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ARTIFICIAL REPRODUCTIVE TECHNIQUES AND PARENTING: TRENDS AND PARADOXES

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Translated by Allison Arnold

ABSTRACT

The increasing use of artificial reproductive techniques generates very complex problems concerning parent-child juridical relations. Posthumous insemination, heterologous fertilization procedures, and surrogate motherhood raise questions as to the traditional ways in which we establish parenthood. This paper analyzes trends in comparative family law and proposes responses to the challenges presented by artificial reproductive techniques. First, it considers the juridical issues that arise from the use of donor gametes, with special attention to the question of donor anonymity. Then the paper considers basic principles that should guide law and policy in this area, and proposes conclusions as to the right to identity, the commodification of the human body, the traceability of gametes, the exploitation of women, and other matters. The paper considers same-sex marriage (with special attention to a recent Argentinian law recognizing it), and considers the possibility of “two-mother” or “two-father” families. The complexities of the different combinations of biological parents, donors, and surrogate mothers are considered. The paper concludes by identifying the problems intrinsic to these reproductive techniques and by emphasizing the need for strong legal measures to assure the human dignity of the unborn child and the transmission of life, with special consideration to family law.

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I. TECHNIQUES OF ARTIFICIAL PROCREATION:
THEIR PURPOSES AND RELATIONSHIP TO PARENTING

Our era witnesses an increasing use of techniques of artificial procreation, that is, procedures directed toward the conception of human beings in ways other than the sexual union between man and woman. These techniques are employed for the following purposes:

1. To overcome inability to reproduce caused by the sterility or infertility of one or both partners;
2. To overcome the inability to reproduce inherent in a same-sex relationship;
3. To prevent the gestation of a child who may have an illness or be likely to contract one, or who may have a disability—this may be achieved by pre-implantation genetic screening of embryos,² followed by the annihilation of those which have been identified as at risk;³
4. To procure a child with certain desired characteristics;⁴
5. To conceive a child in order that he or she may later be the donor or seller of cells and tissues to a sibling. This process (known in Spanish as *bebé-medicamento*—savior siblings) arouses the justified criticism that it involves the instrumentalization of the child. In addition, the procedure is objectionable as it may involve the destruction of embryos produced by extra-corporeal techniques.

Techniques of artificial reproduction (for any of these aims) can be classified as intra- or extra-corporeal, depending on where fertilization occurs. They may be homologous or heterologous, depending on whether the gametes are obtained from third parties (donors or sellers).

² Another technique involves the screening of gametes, e.g., the screening and selection of eggs prior to fertilization.

³ See Zachary P. Demko, Matthew Rabinowitz, & David Johnson, *Current Methods for Preimplantation Genetic Diagnosis*, 13 JOURNAL OF CLINICAL EMBRYOLOGY 6 (2010), available at <http://www.geneseurity.net/wp-content/uploads/2010/04/Current-Methods-for-Preimplantation-Genetic-Diagnosis.pdf>. This article notes that “[c]ouples undergoing *in vitro* fertilization ... have the unique opportunity to use pre-implantation genetic diagnosis (PGI) to select their best embryos for transfer ... ” (*Id.*). This selection implies the elimination of the unwanted child, and so violates the right to life of the embryo.

⁴ Professor George Dent makes an interesting presentation and analysis of these matters, with frequent reference to literature and the cinema, in his article *Families We Choose? Visions of a World Without Blood Ties*, 2 INT’L J. JURISPRUDENCE FAM. 13 (2011).

Techniques of artificial reproduction raise ethical and legal problems because they involve the instrumentalization and technification of the process of generation of a new human life and we think that these techniques should not be approved by the law. In particular, this paper focuses on the implications that such techniques have for parenthood and motherhood. This is centrally linked with three biotechnoscientific possibilities: post-mortem insemination, heterologous fertilization, and surrogate motherhood or the renting of wombs. We will analyze the fundamental principles that apply to these practices, trends in relation to what is called heterologous fertilization, and problems related to the claim of same-sex partners to have children by means of these techniques.

II. PRINCIPLES OF LAW AND JUSTICE INVOLVED IN HETEROLOGOUS FERTILIZATION⁵

The donation or sale of gametes for reproductive purposes raises new and serious bioethical and legal questions because it deliberately dissociates biology and “procreational will.”

Centrally, the issue at stake is the way in which fatherhood and motherhood are determined. Those involved with heterologous fertilization maintain that the child born as a result of the use of artificial procreation techniques should be considered to be the child of the people who requested the procedure. This supposes an alteration of the fundamental principles underlying filial relationships.⁶

⁵ The author’s proposals for legal regulation of techniques applied to human procreation are discussed in Jorge Nicolás Lafferriere, *Técnicas de Procreación Humana. Propuesta para la Tutela Legislativa de la Persona Concebida* [*Techniques of Human Procreation: Proposal for the Legislative Protection of the Person Conceived*], 219 REVISTA EL DERECHO 858 (2006).

⁶ Among the countries that have banned heterologous techniques, Italy stands out (*see* Article 4.3 of Law of 19 February 2004, n. 40, titled “Norme in materia di procreazione medicalmente assistita,” *Gazzetta Ufficiale della Repubblica Italiana*, n. 45, 24 February 2004, *available at* <http://www.parlamento.it/parlam/leggi/040401.htm>). For an analysis of the Italian situation, *see* *La Legge 40. Sei Anni Dopo* [*Law 40: Six Years Later*], 1 QUADERNI DI SCIENZA & VITA (March 2010), *available at* <http://www.scienzaevita.org/quaderni.php>. Austria also prohibits the giving of eggs and sperm through extra-corporeal techniques *Fortpflanzungsmedizingesetz* [Artificial Procreation Act], Federal Law Gazette 275/1992. This provision has been held by the Grand Chamber of the European Court of Human Rights not to violate the European Convention on Human Rights. *Case of S.H. and Others v. Austria*, Application No. 57813/00, 3 November 2011 *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbk&action=>

In filial matters, the biological principle usually governs, so that motherhood and fatherhood are determined, ultimately, by the biological link.⁷ This biological principle is one that human reason can grasp. It corresponds to the natural law, which demands respect for the origin of human life in the sexual union of man and woman. In our time, the expansion of techniques of artificial procreation has challenged this idea. But the truth is that the use of these techniques to procreate has introduced a different logic in the transmission of life that contradicts natural law. Specifically, it contradicts the second principle of natural law, which establishes the need to protect and promote the family. And that includes respect for the particular and unique way in which human life is transmitted. Certainly techniques of artificial procreation do not respect such a principle.

Moreover, in the case of a marriage between a man and a woman, these techniques affect the principle of marital and conjugal unity in two ways: they infringe the unity of the conjugal and the generative, and they infringe the union in its unitive and procreative dimension.⁸ In fact, one of the first principles of natural law states that marriage is the best and more appropriate way to transmit life. As John Finnis says, “Marriage is a distinct fundamental human good because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely, the bringing of that person into existence as *conceptus*, embryo, child, and eventually adult, fully able to participate in human flourishing on his or her own responsibility.”⁹ In many cases, artificial reproductive techniques alter the basic goods of marriage.

From the point of view of the child, he or she has the right to be conceived “from untampered-with biological origins.”¹⁰ Also at stake is the right of the

html&highlight=Austria&sessionid=82948213&skin=hudoc-en. Decisions and judgments of the European Court of Human Rights are available in the court’s case law database (HUDOC) at www.echr.coe.int

⁷ Hernán Corral Talciani explains that the principle of biological truth has expanded not only because of ideological and cultural changes, but also because of the advances in genetic testing. *Intereses y Derechos en Colisión sobre la Identidad del Progenitor Biológico: Los Supuestos de la Madre Soltera y del Donante de Gametos* [*Interests and Rights in Conflict About Biological Parent’s Identity: The Cases of the Unmarried Mother and of the Sperm Donor*] 16 REVISTA IUS TE PRAXIS 57, 60 (2010).

⁸ Elio Sgreccia, MANUALE DI BIOÉTICA [HANDBOOK OF BIOETHICS] 656 (4th ed. 2007).

⁹ John Finnis, *Marriage: a Basic and Exigent Good*, 91 MONIST 388, 389 (2008).

¹⁰ Margaret Somerville, *Children’s Human Rights to Natural Biological Origins and Family Structure*, 1 INT’L J. JURISPRUDENCE FAM. 38 (2010).

child to identity, which is expressly incorporated in the U.N. Convention on the Rights of the Child. Article 8 provides:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.¹¹

Establishing the filial ties of the child is a requirement of justice, since personal identity arises from a complex structure that includes biological ties. Therefore, deliberately engendering a child with a dissociated fatherhood or motherhood compromises the child's identity.¹²

III. TRENDS AND CONCERNS IN REGARD TO TECHNIQUES OF HETEROLOGOUS ARTIFICIAL PROCREATION

Heterologous fertilization techniques rely on the donation or sale of gametes. Heterologous fertilization can rely upon intra-corporeal techniques (especially artificial insemination) or extra-corporeal ones (mainly in vitro fertilization and intracytoplasmic sperm injection).

The heterologous techniques necessarily raise bioethical and legal issues. Two major principles appear to guide legislation in this area: one of *anonymity* and the other of *autonomy* or *freedom* (with special emphasis on freedom to donate or sell gametes). However, some trends have highlighted the inadequacy of these principles and thus raise doubts about the legitimacy of the donation or sale of gametes, and even the legitimacy of the heterologous techniques.

We will consider the concerns about anonymity, commercialization, transmission of diseases and genetic defects, and “designer babies.”

¹¹ Convention on the Rights of the Child, GAOR 44/25, 1577 U.N.T.S. 3 (September 2, 1990), available at <http://www2.ohchr.org/english/law/crc.htm>

¹² Professor David Benatar considers that gamete donation is almost always morally wrong because gamete donors treat their responsibilities too lightly by leaving the rearing of their offspring to others. David Benatar, *The Unbearable Lightness of Bringing into Being*, 16 J. APPLIED PHIL. 173 (1999). It might be said that Benatar is opposed to gamete donation only because it results in reproduction, since he assumes an anti-natalist position. See David Benatar, *Better Never to Have Been: The Harm of Coming into Existence*, Oxford Scholarship Online (September 2007), doi:10.1093/acprof:oso/9780199296422.001.0001. However, this is not the argument of the 1999 article cited above.

A. Concerns about Anonymity and Disclosure

The anonymity of the donor or seller is presented as an attempt to solve some of the problems that arise from heterologous fertilization. Thus, Spanish law 14/2006, article 5, paragraph 5,¹³ “Of Human Assisted Reproduction Techniques,” provides:

The donation will be anonymous and must ensure the confidentiality of the identity data of the donors by the gamete banks, and, where appropriate, by the donor registries and activity of the centers that are formed. The children born are entitled for themselves or by their legal representatives to obtain general information about the donors that does not include their identity. The same right applies to recipients of gametes and pre-embryos. Only as an exception, in extraordinary circumstances involving a certain danger for the life or health of the child or when appropriate under the laws of criminal procedure, may be revealed the identity of the donors, provided that such disclosure is necessary to avoid the danger or to achieve the proposed legal purpose. Such disclosure will be narrow and does not imply any publicity of the identity of the donors.

Nevertheless, several factors and circumstances suggest a gradual decline of anonymity in these matters.

1. Right of the Child to Learn the Identity of the Biological Parents

The major circumstance undermining anonymity is the right of the child to learn about its origins. As we said, this right to identity is acknowledged in the Convention on the Rights of the Child (article 8)¹⁴ and numerous voices propose this right.¹⁵ Anonymous donation of gametes denies this right because it prevents the child from knowing his or her biological origin.

Some studies have emphasized the consequences for children of anonymous donation of gametes. Elizabeth Marquardt has led an important research project, published as *My Daddy’s Name is Donor*. Her research found that

young adults conceived through sperm donation (or “donor offspring”) experience profound struggles with their origins and identities; family relationships for donor

¹³ *Sobre Técnicas de Reproducción Humana Asistida* [Of Human Assisted Reproduction Techniques] [hereinafter *Técnicas de Reproducción*], Boletín Oficial Estado, 2006, 126, available at <http://www.boe.es/boe/dias/2006/05/27/pdfs/A19947-19956.pdf>

¹⁴ *Supra* note 11.

¹⁵ The protection of such a right in Spanish law is discussed in Carlos Martínez de Aguirre, *The Principle of Verisimilitude of Artificial Filiation Links: Biology as a Model for the Law of Parent and Child*, 2 INT’L J. JURISPRUDENCE FAM. § II.C (2011).

offspring are more often characterized by confusion, tension, and loss; donor offspring often worry about the implications of interacting with—and possibly forming intimate relationships with unknown, blood-related family members; donor offspring are more likely to have experienced divorce or multiple family transitions in their families of origin; donor offspring are significantly more likely than those raised by their biological parents to struggle with serious, negative outcomes such as delinquency, substance abuse, and depression, even when controlling for socio-economic and other factors.¹⁶

As Margaret Somerville points out: “Ethics, human rights, and international law—as well as considerations such as the health and well-being of adopted and donor-conceived children—all require that children have access to information regarding their biological parents.”¹⁷ Professor Somerville emphasizes the need to put the child and his human rights at the center of the decision making as to what should be required. This right to learn the identity of the biological parents may also lead to a right to know the circumstances of conception.¹⁸

The right to learn the identity of the biological parents may also be complemented by the right to establish legal filiation in a lawsuit against the donor or the seller. In Argentina, for example, under current law, the child always has the right to identify his biological parents and also to establish a legal parenthood and motherhood tie.

2. Traceability

The anonymity of the donor or seller of gametes appears to have been undermined, unexpectedly, by the appearance of European Union administrative rules related to the traceability of human tissues. The European Parliament and the Council of the European Union have adopted rules requiring traceability from the donor to the recipient, and though the primary focus of

¹⁶ Elizabeth Marquardt, Norval Glenn, & Karen Clark, *My Daddy's Name is Donor: A New Study of Young Adults Conceived through Sperm Donation*, Institute for American Values, 2010, http://www.familyscholars.org/assets/Donor_FINAL.pdf

¹⁷ Somerville, *supra* note 10, at 44.

¹⁸ Lucy Frith studies the legislative evolution of the systems concerning anonymity and non-anonymity in relation to the donors or sellers of gametes and calls attention to the separate question whether there should be, in addition to a right to know the identity of the donors or sellers, a right to know the “circumstances of conception.” *Beneath the Rhetoric: The Role of Rights in the Practice of Non-Anonymous Gamete Donation*, 15 *BIOETHICS* 473 (2001), available at <http://www.ncbi.nlm.nih.gov/pubmed/12058771>

these rules was the veterinary and food industries, a subsequent directive appears to extend them to human cells.¹⁹ Traceability is defined as

the ability to locate and identify the tissue/cell during any step from procurement, through processing, testing and storage, to distribution to the recipient or disposal, which also implies the ability to identify the donor and the tissue establishment or the manufacturing facility receiving, processing or storing the tissue/cells, and the ability to identify the recipient(s) at the medical facility/facilities applying the tissue/cells to the recipient(s); traceability also covers the ability to locate and identify all relevant data relating to products and materials coming into contact with those tissues/cells.²⁰

In Great Britain, these directives were absorbed into the Human Fertilisation and Embryology Act 1990 through additional regulations in 2007.²¹ Although this directive does not refer explicitly to heterologous fertilization, it establishes an obligation to identify the origins of the gametes that collides with anonymity.

3. Possibility of Sibling Mating

An additional concern, which may undermine anonymity rights, is the possibility that children of the same donor or seller will become acquainted and have children together, with the consequent risk that their children will be genetically defective.²² The United Kingdom's government operates a "Donor Sibling Link" (DSL), which allows people over 18 years of age who were

¹⁹ See European Parliament and Council of the European Union, Directive 2004/23 on the Establishment of Quality Standards and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells, Official Journal (O.J.) 2004 (L 102) 48, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:102:0048:0058:en:PDF>. Regarding the issue of anonymity, Directive 2004/23 requires "traceability from the donor to the recipient." The doubts that emerged from this directive prompted a new provision, Directive 2006/17. The latter directive establishes the biological tests to be imposed on the donors of reproductive cells. Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as Regards Certain Technical Requirements for the Donation, Procurement and Testing of Human Tissues and Cells, O.J. 2004 (L 38/40), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:038:0040:0052:EN:PDF>

²⁰ Commission Directive 2006/17, art. 1.g, *supra* note 19.

²¹ Human Fertilisation and Embryology (Quality and Safety) Regulations 2007, available at <http://www.legislation.gov.uk/uksi/2007/1522/contents/made>

²² This point is made in connection with Jewish law in Rabbi J. David Bleich, *Family Values in the Jewish Tradition*, 1 INT'L J. JURISPRUDENCE FAM. 127 (2010).

conceived by donors or sellers of gametes to communicate with children of the same donor or seller.²³ A recent article in the *New York Times* reports that one sperm donor fathered approximately 150 children, and further discloses that other “outsize groups of donor siblings are starting to appear” and that many “comprising 50 or more half siblings are cropping up on Web sites and in chat groups,” and that such half siblings “often live close to one another.”²⁴ (Besides other problems, if a legal system imposed paternal responsibilities on a sperm donor, they would go unfulfilled by a man with this many children.²⁵)

*B. Concerns about Commercialization,
Quality Control, and Liability*

Other concerns about heterologous fertilization relate to the emergence of a “gamete market,” and even an “embryo market,” now enormous in size and scope. It has been estimated that the United States hosts a multi-billion-dollar fertility industry.²⁶

This phenomenon gives rise to numerous ethical questions. One—perhaps not the most fundamental—relates to price. An article published in the *Hastings Center Report* in 2010 reported numerous violations of the limit of \$5,000 for the sale of eggs established in guidelines of the American Society for Reproductive Medicine.²⁷ The study reports the existence of notices in college newspapers that offered \$50,000, noting that the price varied according to the intellectual level of the seller, and in some cases conditions were imposed as to the seller’s appearance and ethnicity. The Spanish statute cited above aims to allay this concern by providing: “The donation shall never have lucrative or commercial character. The economic compensation for damages that can be set may only strictly compensate the physical

²³ See <http://www.hfea.gov.uk/donor-sibling-link.html>

²⁴ Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, NEW YORK TIMES, Sept. 5, 2011, available at http://www.nytimes.com/2011/09/06/health/06donor.html?_r=2&scp=1&sq=wendy%20kramer&st=cse

²⁵ For U.S. authorities on whether a sperm donor is liable for child support (including some holding that he is), see <http://fatherhoodbychoice.org/article.php?story=20110406174321956>

²⁶ See Marquardt et al., *supra* note 16 at 5. (“The United States alone has a fertility industry that brings in \$3.3 billion annually.”)

²⁷ See Aaron D. Levine, *Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors*, 40 HASTINGS CENTER REPORT 25 (2010), available at <http://www.thehastingscenter.org/Publications/HCR/Detail.aspx?id=4549>, discussed below in the text following note 28.

discomforts and expenses for travel and labor that can be derived from the donation and may not include economic incentive for it.”²⁸

It is doubtful that this law, or any law that merely regulates the price or terms of gamete-transfer agreements, can alleviate many of the major concerns discussed herein. Inherent in this market, and perhaps in all markets, is the logic of commodification.

Commodification is incompatible with the notion of human body because it goes against the dignity of every human being. Also, when the human body is considered as a “thing” under commerce, a new form of slavery appears. In this field, there is great consensus that, for instance, human organs cannot be commercialized. We think this criterion should apply also to gametes and, especially, to embryos, who are human beings. The recent study *My Daddy’s Name is Donor* revealed that young adults conceived through sperm donation experience profound struggles over the role of money in their conception.²⁹

1. Exploitation

One fundamental concern is exploitation of the people who donate or sell gametes and of those who receive them. The most intimate and cherished of human projects is involved, and—for someone who purchases a gamete owing to difficulties in reproducing in the traditional way—one of the most fundamental aspects of life, parenthood, is at stake. The opportunities for unfair treatment and the exploitation of hope and fear for monetary gain are obvious, as may be the danger of psychological scarring when procedures go awry.³⁰

2. Import and Export of Gametes

The donation or sale of gametes involves additional concerns relating to international commerce. Only clear measures may prevent the emergence of an international market in gametes. Significantly, European Directive 2004/23, Article 9, governs “Import/Export of Human Tissues and Cells.” The direc-

²⁸ *Técnicas de Reproducción*, *supra* note 13.

²⁹ Marquardt et al., *supra* note 16, at 7.

³⁰ In the United States, it has been noted that people are willing to pay up to \$10,000 for each cycle of IVF, and that their efforts may not produce any results, while at the same time involving some level of medical risk, owing to the use of hormones, and involving the investment of significant amounts of time and energy and the endurance of some level of pain. See David Han, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2811 (2005).

tive requires member states to strive “to ensure the voluntary and unpaid donations of tissues and cells.”³¹

The import and export of gametes is subject to the same objections as is traffic in human organs. Also, it implies further problems for the child conceived through imported gametes in case he wants to learn about his biological parents, because he will hardly be capable of contacting them if they live in a faraway land.

Thus, the manipulation and commodification of gametes clearly involves the objectification of the human body, seriously affecting the dignity of the person. Only a ban of artificial procreation techniques, including the prohibition of heterologous techniques, can avoid the reduction of the human body to the level of a commodity to be bought or sold.³²

3. Concerns about “Designer Babies”

In close connection with the problem of “quality control,” which we will discuss next, a particularly serious legal-ethical problem arises in cases in which the donor or seller of the gametes is selected for a eugenic purpose, that is, in order to secure certain characteristics for the offspring. All heterologous techniques involve some eugenic planning, since in all cases some eugenic considerations are taken into account, from the simplest (the age of the seller or donor) to the most complex. Some even take into account the profession of the donor or seller and his or her IQ, physical appearance, ancestors, etc.³³ Some years ago, two deaf women who lived together wanted to have a deaf child, to which end they used sperm donated by a friend

³¹ See *supra* note 19.

³² Guidelines for embryonic stem cell research in the United States approved by the National Institutes of Health in July 2009 also awaken fears of an expansion of the international circulation of embryos, as they provide for the possibility of federal financing of projects that seek to “derive” stem cells from embryos cryopreserved outside of the country. (The guidelines require countries where the cryopreserved embryo centers are located to have regulations similar to those imposed in the United States.) *National Institutes of Health Guidelines on Human Stem Cell Research*, July 7, 2009, <http://stemcells.nih.gov/policy/2009guidelines.htm>. This is a matter of special concern, since embryos, not just gametes, are involved. The existence of thousands of cryopreserved embryos suggests that the situation presents a serious violation of the right to life of human beings already conceived and endowed with the dignity and rights of the human person. See Jorge Nicolás Lafferriere, *La Regulación Jurídica de la Investigación sobre Células Troncales* [*Legal Regulation of Stem Cell Research*], 60 *MEDICINA E MORALE* 241(2010).

³³ See Levine, *supra* note 27.

specially chosen because he had five generations of deaf people in his family.³⁴

4. Possibility of Transmission of Diseases and Genetic Defects

Another problem relates to quality control: the possibility that gamete donation will result in the transmission of hereditary diseases or defects. This possibility raises the question of the scope of the responsibility of the donor, of intermediating institutions such as the gamete bank, and of the institutions and professionals who perform artificial procreation procedures.

Liability of gamete donors is under discussion. Suriya Jayanti analyzes the problem of liability of egg donors for latent genetic disease, comparing egg donation with sperm donation, adoption, surrogacy, and blood donation.³⁵ This author states that liability might be established under two legal theories: product liability³⁶ and negligence. Jayanti concludes that “while courts could potentially impose liability under either [theory], the inability to know of genetic predispositions, the public policy implications of recognizing an egg donor as a genetic parent, and the best interests of an egg donation child all support not holding the egg donor liable.”³⁷ Other authors have argued that a donor should be liable if he or she knew of the communicable disease, or even if not, since donation of a gamete is a risky activity.³⁸ Some have proposed a tort of “wrongful life,” recognized in a very few American jurisdictions.³⁹ We will not debate this topic in depth.

³⁴ See *Regulating Preimplantation Genetic Diagnosis: The Pathologization Problem*, 118 HARV. L. REV. 2770, 2782 (2005).

³⁵ Suriya E. P. Jayanti, *Guarantors of Our Genes: Are Egg Donors Liable for Latent Genetic Disease?* 58 AM. U. L. REV. 405 (2008).

³⁶ For an extensive exploration of the product-liability approach, see Francis Sohn, *Products Liability and the Fertility Industry: Overcoming Some Problems in “Wrongful Life,”* 44 CORNELL INT’L L.J. 145 (2011).

³⁷ Jayanti, *supra* note 35, at 425.

³⁸ Daniel R. Lopez, Silvia Mortara, & María I. Ricardone, *Responsabilidad Civil por Transmisión de Enfermedades Congénitas, Genéticas Hereditarias, Derivadas de las Técnicas de Reproducción Asistida Heteróloga* [Civil Liability for Transmission of Hereditary Congenital Diseases, Derived from Heterologous Assisted Reproduction Techniques], 183 EL DERECHO 1392 (1999).

³⁹ See Sohn, *supra* note 36.

5. Imposition of the Juristic Order of Commerce

The application of technology to the transmission of life entails a shift towards the logic of production. (This shift is more pronounced in instances of heterologous fertilization than in instances of homologous fertilization.) As the above discussion about liabilities indicates, the legal and moral order of industry and commerce involves duties on the part of the producers for defects and other unexpected outcomes. One consequence is that the anonymity and confidentiality of those involved are threatened, since all phases of the production process are subject to examination when liabilities are sought to be imposed.

A further consequence, far more fundamental, is that all who participate in artificial reproductive techniques may be required to conform to common standards of production. The transmission of life comes to resemble a regulated industry. Max Weber's "iron cage" descends upon the project of begetting children.⁴⁰

The threat of liability is not minor and, consequently, the giving of gametes has become a complex process. Genetic tests are increasingly performed on donated gametes.⁴¹ Spanish Law 14/2006, article 5, paragraph 6, states:

Donors must be over 18 years of age, of good psychophysical health and full capacity to act. Their psychophysical state must satisfy the requirements of a mandatory protocol for the testing of donors that will include phenotypic and psychological characteristics, as well as clinical conditions and analytical determinations necessary to demonstrate, according to the state of knowledge of the science and of the technology existing at the time of its realization, that donors do not suffer from diseases genetic, hereditary, or infectious transmissible to the offspring. These same conditions shall apply to donor samples from other countries; in this case, the managers of the corresponding center referrers must certify compliance with all conditions and tests whose determination is not practicable in the samples sent to their receipt. In any case, approved centers may refuse the donation when the psychophysical conditions of the donor are not suitable.⁴²

⁴⁰ The term *iron cage* is a translation of *stahlhartes Gehäuse*, probably better rendered "a shell as hard as steel," as it is in Max Weber, *The Protestant Ethic and the "Spirit" of Capitalism* (1905), in *THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM AND OTHER WRITINGS* 1, 121 (Peter Baehr & Gordon C. Wells eds. & trans., 2002).

⁴¹ ADRIANO BOMPIANI, *LE TECNICHE DI FECONDAZIONE ASSISTITA: UNA RASSEGNA CRITICA* [THE TECHNIQUES OF ASSISTED REPRODUCTION: A CRITICAL REVIEW] 152 (2006).

⁴² *Técnicas de Reproducción*, *supra* note 13.

IV. CRITICAL ASSESSMENT OF HETEROLOGOUS FERTILIZATION

The trends and concerns discussed above suggest serious objections to heterologous techniques of reproduction.

As pointed out in section II of this article, heterologous techniques of reproduction involve an alteration of the fundamental principles of filial relationships. They affect the principles of marital and conjugal unity. They involve a departure from the biological principle for determining motherhood and fatherhood.

As also pointed out above, such techniques violate the child's right to identity. Provisions that secure the anonymity of the biological parents aggravate the deprivation, hiding the truth and bringing unexpected consequences for the child, who lives in a falsehood with regard to the ties most constituent of his personal identity. For these reasons, provisions securing such anonymity clearly violate the rights of the child. In all cases, a child should have a right to learn of his or her original biological ties.

Some seek to justify heterologous techniques by developing theories about what determines "parental responsibility."⁴³ For Bayne, there exist four stances that justify parental responsibility: gestationalism, intentionalism, geneticism, and causalism:

Gestationalists claim that parenthood is based on gestation and child-birth; intentionalists claim that parenthood is based on intentions to rear; geneticists claim that parenthood is based on the relation of direct genetic derivation; and causalists argue that parenthood is grounded in the relation of being the cause of a child's existence.⁴⁴

It seems that in gestationalism, intentionalism, and causalism, fatherhood and motherhood are identified as functions of human decisions. This suggests that according to those theories someone could properly renounce fatherhood or motherhood without justification. If paternity or maternity arises through choice, it is hard to see why it should not be abrogated through choice as well.

The problem with these theories when we apply them to heterologous fertilization is that they put at the center of the debate the adults' desires and

⁴³ Tim Bayne, *Gamete Donation and Parental Responsibility*, 20 J. APPLIED PHIL. 77 (2003); Giuliana Fuscaldo, *Genetic Ties: Are They Morally Binding?* 20 BIOETHICS 64 (2006); Avery Kolers & Tim Bayne, *Are You My Mommy? On the Genetic Basis of Parenthood*, 18 J. APPLIED PHIL. 273 (2001); Rivka Weinberg, *The Moral Complexity of Sperm Donation*, 22 BIOETHICS 166 (2008).

⁴⁴ Bayne, *supra* note 43.

they dismiss or ignore the rights of the child. As Ursula Basset says, the child has the right to the unity of all the components of his or her identity.⁴⁵ Heterologous fertilization intentionally breaches the unity of all the aspects of identity and in doing so, violates the right of the child to identity.

The present article maintains that the basis of filiation rests not on a convention or a choice, but upon a sound anthropological conception, recognizing the person in his dimension of body and soul. The relationships of filiation, therefore, cannot be left to the mercy of the will of the individuals.

The law should recognize the biological basis of fatherhood and motherhood. It may face this question when a child conceived by heterologous techniques brings an action asserting the filiation of the donor or seller of the gametes (either male or female).⁴⁶ In Argentina, Article 953 of the Civil Code states:

The object of legal acts should be ... acts that are not impossible, illegal, contrary to the good customs or prohibited by law, or that oppose freedom of action or the conscience, or that prejudice the rights of a third party. Legal acts that do not conform to this provision are null and void as though they had no object.⁴⁷

To conceive a child in a way that dissociates genetic fatherhood or motherhood from the procreational will is clearly contrary to good customs.

At stake in all such matters is the dignity of the transmission of life. Projects of human reproduction must not be subject to technical parameters of control and manipulation, but should be performed within the full human framework of the sexual union between man and woman. For these reasons, this article proposes that today in Argentina, techniques of artificial procreation result in acts contrary to good customs and, therefore, are null and absolutely void by operation of Article 953, quoted above.

⁴⁵ Ursula C. Basset, *El Niño Tiene Derecho a la Unidad, Siempre que Sea Posible, de Todos los Aspectos de su Identidad* [*The Child Has the Right to the Unity, As Much As Possible, to All the Aspects of His Identity*], REVISTA LA LEY I.

⁴⁶ See, e.g., *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *Myers v. Moschella*, 677 N.E.2d 1243 (Ohio Ct. App. 1996); *In the Matter of Parentage of J.M.K. and D.R.K.*, 119 P.3d 840 (Wash. 2005), cited by Elizabeth McDonald, *Sperm Donor or Thwarted Father? How Written Agreement Statutes Are Changing The Way Courts Resolve Legal Parentage Issues in Assisted Reproduction Cases*, 47 FAM. CT. REV. 340 (2009).

⁴⁷ Cód. Civ., art. 953, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texact.htm>

V. ARTIFICIAL REPRODUCTIVE TECHNIQUES AND SAME-SEX UNIONS

In an effort to assimilate completely to the union of man and woman, partners in the new and so-called “marriages” of people of the same sex aim to have children of the marriage through techniques of artificial procreation. An ideologized voluntarism seeks to destroy biological limits, undermine the principle that the biological tie is the foundation of filiation, and base the filial order instead upon rules of procreational will. This approach exceeds the limits of morality and good customs and certainly affects the common good by breaking the most basic ties that link children to adults. Furthermore, the use by same-sex couples of artificial procreation techniques leads to legal problems that cannot be solved without serious impairment of the rights of children.

A. The Simple Case

The “simple case” involves two women united in an alleged marriage; one of the women obtains sperm from a male to fertilize her ovum and brings the embryo to birth. This case is called “simple” because the woman who provides the ovum oocyte also gestates it; no surrogate motherhood or egg donation is involved.

A central legal question here is this: Should the baby be considered the child of both women? Argentinian Law No. 26618 approaches the issue from a purely registrational perspective, providing that in such a case the child is to be recorded in the Civil Registry under the name of the birth mother “and her spouse.”⁴⁸ In this way, the law deliberately excludes the father. This statute does not make clear what may be the status of the “spouse” in relation to the child.⁴⁹

Some might favor designating the “spouse” as a “co-mother,” so that the child would be registered as having two mothers and no father. From a legal perspective in Argentina, this would be incompatible with the current rules of filiation, since under the Civil Code—in provisions that were not repealed or modified when Law 26618 was adopted—such child is “son” or “daughter”

⁴⁸ Law No. 26618, modifying the Civil Code and Laws 26413 and 18248, Boletín Oficial, July 22, 2010, <http://www.infoleg.gov.ar/infolegInternet/anexos/165000-169999/169608/norma.htm>

⁴⁹ In the National Congress of Civil Law, professors from Argentina agreed that the spouse of the mother should not be considered a mother under Law 26618 (23 Jornadas Nacionales de Derecho Civil, Tucumán, Argentina, September 2011, www.derechocivil2011.com.ar)

of the mother who provided the egg and gave birth to him and of the father who provided the sperm, and is to be registered accordingly. To register the child with two mothers and without identifying a father would violate the right to identity established in Article 8 of the Convention on the Rights of the Child (known as the “Argentina” clause)⁵⁰ and in Law 26061.⁵¹ The child would be deliberately and legally deprived of its paternal tie and assigned a fictitious double maternal bond.

Proposals of this sort deny the obvious reality that a child has only one biological father and one biological mother. They would commit a biotechnological and legal abuse by imposing on the child, without his consent, a substitute identity.

A startling implication of the “two mothers” approach can be identified if one considers its application to an instance in which one woman “married” to another has begotten a child, not through artificial techniques, but by having sexual relations with a man. The conclusion seems inevitable that here also the child would be legally recognized as having two mothers and no father. This result would shield the adulterous man from legal consequences arising from his fatherhood.

If one moves forward with the idea of “co-motherhood,” the break introduced into the filial system is so great that further questions arise. Could the child in the future challenge the motherhood of the “spouse” of the biological mother on the grounds that she has no biological link with the child? Could the child assert the fatherhood of the donor or seller of the sperm (or of the man who fathered the child through sexual intercourse)? Could the “co-mother” challenge motherhood if she did not consent to the use of artificial procreation techniques by the birth mother (or consent to the act of sexual infidelity)? Could the biological father acknowledge fatherhood and thereby require the law to recognize him as the father (resulting in a child’s having two legal mothers and one legal father)? Could biological children of the “co-mother” challenge the filiation of their so-called sibling, on the basis of the absence of biological link?⁵²

⁵⁰ This clause is quoted in the text *supra*, at note 11.

⁵¹ Law No. 26061, Boletín Oficial October 26, 2005, <http://www.infoleg.gov.ar/infolegInternet/anexos/110000-114999/110778/norma.htm>

⁵² Under current Argentinian law, the child of the “co-mother” could perfectly well challenge the filiation because the Argentinian legal system on filiation is based upon the “biological truth.” On the other hand, allowing the possibility of “co-motherhood” implies that the child is registered with two mothers and no father and that he could inherit from both mothers.

B. Complex Cases and Argentinian Law No. 26618

Nevertheless, we consider, as mere intellectual hypothesis,⁵³ the multiplicity of variants that can be generated from a radically voluntaristic application of the techniques of artificial procreation to same-sex unions. The following situations can be imagined. In the case of two women, the variants would be:

Table 1. Variations in Assisted Reproduction for Two Women in a Same-Sex Union

| Case | Source of Semen | Source of Egg | Birth Mother |
|------|-----------------|---------------|------------------|
| 1 | Donor/Seller | Spouse 1 | Spouse 1 |
| 2 | Donor/Seller | Spouse 2 | Spouse 2 |
| 3 | Donor/ Seller | Spouse 1 | Spouse 2 |
| 4 | Donor/Seller | Spouse 2 | Spouse 1 |
| 5 | Donor/Seller | Donor/Seller | Spouse 1 |
| 6 | Donor/Seller | Donor/Seller | Spouse 2 |
| 7 | Donor/Seller | Spouse 1 | Surrogate Mother |
| 8 | Donor/Seller | Spouse 2 | Surrogate Mother |
| 9 | Donor/Seller | Donor/Seller | Surrogate Mother |

Cases 1 and 2 are what we have called the “simple case.” In the Cases 1, 5, and 7, Spouse 2 would have no biological relationship to the child. In Cases 2, 6, and 8, Spouse 1 would have no biological relationship to the child. In the Cases 2 and 4, both Spouse 1 and Spouse 2 would have some biological relationship to the child, and under the Civil Code the birth mother would be the legal mother even though the other spouse would be the genetic mother. In Cases 7, 8, and 9, the surrogate would be the legally recognized mother, although in Cases 7 and 8, the “spouse” who provided the egg (the genetic mother) could claim motherhood as well, while in Case 9 neither of the two “spouses” could claim a maternal tie.

In the case of two men, the variants would be:

⁵³ We reiterate our strong opposition to the biotechnological abuses that arise from the application of artificial procreation techniques.

Table 2. Variations in Assisted Reproduction for Two Men in a Same-Sex Union

| Case | Source of Semen | Source of Egg | Birth Mother |
|------|-----------------|---------------|------------------|
| 10 | Spouse 1 | Donor/Seller | Donor/Seller |
| 11 | Spouse 1 | Donor/Seller | Surrogate Mother |
| 12 | Spouse 2 | Donor/Seller | Donor/Seller |
| 13 | Spouse 2 | Donor/Seller | Surrogate Mother |
| 14 | Donor/Seller | Donor/Seller | Donor/Seller |
| 15 | Donor/Seller | Donor/Seller | Surrogate Mother |

In Cases 10 and 11, Spouse 2 has no biological connection with the resulting child; in Cases 12 and 13, Spouse 1 has no biological connection to the child. In Cases 11, 13, and 15, the surrogate mother would be the legally recognized mother, under current Argentinian law. In cases 14 and 15, neither “spouse” would have a biological connection to the child.

These tables highlight the complexities and conundrums inherent in any attempt to create a coherent and defensible filiation system in the context of same-sex “marriages.”

VI. CONCLUSIONS

Techniques of artificial procreation, especially those involving the donation or sale of gametes, involve serious alterations to fundamental principles of the legal order, and implicate essential rights such as the child’s right to identity and the family’s right to protection.

In the specific case of same-sex unions, this article maintains that the use of techniques of artificial procreation constitutes a serious wrong. In all such cases, the consequence is to promote the imposition of the will as a principle of parenting. This undermines the specificity of the relationships of fatherhood and motherhood. A logic of production, commerce, or commodification emerges. These tendencies advance an objectification of children, who are subjected to the will of adults who may dispose of their children and of their own most intimate and basic ties as a matter of personal preference. Developments of this sort mark a milestone and establish a precedent of untold consequence, undermining the solid foundational principles of the filial system.

For all these reasons, it follows that there is a need to approve a specific law prohibiting heterologous artificial procreation techniques.⁵⁴ The legislature must protect the best interests of the child, and therefore must put a stop to techniques such as these, which involve a transformation in the transmission of human life that does not respect the unique character of the sexual union between husband and wife.

A quotation from Dr. Catalina E. Arias de Ronchietto can illuminate the close of this article:

The intermediation of assisted fertilization techniques in human procreation is always invading a reality that it exceeds, as evidenced by its procedural demands disguised as warranty, the lesser evil. Everything in the technologies of extra-corporeal fertilization betrays its veterinarian origin, an area to which, with certain reservations, it should return. But the pressure of huge vested interests, million-dollar investments, and the corresponding pecuniary yield they produce, yield which includes the possible international renown to conquer in the contemporary traffic of honors, are some of the reasons for this *laissez faire, laissez passer*. The abuse that thrives on the misdirected frustration of those who are users of the practices of extra-corporeal human reproduction has appropriated a market of ambitions and afflictions.⁵⁵

⁵⁴ There are some specific objections concerning homologous techniques of artificial procreation that we have not analyzed in this article. *See supra* note 5.

⁵⁵ Catalina E. Arias de Ronchietto, *El Derecho Frente al Congelamiento de Óvulos Humanos Fecundados. Suspensión de la Práctica y Adopción Prenatal para los Embriones ya Existentes* [*The Claim Against the Freezing of Human Fertilized Eggs: Suspension of the Practice and Prenatal Adoption for Already Existing Embryos*], 182 *EL DERECHO* 1645 (1999):

La intermediación de las técnicas de fecundación asistida en la procreación humana es siempre invasora de una realidad que la excede, lo evidencian sus exigencias procedimentales disfrazadas de garantía, de mal menor. Todo en las técnicas de fecundación extracorpórea delata su origen veterinario, ámbito al que, con ciertas reservas, debieran regresar. Pero la presión de ingentes intereses creados, las millonarias inversiones y el correlativo rédito pecuniario que rinden, rédito que incluye el eventual renombre internacional a conquistar en el contemporáneo tráfico de honores, son algunas de las razones de este laissez faire, laissez passer. El abuso medrador de la frustración mal encausada de quienes son los usuarios de las prácticas de reproducción humana extracorpórea se ha apropiado de un mercado de ambiciones y aflicciones.