

Surrogacy, Geneticism and Equality: The Case of *AB v Minister of Social Development*

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ABSTRACT: Section 294 of the Children’s Act 38 of 2005 provides that a surrogate motherhood agreement will not be valid unless the child born as the result of the agreement is genetically related to at least one of the commissioning parents. This provision was upheld by a majority of the Constitutional Court in *AB v Minister of Social Development*. I argue in this article that the majority overlooked some troubling constitutional issues. First, I argue that the provision infringes the equality right in s 9(1) of the Constitution, either because the distinction it draws is not rationally connected to the legitimate goal of protecting the best interests of children, or because it serves an illegitimate goal, that of forcibly imposing a contested bionormative conception of the family on people who reasonably disagree. Secondly, I argue that s 294 unfairly discriminates against commissioning parents who would like to enter into a surrogacy agreement but cannot contribute genetic material, thereby infringing s 9(3) of the Constitution. I argue that the *AB* majority failed to recognise these flaws in the provision because (i) it misidentified the purpose of s 294 and (ii) was too ready to ascribe the predicament of commissioning parents barred from entering into a surrogacy agreement to medical conditions and personal preferences rather than legal discrimination. Its understanding of the constitutional right to equality is accordingly unattractive.

KEYWORDS: Surrogacy, genetic link, right to know genetic origins, infertility, right to equality, unfair discrimination, bionormativity

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I INTRODUCTION

Prior to the enactment of the Children's Act 38 of 2005 there was no South African legislation expressly regulating surrogacy agreements. Chapter 19 of the Children's Act remedies this situation by making it possible for prospective parents who are permanently and irreversibly unable to give birth to a child ('pregnancy infertile') to enter into a valid surrogacy motherhood agreement subject to meeting certain requirements. One of these requirements is contained in s 294, which provides that a surrogate motherhood agreement will not be valid unless there is a genetic link between the child born as the result of the agreement and the commissioning parent or parents. In particular, the child must be genetically related to both of the commissioning parents, or, if this is not possible due to 'biological, medical or other valid reasons', to one of the commissioning parents. If the commissioning parent is a sole parent, the child must be genetically related to that parent. Thus s 294 prevents commissioning parents who are unable to contribute at least one gamete to conception ('conception infertile') from entering into a surrogacy agreement. I will call this differentiation the 'no-double-donor requirement'.

*AB v Minister of Social Development (AB)*¹ concerned the constitutional validity of s 294. AB was pregnancy infertile and conception infertile (being biologically unable to contribute her own gamete for conception and not involved in a sexual relationship with someone who could contribute a gamete). She therefore fell foul of the no-double-donor requirement. The Constitutional Court was asked to consider whether s 294 unreasonably and unjustifiably limits the rights to equality before the law and equal protection and benefit of the law (s 9(1) of the Constitution); human dignity (s 10); non-discrimination (s 9(3)); privacy (s 14); access to health care services, including reproductive health care (s 27(1)(a)); and the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction (s 12(2)(a)).

The majority of the Court upheld s 294. In a judgment written by Nkabinde J (MogoengCJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlantla J and Zondo J concurring), the majority found that the no-double-donor requirement does not breach the equality right in s 9(1), because the differentiation it effects passes the established test of being rationally connected to a legitimate governmental purpose.² In particular, the majority held that s 294 serves the best interests of children by giving them 'clarity' regarding their origins, in the form of knowing who their genetic parents are, which the majority said is 'important to the self-identity and self-respect of the child'.³ The majority also found that the no-double-donor requirement does not discriminate against commissioning parents who are conception infertile. It found that the ground of infertility is not one of the specified grounds mentioned in s 9(3) of the Constitution,⁴ and implied that it is not an analogous ('unspecified') ground either.⁵ The majority concluded that the less favourable treatment of commissioning parents who cannot contribute a gamete does not amount to discrimination against them, let alone unfair discrimination.⁶

¹ *AB & Another v Minister of Social Development* [2016] ZACC 43, 2017 (3) SA 570 (CC).

² *Prinsloo v Van der Linde & Another* [1997] ZACC 5, 1997 (3) SA 1012 (CC) at para 22 ('Prinsloo').

³ *AB* (note 1 above) at para 294.

⁴ *Ibid* at para 298.

⁵ *Ibid* at para 301.

⁶ *Ibid* at para 304.

Turning next to s 12(2)(a) of the Constitution, which guarantees the right to bodily and psychological integrity, including the right to make decisions concerning reproduction, the majority observed that many women do not enjoy security in and control over their bodies. This led the majority to infer that the focus of s 12(2)(a) is ‘on the individual woman’s own body and not a body of another woman’,⁷ and hence that the only reproductive decisions protected by s 12(2)(a) are decisions where the body of the person making the decision is affected. Since any decision to enter into a surrogacy agreement would not affect AB’s body (presumably because she would not be contributing a gamete), her right to make decisions concerning reproduction was not restricted by s 294.⁸

Finally, the majority quickly dismissed AB’s arguments that her s 27(1)(a) right to have access to health care services, including reproductive health care, had been violated and that her s 14 right to privacy had been violated. The majority noted that s 27(1) has to be read alongside s 27(2), which obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights mentioned in s 27(1).⁹ It also referred to the finding of the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal* that the obligation imposed on the state by s 27 in regard to health care is ‘dependent upon the resources available for such purposes, and ... the corresponding rights themselves are limited by reason of the lack of resources’.¹⁰ Regarding privacy, although the majority acknowledged that the right to privacy includes the right to make autonomous decisions in respect of ‘intensely significant aspects of one’s personal life’,¹¹ it stated without further explanation that AB’s right to privacy was not limited by s 294.¹²

The minority would have invalidated s 294. In a judgment written by Khampepe J (Cameron J, Froneman J and Madlanga J concurring), the minority agreed with the majority that s 294 serves the best interests of children and is therefore rationally related to a legitimate purpose.¹³ The minority held, however, that s 294 limits the right to psychological integrity by preventing AB and others like her from making decisions concerning reproduction.¹⁴ The minority also held that s 294 draws two distinctions, both of which are unfairly discriminatory. It called these the ‘first differentiation and ‘second differentiation’. The first differentiation involves the less favourable treatment of commissioning parents who are conception infertile.¹⁵ (This was the differentiation upheld by the majority.) The second differentiation is less straightforward. The minority was concerned about a difference between the law’s approach to double-donation of gametes under the surrogacy scheme by comparison with the in vitro fertilisation (IVF) scheme. The minority referred here to the fact that Regulation 10(2)(a)(ii) of the Regulations Relating to Artificial Fertilisation of Persons, 2012, made under the National Health Act 61 of 2003, allows parents who are conception infertile but who can give birth to a child (ie, are pregnancy fertile) to have IVF treatment using both male and female donor gametes. By contrast, those who are pregnancy infertile and need to enter into a surrogacy

⁷ Ibid at para 313.

⁸ Ibid at paras 314–315.

⁹ Ibid at para 320.

¹⁰ *Soobramoney v Minister of Health, KwaZulu Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC) at para 11.

¹¹ Citing *S v Jordan & Others* [2002] ZACC 22, 2002 (6) SA 642 (CC) at para 76.

¹² *AB* (note 1 above) at para 323.

¹³ Ibid at para 104.

¹⁴ Ibid at paras 73–97.

¹⁵ Ibid at paras 106–119, 127.

agreement in order to have a child are required to contribute genetic material to conception. The minority saw the discrepancy between the surrogacy scheme (prohibiting double-donation of gametes) and the IVF scheme (allowing double-donation) as amounting to another kind of unfair discrimination against AB, in this case on the ground of being pregnancy infertile.¹⁶ Having found that s 294 limits the rights to equality and psychological integrity, the minority went on to find that the limitations are not reasonable and justifiable in terms of s 36(1) of the Constitution.¹⁷

I will focus in this article on the equality issues. Some of my arguments are directed to showing that s 294 should have failed at the first hurdle: the absence of a rational relationship to a legitimate purpose in terms of s 9(1) of the Constitution. The purpose of the no-double-donor requirement is not perspicuous on its face. Both the majority and the minority took the view that it is intended to serve the best interests of children. In its search for a way in which the requirement might achieve this effect, the majority took the view that it satisfies the psychological need of children to have knowledge of their genetic origins. I will argue that other features of the Children's Act cast doubt on the supposition that this is what the legislature had in mind. An alternative possibility is that the requirement is supposed to serve the best interests of children by creating a strong bond between children and their custodial parents. Although this might have been what the legislature hoped to achieve, I will argue that the exclusion of parents who cannot contribute a gamete is not rationally connected to this purpose, since there is no evidence that the bond between parents and children is weaker in non-genetically-related families. My final suggestion on this matter is that the purpose of s 294 may not be the benign one of serving the best interests of children. I will argue that if s 294 is rationally connected to any purpose, it is the illegitimate purpose of forcibly imposing a bionormative conception of the family – one that regards biological relationships as inherently superior (see part III).

In a further set of arguments, I will suggest that even if the differentiation effected by s 294 does not breach s 9(1) of the Constitution, it nevertheless breaches s 9(3), because it unfairly discriminates against parents who are conception infertile. I therefore disagree with the majority and agree with the minority on this matter. On the other hand, I do not believe that s 294 discriminates against parents who are pregnancy infertile. I therefore disagree with the minority's arguments in relation to the 'second differentiation' (see part II).

Finally, I will suggest that there is a further reason to reject the majority's interpretation of the purpose of the no-double-donor requirement. As mentioned above, in explaining how s 294 serves the best interests of children, the majority fixed on the importance to children of having knowledge of their genetic origins. I will argue that it is difficult to reconcile this proposition with the IVF regime. The problem here is that the IVF regime not only allows double-donation of gametes, as explained above, but also guarantees the anonymity of gamete donors. This means that children conceived as a result of double-donor IVF treatment will be deprived of identifying information about both their genetic parents. In my view, this creates a problem for the majority's interpretation of the purpose of s 294, since it implies that the law is selectively concerned with children's interests in knowing their genetic origins, and hence that the law is morally incoherent. I will argue that judges should be hesitant to interpret a provision in a way which has this implication. In this regard, I am influenced by Ronald Dworkin's

¹⁶ Ibid at paras 120–127.

¹⁷ Ibid at paras 129–213.

principle of integrity in adjudication, which obliges judges to see the law as morally coherent or coherent in principle, so far as possible (see part III).¹⁸

These arguments lead me to conclude that the majority's understanding of the right to equality under the Constitution is unattractively cramped. In failing to recognise that s 294's differential treatment of prospective parents who are conception infertile is unfair discrimination, and in being unwilling to interrogate the legitimacy of the state's purpose, the majority gave us an ungenerous version of the constitutional principle of equality in the service of a dubious legislative goal.

II DOES THE NO-DOUBLE-DONOR REQUIREMENT DISCRIMINATE UNFAIRLY?

In my opinion, both the minority and the majority found too quickly that s 294 passes the s 9(1) test of being rationally related to a legitimate government purpose. Furthermore, once having found to this effect, the majority then found too quickly that s 294 does not discriminate, thereby avoiding the need to determine whether it discriminates unfairly and cutting the equality inquiry prematurely short. I will discuss the s 9(1) issues in part III. In this part, I will assume for the sake of argument that s 294 does further a legitimate purpose, and focus on the discrimination issues, arguing that not only does s 294 discriminate against commissioning parents who cannot contribute a gamete to conception, but that the discrimination is unfair.

The majority found that s 294 does not differentiate on either a specified ground (ie, one listed in s 9(3) of the Constitution) or a ground analogous to the specified grounds (an 'unspecified ground'). It appeared to regard it as self-evident that the distinction made by s 294 is not based on a specified ground, saying merely that infertility is not mentioned in s 9(3).¹⁹ The minority did not question the majority's view.²⁰ Yet *disability* is a specified ground and most people regard infertility as a form of disability. For instance, the South African Law Reform Commission describes infertility in women as the fifth highest serious global disability among populations under the age of 60.²¹ The fact that infertility is not specifically listed in s 9(3) does not support the view that it is not a specified ground, since no specific disabilities are singled out for mention in s 9(3) – presumably because the framers of the Constitution did not think that the protective effect of s 9(3) should extend only to a limited number of specifically mentioned disabilities. These considerations suggest that s 294 differentiates on the basis of the specified ground of disability, in which case it should have been found to be discriminatory and presumptively unfair in terms of s 9(5) of the Constitution. It would then have become necessary to consider whether (i) the presumption of unfairness can be rebutted (by demonstrating that the differentiation does not impair the dignity of conception infertile people), or (ii) the unfairness can be justified in terms of the limitation clause (assuming that it is possible for unfair discrimination to be reasonable and justifiable). The majority bypassed these complex questions when it found that s 294 does not differentiate on the basis of a specified ground.

Having found that s 294 does not differentiate on a specified ground, it was necessary for the majority to consider whether it differentiates on an unspecified ground, so as to come to a

¹⁸ R Dworkin *Law's Empire* (1986) 167, 176.

¹⁹ *AB* (note 1 above) at para 298.

²⁰ *Ibid* at para 105.

²¹ SA Law Reform Commission Issue Paper 32 'The Right to Know One's Biological Origins' (May 2017) at para 2.1.

conclusion on the discrimination issue. Although the majority did not use the term ‘unspecified ground’, it said that ‘[t]he differentiation will amount to discrimination if the impugned provision authorises unequal treatment of people based on certain attributes and characteristics attaching to them’,²² and it cited as support for this proposition the established test for differentiation on an unspecified ground as laid down in *Harksen NO v Lane* (‘*Harksen*’).²³ According to this test, a differentiation will be based on an unspecified ground if it is based on attributes or characteristics attaching to individuals which have the potential to impair their fundamental dignity or affect them adversely in a comparably serious manner.²⁴

In considering whether s 294 ‘authorises unequal treatment of people based on certain attributes and characteristics attaching to them’, the majority made two points, both of which were intended to show that AB’s predicament was not caused by s 294, but rather by factors peculiar to her – her medical condition (which was not a disability) and her choices. First, although the majority conceded that infertile people experience social isolation and marginalisation, it stated that what disqualifies infertile people from entering into a surrogacy arrangement is their biological or medical condition, not the law.²⁵ Secondly, the majority stated that the inability of people like AB to enter into surrogacy arrangements is due to their personal preferences and hence not a matter of differential treatment based on their ‘attributes or characteristics’.²⁶ In the majority’s view, AB had the option of finding a fertile permanent partner, whose gamete could then be used for the conception of a child. As the majority judgment put it: ‘[i]f the infertile commissioning parents, or parent, decide not to use the available legal options, they have to live with the choices they make’.²⁷ Thus it was AB’s ‘personal choice and not her attributes of being infertile or the challenged provision that place[d] her outside of the ambit of s 294’.²⁸ The majority concluded that the differentiation effected by s 294 does not amount to discrimination. There was therefore no need to consider whether it is unfair.²⁹

There are two problems with these arguments. First, although it is true that conception infertile parents suffer from a medical condition which is, as the majority said, not ‘created or compounded’³⁰ by the law, it does not follow that it is not the law which disqualifies them from entering into surrogacy agreements. Consider a law which prevents people who suffer from hypertension from becoming airline pilots. Can it be said that because their medical condition is not created by the law, it is not the law which prevents them from becoming airline pilots? This is implausible. Although the barrier is reasonable, it is still a legal barrier. It is likewise the law, not their medical condition, which prevents conception infertile parents from having a child via surrogacy. The minority made the same point in connection with its finding that s 294 limits the right to psychological integrity.³¹ The minority said that s 294 creates a legal

²² *AB* (note 1 above) at para 298.

²³ *Ibid* at footnote 286.

²⁴ *Harksen v Lane NO & Others* [1997] ZACC 12, 1998 (1) SA 300 (CC) at para 46 (‘*Harksen*’).

²⁵ *AB* (note 1 above) at para 299.

²⁶ *Ibid* at para 301.

²⁷ *Ibid* at para 302.

²⁸ *Ibid* at para 303.

²⁹ *Ibid* at para 304.

³⁰ *Ibid* at para 301.

³¹ *Ibid* at paras 73–97.

barrier blocking access to surrogacy for conception infertile parents and that it ‘thus becomes the cause of continuing psychological trauma’.³²

The second reason the majority gave for locating the source of the ‘problem’ not in the law, but in people like AB is equally unsatisfactory. This is the proposition that the inability of AB to enter into a surrogacy arrangement was due to her personal choice not to be in a relationship with a (fertile) partner, and hence not a matter of her ‘attributes or characteristics’ at all. The majority’s approach here is reminiscent of certain problematic statements made in *Volks NO v Robinson*,³³ in which the majority of the Constitutional Court upheld a provision which prevented the survivor of a permanent heterosexual partnership from claiming reasonable maintenance from her deceased partner’s estate. In a separate concurring judgment, Ngcobo J emphasised the fact that cohabiting life partners have the legal right to marry, concluding that their inability to access the protective regime which applies to married people is due to their own choice not to marry, not to legal discrimination.³⁴ It is, however, difficult to accept Ngcobo J’s view that the disadvantages suffered by cohabiting life partners are a simple matter of choice. On the contrary, one partner to an informal relationship (typically the woman) may wish to marry, but the other partner may refuse to do so, frequently so as to evade the legal obligations of marriage.³⁵

The judges in *AB* similarly exaggerated the extent to which people’s relationships are a matter of personal choice. This is true even of the minority, which accepted the majority’s view that AB had made a deliberate choice not to enter into a relationship with a fertile partner, confining itself to the observation that AB’s decision not to enter into such a relationship was a choice she was entitled to make, since ‘the decision to be single, or follow any other relationship path is deeply personal’.³⁶ In my view, this concedes too much to the majority. To enter into a surrogacy arrangement, AB would have needed to find an intimate partner with whom she wanted to share her life; her feelings would have had to be reciprocated; and the partner would have had to be both fertile and willing to enter into a surrogacy arrangement. It is difficult to see how these variables can be said to have been under AB’s control, such that her failure to be in a relationship with a person with all these characteristics can be ascribed to her personal preferences. The implausibility of this view is even more obvious if we consider a case where both parties to a marriage cannot contribute a gamete to conception and are therefore disqualified by s 294 from entering into a valid surrogacy agreement. Of course, they could enter into separate surrogacy arrangements if they were to divorce and find fertile partners, but would anyone take the view that if they refuse to avail themselves of this option, they have only themselves to blame? Even radically neoliberal views, which are willing to ascribe many forms of disadvantage to people’s choices, would not be so hyper-voluntarist.

I have explained why I disagree with the majority’s finding that s 294 does not discriminate on the ground of conception infertility. The final question is whether s 294 discriminates unfairly. In my view, the minority was correct to find that it does. Goldstone J explained the concept of unfair discrimination in *Harksen*, saying that the point of the equality guarantee is to prevent unequal treatment based on criteria which have been used to ‘categorize,

³² *Ibid* at para 93.

³³ *Volks NO v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC).

³⁴ *Ibid* at paras 91–92.

³⁵ D Meyerson ‘Rethinking Marriage and its Privileges’ in A Claassens & D Smythe (eds) *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* (2013) 385, 388.

³⁶ *AB* (note 1 above) at para 96.

marginalise and often oppress'.³⁷ He also stated that '[i]n the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination'.³⁸ Infertility is a good candidate for a criterion which meets these tests. As the minority observed, infertility is an emotionally distressing condition and it is also a condition which has been used to stereotype, shame and marginalise people. It is, moreover, obvious that excluding conception infertile people from access to surrogacy services has a highly detrimental impact on them.³⁹ Section 294 therefore impairs the dignity of conception infertile people and is unfair to them.⁴⁰

Someone might attempt to challenge this conclusion by arguing that people in the situation of *AB* can avoid the detrimental impact of the no-double-donor requirement by adopting a child. Adoption – it might be said – is the equivalent of surrogacy for them, since they are biologically unable to have a child genetically related to them. This was, in fact, the view of the Ad hoc Parliamentary Committee on Surrogate Motherhood when it recommended the no-double-donor requirement. The Report of the Committee stated:

In instances where both the male and the female gametes used in the creation of the embryo are donor gametes, it would result in a situation similar to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child.⁴¹

The Committee then went on to state that '[t]his type of surrogacy was not preferred by most commentators'.⁴² No reasons are given for this 'preference', suggesting a moral aversion as such to the use of surrogacy to create children with no genetic tie to their custodial parents. I will return to this possibility later, because in my view the real purpose of s 294 may be to impose a contested moral view about the inherent superiority of biological families. For the moment, it is only necessary to point out that the comparison between adoption and double-donor surrogacy is flawed.

First, as the minority in *AB* observed, there are psychologically salient differences between double-donor surrogacy and adoption. Double-donor surrogacy allows the commissioning parents to be involved in selecting both the gametes and the surrogate mother, and it also gives them the opportunity to participate in the surrogate mother's pregnancy. These features of double-donor surrogacy encourage the development of an emotionally significant bond with the child.⁴³ Secondly, the number of babies available for adoption is limited and the commissioning parents may not even qualify under the adoption rules. The South African Law Reform Commission made these points in a recent Issue Paper which considered whether children should have a legal right to know their biological origins.⁴⁴ Contrary, then, to the view of the Ad Hoc Parliamentary Committee, conception infertile parents are not as well served by adoption as by double-donor surrogacy.

³⁷ *Harksen* (note 24 above) at para 49,

³⁸ *Ibid* at para 50.

³⁹ *AB* (note 1 above) at paras 83–89, 106, 112, 120–127.

⁴⁰ *Ibid* at para 127.

⁴¹ Report by the Parliamentary Ad Hoc Committee on the South African Law Commission Report on Surrogate Motherhood (1999) at E.1.2(e), available at: lpmg-assets.s3-website-eu-west-1.amazonaws.com/docs/990211slrcreport.doc

⁴² *Ibid*.

⁴³ *AB* (note 1 above) at paras 177–185.

⁴⁴ SA Law Reform Commission (note 21 above) at para 3.32.

It remains only to consider the minority's view that s 294 unfairly discriminates not only against the conception infertile (the 'first differentiation') but also against the pregnancy infertile (the 'second differentiation').⁴⁵ In this regard, the minority relied on a discrepancy between the surrogacy regime and the IVF regime. As mentioned in part I, the Regulations Relating to Artificial Fertilisation of Persons allow parents who are conception infertile but who can give birth to a child (ie, are pregnancy fertile) to have IVF treatment using both male and female donor gametes. As a result, these parents are able to have children who are not genetically related to them. By contrast, pregnancy infertile parents, who need to enter into a surrogacy agreement in order to have a child, are required to be genetically related to the child. The minority thought that the law's less favourable treatment of conception infertile parents who are also pregnancy infertile is harmful to their dignity, stating that '[p]otential users of surrogacy must live with the indignity of knowing that the law gives extra entitlements to those who are not pregnancy infertile, and therefore can use IVF, for no discernible reason supported by argument or evidence'.⁴⁶ The minority therefore concluded that s 294 unfairly discriminates against those who are pregnancy infertile.⁴⁷

It is not clear, however, that this discrepancy between the two sets of laws can be used to impugn s 294 as an infringement of the right to equality. The first differentiation is clearly amenable to challenge on this basis because the disqualification is imposed by s 294. Section 294 draws a distinction within the class of pregnancy infertile commissioning parents: those who cannot contribute a gamete are treated less favourably than those who can. Because their less favourable treatment is mandated by s 294, s 294 can be challenged for unfairly discriminating against them. By contrast, the second differentiation is a differentiation within the class of commissioning parents who cannot contribute a gamete: those who can carry a pregnancy are treated more favourably than those who cannot. The former are permitted to have children who are genetic strangers to them, while the latter are not. It is not, however, s 294 which confers the benefit on the former. It is a different law. Since s 294 does not treat commissioning parents who are pregnancy infertile less favourably than those who are pregnancy fertile, it is difficult to see how *it* can be challenged for drawing an unfair distinction between the two groups of parents.

Is it perhaps the case that s 294 indirectly discriminates on the ground of pregnancy infertility? Does it have a disproportionately adverse effect on prospective parents who are pregnancy infertile? In the case of *City Council of Pretoria v Walker*, the imposition of a burden on a ground which appeared to be race-neutral (geographical place of residence) was found to be indirectly discriminatory on the grounds of race, because the majority of those who lived in areas where the burden was imposed were white, while the majority of those who lived in areas where the burden was not imposed were black.⁴⁸ Section 294 does not impose a burden, but it does withhold an opportunity, and withholding an opportunity can also be indirectly discriminatory. This will be the case when the opportunity is withheld on a ground which is facially non-discriminatory but discriminatory in its effect.

The question, then, is whether the requirement that commissioning parents should contribute at least one gamete to conception – a requirement seemingly unrelated to the ability

⁴⁵ *AB* (note 1 above) at paras 98–101.

⁴⁶ *Ibid* at para 123.

⁴⁷ *Ibid* at para 127.

⁴⁸ *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC) at paras 31–33.

to give birth to child – has a differential effect on parents who cannot give birth to a child, amounting to indirect discrimination against them. Assuming that pregnancy infertility is a protected attribute under s 9(3), this question would receive an affirmative answer if pregnancy infertile parents are less likely to be able to contribute a gamete to conception than parents who are pregnancy fertile. This is not, however, the case. By contrast with race and geographical place of residence, which are very closely connected in South Africa, there is no overlap between conception infertility and pregnancy infertility: parents who are pregnancy fertile are just as likely to be incapable of satisfying the s 294 requirement as parents who are pregnancy infertile. Since the provision does not have a disproportionately adverse impact on parents who are pregnancy infertile, it does not indirectly discriminate against them. If anything, the Children’s Act arguably discriminates against parents who are pregnancy fertile, since they are separately disqualified from entering into a surrogacy agreement in terms of s 295 (a) of the Act.

III IS THE NO-DOUBLE-DONOR REQUIREMENT RATIONALLY CONNECTED TO A LEGITIMATE PURPOSE?

The *AB* majority took the view that the failure of people like *AB* to have a fertile partner is a matter of personal preference or choice. Even if this were correct – something that I have disputed – it would still be necessary to explain why conception infertile people like *AB* should have to give up their single status and find a willing fertile partner in order to enter into a surrogacy agreement. The same question arises where both parties to a relationship suffer from conception infertility. Why should they have to dissolve their relationship and find a fertile partner? People who do not suffer from conception infertility are not required to find or change partners in order to have a child via surrogacy. Suppose, by way of analogy, that the legislature were to decide to restrict access to surrogacy to Christian infertile parents. Religion is a matter of choice, and non-Christians are able to convert to Christianity, but the fact that they can do so would not make this requirement any less arbitrary or irrational. Why, then, is the requirement imposed by s 294 not similarly arbitrary and therefore a breach of s 9(1) of the Constitution?

In their consideration of the s 9(1) issues, both the majority and the minority found that the differentiation effected by s 294 is not arbitrary, saying that the differential treatment for which it provides is a rational way of serving the best interests of children. In coming to this conclusion, the minority omitted to discuss the first differentiation and provided only the briefest of remarks in relation to the second differentiation – the different treatment (according to it) of the pregnancy fertile and the pregnancy infertile. The minority said:

[T]he purpose of s 294 is principally to ensure that the best interests of the child to be born are safeguarded. In the case of surrogacy arrangements, the commissioning parent does not carry the child. This is significantly different to cases where conception is realised through IVF treatment of one of the commissioning parents. That is reason enough to conclude that the differentiation is not arbitrary or capricious. Section 294 is therefore not constitutionally invalid on the basis of section 9(1).⁴⁹

The majority also had surprisingly little to say in explaining how s 294 is supposed to serve the best interests of the child. It appears that it was influenced by the submission of the Centre for Child Law, which was admitted as *amicus curiae*. The Centre inferred from the fact that

⁴⁹ *AB* (note 1 above) at para 104.

s 294 has the heading ‘Genetic origin of child’ that it was intended to protect the child’s ‘right to know its genetic origin’. Although the Centre conceded that ‘South African laws have not yet formalised the realisation of this right’,⁵⁰ it said that international law supports the view that donor-conceived children have a right to know their genetic parents,⁵¹ and that s 294 provides some protection in this regard by ensuring that children born of surrogacy will be able to ascertain the identity of at least one of their genetic parents.⁵² According to the Centre, the rationale for recognising the child’s right to know its genetic parentage is that knowing one’s genetic origins is essential to human well-being.⁵³

As to how knowledge of one’s genetic ancestry contributes to well-being, the argument standardly made is that children who do not know their genetic parents suffer from identity problems. John Triseliotis, for instance, writes: ‘[i]t can now be claimed with some confidence from the available evidence that there is a psychosocial need in all people, manifest principally among those who grow up away from their original families, to know about their background, their genealogy, and their personal history if they are to grow up feeling complete and whole’.⁵⁴ David Velleman makes the stronger argument that actual acquaintance or contact with one’s biological parents is important both for gaining self-knowledge and for identity formation. In relation to self-knowledge, he writes: ‘for information about what I am like as a person, [my biological parents and siblings] are the closest thing to a mirror that I can find’.⁵⁵ As far as identity formation is concerned, he claims that one’s biological relations provide the resources with which to construct a meaningful narrative around the events of one’s life, so as to develop a healthy sense of identity.⁵⁶ In short, ‘[i]n 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’.⁵⁷ Velleman adds that ‘[n]ot knowing any biological relatives must be like wandering in a world without reflective surfaces, permanently self-blind’.⁵⁸ The phrase, ‘genealogical bewilderment’, used by the British psychologist HJ Sants, is also frequently invoked in this context. Sants used the term to describe (as he saw it) the psychological disorder or confusion about identity experienced by children who do not know their biological origins.⁵⁹ I will call this view ‘the Identity Formation Argument’.

It is worth emphasising that the defenders of the Identity Formation Argument believe that ignorance of just one genetic parent is sufficient to give rise to identity problems, since they insist that identity problems arise not only in the adoption context, but also in the context of donor-assisted conception, which generally involves the creation of a child genetically related to one of the parents (eg, the man is infertile and the woman is artificially inseminated using

⁵⁰ Ibid at para 205.

⁵¹ Ibid at para 31.

⁵² Ibid at para 32.

⁵³ Ibid at para 30.

⁵⁴ J Triseliotis ‘Obtaining Birth Certificates’ in P Bean (ed) *Adoption: Essays in Social Policy, Law and Sociology* (1984) 38, 38.

⁵⁵ D Velleman ‘Family History’ (2005) 34 *Philosophical Papers* 357, 368.

⁵⁶ Ibid at 375–376.

⁵⁷ Ibid at 365.

⁵⁸ Ibid at 368.

⁵⁹ HJ Sants ‘Genealogical Bewilderment in Children with Substitute Parents’ (1964) 37 *British Journal of Medical Psychology* 133, 133.

donor sperm). Thus Velleman maintains that children who do not know one of their genetic parents are cut off from one half of an understanding of what they are like.⁶⁰ He adds:

Their estrangement even from one parent, or from half-brothers and -sisters, must still be a deprivation, because it estranges them from people who would be familiar without any prior acquaintance, people with whom they would enjoy that natural familiarity which would be so revealing about themselves. How odd it must be to go through life never knowing whether a sense of having met a man before is due to his being one's father. How tantalizing to know that there is someone who could instantly show one a living rendition of deeply ingrained aspects of oneself. How frustrating to know that one will never meet him!⁶¹

Velleman concludes that it is always wrong to conceive a child using donor gametes, even if only one donor gamete is used and the other custodial parent is genetically related to the child. Sants likewise emphasised that a genealogically bewildered child can be found in any family where one of the natural parents is unknown.⁶² In short, the defenders of the Identity Formation Argument believe that children need to have a *complete* picture of their ancestry in order to develop a healthy identity and a true sense of who they are.

Returning now to the reasons why the majority held that the differentiation effected by s 294 is not arbitrary, the majority found that s 294 'ensure[s] that the child becomes aware of its genetic origin'.⁶³ It also accepted the Identity Formation Argument, stating that 'clarity of origin' is important to children's self-identity and self-respect, and therefore in their best interests.⁶⁴ It was consequently beyond question for the majority that s 294 is rationally connected to a legitimate purpose.⁶⁵ As to whether empirical data support the claim that the absence of a genetic link between commissioning parents and child is harmful to the child, the judges took the view that this was not relevant to the constitutionality of the provision.⁶⁶ The majority also stated that the rationality of s 294 is as self-evident as the rationality of a provision which disqualifies people who have defective vision or uncontrolled epilepsy from driving.⁶⁷

Although the majority readily accepted the Identity Formation Argument, it is by no means uncontroversial. Some writers have pointed to the anecdotal, limited and inconclusive nature of the evidence, as well as the considerable variations in people's experiences which the evidence reveals.⁶⁸ Others have argued that any identity problems that children do experience as a result of not knowing their origins are socially induced by virtue of our culture's over-valuation of biological ties. Thus Sally Haslanger argues that the value our culture places on 'blood ties' and 'naturally' formed or 'normal' families is a socially constructed idea. She describes this

⁶⁰ Velleman (note 55 above) at 368.

⁶¹ Ibid at 368–369.

⁶² Sants (note 59 above) at 133.

⁶³ AB (note 1 above) at para 254.

⁶⁴ Ibid at para 290.

⁶⁵ Ibid at para 293.

⁶⁶ Ibid at para 291.

⁶⁷ Ibid at para 288.

⁶⁸ M Taylor-Sands 'Removing Donor Anonymity: What Does it Achieve? Revisiting the Welfare of Donor-conceived Individuals' (2018) 41 *University of New South Wales Law Journal* 555, 564–567; B Clark 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 3 *Georgia Journal of International and Comparative Law* 619, 645–649; DW Thaldar 'Post-truth Jurisprudence: The Case of *AB v Minister of Social Development*' (2018) 2 *South African Journal on Human Rights* 231, 252.

idea as the ‘natural nuclear family cultural schema’.⁶⁹ Haslanger concedes that this schema can play an important role in forming healthy identities in a cultural context like ours in which it is dominant. She says that children who lack knowledge of their biological parents are ‘left without answers to questions that matter culturally, and this is stigmatizing’.⁷⁰ Ensuring that children have knowledge of their origins can consequently help them to overcome the stigma of not ‘fitting’ the schema.⁷¹ This does nothing, however to challenge the schema, and Haslanger argues that our main goal should be to undermine the dominant ideology of the family, not help people to match it.⁷² She gives the analogy of children of inter-racial partnerships who may find it difficult to tell a life story that fits the dominant schema of the ‘Black-White racial binary’.⁷³ Their difficulties do not mean that inter-racial partners should be prevented from having children. Instead, it means that the schema should be dismantled.

Although these issues are very interesting, there is no space to pursue them here. Instead, I will simply assume for the sake of argument that the Identity Formation Argument is sound and that children need knowledge of their genetic origins in order to develop a healthy identity. I will argue, however, that there are two reasons to reject the majority’s view that the legislature was motivated by these considerations when it enacted s 294. First, I will suggest that when s 294 is read within the context of the Children’s Act as a whole, doubt is cast on the idea that the legislature had children’s identity needs in mind when it required commissioning parents to contribute at least one gamete to conception. Secondly, I will argue that the majority’s supposition about the purpose of s 294 is difficult to reconcile with the IVF regulations, where the law has shown no interest in ensuring that children born as a result of IVF have knowledge of their genetic origins. I will then turn to consider an alternative explanation of why the legislature might have thought that s 294 is a means of advancing the interests of children. The legislature might have thought that when children born of surrogacy are genetically related to at least one of their custodial parents, the bond between children and parents is stronger,⁷⁴ and hence that these families function more successfully, whatever the extent of the children’s knowledge on the matter of their origins. This explanation of why the legislature enacted s 294 is more consistent with other provisions in the Children’s Act and is also more consistent with the IVF laws. I will argue, however, that the empirical evidence does not support the view that families function more successfully when there is a genetic relationship between parent and child. The no-double-donor requirement is therefore not a rational way of advancing this objective. Finally, I will suggest that if ensuring genetic connectedness is rationally connected to any goal, it is the goal of imposing a bionormative conception of the family. This is not a legitimate purpose, however, making the majority’s comparison with preventing sight-impaired people from driving inapt.

⁶⁹ S Haslanger ‘Family, Ancestry and Self: What is the Moral Significance of Biological Ties?’ in *Resisting Reality: Social Construction and Social Critique* (2012) 175. See also K O’Donovan ‘A Right to Know One’s Parentage’ (1988) 2 *International Journal of Law and the Family* 27, 32 (remarking that ‘[i]f children and their adoptive parents feel unnatural, inadequate, lacking in identity, might this not be the product of a society which constructs a particular family form as “natural”?’).

⁷⁰ Haslanger (note 69 above) at 179.

⁷¹ *Ibid.*

⁷² *Ibid* at 180–181.

⁷³ *Ibid* at 180.

⁷⁴ Thaldar also distinguishes between these two views as to the legislative purpose. See Thaldar (note 68 above) at 243.

I will begin by explaining why I do not agree with the majority that the reason why the legislature enacted s 294 was to ensure that children become aware of their genetic origins so as to satisfy their interest in forming a healthy identity. Suppose the commissioning parents have contributed only one gamete – a possibility which is contemplated by s 294 if there are ‘biological, medical or other valid reasons’. Two other features of the legal landscape come into play at this point. First, the law does not impose a duty on the commissioning parents or anyone else to inform the child about the fact that a donor gamete was used in her conception. There is no provision, for instance, requiring this to be recorded on the child’s birth certificate. Secondly, even if the commissioning parents do inform the child that a donor gamete was used, s 41(2) of the Children’s Act prevents the child from discovering the identity of the donor.

In light of this, two scenarios can arise, in neither of which will the child have the knowledge of her origins required to satisfy her hypothesised identity needs. In the first scenario, the child knows that she does not know one of her genetic parents. In the second scenario she falsely believes that she is related to both of her genetic parents. The first scenario will arise if the commissioning parents disclose to the child that she was born as a result of surrogacy and tell her which of her custodial parents is her genetic parent. In this situation, she will be aware of her genetic origin on one side of the family, while also being aware that the identity of her other biological parent is unknown to her and will always remain so by virtue of s 41(2). Although this child has partial knowledge of her origins, her awareness that her knowledge is *only* partial will be an obstacle to forming a healthy identity in terms of the Identity Formation Argument. As explained above, defenders of the Identity Formation Argument believe that a child who knows that she knows nothing about one of her genetic parents will feel that something important is missing in her life.

In the second (and more probable) scenario, in which the commissioning parents keep the surrogacy agreement secret,⁷⁵ the parents intend the child to make the false assumption that both of her custodial parents are her genetic parents. She will have one false belief and one true belief as a result. Let us suppose that she falsely believes that her custodial mother is her genetic mother and truly believes that her custodial father is her genetic father. It might be thought that her true belief gives her partial knowledge of her origins, putting her in the same position as the child in the first scenario from the identity formation perspective. This is not, however, correct. The child’s true belief is not justified, since the process by which it was formed was unreliable, and knowledge requires justified true belief, according to the accepted philosophical analysis of knowledge. Suppose someone invents a machine which is supposed to tell you whether your custodial parent is your genetic parent. No-one knows, however, that the machine is inaccurate and gives the right answer only half the time. I consult the machine as to whether my custodial father is my genetic father and it tells me that he is. On this occasion, the machine is correct, and the belief I have acquired about my ancestry on my father’s side happens to be true. But do I *know* this? Clearly, I do not because the machine is unreliable. The same is true if a child is led to believe that both her custodial parents are her genetic parents when this is true only of her father. By contrast with the child in the first scenario, who at least

⁷⁵ Levels of parental disclosure of the use of donor gametes have traditionally been low. Ravitsky cites various studies which show that an ‘overwhelming majority’ of parents do not tell their children that donor sperm or eggs were used in their conception. See V Ravitsky ‘Knowing Where You Come From: The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness’ (2010) 11 *Minnesota Journal of Law, Science and Technology* 655, 682.

has some knowledge of her origins, this child will lack all knowledge of her origins, because her custodial parents are an unreliable source of information on the matter. She is therefore even less likely than the child in the first scenario to grow up feeling ‘complete and whole’ if the Identity Formation Argument is sound.

Someone might respond to this claim by saying that the ‘knowledge’ of one’s origins required for a healthy identity in terms of the Identity Formation Argument does not have to be fully fledged knowledge in the philosophical sense. True belief, even if unjustified, will suffice. This being the case, the child’s true belief about her father in the second scenario is able to serve her identity needs to the same extent as the child’s partial knowledge in the first scenario. It is difficult to know how to assess the plausibility of this claim, since the defenders of the Identity Formation Argument do not explain what they mean by ‘knowledge’, but it is not necessary to pursue this here, because there is an additional respect in which the child in the second scenario is worse off than the child in the first scenario if the Identity Formation Argument is sound. The child in the first scenario is not in the grip of a false belief. By contrast, the child in the second scenario falsely believes that her custodial mother is her genetic mother. If it is true that ‘knowing who you are requires knowing how you came to be’,⁷⁶ the self-understanding of the child in the second scenario will be contaminated by her parents’ deception. Although the child in the first scenario will have a gap in her self-understanding, at least she will have a clear-eyed view of what is missing. By contrast, the child in the second scenario will have a false sense of who she is. She will forge a false identity and enjoy an unwarranted sense of self-knowledge built around the wrong genetic narrative. Since she has been misled as to how she ‘came to be’, her confidence that she understands herself will be an illusion based on parental deception.⁷⁷

In light of the arguments I have made, it is difficult to see how the purpose of s 294 can be to serve children’s interests in constructing their self-identity around knowledge of their genetic parents. If the legislature had really sought to protect this putative interest, it would not have allowed commissioning parents to contribute only one gamete to conception, while simultaneously preventing the child from discovering the identity of the donor of the other gamete, and even permitting the existence of the donor to be kept secret, thereby making it possible for children born of surrogacy to be deceived about their genetic origins and to construct a spurious sense of identity built on an illusion.

To be clear, my argument has not been that s 294 is a poor instrument for achieving the legislative purpose of serving children’s identity needs, let alone that this makes it irrational. An argument to this effect could justifiably be criticised on the ground that rationality analysis in terms of s 9(1) of the Constitution is a limited inquiry, and that courts will not invalidate a scheme merely because it achieves a legislative purpose imperfectly and ‘could have been

⁷⁶ Ibid at 675.

⁷⁷ If the Identity Formation Argument is sound, the problem of a ‘false identity’ should also afflict naturally conceived children whose custodial father is not their genetic father and who are not aware of this. Defenders of the Identity Formation Argument should therefore advocate for routine paternity testing to be performed at birth on all naturally conceived children, with the results to be recorded on birth certificates. As Ravelingien and Pennings say, this would put pressure on mothers to inform children about the identity of their real fathers, thereby assuming children ‘genetic truth’ – having a true picture of who they are and where they come from. See A Ravelingien & G Pennings ‘The Right to Know Your Genetic Parents: From Open-Identity Gamete Donation to Routine Paternity Testing’ (2013) 13 *The American Journal of Bioethics* 33, 34–35. This intervention is the logical next step for defenders of the Identity Formation Argument.

improved in one respect or another'.⁷⁸ I have not, however, made a means/end rationality argument, let alone one that incorrectly identifies rationality with designing a fully effective means to achieve the legislative purpose. Instead, I have argued that the legislature's purpose in enacting s 294 could not have been to serve children's identity needs, because other restrictions and permissions contained in the Children's Act undermine that construction as a matter of statutory interpretation.⁷⁹

I turn now to my second reason for thinking that the legislature was not concerned with children's identity needs when it enacted s 294, namely, the difficulty of reconciling this proposition with the legal regime governing IVF treatment. I will argue that the purpose attributed by the majority to s 294 implies that the IVF and surrogacy regimes embody contradictory moral conceptions – an implication which we should not accept lightly.

I previously discussed the fact that pregnancy fertile parents are permitted to use two donor gametes under the IVF regime, whereas pregnancy infertile parents are obliged to contribute at least one of their own gametes under the surrogacy regime. Although I rejected the minority's view that the difference in approach under the two regimes means that s 294 is discriminatory, I am now comparing the two regimes from the perspective of the state's supposed interest in serving children's psychological needs. When we combine the fact that the IVF regulations allow double-donation of gametes with the fact that donor anonymity is guaranteed by s 41(2) of the Children's Act, the result is that children born as a result of double-donor IVF treatment will lack knowledge of their genetic origins on both sides. Furthermore, if the IVF treatment is kept secret, these children will falsely believe that they are related to both of their custodial parents when they are related to neither. It is clear, therefore, that in the case of IVF treatment the law is more concerned about the rights of parents and donors to privacy and autonomy than the interest of children in constructing a healthy identity around knowledge of their origins.

Recognising that it needed to explain why the law is concerned about children's identity needs in the surrogacy context but indifferent to them in the IVF context, the majority offered two (incompatible) responses. First, it suggested that there is a morally relevant difference between IVF treatment and surrogacy. The majority pointed out that IVF treatment is different from surrogacy in that it caters for women who are able to carry a child. Thus, although these women may not be the genetic mother of the child, they do have a 'gestational link'.⁸⁰ The majority also took the view that the gestational link is 'emotionally significant, as it allows the woman to feel that the child is "hers" and to feel that she is a "normal" mother who conceived

⁷⁸ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18, 1999 (2) SA 1 (CC) at para 16.

⁷⁹ The minority also thought that the purpose of s 294 is not to give children born of surrogacy knowledge of their origins. However, it came to this conclusion for different reasons. The minority accepted without question the majority's view that s 294 ensures children acquire knowledge of their origins at least in part, and it also seemed to accept that partial knowledge of origins is sufficient to satisfy children's identity needs. It held, however, that the partial knowledge ensured by s 294 is a coincidence, not its intended effect. To hold otherwise, according to the minority, amounts to accepting that s 294 and s 41(2) of the Children's Act were enacted for purposes that are inconsistent with each other. This is because s 41(2) clearly promotes donor anonymity over children's interests by forbidding donor-conceived children from knowing their origins. Why, then, the minority asked, would the legislature actively seek to protect the interests of a subclass of these children (those born of surrogacy) by ensuring that they know their origins? According to the minority, this would make s 41(2) and s 294 contradictory, rather than complementary: *AB* (note 1 above) at paras 158–166.

⁸⁰ *Ibid* at para 289.

“naturally”.⁸¹ The majority suggested that the feelings created by carrying a child explain why the IVF regulations do not need to insist on a genetic link. In the case of surrogacy, by contrast, a genetic link is desirable in order to compensate for the absence of a gestational link.⁸²

However, even if we suppose that the majority is right about the emotional bond created by carrying a child, this still does not explain why it is legitimate for IVF law to deprive IVF children of knowledge of their genetic origins, and even to encourage them to make false assumptions about their origins by allowing their parents to conceal the IVF treatment. If knowing their genetic origins is important to children’s self-identity and self-respect, why would the law lose interest in this vital matter merely because there is an emotional bond between custodial mothers and their non-genetically-related children? How can an emotional bond between mother and child substitute for the psychological importance of knowing one’s genetic origins? The one seems to have nothing to do with the other. Conversely, if an emotional bond *can* compensate for ignorance of one’s genetic parentage, why did the legislature not recognise this in the context of double-donor surrogacy, where, as explained in part II, the opportunity to select the gametes and the surrogate mother and to participate in the surrogate mother’s pregnancy also create an emotional bond? In short, the fact that IVF treatment caters for women who are able to carry a child does not satisfactorily explain why the law would have sought to give children born of surrogacy knowledge of their origins but denied this knowledge to children born of IVF treatment, since there is no morally relevant difference from the perspective of children’s identity needs between double-donor surrogacy and double-donor IVF.

In its second response, the majority grasped this nettle. Implicitly backtracking on the idea that there is a morally relevant disanalogy between the two forms of assisted reproduction, the majority suggested that IVF law is at fault in unjustifiably neglecting children’s identity needs. Thus, the majority stated:

The risk to children’s self identity and self respect (their dignity and best interests) is, unquestionably, all important. The fact that these rights are placed at similar risk in another context is hardly a reason to find their protection irrelevant.⁸³

The majority’s second explanation of the divergence between the two regimes cannot be dismissed out of hand, since it is possible that the law might be selectively concerned with children’s identity needs. Surrogacy law might be intended to serve children’s psychological needs in forming a healthy identity despite the fact that IVF law wrongly repudiates these needs. This would, however, mean that the law is morally incoherent, which is an inference we should be hesitant to draw.

In saying this, I am influenced by Dworkin’s plausible principle of integrity in adjudication, which emphasises the need for judges to see the law as morally coherent or coherent in principle, as far as possible. Dworkin’s principle tells judges to prefer interpretations which enable the law to be understood as expressing a unified moral vision or as speaking with one voice. As he puts it, judges should test their interpretations of particular laws by asking whether they ‘could form part of a coherent theory justifying the network as a whole’.⁸⁴ This is not to say that an interpretation of this kind can always be found. Where possible, however, judges should strive

⁸¹ Ibid at fn 273.

⁸² Ibid at para 289.

⁸³ Ibid at para 290.

⁸⁴ Dworkin (note 18 above) at 245.

to see the total set of laws as morally coherent.⁸⁵ Judges should therefore ‘identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness’.⁸⁶ The majority’s criticism of the IVF regime for risking the interests protected by the surrogacy regime implies that there is no coherent conception of justice and fairness which underpins both regimes. Yet the majority’s understanding of the purpose of s 294 was not forced on it by unambiguous statutory language. Even if we assume that the generic aim of s 294 is to serve the best interests of children, s 294 might have been intended to serve children’s interests other than by providing them with knowledge of their genetic ancestry. I will shortly explain what this alternative route might be and I will suggest that it is more consistent with the IVF regime’s indifference to children’s identity needs. If these arguments are correct, it follows that the majority’s approach breaches Dworkin’s principle of integrity in adjudication.

In summary, I have argued that there are two reasons to reject the majority’s understanding of the purpose of s 294. First, legal protections for donor anonymity and parental secrecy mean that children raised by parents who qualify under s 294 may not have the knowledge of their origins which is supposed to play such an important role in developing an adequate self-concept. Hence it cannot be the purpose of 294 to provide such knowledge. Secondly, the majority failed to point to any morally relevant difference between the surrogacy and IVF regimes that might help to explain why the IVF regime allows anonymous double-donation of gametes and therefore ignores children’s putative identity needs. Although this is not in itself a decisive consideration, since the law does not necessarily speak with one voice, it does provide a supplementary reason to think that the majority misidentified the purpose of s 294.

What, then, is the purpose of s 294? Assuming for the moment that the no-double-donor requirement is intended to promote good outcomes for children, we need to consider whether s 294 might be intended to achieve this effect in a way which bypasses children’s psychological interests in becoming aware of their origins. Although s 294 does not ensure that children born of surrogacy will have the knowledge they need to construct a healthy identity, it does make it probable that children born of surrogacy will be brought up by at least one genetic parent (subject only to intervening circumstances such as death or divorce). Perhaps the legislature thought that being raised by at least one genetic parent is in the best interests of children – quite apart from what they may know, or not know, or assume, whether truly or falsely, about their genetic origins. As to why this is in the best interests of children, the legislature might have thought that when children are raised by their biological parents, the knowledge that their children are their ‘own’ makes for a ‘natural’ and therefore stronger bond between parents and children, the existence of which promotes more loving and stable families and better outcomes for children.

This possible justification for s 294 is like the ‘clarity of origin’ justification in being based on the best interests of children, but it does not tie the welfare of children to *their* knowledge of who their genetic parents are. Instead, their welfare is tied to their *parents’* knowledge that their children are not genetic strangers to them. At one point the majority seemed to suggest that this might be the justification for s 294, because it said that s 294 serves the purpose of creating a bond between the child and the commissioning parent or parents. The creation of a bond is designed to protect the best interests of the child-to-be-born so that the child has a

⁸⁵ Ibid at 176.

⁸⁶ Ibid at 225.

genetic link with its parent(s).⁸⁷ Along the same lines, the majority stated that s 294 ‘safeguards the genetic origin of the child’⁸⁸ (which is different from safeguarding the child’s knowledge of its origin). This justification for s 294 makes more sense of it than the ‘clarity of origin’ justification. Arguably, it also fits better with the law’s toleration of (anonymous) double-donor IVF, if it is true that a gestational link creates an emotional bond between a woman and her non-genetically-related child. Although it is difficult to see how a gestational bond could justify ignoring a child’s identity needs, it might be an acceptable substitute for the hypothesised ‘natural’ bond in genetically-related families.

It is not, however, clear that there is a stronger bond between parents and children in genetically-related families or that these claims about the welfare of children in genetically-related families are true. These are empirical claims and according to surveys of empirical research on the matter they are not well supported. For instance, Lucy Blake, Martin Richards and Susan Golombok comprehensively examine the empirical evidence regarding children’s well-being in different kinds of families and conclude that there is no significant difference in well-being between children in families formed using donor gametes, children who are reared by their genetic parents, and adopted children.⁸⁹

Although Blake, Richards and Golombok note that a small number of adopted children experience psychological problems, they say that this is not because they have been reared in a non-biological family. Instead, the slightly poorer outcomes for adopted children are explained by the fact that they are more likely to have experienced adversity in their pre-natal and/or pre-adoption environments. Suffering from neglect, abuse, malnourishment and understimulation in these environments may delay children’s development and interfere with the quality of their attachment relationships. The older they are when they are adopted, the more likely they are to be detrimentally affected by these early stresses.⁹⁰ At the same time, Blake, Richards and Golombok emphasise that ‘[t]he vast majority of children who are adopted are well within the normal range of well-being and show behavioural patterns that are similar to their non-adopted peers’.⁹¹ Blake, Richards and Golombok also discuss studies which compare the well-being of adopted children exposed to pre-adoption adverse experiences with the well-being of children exposed to similarly adverse experiences who are not adopted and who continue to be raised by their biological parents. These studies found that the former do better than the latter, leading Blake, Richards and Golombok to conclude that adoption improves the life chances of children who have been exposed to early stresses.⁹² This is because most adopted children are moved from an unstable and low socio-economic environment to a nurturing family of higher socio-economic status.⁹³ In so far as families are concerned in which children were conceived using IVF, gamete donation and surrogacy, Blake, Richards and Golombok

⁸⁷ *AB* (note 1 above) at para 287.

⁸⁸ *Ibid* at para 288.

⁸⁹ L Blake, M Richards and S Golombok ‘The Families of Assisted Reproduction and Adoption’ in F Baylis & C McLeod (eds), *Family-Making: Contemporary Ethical Challenges* (2014) 64, 78. Golombok is described as a ‘leading researcher’ in M Freeman ‘The New Birth Right’ (1996) 4 *International Journal of Children’s Rights* 273, 286. She gave an expert opinion when *AB*’s challenge to s 294 was heard in the Pretoria High Court: *AB & Another v Minister of Social Development* [2015] ZAGPPHC 580, 2016 (2) SA 27 (GP) at para 96.

⁹⁰ Blake, Richards & Golombok (note 89 above) at 75, 78.

⁹¹ *Ibid* at 76.

⁹² *Ibid*.

⁹³ *Ibid*.

conclude from their analysis of the empirical findings that ‘the families of ARTs [assisted reproductive technologies], including those children who have been conceived with gametes from others, like the majority of adoptive families, function well and their children grow up very much like those in families built through the usual processes of sexual reproduction’.⁹⁴

In light of these findings, it is clear that the no-double-donor requirement bears no relationship to the purpose of promoting more loving and stable families, and if this is what s 294 is intended to achieve, it fails to satisfy the rational connection test under s 9(1) of the Constitution. Although, as noted earlier, the legislature does not have to choose the most efficacious means to achieve its goal, its chosen means must make *some* contribution to the achievement of the goal in order to be rationally connected to it. In the case of s 294, as Donrich Thaldar points out, not only is there no evidence showing that a genetic link is in the best interests of children. There is actually evidence against it.⁹⁵ It is difficult to understand why the majority took the view that it did not have to consider these issues, but chose to rely instead, as Thaldar observes, on the ‘judges’ personal beliefs regarding the importance of blood ties’.⁹⁶

This brings us to the final possibility. It may be that the real purpose of the no-double-donor requirement is not to prevent demonstrable harm to children, but to use the power of the state to advance a particular, bionormative conception of the ideal family form. As Charlotte Witt explains, the bionormative conception takes genetically-related families to be the ‘gold standard’ or ‘Platonic form’ of the family.⁹⁷ This deeply embedded cultural assumption is also sometimes referred to as the ‘biologic paradigm’. Mianna Lotz observes that the biological paradigm ‘emphasises the primacy, strength and permanence of biologic connection’, in contrast with the ‘second-class status’ of legal kinship, which is viewed as ‘fictive’, ‘fragile’ and ‘impermanent’.⁹⁸ Empirical research has confirmed the strength and prevalence of the bionormative view that family forms not based on blood ties are less meaningful and less legitimate than those that are.⁹⁹ Yet defenders of the bionormative conception struggle to pinpoint exactly why genetically-related families are superior.¹⁰⁰ As even Velleman concedes, ‘[t]he topic of our biological origins is littered with mythical or symbolic thoughts about blood and bone and seed and such’,¹⁰¹ which do not provide a sound reason to think that biological ties are morally important. Yet Velleman’s own account of the moral importance of biological ties resorts to what he calls ‘universal common sense’¹⁰² and the ‘homely truth’¹⁰³ that ‘[f]irst comes love, then comes marriage, and then the proverbial baby carriage’.¹⁰⁴ Common sense

⁹⁴ Ibid at 77. Thaddeus Metz discusses related studies which reach the same conclusion in ‘Questioning South Africa’s “genetic link” requirement for surrogacy’ (2014) 7 *South African Journal of Bioethics and Law* 34, 35.

⁹⁵ Thaldar (note 68 above) at 245 (concluding that there is no evidence supporting the existence of a nexus between s 294 and the best interests of the child, and that there is positive evidence that there is no such nexus).

⁹⁶ Ibid at 253.

⁹⁷ C Witt ‘A Critique of the Bionormative Concept of the Family’ in F Baylis & C McLeod (eds) *Family-Making: Contemporary Ethical Challenges* (2014) 49, 49.

⁹⁸ M Lotz ‘Adoptee Vulnerability and Post-Adoptive Parental Obligation’ in F Baylis & C McLeod (eds) *Family-Making: Contemporary Ethical Challenges* (2014) 198, 201.

⁹⁹ Ibid at 202.

¹⁰⁰ Witt (note 97 above) at 49.

¹⁰¹ Velleman (note 55 above) at 362.

¹⁰² D Velleman ‘Persons in Prospect’ in *Beyond Price: Essays on Birth and Death* (2015) 108.

¹⁰³ Velleman (note 55 above) at 370.

¹⁰⁴ Ibid.

and homely truths do not amount to reasoned arguments. Other writers who favour the bionormative conception of the family have similar difficulties in defending it, falling back on ‘what everyone knows about families’,¹⁰⁵ or claiming that our ‘humanness’ is tied to the existence of the biological family.¹⁰⁶

It is quite likely that bionormative ideas of this kind are the real driving force behind s 294 and that we have arrived here at a purpose which the surrogacy arrangements under the Children’s Act do achieve, namely, the entrenchment of the biologic paradigm and the privileging of some family forms over others. Section 294 can be plausibly explained on the basis that the legislature was operating with an implicit moral hierarchy of the kinds of families which can result from the use of surrogacy. The ranking runs from first-best, to second-best, to altogether unacceptable, with a family’s place in the ranking being based on its proximity to the ‘natural’ family form. This supposition explains the nested structure of s 294. The family closest to the natural form is one in which children born of surrogacy are genetically related to both of their custodial parents. This form is therefore located at the apex of the moral hierarchy, being the outcome which s 294 seeks to secure in the first instance by insisting that, where possible, the gametes of both commissioning parents should be used to effect the conception. Second-best, although still morally acceptable (but only if there are ‘biological, medical or other valid reasons’), is the family in which children born of surrogacy have a genetic connection to one custodial parent. Finally, the family in which neither of the custodial parents is related to the child is seen as an inherently inferior form of family life, sitting at the bottom of the hierarchy, and therefore not to be facilitated. Although it is necessary to tolerate the existence of non-genetically-related families when children who have already been born cannot be cared for by their biological parents, acceptance of the biologic paradigm implies that parents who cannot contribute a gamete to conception should not be allowed to deliberately create ‘second-class’ families by entering into surrogacy agreements.¹⁰⁷ We have here an uncomplicated explanation of the no-double-donor requirement, in contrast to the difficulties encountered in attempting to tie the requirement to the best interests of children.

If the underlying purpose of the law is to prevent the creation of families which the legislature regards as morally inferior, there can be no doubt that s 294 is a suitable means to further it. The question, however, is whether this is a legitimate purpose, as required by s 9(1) of the Constitution. Although the Constitutional Court has on occasion found that legislation has failed this test, the relevant considerations have not always been fully explored. For instance, in two recent cases – *Holomisa v Holomisa and Another*¹⁰⁸ and *Rahube v Rahube and Others*¹⁰⁹ – the Court made findings of an impermissible purpose without providing much systematic guidance. The former case dealt with the fact that women married out of community of property under legislation of the former Transkei did not enjoy certain protections on divorce conferred by the Divorce Act 70 of 1979. The Court found it ‘almost impossible to conceive’

¹⁰⁵ Witt (note 97 above) at 62.

¹⁰⁶ L Kass ‘Making Babies – The New Biology and the “Old” Morality’ (1972) 26 *The Public Interest* 18, 51. For cogent criticisms of Kass’s views, see Metz (note 94 above) at 36.

¹⁰⁷ See Velleman (note 55 above) at 360–361 for the distinction between adopting a child whose ties to its biological parents have ‘been ruptured after conception’ and using gamete donation to intentionally create a child ‘for whom those ties were ruptured antecedently’. Velleman argues that the latter is always morally wrong.

¹⁰⁸ *Holomisa v Holomisa & Another* [2018] ZACC 40 (‘*Holomisa*’).

¹⁰⁹ *Rahube v Rahube & Others* (‘*Rahube*’) [2018] ZACC 42 (‘*Rahube*’).

of a legitimate governmental purpose for the differentiation.¹¹⁰ The latter case concerned a provision in the Upgrading Act 112 of 1991, which automatically upgraded land tenure rights under apartheid into full ownership rights. The intention of the Act was to redress the injustices caused by the colonial and apartheid regimes. However, women could not hold land tenure rights under apartheid and were therefore excluded from the upgrading scheme. Since the provision perpetuated an unjust situation created by apartheid legislation, the Court concluded that it lacked a legitimate governmental purpose.¹¹¹

The most detailed source of guidance in relation to constitutionally impermissible purposes remains *Prinsloo v Van der Linde*, in which Ackermann J stated that in differentiating between people ‘the constitutional state ... should not ... manifest “naked preferences” that serve no legitimate governmental purpose,’¹¹² and added that governmental action should relate to ‘a defensible vision of the public good’.¹¹³ As noted by Ackermann J, the term ‘naked preferences’ was originally introduced by Cass Sunstein, who used it to capture a theme which unites a number of clauses in the United States Constitution. According to Sunstein, large areas of US constitutional doctrine are directed to ensuring that government action does not result from ‘private pressure’¹¹⁴ or a ‘factional take-over’,¹¹⁵ but is, instead, the result of a ‘legitimate effort to promote the public good’,¹¹⁶ or is justified by reference to ‘some public value’.¹¹⁷ Sunstein sought to convey this by saying that these areas of US constitutional law require government action to be grounded in more than naked preferences.

Everyone will agree that governmental action must seek to promote the public good or be justified by reference to a public value in order to count as a legitimate exercise of power in a constitutional state. These terms do not, however, wear their meaning on their sleeve. The *AB* majority readily found that s 294 promotes a public good,¹¹⁸ but that was a foregone conclusion in light of its finding that the provision serves the best interests of children – something which is an uncontroversial example of a public good. If, however, the purpose of s 294 is not to serve the best interests of children but to privilege a particular family form on the grounds of its intrinsic moral superiority, the matter becomes more complex. It is impossible to determine whether this is a legitimate purpose without resort to normative theorising directed at giving principled content to the notion of what is ‘public’. In my view, John Rawls provides the most powerful theoretical account of this notion via the distinction he introduces between laws justified by ‘public reasons’ and ‘comprehensive reasons’. I have explained elsewhere why I think that Rawls’s approach is sound.¹¹⁹ Here, I will simply summarise his framework and argue that it supports the conclusion that seeking to promote a bionormative conception of the family cannot be justified in terms of public values and therefore amounts to an illegitimate exercise of power.

¹¹⁰ *Holomisa* (note 108 above) at para 24.

¹¹¹ *Rabube* (note 109 above) at para 43.

¹¹² *Prinsloo* (note 2 above) at para 25.

¹¹³ *Ibid.*

¹¹⁴ C Sunstein ‘Naked Preferences and the Constitution’ (1984) 84 *Columbia Law Review* 1689, 1691.

¹¹⁵ *Ibid* at 1690.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* at 1692.

¹¹⁸ *AB* (note 1 above) at para 287.

¹¹⁹ D Meyerson ‘Three Versions of Liberal Tolerance: Dworkin, Rawls, Raz’ (2012) 3 *Jurisprudence* 37.

Rawls makes three central claims. First, he maintains that modern democratic societies are inevitably characterised by the fact of ‘reasonable pluralism’.¹²⁰ Rawls means by this that reasonable people differ deeply and irreconcilably on many moral, religious, metaphysical and philosophical matters concerning what is valuable in life and gives life meaning. Reasonable people have conflicting ‘comprehensive doctrines’, as he puts it.¹²¹ Secondly, Rawls argues that law-making for comprehensive reasons is an illegitimate exercise of power, or at least that this is the case when the laws concern constitutional essentials (such as the scope of the basic rights and liberties) or matters of basic justice (social and economic equality). According to Rawls, justifying a law by reference to a comprehensive doctrine is equivalent, from the perspective of reasonable citizens who reject the comprehensive doctrine, to having a particular religion forcibly imposed on them.¹²² How, then, can the exercise of power be legitimate? How can the state avoid this kind of violation of citizens’ freedom? Rawls’s third claim is that for the exercise of power to be legitimate it must be reasonably justified to everyone. He infers from this that all questions arising in the legislature touching on constitutional essentials and matters of basic justice should be settled by principles and ideals that all citizens can reasonably endorse.¹²³ Rawls uses the term ‘public’ to capture this idea, saying that arguments regarding these matters should appeal only to public reasons that relate to political values, these being values that are not peculiar to any comprehensive view.¹²⁴ Examples are ‘the values of equal political and civil liberty; fair equality of opportunity; the values of economic reciprocity; the social bases of mutual respect between citizens’.¹²⁵

Rawls illustrates his view with several examples. For instance, he discusses possible reasons for infringing people’s religious liberty and says that ‘if we argue that the religious liberty of some citizens is to be denied, we must give them reasons they can not only understand – as Servetus could understand why Calvin wanted to burn him at the stake – but reasons we might reasonably expect that they, as free and equal citizens, might reasonably also accept’.¹²⁶ Rawls also discusses different arguments for prohibiting physician-assisted suicide. He observes that some people argue against physician-assisted suicide on the ground that choosing to die is against the will of God. Others argue that if physician-assisted suicide were to be permitted, sick and disabled people might be pressured to end their lives. The former is not an appropriate justification for laws prohibiting assisted suicide, according to Rawls, because it is not a view to which everyone might reasonably agree. Putting this in the terminology used in *Prinsloo*, we can say that prohibiting physician-assisted suicide for religious reasons is more akin to imposing ‘naked preferences’ than seeking to secure a ‘defensible vision of the public good’. By contrast, seeking to protect vulnerable people from being pressured to end their lives is an appropriate justification, not because this justification for prohibiting assisted suicide is one to which everyone will necessarily agree, but because it is a justification to which everyone *might* reasonably agree, since it does not conflict with comprehensive convictions. It

¹²⁰ J Rawls *Political Liberalism* (1993) xvi.

¹²¹ *Ibid.*

¹²² S Freeman ‘Public Reason and Political Justifications’ (2004) 72 *Fordham Law Review* 2021, 2025–2026.

¹²³ Rawls (note 120 above) at 137.

¹²⁴ *Ibid* at 217.

¹²⁵ *Ibid* at 139.

¹²⁶ J Rawls ‘The Idea of Public Reason Revisited’ (1997) 64 *University of Chicago Law Review* 765, 771.

is therefore the right *kind* of reason to figure in a justification for a coercive law which touches on basic rights and liberties – a public reason.¹²⁷

The extent to which society should accommodate different familial structures, such as same-sex marriage and polygamy, would seem to be exactly the kind of question which should be decided by reference to public reasons, given the fundamental interests ('basic rights and liberties') at stake, such as equality, privacy, intimacy and autonomy. Rawls himself considers justifications for laws regulating the family and assesses them according to whether they are justified by reasons to which everyone might reasonably agree. Thus, he argues that government has no legitimate interest in the particular form of family life, except insofar as it 'affect[s] the orderly reproduction of society over time'.¹²⁸ What he means by this, as he explains, is that the government's legitimate interest in the family is confined to securing equal justice for its members by protecting their basic rights and liberties, and freedom and opportunities.¹²⁹ Rawls illustrates the extent of this interest with the example of monogamy, saying that if monogamy were necessary for the equality of women, this would generate a legitimate governmental interest in protecting it. This is because the freedom and equality of women are among the political values of public reason.¹³⁰ By contrast, justifying the protection of monogamy by appealing to its intrinsic value, or its value 'as such', would 'reflect religious or comprehensive moral doctrines', and would fail to specify a proper interest in the family.¹³¹ It is perhaps worth emphasising that Rawls is not saying that the state is not entitled to regulate the family. He is merely saying that it is illegitimate to do so for reasons that can only be endorsed by citizens who accept a contested, comprehensive framework.

If the restriction on access to surrogacy agreements contained in s 294 rests on a belief in the intrinsic moral superiority of genetically-related families, or their value 'as such', it is clear that the justification would fail Rawls's test of public reason, because it would not offer reasons which could be shared by all reasonable people regardless of their differences on deeper, comprehensive questions concerning what is of value in life and gives life its meaning. The bionormative conception of the family is an expression of a contested ethical and religious view about what it means to be a good family – a view that stigmatises non-genetic families for reasons which it is not reasonable to think others might reasonably accept. Many reasonable people subscribe to more pluralistic ideas about good families. These opposing reasonable conceptions of the family do not see biological parenthood as inherently superior to social parenthood or blood relationships as the foundation for our humanity. They see value in the social aspects of kinship and the many family forms, both biological and non-biological, that can provide children with love and care and meet their emotional needs. They wish to facilitate, not prevent, the variety of ways – 'natural' or not – in which people can become parents.

The minority in *AB* made related points about the inappropriateness of legally entrenching one form of family life over others and the need to accommodate different family formations in light of the diversity of South African society. However, the minority saw the privileging of genetically-connected families as a matter of discrimination, viewing the genetic link requirement as an affront not only to the dignity of 'prospective parents, but also of families

¹²⁷ B Prusak 'Politics, Religion and the Public Good: An Interview with Philosopher John Rawls' (1988) 125 (16) *Commonweal* 12, 14.

¹²⁸ Rawls (note 126 above) at 779.

¹²⁹ *Ibid* at 788–789.

¹³⁰ *Ibid* at 793.

¹³¹ *Ibid* at 779.

with adopted children, and our society as a whole'.¹³² By contrast, I have suggested that seeking to entrench a particular family form for no reason other than a belief in its intrinsic value amounts to siding with one faction or group in society. The justification in question does not relate to a 'defensible vision of the public good'. This means that it is a constitutionally impermissible purpose and a breach of s 9(1) of the Constitution.

IV CONCLUSION

I have argued in this article that the no-double-donor requirement contained in the surrogacy regime raises troubling constitutional issues, especially from the perspective of the constitutional right to equality. First, the provision infringes the equality right in s 9(1), either because the distinction it draws is not rationally connected to the legitimate goal of protecting the best interests of children, or because it successfully serves an illegitimate goal, that of forcibly imposing a contested bionormative conception of the family on people who reasonably disagree. Secondly, s 294 unfairly discriminates against commissioning parents who would like to enter into a surrogacy agreement but cannot contribute genetic material, thereby infringing s 9(3). The *AB* majority failed to recognise these flaws in the provision because (i) it misidentified the purpose of s 294 and (ii) was too ready to ascribe *AB*'s predicament to medical conditions and personal preferences rather than legal discrimination. Its understanding of the constitutional right to equality is accordingly unattractive.

¹³² *AB* (note 1 above) at paras 116–119.