ARTICLES

ABOLISHING ANONYMITY: A RIGHTS-BASED APPROACH TO EVALUATING ANONYMOUS SPERM DONATION

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I. Introduction

As many as 60,000 children born in the United States each year are conceived using donor sperm.[1] Despite its popularity, the sperm selling industry remains largely unregulated; as one person remarked, "[w]e have more rules that go into place when you buy a used car than when you buy sperm."[2] A requirement that donors provide identifying information to be made available for their biological children or the parents of those children is one such markedly absent regulation.[3] As other countries increasingly move toward abolishing anonymity in gamete donation, the United States shows no indication that it will follow suit.

It is unclear why the United States and its sperm selling industry have not banned the practice of anonymous sperm donation. Some critics believe that the United States' sperm selling industry has an interest in maintaining donor anonymity so that it can escape accountability for the products that it sells.[4] Clinics sell sperm that they advertise as being from a donor with admirable qualities.

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[1] Jacqueline Mroz, *From One Sperm Donor, 150 Offspring*, N.Y. Times, Sept. 5, 2011, at D1, *available at* http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all .

[2] *Id.*; *see also* Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. Times, Jan. 20, 2006, at A1, *available at* http://www.nytimes.com/2006/01/20/national/20donor.html?pagewanted=all&_r=0 (claiming that "[w]hile the Food and Drug Administration requires donor agencies to screen for several communicable diseases, including H.I.V. and Creutzfeldt-Jakob disease, it has allowed the fertility industry to set its own rules regarding just about everything else.") (hereinafter *Are You My Sperm Donor?*).

[3] Mroz, *supra* note 2.

[4] Harmon, *Are You My Sperm Donor?*, *supra* note 3.

Keeping the donor anonymous guarantees that no one can verify whether he actually has those traits.[5] Even if the industry does not have such nefarious intentions, anonymity does give the industry complete control over donor information, thus making its transactions "more efficient and less work."[6] Other scholars argue that fears of "legal pitfalls" drive the industry to cling to donor anonymity.[7] Others still blame the doctors and claim that doctors' aversion to recordkeeping helps to perpetuate anonymity.[8]

No matter whose interests are served by the perpetuation of this system of anonymity, it is time that we reevaluate whether shielding sperm donors' identities is an ethically defensible policy, especially as other countries undertake similar projects and determine that the practice must cease. In this paper, I evaluate whether such a practice is ethically defensible, and make recommendations for change in the industry.

This paper proceeds in four parts. In Section II, I outline the current legal landscape surrounding donor anonymity in the United States to demonstrate that the current system provides donor-conceived children with no avenue through which to pursue the identity of the donors of their genetic material. I proceed to contrast the United States' system with those of other countries. In Section III, I take a rights-based approach to the issue of anonymity to evaluate whether the industry's harms outweighs its benefits. In this section, I survey the rights of the three most interested parties: the donor-conceived child, the intended parents of the child, and the sperm donor himself. I proceed to weigh these rights and determine that the harm done to the donor-conceived child outweighs any interests that donors and intended parents may have. In Section IV, I address counterarguments to this rights-based approach, and I show why this approach is the best model by which to measure the ethicality of the current system. Finally, in Section V, I conclude that anonymous sperm donation is an unethical practice and, as a result, should be banned by law.

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[5] *Id.*

[6] *Id.*

[7] George J. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1, 12 (1980).

[8] Hollace S. W. Swanson, *Donor Anonymity in Artificial Insemination: Is It Still Necessary?*, 27 COLUM. J. L. & SOC. PROBS. 151, 154 (1993).

II. Donor Anonymity in the United States

Sperm donors in the United States have been shielded by a wall of anonymity for over a century.[9] Until recently, many children conceived with donor sperm were raised to believe they were the biological children of their parents[10] and consequently lacked knowledge that a missing piece of their biological history existed behind this legally impenetrable wall. In recent years, however, parents have begun to inform their children of the nature of their conception, and these donor-conceived children have grown into adults who often wish to locate their anonymous donors.[11] Attempts to obtain information protected behind the wall of anonymity "are usually hopeless, and heartbreaking."[12] And the American legal system offers no respite for sperm-donor offspring. In fact, United States law shields donor identities from their biological children, leaving donor-conceived children with no legal vehicle through which to obtain their donors' identities.

At present, there are few regulations restricting the United States' sperm donation industry.[13] Donors can provide enough sperm to father "hundreds of children," and required testing of sperm is "minimal."[14] Most importantly, there currently exist no overarching law or laws requiring disclosure of any information from sperm donors or their recipients.[15] Under the current regime, the law does not provide donor-conceived offspring with a means to obtain their donors' identities.

While many courts have considered questions of parentage of donor-conceived children when both the donor and recipient are known, courts have been largely silent regarding donor anonymity. Courts have determined that sperm donors who are married to their sperm recipients are the fathers of the donor-conceived children[16] and that husbands married to women who have conceived

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[9] *Id.*; David Plotz, *Who's Your Daddy?*, N.Y. Times, May 19, 2005, at A27, *available at* http://www.nytimes.com/2005/05/19/opinion/19plotz.html?pagewanted=print.

[10] Plotz, *supra* note 10.

[11] *Id.*

[12] *Id.*

[13] Naomi R. Cahn, *End the Anonymity*, N.Y. Times, September 13, 2011, http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/sperm-donors-should-not-be-anonymous.

[14] *Id.*

[15] *Id.*

[16] Okoli v. Okoli, 963 N.E.2d 730 (Mass. App. Ct. 2010); Breit v. Mason, 718 S.E.2d 482 (Va. Ct. App. 2011).

using third party donor sperm are fathers of the resulting child.[17] Parties have litigated the issue of whether non-biologically-related, same-sex parents of a child conceived through artificial insemination have parental rights and obligations.[18] And courts have held that donors have no parental rights or obligations to their biological children if the donor agreement explicitly absolves them of such.[19] However, I have found only one instance in which a court addresses whether a sperm donor has the right to remain anonymous, and that court did not settle the issue.[20] This lack of guidance does not leave donor-conceived children with a clear method by which to seek the identity of their donors through the court system.

Despite the lack of guidance from the courts and the legislature, there has been some recent movement in the United States to deconstruct the wall of anonymity. The state of Washington recently enacted legislation allowing donor-conceived children to access the names of their donors when they reach the age of eighteen.[21] However, this legislation allows donors to opt out of the provision that would allow donor-conceived children to gain access to their identity.[22] Thus, if donors so choose, they can continue to remain anonymous so long as they take affirmative steps to hide their identities.

Another attempt to limit anonymous sperm donation in the United States has been fueled not by concern for the child's best interests, but rather, by a (perhaps misguided) public health concern. The FDA has recently banned sexually active gay men from donating sperm anonymously, arguing that such donation risks transmission of HIV to female sperm recipients.[23] While imposing

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[17] Brown v. Brown, 125 S.W.3d 840 (Ark. Ct. App. 2003).

[18] Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011); Debi R.-C. v. Danica P., 32 Misc. 3d 1244(A), 2011 WL 4357496 (N.Y. Fam. Ct. July 28, 2011); Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007).

[19] Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482 (Ct. App. 2005); Brown v. Gadson, 654 S.E.2d 179 (Ga. Ct. App. 2007); *In re* Mullen, 953 N.E.2d 302 (Ohio 2011); *In re* H.C.S., 219 S.W. 3d 33 (Tex. App. 2006).

[20] Doe v. XYZ Co., Inc., 914 N.E.2d 117 (Mass. App. Ct. 2009) (stating that a donor's willingness to be identified may overcome a contract for anonymity).

[21] Bonnie Rochman, *Where Do (Some) Babies Come From? In Washington, a New Law Bans Anonymous Sperm and Egg Donors*, Time, July 22, 2011, http://healthland.time.com/2011/07/22/where-do-some-babies-come-from-in-washington-a-new-law-bans-anonymous-sperm-and-egg-donors/.

[22] *Id*.

[23] Michael Allen, *FDA to Ban Gay Men from Being Anonymous Sperm Donors*, Opposing Views, Aug. 24, 2012, http://www.opposingviews.com/i/health/conditions/aidshiv/fda-ban-gay-men-being-anonymous-sperm-donors. Such an argument appears to be grounded in the FDA's misconception that gay men

a small limitation on who can donate anonymously, this ban does not do much to reveal anonymous donors to their biological children. Moreover, it is not fueled by a desire to give donor-conceived children the ability to obtain the identity of their donors, but rather, by stigmatization of gay men as being carriers of disease,[24] which is problematic in and of itself.

While the United States has done little to tear down the wall of anonymity either through the courts or the legislature, foreign jurisdictions have increasingly demonstrated an unwillingness to allow donors to hide indefinitely from children conceived with their sperm.[25] In a ruling just last year, British Columbia banned anonymity for sperm and egg donors.[26] The judge hearing the case reasoned "anonymity is not in the child's best interests," and the province's representative for children and youth remarked that the decision "suggests the rights of the child and the right to have health information and other things that are important to their well-being as they grow and become adults trumps the privacy interest of the system behind the anonymous sperm-donor program."[27] In Australia, donor-conceived children born since 1998 have had the right to information regarding the identities of their donor parents.[28] Australia's Parliament recently made a recommendation to amend the law to release the identity of sperm donors to children conceived with donor sperm prior to 1998; however, Australia has asked for an additional six months to decide whether and how best to implement

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are more likely to carry HIV. As Allen writes, "FDA officials say that gay men are at a higher risk for getting HIV, but critics of the new policy say that the agency would be better served by screening procedures that identify high-risk behaviors in all donors." *Id.*

[24] *Id.*

[25] Sunny Dhillon, *Landmark Ruling Ends Donor Anonymity in B.C.*, Globe and Mail (Can.), May 20, 2011, at A6, *available at* http://www.theglobeandmail.com/news/british-columbia/landmark-ruling-ends-sperm-and-egg-donor-anonymity-in-bc/article546010/ (stating that "11 jurisdictions had banned anonymous gamete donation – seven in Europe, three in Australia, one in New Zealand. Sweden was the first in 1985.").

[26] Pratten v. British Columbia, 2011 BCSC 656 (Can. B.C.), *available at* http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf (emphasis omitted).

[27] *Id.*; Dhillon, *supra* note 26.

[28] Susie O'Brien, *Donor-Conceived Kids Deserve Truth about Who Their Biological Parents Are*, Herald Sun (Austl.), Nov. 20, 2012, http://www.heraldsun.com.au/opinion/donor-conceived-kids-deserve-truth-about-who-their-biological-parents-are/story-e6frfhqf-1226519829416.

this recommendation.[29] And in Britain, anonymity for sperm donors ended in 2005.[30]

The United States has lagged behind the international movement away from donor anonymity. Few regulations on the donor market exist even to this day, and children are not provided with a legal vehicle through which they can obtain the identity of their anonymous sperm donor. It remains unclear when and if the United States will implement such legislation.

III. Tearing Down the Wall of Donor Anonymity: A Rights-Based Approach

To determine whether sperm donor anonymity is an ethical policy, the rights of the interested parties must be weighed against each other. Only by determining who is harmed and who benefits, and to what degree, by the policy at issue can we determine if it is just. Such balancing requires a careful exegesis of the rights of the parties affected by the policy. In this section, I articulate the interests of donor-conceived children, intended parents, and donor parents to determine whose interests should prevail.

A. *Rights of the Child*

1. The Right to Medical Information

Children conceived from anonymous donor sperm might lack access to medical information that has the potential to save their lives or to better inform decisions regarding their care. This dearth of medical information[31] is causing very real problems for many

[29] Kate Hagan, *More Time Needed for Egg, Sperm Donor Decision*, The Age (Austl.), Oct. 12, 2012, http://www.theage.com.au/victoria/more-time-needed-for-egg-sperm-donor-decision-20121011-27fp8.html.

[30] *Sperm Donor Anonymity Ends*, BBC News, Mar. 31, 2005, 11:03 PM, http://news.bbc.co.uk/2/hi/health/4397249.stm.

[31] This problem of no medical information is also apparent in the similar context of closed adoption. Some progress was made after adoptees and their parents rallied for access to more medical information. Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 Wis. J.L. Gender & Soc'y 73, 91 (2010). As a result of the push for more information, open adoption is now the norm. *Id*. Many states have enacted "adoption with contact" statutes that allow adoptive and birth families to enter into an agreement for visitation or contact later in life. *Id*. at 93. Other states have dealt with the issue of information dissemination in other ways, such as allowing sealed records to be opened under specific conditions and implementing registries that are either unrestricted or require mutual consent. Shelly Ann Kamei, *Partitioning*

children of anonymous sperm donation, and people are complaining "that they are at the mercy of the fertility industry for important information – for instance, that a donor developed diabetes in later life – that might signal health risks."[32]

One donor-conceived woman found herself sapped of all energy and unable to lift her legs a few days after giving birth.[33] Thinking it was normal over-exertion, she remained mostly unconcerned until her condition took a turn for the worse.[34] The next morning the woman had to undergo an emergency surgery; she was hemorrhaging as the result of a blood clot in her uterus.[35] The article states that doctors may have been able to prevent her from clotting or hemorrhaging had they known her biological medical history.[36]

In another case, a donor-conceived woman was diagnosed with bowel cancer and her genetic history may hold the key to her diagnosis or care.[37] She desperately wants access to her medical history as her prognosis worsens, speculating that this medical information may hold some critical fact about her condition.[38] Moreover, she wishes to warn any potential half-siblings she has to undergo frequent testing for bowel cancer so that they can avoid (or at the very least, minimize the likelihood of) her fate.[39]

Donor-conceived people have a right to know their medical histories. Knowledge of one's medical history allows one to preemptively seek testing or alter behavior to avoid entirely or to

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Paternity: The German Approach to a Disjuncture Between Genetic and Legal Paternity with Implications for American Courts, 11 San Diego Int'l L.J. 509, 551 (2010). While more steps have been taken to increase access to medical records in the adoption context than in the sperm donation context, most jurisdictions have rules barring adoptees from obtaining their original birth certificates, and many will only provide information offered at (or prior to) the time of the adoption. Jessica R. Caterina, *Glorious Bastards: The Legal and Civil Birthright of Adoptees to Access Their Medical Records in Search of Genetic Identity*, 61 Syracuse L. Rev. 145, 154 (2010).

[32] Harmon, *Are You My Sperm Donor?*, *supra* note 3.

[33] Emily Shenk, *Some Donor-Conceived Children Now Seeking Answers*, Daily Herald (Chicago, Ill.), Oct. 10, 2011, http://www.dailyherald.com/article/20111010/entlife/710109995/.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] Hagan, *supra* note 30; Sarah Dingle, *Government Delay for Donor Conceived People "Appalling"*, World Today (Austl.), Oct. 15, 2012, http://www.abc.net.au/worldtoday/content/2012/s3610686.htm. While the woman in this case is Australian, the problems are the same in the United States where records are kept sealed despite children's interests in knowing their medical information.

[38] Hagan, *supra* note 30.

[39] *Id*.

put off conditions to which one might be genetically predisposed.[40] Moreover, as noted in the stories of the women above, with proper medical information doctors may be able to prevent certain medical emergencies from occurring. The ability to monitor, prolong, and maintain good health should be provided to people whenever possible, particularly when the burden to disseminate such information is low, as it is here. Additionally, such information may be necessary for donor conceived children to give true informed consent to medical procedures, as risks from such procedures may change depending on their genetic makeup. Therefore, these children have a right to lift donor anonymity so that they may learn their medical histories as well as learn of any changes to such histories.

2. The Right to Identity

Some donor-conceived children express extreme and pervasive distress over not knowing the identity of their sperm donors.[41] Colton Wooten, a donor-conceived person, writes,

> I call myself an only child, but I could very well be one of many siblings. I could even be predisposed to some potentially devastating disease. Because I do not know what my father looks like, I could never recognize him in a crowd of people. I am sometimes overwhelmed by the infinite possibilities, by the reality that my father could be anywhere: in the neighboring lane of traffic on a Friday during rush hour, behind me in line at the bank or the pharmacy, or even changing the oil in my car after many weeks of mechanical neglect.
>
> I am sometimes at such a petrifying loss for words or emotions that make sense that I can only feel astonished by the fact that he could be anyone.[42]

Another donor-conceived child writes, "I cannot fathom going through life never knowing where I have come from, my ancestry and my identity."[43] Donor-conceived children have a right to iden-

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[40] *Id*.

[41] Harmon, *Are You My Sperm Donor?*, *supra* note 3 (stating that "[m]any children born from donors are haunted by questions of identity, for which they blame companies that require anonymity as a condition of buying their sperm and eggs.").

[42] Colton Wooten, *A Father's Day Plea to Sperm Donors*, N.Y. Times, June 18, 2011, at 9, *available at* http://www.nytimes.com/2011/06/19/opinion/19wooten.html.

[43] Selma Milovanovic, *Legal Bid to Reveal Donor Father*, The Age (Austl.),

tifying information that could help ameliorate the void they may feel.[44]

Some donor-conceived children report multiple manifestations of psychological harm. One donor-conceived child expressed experiencing "'anxiety and stress' about her inability to learn anything about her biological father."[45] Another stated that "she had suffered mentally, emotionally and physically from being denied knowledge about her family."[46] Donor-conceived children are more likely to feel isolated from their families, and "fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency, and substance abuse." They are "twice as likely as those from intact marriages to get divorced."[47] The lack of access to clear identifying information about one's biological history appears to have the ability to cause unique psychological harm to donor-conceived children.

Some donor-conceived people report that lack of access to their identity makes them feel less than human – like second-class citizens. One says, "I cannot begin to describe how dehumanizing and powerless I am to know that the name and details about my biological father and my entire paternal family sit somewhere in a filing cabinet . . . with no means to access it . . . Information about my own family, my roots, my identity, I am told I have no right to know."[48] Another remarks, "That records could be destroyed, denying her half her biological heritage and medical information, made her feel like a 'second-class citizen [. . .]'"[49]

When donor-conceived children are able to locate pieces of their biological identity, such as finding a half-sibling, it "can feel

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Jan. 27, 2011, http://www.theage.com.au/victoria/legal-bid-to-reveal-donor-father-20110126-1a5el.html.

[44] *See* Convention on the Rights of the Child, G.A. Res. 44/25, art. 7, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (stating that a child has "the right to know and be cared for by his or her parents.")

[45] Keith Fraser, *B.C. Law Hiding Sperm Donors 'Discriminatory'; Judge Rules; Law Releases Information to Adopted Children*, National Post (Can.), May 20, 2011, at A8.

[46] Milovanovic, *supra* note 44.

[47] Michael J. McManus, *Anonymous Father's Day*, Coldwater Daily Reporter (Mich.), June 23, 2012, http://www.thedailyreporter.com/article/20120625/NEWS/306259967.

[48] Angela Shanahan, *Murkey Business of Donor Conception is Having a Brutal Effect on the Offspring*, Australian (Austl.), Feb, 19, 2011, http://www.theaustralian.com.au/opinion/murky-business-of-donor-conception-is-having-a-brutal-effect-on-the-offspring/story-e6frg6zo-1226008097867.

[49] Fraser, *supra* note 46.

like coming home."[50] One donor-conceived child writes, "I hate when people that use D.I. [donor insemination] say that biology doesn't matter [. . .] [b]ecause if it really didn't matter to them, then why would they use D.I. at all? They could just adopt or something and help out kids in need."[51] In sum, access to information about biology seems capable of curing, or at least starting to heal, the harm caused by anonymity.

These stories demonstrate that at least some children conceived with sperm from an anonymous donor have a pull, or inexplicable desire, to be in touch with the other half of their genetic identity. The desire for that information can be overwhelming, and the knowledge that it might never come debilitating. And this desire for knowledge is hardly rare: in a survey of children conceived with anonymous donor sperm, 82% said they wished to be in contact with their biological father.[52] The harm done to these people by barring them from access to sought-after identifying information is undeniable. Surely entitlement to information about one's self, and consequently, entitlement to avoid feelings of second-class citizenship and dehumanization, is not based purely on the luck of how and by whom one is conceived.[53] Therefore, children have a right to identifying information about their donor father. The difference between a child born to their genetic parents and a child born to commissioning parents should not result in a difference of rights.

3. The Right to Citizenship

Children of anonymous sperm donors may be left without United States citizenship if information about the citizenship of their gamete donors remains anonymous. Maya and Shira Lavi were born in Israel to an American mother who had used donor gametes to conceive.[54] Because their mother was unable to prove

[50] Amy Harmon, *Hello, I'm Your Sister. Our Father is Donor 150*, N.Y. Times, Nov. 20, 2005, at 11, *available at* http://www.nytimes.com/2005/11/20/national/20siblings.html?pagewanted=all&_r=1& (hereinafter *Hello, I'm Your Sister*).

[51] *Id.*

[52] D. R. Beeson et al., *Offspring Searching for Their Sperm Donors: How Family Type Shapes the Process*, 26 Human Reprod. 2415, 2419 (2011).

[53] See discussion *infra* Part III.B., about how the right to procreate should not be left up to biological luck. The same analysis applies in this case. If there is a very real interest that only some people are able to obtain based solely on their biology, and there is a way to rectify this to create similar access to those rights for all people, we should seek to enable all people to have access to their rights.

[54] Interview by Matt Lauer with Ellie Lavi (Apr. 17, 2012).

that either of the girls' gamete donors were U.S. citizens, the girls were denied U.S. citizenship.[55] It appears that for families living abroad, information regarding the citizenship of sperm donors may be crucial to guarantee that children born from anonymously donated gametes receive citizenship. Children born to United States citizens have a right to be granted citizenship. Thus, children have a right to information that would enable their parents to prove their citizenship to government officials.

4. The Right to Avoid Incest

Donor-conceived people have an interest in knowing the identity of their donor-father so that they may avoid illegal incestuous relationships, either with potential siblings or half-siblings, or with their biological father himself.[56] In the United States, there is no limit on the number of kids that one donor may father.[57] Sperm donors have been known to father as many as 70 to 150 children.[58] It seems plausible, if not mathematically probable, that some people would end up in an incestuous relationship with a half or full sibling if they did not know the identity of that sibling.[59] People have the right to know the identity of their gamete donors to avoid unintentionally committing a crime and acting against social mores by engaging in such relationships.

B. *Rights of the Intended Parents*

Intended parents have an interest in procreation. Anonymous sperm donation is a means through which intended parents can pursue that interest. Thus, parents have an interest in anonymous sperm donation as it allows them to realize their right to procreate.

The right to procreate has long been recognized as a fundamental right.[60] The right to procreate is seen by some to be so fundamental to human existence that it should not be limited even in

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[55] *Id*.

[56] Swanson, *supra* note 9, at 177.

[57] *Lax Sperm Donor Laws in U.S., Canada Spawn Debate; Disease, Incest Risks Caused by Repeated Use From Same Source*, Vancouver Sun, Oct. 12, 2011, at B5.

[58] *Id.*

[59] Swanson, *supra* note 9.

[60] *See, e.g.,* Skinner v. Oklahoma *ex. rel.* Williamson, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

instances where other rights may permissibly be abridged, such as in cases of incarceration.[61] This fundamental right to procreate has been interpreted to include both the physical right to reproduce and the right to rear children.[62] The physical right to reproduce, it has been argued, extends to create a separate woman's right to pregnancy and childbirth, as these experiences provide "enormous satisfaction and significance."[63] The right to childrearing, even when the child is not biologically related to one or both of his or her parents, exists because "[t]o deny someone who is capable of parenting the opportunity to rear a child is to deny him an experience that may be central to his personal identity and his conception of a meaningful life."[64]

These rights to childrearing and the physical experience of gestation naturally give rise to a right to use assisted reproductive technologies, such as anonymous sperm donation, to resolve fertility complications.[65] A fertile woman with an infertile husband has the right to become pregnant and bear a child, even if this requires the use of assisted reproductive technology,[66] such as anonymous sperm donation. Because an infertile couple's rights to rear children are identical to those of a fertile couple, assisted reproductive technology may be used so that the infertile couple can exercise its rights to rear children in the same way as a fertile couple.[67] As one scholar argues, "[A] legal distinction based on the natural lottery of physical equipment is not reasonable."[68] Fulfillment of rights should not be left up to luck, so couples (or singles) should be able to utilize anonymous sperm donation to resolve fertility complications and place them on equal ground with their fertile counterparts.

Applying this right specifically to the case of anonymous sperm donation, ending access to anonymously donated sperm abridges the fundamental right to procreate. Illegalizing anonymity has historically led to a drastic drop in the availability of sperm.

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[61] *See, e.g.,* Greg Krikorian, *Judges Back Procreation by Inmates*, L.A. TIMES, Sept. 6, 2001, http://articles.latimes.com/2001/sep/06/news/mn-42665.; *but c.f.* Joseph J. Bozzuti, *Judicial Birth Control? The Ninth Circuit's Examination of the Fundamental Right to Procreate in* Gerber v. Hickman, 77 ST. JOHNS L. REV. 625 (2003).

[62] John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth,* 69 VA. L. REV. 405, 410 (1983).

[63] *Id.* at 409.

[64] *Id.* at 410.

[65] *Id.* at 428.

[66] *Id.*

[67] *Id.*

[68] *Id.*

In Australia, where anonymous donation has been eliminated, there are only three available sperm donors at the largest fertility clinic.[69] Five years after anonymous sperm donation was banned in Scotland, there are just 26 sperm donors available in the country.[70] Britain also demonstrates a severe shortage of sperm available for donation.[71] Thus, intended parents have an interest in retaining anonymity in sperm donation because ending anonymity, at least in some other countries, has lead to a precipitous drop in availability of donor sperm. Because couples have a right to procreate using sperm donation, activity that limits the availability of donor sperm, which could in turn keep couples from procreation, infringes upon this fundamental right.

However, rights are not absolute. Rights may properly be limited where exercise of a right harms others.[72] According to the harm principle as articulated by J.S. Mill, rights may be limited "in order not to harm others and less impede someone else from achieving their own ends in life."[73] We as a society do sometimes limit reproductive rights when we believe that they harm others individually, or as a whole, such as when their exercise is against public policy. For instance, we criminalize the selling of babies (and seek to criminalize close cases where transactions involving reproduction come uncomfortably close to baby selling) either because we see this as a form of slavery (which infringes a person's right to be free) or because we believe that people should not be bought and sold.[74] Therefore, the right to procreate is not absolute, and it can properly be limited when it harms others, either individually or collectively.

Anonymous sperm donation is not a proper exercise of procreative rights because it may harm resulting children, even if these

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[69] Natalie Robertson, *Donors Pool Hits a Low*, Eastern Courier Messenger (Austl.), Oct. 5, 2011, at 27.

[70] Christine Lavelle, *Scotland Has Just 26 Sperm Donors; Loss of Anonymity Blamed*, Daily Rec. (Scot.), Nov. 20, 2010, at 31.

[71] Denise Grady, *Shortage of Sperm Donors in Britain Prompts Calls for Change*, N.Y. Times, Nov. 12, 2008, at A10, *available at* http://www.nytimes.com/2008/11/12/health/12sperm.html?_r=0.

[72] Imer B. Flores, Law, Liberty, and the Rule of Law (in a Constitutional Democracy) 91 (2013).

[73] *Id.* at 92.

[74] Juliet Fletcher, *Controversial Egg Donation Law Sits Before Christie*, Times (Trenton, N.J.), June 25, 2012, at A4, *available at* http://www.northjersey.com/news/160164475_Gestational_carrier_bill_gets_to_Christie.html; Katie Brandenburg, *Photojournalist Honored for 'Black Market Babies,'* Daily Independent (Ashland, Ky.), Dec. 12, 2011, http://dailyindependent.com/local/x891767404/Photojournalist-honored-for-Black-Market-Babies/print.

children's parents never intend that to be the case.[75] Anonymous sperm donation has the potential to cause psychological and physical harm, leave a child barred from half of his or her identity, deny a child citizenship, and lead to unintended consequences, such as incest. Because anonymous sperm donation may be a technique to produce children that is fundamentally harmful to the children that it creates, it is not a proper exercise of procreative rights. The worry that anonymity may limit the right to procreate by limiting access to donor sperm is also not necessarily true, and "the benefits [of a ban on anonymity] far outweigh the costs."[76]

Anonymous sperm donation may not be necessary for people to procreate, and the nature of the sperm industry has morphed into one that provides the means for parents to pick and choose desirable traits for their children, rather than to procreate for procreation's sake. In recent years, the business of anonymous sperm donation has been referred to as "an arms race."[77] Rather than seeking any sperm that would allow them to procreate, some women seek very specific sperm that may give their child an advantage in life, such as dashing good looks, or brilliance.[78] Because donor files must be pristine and appealing to be marketable, banks are only accepting about 1 to 2% of donor applicants.[79] One Los Angeles sperm bank recently advertised a service that allows potential parents to select sperm from donors who resemble celebrities, such as Johnny Depp and Justin Timberlake.[80] Since offering this service, traffic to the clinic's website has increased 400%.[81] In other countries, the sperm donation service has gone a step further and websites have been created to provide potential parents with actual celebrity sperm.[82] While one may have a right to procreate,

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[75] *See* Amy Harmon, *Are You My Sperm Donor?*, *supra* note 3 (stating that "some critics are pondering the larger question of whether anybody, having already decided that ones children will never know where they came from, has the right to bring them into the world.").

[76] Naomi Cahn & Wendy Kramer, *What the Kids Really Want,* BioNews 619 (Aug. 8, 2011), http://www.bionews.org.uk/page_97447.asp?hlight=Wendy+Kramer.

[77] Gina Kolata, *Psst! Ask for Donor 1913*, N.Y. Times, Feb. 18, 2007, http://www.nytimes.com/2007/02/18/weekinreview/18kolata.ART.html?scp=1&sq=Gina%20Kolata,%20Psst!%20%20Ask%20for%20Donor%201913&st=cse&_r=0.

[78] *Id.*

[79] *Id.*

[80] Anonymous, *news & blues*, Syracuse New Times, Dec. 1, 2010, at 4.

[81] *Id.*

[82] *New Sperm Donor Service Offers Celeb Crazy Women Choice of A-Lister Baby Daddys*, Asian News International, Oct. 17, 2012, *available at* 2012

one does not have a fundamental right to use an industry to attempt to create a perfect baby.

Moreover, anonymous sperm donation harms parents themselves. It is heartbreaking to watch one's child undergo any sort of emotional distress. By opting for anonymous sperm donation, a parent may be forced to watch his or her child search for something that is nearly impossible to find. As a sperm recipient who also happens to be an egg donor stated, "When I came home from that first meeting with [my biological children], I cried knowing that I could never give [my son] what I had given to them. . . . I do believe that it is fundamental to human beings to know where they came from."[83] When parents must watch their children undergo psychological or physical pain and are helpless to correct it, particularly when it is the (unintentional) result of one of their actions, they, too, suffer harm.

Still, some might argue that the right to procreate using anonymous sperm donation is so fundamental that it overcomes the myriad harms it may cause resulting children. When balancing the rights of the child and intended parents, however, a huge distinction in the positions of the two interested parties comes into play. In an anonymous sperm donation scenario, parents intentionally exercise their rights in a way that may infringe upon the rights of the resulting child to be free from harm.

In cases where parents create a child who will not be parented by its biological parents, the parents act in a way that may cause harm to the resulting child. This harm is most likely never intended, and most parents probably conceive children with the intention of bestowing the best life possible upon them, but these facts do not shield the resulting child from the potential consequences of being a child of an anonymous donor. As one scholar notes, "[t]hat this child cannot be parented by one or both of its biological parents is not a disadvantage that its custodial parents volunteer to mitigate; it was a desideratum that guided them in creating the child, to begin with." He proceeds by stating, "[r]ather than adopt a child whose ties to its biological parents had been ruptured after conception, they intentionally created one for whom those ties were ruptured antecedently."[84] The scholar notes that, "[s]urely, we don't believe that parents are entitled to make themselves slightly better off in

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WLNR 22001047.

[83] Rachel Porter, *How (with a little help from the Mail) I Finally Found the Twins I'd Given Life with Donated Eggs*, Daily Mail (U.K.), Sept. 3, 2011, *available at* 2011 WLNR 17487458.

[84] J. David Velleman, *Family History*, 34 Phil. Papers 357, 361 (2005).

some fundamental dimension by impoverishing their children in the same dimension."[85]

In cases of anonymous sperm donation, that an intentional act on behalf of the parents results in (most likely unintentional) harm to the child is even more acute: parents intentionally choose to use sperm, and that that use of sperm may sever the child's ties to his or her biological parents and sever the child from half of his or her identity. While this is not to say that parents would ever intend a negative result for their child, the consequences of their actions may harm their child just the same. Conversely, potential children who have interests in knowing their identities do not intend to deprive their parents of their right to procreate; in fact, there remain many other methods by which people can become parents other than anonymous sperm donation. The mere fact that anonymous sperm donation may provide easier and more plentiful access to sperm (and thus might give potential parents an advantage with regard to time, money, or convenience when they seek to exercise their right to procreate) should not justify depriving an entire class of children of information that may be crucial to their identity and well-being. Thus, on balance, a potential child's right to the identity of his sperm donor outweighs a potential parent's right to make an intentional, procreative decision that necessarily denies the resulting child that right.

C. *Rights of the Donor*

1. Right to Privacy

A young, college-aged man sells his sperm at a bank for a little extra money to make ends meet. He is typically given between $50 and $100 for his vial of sperm,[86] and he leaves without ever thinking twice about the potential children his "donation" may create. Because he has been promised anonymity, he certainly does not consider that his future biological children could one day knock on his door, after he has settled down and had children of his own, seeking to forge some relationship with him because a long time ago he sold what would become one half of their genetic material for pizza money. These unanticipated visits could be psychologically harmful, confuse his family, or even upset his relationship with his family.[87] One donor who sold sperm to help pay his way through

[85] *Id.* at 371.
[86] Harmon, *Hello, I'm Your Sister*, *supra* note 51.
[87] Swanson, *supra* note 9, at 180.

graduate school claims that he "would not have done so had he been required to update his medical records or reveal identifying information."[88] The thought of incurring any obligations other than providing the vial of sperm is far from the sperm donor's mind.

Sperm donors have an interest in privacy. Moreover, when a donor is guaranteed privacy and only donates in reliance on that promise, to force disclosure of personal information, thereby allowing future children to invade the donor's privacy, is both a breach of contract and a broken promise.[89] In *In re Guardianship of I.H.*, the court, in deciding whether service upon an anonymous sperm donor was necessary in a paternity case, stated that donors who donate in exchange for a promise of confidentiality "do so with the intention of remaining anonymous and unconnected to the child conceived," and that such an intention is recognized by courts and the Uniform Parentage Act.[90] Surely donors have interests in maintaining their constitutional right to privacy and in guaranteeing that the promises made to them are not broken. Exposing donor information *ex post facto* would thus be unfair because the promise to not reveal the information acted as a guarantee for the donor that he was not assuming any risks.

However, one could argue that sperm donors have offered their genetic material for the purpose of creating a child, and as a result, should have no expectation of privacy or that they will be entirely free from risk in what ensues. At the very least, donors should have their rights weighed against those of the people whom they may harm. Gametes are "hazardous material" because they can create people with needs and "full moral status."[91] Because gametes have this capability, those in possession of gametes must be held to a high standard of care.[92] By engaging in risky gamete activity, e.g., donating gametes when we know that they have the capability of creating children with personhood, "we assume the costs of that risky activity."[93] As one scholar writes,

> Risky activities often involve a conflict of interests (which can be deemed rights by deontologists, or simply goods by consequentialists) between the interests of

[88] Shenk, *supra* note 34.

[89] Carole, *Unintended Consequences: Rethinking Anonymous Third Party Reproduction*, Fertility Lab Insider, Jul. 25, 2012, http://fertilitylabinsider.com/2012/07/unintended-consequences-3rd-party-reproduction/.

[90] *In re* Guardianship of I.H., 834 A.2d 922, 926 (Me. 2003).

[91] Rivka Weinberg, *The Moral Complexity of Sperm Donation*, 22 Bioethics 166, 171 (2008).

[92] *Id*. at 172.

[93] *Id*. at 170.

> the risk imposer and the interests of the risk imposee. Generally, the imposer has an interest in freely engaging in activities of her choice and the imposee has an interest in avoiding being the victim of a risk that results in harm. One way to resolve this conflict of interests is to weigh the costs to each party of having the other party's interests prevail.[94]

If the donor's privacy interests prevail, a child is left without access to half of an identity. If the child's right to know his identity prevails, especially if it applies retroactively to anonymous sperm that has already been used to conceive children, the donor incurs one of two types of costs: (1) he could opt not to donate in the first place (if he is deciding to do so after anonymous sperm donation has been banned), in which case he loses $50-100 that he otherwise could have received from donating, or (2) he loses his interest in keeping his identity private, and in living his life without potential intrusion from unwanted children. In instance (1), the deep psychological and medical costs to the child that may result appear to outweigh a potentially lost payment of $50-100. In instance (2), I contend that the costs imposed on the child still outweigh the costs imposed on the donor. I believe that this is particularly so in light of the notion that the sperm donor has lost at least some of his implicated rights, and thus has a lesser privacy interest, because he knowingly donated his gametes.

Sperm donors are aware that their donated sperm could create a human life. Presumably, donors are aware that they have the opportunity to sell their sperm precisely because there is demand from infertile couples to use that sperm to create human life. Assuming that the resulting child will not suffer the consequences of being a child of anonymous donation is akin to firing a gun and expecting the bullet to hit nothing and no one. It would be wonderful if no harm results, but there is a high likelihood that a person will be harmed by the act. If the consequences of the potentially harmful act cause a negative effect to obtain, such as if the gun-firer does hit someone and is arrested and imprisoned as a result, the actor can be said to have waived some of the rights that he may have had (such as to not be imprisoned) had he not acted in a reckless manner. The actor failed to treat a potentially risky activity with the requisite high standard of care, and cannot escape the consequences of the end result.

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[94] *Id*. at 170-71.

That many courts view sperm as a special substance because of its potential to create life, rather than as a mere piece of property, supports this view of gametes as material to be treated with the utmost care.[95] In *Hecht v. Superior Court*, the court was asked to decide the fate of a decedent's vials of sperm willed to his girlfriend.[96] The court reasoned that the decedent had a property interest in his sperm,[97] but that the sperm was "unlike other human tissue because it is 'gametic material' [. . .] that can be used for reproduction."[98] The court mentions that sperm has special value, unlike other property interests in human tissue, in that it has the potential to create a child.[99] In *In re Estate of Kievernagel*, the court agreed with *Hecht*, and repeated the proposition that "gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death."[100]

These cases demonstrate that courts recognize sperm as a unique substance with special value because of its ability to create a human life. When sperm donors release their genetic material into the world, they take a risk in exchange for a small payment. When that risk grows into a human being with the status of personhood, its rights mature. Without looking further to balance the costs and interests of each involved party, it appears that donors already assumed the risk that the child might one day seek information identifying that donor.

Moreover, the issue of the harm that would occur to the donor as a result of promise-breaking can be overcome when one looks to the rights of the donor-conceived child. It is unjust to allow parents and cryobanks to curb the free will of a donor-conceived person by binding them to a promise made before they are even conceived. It seems that while we do allow parents to make many decisions for their children, we do not allow parents to make decisions as important as this prior to a child's maturation, or even conception. If parents contracted to bind their children to a certain career before the child was even conceived, such a contract would likely be struck

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[95] *But see* Harvey L. Fiser & Paula K. Garrett, *Life Begins at Ejaculation: Legislating Sperm as the Potential to Create Life and the Effects on Contracts for Artificial Insemination*, 21 Am. U.J. Gender Soc. Pol'y & L. 39 (2012) (arguing that courts should not view sperm as a substance with the potential for life, but rather, should view sperm as being akin to any other organ or blood donation).

[96] Hecht v. Super. Ct., 20 Cal. Rptr. 275 (Ct. App. 1993).

[97] *Id*. at 281.

[98] *Id*. at 283 (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

[99] *Id*.

[100] *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 316 (Ct. App. 2008).

down on public policy grounds. Therefore, promises that bind third parties to refrain from acting to obtain information fundamental to their health and well being appear to be against public policy. Because promises made in the anonymous sperm donation context constitute such promises, they should not be upheld.

Ultimately, a donor-conceived child's right to be free from the harms of increased medical and psychological problems, to complete their sense of identity, to potentially gain citizenship, and to be free from the risk of incest outweigh the annoyance and disturbance associated with having one's name and medical information released and a promise broken. This view has been expressed by the courts, as they recognize that "[e]ven when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy."[101] When a donor makes many donations to a cryobank, the donations "involve[] a substantial commercial transaction likely to affect the lives of many people," and thus, his expectation of privacy should be diminished.[102] When the court balanced this right to privacy against the interests of the donor-conceived child's in medical information, the court held that the child's rights outweighed the donor's, and the John Doe involved in the case would have to appear in a deposition.[103] As a result, in sperm donor anonymity cases, the expectation of privacy is diminished by the mere fact that a donor assumes the risk that a child could be created when he releases his gametes into the world. Donor-conceived children's interest in identifying information about their biological fathers outweighs the donor's right to privacy. As one donor stated when discussing the potential end to his anonymity,

> Of course, it will be complicated and challenging for me and my family. But I believe I have a fundamental responsibility to those people to let them see and know something of their genetic and biological heritage. I see this as an issue of fundamental human rights — the rights of donor-conceived people to know of their origins if they wish. To my mind that human right outweighs the promises of anonymity that I and other sperm donors received in the 1980s.[104]

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[101] Johnson v. Super. Ct., 95 Cal. Rptr. 2d 864, 876 (Ct. App. 2000).

[102] *Id*. at 877.

[103] *Id*. at 878.

[104] Ian Smith, *Knowing About Your Biological Origins is a Basic Right*, The Age (Austl.), Apr. 9, 2012, http://www.theage.com.au/opinion/society-and-culture/knowing-about-your-biological-origins-is-a-basic-right-20120408-1wj7s.html .

2. Right to be Free from Child Support Payments and Paternity Obligations

Sperm donors sever their parental rights and obligations when they sell their sperm. Because they sever their parental rights and obligations, anonymous donors, like all donors, have a right to be free from child support payments and paternity obligations. If parents of donor-conceived children were able to locate anonymous sperm donors, donors may fear that they would be held liable for the financial – and possibly other – obligations of parenthood. Anonymity provides reassurance to sperm donors that they are only providing genetic material for potential children, and are not signing on to become parents.

In practice, it appears that true sperm donors who are not listed on birth certificates, who take no part in a child's rearing, who are not married to the child's intended mother, and who contract to waive parental rights or obligations are not held liable for child support or declared the legal fathers of a donor-conceived children in paternity suits.[105] In *People v. Sorensen*, for example, a case about child support for a donor-conceived child, the court stated, "the anonymous donor of the sperm cannot be considered the 'natural father,' as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney."[106] Thus, it seems implausible that compelling release of donor-identifying information would lead to a significant increase in the number of donors that courts find to have the rights and obligations of a father.

If, however, there is some legal obligation for sperm donors to pay child support or to accept paternity in a suit, and adjudication of paternity claims in court would confer upon them these rights and obligations, allowing donors to hide from such obligations behind a wall of anonymity is neither just nor preferable. While donors have a right to their privacy, this privacy does not in turn create a right to hide from legal obligations. Perpetuating a scheme of anonymity to protect people from obligations is against public policy because it encourages secrecy and is a method by which one can avoid paying what one owes. Moreover, the threat of paternal

[105] Ken LaMance, *Sperm Donor Parental Rights/Obligations*, LegalMatch, http://www.legalmatch.com/law-library/article/sperm-donor-parental-rightsobligations.html (last modified Dec. 21, 2011); Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482 (Ct. App. 2005) (holding that a sperm donor could not prevail in a paternity claim over the donor-conceived child); *In re* H.C.S., 219 S. W. 3d 33 (Tex. App. 2006) (holding that a sperm donor lacked standing to adjudicate paternity of donor-conceived child).

[106] People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968).

rights and obligations may incentivize increased thought and care in the drafting of sperm donor agreements. This could lead to an increase in information for all involved parties. It seems preferable that sperm donors give careful thought to their decision to donate their genetic material; thus, incentivizing an increase in thought and reflection could improve the donor business for all involved.

D. *Balancing of Harms*

Donor-conceived people have a strong interest in discovering the identity of their sperm donors. Denying children access to this identifying information has the potential to cause them unique harm. The lack of identifying information leaves donor-conceived children in a state of second-class citizenship, where they are not granted the same basic rights to health and identity as children in similar positions who, by fortune and no act of their own, have a greater likelihood of access to their biological parents, or to information about them. The harm done to donor-conceived people by refusing to provide them with identifying information about their donors outweighs the donor's interest in privacy and the intended parents' interest in procreation.

IV. Objections to the Rights-Based Approach

A. *The Non-Identity Problem*

Of course, an analysis weighing the rights of potential children against sperm donors and intended parents is epically misguided if potential children cannot be harmed by the conditions leading up to their conception. Some scholars argue that potential children cannot be harmed at all in the ways that I outlined above because of the non-identity problem.[107] The argument goes that if the anonymity involved in sperm donation causes harm to children, and the harm can only be stopped from occurring if people cease using anonymous sperm donors, the specific children who would have been born using anonymous sperm donation will not be born at all.[108] Since most of the children conceived from anonymously donated sperm will "not be so miserable as to be 'wrongful,' it would seem that once born they have benefitted from rather

[107] John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 Am. J.L. & Med. 7 (2004).

[108] *Id.* at 14.

than been harmed by being born."[109] Thus, children conceived with anonymous donor sperm are not harmed from anonymity, because without that anonymity, they never would have been born at all.[110] Therefore, restrictions on anonymity cannot be justified by an appeal to the harm done to the resulting children.[111]

There are some difficulties, however, with this application of the non-identity problem. Rivka Weinberg draws a distinction between future people[112] and merely possible people to illustrate one problem.[113] Weinberg begins by stating that one major pitfall of the non-identity problem is that it uses existence itself to outweigh all the harm done to the resulting child.[114] This is problematic because existence itself cannot be weighed against individual experiences. Weinberg states that existence may provide the opportunity for life experiences to be enjoyable in a way that outweighs the harms done to the child (Weinberg gives the example that the experience of eating chocolate could outweigh the harms of blindness in a child, and without existence one could not eat chocolate). However, the conditions of conception that cause harm to the resulting child are not inextricably connected to the enjoyable life experiences themselves (e.g., one does not need blindness, or anonymous sperm donation, to have enjoyable life experiences like eating chocolate).[115] The only reason that harms like anonymous sperm donation can be weighed against benefits is because a child exists to undergo both these harms and benefits.[116] As Weinberg puts it, "when both benefits and harms are weighed against each other, chocolate may outweigh blindness but one is still harmed by blindness unless existence is included in the equation."[117]

Weinberg states that there is a distinction between future people (people who will actually be born) and merely possible people (hypothetical people that could have been born, but are not).[118] Only future people, and not merely possible people, have interests, because existence is a prerequisite for having interests.[119] People who never exist are not harmed by nonexistence; how could they

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] I have referred to these children as "potential children" or "potential people."

[113] Rivka Weinberg, *Identifying and Dissolving the Non-Identity Problem*, 137 PHIL. STUD. 3, 9 (2008).

[114] *Id.* at 8.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 9.

[119] *Id.* at 14.

be harmed by never having existed in the first place?[120] It seems ludicrous to even address this point. But people who do exist can be, and are, harmed by the conditions of their conception, and have an interest in not being so harmed. Going back to the claim that children cannot be harmed by conditions of their conception because those very conditions caused their existence, Weinberg goes further to argue in the alternative. She states,

> even if future persons do have an indirect interest in their initial existence, that still doesn't mean that it is in their interests to have any of their current or future interests (e.g., in vision) compromised in order to secure the benefit of existence because the benefit of existence is already secure; otherwise, who are we talking about? A merely possible person. Only merely possible people could possibly, but will not actually, exist.[121]

And, as explained, above, merely possible people cannot have interests. Ultimately, Weinberg concludes that "[p]rocreative negligence harms the future children who bear its burdens. Existence, which is unnecessary, value neutral, and something all future people will have, does not outweigh anything."[122]

Because existence has no moral value, it cannot be weighed against the claim that anonymous sperm donation causes very real harm to children. If anonymous sperm donation was outlawed, children created from anonymous donor sperm could have never been created in the first place, and would have been no worse off for their nonexistence. However, when we do create children using anonymous donor sperm, we must take into account the decisions that we make, and whether or not they will harm the resulting future child.

Moreover, the non-identity problem is not applicable to all of the children who have already been created using donor sperm. These children have all of the same interests as children who have not yet been created. Even if the non-identity problem prevailed and we could not evaluate the interests of potential children in an analysis of the ethicality of anonymous sperm donation, the harm

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[120] *Id*. at 15.

[121] *Id*. at 15-16.

[122] *Id*. at 17. *See also* Velleman, *supra* note 85, at 372 (stating that "we cannot justify severing the child's ties to one of its parents by pointing out that, in order to avoid doing so, we would have had to omit creating the child altogether. This justification would portray separation from a biological parent as the lesser of two evils for the child, preferable to the greater evil of never having existed. But never having existed would not have been an evil for the child, because a non-existent person suffers no evils.").

being done to actual children at present is enough to justify a retroactive end to anonymous sperm donation. Ultimately, then, the non-identity problem does not obliterate a rights-based approach that is based on the rights of donor-conceived children.

V. Conclusion

Because children have an interest in knowing the identities of their donor-parents, and because that interest outweighs the privacy and procreative interests of donors and intended parents, changes to the current anonymous sperm donation system are necessary.

First, anonymous sperm donation should be abolished by law so that no more children will be harmed by the practice.[123] Donor-conceived people, upon reaching the age of 18,[124] should be allowed access to identifying information about their donor fathers. To facilitate access to such information, the United States should create a comprehensive reporting scheme through which clinics and sperm banks are required to report donors' identifying information, and to continue to monitor and update such information (e.g., medical information) if it changes.[125]

Second, all anonymous sperm donations that occurred prior to the ban on anonymous donation should be retroactively opened, to the extent that accurately kept records exist to facilitate such a program. If a wrong can be righted in the world, and the harm done to that wronged person persists and outweighs the interests of any other affected party, there is no reason not to undo the harm to whatever degree possible. Thus, donor-conceived people who currently suffer all of the harms of anonymous donation outlined above may be relieved of some of their suffering.

These changes to the sperm donation industry are necessary if we are to recognize donor-conceived people as citizens with interests and the status of full-personhood. As Wendy Kramer and Naomi Cahn write, "[u]ltimately if we value children and their families, then reform must occur."[126]

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[123] Cahn & Kramer, *supra* note 77, (arguing that the U.S. should ban donor anonymity).

[124] Swanson, *supra* note 9, at 188, argues that donor records should be opened for donor-conceived children upon their reaching the age of eighteen. However, he argues that identifying information about the donor should only be available with the donor's consent, effectively creating an opt-out provision for all donors to remain anonymous, or to be encouraged to remain anonymous by those in the sperm industry.

[125] Cahn & Kramer, *supra* note 77, (advocating for a database for reporting of sperm donor information by clinics and sperm banks).

[126] *Id*.