

# Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands

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## INTRODUCTION

In the United States, a movement urging forbidding sperm-donor anonymity is rapidly gaining steam.<sup>1</sup> Naomi Cahn is among its most passionate and thoughtful supporters. In this Response, I explain why I think this movement and its goals are misguided, using Cahn’s article as my jumping off point.

Naomi Cahn’s *The New Kinship*<sup>2</sup> centralizes in one place a career spent at the intersection of adoption, reproductive technology, and the law, and deep think-

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1. As evidence of this movement, consider a recent *New York Times* “Room for Debate” online conversation to which Cahn contributed. See *Making Laws About Making Babies*, N.Y. TIMES (Sept. 13, 2011), <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies>.

2. See generally Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012) (developing a legal framework for “donor-conceived family networks”).

ing about sperm-donor<sup>3</sup> anonymity. As is characteristic of Cahn's scholarship,<sup>4</sup> this Response thoughtfully interweaves fine-grained legal analysis with the lived experience of sperm donors and their children and casts a wise eye on the social and technological developments just over the horizon. In particular, Cahn's discernment of the way family law adapts to three separate jurisprudential strands (relating to the sum or separate parts, domesticity, and multiple parenthood) and the taxonomy she provides of different regulatory approaches to these news families<sup>5</sup> are rich jumping-off points for other scholars.

I come not only to praise her work but also to crystallize and reflect on a few places where we have stark disagreements on the subject of sperm-donor anonymity. This Response gives me an opportunity to share with readers discussions we have had over the past five years or so about the intersection of our work and methodological approaches.

I focus on Cahn's defense of mandatory sperm-donor registries of the type in place in Sweden, Austria, Germany, Switzerland, the Australian states of Victoria and Western Australia, the Netherlands, Norway, and, most recently, the United Kingdom and New Zealand.<sup>6</sup> The UK system is typical in requiring new sperm (and egg) donors to put identifying information into a registry and providing that a donor-conceived child "is entitled to request and receive their donor's name and last known address, once they reach the age of 18."<sup>7</sup> While advocacy for these registries represents only a portion of Cahn's enlightening article, the spread of these registries across the world makes Cahn's endorsement of them particularly worth discussing. Indeed, a provincial court in my home country of Canada has recently declared unconstitutional the province's law permitting sperm-donor anonymity, relying on an analogy to open adoptions, which is similar to the analogy Cahn champions in her work.<sup>8</sup> It is thus this element, and not the rest of Cahn's article, that I will focus on.

I will explain four problems from *within* the confines of her argument that I see with Cahn's argument in favor of these registries. I am thus putting to one side more external critiques that might focus on things like the high value Cahn attaches to having a genetic connection or the lower value of anonymous

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3. I will continue to use the term *sperm donor* as Cahn does because it is familiar, even though *sperm provider* might more accurately capture the reality of the practice because the vast majority of donors sell their sperm rather than provide it altruistically. *See id.* at 380–81.

4. *See generally* NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION (2009) (discussing current and future legal issues pertaining to reproduction practices and technology); Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59 (2009) (discussing how sperm donation may lead to inadvertent inbreeding and the legal protections this necessitates).

5. *See* Cahn, *supra* note 2, at 394–403, 407–17.

6. *See* Cahn, *supra* note 2, at 419–25. For a discussion of the foreign regimes, see I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. (forthcoming 2012).

7. *Can You Be Anonymous as a Sperm, Egg or Embryo Donor?*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/1973.html> (last updated Nov. 10, 2009).

8. *See* Pratten v. British Columbia (Att'y Gen.), 2011 BCSC 656 (Can.).

reproduction,<sup>9</sup> the seemingly minor nature of the harms to children involved, the possibility that her approach may reify genetic essentialism and thus reinforce the very harms posed by a lack of social connection with one's genetic parents, or the underlying assumptions about the state as a better judge of matters relating to children than their genetic and rearing parents.

The problems I will address internal to the argument pertain to her claims of harm to sperm donors and recipients, her claim of harm to the children that result from these acts of reproduction, and her privileging of analogies to adoption over analogies to coital reproduction. Finally, I suggest that Cahn's argument may not go far enough even on its own terms in endorsing only a "passive" registry in which children have to reach out to determine if they were donor conceived, rather than an "active" registry that would reach out to them.

### I. HARM TO DONOR AND RECIPIENT PARENTS AND CHANGED SELVES

Cahn claims two separate primary justifications for requiring such registries: the prevention of harm to donor-conceived children<sup>10</sup> and the prevention of harm to those other than the resulting child making use of sperm-donor registries, which I examine here. The argument of harm to donor and recipient parents is offered partially as a response to points I have made in undermining harm-to-resulting-children arguments,<sup>11</sup> so it is worthwhile to determine whether this response has bite or, in fact, Cahn has to rely solely on harm-to-resulting-child type arguments after all.

Cahn writes:

Accordingly, a new paradigm for donor-conceived families considers not just the child, but also the interests of donors, parents, the donor family network, or the larger community. Some parental interests could be furthered through this new paradigm, interests such as making contact with genetically related offspring and even the donor, ensuring the integrity of their own families, and respecting their children's interests. A focus only on regulation, rather than relationships, also overlooks donors' interests in becoming known and possibly establishing connections with their offspring.<sup>12</sup>

This argument is quite weak as a support for the kind of registries Cahn defends based on the model used in the United Kingdom and elsewhere. As she notes in a footnote, there is a market-based solution to this concern: donors who want their donor-conceived children to contact them, or recipients who want the donors to have the option of connecting with their children, can opt for an open-identity donation system, whereby donors and recipients opt into this

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9. See Cahn, *supra* note 2, at 382–86.

10. See *infra* Part II.

11. See I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. (forthcoming 2011).

12. Cahn, *supra* note 2, at 425 (emphasis omitted).

identification.<sup>13</sup> Thus, by mandating a one-size-fits-all solution, Cahn is not letting people opt into the category they prefer and thereby maximize their own welfare and life plans, but rather is requiring everyone to be available for contact whether or not they want it. A compulsory registry cannot be justified based on the interests of these players because the market-based solution furthers the interest of donor and recipient parents better than a one-size-fits-all regulation.

Cahn's response to this critique<sup>14</sup> is that she is instead worried about what I have called in other contexts "affective forecasting" or "[t]ransformative [e]xperience[]" or changed-selves type arguments:<sup>15</sup> that donors or recipient parents (or both) will think they do not want to be identified but later in life change their minds and want to connect with the children.

There are several problems with this argument. First, there is the standard concern that such arguments are unduly paternalistic; indeed, Justice Kennedy has received sustained criticism for using this type of argument in the reproductive sphere to uphold the constitutionality of a ban on partial-birth abortion procedures because "[w]omen who have abortions come to regret their choices, and consequently suffer from '[s]evere depression and loss of esteem.'"<sup>16</sup> Second, Cahn points to no empirical evidence demonstrating that this hypothesized change in preferences is likely to occur. In fact, it seems equally possible that those who agree to a mandatory identification system later want to undo *that* choice,<sup>17</sup> and it is not clear why that transformative experience should not be given equal weight. Finally, even on its own terms, the argument cannot support the kind of donor registry proposed by Cahn and the one that is in place in the United Kingdom and elsewhere in which donor children can call at age

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13. *Id.* at 425 n.308. She graciously acknowledges some prodding by me on this point. *Id.*

14. *Id.*

15. See I. Glenn Cohen, *The Right Not To Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1174–80 (2008) (discussing these arguments in the context of preembryo disposition and surrogacy agreements).

16. *Gonzales v. Carhart*, 550 U.S. 124, 183 (2007) (Ginsburg, J., dissenting) (second alteration in original) (quoting *id.* at 159 (majority opinion)). For critiques, see, for example, *id.* at 184–85 (Ginsburg, J., dissenting) (suggesting that "[t]he solution the Court approves . . . is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks" but instead to "deprive[] women of the right to make an autonomous choice, even at the expense of their safety," a view Justice Ginsburg argues "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited"); Cohen, *supra* note 15, at 1174–81.

17. It is hard to get evidence on the phenomenon, but at least one study is suggestive. A 2003 study looked at U.S. couples who conceived children through "open-identity" sperm donation programs and had children who at the time of the study were twelve to seventeen years old. It found that, among heterosexuals, thirty percent of recipient parents had not yet disclosed to their children that they were donor conceived, as compared to zero who had not done so among lesbian and single mothers (although two-thirds of the heterosexual parents claimed they would disclose at some point). See J.E. Scheib et al., *Choosing Identity-Release Sperm Donors: The Parents' Perspective 13–18 Years Later*, 18 HUM. REPROD. 1115, 1120 (2003). Although I do not want to put too much stock in this study—the sample size was small (ten heterosexual parents)—it shows that at least some recipient parents who voluntarily seek donor-release programs change their minds.

eighteen to find out whether they were donor conceived and, if they were, determine the name of their donor. Instead, it would support only a system in which *recipient parents* can, after a change in preferences, phone the registry and get the name of the donor, or *donor parents* can phone the registry and get the name of the recipients. If changes in preferences of parental donors or recipients is the concern that motivates Cahn's argument, the type of registry she endorses does not serve those interests because it relies on the child to initiate contact with the registry, which is *independent* of the donor's or recipient's change in preferences.

Therefore, harm to parental interest should be discarded as a strong justification for a mandatory donor registry of the kind Cahn supports. If Cahn's argument is to succeed, it will necessarily rely on the claim that these registries are desirable to prevent harm to the children, which results from anonymous sperm donation.

## II. HARM TO CHILDREN AND NONIDENTITY

One of the central organizing principles of family law is the prevention of harm to existing children or, if you prefer, the protection of children's welfare or best interests. I have argued elsewhere that the transposition of this principle to regulations designed to "protect" children in the reproductive context by altering when, whether, or with whom individuals reproduce is rhetorically attractive but deeply intellectually problematic for reasons associated with Derek Parfit's Non-Identity Problem and recognized by courts in the tort context by their rejection of wrongful-life tort suits.<sup>18</sup>

Without going too deeply into this other work, here is the punch line: whenever a proposed intervention will itself determine whether a particular child will come into existence, child-welfare arguments premised on that child's welfare are problematic. So long as a child will *not* be provided a "life not worth living," the child cannot be said to be harmed when its counterfactual was not existing, or by having a different child (genetically speaking) substituted for it. Thus, any intervention that will alter whether, with whom, or even when individuals reproduce cannot be justified by concern for protecting the resulting child's welfare unless the child would have a life not worth living absent the intervention.

Prohibitions on sperm-donor anonymity tend to alter whether and with whom individuals reproduce. Such regulation may cause some would-be donors not to donate, altering whether and with whom they reproduce. It also changes whether

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18. See I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347, 348–50 (2008); Cohen, *Regulating Reproduction*, *supra* note 11; Cohen, *Beyond Best Interests*, *supra* note 6. For good discussions of the Non-Identity Problem in the nonlegal context, including Parfit's own, see DEREK PARFIT, REASONS AND PERSONS 358–59 (rev. ed. 1987); ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 224 (2000); Dan W. Brock, *The Non-Identity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 BIOETHICS 269, 269–75 (1995).

recipients reproduce, in that some intending parents will be unwilling to engage in artificial insemination if donor identification is mandated. Further, regimes that prohibit anonymity usually *ceteris paribus* reduce the number of sperm donors, as has been the experience in Sweden, the Australian province of Victoria, England, New Zealand, and the Netherlands.<sup>19</sup> If such regulation produced a true gamete shortage, then we would end up with a de facto restriction on whether some individuals seeking donors reproduce. Even if this regulation results only in waiting lists (as has been the case in many countries),<sup>20</sup> that too may de facto limit whether individuals reproduce because some women seeking sperm donation will be at the end of their fertility cycle and often multiple attempts are required to successfully inseminate.<sup>21</sup>

To deal with shortages caused by removing sperm-donor anonymity, many countries try to recruit new sperm donors, thereby altering *with whom* individuals reproduce. In Sweden and the Australian province of Victoria, “recruitment efforts have focused increasingly on the older, more altruistically motivated donor as a way of rebounding from the initial dampening effects” of the prohibition on donor anonymity; one clinic in the Australian province of New South Wales even flew “Canadian students to Australia for complimentary vacations” that required sperm donations every second day.<sup>22</sup> Furthermore, even if the same donors provide sperm to the same recipients under either regime, regime choice may alter *when* they donate (earlier in life versus later on) and thus *when* reproduction takes place.

Therefore, a prohibition on sperm-donor anonymity cannot be justified simply by concerns of “harm” to children because the regulation would “protect” these particular children out of existence, and there is no plausible argument that these children would have a life not worth living.<sup>23</sup>

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19. See Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 B.U. L. REV. 1189, 1207–18 (2010) (reviewing CAHN, *supra* note 4); June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 540–41 (2006).

20. See Bernstein, *supra* note 19, at 1193–94.

21. The American Society for Reproductive Medicine estimates that with artificial insemination “the monthly chance of pregnancy ranges from 8% to 15%.” AM. SOC’Y FOR REPROD. MED., THIRD PARTY REPRODUCTION (SPERM, EGG, AND EMBRYO DONATION AND SURROGACY): A GUIDE FOR PATIENTS 12 (2006), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/thirdparty.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf).

22. See Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 552–53 (2006).

23. In fact, as I have argued elsewhere, anonymous sperm donation is a more complex case involving what I call an “imperfect” Non-Identity Problem. If a move from a regime permitting anonymous sperm donation to a regime prohibiting anonymous sperm donation *always* alters when, whether, or with whom individuals are reproduced, one could say that child welfare is irrational as a justification—a “perfect” Non-Identity Problem. By contrast, hypothetically there may exist at least one child who would have come into existence in both the anonymity-permitted and anonymity-prohibited regimes—one child conceived when the same donated sperm meets the same egg and for whom the rule has no effect on whether, when, and with whom reproduction takes place. As to that particular potential child (or children), a child-welfare justification will be possible if he or she would be better off with access to the identity of his or her donor genetic parent, which is why I call this type of situation

Cahn acknowledges my argument<sup>24</sup> but also seems to want to avoid its implications. Let me offer her words and some possible reconstructions, and then explain why I disagree with her position.

#### A. LAST JUDGMENT

First, Cahn writes,

[R]ather than focus on the “resulting child,” the approach criticized by Professor Cohen, we should focus on the rights of a child who actually comes into existence. At that point, the test should not be: would this child have been better off not being born? Instead, as Amartya Sen and Martha Nussbaum have emphasized, there is a responsibility to maximize human capabilities.<sup>25</sup>

One reconstruction is that there is something that can be done *after the fact of birth* to remedy the “injury” to the child, enabling it to access the identity of its donor parent.<sup>26</sup> This reconstruction would adopt the “last judgment” strategy suggested by Axel Gosseries in the application of the Non-Identity Problem in environmental contexts.<sup>27</sup>

Gosseries imagines a man trying to decide whether to bicycle or drive home from work every day, with attendant effects on the environment experienced by present and future generations. He chooses to drive. Gosseries then imagines that many years later the man’s now-seventeen-year-old daughter who is an environmental activist lambastes him for making the environment so much worse by not bicycling. The man responds: “[H]ad I done so, *you* would not be here”—because the man would have come home at a different time each day and thus slept with his wife at a different time and produced a different child. The father continues: “Since your life in such a polluted environment is still worth living, why blame me? I certainly did not harm you.”<sup>28</sup>

Gosseries disagrees with the father. He suggests that when there is overlap between generations (to at least some degree), there may be an asymmetry in the way the Non-Identity Problem immunizes pre- and postconception harms. “As long as the father’s pro-car choice was a necessary condition for his daughter’s existence, it remains unobjectionable [such that] his preconception actions are immune to moral criticism when it comes to alleged harms to his

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an imperfect Non-Identity Problem. But the sheer number of children for whom this will be true is significantly smaller than the universe of all donor-conceived children. I have argued elsewhere that this small subset of harmed children cannot save the type of regulation proposed by Cahn and in place around the world. *See* Cohen, *supra* note 11. I think I am right on this point, and although Cahn has not argued with it, it remains possible for her or others on her side to do so in future works.

24. Cahn, *supra* note 2, at 422.

25. *Id.* (footnote omitted).

26. This discussion also appears in Cohen, *supra* note 11.

27. *See* Axel Gosseries, *On Future Generations’ Future Rights*, 16 J. POL. PHIL. 446, 459–64 (2008).

28. *See id.* at 460 (internal quotation marks omitted).

daughter.”<sup>29</sup> “However, as soon as the daughter is conceived, all the father’s subsequent actions no longer fall within the scope of the non-identity context” such that “we should expect the father to *catch up* as soon as his daughter has been conceived in order to be able, at the end of his life, to eventually meet” his obligations to her with regards to the environment.<sup>30</sup> Even if the harm to the environment the father has already inflicted is irreversible, says Gosseries, “he should act in such a way as to compensate for such negative impacts through substitution measures (e.g.,[.] replacing an extinguished species with new energy-saving technology).”<sup>31</sup>

Can we make the same claim here, that the recipient parents who have sought to use anonymous sperm donation should “catch up” by revealing the child’s identity later on, and that this justifies the legal prohibition on sperm-donor anonymity? The argument would suggest that the obligation to reveal to the child his true genetic father—or at least to make sure this parentage information is available in the registry—is like the obligation identified by Gosseries in the environmental context of adopting energy-saving technologies going forward. Thus, Cahn might follow Gosseries in suggesting that the Non-Identity Problem is inapplicable to obligations to the child that could be met *after* its birth.

Will such an approach work? I think not because of what I call the “anticipation problem.” A legal obligation for the sperm donor to place his name in a registry available to the child at age eighteen, as discussed above, is the very thing likely to alter donor and recipient behavior about when, whether, or with whom they reproduce. Thus, a legally enforceable catch-up obligation feeds back into the conception decision and thus is not immunized from the Non-Identity Problem. Therefore, even as to sperm-donor anonymity, the Non-Identity Problem cannot be evaded by justifying the regulation in the prevention of harm to the resulting child.

Indeed, without going into the philosophical nuances, the Pennsylvania Supreme Court accepted a somewhat similar argument against parental liability for known sperm donors. In a case where a known donor and genetic mother had agreed that the donor would not be the legal father, but post-birth the mother sued him seeking child support, the court rejected the claim that concern for the resulting child should render the agreement unenforceable as contrary to public policy, observing that: “This Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favor of Sperm Donor in this case denies a source of support to two children who did not ask to be born into this situation” but that “[a]bsent the parties’ agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe

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29. *Id.* at 461.

30. *Id.*

31. *Id.*

from a support order.”<sup>32</sup> To put it in my terms, the court is recognizing that had the sperm donor known that the legal rule was that the agreement would be unenforceable he would not have engaged in the reproductive activity, producing a Non-Identity Problem by anticipation, such that harm to the child of not being supported cannot be used as a justification for imposing child support obligations.

In her article, Cahn responds to my critique by writing, “[t]he issue, however, once the child comes into being, is how to maximize the child’s welfare; prospectively, at least, any donor who provides gametes will be aware of responsibilities to children created from those gametes.”<sup>33</sup> This does not seem responsive. The point is not about retroactivity—we both agree that the registry will only be in force prospectively. Nor is it enough to say that the issue is how to maximize children’s welfare once born. The point of my discussion of the “last-judgment problem” is that if we set the legal rule as Cahn wants us to—requiring the registry—it will alter when, whether, or with whom individuals conceive. To the extent it does so, her proposed law cannot be justified on the basis of preventing harm to the children who would come into existence in a world without mandatory registries because the law will cause those children not to exist at all (at most replaced by other children, if even that). This is the feedback on the conception decision from regulation of postconception behavior.<sup>34</sup>

#### B. WRONGING WHILE OVERALL BENEFITTING

There is a second possible reconstruction of Cahn’s argument: that Cahn means to incorporate an approach I have called “wronging while overall benefiting.” This approach concedes that because of the Non-Identity Problem no child is *harmed* by the act of anonymous sperm donation that produces them (because they are not made worse off compared to a counterfactual world in which they were not born), but a child is nonetheless *wronged* even while overall benefitted by being brought into existence. Seana Shiffrin is the most prominent proponent of this view in legal circles.<sup>35</sup> As applied here, this kind of argument would suggest that, by depriving a child of access to the identity of his genetic father, we have wronged him, even if we have not harmed him, because he has a life worth living.

Shiffrin rejects the “comparative model” of harm that treats harm and benefit

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32. *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (Pa. 2007).

33. Cahn, *supra* note 2, at 423 & n.301.

34. Can the last-judgment argument give us a basis for finding that people who fail to choose identified sperm donation deserve *moral censure* even if their actions cannot justify legal regulation through mandatory registries? Anticipation of moral censure itself might also alter when, whether, or with whom one reproduces. However, there are some additional complexities on the purely moral context that I put to one side for present purposes.

35. See Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117, 119–20 (1999). Cahn cites Shiffrin for the proposition, “[A] child who does not yet exist is not harmed through its nonexistence.” Cahn, *supra* note 2, at 423. I, too, fully endorse this proposition in my own work. See Cohen, *supra* note 11.

as two sides of the same scale and its “principle that one may inflict a lesser harm on someone simply to benefit him overall, when he is unavailable to give or deny consent.”<sup>36</sup> She instead endorses an asymmetrical, noncomparative approach in which “harm” is associated with noncomparative, absolutely bad states such as broken limbs, disabilities, death, and significant pain, and “benefit” is associated with goods such as material advantage, sensual pleasure, and goal fulfillment.<sup>37</sup> Shiffrin then distinguishes between two types of benefits, those that represent the “removals from or preventions of harm” and a residual category she terms “pure benefits.”<sup>38</sup> She argues that it is permissible to inflict a lesser harm to remove or prevent a greater harm, but wrong to inflict that same harm in order to confer a pure benefit, no matter how large that benefit.<sup>39</sup> Shiffrin extends this idea to wrongful-life cases, suggesting that no one is harmed by not being created—being born confers on the child only a pure benefit and not the avoidance of harm.<sup>40</sup>

Applying the same principle to anonymous sperm donation, the argument would be that, by producing a child through anonymous sperm donation, one has harmed the child in order to confer on it a pure benefit, which is wrongful. We should be clear that Shiffrin herself has largely limited the ambit of her claim to an argument for tort liability for wrongful life, so the argument under consideration is an extension of her claims that she may not endorse. However, even an attempt to apply Shiffrin’s approach to anonymous sperm donation seems likely to fail.

Shiffrin’s argument is rich and complex, and thus my attempts to wrestle with it in other work are quite involved; for present purposes, I will merely summarize why I think this approach is unlikely to save Cahn’s claim. Shiffrin’s approach leads to the conclusion that all acts of reproduction (not just wrongful life or anonymous sperm donation) are *prima facie* wrongful—a conclusion many will find problematic. To the extent she countenances that the wrong may be abated by love and support for the resulting child, it is not clear why the recipient rearing parents do not adequately provide that love and support. Further, Shiffrin’s argument relies on a noncomparative conception of harm that may be problematic. The intuition pump Shiffrin uses to generate the rule about harm and pure benefits may not work or apply in the reproductive context. Finally, even if this approach can justify tort liability, it runs into problems justifying a regulatory regime that seeks to prevent anonymous sperm donation altogether. In the words of LeVar Burton, “[b]ut you don’t have to take my word for it,”<sup>41</sup> and you can read the article in which I explore these points.<sup>42</sup>

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36. Shiffrin, *supra* note 35, at 119–22, 127.

37. *See id.* at 120–25.

38. *See id.* at 124–25.

39. *See id.* at 125–27.

40. *See id.* at 119–20.

41. *Reading Rainbow* (PBS television broadcast).

42. *See* Cohen, *supra* note 6.

## C. NON-PERSON-AFFECTING PRINCIPLES

There is a third possible reading of Cahn, lightly implied by two sentences two paragraphs later:

More than ninety percent of United States women will use contraception at some point in their lives, and even the Catholic Church permits the rhythm method. We thus must allow for some impeding the existence of a child, and the question then becomes which ones we, as a culture, will choose to impose, and why and how we decide which regulations are appropriate.<sup>43</sup>

Perhaps Cahn is saying it would be better for the world if, instead of these children being born through anonymous sperm donation, other children were born who would know their genetic parents because this latter group would have better lives. Philosophers have referred to this as the non-person-affecting principle.<sup>44</sup> One such view suggests the world would be better off, if instead of person *A*, who will experience serious suffering or limited opportunity, person *B*, who will not experience those things, came into existence—that is, “[a]lthough the person born with the condition in question would not have been harmed by birth, the world is better off if a person without that harm had been substituted in his place.”<sup>45</sup> We can also understand this argument to replace the best interests of resulting *children* with the best interests of a resulting *population*, or as an obligation to produce the population of children with the highest welfare possible. It is a claim that the world is better off even though no person is made better off; the world is better in an impersonal sense.

I have doubts about whether Cahn would actually like to go in this direction, but in any event, I have critiqued this approach elsewhere as a justification for the regulation of reproduction, including bans on anonymous sperm donation.<sup>46</sup> I think the non-person-affecting principle may be limited to cases in which the same number of children will come into existence whichever way we set the regulation,<sup>47</sup> which is unlikely to be true of sperm-donor registries. It also faces other problems: If the small population welfare deficits that allegedly result from anonymous sperm donation are enough to justify bans on the practice, we should also endorse much more significant regulation of coital and other reproductive technologies than we currently do. The non-person-affecting principle relies on premises that support the eugenics movements of old, which many find objectionable. Further, it seems to justify equally well regulations requiring parents to have enhanced children, which some would find objection-

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43. Cahn, *supra* note 2, at 424.

44. See, e.g., PARFIT, *supra* note 18, at 359–61, 364–65; Brock, *supra* note 18, at 273.

45. John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 16 (2004).

46. See Cohen, *supra* note 11.

47. The reason is complex and has to do with paradoxes implied by average and total welfarist approaches, as discussed in Cohen, *supra* note 11.

able. Finally, the approach may have trouble grounding criminal-law-type rules, such as making anonymous sperm donation illegal, depending on one's theory of the moral limits of criminal law.<sup>48</sup>

#### D. OTHER POSSIBLE REFORMULATIONS

There are still other possibilities open to Cahn that I do not think are suggested by her text. Under a virtue-ethics approach, she could argue that the prohibition is needed to ensure that parents act in keeping with the virtues of parenthood.<sup>49</sup> Under a legal-moralist approach, Cahn could argue for the use of criminal law or other regulatory tools to deter acts that neither harm nor offend, but do undermine public morality, all in the name of maintaining traditional family structures.<sup>50</sup> Knowing Cahn's larger body of work, I find it unlikely she would want to freeze traditional family values, and there are interesting questions of whether sperm donation could ever be traditional and whether its anonymity is in fact *more*, not less, traditional.<sup>51</sup> Finally, Cahn could argue for a reproductive-externalities approach, in which the reproductive regulation is justified not by harm imposed on the child but by costs imposed on third parties.<sup>52</sup> Again, this seems an unlikely route for Cahn, especially because it is unclear that there are significant externalities from anonymous sperm donation (particularly given what I have said above about harm to donor and recipient parents). In any event, I have critiqued these three approaches in my own work, and, for the reasons I have suggested, I find them unpersuasive as a justification for prohibiting sperm donor anonymity.<sup>53</sup>

If what I have said is right, Cahn has not made a persuasive showing that sperm-donor registries are needed to prevent harm to children. If they are not needed to prevent harm to children and, as I have suggested above, they are not needed to prevent harm to donor or recipient parents, the question becomes whether they are needed at all. At the very least, I have shown why the argument that these registries are an appropriate limitation on otherwise voluntary reproductive choices of adults is more complicated than it might first appear.

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48. *See id.*

49. *See* R. McDougall, *Acting Parentally: An Argument Against Sex Selection*, 31 J. MED. ETHICS 601, 603 (2005).

50. *See* 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 3–4 (1988).

51. *Cf.* Cahn, *supra* note 2, at 374, 391–92 (suggesting that secrecy has been the norm until the last decade with sperm donation).

52. *See* Cohen, *supra* note 6.

53. *See* Cohen, *supra* note 11; Cohen, *supra* note 6 (discussing similarities between the reproductive-externalities approach and the eugenics movement of old, how wide a diffusion of harms can count, underinclusivity, implications for enhancement, the possibility of making parents internalize the externality, political theory and constitutional law challenges to legal-moralist accounts and virtue-ethics arguments against enhancement, and whether virtue ethics approaches really evade the Non-Identity Problem).

### III. COMPETING ANALOGIES: A MODEST PROPOSAL FOR A MISATTRIBUTED-PATERNITY AND ONE-NIGHT-STAND REGISTRY

One of the great strengths of Cahn's larger project is to force us to reconsider why adoption and reproductive technology are regulated so differently. The prior Part suggests some important differences between the two, especially with regards to preventing harm to children. The failure to mandate the identification of adoptive parents may harm existing children (assuming the presence of empirical evidence), while it is more problematic to claim that the failure to mandate sperm-donor registration will harm children.

A different response is that there is a potentially competing analogy to adoption: natural reproduction. In the Swiftian tradition, let me offer a "Modest Proposal"<sup>54</sup> to examine the strength of Cahn's arguments. If, as Cahn claims, children are harmed when they are deprived of knowledge about their true genetic origins and identifying information about their genetic parents—to such an extent that the state should mandate sperm-donor registration against the will of both donor and recipient parents<sup>55</sup>—then why not apply the same regulation to natural reproduction? In particular, why not require every individual who engages in coital sex with a fixed probability of conception<sup>56</sup> to put his or her name and contact information in a registry mirroring the one endorsed by Cahn, with the proviso that their names would be erased from the registry if there were no evidence of pregnancy within a few months? This would encompass a "one-night-stand registry" in that never again would a child who results from a temporary relationship suffer the harms which Cahn envisions and which she claims call out for governmental regulation. In fact, my hypothetical registry's beneficiaries are broader still. There is evidence that misattributed paternity—believing like Luke Skywalker that your father is someone other than who he is<sup>57</sup>—is not an insignificant phenomenon, with studies suggesting that it may affect as few as one percent and as many as thirty percent of the population, with most estimates clustering at two to five percent of the population.<sup>58</sup> At age

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54. See generally JONATHAN SWIFT, *A Modest Proposal*, in *A MODEST PROPOSAL AND OTHER SATIRICAL WORKS* 52 (Dover Publications, Inc. 1996) (1729), available at <http://www.gutenberg.org/files/1080/1080-h/1080-h.htm> (proposing, in satirical essay, that the Irish eat their children).

55. Again, nothing stops those in favor of identification from using an available open-identification program, so it is the unwilling that regulation must target.

56. The probabilistic threshold could match the probability of successful donor insemination, around eight-to-fifteen percent per month. See AM. SOC'Y FOR REPROD. MED., *supra* note 21. We could exempt, for example, gay sex and perhaps all nonvaginal sex, although as I have discussed elsewhere there has been at least one case in which it is alleged that semen from oral sex has been used for insemination purposes. See I. Glenn Cohen, *The Constitution and the Rights Not To Procreate*, 60 STAN. L. REV. 1135, 1147 (2008) (discussing *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at \*1 (Ill. App. Ct. Feb. 22, 2005)). Whether to exempt sex with condoms or other forms of birth control would depend on matching the probability thresholds of success for donor insemination.

57. See *STAR WARS: RETURN OF THE JEDI* (20th Century Fox 1983).

58. See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 315 n.106 (2010) (citing Bryan Sykes & Catherine Irven, *Surnames and the Y Chromosome*, 66 AM. J. HUM. GENETICS 1417, 1418 (2000)).

eighteen, these children too could discover that their fathers are not who they thought they were and thus avoid the harms that motivate Cahn's call for regulation.

To be fair, there are distinctions between my Modest Proposal and Cahn's. Perhaps we have independent worries about the misuse of data on our sexual partners, or we do not trust the government to erase our names from the registry if no child results.<sup>59</sup> There are, though, also ways in which my registry might be thought of as *more* desirable than Cahn's: mine seems less likely to have a chilling effect on the willingness to engage in sex than her registry's chilling effect on the willingness to engage in donations. To the extent it would increase the use of condoms, my Modest Proposal might be thought to have desirable spillover effects in reducing STD transmission. It would also better enable the state to pursue child support from deadbeat dads.

The strongest distinction between Cahn's actual proposal and my Modest Proposal is that sperm donors provide sperm with the intention of creating a family while at least some of those affected by my Modest Proposal may not (though there certainly are cases in which individuals seek to produce a child together coitally but down the road the child is reared by a different father and never knows its true genetic origin). Even when this distinction is operative, however, it is not clear that it should make a difference. Courts routinely impose parental status and support obligations upon men who are deceived into believing their partners are using birth control or are incapable of reproducing.<sup>60</sup> A common theme in this case law is that whatever rights the father might have must give way to the best interests of the child, who would otherwise go unsupported; put another way, the right to support belongs to the child and only the child can waive it.<sup>61</sup> If one views information about a child's genetic parentage as a kind of right of a child or duty that a child is owed—and I think it is fair to characterize Cahn's view as along these lines—then, just as in the child-support cases, I think there is a strong argument for extending the disclosure right to coital-reproduction cases, even when reproduction happens by accident.

Of course, my proposal is meant to provoke. I take it as given that most of us, Cahn probably included, would recoil at the notion of this kind of mandatory registry. However, this invites the question as to *why*, because it seems to enable

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59. That said, the latter worry may apply to sperm-donor registries as well.

60. See Cohen, *supra* note 15, at 1128 n.37 (presenting a list of cases).

61. *Id.* at 1128; see, e.g., *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996) ("The child is an innocent party, and it is the child's interests and welfare that we look to . . ."); *Faske v. Bonanno*, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) (per curiam) ("Since a child may not suffer for a parent's release of the child's claim, neither should the child suffer from one of the parents' 'fault' regarding the conception."); *Mercer Cnty. Dep't of Soc. Servs. ex. rel. Imogene T. v. Alf M.*, 589 N.Y.S.2d 288, 290 (N.Y. Fam. Ct. 1992) ("This Court is not concerned with the child's mother's actions but rather protecting the best interests of and insuring that adequate provision will be made for, the child's needs."). Of course, for reasons relating to the arguments I noted in Part II, I would not be too quick to endorse this kind of harm-to-resulting-child argument marshaled by these cases. But, in this Part, I am examining the question from the perspective of someone like Cahn, and these courts that do accept harm-to-resulting-child type arguments.

many of the same goals as Cahn's proposal and the registries in place across the world. We can think of adoption and coital reproduction as a little like the optical illusions known as Rubin's Vase, which can be perceived as either a vase or the profiles of two human faces gazing at one another;<sup>62</sup> it is instructive to think of reproductive technology juxtaposed against both frames, not just one. In what is one of my favorite lines in judicial opinions on reproduction, Justice Sillis wrote in the famous *Buzzanca* case before the California Court of Appeal—reasoning from these kinds of cases to impose parental obligations on a commissioning father who was in a surrogacy arrangement gone awry—that “a deliberate procreator is as responsible as a casual inseminator.”<sup>63</sup> With my Modest Proposal, I want to suggest that the identity goes both ways, and that Cahn's proposal should apply equally to the “casual inseminator.”

These reflections on my Modest Proposal leave me thinking that unless Cahn and other proponents of sperm-donor registries can argue that genetic offspring who stem from our sexual reproductive encounters deserve much more protection than genetic offspring who stem from our nonsexual reproductive encounters, the argument for the sperm-donor registries requires a premise of “reproductive-technology exceptionalism” (that reproductive technology should be regulated quite differently from natural reproduction). While I think that Cahn herself would be unlikely to endorse the view that reproduction through these technologies is a “lower status” kind of reproduction, worthy of less protection, I worry that her argument might *sub silentio* depend on that premise, as my Modest Proposal helps us see.

#### IV. NOT GOING FAR ENOUGH: ACTIVE AND PASSIVE REGISTRIES

For all the reasons I have discussed, I am not convinced by Cahn's argument for mandatory sperm-donor identification via a registry and thus oppose proposals for a mandatory registry in the United States. Suppose you disagree and think that Cahn has successfully made the case based on the harm to the resulting child. In that case, there is a sense in which her proposal does not go far *enough*. The model that Cahn endorses, like the ones in place in the UK and elsewhere,<sup>64</sup> are what I call passive registries. Children have to call the registry at age eighteen to determine whether they are donor conceived in order to receive the identities of their donors. If their recipient parents do not inform the children that they are donor conceived, it seems likely that only a smaller subset of donor-conceived children will call the registry. While some recipient parents may fear this possibility enough that they will inform their donor-conceived children, many recipient parents, especially among heterosexual families, are

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62. See, e.g., *Rubin Vase Illusion*, OPTICAL-ILLUSIONIST.COM (May 25, 2009), <http://www.optical-illusionist.com/illusions/rubin-vase-illusion>.

63. *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 292 (Cal. Ct. App. 1998).

64. See Cahn, *supra* note 2, at 420; *Can You Be Anonymous as a Sperm, Egg or Embryo Donor?*, *supra* note 7.

likely to “chance it” and hope that their children will not investigate.<sup>65</sup>

As far as I know, there are no good statistics on how many donors in systems with passive registries have informed their children. Given that studies Cahn cites in her book have shown that only five percent of recipient parents disclose under anonymous sperm-donation programs,<sup>66</sup> and that thirty percent of heterosexual recipient parents who have chosen identity-release sperm donations still had not disclosed to their twelve-to-seventeen-year-old children that they were donor conceived,<sup>67</sup> it seems plausible that passive registries of the kind championed by Cahn will lead to something less than all donor-conceived children being informed that they were the result of sperm donation. Therefore, for some subset of donor-conceived children, possibly the majority, all the harms anticipated by Cahn will persist even in the face of the passive registry.

If we took Cahn’s argument seriously, what would be needed is a more muscular kind of intervention, which I call an active registry. This registry would itself contact the child at age eighteen to let him or her know that he or she was donor conceived and allow (but not force) him or her to receive information about the donor. In the shadow of such a law, it seems plausible that the vast majority of parents would opt to inform their children of their donor-conceived status rather than wait for a civil servant to do so.<sup>68</sup> If we were convinced by Cahn’s article, it seems we would have good reasons to adopt the active registry instead of her proposed passive registry, which is also the kind present in many foreign jurisdictions.<sup>69</sup>

Indeed the active registry may seem fairer because donor-conceived children

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65. Cf. CAHN, *supra* note 4, at 122 (reviewing studies showing that “most heterosexual parents do not disclose to their children that they have been conceived with third-party gametes” in contrast to same-sex families). I will also observe the way in which one’s choice of a starting case may infect the analysis. Far too many legal writers start with a heteronormative, two-parent, intact family as their starting point and move new types of family structures to the periphery. See, e.g., Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 444–51 (2006). It is a great credit to Cahn’s work that she sees American families for the diverse mosaic that they are. One ironic risk, though, is that considerations more pertinent to the traditional heteronormative family may get left out when one adopts the wider lens. I suspect this is partially what motivates the preference for the passive over the active registry, since children of gay or single recipient parents do not need to be told they were conceived via reproductive technology. It may also hide the way in which sperm-donor anonymity represents different value choices for these kinds of families. In particular, the desire to preserve the equality of relationship between recipient parents when one is not the genetic parent may render artificial insemination by this kind of family quite different from the adoption case.

66. See Susan Golombok et al., *Families with Children Conceived by Donor Insemination: A Follow-Up at Age Twelve*, 73 CHILD DEV. 952, 966 (2002). Cahn cites these papers in CAHN, *supra* note 4, at 123 n.34.

67. See Scheib et al., *supra* note 17.

68. A similar compliance rate might theoretically be achieved by making it a crime not to tell one’s donor-conceived child about his or her sperm-donor father, but it seems to me that this would involve much more complicated detection problems and possibly raise normative or constitutional compelled-speech issues.

69. See Cahn, *supra* note 2, at 420; *Can You Be Anonymous as a Sperm, Egg or Embryo Donor?*, *supra* note 7. Of course the case for the “active” registry is not ironclad. It might be more costly to implement than the passive one, though we could always fund it by taxing sperm-donation clinics.

of coupled heterosexual recipient parents would be just as likely to detect their origins as children of same-sex recipient parents and single recipient parents. Moreover, to the extent recipient parents would no longer be able to “pass” as genetic parents to their donor-conceived children, the active registry might decrease the tendency for rearing parents to seek sperm donors who are racial matches for themselves, a practice some have found objectionable.<sup>70</sup>

Yet for me and, I suspect, for many of those who find Cahn’s argument appealing, the active registry seems somewhat frightening. If Cahn’s argument is right, it seems odd that a system that is more effective at achieving the goals championed by Cahn should seem less desirable. It is not as though we think that the child who, like Nancy Drew, sleuths out her donor-conceived nature is *more* deserving of this information than the one who has passively accepted that her father is the man who has reared her.

I can think of three reactions to this discussion. First, those persuaded by Cahn’s article might overcome their intuitive discomfort and endorse the active registry. Second, consideration of the active registry might help us reach reflective equilibrium on the passive registry and doubt some of the arguments Cahn has put forward in favor of it. Third, one might develop an intersectionality theory in which one demonstrates empirically that the supposed harm to donor-conceived children deprived of their donor’s identities is most pronounced for children who *already suspect* they are donor-conceived; by doing so, one might establish normatively that only for this subset does the anticipated level of harm justify the intrusion on donor and recipient parents’ welfare and autonomy. This is a possible way of resolving the problem, but I worry that it is a just-so story. I am, unsurprisingly, most attracted to the middle option, but my purpose here is merely to show how consideration of the active registry enriches Cahn’s discussion.

#### CONCLUSION

As is true of all of Cahn’s many works, *The New Kinship* is enlightening, thoughtful, and beautifully captures both the academic and personal sides of the issue. I have focused here on the place where Cahn and I diverge. This disagreement, however, in no way eclipses my admiration for this important piece of scholarship, indeed for the entire body of her work.

For the reasons discussed, I am not persuaded by Cahn’s argument for adopting a mandatory sperm-donor identification registry of the kind in place elsewhere in the world. Indeed, I think these registries should be eliminated, not replicated. At a moment in which the idea of these registries is rapidly gaining popularity and attention in the United States, I hope my dissenting voice will be heeded.

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70. See generally Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844 (2009) (“[R]acially salient forms of donor disclosure are pernicious social practices, which, while operating beyond the reach of the law, ought to be condemned as bad policy.”).