of what some want. Rather, many donor offspring want to initiate a relationship with their donor. In balancing the interests, legislatures must ask themselves whether it is appropriate to give donor offspring the right, albeit indirectly, to contact a donor and initiate a relationship with him or her if such a relationship is not wanted. In the adoption law context, some states have allowed adoptees to access their original birth certificates, but have provided birthparents with a contact veto, in an attempt to balance the competing interests of the birthparents and the children. If such laws were to be enacted in the area of gamete donation, similar issues would need to be considered. If states were to implement this approach, there may be no point in enacting the law at all as donor offspring may not have as strong an interest in accessing the information when compared to the donor’s privacy interest.

As previously stated, upon completion of the donation process, a donor relinquishes all rights to his or her gametes and has no right to know whether or not a child was conceived with his or her genetic composition. Due to advanced medical technology in the field of ART, involving embryo freezing, donor offspring could potentially be

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159 See Baines, supra note 95, at 119–20; Chestney, supra note 94, at 384.
160 See Interview with Sharon Eyny, supra note 52.
161 Id.
162 See supra Part III.A.
163 See supra Part II.
born many years after the donor donated gametes. Additionally, it is possible that more than one child could result from one donation cycle. While some donors may be properly informed of these possibilities, some donors may not be. Instead, donors are informed of the medical procedure involved in the donation and little, if anything, is discussed about the child that may or may not result. Payment is not intended to be for the gametes themselves. Presumably all donors would agree that the payment received is not equivalent to the value of a lifelong commitment to a child the donor is not even allowed to know was created.

In balancing the interests of donor offspring and donors, legislatures must consider whether it is reasonable to hold donors accountable indefinitely for decisions that could have been made more than twenty years earlier when the donors were very young. Allowing donor offspring to access identifying information about the donor inevitably provides the donor offspring with an opportunity to initiate contact with the donor. Unlike in the adoption law context where a birthmother is permitted to change her mind about giving up a child at any point up until the birth of the child, a gamete donor loses control over the gamete well before a child is ever conceived. A gamete donor is thus denied the ability to reflect on the decision and to change his or her mind. The reasoning behind this practice is that the interest of the child and the intended parents prevail. As a policy matter, it is inconsistent to allow a birthmother and a surrogate carrier—using her egg—to change her mind, but deny this opportunity to a donor, even though it seems to be more administratively feasible. If that is the case, then why must the donor’s interest in maintaining anonymity be compromised yet again?

A hypothetical illustrates some of these concerns. Presume ten years from now Lindsay Cooper is married and raising three children. Subsequent to the enactment of a law permitting donor

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164 See generally Questions and Answers About Infertility, supra note 21, at 57.
165 Id. at 53.
166 See Interview with Sharon Eyny, supra note 52.
167 See supra Part II.A; supra note 58. Some have argued that payment to donors, in particular egg donors, is coercive and perhaps donors are not as aware as they should be about what it means to donate eggs. See Thomas J. Papadimos & Alexa T. Papadimos, The Student and the Ovum: The Lack of Autonomy and Informed Consent in Trading Genes for Tuition, 2 Reprod. Biol. Endocrinol. 56 (2004) (questioning whether egg donors are adequately informed on egg donation and whether high payments to egg donors is coercive).
168 See supra Part II.A–B.
169 See supra Part I.
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offspring to access identifying donor information, Lindsay is confronted by her donor offspring against her will. How might this affect her relationship with her children and husband? Perhaps her interest in maintaining anonymity is heightened due to the fact that other people in her life could be impacted as a result of disclosure. Further, assume she is very religious and that knowledge of her having served as an egg donor might stigmatize her in her religious community. Assume the donor offspring in this hypothetical has been raised by a wonderful and loving family, but longs to have a relationship with Lindsay. While Lindsay may welcome such a relationship, she may not—nothing requires her to embrace her donor offspring. In this situation, it seems that the donor offspring’s interest in accessing a record with Lindsay’s name, coupled with no right to thereafter form a relationship with her, should be outweighed by Lindsay’s interest in maintaining anonymity.

Allowing donor offspring to have access to identifying donor information without balancing the competing interests of donors in maintaining an anonymous status is unreasonable. In this sensitive area, it is hard to separate oneself from the obvious emotions involved, but this is not an issue that can be decided on morals alone. It is one that must be looked at through an objective and non-judgmental lens. The best way to address this intricate matter is by balancing the competing interests involved in each instance on a case-by-case basis.

3. The Intended Parents’ Interest

The third party to an IVF procedure, the intended parents, have yet another interest in the enactment of laws permitting or requiring disclosure of donor identity. Their interest should not be undermined in the balancing of the competing interests at stake because, as a matter of public policy, the State should not discourage people from having children, even in the most unconventional of ways. In the ART context, the intended parents have been through a great

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170 See generally Questions and Answers About Infertility, supra note 21, at 29 (providing issues some religions consider as to whether or not a religion approves of use of ART). Many religions do not approve of ART. See generally Deepa Kharb, Assisted Reproductive Techniques Ethical and Legal Concerns, 4 Internet J. Law, Healthcare & Ethics (2d ed. 2007).

171 This Comment does not suggest that all donors have the same interest in maintaining a confidential status. Nor does it suggest that donor offspring should not be able to contact those donors who welcome such a relationship. See infra Part V (describing donor and donor sibling registries as options available to those who welcome contact).
The intended parents have likely invested a great deal of time, energy, and money to conceive a child they planned to raise and provide for. In many cases, the intended parents went through several cycles of IVF prior to their decision to use a donor and only then decided to use donor gametes after it was determined that this was the only way to achieve a pregnancy. The intended parents' interest is unique in that it is two-sided. This party has an interest that encompasses aspects of their being individuals, as well as their being parents and wanting to do what they believe is best for their child.

As other commentators have observed, many couples that have undergone IVF have decided not to inform their children of their genetic origins, despite almost universal recommendations urging parents to disclose this information. Parents' reasons for non-disclosure differ greatly. Because there is no law mandating disclosure, couples are free to decide whether or not to share this information with their children. If laws are enacted permitting or requiring disclosure of donor identity, more families might decide not to inform their children of their genetic background. The practical implication that such laws might result in less information being given to donor offspring and even more secrecy should be considered by legislatures when analyzing this issue.

If laws permitting or requiring disclosure of donor identity are enacted, parents might have legitimate reasons for not informing their children of their genetic origin. For example, they might not think it would be in their child's best interest to know such information, especially if it could lead to their child's rejection by the donor. Another reason might be concern that a relationship between the child and donor could undermine their own relationship with their

172 See QUESTIONS AND ANSWERS ABOUT INFERTILITY, supra note 21, at 59–63.
173 See Interview with Sharon Eyny, supra note 52.
174 In a study conducted in 1994, seventy-three percent of couples reported that they would not tell their children if such children were conceived through IVF. Mary Casey Jacob, Susan C. Klock & Donald Maier, A Prospective Study of Donor Insemination Recipients: Secrecy, Privacy and Disclosure, 62 FERTILITY AND STERILITY 477, 481 (1994).
175 Some of the reasons given for why parents would not tell their children such information include: concern for the best interest of the child, to protect the child or couple from the stigma of infertility, right to privacy, and a desire to feel like a normal family. See id. at 482. In the past, doctors and IVF programs recommended that parents not tell their children about the IVF procedure. See Interview with Sharon Eyny, supra note 52.
176 It is much easier for families that have undergone IVF treatment to keep this information secret than for families that have gone through adoption proceedings as the gestational mother carries the embryo to term and delivers the baby. See Jacob, supra note 174, at 482.
child. The intended parents have an interest in keeping their family together and protecting their children. These parents would likely also object to the enactment of laws that permit or require disclosure of donor identity on the grounds stated above, that such laws over-emphasize the importance of knowledge of identifying donor information and are misleading in that they could give donor offspring a false hope that donors will welcome contact and relationships with them.

While the intended parents’ interest is different than that of the donor offspring or the donor in that it is more removed, it is nevertheless important. This interest should be considered both as its own matter and as part of the balancing of the child’s interest. In addition, the concerns addressed above should be noted as practical consequences that could result from the enactment of such laws. As a policy matter, it is appropriate to respect the intended parents’ status as the legal parents and not to exclude their interest in the balancing and treatment of these cases on an individual basis.

B. Reliance Issues and Contract Law

If donor identity disclosure laws are considered and / or enacted, such laws should only be applied prospectively. When egg donors such as Lindsay Cooper signed informed consent agreements before undergoing treatment, they were likely not advised of the possibility that laws could later be enacted permitting their donor offspring to access identifying information about them. Rather, most donors were advised of the ordinary medical risks involved in the IVF procedure, and as far as legal concerns, were advised that upon retrieval and donation of their eggs, they would lose control of the eggs and would never be entitled to know whether a child was conceived. Therefore, in signing such agreements, the donors rea-

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177 There is an assumption that laws permitting or requiring disclosure of donor identity could be applied retroactively as Tennessee and Oregon applied statutes dealing with the issue of disclosure of adoption records retroactively. *See* Chestney, *supra* note 94, at 385.

178 *See supra* Part I.


180 In the gamete donation context such an agreement might also be looked at by a court as evidence of the intent of the donor to donate gametes and not to become a parent of the resulting child. *See* KINDREGAN & MCBRIEN, *supra* note 36, at 315.

181 *See supra* Part II.A–B.
reasonably relied on the terms of the contract and reasonably believed that their identity would remain anonymous indefinitely.\textsuperscript{182}

Retroactive application of the laws would be unjust and perhaps even unconstitutional as it violates the Contracts Clause of the U.S. Constitution, which states that "[n]o State shall... pass any... law impairing the Obligation of Contracts."\textsuperscript{183} If a state enacts a law that interferes with an existing private contract, the law will be invalidated unless it serves a "significant and legitimate public purpose" and the law is "reasonably related to achieving the goal."\textsuperscript{184} In this case, because of the severity of the impairment to the donor's contract to remain anonymous, a court would have to look carefully at the nature and the purpose of the state legislation.\textsuperscript{185} In doing this, it is possible that a court would find that this issue is not one that concerns the general public and such infringing legislation is thereby improper. Although the Supreme Court has been hesitant to find violations of the Contracts Clause in recent years, an argument may still be made, especially in this context where donors clearly relied on contracts guaranteeing them an anonymous status.\textsuperscript{186}

This detrimental reliance issue is complicated because in some cases the governing contract is an informed consent agreement between the physician, donor and the intended parents.\textsuperscript{187} Physicians and hospitals should not have a duty imposed on them to inform donors that an informed consent agreement does not guarantee that the donor's identity will be forever anonymous as this would be un-

\textsuperscript{182} For purposes of this section, the author writes about egg donors and not sperm donors because as stated in Part I.B, many sperm donors do not enter into contract regarding their identity because state laws generally proclaim the husband of the recipient (of such sperm) as the legal father of the child. See Kindregan & McBrien, supra note 36, at 298. However, sperm donors might enter into agreements with the sperm bank or agency as to their confidentiality. See N.Y. State Task Force Recommendations, supra note 20, at 259. As such, similar reliance arguments can be made for the sperm donor.

\textsuperscript{183} See U.S. Const. art. I, § 10, cl. 1. This clause does not apply to the government's ability to regulate the terms of future contracts. See Ogden v. Saunders, 25 U.S. 213 (1827). Rather, it applies only if the government is interfering with the performance of an already existing contract. Id.

\textsuperscript{184} See Chemerinsky, supra note 132, at 636.


\textsuperscript{186} See Chemerinsky, supra note 132, at 637–38 (noting the Court's reluctance to find violations of the Contracts Clause, but acknowledging that Allied Structured Steel v. Spannaus, 438 U.S. 234 (1978), may one day be used to "revitalize the [C]ontracts [C]lause").

\textsuperscript{187} There could also be more than one contract (one with the physician/hospital and the donor and one with the physician/hospital and the intended parents).
Physicians and hospitals should be responsible for the medical issues related to the IVF procedure and are not qualified or licensed to provide patients with legal advice.

As demonstrated above, laws permitting or requiring disclosure of donor identity might encourage lawsuits brought by donors and intended parents, arguing that they relied on these contracts to their detriment. If courts had to determine whether to enforce such agreements, they might look to how surrogacy contracts are treated. However, state laws currently differ greatly on the issue of whether surrogate agreements are enforceable contracts. New York, the District of Columbia, Indiana, Michigan, Arizona, Utah, and North Dakota find surrogacy contracts void and unenforceable as against public policy. However, surrogacy agreements are legal in Florida, Virginia, New Hampshire, Illinois, and Nevada. Therefore, it will likely be unhelpful for courts to look to how surrogacy contracts are treated if courts must determine whether or not to enforce informed consent agreements that address donor confidentiality and courts may be hesitant to treat any medical document such as an informed consent agreement as anything more than this. This is problematic if donors are not advised of this possibility.

Even if legislators took these arguments into consideration and decided to apply the laws prospectively, there would need to be major changes in the medical field as to what role informed consent agreements would play in IVF procedures. In addition, physicians and

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Some IVF programs do recommend that donors contact an attorney before beginning the egg donation process. See Interview with Sharon Eyny, supra note 52. However, it is unlikely that donors would actually contact an attorney given the fact that most donors are young college students motivated to donate gametes for the compensation. It is unlikely they would forego half of this payment in order to speak to a lawyer about legal rights.

The counter-argument to this would be that it would not be overly burdensome for physicians/hospitals to have a general provision included in the informed consent agreement that explains that this document does not guarantee that a donor's identity will remain anonymous indefinitely. However, even this might become complicated if a physician/hospital is expected to discuss this provision with donors. As a practical matter, most physicians/hospitals would probably not want to draw attention to this fact because it might discourage donors from participating in the program.

See KINDREGAN & McBRIEN, supra note 36, at 306–09.

Id. In addition, such agreements are impliedly legal in Iowa, Alabama and West Virginia. Id. In California and Massachusetts surrogacy contracts are enforceable subject to limitations. Id. In New Jersey, Ohio, Oregon, and Pennsylvania disputes arising in relation to surrogacy agreements are decided on a case-by-case basis. Id. Finally, Washington, Louisiana and Kentucky deny the enforcement of surrogacy agreements for compensation. Id.
hospitals would need to assume more of a counseling role, which is potentially problematic. It may even become necessary for donors to consult attorneys in order to fully understand application of the laws and legal consequences. It is likely that all of this would result in a dramatic decrease in the number of people willing to be gamete donors.

C. Legal and Practical Consequences: Additional Considerations as to Why Laws Permitting or Requiring Disclosure of Donor Identity Should Not Be Enacted

Laws allowing donor offspring to access identifying information about their donor would likely have negative legal and practical consequences as well. Because such laws could potentially impact society as a whole, courts should consider the following legal and practical consequences when balancing the competing interests.

First, unlike in the adoption context, where identifying information about a child’s birthparents is commonly recorded on the child’s original birth certificate, identifying information about gamete donors is recorded on medical records. In those states that allow adult adoptees to access identifying information, the child is provided with the original birth certificate. If states were to extend this right to donor offspring and enact a prospective law on the issue, allowing such children to access medical records would create problems with respect to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which provides specific guidelines to ensure privacy of medical records. One might argue that to avoid this problem an agency or hospital could simply provide the donor offspring with the donor’s name. However, compliance with HIPAA would still be problematic, as medical records would need to be opened at various points in time by hospital administrators to get this identifying information.

Second, the possible enactment of laws permitting or requiring disclosure raises other concerns about the maintenance of donor identifying records and tracking. Generally, identifying records on

195 See supra Part III.A.
196 See Interview with Sharon Eyny, supra note 52.
197 See supra Part III.A.
199 HIPAA requires health plans, most health care providers, and health care clearinghouses to comply with its standards. Id. The privacy rule within HIPAA establishes regulations for the use and disclosure of protected health information, namely any information about health status, provision of health care, payment for health care, medical record, or payment history. Id.
donors are maintained by sperm banks, egg/sperm donation agencies, or doctors' offices if the donor donated gametes directly at the office. However, there is no law requiring donors to update their records when donors marry, change their name, relocate, or acquire new information about themselves. Some donors do contact the agency or hospital where they donated gametes if they discover some medical trait or become ill and find it necessary to document the condition for donor offspring. If laws are enacted permitting or requiring disclosure of donor identity, states will most likely be required to take further action requiring donors to update key information. If a donor changes his or her name or marries, medical providers will arguably need to modify donor information until the donor offspring reaches majority. Is it reasonable to require donors to constantly update their information or require medical providers to store such information indefinitely?

Many other questions need to be answered before such laws can be enacted. For example, who is responsible for the maintenance of these records and who is going to pay for this service? Today hundreds of independent agencies recruit egg and sperm donors for IVF procedures. In those cases, the agencies maintain the identifying records on the donors. If a hospital uses donors from an indepen-

198 If the donor participated in a donor program with the hospital, the identifying information would be in the form of medical records. See Interview with Sharon Eyny, supra note 52.


200 See id. Even when and if donors do this, there is no law requiring hospitals or agencies to contact donor offspring/intended parents to inform them of such changes.

201 It is likely that infertile couples would bear this cost. One might question whether this is reasonable given how expensive it can be to maintain and store records for indefinite periods of time. Couples undergoing IVF treatment in New York already pay around $25,000 per single donor cycle. See Interview with Sharon Eyny, supra note 52. Also, most insurance companies do not cover IVF services, so patients are left to pay some or all of the costs themselves. See KINDREGAN & McBRIEN, supra note 36, at 282 n.54.

202 There is also a donor sibling registry, which is a web database that allows donors and/or offspring to record information in hopes of connecting with each other. See The Donor Sibling Registry, http://www.donorsiblingregistry.com/ (last visited Jan. 5, 2009). If both the donor and the donor offspring provide matching information, the registry assists in making this connection possible. Id. As of Jan. 5, 2009, there were 15,294 registrants on this registry, with 9578 matches being reported between donor and donor offspring and 3937 matches between donor siblings. Id.

203 See Sforza, supra note 199, at 2. Sforza discusses the recent bankruptcy of Options National Fertility Registry (Options), an agency that matches egg donors with fertility patients in Orange County, California. Id. The agency stores documents.
dent agency, the hospital would only have records that directly relate to the medical procedure and the agency would have all other identifying information. While hospitals are medically and legally obligated to maintain their records for a certain number of years, it is not clear whether independent agencies must follow the same record-keeping requirements for donor identity information.

Third, if such laws are enacted to allow donor offspring to access identifying information about their donors, one might argue that this creates a slippery slope for other medical areas. For example, could organ donors have a right to access identifying information about the family of their donor? While this argument might seem far-fetched, a person who has undergone heart surgery and has received a heart from someone might have a similar longing to access identifying information about the person whose heart is keeping him alive. In the IVF context, it is possible that new medical techniques will develop allowing physicians to create life in new and fascinating ways, which many people would argue is beneficial for our society. The enactment of laws allowing donor offspring to access identifying information about donors may have the potential to hinder medical science and prevent the development of new reproductive technologies.

As a practical matter, laws permitting or requiring disclosure of identifying donor information would undoubtedly have a dramatic effect on the IVF field of medicine, in particular on the supply of donated gametes. Egg donors and sperm donors are already in high

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with egg donor names and addresses in eleven large storage cabinets. Id. Due to the bankruptcy, there is a risk that these files will all be discarded and with that the chances of providing many donor offspring identifying information about their donor is lost. Id. at 4. The article reports that this would affect thousands of eggs and hundreds of embryos produced by Options donors. Id. The article goes on to question whether such records should be preserved given the fact that they contain such highly sensitive information. Id. However, because there are no laws requiring maintenance of such records, it is likely that the files will be thrown out. Id. See id. This is problematic because contracts might have been signed with the donor and the agency as to the confidentiality of such records. In this case, the same contractual problems and tracking issues discussed might arise. See id. at 3.

Access to organ donor identity information is beyond the scope of this Comment. However, the author believes that it is unlikely that any court or legislature would find that an organ donee has a right to access identifying information about the organ donor. As an example, the United Kingdom experienced a huge decline in the supply of gamete donors after laws permitting disclosure of donor identity were passed. See REVOLUTION IN PARENTHOOD, supra note 123, at 34 n.9 (noting that "countless articles reported that banning donor anonymity had caused a sudden, drastic drop in men willing to donate sperm in Britain").
demand due to the fact that so many couples are using infertility pro-
cedures to conceive children. Such laws could also potentially harm other fields of medicine, such as stem cell research. Currently, many embryos are donated to hospitals for stem cell research. If laws permitting or requiring disclosure of donor identity are enacted, fewer donors may agree to donate gametes. This may have a spillover effect because there will be fewer embryos produced, some of which could have been used for stem cell research purposes.

V. RECOMMENDATIONS FOR ACTION WITHOUT ENACTMENT OF DISCLOSURE LAWS

This Comment does not suggest that donors should not be permitted to establish relationships with donor offspring should they have a mutual desire to do so. Rather, it posits that such relationships should not be mandated. Today, many donation programs have donor registries, which allow a donor to declare that they wish to be contacted by their donor offspring. In turn, donor offspring have the option of making contact. In addition, there are several donor sibling registries where donor offspring can try and connect with others that may be related to them without contacting the donor. Also, in all circumstances a donor offspring is allowed to know general information about his or her heritage and medical history, if necessary. This shows that there are some compromises available to aid those donor offspring who have an interest in learning about their identity without enacting laws permitting or requiring disclosure of donor identity.

208 See supra Part II; see also Sforza, supra note 199, at 2 (establishing that more than 100,000 children in our country were created from egg donation).


211 Id.


213 See supra Part IV.
The parties involved in each IVF procedure have unique interests that should be delicately balanced against each other in determining whether the disclosure of identifying donor information is appropriate. Legislators should not enact all-encompassing laws permitting or requiring disclosure of donor identity. Rather, legislators should evaluate the known competing interests and formulate a balancing test and standards courts can apply to individual cases. In this regard, legislators may look to adoption law and the "good cause" standard as a starting point in identifying some relevant concerns. As previously noted, because of the extraordinary nature of this issue and the lack of a great amount of precedent in this area of the law, it would be more appropriate for courts and legislators to address requests for information on a case-by-case basis.

VI. CONCLUSION

As infertility success rates continue to increase due to the use of new advanced medical technologies, more and more donor offspring are being brought into the world. Such "miracle children" serve as an example of how reproductive technology has enriched the lives of many infertile couples, allowing them to create and raise families. In assessing whether or not to enact laws on gamete donor disclosure, state legislators must recognize the need for a careful balance between the competing interests of the donor, the child and the intended parents. If the State finds it necessary to act, it should thoroughly examine each party's interests and devise alternative solutions to achieving what is best for the child through means other than enacting laws that generally provide donor offspring with identifying donor information.

The State should continue to allow donor offspring to access information about their genetic heritage and medical information if necessary, but should not extend this right to knowledge of identifying information about donors. The State should refrain from fulfilling a child's perhaps misconceived short-term wish to access identifying information about his or her donor and should instead focus on what is best for all parties, our society in general and the future of medical science.

214 See supra Part III.A n.100.