

Questioning South Africa's 'genetic link' requirement for surrogacy

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South African law currently forbids those seeking to arrange a surrogate motherhood agreement from creating a child that will not be genetically related to at least one of them. For a surrogacy contract to be legally valid, there must be a 'genetic link' between the child created through a surrogate and the parents who will raise it. This law is currently being challenged in the High Court of South Africa, and in this article I critically explore salient ethical facets of the dispute. I argue that the law is unjust and should be revised.

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South African (SA) law currently forbids those seeking to arrange a surrogate motherhood agreement from creating a child that will not be genetically related to at least one of them. For a surrogacy contract to be legally valid, there must be a 'genetic link' between the child created through a surrogate and the parents who will raise it. Specifically, the law says:

'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'^[1]

This law implies that at least one of the commissioning parents must provide a gamete, i.e., either sperm or eggs, which will be used to form the embryo of the child that she or they intend to rear.

Interest in this topic is heating up in SA, with a recent (brief) ethical overview of the matter having been published^[2] and a legal challenge currently being made against SA's Minister of Social Development, who supports the current law.^[3] To begin to appreciate some of the rationale for doubting the justice of the law, consider the following scenario.

Imagine a couple that has tried for over a decade to get pregnant, but has been unable to do so. Suppose that he is sterile and she is now in her late 40s, without viable eggs and unable to gestate a fetus. And yet both still long to be involved with a child from the start, perhaps one that is likely to have features similar to theirs. The law, as it stands in SA, forbids them from using a surrogate mother who would carry an embryo fertilised by donor gametes that the couple has selected.

In this article I appeal to moral-philosophical reasons to conclude that SA's surrogacy law is unjust in respect of the above scenario and those similar to it. I rebut rationales, usefully divided into consequentialist and non-consequentialist moral arguments, for

thinking that the law is justified. The consequentialist arguments maintain that the results of changing the law to permit surrogacy without a genetic link would be undesirable in some way, perhaps for causing harm to the child or starting a 'slippery slope' towards a society that systematically employs eugenics. The non-consequentialist arguments contend that there is something immoral in itself, apart from the long-term consequences, about creating a child that will not be genetically related to the parents who care for it. After arguing against both attempts to ethically justify the status quo, I provide some positive reasons for thinking that the law is unjust.

Note that in this article I do not address broader issues relating to the ethics of *in vitro* fertilisation (IVF), the destruction of embryos, embryo transfer and gestational surrogacy. I focus strictly on whether surrogacy is morally impermissible and should be legally forbidden for the specific reason that a genetic link would be missing between those commissioning the pregnancy and the created child. In addition, I do not wade into the thicket of ethical debates about related issues such as cloning and genetic enhancement, and where they are mentioned, it is only to put the present issue in context.

Most of those who have written on surrogacy in the absence of a genetic link have been either religious conservatives, on the one hand, or radical transhumanists, on the other. They have either sought to preserve traditional mores or to completely upend them in favour of overhauling human nature towards something allegedly much better. Part of my aim in this article is to articulate a moderate position, in between these extremes and grounded on values consonant with SA's Constitution, including contemporary understandings of the African ethic of *ubuntu*.

Consequentialist arguments for a genetic link

A consequentialist argument for a certain law is a moral rationale according to which the long-term outcomes for society with the law would be better than without it. Frequently called 'cost-benefit

analysis' in the realm of public policy, the idea is that a norm is justified insofar as it is expected to produce more good and to reduce more bad than the feasible alternatives to it.

Applied to the law requiring a genetic link between those who create a child and those who intend to rear it, the claim would be that more desirable net benefits are expected from the law than from some other law that could realistically be adopted. In the present context, two types of harm are most commonly discussed, namely psychological damage to the child who has been created, and the much more far-reaching prospects of opening the floodgates to a society that uses eugenics to enhance embryos.

Would the created child be harmed?

One natural question to ask about a child who would be reared with parents genetically unrelated to him is whether he would be badly off as a result. In particular, perhaps such a child would be confused about his identity or, as the moral philosopher J David Velleman has put it, suffer from a kind of blindness about who he is:

'In coming to know and define themselves, most people rely on their acquaintance with people who are like them by virtue of being their biological relatives ... Knowing what I am like would be that much harder if I didn't know other people like me. And if people bear me a literal family resemblance, then the respects in which they are like me will be especially relevant to my knowledge of what I am like ... Not knowing any biological relatives must be like wandering in a world without reflective surfaces, permanently self-blind.'^[4]

Based on one oft-cited study,^[5] some psychologists have also indicated concern about those reared in families with whom they lack a genetic link in terms of feeling different and consequently lacking some self-esteem.

Now, children who are adopted lack a genetic link with the parents looking after them, and virtually no one believes that adopting such a child is immoral and that staying in an orphanage would be preferable. So, one might wonder whether there is a genuine *prima facie* concern on this score.

However, there is plausibly some morally relevant difference between adopting a child who already exists and who will lack a genetic link with its parents, on the one hand, and creating a child who does not yet exist and who will lack a genetic link with its parents, on the other. Perhaps it is impermissible to create a person whom one can foresee is likely to undergo some kind of psychological harm, but permissible to adopt an extant person who might suffer the same harm, when doing so would minimise the harm he would face overall, viz. if left in an orphanage. Velleman also makes this point eloquently:

'Much as we love disadvantaged children, we rightly believe that people should not deliberately create children who they already know will be disadvantaged. In my view, people who create children by donor conception already know – or already should know – that their children will be disadvantaged by the lack of a basic good on which most people rely in their pursuit of self-knowledge and identity formation.'^[4]

And since the law in relation to children ought to serve their interests, it should forbid creating children who will foreseeably lack a genetic link to those who rear them, or so the argument goes.

I have two objections to make to this argument. First, I point to very recent and substantial counter-evidence, viz. based on large samples and longitudinal studies, indicating that psychological harm has not been suffered by the offspring of donated gametes in respect of a lack of a genetic link with their parents.^[6-9] One of these concludes: 'The findings of this study add to the growing body of research suggesting that biological relatedness between parents and children is not essential for positive child adjustment.'^[6]

My second point is that even if, for the sake of argument, there were *some* foreseeable harms to an adolescent or adult who lacks a genetic link to his parents, it would not necessarily be immoral to create him, since the alternative would be his non-existence, which is far from obviously preferable (for a different but related answer to this question, which emphasises the fact that the law seeks to remove children from parents only in the most extreme cases, see Meyerson^[10]).

Returning to a comparison between adopting a genetically unrelated child and creating one, the alternative to adoption is that a child remains alive in the care of a state orphanage or the like. The alternative to creating a child with donated gametes and a surrogate birth-mother is the non-existence of that child. Hence, for the present consideration of harm to the child to hold weight, it must be that never existing at all would be better for a child than being created and then living in a loving, supportive home with parents who are not genetically related to him.

That claim is, if not absurd, then extraordinarily dubious and, still more, morally improper as a ground of law. Surely, the relevant test is whether the life of the created child would be worth living. And I submit that the overwhelming majority of those working in ethics would contend that your life could indeed be worth living even if you were not genetically related to parents who loved you and did all they could to help you flourish in the world. After all, virtually no one believes that it would be better for, say, an adopted child in an intimate, supportive household to die than to carry on living. However, the logic of the present argument entails that it would be, by virtue of the alleged harm occasioned by being reared by those not genetically related to him.

Would a eugenic rat-race ensue?

Here is another version of a consequentialist argument for SA's law requiring a genetic link between those who create a child and those who intend to rear it. It appeals not to the short- to medium-term harm to the child, but rather to long-term results for the broader society. Even if the specific offspring of donated gametes would not suffer in terms of their identities or otherwise, it could be that changing the law to allow people to create such children would have disastrous consequences down the road for others.

In particular, it is natural to be concerned about opening the floodgates to a eugenic society in which embryos are routinely screened and engineered with regard to traits such as sex, height, intelligence, memory, patience, beauty and related traits that tend to confer competitive advantage. Perhaps in such a society children would be 'reduced to' their genetic potential and not given the freedom to act in accordance with their own desires. Maybe there would be even more systematic kinds of inequality, biologically engendered through genetic manipulation, beyond the social ones of race and class that are already so salient in SA society. It could even be the case that opening the door to severing any genetic

link between children and parents could encourage society to allow the converse of an identical genetic link in the form of reproductive cloning (famously argued by Leon Kass^[11]).

There might of course be some thinkers who maintain that these risks would be worth the benefits of much-improved health to the human race. However, I set that sort of transhumanist and fairly radical objection aside. Instead of welcoming the slippery slope, I provide reason to doubt that it would be likely to occur.

Slippery slopes are often readily forestalled by putting laws and other rules in place. A few such laws already exist in SA. SA could continue its policy of forbidding commercial gamete distribution^[12] and commercial surrogacy,^[13] permitting these practices only for altruistic reasons, with compensation for time and other inconvenience being the only financial element involved. It could retain the requirement that only people who cannot give birth themselves may make use of surrogacy.^[14] And it could of course continue to maintain a ban on human cloning.^[15]

I do not express any view in this article as to which of these kinds of 'brakes,' if any, would be appropriate. My point is merely that something of the sort appears to be on hand, if one were keen to stop the slide towards a society in which, say, the rich seek out the choicest donated eggs and sperm, or the genetic engineering of their own, with the aim of creating what in the popular press are often called 'designer babies'^[16,17] who would eventually dominate the rest of society.

Non-consequentialist arguments for a genetic link

Non-consequentialist arguments in favour of forbidding people from creating children they know will not be genetically related to themselves imply that there is something wrong with doing so 'in itself,' setting aside consideration of the results of doing so. Too often such arguments either appeal to religious tracts about God's will, which hardly command acceptance from a broad array of rational enquirers, on the one hand, or to vague and easily questioned rationales about such a practice being 'unnatural' (so is getting a tattoo) or a matter of 'playing God' (so is killing in self-defence), on the other.

In this section, I instead focus on arguments that are *prima facie* stronger, some of which have been advanced by Kass, who acknowledges the weaknesses of the usual rationales. Kass, in my opinion, has two distinct arguments for a genetic link: according to one, lineage is good for its own sake, and according to another, sexual procreation, which implies a genetic link, is good for its own sake. As I will demonstrate, both arguments rest on the basic principle that human nature has a dignity that is not to be degraded, and I will bring out respects in which this principle is deeply flawed as a reason for concluding that a genetic link is morally required. I will also address an *ubuntu*-based argument for a genetic link that appeals to the moral value of kinship.

A requirement to respect the dignity of 'human nature'

About the first uses of IVF, Kass, at least as of 2002,^[18] says that has he no complaint, since they involved taking the sperm and eggs of a married couple to create an embryo that they would then rear. Speaking of this intramarital use of IVF, Kass remarks that 'there could

be no objection. Here indeed is the natural and proper home for the human embryo. Here indeed is the affirmation of transmission and the importance of lineage and connectedness.'^[18]

However, criticising the use of IVF and embryo transfer for the purposes of creating a child that will not have a genetic link to those who rear it, Kass says that such new techniques will serve:

'... not to ensure and preserve lineage, but rather to confound and complicate it ... Properly understood, the largely universal taboo against incest, and also the prohibitions against adultery, defend the integrity of marriage, kinship, and especially the lines of origin and descent. These time-honored restraints implicitly teach ... clarity about who your parents are, clarity in the lines of generation, clarity about who is whose ... This means, concretely, no encouragement of embryo adoption or especially of surrogate pregnancy.'^[18]

Some of Kass's rationale is consequentialist, to the effect that when origins and parentage become opaque, the prospects of what he calls 'civilized community' decline. However, another part of it, on which I focus here, is non-consequentialist and, specifically, a matter of respect for human dignity. Elsewhere Kass remarks, 'Man is partly defined by his origins; to be bound up with parents, siblings, ancestors, is part of what we mean by "human,"'^[19] so that when people are foreseeably created without a genetic link to those who will take care of them, then they are objectionably treated as inhuman.

Not only are the embryo, fetus and child treated inhumanly or degraded by virtue of knowingly being created in ways that sever the genetic relationship between them and their caregivers, but the parents themselves, and perhaps the traditional family more generally, are treated disrespectfully. On this, Kass remarks in an early article:

'There are more and less human ways of bringing a child into the world. I am arguing that the laboratory production of human beings is no longer human procreation, that making babies in laboratories – even 'perfect' babies – means a degradation of parenthood ... If the depersonalization of the process of reproduction and its separation from human sexuality dehumanize the activity which brings new life, and if the manufacture of human life threatens its humanness, both together add up to yet another assault on the existence of marriage and the human family.'^[19]

Kass also has this to say:

'When it comes to human biotechnical engineering, only if there is something inherently good or dignified about, say, natural procreation, human finitude, the human life cycle (with its rhythm of rise and fall), and human erotic longing ... only then can we begin to see why those aspects of our nature need to be defended. (It is for this reason why a richer bioethics will always begin by trying to clarify the human good and aspects of our given humanity that are rightly dear to us, and that biotechnology may serve or threaten.) We must move from the hubristic attitude of the powerful designer to consider how the proposed improvements might impinge upon the nature of the one being improved.'^[20]

Notice the difference in argument here from the previous one. The logic of the present argument entails a much broader conclusion, to the effect that even using IVF in ways that preserve a genetic link is immoral for not being part of the characteristic process by which human beings procreate, viz. by sexual intercourse.

As Kass himself seems to have changed his mind about that, as per the discussion above regarding intramarital use of IVF, one might be tempted to set the present rationale aside. However, both arguments are a straightforward product of a common moral foundation, and so I will continue to address them both. I suspect that they stand or fall together.

Both of the previous arguments, when understood in non-consequentialist terms, maintain that human nature has a dignity that it is wrong to degrade, that the use of reproductive technologies and surrogacy to create a child that will not be genetically related to its caregivers degrades human nature, and hence that they are wrong to use. Here, I argue that the claim that human nature has a dignity can be understood in one of two major ways, of which one begs the question and the other has extremely counterintuitive implications.

To say that 'human nature' has a dignity is ambiguous, for it is not clear whether that phrase is associated with a 'moralised' concept or not. A moralised concept is one that is inherently evaluative or normative, and is the sort of notion that ethicists invoke for a living, with good examples being justice, virtue, well-being, meaningfulness and human excellence. Given the ways in which these concepts are normally invoked, one would be contradicting oneself to say that there is nothing desirable about virtue and that one has no reason to seek it out. In contrast, a non-moralised concept does not essentially include some kind of appraisal, and is instead the sort of notion that a scientist would employ to describe some facet of the world. Here, a very good example is the anthropological concept of *Homo sapiens*.

My contention is that speaking of 'human nature' could mean either human excellence or *Homo sapiens*, and that Kass's arguments fail to convince, regardless of which is meant. First, consider the differences in what the phrase 'human nature' might mean, depending on whether a moralised concept is intended or not.

Sometimes when we speak of 'human nature', we have moralised ideals in mind, e.g. when we praise someone in Yiddish for being a *mentsh*, or in German for displaying *Menschlichkeit*, or in the Nguni languages for exhibiting *ubuntu* (literally, humanness for Zulu, Xhosa and Ndebele people). When we speak of 'humanity' in these contexts, we are referring to *particular* aspects of human nature that we find to be intrinsically valuable or good for their own sake.

Other times when we speak of 'human nature' we have a much more neutral concept in mind. Here, we would be speaking of humanity as a species, comparable in connotation to the categories of *Canis lupis familiaris* (domestic dogs) or *Felis catus* (domestic cats). A scientific use of the term refers to a being with a particular sort of DNA, a natural kind distinct from others on earth.

Here, now, is the rub. Kass must have one or the other sense of 'human nature' in mind, and it turns out that neither will do any justificatory work for him.

Suppose, first, that Kass is using a moralised concept. In that case, it is quite plausible to assert that so-called 'human nature' has a dignity or otherwise deserves respect; for it is a priori designated as picking out features of us that are good for their own sake. However, if Kass now claims that conditions such as maintaining a genetic link and reproducing sexually are parts of 'human nature' that deserve respect, then he is *begging the question* against those who are inclined to deny these claims. If these conditions are facets of human nature in a moralised sense, then Kass is merely *asserting* that they are good for their own sake in calling them aspects of 'human nature'. But he is

supposed to be contributing to a debate about whether they indeed deserve respect, and merely calling them 'human nature', and hence implicitly good for their own sake thereby, does not provide a reason to believe that they are.

Suppose Kass is instead using a non-moralised concept of human nature. To say that maintaining a genetic link and reproducing sexually are parts of human nature in this sense does not beg the question and indeed is clearly true. Characteristically, human beings as a species do reproduce sexually and thereby maintain a genetic link with the children for whom they care. Of course, not all human beings do that. However, even though not all domestic cats meow and have four legs, it is true that the species *Felis catus* does.

Now, making the descriptive point that members of *Homo sapiens* characteristically reproduce sexually and are genetically related to the offspring they look after carries with it no evaluation. And so it is quite open for one to question whether it is good for its own sake or otherwise deserves respect. After all, there are other facets of 'human nature' in the descriptive sense that are clearly bad and should instead be shunned, as well as some that are neither good nor bad.

For instance, it is plausible to think that members of *Homo sapiens* have a disposition to see others who they perceive as different from themselves as pollution and to want to cleanse themselves of such others upon feeling threatened.^[21] It is such an orientation that I believe best accounts for atrocities such as the Nazi Holocaust, the Rwandan genocide and many other large-scale crimes against humanity. Supposing for the sake of argument that this disposition were indeed part of our inherent biological make-up, it would nonetheless not deserve respect. Kass cannot plausibly claim that 'human nature' in the descriptive sense is completely valuable and worthy of protection.

For an additional example, being born with four toes on each foot instead of five would be a deviation from 'human nature' in the descriptive sense, but would not carry with it anything of moral salience. Similar remarks, for all that has been said so far, might well go for conditions such as ensuring a genetic link between children and parents.

In sum, when Kass says things such as 'Man is partly defined by his origins', he means either (i) that human beings are good for their own sake insofar as they have come from a certain source, which begs the question against people like me who doubt that; or (ii) that human beings characteristically come from a certain source, which is true but carries with it no normative appraisal and is therefore up for grabs in terms of whether it deserves respect or not.

Parts of human nature are surely valuable and deserve respect, but not all of them, and Kass does not provide substantive reason to think that a genetic link is one of them. Indeed, he is well known for eschewing the idea that we can reason much about ethical matters, instead finding wisdom in people's emotional reactions of repulsion, widely known among bioethicists as the 'yuck factor'. Few contemporary professional ethicists and moral philosophers, however, think that people's common disgust of, say, inter-racial romance in the 20th century was revealing of anything morally significant.

A requirement to exhibit human excellence

As indicated above, '*ubuntu*' means humanness or human excellence, i.e. attitudes and behaviour that are morally upright and to be pursued in life. In a South African context, it is natural to want to

know what an *ubuntu*-based ethic would entail for the present moral dilemma.

In addition, one might have the strong suspicion that an indigenous African ethic would require there to be a genetic link between parents commissioning a surrogate and the resultant child, given how often kinship relationships are prized in sub-Saharan Africa. As Anthony Appiah remarks of a typically African approach to ethics:

'This form of moral thought permits someone, the agent, to treat someone else, the patient, in a certain manner because the two are related, not because the patient has particular qualities or needs, for example, I might give shelter to someone "because she is my kinswoman"^[22]

The recurrent focus on kinship, which connotes blood ties and common descent, among traditional African peoples might lead one to think that it should be of utmost importance when creating children, i.e. that one would fail to exhibit *ubuntu*, and would rather be acting in a more animalistic manner, in knowingly creating a child that would not be related to one. Perhaps those who question SA's law, such as myself, are simply Western liberals who prize autonomy above all.

I cannot comment on what a given indigenous people in sub-Saharan Africa would say about the ethics of using IVF, embryo transfer and gestational surrogacy to create a child that would lack a genetic link to the commissioning parents. What I can speak to, however, are the values typically prized by post-war moral theorists who claim inspiration by mores associated with *ubuntu*.

Conceptions of how to relate morally to others in recent southern (and more generally sub-Saharan) African analyses of *ubuntu* do not tend to include the idea of anything biological. What is instead recurrent in the literature about the proper relationships to have with others in order to exhibit human excellence are these *social* elements: sharing a way of life with others and caring for others' quality of life. That is, it is characteristic of adherents to *ubuntu* to maintain that one displays virtue to the extent that one enjoys a sense of togetherness with others, participates with them on a co-operative basis, and helps them out of sympathy or otherwise for their sake.^[23] Communal or harmonious relationships are what matter, not genetic ones.

In support of my interpretation, consider the following representative remarks of South African thinkers on the nature of *ubuntu*. First, note that former SA Constitutional Court Justice Yvonne Mokgoro remarks of an *ubuntu* ethic, 'Harmony is achieved through close and sympathetic social relations within the group.'^[24]

Prof. Muxe Nkondo, who has had positions of leadership on SA's National Heritage Council, says: 'If you asked *ubuntu* advocates and philosophers: What principles inform and organise your life? What do you live for? ... the answers would express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community.'^[25]

Dr Mluleki Mnyaka and author Mokgethi Motlhabi together say of *ubuntu*: 'Individuals consider themselves integral parts of the whole community. A person is socialised to think of himself, or herself, as inextricably bound to others ... *Ubuntu* ethics can be termed anti-egoistic as it discourages people from seeking their own good without regard for, or to the detriment of, others and the community.'^[26]

Dr Reuel Khoza, author of a well-regarded book on *ubuntu* and leadership, with introductions by Nelson Mandela and Thabo Mbeki, sums up the view this way: '*Ubuntu* is characterised by such values

as caring, reciprocity, sharing, compassion, hospitality, cohabitation, cooperation and tolerance.'^[27]

Finally, renowned exponent of an *ubuntu* morality Archbishop Desmond Tutu says: 'When we want to give high praise to someone we say, "*Yu, u nobuntu*"; "Hey, so-and-so has *ubuntu*." This means they are generous, hospitable, friendly, caring and compassionate. They share what they have.'^[28]

I could easily add many more citations that indicate similar ideas. As should be clear, none of these kinds of relationships implies, or otherwise requires, a genetic link between those party to them. Among contemporary exponents of an *ubuntu* ethic, it is *much* more controversial to claim that a genetic link is central to morality than it is to maintain that loving, friendly, communal and generally positive social relationships are what are to be prized. In fact, it is more characteristic of an *ubuntu* perspective to maintain that 'it takes a village to raise a child', a natural interpretation of which is that those without a genetic link to the young can have a vital role to play in their healthy upbringing.

Finally, recall that a quintessential feature of *ubuntu* is not a function of intimate, let alone biological, relationships, but is instead a matter of being hospitable to strangers, as Nelson Mandela^[29] and others^[26] have maintained. I have in mind the practice, widespread in pre-colonial Africa, of welcoming visitors to a village to the point of sharing one's best food with him or her, at least for a time. Viewing everyone, regardless of whether or not they are related to oneself, as part of a human family and someone with whom to commune is also a core aspect of *ubuntu* and sub-Saharan ethics more generally.^[30,31]

Severing the genetic link: Some positive reasons to permit it

So far I have provided objections to the major ethical arguments in the literature for thinking that SA's law is just insofar as it requires an embryo placed in a surrogate to be genetically related to the parents who will care for the newborn baby. I now supplement this negative strategy by concluding with some brief positive considerations for overturning this law. Appealing to values that resonate with SA's Constitution, I contend that they entail that the law is unjust.

The lack of overlapping consensus in SA society about the best form that the family should take provides strong reason to think that the government should remain neutral on the matter, letting residents decide for themselves. Just as it would be wrong in SA society for the state to intentionally promote a single religion in the face of religious diversity among residents, so it would be wrong for the state to intentionally promote a single type of family when there is a diversity of intelligent opinion about which sort of family is worthwhile. Where there is reasonable disagreement about a matter, as there is with respect to religion and family, respect for people's judgement, privacy, autonomy and related factors normally entails that the state ought to let them decide for themselves, as others have also suggested previously, including in the context of surrogacy.^[10]

One need not be a staunch Western liberal fan of autonomy to appreciate the force of this argument. Consider that, in terms of *ubuntu*, part of what is valuable about communal relationships is that people come together and stay together of their own accord and are not corralled into living with certain people as opposed to others. From that ethical standpoint, too, the state should not dictate the nature of the family South Africans are permitted to enjoy.

Finally, even if there were, *ex hypothesi*, some substantial agreement among South Africans about which family is most desirable, it would not follow that it would necessarily be appropriate to base law on those views. One major ethical purpose of the SA Constitution is to protect those with minority viewpoints and ways of life, when these would not violate others' abilities to take advantage of civil liberties, participation in democratic governance, socioeconomic goods and the like. Hence, even if a survey of South Africans indicated that a large majority favours a genetic link between parents and children, those with a different view morally should be afforded the space to live as they please, so long as they are not preventing others from choosing the kind of family they prefer or otherwise violating a right.

Conclusion

In this article I have mostly argued against a variety of ethical rationales for SA's current approach to surrogacy, which requires a genetic link between the commissioning parents and the created child. These rationales have appealed to: the prospect of harm to the child; a slippery slope towards systematic eugenics; a principle of respect for human nature; and a principle of developing one's humanness. In each case I argued that these considerations fail to provide a sound defence for the law. Furthermore, I contended that in the absence of a strong, or even widely held, ethical rationale for it, the law should be revoked out of respect for people's privacy and their ability to create loving and intimate relationships.

Such a position, which would accord more liberty than a religious traditionalism, is not necessarily motivated by a radical transhumanism, and also need not lead to that in practice. Instead, SA's Constitution and its attendant values can chart a safe course.

References

1. South African National Government. The Children's Act No. 38 of 2005, section 294. <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf> (accessed 11 March 2014).
2. Slabbert MN. Legal issues relating to the use of surrogate mothers in the practice of assisted conception. *South African Journal of Bioethics and Law* 2012;5(1):27-32.
3. AB and Surrogacy Advisory Group v Minister of Social Development, High Court of South Africa, Case No 40658/13.
4. Velleman JD. Family history. *Philosophical Papers* 2005;34(3):357-378. [<http://dx.doi.org/10.1080/05568640509485163>]
5. Turner AJ, Coyle A. What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications

- for counselling and therapy. *Hum Reprod* 2000;15(9):2041-2051. [<http://dx.doi.org/10.1093/humrep/15.9.2041>]
6. Golombok S, Blake L, Casey P, Roman G, Jadva V. Children born through reproductive donation: A longitudinal study of psychological adjustment. *J Child Psychol Psychiatry* 2012;54(6):653-660. [<http://dx.doi.org/10.1111/jcpp.12015>]
7. Van Gelderen L, Bos H, Gartrell N, Hermanns J, Perrin E. Quality of life of adolescents raised from birth by lesbian mothers: The US national longitudinal family study. *J Dev Behav Pediatr* 2012;33(1):1-7. [<http://dx.doi.org/10.1097/DBP.0b013e31823b62af>]
8. Jadva V, Blake L, Casey P, Golombok S. Surrogacy families 10 years on: Relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins. *Hum Reprod* 2012;27(10):3008-3014. [<http://dx.doi.org/10.1093/humrep/des273>]
9. Blake L, Casey P, Jadva V, Golombok S. 'I was quite amazed': Donor conception and parent-child relationships from the child's perspective. *Children and Society* 2013;1-13. [<http://dx.doi.org/10.1111/chso.12014>]
10. Meyerson D. Surrogacy agreements. *Acta Juridica* 1994;27(3):121-145.
11. Kass LR. The wisdom of repugnance. *The New Republic* 1997;2 June:17-26.
12. National Health Act No. 61 of 2003. Regulations relating to the artificial fertilisation of persons. Government Notices No. 35099, 2012, section 4.
13. Children's Act No. 38 of 2005, section 301.
14. Children's Act No. 38 of 2005, section 295(a).
15. National Health Act No. 61 of 2003, section 57.
16. Brownlee S. Designer babies. *Washington Monthly* 2002; March. <http://www.washingtonmonthly.com/features/2001/0203.brownlee.html> (accessed 11 March 2014).
17. Baird S. Designer babies: Eugenics repacked or consumer options? *The Technology Teacher* 2007;66(7):12-16.
18. Kass LR. The meaning of life – in the laboratory. *The Public Interest* 2002; 146(Winter):38-73.
19. Kass LR. Making babies – the new biology and the 'old' morality. *The Public Interest* 1972;26(Winter):18-56.
20. Kass LR. Ageless bodies, happy souls. *The New Atlantis* 2003;1:9-28.
21. Koestler A. *The Ghost in the Machine*. New York: Macmillan, 1967.
22. Appiah A. Ethical systems, African. In: Craig E, ed. *Routledge Encyclopaedia of Philosophy*. London: Routledge, 1998.
23. Metz T. African and western moral theories in a bioethical context. *Developing World Bioethics* 2010;10(1):49-58. [<http://dx.doi.org/10.1111/j.1471-8847.2009.00273.x>]
24. Mokgoro Y. *Ubuntu* and the law in South Africa. *Potchefstroom Electronic Law Journal* 1998;1(1):15-26. [<http://dx.doi.org/10.4314/pelj.v1i1.43567>]
25. Nkondo GM. *Ubuntu* as a public policy in South Africa: A conceptual framework. *International Journal of African Renaissance Studies* 2007;2(1):88-100.
26. Mnyaka M, Motlhabi M. *Ubuntu* and its socio-moral significance. In: Murove FM, ed. *African Ethics: An Anthology of Comparative and Applied Ethics*. Pietermaritzburg: KwaZulu-Natal Press, 2009:63-84.
27. Khoza R. *Let Africa Lead*. Johannesburg: Vezubuntu, 2005:xxii.
28. Tutu D. *No Future without Forgiveness*. New York: Random House, 1999:34.
29. Mandela N. Experience *ubuntu* (excerpt from an interview with T Modise in 2006). <http://www.youtube.com/watch?v=HED4h00xPPA> (accessed 11 March 2014).
30. Shutte A. *Ubuntu: An Ethic for the New South Africa*. Cape Town: Cluster Publications, 2001:25-30.
31. Gyekye K. African ethics. In: Zalta E, ed. *Stanford Encyclopedia of Philosophy*. 2010. <http://plato.stanford.edu/entries/african-ethics/> (accessed 11 March 2014).