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On the Right to Know and The Use of Double Standards: Response to Open Peer Commentaries on “The Right to Know Your Genetic Parents: From Open Identity Gamete Donation to Routine Paternity Testing”

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In our article “The right to know your genetic parents: from open-identity gamete donation to routine paternity testing,” (2013) we did not argue for a fundamental right of both donor and naturally conceived offspring to know the identity of their genetic fathers. Our argument is conditional (and the result rather the opposite): if one assumes that donor conceived offspring have such a right, it should also apply for naturally conceived offspring. There is no human legal right that specifically entitles one to knowledge of the identity of one’s genetic parents, but advocates of such entitlement—both in the context of gamete donation (GD) and adoption—commonly defend their case by reference to the universal human rights to identity and private life. As the basic aim of international human rights is to protect all human beings who require the good concerned, without distinction of any kind, we argue that it would be discriminatory not to grant the right to know to all people who are unaware or uncertain of their genetic origin, including those who were naturally conceived. One (but surely not the only) way to extend this right, we proposed, was through routine paternity testing of all (both naturally and donor conceived) children at birth.

The routine paternity testing proposal is of course a reductio ad absurdum in which Cohen (2013), Frith (2013) and Leighton (2013) rightly recognize an attempt to generate skepticism about the one-sided focus on and the overriding significance ascribed to the child’s interest to know the genetic truth. For the sake of argument, we chose not to question the premise that anonymous donation goes against the donor conceived offspring’s rights and needs—although we agree with Cohen (2013) that the harm claims are philosophically [as well as empirically] problematic. Nor did we criticize the underlying concept of identity (Brandt 2013) and the normative assumptions about biogenetic kinship that are implicit in open-identity GD (Leighton 2013), although these are important points to include in the broader debate. We merely focused on the arguments that are often rehearsed within the literature to justify the focus on the child’s right to know and attempted to draw out where such arguments may lead to. The analogy with routine paternity testing invites defenders of open-identity GD to weigh the concept of a child’s right to know against the negative consequences this can produce.

Various commentators note that the consequences of focusing on the child’s right to know must not be weighed equally, as there are morally relevant differences between the misattributed paternity (MP) case and that of open-identity GD:

First, there are said to be important disparities in the potential benefits of disclosure. There is a general imbalance between GD, where a child can learn the identity of the donor, and MP, where the genetic father may remain unidentified/unidentifiable (Galvin and Liu 2013; Malek 2013; Brandt 2013, Frith 2013). In such MP cases, paternity test results only verify whether one is indeed the genetic child of one’s rearing parents and fail to address the child’s identity needs or to offer information that can be healing and helpful for the child (Brandt 2013; Sperling 2013). This can be troublesome for the child and ignores the possibility

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that some children would rather not know the truth about their genetic origin (Galvin and Liu 2013).

Second, significant differences in terms of the potential harms are perceived. MP disclosure is likely to be much more destructive to the mother-father relationship and could change the nature of the social father’s relationship with the child (Sperling 2013; Galvin and Liu 2013), whereas with GD, the disclosure occurs in sincerity and openness. MP cases can also cause considerably more harm to the child’s self-image, given the awareness that the conception was likely unintended and fraught with regret (Malek 2013). Furthermore, children born as a result of adultery face rejection, stigma and other negative effects on their sense of identity and worth (Brandt, 2013). The latter harm is socially generated and cannot be minimized by counseling or other remedies that focus on the individual alone.

Third, there is said to be disparity in terms of the rights infringements. In GD, both parents (presumably) consented to the use of a donor and the potential burdens related to that choice. Those who believe that building families through donor conception is wrong or damaging can refrain from using these methods. In MP cases, by contrast, the conception resulted from acts and choices which the social father was not involved in and probably not even aware of (Sperling 2013; Galvin and Liu 2013; Malek 2013; Brandt 2013). Disclosure of MP also singles out the mother and disproportionately undermines and scrutinizes her position and rights (Heidt-Forsythe and McGowan 2013). The two cases are also different for the genetic fathers: whereas sperm donors knowingly and autonomously consented to the reproduction and future release of their identity, this may not be the case for genetic fathers in MP cases (Chang and Buccafurmi-Huber 2013). In fact, with MP, it is likely that the genetic father did not intend and perhaps even resisted having an extramarital child, but he has no control over the reproduction or the exposure of his identity. This infringement of privacy can be all the more serious, given the difficulties of ensuring anonymity in genomic data banks, as pointed out by Greenbaum (2013).

Finally, the two cases are said to be significantly different in terms of what ‘the right to know’ requires (Brandt 2013; Frith 2013). Brandt notes that our proposal does not identify what type of information the genetic father in MP cases would be obliged to give, but that it is implausible to argue for a right to all, including deeply personal, information when no social relationship between the parties exists. According to Frith, our proposal inverts the moral and legal rights related to openness about one’s genetic origin. By including the option of birth certificate marking, we turn the right to be told of one’s conception circumstances into a legal right; whereas the right to be told about those origins becomes a moral right (it remains up to the mother to disclose the identity of the genetic father). In open-identity donation policies, it is the opposite: disclosure of the conception circumstances is no more than a moral right, but donor conceived offspring are granted a legal right to information about their donor.

It is true that the analogy is not perfect; in fact, we acknowledged many of the differences ourselves throughout our paper. However, in our view, the imbalance—particularly in terms of potential harms—is due to differences of degree rather than kind. Perhaps the analogy would work better if we hadn’t included the birth certificate marking; and we acknowledge that Cohen’s ‘one night stand register’ (Cohen 2012) forms a better basis of comparison. However, the major point of the paternity testing proposal was to accommodate as well as possible the arguments used to defend openness about the donor conceived offspring’s genetic origin. These arguments relate to the overall benefits of open communication, the harmful impact of secrecy, and the importance of knowing the genetic truth. In order to best facilitate these assumed interests of the child, we constructed a case where the chances of secrecy were minimized: by early paternity testing, both parents are aware of the situation; the birth certificate marking ensures that the child will be aware of it too, some day. This, along with the understanding that late disclosure is particularly damaging, will allow and actually pressure the parents to take a proactive stance and inform the child at an early age.

As many defenders of open-identity GD have also proposed mandatory disclosure of the conception circumstances, the essential difference between the MP case and the rationale in defense of open-identity GD lies not in the legal versus moral right to know of the conception circumstances, but in the right to know about one’s genetic origin. There is in other words an obvious asymmetry in terms of the type of information the child has access to. Even though our scenario would pressure the mother/parents in disclosing the father’s identity, this will indeed not always be possible or desirable. But arguably, the genetic father’s identity is not the decisive benefit of open-identity GD either. This is clear when one considers that openness about the child’s genetic origin is even encouraged within anonymous donor policies. It is also clear when we consider what exactly donor conceived offspring can expect to obtain when accessing donor identifying information. Even when the child knows the donor’s identity, it is equally questionable whether open-identity GD necessarily addresses the “Who am I?” question. Granting offspring access to the donor’s name and address is a remarkably simplistic approach to their assumed identity needs. What this approach implies is that contact with the genetic father will enable the offspring to gather important information about his genetic heritage and/or life narrative. But such contact is in no way guaranteed by open-identity donation policies. To our knowledge, donors are not obliged to accept contact requests from or to share deeply personal information with the offspring. As Brandt argues, “It seems implausible that children have a right to all information about their genetic parents that they might find useful for building their self-identity.” This holds not only for genetic fathers in MP cases, but for GD as well. On the other hand, that some MP children would rather not know the truth about their genetic origin (Galvin and Liu 2013) also applies to GD, but here root searching has turned into the norm.
Furthermore, although it may be true that in many MP cases the genetic father did not knowingly choose to conceive and have the child, the conditions and relevance of the donors’ consent should also be questioned critically. While Cheng and Buccafurni–Huber (2013) state that donors knowingly consent to the identity release, we pointed out that there is an increasing willingness to override the donor’s consent (cfr. the Law Reform Committee’s proposal to release donor identity retrospectively). In any case, it is worth wondering whether the donor’s consent is always as autonomous and informed as the authors presume, particularly considering the different motivations that may underlie the decision to donate and the fact that some donors are very young. Do they fully understand and foresee the implications of their consent, e.g. the effect that future contact requests may have on them and their family life? What if their opinions and feelings about having donor conceived offspring change over time? Moreover, what exactly are they consenting to? While in MP cases, the genetic father may be very clear in his desire not to have a child, this is (hopefully) also the case for the donors. That they want to help conceive a child does not necessarily mean that they want to have a meaningful connection with that child.

Even if one agrees that the asymmetries between the two cases are important, the point is that there is almost no consideration for the similarities. While virtually no one is willing to accept the potentially disruptive consequences of pursuing the child’s right to know in MP cases, similar effects of open-identity donation policies are systematically ignored or disregarded. Heidt-Forsythe and McGowan regret that the discussion of our proposal interprets the position and rights of the mother too narrowly. They state that:

“Instead of seeing the mother as a separate social actor from the social father, the authors analyze the effects of paternity testing on the mother as one half of a heterosexual couple. (…) a social father’s sexual practices are not explicitly exposed in paternity testing. As such, mandatory paternity testing makes women’s sexual practices suspect and open to scrutiny in a way that her partner’s sexual practices are not” (42).

Is a similar tendency not visible in the imperative to be open about donor conception? In GD, would-be parents are heavily encouraged (and ‘morally obliged’) to grant their child knowledge of his descent. This implies exposure of the social father’s (or mother’s) infertility, which, as we noted, is still taboo to this very day. The connotations of non-masculinity and sexual problems put the father at risk of ridicule and scrutiny. Brandt argues that the parents’ consent to open-identity GD means they are willing to face these difficulties; those who feel that this is problematic can simply refrain from using the reproduction method. Again, the situation is not always that simple. It is very conceivable that some would-be fathers experience pressure to conceive a child: perhaps having and carrying a baby of ‘her own’ is a crucial goal for the would-be-mother; perhaps childlessness or adoption is simply no option given one’s cultural and/or religious background and environment. The irony is that these people aren’t being heard. They are, as Turkmendag and colleagues (2008) argue, “caught in a vicious circle: those who prefer anonymous donation are reluctant to press their claims because confidentiality matters to them and they are intimidated by the force of the rights-based discourse of openness” (292). Here too, the harm is a social problem, created by the stigma related to infertility and the importance of genetic kinship. We tend to agree with Brandt that such social harms cannot be mooted by counseling (although, oddly enough, for discrimination resulting from the use of donor conception, such counseling is considered a sufficient response). Surety these social attitudes need to be addressed, but can we really expect donor conceived families to take the lead?

The point is that in both cases the government intrudes into one’s intimate and private life and provides a highly questionable ‘one-size-fits-all’ solution for healthy child and family development.

REFERENCES


