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Donor Conception and Mandatory Paternity Testing: The Right to Know and the Right to Be Told

Lucy Frith, University of Liverpool

One interpretation of what makes something a moral principle is that it should be able to be universalized, applicable to everyone, regardless of individual desires, a form of Kant's categorical imperative. Ravelingien and Pennings (2013) take this point and argue that, as it is claimed that the donor conceived should have a right to know their gamete donor, a right that can be translated into the right to know one's biological parents, this right should be extended to all children, however they were conceived. Ravelingien and Pennings's central point is to make the case for a moral symmetry. They do not advance a position that there is a right to know one's biological parents; their claim is: If the ability to find out about one's biological parents is indeed a right, then this right should be extended to all groups of children, not just donor-conceived children. This would remove the moral asymmetry in treatment between donor- and non-donor-conceived children in this regard.

The point of the exercise to remove this moral asymmetry is to highlight the possibly troubling implications that a right to know one's biological parents may produce if it is extended from the donor conceived to the wider population. As they state, "It is likely that our proposal will raise concerns regarding the extent to which the 'right to know' conflicts with other rights and interests." This will cast into doubt donor-conceived children's right to know their gamete donor, as moral presumptions should apply to all relevant groups equally—the impartiality claim—and if the logical consequences of giving the donor conceived this right are harmful, due to being forced to extend it by consistency claims, we should rethink this policy. This commentary does not debate the claim that the donor-conceived have a right to know their gamete donor (although I have argued elsewhere for such a view [Frith 2001a]). Further, the

project of removing any moral asymmetry is only worth doing if it can be claimed that the two groups of children—the donor-conceived and those conceived "naturally," the non-donor-conceived—are similar in all morally relevant aspects. I do not address the arguments about whether there are salient moral differences between these two groups, but concentrate on whether Ravelingien and Pennings's proposal, to remove any moral asymmetry, has been successful.

ASYMMETRY IN THE RIGHT TO BE TOLD

The central aim of Ravelingien and Pennings's article is to remove a moral asymmetry between these two groups of children. However, their proposal creates another moral asymmetry, giving only the non-donor-conceived the right to be told. Ravelingien and Pennings's suggestion is that by performing mandatory paternity testing on all babies of heterosexual couples, for these non-donor-conceived children when it is found that their "social" father is not their biological father, the results should be recorded on their birth certificate, a way of ensuring the right to be told. However, with the donor-conceived, no form of birth certificate marking is suggested; telling is not "ensured" in this way but is left up to the parents. Thus, the central aim of the authors' proposal, to remove any such differential treatment, has not been achieved.

There has been a debate over whether it is appropriate to annotate birth certificates to indicate that the person was conceived from donor gametes. In the United Kingdom, the Warnock Committee recommended such a course of action to ensure that the donor-conceived were told (Warnock 1985), and the issue was debated again in the run up to the revision of the Human Fertilisation and Embryology

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Act between 2005 and 2007. However, it was felt by the Department of Health that encouraging telling by educational rather than legal means was more appropriate (Department of Health 2007). Whether it is appropriate to annotate birth certificates to show the person was donor conceived and how such a measure should be carried out practically without making it intrusive or giving access to personal information to those who have no need to know, are sources of controversy (see Blyth et al. 2009). However, if Ravelingien and Pennings want to remove any moral asymmetry between the donor- and non-donor-conceived, the issue of annotating the birth certificates of the donor-conceived would have to be addressed.

The distinction between the right to know one's biological origins and the right to be told about those origins are two separate rights that are often conflated in the debate over nonanonymous gamete donation (Frith 2001b). Currently in the United Kingdom, for example, since 2005 children born from gamete donation have the right to access identifying information about their gamete donor held on the Human Fertilisation and Embryology Authority (HFEA) register. This is a legal right enshrined in law. However, the right to be told of the circumstances of their conception, and hence be in position to exercise this legal right, is left as a moral right to be fulfilled by the parents (if they so wish). It is seen as good practice to encourage such telling (Frith 2010; HFEA 2009, 20.7–20.8) but it is not enforced in any way; in this sense it has not become a legal right.

Feinberg's distinction between legal and moral rights is useful to elucidate the different rights at play here. Feinberg (1973) defines a legal right as a claim that is recognized by some system of legal rules or regulations, whereas a moral right is a right that exists independently of any legal rules. These two rights are both derived from a moral commitment, but the way that they are enforced in practice marks an important difference between them. Under Ravelingien and Pennings's proposal, with the mandatory testing of babies born from heterosexual couples, arguably their right to be told (something about their parentage) has been enshrined as a legal right—the name of their biological father is on their birth certificate, or the birth certificate will not record the father's name. Thus, what is left as a moral right for the donor conceived—the right to be told—is a legal right for the non-donor-conceived.

ASYMMETRY IN THE RIGHT TO INFORMATION

This legal right to be told that the non-donor-conceived gain, however, might simply be a right to know who is *not* their father rather than who *is*, and Ravelingien and Pennings's proposal creates a further asymmetry between these two groups. The donor-conceived child has a legal right to information about their gamete donor under non-anonymous jurisdictions such as the United Kingdom (the right to information held on the HFEA register). However, with the non-donor-conceived child, if it is found that the social father is not the biological father, this does not then lead to the child getting information about his or her biological fa-

ther; it just leaves a blank on the birth certificate where the father's name should be. The authors state that in a situation like this, "the fact that the child will find out eventually (once he or she accesses his or her birth certificate) would put pressure on the mother to inform the child about his or her genetic father early on." But telling the child *who* his or her biological father *is* becomes a moral duty of the mother—it is left up to her whether to tell her child who the father is and how much information about the father to give. Simply having a blank space on a birth certificate does not fulfill the right to know one's biological parentage.

Thus, this new moral asymmetry creates problems, if the aim of Ravelingien and Pennings's proposal is to ensure that the non-donor-conceived have the right to know their biological father as arguably the donor-conceived do. If the proposed father is not the biological father, finding this out does not necessarily give the non-donor-conceived child information about his or her biological father. In order to do this, a large-scale investigation might have to be mounted, if the mother is not willing to say who the father is or does not know, to find the biological father to enable genetic testing. Such problems and the possibly intrusive nature of the proposal might be why both the bills referred to by Ravelingien and Pennings that proposed mandatory paternity testing (Kansas Legislature 2011; State of New Jersey 2012) have died at committee stage. The act they cite that is in force, Portugal's Civil Code, is concerned with unmarried mothers who do not register a father on the birth certificate. Under this code a child born of a married woman is presumed to be that of the husband, whether it is in fact biologically their child or not—*pater est quem nuptiae demonstrat*. Therefore, the Civil Code is about linking fathers to children for the purposes of maintenance and support, not any concern with knowing one's biological originator.

CONCLUSION

Under Ravelingien and Pennings's proposal, moral asymmetries between the donor-conceived and the non-donor-conceived still exist. The donor-conceived do not have a legal right to be told about the circumstances of their conception, whereas the non-donor-conceived do (although possibly only in negative form). The donor-conceived have a legal right to information about their gamete donor, but the non-donor-conceived have no legal right to information about their biological father. Therefore, the central aim of Ravelingien and Pennings's article, to remove moral asymmetries of treatment between the two groups of children, has not been met. ■

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DNA of a Family: Testing Social Bonds and Genetic Ties

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Managing the interplay of private information within families creates challenges, especially when the information involves member identity, a complex and emotionally charged issue. Ravelingien and Pennings (2013) argue that individuals have a fundamental right to know their genetic origins and that this right should be extended to all children “with uncertain or unknown genetic backgrounds” (33). They propose that every infant’s identified father should undergo a DNA paternity test at the child’s birth to determine his biological link to the child. Viewing such a practice as supporting the fundamental right of a child to know his or her genetic heritage and avoiding the harm of misattributed paternity, the authors reference adoption and sperm donation practices to support their argument. Although presented as meeting the best interest of the child, this practice could create issues for the entire family. A more nuanced approach to such revelations needs to be considered. Issues that must be confronted include information “ownership,” adverse family effects, and difficulties with the comparison to adoption.

A key consideration regarding revelation involves the question: “Whose news is it?” Communication Privacy Management theory (Petronio 2002) advances the position that individuals “own” their personal information and addresses the confounding issue of information ownership within relationships. Petronio delineates ways in which individuals manage their private information based on the intersection of information boundary structures and a personally developed rule-based management system of boundary regulation. Boundary management practices

reflect the following criteria: culture, gender, motivation, contexts, and risk/reward ratio. Therefore, individuals may become co-owners of another’s private birth information in the following ways: direct disclosure by the individual, inappropriate disclosure by a confidant/co-owner, and accidental discovery.

Paternal uncertainty presents a particularly complex case of co-ownership since the key information stakeholder is the child. The mother already “owns” any information about her previous sexual partners, and the current (social) father may always seek paternity testing. Conversely, if complicated circumstances arise, young children cannot exercise their rights to control their paternity information. The mother may not always know with certainty the identity of the child’s biological father, due to circumstances ranging from having multiple partners to a rape experience. Thus, children who are the rightful owners of their birth information may not be able to comprehend or benefit from such information for many years. This issue is compounded when such information has the potential to impact the child and others negatively. Required paternity testing and the potential revelation of a man’s lack of biological ties to “his” new baby have serious repercussions for the child, and potentially any siblings, in cases where infidelity is discovered; these include negative health outcomes related to relocation of the child (Braver, Ellman, and Fabricius 2003) and a higher risk of paternal violence (Daly and Wilson 1998). Maintaining privacy in such situations provides affected members with a way to manage

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