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Article abstract

This article deals with the various filiation issues arising from the application of assisted reproduction techniques. The author asserts that assisted reproduction techniques produce a dissociation between the blood and genetic elements of procreation and people's will to become parents, which causes hard judicial dilemma in paternity suits. Legislative and judicial criteria developed both under European and American legal systems to solve this case are systematized in the article, wherein the author directs criticism to those criteria that tend to undermine the natural physiology of human reproduction in spite of the "intent of reproduction" concept. This latest concept is criticized as being a form of contractualization of filiation links. The author suggests that a deeper understanding of the human dignity, and of the international standard of the best interest of the child should be useful to protect children from being a part of the new market-of-human-beings that could arise from the massive application of assisted reproduction techniques.

Filiation and Assisted Reproductive Technology

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> And 'parent'? questioned the D.H.C.
>
> There was an uneasy silence. Several of the boys blushed. [...]
>
> One, at last, had the courage to raise a hand.
>
> 'Human beings used to be...' he hesitated; the blood rushed to his cheeks. 'Well, they used to be viviparous.'
>
> [...]
>
> 'In brief', the Director summed up, 'the parents were the father and the mother. [...] These facts are unpleasant, I know. But most historic facts are unpleasant.'
>
> (Aldous Huxley, *Brave New World*, Chap. II)

ABSTRACT

This article deals with the various filiation issues arising from the application of assisted reproduction techniques. The author asserts that assisted reproduction techniques produce a dissociation between the blood and genetic elements of procreation and people's will to become parents, which causes hard judicial dilemma in paternity suits. Legislative and judicial criteria developed both under

RÉSUMÉ

Le présent article traite des diverses questions de filiation qui découlent de l'application des techniques de reproduction assistée. L'auteur affirme que les techniques de reproduction assistée entraînent une dissociation des aspects naturels et génétiques de la procréation et du désir de devenir parent, ce qui pose un dilemme difficile pour les tribunaux lors des actions en recherche de paternité.

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European and American legal systems to solve this case are systematized in the article, wherein the author directs criticism to those criteria that tend to undermine the natural physiology of human reproduction in spite of the "intent of reproduction" concept. This latest concept is criticized as being a form of contractualization of filiation links. The author suggests that a deeper understanding of the human dignity, and of the international standard of the best interest of the child should be useful to protect children from being a part of the new market-of-human-beings that could arise from the massive application of assisted reproduction techniques.

Le présent article réunit les critères judiciaires et législatifs établis au sein des systèmes de droit européens et américain dans le but de remédier au problème. L'auteur y critique les critères qui tendent à ignorer la physiologie naturelle de la reproduction humaine, malgré l'existence de la notion de l'« intention de procréer ». Cette toute nouvelle notion est critiquée au motif qu'elle constitue une forme de contractualisation des liens de filiation. L'auteur soutient qu'une meilleure compréhension de la dignité humaine et de la norme internationale de l'intérêt supérieur de l'enfant devrait aider à empêcher l'apparition des enfants sur le nouveau marché d'êtres humains qui pourrait naître de l'application massive des techniques de reproduction assistée.

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I. TECHNOREPRODUCTION AND DISSOCIATING EFFECT

Louise Brown, the British girl whom the press called the first "test-tube baby", because she was the first human being ever to be conceived by means of *in vitro* fertilization, is now 21 years old. It was in 1978 that the eyes of the world were opened to the possibility of resorting to methods of fertilization that replaced sexual intercourse between spouses as a mean of ensuring offspring.

After two decades the procedures involved have multiplied and reformed into a wide array of modes, resulting in serious challenges, juridical as well as ethical. The question of admissibility and the legal correctness of such procedures, as well as the way in which they are to be allowed, regulated, or perhaps prohibited under Civil law is still far from settled.

In 1996, massive destruction of embryos, a necessary outcome of British legislation that provides for disposal of frozen embryos after five years (Art. 14.4 *Human Fertilization and Embryology Act, 1990*), caused worldwide commotion.

Today, current developments in cloning techniques by nuclear transplant offer the latest challenge to the conscience of mankind as to the objective and generalizable ethical

criteria for assessing the justice or injustice of the new forms of human reproduction technologies.

If we had to summarize in one word the fundamental effect of such reproductive procedures, we would choose the word "dissociation". These methods began by dissociating two dimensions that until then had been indissolubly bound together: sexual union and capacity for generation. The exact opposite of contraception, medically assisted reproduction seeks the child as the outcome of a series of technical processes not including conjugal union. It is, as Jerôme Lejeune said, "making children, without making love".[1] The dissociation connotation of assisted reproduction does not end there; it also separates the child just conceived (call it what you will: zygote, fertilized egg, pre-embryo) from the natural protection of the mother's womb and turns the child into laboratory material. It appears understandable that under such circumstances the value of the human dignity of that diminutive being should go unappreciated or unrecognized, becoming exposed to the hazards of disposal for lack of "viability" or quality, preservation in cold nitrogen to aid new experiments, or vivisection to utilize its cells and tissues.

Thirdly, dissociation also similarly affects the links binding the child thus conceived to the participants in the reproduction process. In the event of applying so-called "heterologous technologies", meaning procedures involving utilization of male or female gametes of persons other than the would-be parents, fatherhood or motherhood is dissociated from the resulting child. Beyond the provisions of law or the rulings of judges, the child's nature as a child is split: socially and legally, it may be the offspring of someone who did not contribute in physical terms to its constitution as a human being. The intervention of a gestational mother brings in an additional dissociating element, for this separated two elements peculiar to the biology of reproduction, *i.e.* the genetic contribution and the gestational contribution.

Thus a child, at least hypothetically, might have as many as five possible parents, namely the man and woman who desire the child's birth, the donor of the male gamete contrib-

1. J. LEJEUNE, *¿Qué es el embrión humano?*, Madrid, Rialp, 1993, p. 121.

uted and the woman who donated the egg to the process, and finally the mother who bears the child. Two possible fathers, three possible mothers. Not to mention that the gestational mother may be married and her husband's paternity presumed, thus raising the number of possible parents to six: three fathers, three mothers.

What began apparently as a merely instrumental procedure intended to achieve the therapeutical aim of overcoming infertility, is now revealed rather as a new concept of man's image and of how a family is constituted, as well as paternal or maternal relations. Human cloning — though universally condemned from the Vatican to the Council of Europe to the White House following the episode of Dolly, the sheep — is no longer looked on in scientific circles as a deviation to be forbidden but rather as a means of treatment for illness in adults. Production of tissue not rejected by the recipient has suggested that an ideal method would be to produce a blastomere from a donated egg into which the genetic nucleus of a mature cell of the patient is introduced. By reprogramming the nucleus and obtaining totipotent cells from the blastomere, these cells may be differentiated to produce the tissues or organs needed.[2] Some might argue that therapeutic results are obtained at the expense of sacrificing an embryonic human being; however, the logic of dissociation, which, as I have attempted to show, directs assisted reproductive medicine, merely sees there another milestone in its progress.

The starting point is when it is considered ethically acceptable to separate sexual contact from accepting a child as a person. We are close to admitting the utilitarian production of human beings who can hardly call their cloned predecessors father or mother.

It is thus the dissociating element applied to the relations between generator and generated which leads the jurist to reflect and examine the way in which law, understood not as a mere technique for social organization but as the art of

2. *Cf.* D. SOLTER and J. GEARHART, "Putting Stem Cells to Work", in *Science*, vol. 283, n° 5407, March 5, 1999, pp. 1468-1470; also A. TROUNSON and M. PERA, "Potential benefits of cells cloning for human medicine", (1998) 10 *Reproduction, Fertility and Development*, pp. 121-125.

what is just and what is good, must resolve the problems of filiation.

This problem does not appear to exist, though others do, when assisted reproductive technologies are used with genetic material from the couple who desire the child, with no intervention of third parties contributing gametes or gestational services.

II. BIOLOGISM OR VOLUNTARISM: WHAT DOES BEING A PARENT MEAN?

Filiation is a term we use to designate the relation between a parent and his or her children, without realizing that when we speak of parent and child we are taking for granted the notion of filiation. This is tautology.

It seems to me that no one questions that filiation is not primarily a juridical, but a natural relation, in the sense that it precedes the law. At the same time, this relationship is covered by law for familial and social reasons, and various effects, rights, obligations, and liabilities arise therefrom.

From a legal standpoint, the dichotomy between "natural" and "legal" filiation has clouded the conceptualization of filiation for a long time.

Strong criticism arose in the seventies over the way in which 19th century Codes provided for juridical acceptance of filiation. The preference granted to legitimate filiation was contested, most particularly the fact that the content of filiation was purely formal and depended on the condescendence of the father. The provision whereby only the husband, in his lifetime, might contest paternity of adulterine offspring, wilfully keeping up a false fatherhood, was deemed unjust. Another much-criticized point was that investigation of paternity was closely restricted, while the law favored acknowledgement, either express or tacit (by means of notorious possession) as a way to determine illegitimate filiation.

The reform of filiation law, which began in Europe in the late seventies and has extended almost worldwide, privileges biological truthfulness as one of its core principles. That is to say, the blood tie constitutes and reveals filiation, and should

be recognized in law, over and above other interests (*e.g.* family peace, marriage stability, etc.).

The so-called juridical "progressiveness" of the time, raising high the banners of biology, promptly ran into embarrassing difficulties. The emergence of assisted reproductive technology with the aid of third parties did not appear easy to harmonize with the principle of "biological truth", which must lead to determination of the paternity or maternity of the donor of gametes. Former critics of the formality of the Napoleonic régime began to find that, at least in certain cases, the formal element should come before biological truth, and that "legal father" might be different from "biological parent".[3]

It is worth noting, however, that a gross inconsistency remains unresolved: whereas in natural reproduction filiation is constituted by the biological element of bloodline descent, in medically assisted reproduction, filiation aims to rest on this element of biological reality. Thus it does not seem absurd to oppose natural to artificial or technological filiation, which arises on a parallel basis.

The question therefore still stands: what does it mean to be father, mother, or child? How is this status to be considered in juridical terms?

III. CRITERIA FOR LEGISLATION OR JUDGMENT

The experience of comparative law shows that no uniform criteria exist to address the delicate problems of filiation arising from reproductive technology. As a rule, legislators and judges have resorted to various elements serving to determine filiation and have led them back to traditional assumptions of bloodline filiation or filiation by nature.

The possibility of designing a new form of filiation along with both filiation by nature and adoptive filiation has arisen in the literature only. Some time ago, Trabucchi suggested calling it "civil filiation".[4] The proposal, however, met with

3. *Cf.* F. RIVERO HERNÁNDEZ, "La investigación de la mera relación biológica en la filiación derivada de fecundación artificial", in *La filiación a finales del siglo XX*, 2nd Basque World Congress, Madrid, 1998, pp. 145-148.

4. A. TRABUCCHI, "Procreazione artificiale e genetica umana nella prospettiva del giurista", in *Procreazione artificiale nella genetica umana*, Padova, 1987, pp. 15-16.

little success, perhaps owing to the difficulty of accurately characterizing such filiation and determining why it is called by such an ambiguous and generic name.

We believe that the main criteria that come into play to recompose the filiation link of a child conceived with the aid of technology are basically six: genetic contribution or title to the gametes, affection of the parents who desire the child, prior judgment on the lawfulness or unlawfulness of the technologies, analogy with adoption, the child's higher interest, and the will to procreate or reproduce. Some of the foregoing elements are often preferred over others, and at other times complement one another to arrive at a more or less reasonable solution.

A brief description of such elements and their most frequent application will illustrate the complexity of the present picture.

A. THE GENETIC ELEMENT

The genetic contribution, that is, the persons whose stem cells produced the zygote that eventually becomes a born child, is the traditional element determining filiation since the remote past. As it was not possible to know such origin for certain, it was deemed proved by the fact of parturition, for the wife, and generally by the presumptive paternity of the husband. In other cases, proof of intercourses with the mother could show such biological contribution. Today, polymorphonuclear DNA tests allow biological paternity or maternity to be shown with considerably more precision.

Filiation based on genetic contribution cannot be put aside lightly in the case of children brought into the world by means of reproductive technologies. Indeed, when artificial insemination or *in vitro* fertilization is performed with the gametes of the couple who desire to procreate, paternity and maternity will be determined in accordance with this traditional criterion.

Moreover, even with technologies assisted by third parties, genetic contribution also plays a major role. This was the case in judgments of U.S. Courts in surrogate maternity cases, where paternity was ascribed to the male whose sperm

fertilized the egg of the woman carrying the child, and maternity to the same woman, not only because of her gestation but also for having contributed her own genetic material to the new child.[5]

A difficult problem arises when a choice must be made between genetic contribution (title to the egg) and contribution to embryo nourishment and care (title to gestation). It does not appear to be a simple matter, then, to judge which of the two contributions — both equally biological — is to be preferred.

B. THE ELEMENT OF AFFECTION

It has been very often argued that where assisted reproductive technologies are involved, filiation should be based on the warmth of affection rather than on cold biology. Here the determining criterion to identify the parents is neither the origin of the gametes nor the biological contribution of gestation but the affection with which the recipient couple accept the child. Affection determines fatherhood and motherhood.

Although upheld by some literature,[6] the element of affection seems too subjective and uncertain to provide effective help in cases of dispute. If it is a question of affection, why should the power to contest paternity be denied to the husband who, though unable to refuse consent for his wife to be inseminated with another man's semen, now rejects absolutely the child that he feels is alien and for whom the has no fatherly love?

Accordingly, this criterion appears rather weak.

C. PRIOR LAWFULNESS OR UNLAWFULNESS OF THE TECHNOLOGIES

The value that the legal system may attach to the legitimacy of such procedures would appear to have no bearing on the regulation of the filiation links of the resulting child.

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5. In this sense, the famous *Baby M* case (*Stern* v. *Whitehead*, New Jersey Super, 267.542 A.2d 52, 1988).

6. *Cf.* G. FIGUEROA, *Persona, pareja y familia*, Santiago, Edit. Jurídica de Chile, 1995, pp. 115-116.

Clearly, even though so-called "donation" of gametes or "hiring" wombs were forbidden by law, if such procedures are performed against such prohibition and as a result a child is born, the existence of the child cannot be ignored or treated as a contractual effect that annulment of a forbidden contract should cause to disappear. It appears from this reasoning that two spheres should remain separate: that of the legitimacy of a singular mode of assisted reproduction technology from that of determination of the parental ties of the child born as a result thereof.

I disagree with this position, however. Indeed, it would be effective only if we assume *a priori* that all technologies are legitimate and that no one of them could be declared illegal by legislation or judgment. The fact remains that a technology may not be legally discouraged if its filiation-related effects are regulated as though it were legitimate and irreproachable. Hence determining which technologies are to be considered legal, which are morally reprehensible though legally tolerated, and which are to be forbidden outright, is a previous judgment required to formulate a consistent and systemic regulation of filiation effects.

One proof that such an attitude is not entirely absent, as current literature might lead us to think, is the position adopted in Europe in regard to surrogate motherhood, There is no doubt that the European rule providing that if — breaching legal prohibition — a child is born for the account of another woman, the child's mother is she who delivered it, is a powerful deterrent against such practice.[7]

D. ANALOGY WITH ADOPTION

A criterion that often emerges when resolving disputes among genetic donors, gestational contributors, and recipient couples, is that of applying by analogy certain rules provided under positive law for cases of adoption. This is what happens when the case is a question of cryopreserved embryos offered to a couple other than the progenitor couple.

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7. *Cf.* J. BUSTOS PUECHE, *El Derecho Civil ante el reto de la nueva genética*, Madrid, Dykinson, 1996, p. 188.

Adoption is also invoked to give the man or woman who desires the child preference over the donor of the sperm or egg that gave the child life. It is said that, in essence, the child is being preadopted, even before it was conceived.[8]

In my view, however, the analogy has limitations and cannot play a determining role, because adoptive filiation is intended for protecting and sheltering a child who unfortunately has no proper home in which to live. The main thrust of adoption is the orphaned or abandoned child. The interest of the adopting parents in obtaining offspring is only a secondary consideration. Although in technologies involving contribution of gametes there is no doubt that the focus of interest moves from the child to the adults who desire a child. Whereas in adoption parents are sought for the benefit of a child who has none, in heterologous technology, a child is created who is born an orphan to satisfy the desires of parents who wish to accept it.

E. THE BEST INTEREST OF THE CHILD

The standard of the 'best interest of the child' (article 3, *Convention on the Rights of the Child*) is sometimes taken into account, though often only nominally and to support decisions justified by other criteria. In U.S. trials this element is sometimes invoked to decide on the issue of paternity or maternity, other times on custody or personal care of the child.

In my view, this criterion should be considered when issuing prior judgment on the legitimacy of the technology, so that procedures subordinating the unborn child's interest to the interest of adults desiring offspring or medical teams seeking a form of treatment or furthering a research project should not be deemed legitimate.

8. *Cf.* M. SOTO LAMADRID, *Biogenética, filiación y delito*, Buenos Aires, Astrea, 1990, p. 79.

F. THE SO-CALLED "INTENT TO REPRODUCE"

The most popular criterion in circles where reproductive medicine is idealized as a new victory of reason and freedom over nature, is the so-called "will to procreate"[9] or what U.S. Statutes and Courts call "intent of reproduction".[10]

According to this point of view, filiation should change direction: from genetic or biological contribution to the will to procreate. The father and mother of a child conceived by means of assisted reproductive technologies are the man and woman who gave their consent for such child to be conceived, carried, and born.

This justifies that the man who consents to the woman being inseminated with semen from another man be seen as the true father of the child, to the extent that he has consented to the technology. The paternity of a child born as a result of post mortem fertilization is also grounded on the will expressed by the deceased male.

The element of intent poses a powerful challenge to the traditional system, the latter conceiving filiation as independent of the will and possible even without intent or against the will of the father or mother. It seems difficult to accept that the intent to reproduce should be given priority in cases of assisted reproductive technologies, where blood ties determine cases of natural filiation. To some extent, however, the proposal of the will to procreate is so powerful that it tends to overlap traditional criteria based on biology, lending its color to the entire filiation system.

IV. PROBLEMS AND CASES

Having summarily reviewed the criteria usually resorted to for helping to fix filiation in reproductive technologies, we may now examine the way in which major filiation problems arising out of such practices are being resolved today.

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9. In this sense, for instance, F. RIVERO HERNANDEZ, "La investigación...", *loc. cit.*, note 3, p. 146.

10. D. VETRI, "Reproductive technologies and United States Law", (1988) 37 *International and Comparative Law Quarterly*, pp. 505 ff.

A. MATRIMONIAL FILIATION: DETERMINATION AND CONTESTING

One of the first problems posed to legislators and judges was whether the husband who consented to the insemination or *in vitro* fertilization of his wife with sperm donated by a third party could or could not initiate action to contest paternity on the grounds that he is not the child's biological father. This situation has perhaps originated more legislation than any other in Western law. Many legal systems expressly forbid the consenting male to contest his paternity subsequently.[11] The case of egg donation is not generally contemplated, whereas based on the same rule it might be contended that the woman who gives birth is prevented from contesting her own maternity owing to the genetic contribution of another egg donor.

Spanish law 35/1988, dated November 22, provides in both instances: "Neither husband nor wife, if they have given their consent, expressly and beforehand, to fertilization with the contribution of a donor or donors, may contest the matrimonial filiation of the child born as a result thereof" (art. 8.1). The British law of 1990 reverses the terms and provides that the husband shall be the father "unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be)" (sect. 28.2). The French law (*Law n° 94-653 of July 29, 1994*) states that contesting is possible if it is argued that the child is not the fruit of assisted reproduction or if consent is ineffective: "à moins qu'il en soit soutenu que l'enfant n'est pas issu de la procréation médicalement assistée ou que le consentement a été privé d'effet" (art. 311-20 of the French *Civil Code*). To the same effect, the *Civil Code of Québec*: "[...] le mari de la mère peut désavouer l'enfant ou contester la reconnaissance s'il n'a pas consenti à la procréation médicalement assistée ou s'il prouve que l'enfant n'est pas issu de celle-ci" (art. 539).

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11. *Id.*, p. 509. The author's contains a reference to the *Uniform Parentage Act* and the 29 States that had legislated to that effect in the U.S. by 1988. In Europe the following Civil Codes are worth mentioning: Belgium (art. 318), Netherlands (art. 201), Portugal (art. 1839), Switzerland (art. 256), and Greece (art. 1471). In Latin America, art. 187 of the *Bolivian Family Code* and art. 72 of the *Costa Rican Family Code*.

Where there is no specific legislation, application of the classic rule that civil status is inalienable, thus action cannot be renounced, leads the courts to admit action by the husband despite his initial consent. This happened in France until 1990[12] and still happens today in Germany.[13] In Italy, courts have consistently admitted action to contest since 1956,[14] although the Court of Appeal amended this attitude by a decision dated July 29, 1994, and denied the husband the right to action.[15]

The prohibition to contest does not seem to be unanimous. Thus, the new article 311-20 of the French *Civil Code* (introduced under *Law n° 94-653 of July 29, 1994*) has come under criticism because it upholds false paternity even against the will of the husband who rejects the child, and deprives the latter of the possibility of resorting to full adoption.[16] The suggestion is that it is better to allow paternity to be contested and as a counterbalance consider the consenting husband liable for damages, and sentence him to payment of child support in favor of the child so conceived.

It is worth noting, furthermore, that legal exclusion of action to contest is not consistent with the fact that in natural filiation the husband's consent to his wife's adultery does not restrain him from subsequently contesting his own presumptive paternity. What is the reason for such different treat-

12. Trib. Nizza June 30, 1976, Gazette Palais 1977, j. I. 48. With no legal support whatsoever, the Paris Court denied the man's contesting action on the grounds of his consent (*Trib. gr. inst. Bobigny, January 18, 1990, D.* 1990. 332), and was criticized by the doctrine, which pointed out that contesting was in order. *Cf.* J. HAUSER and HUET-WEILLER, « La famille, traité de droit civil sous la direction de Jacques Ghestin », *L.G.D.J.*, vol. X, 2nd ed., Paris, 1993, pp. 655-656.

13. BGH, July 12, 1995, *Familienrecht*, 1995, 1272. *Cf.* R. ANDORNO, "La procreación asistida en el Derecho comparado", in R. ANDORNO *et al.*, *El derecho frente a la procreación artificial*, Buenos Aires, Depalma, 1007, p. 105.

14. Since the sentence of the Court of Rome, April 30, 1956, Giustizia Civile 1956, I. 1612, relevant jurisprudence uniformly adopted this position. *Cf.* F. CIRILLO, "La fecondazione artificiale eterologa de il rapporto di paternità nella filiazione legittima de in quella naturale", in (1998) 4 *Rivista di Diritto Civile*, pp. 665-667.

15. C. Cas., March 16, 1999, in Giustizia Civile 1999, 1317, favorable note by C. BIANCA. The note, however, mentions criticism by A. FINOCHIARO, "La Cassazione non può svolgere una suplenza nelle funzioni riservate al legislatore", in *Guida al diritto*, 1999, 54.

16. *Cf.* J. RUBELLIN-DEVICHI, in J. RUBELLIN-DEVICHI *et al.*, « Droit de la Famille », *D.* 1996. n° 1325, p. 410.

ments? Why should the rule that action to establish status cannot be renounced be disallowed in one case and upheld in another, when the assumptions are basically the same?

B. NON-MATRIMONIAL PATERNITY OF THE CONSENTING MALE

In the case of an unmarried couple, where the man allows his partner to be inseminated with his own or a donor's semen, the problem of determining paternity again arises. Presumptive paternity does not apply in this case for the matrimonial link is lacking. The problem is whether the document declaring consent should be given equivalent weight to a formal acknowledgement of non-matrimonial paternity. The response given to this question under existing laws is negative, for it does not appear possible to acknowledge a child who is non-existent because it has not yet been conceived. Based on consent, however, it is possible to claim judicial establishment of paternity. The French *Civil Code*, for instance, provides that "[...] est judiciairement déclarée la paternité hors mariage de celui qui, après avoir consenti à l'assistance médicale à la procréation, ne reconnaît pas l'enfant qui en est issu" (article 311-20).

In Spain an intermediate procedure is allowed to determine paternity under administrative proceedings subsequently approved by the judge in charge of the civil Register, to which end the document containing consent is considered an "unquestionable writ" (art. 8.2 of *Law 35/1988*). Notwithstanding, under this procedure, the opposition of the presumed father frustrates such determination and the parties concerned must resort to filiation suit.

A different formula is provided under the *Civil Code of Québec*, whereby if the unmarried male fails to acknowledge the child, the latter may only resort to civil liability action (art. 540). This formula comes under criticism because it restores the differences between children born in or out of wedlock,[17] though the difference in fact derives from the

17. J. BEAULNE, « Réflexions sur quelques aspects de la procréation médicalement assistée en droit des personnes et de la famille », (1995) 26 *R.G.D.* 235-263, pp. 256-257.

presumption *pater is est* rather than the application of heterologous technology.

A further problem that arises is whether the man who consents and acknowledges the non-matrimonial child may subsequently contest such acknowledgement on the grounds of lack of consanguinity because donor semen was used. Laws tend to be silent on this assumption and doubt arises whether exclusion of the right to contest matrimonial paternity (where it exists)[18] applies by analogy or whether the general rules in favor of biological truth should apply.

C. "DONATION" OF EMBRYOS CONCEIVED *IN VITRO*

If we accept that embryos may be cryopreserved, it could happen that the couple with whose gametes they were conceived no longer wish to utilize them, *e.g.* because they have obtained offspring already by other means. The question then is whether the progenitors may donate such embryos to another infertile couple. Spanish law accepts this. French law does too but as an exception, deeming it not a donation but an *accueil* or acceptance (art. L. 152-4 and 152-5 of the *Code de la santé publique* (Code of Public Health), which leads to considering the process similar to adoption.[19]

If the possibility of donation of embryos is legally accepted, paternity is evidently determined by the consent of the male and maternity by the gestation of the woman receiving the embryo.

D. ACTIONS BY A THIRD-PARTY GAMETE DONOR

In general, sole genetic contribution by means of what has been improperly termed "gamete donation" is not accepted to admit a paternity or maternity claim on the child

18. Such is the opinion of F. RIVERO HERNÁNDEZ, in J. LACRUZ BERDEJO *et al.*, *Elementos de Derecho Civil IV. Derecho de Familia*, Bosch, 4th ed., 1997, pp. 528-529, though excepting the case where the child is born due to a cause other than artificial fertilization consented to by the man.

19. M.-C. GAUDREAULT, «L'embryon en droit français : titulaire d'un statut juridique», (1997) 28 *R.G.D.* 467-493, p. 487, points out that accepting an embryo is subject to numerous conditions that, in her formulation, are extremely analogous to those applied to the adoption of a child.

resulting from reproductive technology. The case is not considered in the literature, for it is assumed that the "donor" has no interest in claiming filiation for him or herself.

French law, however, provides that "aucun lien de filiation" may be established "entre l'auteur du don et l'enfant issu de la procréation" (art. 311-19 of the *Civil Code*). In Spain, *Law 35 / 1988* provides that in cases where the identity of the donor must be disclosed, such disclosure "does not imply in any way legal determination of filiation" (art. 8.3).

Notwithstanding, when it is a question of surrogate motherhood, the woman who in addition to carrying the child has contributed her own gametes may wish to claim her own maternity. U.S. courts have recognized her as the mother, not so much for having given birth to the child but in addition for having made her genetic contribution.[20]

E. THE CHILD'S RIGHTS VIS-À-VIS THE "DONOR OF GAMETES"

One of the most extensively debated questions posed by the practice of heterologous technologies is that of harmonizing the rights of the child to know who his or her parents are and the right to reserve or confidentiality to be ensured for whomever contributes his or her gametes with no desire to be father or mother.

The confrontation between the child's right to identity and the right to privacy of the biological progenitor has given rise to intensive debate. There are four possible options to resolve the issue.

(1) Guaranteeing absolute anonymity to the donor is the solution that seems to prevail in French legislation (art. L.673-7 *Code de la santé publique*). Moreover, any liability action against the donor is expressly excluded (art. 311-19 of the *Civil Code*).

(2) Guaranteeing general and relative donor anonymity. This is the case in Spanish law, where "the children born are

20. In the *Baby M* case, the Supreme Court of New Jersey, together with invalidating the surrogate motherhood contract, considered that the parents of the child were the male principal and the surrogate mother who had contributed her egg. The Court granted custody to the father, but regulated visitation rights in favor of the gestational mother (New Jersey Super, 267.542 A.2d 52, 1988).

entitled to [...] obtain general information on the donors not including their identity" and solely by way of exception, when under special circumstances the child's life is proved to be endangered (art. 5.5 *Law 35/1988*) or when in order pursuant to laws on criminal procedure, such identity can be disclosed (art. 5.5 *Law 35/1988*). The *Civil Code of Québec* extends this right to the child's descendants (art. 542).

(3) Granting the right to know the identity of the donor but without attributing paternity thereto is the solution under Swedish law (*Law 1,140 of December 29, 1984*), which grants the child such right "once sufficient maturity is attained" (art. 4). Austrian legislation (*Law of July 1, 1992*) authorizes exercise of such right from the age of fourteen.

(4) Granting the right not only to know the donor's identity but also to claim donor paternity is a formula that fails to enjoy general acceptance, it is retained as a possibility, however, when it is not feasible to attribute paternity to the woman's husband, for lack of consent or other cause.

This solution would also appear to be correct in the event of fertilization of a woman living alone. By legitimizing this practice, Spanish legislation has led same authors to point out that in such event the child may only expect to determine maternity and will inevitably lack a father.[21]

F. *POST MORTEM* FERTILIZATION

When the frozen semen left by the deceased male is to be used to inseminate a woman who was his spouse or concubine, a problem arises in the paternal filiation of the child thus conceived. Most legislation fails to consider this possibility. In some cases, because it excludes such procedure (like the Swedish and French laws). In others, like Spanish law, because it takes for granted the filiation of the child in respect of the previously deceased parent, provided certain requirements under the law are met, including *inter alia* express consent and performance of the procedure within six months following the demise (art. 9.1).

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21. F. RIVERO HERNÁNDEZ in *Derecho de Familia*, *op. cit.*, note 18, p. 259; J. BUSTOS PUECHE, *op. cit.*, note 7, p. 132.

G. SURROGATE MOTHERHOOD

European legislation has opposed the practice of surrogate motherhood or motherhood for hire. Even in countries where relevant legislation did not yet exist, the courts had nullified hired gestation contracts on the grounds of illegal object, and refused to apply the norms of full adoption to achieve the purpose of this practice (as in France).[22] Spanish law refers directly to the nullity of the contract and regulates filiation: "the filiation of children born by surrogate gestation shall be determined by parturition" (art. 10.2). British law further states that "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child" (sec. 27.1). In Canada, the *Civil Code of Québec* provides, in this same sense, that "Procreation or gestation agreements on behalf of another person are absolutely null" (art. 541).

In the U.S.A. the courts differ on the efficacy given to the surrogate parenting arrangement. In *Baby M* the Supreme Court of New Jersey declared the arrangement invalid; the Supreme Court of California ruled the reverse in *Johnson* v. *Calvert*.[23] Claim to maternity varies according to whether the gestational mother is also the egg donor, in which event she is acknowledged as mother of the child (*Baby M*), or whether the principal is the egg donor but not the gestational mother, in which case maternity is assigned to the woman who desired motherhood (*Johnson* v. *Calvert*). In the latter case the California Supreme Court rejected certain proposals suggesting that both women (the genetic principal and the gestational mother) be awarded the status of mothers of the child.

Lastly, the child may have been conceived with semen from the husband and eggs from a donor, but the woman who seeks maternity is the one to carry the resulting embryo. In this case, the couple being divorced, the father claimed custody

22. *C. Cass., May 31, 1991, D.* 1991. 30, p. 417. *Cf.* M. GOBERT, «Réflexions sur les sources du droit et les 'principes' d'indisponibilité du corps humain et de l'état des personnes», (1992) 3 *R.T.D. civ.* pp. 489 ff.

23. *Johnson* v. *Calvert*, No. X-633190 (Cal. App. Dep't Super. Ct. Oct. 22, 1990) slip.

of the daughters (they were twins) against his wife on the grounds that she was not the biological mother. The New York Court denied the husband's claim and affirmed the maternity of the gestational mother, considering both the will to assume maternity and the biological contribution of gestation.[24]

The uncertainty surrounding the question led the American Bar Association, in their *Guide to Family Law* to recommend that anyone thinking of hiring a surrogate mother should first seek legal assistance.[25]

V. Reforms to Chilean and Argentine legislation

A. The new art. 182 of the Chilean Civil Code

Law n° 19,585 became effective on October 27, 1999, introducing extensive reforms to the Civil Code designed to establish a new statute of filiation. The reforms follows in the wake of the Spanish law of 1981 and the Argentine law of 1985, providing a natural filiation that may be termed matrimonial or non matrimonial for purposes of determining or contesting, despite producing similar effects on matters of child support, *patria potestas*, and inheritance law.

The bill, submitted by the Executive in 1993, failed to cover treatment of filiation in assisted reproductive technologies. In addition, another bill under discussion was intended to regulate both the admissibility of such technologies and the effects thereof on filiation. When both bills were before the Senate, some senators remarked that full application of the principle of freedom to investigate paternity by means of biological tests might prove unsettling to families where a child conceived by heterologous technologies had already been successfully inserted.

After a heated debate, which even took place separately from the rest of the text of the bill, a majority of senators agreed to adopt a new article 182, which reads as follows:

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24. *McDonald* v. *McDonald*, 608 N.Y.S., 2d 477 (1994).

25. The American Bar Association, *Guide to Family Law*, U.S.A., 1996, p. 34. From the information provided, a few states have legally excluded the contract, others restrict it or might grant the mother who is surrogated the right to keep the child after it is born.

> The father and mother of a child conceived by means of assisted reproductive technologies are the man and woman who submit thereto.
>
> Filiation determined in accordance with the preceding paragraph shall not be contested nor a different filiation claimed.

The rule seems to me to be poorly written, imprecise and lacking in rigor. Numerous doubts arise: what is to be understood by assisted reproductive technologies? What is meant by the expression "submit thereto"? Does it imply consent? What kind? By what means will the technological filiation thus regulated be recorded? Should it be termed matrimonial or non matrimonial, according to the civil status of the recipient couple?

To answer these numerous questions the only thing to be done is resort to the history of the rule's establishment and the general context of the law wherein it is inserted. It may thus be concluded that the rule applies only to heterologous technologies (with semen or egg donation) in heterosexual couples and that its sole object is to restrain the action of the consenting man or woman to contest their paternity or maternity, as well as the claim of the biological progenitor.

Doubt still surrounds the right of the child to contest the formal paternity or maternity determined under article 182, in order to claim filiation in respect of the donor of gametes. In my view, the history of the rule (from which a paragraph 3 was deleted, which provided that donation of gametes did not entail kinship), the general contest of the new law, which provides that "the law allows the investigation of paternity or maternity" (art. 195 of the *Civil Code*), together with international texts in favor of the right of the child to know its own parents to the extent possible (*Convention on the Rights of the Child*, art. 7), lead to the conclusion that the child should be given the right to contest technological, and claim biological, filiation.

B. THE DRAFT *ARGENTINE CIVIL CODE* OF 1998

The draft Civil Code written by the Commission designated under Decree 685 of 1995 and submitted to the Minister

of Justice on December 18, 1998, contains two rules related to our subject, *i.e.* art. 543, paragraph 4, and art. 563, paragraph 2.

Article 543 refers to determination of maternity in the event of surrogate motherhood: "The maternity of the child born pertains to the woman who bore it, even if it is proved that she had another woman's fertilized egg implanted in her, whether such procedure be legal or illegal" (art. 543.3). Article 563 refers to matrimonial paternity in cases of assisted fertilization with semen donated by a third party: "Paternity may not be contested if the husband consented to artificial fertilization of the spouse or implantation of an egg fertilized with gametes donated by a third party, whether such consent be legal or illegal" (art. 563.3).

As I see it, the bill seems inclined toward the more generalized criterion among existing legislation: to restrain the consenting husband from contesting presumptive paternity and attribute maternity to the gestational mother in the event of genetic contribution or hiring by another woman.

It is worth noting, however, in respect of restraint from contesting, that the text appears to refer solely to the husband who consented to the use of donor gametes. Action to contest such paternity should also be allowed to the child, pursuant to article 565, which opens the possibility with no restriction whatsoever. Exclusion from the right to contest filiation thus applies solely to the husband and heirs thereof, who are the only ones referred to under article 563, which contains the paragraph on assisted fertilization.[26]

If the child is given the right to contest paternity, may he or she also be allowed to claim paternity from the semen donor? Given the general terms of article 557, the answer should be in the affirmative. This conclusion is all the more sustainable if the husband contests paternity showing that he did not consent to the use of genetic material donated by a third party. Then the child should be given resort to the donor, otherwise he or she would remain fatherless.

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26. It does not appear to be possible for the donor to contest matrimonial paternity, for the draft law provides no action to contest the presumptive paternity of the donor who claims to be the child's progenitor.

The bill fails to provide for cases of application of technologies to unwed couples. For this reason, if the consenting male fails to acknowledge the child once born, paternity can hardly be attributed thereto. At most it might be said that such male is liable for damages therefrom. The provision under article 551 of the bill would apply by analogy, to the effect that "damages to the child arising from lack of acknowledgement are liable to compensation [...]".

The rule referring to maternity covers both egg donation and surrogate motherhood. In both cases a fertilized egg is transferred to a woman for gestational purposes, but on the first instance (egg donation) the gestational mother is she who desires to be the mother of the unborn child, whereas in the second instance (surrogate motherhood), the pregnant woman intends subsequently to deliver the child to another woman, who may or may not be the egg donor. In either case, the rule is peremptory: maternity pertains to the gestational mother.

This is designed to prevent gestational motherhood from being contested on the grounds that the genetic contribution pertains to a third woman. Article 562, which allows maternity to be contested by the husband, the heirs thereto, the child, other interested parties, or even the woman named in the register "because the woman is not the mother of the child that passes as hers" would not apply. Since article 543 is not merely evidentiary but attributive, in the event of egg donation, the gestational mother "is" the mother of the child that passes as her own.

It seems odd, in any case, that the child is not denied action to contest when it is a matter of donated semen, as happens in the case of donated egg. Perhaps the contribution of the gestational mother to the child's development partly justifies the different treatment.

Delving deeper, however, it would appear that what determines the rules of filiation is an implicit judgment of legitimacy on the various reproductive procedures. The authors of the bill have been exquisitely careful to point out, in both provisions, that the implications for filiation that they propose do not prejudge on the lawfulness or unlawfulness of the technologies: "whether such procedure be legal or

illegal" (art. 543); "whether such consent be legal or illegal" (art. 563). It is also clear, nevertheless, that if the technology involves semen donation, the law supports the will of those using such technology to attribute paternity to the husband, irrespective of the fact that he is not the biological father. Whereas in the event of surrogate motherhood the law appears to breach the gestation contract for the account of another party, imperatively attributing maternity to the gestational mother and so frustrating in advance any attempt to submit to such technology.

In other words, the criterion that apparently underlies the draft provisions is that assisted heterologous fertilization with donor semen is legitimate, whereas surrogate motherhood is not. The former is supported (and indeed encouraged); the latter is excluded. The criterion on ethico-juridical legitimacy of the procedures thus seems to be unavoidable when the time comes to regulate their implications for filiation.

Lastly, a degree of inconsistency may be observed: whereas in one instance "the will to procreate" (the husband's consent) is made to prevail, in the other instance what prevails is the biological element (gestation). If the will of the husband is what allows paternity to be attributed, why does the same process not apply to the woman who hires another woman to carry a child and who has also expressed the will to be the mother of the born child?

VI. Towards "contractual" filiation?

The trend underlying the general context of regulating assisted reproductive technologies with the aid of third parties, where filiation ties are being inevitably dissociated, may be leading to a different configuration of the entire law of filiation, if not of the public image of the family itself. Indeed, encouragement of heterologous technologies and, in certain sectors, surrogate motherhood, entails the breakdown of traditional filiation, threatening to replace it with another system where the ties between father, mother, and child are not seen in the light of unconditional love but only of a business deal.

By emphasizing the intent to reproduce in the instruments granting consent to fertilization with donor semen or donor eggs, or in Surrogacy Parent Agreements, it is clear that we are crossing the boundary separating the field of familial matters, inalienable and of public nature, to the market sector and free contract agreements. By regulating filiation assumptions in the new bioreproductive processes we are not only supplementing our law with a new formal filiation rule, to be added to adoptive filiation and natural filiation. Rather, we are introducing a seed of destruction of the classic view of the child as a gift of love, not produced or controlled but accepted and received as it is. Once introduced into the law, the "will to procreate" or "will to accept" could not be limited to cases of assisted reproductive technologies and almost from the very nature of things could be extended to all cases of filiation. Filiation will no longer stem from nature but from the contractual agreement. This will no longer be a question of *status* but of *contractus*.

It is not even a question of returning to Napoleonic formality, for the rules of voluntary acknowledgement were grounded on presumptive biological relations. Here, a filiation is intended that goes beyond legal fiction and shows itself to be of contractual origin.

For American professor Janet L. Dolgin, this conventional filiation intended to subvert the classic view of fatherhood and motherhood is a further sign of a broader revision of the conception of the familial phenomenon. In her own words:

> Allowing the family to be defined through choice — and through intention — may be the transition to families defined through contract.
>
> An essential aspect of the traditional ideology of family is the inexorability of family relationships. Understood as grounded in blood or genes, family relationships simply mirror the inevitability of natural processes [...] However, in cases such as *Davis* and *Johnson* the family is not distinguished from the marketplace. Rather, intent (often evidenced by reference to actual contracts) as the ground on which familial relations are constructed, substitutes for blood and genes in constituting the parent-child relationship. In this construction, choice and

bargain, essential incidents of contractual interaction, become central to the definition of family.[27]

VII. THE VALUE OF HUMAN DIGNITY AND THE CHILD'S BEST INTEREST: KEY NOTIONS

The value of human dignity also extends and very specially to the process of engendering a new person. Technology cannot be justified for its own sake and by the pursuit of ends dissociated from the persons who are the objects thereof. Reproductive technology should be examined in light of criteria of justice. Just interventions are solely those that do not instrumentalize the act of personal union of the spouses or the human being that may result therefrom. Any human being is entitled to be engendered with dignity. Otherwise, we shall be approaching ever more closely to Aldous Huxley's *Brave New World* or to the cybernetic virtual world of the movie *The Matrix*, directed by Larry and Andy Wachowski (1999), which announces that future human beings are not really born but grown.

The child's best interest, if it is to be recognized in full, must include the interest of not being treated as reproductive material, of coming into the world from the unconditional love of a man and a woman who form a stable union to found

27. J.L. DOLGIN, *Defining the family: Law, Technology, and Reproduction in an Uneasy Age*, New York-London, New York University Press, 1997, pp. 208-209. Elsewhere she adds, "In sum, surrogacy and the new reproductive technologies disturb traditional understanding of family in two different, but equally basic, regards. First, these phenomena challenge the long-standing notion that the parent-child tie should be founded in love, not in money. In every state of the United States, adoption laws prohibit the exchange of money for a baby. Yet, commercial surrogacy arrangements and the growing market in infertility treatment involve the exchange of money for gametes, embryos, and babies, pursuant to a variety of contractual arrangements. Second, the new reproductive technologies, including gestational surrogacy [...] muddle assumptions about the social correlates of biological reproduction. Specifically, these phenomena disturb basic assumptions that undergirded public understandings of families, of the parent-child relationship. Certainly, people can choose to create families through reproductive technology or surrogacy that, once formed, resemble traditional families in that their members understand one another as deeply and lastingly bonded together. But because they are founded in choice, rather than created as an inevitable consequence of natural processes, such families can always be replaced by others, attributable to other and different choices" (p. 250).

a home where it can be nurtured, bred, and educated. As Spaemann says:

> It pertains to the temporal part of the human person not to have the origin thereof left in the hands of intentional production, but to happen as the result of a human act not in the least intended, as its immediate purpose, to develop a "product." Only thus does man come to life and exercises his own right "by nature", as a creation of God or of nature, but not of his parents. *Genitum non factum*, engendered, not made by hand in a test-tube and thus deprived of the right to have his existence accounted for.[28]

In this way, any techniques that dissociate reproduction from corporal union should not be fostered by Civil law. Technologies that seriously breach the child's best interest by bringing in third parties as geme donors or providers of gestational services should be explicitly excluded by provisions prohibiting, or at least discouraging, them. The regulation of filiation should also take into account this best interest, so that if technologies that dissociate parental ties are in fact produced, the solution should focus on the welfare and protection of the child conceived.

I believe that harmonizing the biological criteria that should remain as foundations of filiation ties, with provisions based on adoption and personal care of offspring, may be considered to resolve cases of procreation performed against the child's best interest.[29] Thus, in the event of heterologous fertilization, the child's natural father will be the sperm donor, but the child will be deemed to be legally adopted by virtue of the intent of the man who consents to this procedure. Such adoption should be simple and give rise only to paternal obligations rather than rights, unless the judge grants some

28. R. SPAEMANN, "Sobre el concepto de dignidad humana", in *Lo natural y lo racional. Ensayos de antropología*, Madrid, Rialp, 1989, pp. 116-117.

29. F. SANCHO REBULLIDA, "Los estudios previos y las líneas previsibles de la futura regulación española", in *La filiación a finales del siglo XX*, 2nd Basque World Congress, Madrid, 1988, p. 110, points out that "Assuming the child's right to know the identity of its progenitors, it remains for law to establish the content of such determination and the relation thereof with the assumptions of adoption with determination of natural filiation".

rights (such as custody) if he believes that this is justified in the specific instance, by virtue of the child's interest.

In any event, the child should be entitled to know the identity of its biological progenitor and if adoption by the consenting male cannot be performed, to liability action including child support against the man who donated the gametes knowing the purpose of such donation.

In the event of surrogate motherhood, if the gestational mother is also the genetic mother, maternity should be assigned to her. Subsequent adoption by the couple who hired her gestational services should be prohibited. Personal care of the child shall be determined by the judge, again having at heart the child's interest and welfare. If the surrogate mother is not the genetic mother, the case should be resolved as in the case of heterologous technologies. The genetic mother will be the natural mother but the gestational mother will be deemed fully entitled to be the adoptive mother of the child, with all the obligations of motherhood and such rights as the judge may determine. Personal care of the child will also be determined by the judge.

In *post mortem* cases, the child conceived even after the death of the originator of the gametes will be considered the child of such originator, irrespective of the intent thereof, but will not be part of the estate, because it was not in existence at the time of the decease. Cryopreserved embryos should be treated as human beings and their birth obtained, if possible, by implantation in the woman whose eggs permitted their conception. If this is not feasible, the proper procedure is dubious. Permission for gestation by an adopting couple may serve to avoid embryo destruction, but steps should be taken to prevent fostering or encouraging creation of more embryos for purposes of trade or donation.[30]

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30. Pope JOHN PAUL II, in a speech delivered on May 24, 1996, made an appeal to stop production of human embryos for cryopreservation, "bearing in mind that a morally licit outcome is not in sight for the human fate of thousands upon thousands of "frozen" embryos who are and continue to be entitled to the essential rights, and who must therefore be cared for like human persons" (*L'Osservatore romano*, May 31, 1996, pp. 17-18). The doubts surrounding the solution of prenatal adoption, which some authors advocate as an *ultima ratio* solution for frozen embryos present difficulties arising from the production logic wherein the procedure is inserted. *Cf.* M. FAGGIONI, "La cuestión de los embriones congelados", in *L'Osservatore romano*, August 30, 1996, pp. 9-11.

The problems, as we can see, are extremely complex and not likely to be the only ones to be faced if we continue to ignore that the human being as such is above human intent. As C.S. Lewis says, the power of a technology intended to overcome human dignity promises man deceptive power:

> It is the magician's bargain: give up our soul, get power in return. But once our souls, that is, our selves, have been given up, the power thus conferred will not belong to us. [...] if man chooses to treat himself as raw material, raw material he will be: not raw material to be manipulated, as he fondly imagined, by himself, but by mere appetite, that is, mere Nature, in the person of his de-humanized Conditioners.[31]

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31. C.S. LEWIS, *The Abolition of Man*, Great Britain, William Collins Sons and Co. Ltd., 1978, pp. 43-44.