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Artificial Procreation, Societal Reconceptions: Legal Insight from France

I. INTRODUCTION

On 1 August 1984, a tribunal in Creteil, some 30 kilometers outside of Paris, decided the landmark case of Parpalaix v. CECOS.\(^1\) The case was one of first impression for France and other foreign jurisdictions. A 22 year old widow, Corrine Parpalaix, had brought suit against the national federation of sperm banks to recover the sperm of her recently deceased husband. Corrine sought his sperm so she might have the child they had hoped to have while her husband was alive. Thus, was presented the first case world-wide of "post-mortem insemination."

The Parpalaix case bespoke something of the autumn to come. In September, a 21 year old Marseille woman, married and the mother of an 18 month old son, announced she was pregnant and would become the first surrogate mother\(^2\) in France; she was to receive a "gift" of some $8-10,000 for her motherhood.\(^3\) In October, the National Committee on Bioethics\(^4\) announced the results of its year-long study of the same question. Surrogate motherhood was cur-

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\(^2\) "Surrogate mother" generally refers to a woman who agrees to have a child for a sterile couple. A "half surrogate mother" is inseminated with the sperm of the male in the couple, becomes pregnant, and shortly after birth gives the child to the couple. In contrast, a "whole surrogate mother" is impregnated by both the sperm and ova of the couple. Because existing French law appears to presume that the birthing woman and her husband are the legal parents, parties to "surrogate mother" arrangements may institute adoption and like proceedings to establish legal parenthood. See C. Civ., arts. 312, 319, 320. See also infra nn. 39, 87.

\(^3\) 50,000 French francs; Le Point, 24 Sept. 1984 at 56.

\(^4\) Founded in 1983, the 36 member committee issues advisory opinions to the Ministry of Health on ethical concerns raised in medicine, biology and health. Decret No. 83-132 du Febvier 1983, Portant Creation d'un Comite Consultatif National d'Ethique Pour les Sciences de la Vie et de la Sante. 25 Feb. 1983 J.O. at 630. 16 committee members are drawn from the field of scientific research, 15 from the
rently sanctionable under French law, the Committee noted; it recommended surrogate motherhood remain so. The debate sparked by Parpalaix and the surrogate motherhood pronouncements intensified scrutiny of another artificial reproductive technology well underway in France: in vitro fertilization and embryo transfer (IVF-ET), which has begotten numerous children since it was first used successfully in Paris in 1981.

The following thus explores the initial French response to the artificial procreation technologies. For whether portrayed as the marvels of human genetics and biology or as the bane of good-faith but misguided modern inquiry, the technologies provoke a multitude of legal and policy issues. To sample some of the issues more thoroughly, and on the belief that the oldest of the technologies portends issues in the development of the newer technologies, the focus here is on artificial insemination. It raises legal issues on access to the technologies and procreative liberty; the screening and remuneration of sperm donors; informed consent; the pri-
vacy of participants, and medical records confidentiality,\textsuperscript{15} and the legitimacy and filiation\textsuperscript{16} of children resulting from artificial reproduction.

Part II examines the Parpalaix case against the development of Artificial Insemination by Donor (AID) in France. Part III summarizes more recent developments in French artificial procreation law. Part IV concludes by identifying four societal models the French have relied on to address the legal challenges of artificial procreation.

II. PARPALAIX & AID IN FRANCE

A. Post-Mortem Insemination: The Parpalaix Case

Events that eventually led the Parplaixs to court began in the summer of 1981 when the couple met. Shortly thereafter Mr. Parpalaix was diagnosed as having testicular cancer. By the autumn of 1981, he had decided to undergo chemotherapy treatments that risked rendering him infertile. Thus, upon the advice of his physician, Mr. Parpalaix decided to preserve some of his sperm in a Paris Center for the Study and Conservation of Sperm (CECOS).

For the next two years Mr. Parpalaix underwent a series of treatments to and remissions of cancer. A marriage date was postponed and rescheduled several times during the bout with illness. Finally, on 23 December 1983, Corrine Richard and Alain Parpalaix were married. Two days later, on Christmas Day 1983, Mr. Parpalaix died.

In February 1984, the young widow contacted the director of CECOS. She requested the test tubes containing her husband's frozen sperm. CECOS, as a non-profit entity affiliated with a public university hospital center, responded it could not return the sperm without approval of the Ministry of Health.\textsuperscript{17} Thus, in the spring of 1984, Ms. Parpalaix contacted the Ministry of Health. The Ministry responded that artificial insemination was under review. Ms. Parpalaix was informed nothing could happen until the Ministry had concluded its deliberations. In May 1984, Ms. Parpalaix and her deceased husband's parents filed suit to compel CECOS to return the sperm.

In Parpalaix v. CECOS, the Tribunal de Grand Instance de Créteil held that Mr. Parpalaix's intent to preserve his opportunity to procreate, by entering into an agreement with CECOS for sperm preservation, obligated CECOS to return Mr. Parpalaix's sperm to

\textsuperscript{15} See text accompanying infra n. 61.
\textsuperscript{16} See infra n. 39.
\textsuperscript{17} See infra n. 21. See also text accompanying infra nn. 66-68.
the person for whom it was intended—namely, his wife.\textsuperscript{18} The steps
taken by the court to reach its holding illumine the contours of the holding itself.

First, the court narrowed the question presented to a claim of
right to the test tubes containing the widow's husband's sperm. The
court expressly declined to address either the propriety of artificial
semenation under such circumstances, or questions of the filiation
of any resulting children.\textsuperscript{19} Second, the court rejected the appli-
cability of the inheritance laws and declared that the claim implic-
ated a fundamental right:

Sperm is the carrier of life; it is thus tied to a fundamental
liberty, that of giving or not giving life. Our judicial system
ascribes to this liberty a basic value that excludes sperm
from being subject to the legal regime for inheriting
... Human sperm is the genetic expression of a fun-
damental human right. ...\textsuperscript{20}

\textsuperscript{18} Parpalaix, supra, n. 1 at 562.

\textsuperscript{19} Id. See also text accompanying infra n. 71. The still existent Napoleonic
Code provides a child born more than 300 days after the "dissolution" of marriage
with no right of filiation. \textit{C. Civ.}, art. 315. That Ms. Parpalaix would necessarily give
birth to any resulting child more than 300 days after she became widowed, meant
that Mr. Parpalaix, the putative biological father, might not be legal father. For a
discussion of French filiation law, see infra n. 39.

\textsuperscript{20} Id. at 561. Though the court failed to discuss the specific source of the "right
to give life" or procreative liberty, there is authority for both propositions in French
law. Some French commentators argue that within express constitutional or human
right guarantees of a "right to life or liberty" lies an implied right to procreative aut-
omy—that is, a right to give or not to give life. See Regourd, "Les Droits de
L'Homme Devant les Manipulations de la Vie de la Mort," \textit{87 Rev. Droit Publique}
409, 457 (1981); Kiss & Marie, "Le Droit a la Vie," \textit{7 Rev. De Droit de L'Homme}
France is a contracting party, protects the "right to life." \textit{22 U.N. Treaty Series} 222
(1955). Under such a formulation, the right not to give life in France was vindicated
in the 1967 repeal of laws against contraceptive practices and in the 1975 liberaliza-
The 1975 legislation lifted the 50 year prohibition on abortion to permit therapeutic ones
until the 10th week of pregnancy. See \textit{C. Sante Pub.}, art. L. 176; Law #75-17 of 17
Validity of Abortion Legislation: A Comparative Note," \textit{21 McGill L.J.} 673, 676
(1975) (discussing the \textit{Conseil Constitutionnel} decision to uphold abortion law as
part of fundamental liberty of person and not inconsistent with constitutional guaran-
tee of protecting infant health). See generally Draper, "La Loi Relative A
l'Interruption Volontaire de la Grossesse Dix Ans Apres: Histoire D'Un Compro-
procreative liberty on privacy, equality, and right to found a family theories, see
ing law restricting the availability of abortion as not in violation of the European
Convention protection of the right to privacy). See also Doswald-Beck, "The Mean-
ing of the Right to Respect for Private Life Under the European Convention on
of Privacy, Family Life and Other Rights Under Art. 8 of the European Convention
Third, the court found the agreement between CECOS and Mr. Parpalaix to be the applicable and determinative source of law. That CECOS was governed by no particular law or regulations permitted the court to read the legal void as neither mandating CECOS’ retention of the sperm nor prohibiting the return of it to his wife. The court specifically rejected the applicability of the Civil Code, by finding that sperm does not constitute a “thing in commerce but secretion containing the seed of life destined for human procreation.” It similarly rejected the applicability of the Organ Transplantation law of 1976 by finding that semen was neither an organ nor a tissue.

Finally, within the donor/donee understanding, the court found an express obligation of CECOS to preserve the sperm, and an implied obligation to return it to the person for whom it was intended. Indeed, the peculiar circumstances of marriage, the wife’s and parents’ testimony to the wishes and preferences of the deceased donor, unequivocally established the donor’s intent to preserve an opportunity to procreate and to have a child with his wife. In reaching such a finding, the court was perhaps more impressed that at the time of the doing Mr. Parpalaix was seriously involved with the woman who later became his wife than by the fact that he was not married. CECOS assented to Mr. Parpalaix’s intentions in not

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21. Parpalaix, supra n. 1 at 562. CECOS is organized as a non profit, public-purpose entity under the Law of 1 July 1901. Though managed by an administrative board that includes representatives of the Ministry of Health, CECOS has not been the subject of ministerial regulations to govern its services.

22. Parpalaix, supra n. 1 at 562.


25. Id. Arguably, the court exercised the substitute judgment standard in the law of medical treatment decision-making for the incompetent. Applied here, the court scrutinized the manifested preferences and desires of Mr. Parpalaix “to replicate faithfully the decision the incapacitated person would make if he or she were able to make a choice.” U.S. President’s Commission for the Study of Ethical Problems in Medicine & Biomedical and Behavioral Research, 1 Making Health Care Decisions 179 (1982).
forming him of its opposition to them. The court ordered CECOS to return the sperm to a physician of Ms. Parpalaix’s choosing.

The decision had a number of dramatic and immediate effects. It vindicated the claim of right brought by Ms. Parpalaix and her parents in law; Ms. Parpalaix could begin the insemination process to have a post-mortem child. The decision spurred further debate on the benefits, burdens, and law of the reproductive technologies. The government response to Ms. Parpalaix’s request and the case itself emphasized the extent to which advances in medical science pressed the law and society for answers they did not readily have. The effect of the decision was to expand the right of procreative autonomy, as is perhaps more keenly revealed by an examination of the history on and policy of artificial insemination by donor (AID) in France prior to Parpalaix.

B. Artificial Insemination by Donor (AID) In France

Both the history and policy of AID in France are instructive. It is a history of initial moral opposition, technological innovation, and implied claims of medical and thus societal advancement. AID policy, as defined by 19 of the 21 sperm banks in France, has largely been consistent with a traditional view of the family.

History: The history of human artificial insemination descends some 200 years from the annals of Western medical science. First successfully performed and reported in the literature by a London physician in the 1770s, artificial insemination with husband’s semen appears to have been first practiced in France in the 1800s. The first official condemnation was announced by a tribunal in Bordeaux, in 1883, which characterized it as repugnant to natural law, an affront to marriage, and a veritable social danger. The Catholic Church subsequently issued a formal interdiction on the

26. Parpalaix, supra n. 1 at 562.
27. Id. at 563.
28. Three months after the court decision, Ms. Parpalaix began to receive inseminations. By January 1985, it was reported that the inseminations had failed. Le Monde, 12 Jan. 1985 at 10.
30. A woman may be artificially inseminated with her husband’s/partner’s semen (homologous), if the medical procedure will remedy any insufficiencies of natural insemination; or, if her husband/partner is irreversibly sterile, a woman may be inseminated with donor semen (heterologous or AID).
31. See 18 Philo. Trans. R. Soc. Lond. 162 (1799).
practice, in 1897, on grounds that it involved non-coital reproduction and masturbation—all against natural law.33

Non-husband artificial insemination, or artificial insemination by donor (AID), began in the U.S. in 1884, and the first published reports of success in France appeared in 1909.34 Still, in 1949, the French Academy of Science urged that AID be considered an assault on the family, marriage and society.35 In the 1950s members of the French Federation for the Society of Obstetrics and Gynecology observed that the problems posed by AID went beyond medicine and risked degrading human dignity.36

Given the historical discord provoked by artificial insemination in the religious and even scientific communities in France, it is less than surprising that judicial attitudes manifested initial hostility to the practice. In the 100 years between the 1883 Bordeaux denunciation and the 1984 Parpalais decision, French courts considered artificial insemination on three occasions. In a 1956 case involving artificial insemination as a grounds for divorce, an Appeals Court in Lyon described it as "humiliating, excessive, and injurious."37 The same year a Paris court simply referred to artificial insemination as a more recent phenomenon that, in some cases, will bear on the proof or non-proof of paternity.38 In a 1976 husband's action to disavow a child conceived by his wife through A.I.D., a tribunal in Nice observed that "it is not in the least evident that AID constitutes a turpitude."39 These latter non-disparaging observations perhaps

34. Id. at 204.
35. Id. at 205, comments excerpted in Kornprobst, Responsabilite du Medecin Devant La Loi: Jurisprudence Francaise 544 (1957).
36. Id.
39. Judgment of 30 June 1976, Trib. gr. inst., Nice, 1977 D. S. Jur. 45, note Huett-Weiller. There, the parties agreed that the husband was impotent and that the child was conceived by AID. They disputed whether the husband had consented to AID and whether consent established a legal relation to the child. The court held that a husband's consent to AID does not waive the right to disavow paternity. Id.

On the one hand, the decision furthers the "biological accuracy" policy objective of the family law reforms of 1972. See Englehard-Grosjean, "The French Law of Filiation," 37 La. L. Rev. 701 (1977). To accomodate the hard scientific proofs increasingly available to determine blood relations, the 1972 reforms drastically liberalized the evidence one may adduce to rebut the presumption of paternity of a child.
foreshadowed the rhetorical neutrality of the Parpalaix court not to address the circumstantial propriety of AID.40 Such rhetorical neu-


On the other hand, the decision counters the other policy objective of the 1972 reforms: to eliminate the harsh inequalities in the legal status of "illegitimate" and "legitimate" children. See C. Civ., art. 334. See also Englehard-Grosjean, supra at 701. Historically, legitimate filiation developed in part to sanctify and encourage monogamous marriage by legally stigmatizing the progeny of illicit relationships. Frame, "The Status of Children of Illegitimate Parents: A Comparative Survey," 2 Comp. L. Yrbk. 47, 48 (1978). Legitimate filiation thus conventionally establishes a child's legal parents, civil status, name, support and inheritance rights, on biological grounds. Huet-Weiller, et al, Jurisprudence Francaise: La Filiation 1 (1981). Traditionally reasoned, the court decision affirming the disavowal both established no filiation between the husband and child, and seemed to declare a natural, illegitimate filiation between the mother and child. See C. Civ., art. 334-8. In the extreme, the biological accuracy emphasis of the court further suggested the anomalous result that the anonymous sperm donor was the child's father.

Of course, because biological accuracy was undisputed, the court might have effected parliamentary purpose as well by exploring the legitimacy-illegitimacy equality thrust. Four alternative solutions emerge, for example, by unraveling the bundle of rights traditionally conferred by legitimate filiation.

First, because illegitimacy unjustly penalizes and stigmatizes any child, the court might declare the child legitimate, whatever the finding of legal fatherhood.

Second, the court might then jettison the notion of paternal affiliation as unhelpful to defining the legal relations in the case. Such an approach recognizes limited, extraordinary circumstances in which a child may have no legal father and still be legitimate and filiated, without legal stigma, to mother. It further avoids making the donor's biological link suggestive of legal fatherhood. Finally, it preserves the husband's right to disavow paternal relations to a child whom he was incapable of begetting and to whose AID conception he did not consent. A finding that a child has no legal father may not respond to the economic interests of the child, however.

Third, the court might find the child unaffiliated to the husband, and hold that public policy nonetheless favors imposition of support obligations on the husband. See Gursky v. Gursky, 78 N.Y.S.2d 390 (Sup. Ct. 1963) (holding artificially conceived child illegitimate and imposing support obligations). See also, C. Civ., art. 342 (support obligations despite non filiation). Such an approach views the material deprivation of non-support as the greater injustice under the circumstances.

Fourth, consent evidence may be viewed as determinative of waiving an action of disavowal or contestation of paternity. For example, the recently amended Quebec Civil Code provides as follows: "When a child has been conceived through artificial insemination, either by the father or with the consent of the spouses, by a third person, no action for disavowal or contestation of paternity is admissible." 1986 Que. Stat., C. 39, art. 586. See also People v. Sorenson, 437 P. 2d 495 (Cal. 1968) (husband's written consent to AID & public policy render husband legal father of legitimate child). Stated more positively, evidence of consent would establish adoption of the AID child by the husband. Gaboert, "Les Incidences Juridiques des Progres Des Sciences Biologique et Medicale Sur le Droit des Personnes," in Actes du Colloque: Genetique, Procreation et Droit 161, 195 (Nyssen, ed., 1985). Court inquiry would then turn from biological proofs to evidence and standards of consent. See, e.g., R. S. v. R. S., 670 P.2d 923 (Kan. App. 1983) (husband's consent to AID presumed continuous absent clear and convincing evidence of revocation). Cf. In Re. Baby Doe, 353 S.E. 2d 877 (S.C. 1987) (husband's oral or written consent to wife's A.I.D. establishes paternity).

40. See text accompanying supra n. 19.
trality appears to have continued a year after Parpalaix when a Paris court granted a husband's disavowal of paternal relations with a child conceived by his wife through artificial insemination in a physician's office.41

C. National Federation of Sperm Banks—CECOS

The sperm banks of France today result, in part, from cryopreservation, or the technical ability to freeze, thaw, and later successfully use the sperm for pregnancy. The literature reported the first successful pregnancies by the use of frozen semen in the U.S. in the 1950.42 In France before the early 1970s AID was still a "clandestine practice carried on by a limited number of private gynecologists who used fresh donor semen."43 In 1972, two public hospitals in Paris created Centers for the Study and Conservation of Sperm (CECOS). Over the next decade, the number of CECOS's multiplied to all regions of France. Today, 19 of the 21 existing French sperm banks belong to the CECOS federation. The 19 are non-profit entities generally affiliated with regional public hospitals in urban centers. Two of the 21 are private, independent, research institutes unaffiliated with the CECOS federation.44

CECOS Protocols & Policy: Because the 19 banks that constitute the CECOS federation define the French sperm bank infrastructure, its protocols and policies largely affect the reproductive choices of those seeking AID in France. So, what are the policies, protocols, and rationales, that have played a role in the estimated 16,000 infants who have been born by AID in France since 1973?46


44. See supra n. 21.

45. They are La Fondation de Recherche en Hormonologie, in Fresnes, and the Centre de l'Etude de la Fertilite in Marseille. The latter apparently provides services to unmarried women. See Alnot, supra, n. 24 at 19.

Before the 1972 founding of CECOS, the traditional practice of AID involved the use of fresh donor sperm under protocols that became perceived as inadequate. Donors were generally single students who received reimbursement for each ejaculate; protocols neither existed for donor selection, nor for any exams donors might undergo, nor for any limitations on the use of a particular donor's semen.47 A year after the first CECOS opened in Paris, it adopted a policy to elaborate medical and ethical guidelines for the practice of AID.48 The details and rationales of the policy follow and may be viewed in light of Parpalaix:

1. Indications:49

AID is usually justified—"medically indicated" for irreversible male sterility50 (98%) or a high risk genetically transmissible disease (2%).

2. Nonpayment of Donors:51

The rationale for nonpayment argues that it avoids the risk of economic abuse,52 that money may make donation morally unattractive, and that a policy of nonpayment imposes a humanistic, altruistic obligation on society at large.53

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47. David, supra n. 43 at 22. Cf. the results of a survey by Curie-Cohen, et al, "Current Practice of Artificial Insemination by Donor in the United States," 300 New Eng. J. Med. 585 (1979) (indicating that 70% of practitioner respondents used fresh semen from medical or university students who were typically paid $20-35 per ejaculate and who received minimal genetic screening). See also infra nn. 59, 63.

48. David, supra n. 33 at 211.

49. David, supra, n. 43 at 22.


51. In France artificial insemination costs for the treated "infertile couple" are covered by public health insurance. C. Sec. Soc., art. L. 268-1; Arrete du 22 aout 1980. 19 Sept. 1980, J.O. 8362. See also Alnot, supra, n. 24 at 71, 110.

52. This may refer to a concern that donors induced by pecuniary reward may suppress medical information that would otherwise ban their participation.

3. Married Couples' Donation for Married Couples:

In general, donors must be married men less than 45 years old with one or more children. The married fathers' requirement is said to ensure demonstrated male fertility and reduce the risk of genetic disease. The couples' requirement ensures that fertile couples give to sterile "couples," and helps efface claims, or the image, of adultery, which so initially shadowed artificial insemination. This has been relaxed to include donor couples living together and divorced male donors.

4. Donor Screening:

Donors undergo a clinical examination and blood, sperm, and genetic screening. The battery of tests has both a medical efficacy and a public health rationale. First, since male sterility is the primary indication for AID, CECOS has made the rational choice to examine whether donor sperm suffer defects or inadequacies common to the couples who seek AID; the policy thus aims at ensuring fertile, effective donor semen. Second, since infectious, venereal and genetic disease may be transmitted through semen, the blood exams and genetic screening requirements have been implemented to minimize the risk of transmission. Third, since a high risk of geneti-

54. David, supra, n. 33 at 212.
55. Id.
58. David, supra, n. 33 at 215.
59. In 1985, the CECOS federation adopted a policy to prevent the transmission of the Acquired Immune Deficiency Syndrome (AIDS) by semen donor. Each
cally transmissible disease is the other primary indication for AID, CECOS has made the rational choice to screen donors who might otherwise transmit something akin to what recipient couples have sought to avoid.60

5. Donor Anonymity:

Donors are assured of anonymity. Donor information becomes part of a confidential medical file. Those physicians involved in inseminating recipients have knowledge of donors only by an identity code assigned to each test tube.61

[Text continues with references and legal analysis]

60 Historically, less than 2% of donors have been rejected for genetic abnormality. See Chambon, et al, "Sperm Banks & Donor Recruitment in France," in Human Artificial Insemination & Semen Preservation 93 (David & Price, eds., 1980). The CECOS Genetic Committee now permits semen deemed inadequate for insemination to be used for research. David, supra n. 33 at 214-15.

61 In some U.S. jurisdictions, the risk or appearance of a latent disease in an A.I.D. child may constitute a "good cause" exception to the general rule of sealed donor medical records. See Uniform Parentage Act § 5, supra n. 57; Chattman
6. Limited Use of Donor Semen:

A donor's semen is limited to use in five pregnancies, unless a couple having obtained one child by a particular donor desires another child by the same donor. This policy was apparently adopted both upon the general preference of donors and to minimize the risk of consanguinity.

D. Parpalaix Revisited

The background policy of CECOS casts in relief the import of Parpalaix. On the one hand, the circumstances of the Parpalaixs paralleled those of other CECOS donors and recipients. When Mr. Parpalaix gave his sperm, he was part of an unmarried couple, like a minority of CECOS donors. Like another minority of donors, he gave his sperm in anticipation of sterility: in 1983, 26% of CECOS donors underwent voluntary sterilization in the form of vasecto-


Legitimate privacy issues may be addressed, however, without recourse to evasive and potentially injurious medical administration. First, express statutory provisions should cloak parties to artificial insemination with the doctor-patient privilege. A zone of privacy around the donor is desirous, for example, in that it encourages donors to discuss more freely possible medical, psychological, or hereditary concerns. Note, "Artificial Insemination: Disclosure Issues," 11 Colum. Human Rts. L. Rev. 78, 94 (1975). Second, the constitutionally protected right to privacy or liberty extends to procreative choices, including the choice of artificial insemination; that choice may not be infringed or chilled by the State but for compelling reasons. See Robertson, supra n. 20 at 960 n. 65. Third, therefore, a court order compelling disclosure of confidential medical information should be limited to a stringent "good cause" standard. That said, there are a number of affirmative reasons for requiring the maintenance of records. As already indicated, information contained therein may become essential to the best medical interests of a resulting child. Second, such documentation may provide objective information for the resolution of lineage conflicts that might arise, for instance, if an A.I. couple decided to divorce. See Eidenman, "Fathers, Biological and Anonymous and Other Legal Strangers: Determination of Parentage & Artificial Insemination by Donor Under Ohio Law," 45 Ohio St. L. J. 384, 385 (1984). Third, in the exercise of its traditional public health role, the state arguably has a compelling interest in documenting venereal or genetic diseases inimical to the public health. These limited needs may be fulfilled without sacrificing confidentiality.


63. Id. A 1979 survey in the U.S. revealed that a maximum of six pregnancies per donor was typical, though one respondent attributed 50 pregnancies to one donor. Curie-Cohen, supra n. 47 at 587.
mies. The recipient, Ms. Parpalaix, while no longer married nor coupled, was perhaps the closest one could come to the requirements; that her deceased husband's family joined her in the petition evidenced an extended family to welcome the child to be. Arguably, then, Ms. Parpalaix's life circumstances substantially complied with the letter and spirit of the CECOS protocols.

In a strict sense, however, her life circumstances diverged. She was not a couple recipient; she was no longer married. What is more, she failed to suffer irreversible male sterility; under CECOS protocols, AID provides medical therapy for the sterile male in the sterile recipient couple. Ms. Parpalaix was not "medically" sterile. Arguably, Ms. Parpalaix's circumstances were more akin to a similar class of "socially" sterile women who had made similar requests in the past: the 20 single women, 3 lesbians, and 14 similarly situated widows who had sought and been denied CECOS services over the years.

In fact, according to the Director of the CECOS Federation, the first request for post-mortem insemination had been made in 1976. While CECOS was apparently disposed to grant the request, the Ministry of Health forbade it, in part, on grounds of the need for further study. The story repeated itself some 14 times, before Ms. Parpalaix pressed her request in court. Two days after the formal announcement of the court decision the Director of the CECOS Federation welcomed the decision as a clear, positive judicial response.

Given the Director's reception of the decision, it is not surprising that CECOS filed no appeal.

Hence, the uniqueness of the Parpalaix case owes less to the novelty of the circumstances and more to the requestor's substantiated insistence that the request be granted as a matter of legal right. In granting the claim, the court effectively introduced an exception into the CECOS sterility and couples protocols: some non-sterile, unmarried women have legitimate claims for the services of CECOS. A narrow reading of the case would limit the exception to those wo-

64. David, supra n. 33 at 215. Thus, beyond the original purpose of helping remedy involuntary sterility, an evolved purpose of CECOS has become to help "remedy" voluntary sterility (vasectomies).

65. See id. at 222-223. Ms. Parpalaix remains distinct from single women and lesbians by her legal relation to the sperm donor—her husband. See Kayser, supra n. 24 at 192 (differing legal obligations between married and unmarried couples justifies different legal regimes for A.I.D. and A.I.H.) and supra nn. 20, 57. For U.S. commentary see Kritchevsky, "The Unmarried Women's Right to Artificial Insemination: A Call for an Expanded Definition of Family," 4 Harv. Women's L.J. 32 (1981).

66. David, supra n. 33 at 223.
67. See Id.
68. See Id.
men who, like Ms. Parpalaix, were part of a couple that originally donated sperm and for whom the sperm is shown to have been intended. As such, Parpalaix involves procreative restitution and the substitute judgment doctrine. This view emphasizes the procreative autonomy aspect of the decision in terms of the sperm donor.

Under a broader reading of Parpalaix, the case expands the procreative rights of both sperm donors and unmarried, non-medically sterile women. Though one may argue that the court did not directly address the sterility and marriage issue, the court was nevertheless clear that the authority for the decision did not rest with CECOS:

In the event that the claim is granted, the question of insemination would depend solely on the conscience of the widow and her physician, who is governed by the ethical guidelines of the medical profession.

Indeed, this language and the court declaration that procreation involves a fundamental human right adds force to the argument that Parpalaix vindicates the procreative rights of unmarried women seeking artificial insemination to start a family. In effect, the deci-

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70. See supra n. 25.
71. Id. at 562. The court thus appeared unpersuaded by the CECOS argument that were it not permitted to maintain minimal ethical standards, it would heighten the risk of slippage towards the practices of some sperm banks in the U.S., where, it was argued, one may select from a catalogue of donors to buy the sperm of Nobel laureates in the hope of a child prodigy. See Robert, supra, n. 56 at 1270. For commentary on the California Nobel sperm bank, see Note, "Eugenic Artificial Insemination: A Cure for Mediocrity," 94 Harv. L. Rev. 1850 (1981).
72. See text accompanying supra n. 20.
sion authorized a "single" heterosexual woman to become inseminated through the services of CECOS. Presented with the choice between maintaining one's procreative means in a repository subject to state control or returning the same to an individual with whom the donor had been intimately related, the court chose the private sphere.

III: POST-PARPALAIX ISSUES & DEVELOPMENTS

In many respects, the questions presented by Parpalaiix and the CECOS protocols portended the development of legal parenthood, access and screening, procreative autonomy and like issues posed by the newer and more complicated technologies of IVF and surrogate motherhood. Four examples illustrate the point.

First, the legal status of frozen semen may inform the legal status of frozen ova, embryos and like human entities that may result from IVF treatments.74 Second, a societal policy on the payment of gamete donors and health insurance coverage of A.I.D. affords society a model for debating or resolving the same questions for IVF and surrogate motherhood. Such questions themselves suggest the broader task of defining the guiding philosophy and roles the state75 and market76 shall play in different artificial reproduction contexts. Third, the Parpalaiix arguments over access to artificial insemination suggest the general necessity of reconciling procreative rights with societal conceptions of family and the best interests of children begotten of artificial procreation.77

Finally, the societal history of artificial insemination should prove instructive of the evolution of control of the reproduction

resolve the question for lesbian singles or couples. See, e.g., Para. 14 (A)(iv) of Recommendation On The Use Of Human Embryos And Foetuses For Diagnostic, Therapeutic, Scientific, Industrial And Commercial Purposes, Eur. Consult. Ass., 38th Sess., Rec. no. 1046 (Sept. 29, 1986), reprinted in 37 Int'l. Dig. Hlth. Legis. 943 at 945 (1986) (urging Council of Europe member states to forbid "the creation of children from people of the same sex"). See also supra n. 65.


75. As Parpalaiix demonstrates, the government may act as dispute arbiter, medical licensor/certifier, public financier and analyst, or service provider.

76. See, e.g., Fortune, 17 Sept. 1984 at 41, and Wall St. J., 2 July 1986 at 32, col. 1. (For profit company contracts to provide embryo transfers at $10,000/attempt and intends to patent embryo transfer as medical procedure).

77. See supra n. 6. Compare Sweden and OLRC, supra, n. 73.
technologies. That history suggests that once the medical profession develops and diffuses a technology as a means of treating infertility\textsuperscript{78} its use attains notoriety, and becomes perceived as complementing or as upsetting ways that have long constituted the natural procreative and familial order. We have seen that artificial insemination by husband was initially condemned, as was AID, as repugnant to natural law.\textsuperscript{79} In the extreme the technology may be welcomed or rejected as a byproduct of new mores that challenge cherished customs, beliefs and values. The challenge may result in legal and ethical uncertainties that shade the rights and duties of affected parties. Should CECOS return the test tubes to Ms. Parpaitx? Conflicts that emerge from the uncertainty may then break dramatically before the public in the form of technology forcing "the law" to decide novel issues. Thus, the dilemmas of those caught between seemingly dated legal norms and futuristic medical practices at once trigger calls for the prohibition of particular practices and calls for legal reform.

These Parpaitx-like issues and tensions have reverberated in the societal debate that has ensued since Parpaitx was decided. There have been calls for prohibitions. In 1986, the National Committee on Bioethics recommended a moratorium on some research involving human embryos.\textsuperscript{80} More recently, in the face of evidence that the formal nullity of surrogate motherhood contracts\textsuperscript{81} has not discouraged the practice, have come ministerial calls and judicial processes to penalize and formally prohibit the arrangements.\textsuperscript{82}

There have also been calls for reform. The National Committee recently recommended that IVF centers be regulated to operate strictly on a non-profit basis.\textsuperscript{83} A report recently written for the Prime Minister recommended that legislation — paralleling the altruistic philosophy of the CECOS protocols — be enacted to affirm gamete donating as an unremunerated activity, and to penalize those who engage in a commerce of gametes or embryos.\textsuperscript{84}

Hence, France has continued to confront the artificial procreation technologies since its autumn 1984 pronouncements in
Parpalaix. Internationally, it has successfully advocated human rights analysis as a guiding principle to illumine artificial procreation conflicts and their resolution.85 Domestically, the Ministries of Justice and Health have coordinated multidisciplinary conferences on the ethics and legalities of the technologies,86 and the judiciary has offered some pronouncements.87 Though Parliament has yet to enact legislation, the work of legislative drafting groups within the Conseil d'Etat suggests that legislation or regulations in 1988, is likely.88 In short, France deliberates and debates.

IV. CONCLUSION: MODELS FOR CHOICE

The deliberation and debate in France may yield affirmative decisions. Indeed, from a decision-making perspective, the French process and approach enunciates at least four models of societal response to artificial procreation issues: a medical professional standards model, an adjudicatory model, an ethical commission/ad hoc committee model, and a public law model. Each model has strengths and limits. French reliance on each has, accordingly, evolved.

The 1973 CECOS protocols, for example, illustrate initial French reliance on a medical professional standards model to respond to issues raised by AID. Functionally, the model means that the minimal standards of the medical profession are adapted as legal and societal guides.

The professional model imparts strengths and limits. Patients and society need deliberative, expert opinion on the efficacy, risks, benefits, and alternatives of treatment procedures. The medical profession is especially well-qualified to provide such information and should, for example, provide more information on preventing infertility as well.

There are limits to the professional standards model. First, a consensus of medical practice and opinion may not precede popular

diffusion of technology. Second, even when it exists, customary medical practice may inadequately protect the multiple interests implicated by an artificial reproduction technology. U.S. practitioners' reluctance to perform rigorous venereal and genetic disease testing of sperm donors underlines the difficulty. Third, the professional competition and technological glamor that seems to surround artificial reproduction medicine raises questions of whether practitioners always have the best medical interests of their infertile patients as the foremost priority in the development of artificial reproduction practices. Fourth, professional standards may over-reach their useful authority by declaring an issue medical when the issue is largely ethical or legal.

_Parpaix_ and French case law on artificial insemination underscore the latter point. The case arose, in part, due to the limits of the medical standards model to address extra-medical, legal, issues. The medical restrictions in _Parpaix_ were partially challenged by a human rights-duties discourse brought before the courts for its adjudicatory model of dispute resolution. _Parpaix_ thus demonstrates a shift to an adjudicatory model to help answer some artificial procreation questions.

Formal court consideration of and pronouncements upon _Parpaix_-like issues have merit. The pronouncements help eliminate legal uncertainty. Courts may draw on relevant jurisprudential experience to resolve discrete artificial procreation disputes. To the extent courts are relatively independent from majoritarian pressures, moreover, they perhaps best protect the rights and privileges of those exercising unorthodox family choices. Perhaps Ms. Parpaix would confirm this. Courts may also police medical practice, by holding individual practitioners to "the reasonable medical standard," which may necessitate changes when customary practice is clearly inadequate. Finally, the adversarial, systematic presentation of principled arguments before a neutral arbiter, who renders written opinions supporting the ruling and remedy, proves an especially helpful societal process for narrowing and resolving bipolar...


90. The power to declare a reproductive issue medical and to pronounce thereon, likely ensures that the medical professional standards model will remain predominant in societal responses to artificial reproduction issues. See, e.g., "Avis sur les Embryons," supra n. 74 at 885, and AFS, supra n. 59 at 55S (declaring embryo freezing and surrogate motherhood experimental).

91. See supra text accompanying n. 20.
disputes.\textsuperscript{92}

Of course, the adjudicatory model has limits. Important, unresolved issues often do not come before the courts. When they do, the reactive, fact-specific and outcome-erratic nature of adjudication limits society from comprehensively remediying singular or related legal issues.\textsuperscript{93} Adjudication partially depends on relevant, developed bodies of law. Yet the existing bodies of law may not be sufficiently developed or analogous, and may be invoked to mask fundamental value conflicts and choices.\textsuperscript{94} Finally, as with the professional standards model, the adjudicatory model is not designed to probe the ethical issues of artificial procreation.

For such reasons, France has recently turned to its National Committee on Bioethics. The committee illustrates the potential of the ethical commission or ad hoc committee model to address artificial procreation issues.\textsuperscript{95} When, for instance, multidisciplinary ad hoc committees combine medical, legal, ethical, theological, lay-person thought and resources into concentrated study. The committees may respond to existing practice, anticipate future issues, advise on a range of hypotheticals. Their approach may be sufficiently broad to define general philosophy and sufficiently narrow to examine discrete issues. If they are purely advisory, societal acceptance of their views depends on intellectual, moral suasion.

Of course, the ethical commission/ad hoc committee model has limits as well. The breadth of committee thought and inquiry largely depends on its mandate, composition, process, and independence. The Ontario Law Reform Commission mandate and composition was legal, though its deliberative process involved consultation with and commentary from medical and religious bodies.\textsuperscript{96} The French Bioethics Committee is multidisciplinary.\textsuperscript{97} Even if commissions or committees adopt a multidisciplinary and public participation approach, however, the tendency to rely on the views of established luminaries in the face of controversy risks ultimately excluding legitimate, unorthodox views and values.

Finally, France has turned to a public law response to artificial reproduction issues. By public law, I refer to parliamentarian and ministerial initiative whose legal authority derives from underlying administrative, statutory, or constitutional law. A major strength of


\textsuperscript{93} See id. at 394-95.

\textsuperscript{94} See Calabresi, A Common Law for the Age of Statutes 172 (1982).


\textsuperscript{96} See OLRC, supra n. 73 at 6.

\textsuperscript{97} See supra n. 4.
the public law model lies in its potential to address related ethical, legal, medical, policy issues comprehensively and prospectively. This contrasts distinctly with the adjudicatory model. The public law model may thus fix future rights, duties, and outcomes. Of course, it depends on political will and high consensus: first, on the need for public action; second, on the need for particular remedies. Quebec and some U.S. jurisdictions have statutorily addressed the filiation issues of AID;98 France has not, despite legislative proposals to do so.99

Absent high consensus, the public law model encounters difficulty, meaning that the deep controversies surrounding some artificial reproduction issues tend to make legislating substantives outcomes politically inexpedient and practically unlikely.100 The process side of the public law model should prove more helpful in the face of such controversy. Despite the inherent dangers of partisan and majoritarian influences, an open public law process serves important educative functions because it is relatively well-equipped to amass facts, receive and digest divergent public views, and generally orchestrate public debate and alternative policy approaches. The French National Committee on Bioethics is a creature of public law and politics, as are the inter-ministerial conferences coordinated by the Ministry of Justice.

In all, the public law, ad hoc committee, adjudicatory, and medical professional standards models illustrate four imperfect societal tools for responding to the legal and policy challenges of artificial procreation. The recent reliance of France on the ad hoc committee and public law models may prove especially helpful at probing ways to affirm and reconcile competing and evolving notions of family, autonomy, and community, which animate current controversies. Parpalaix demonstrates that each substantive issue warrants creative scrutiny if only because each is so value-laden. Creative use of the models should advance that task. Like many legal tools, they may be invoked to prescribe substantive outcomes or to prescribe procedures and processes for making decisions. The models do not guarantee correct decisions. The strengths and limits of each make them dynamic, interactive, evolutionary. New, refined models shall emerge. For now, however, the existing models offer needed if rudimentary approaches to deliberating the merits of some hard and privileged choices.

98. See § 4 of the Uniform Parentage Act, supra n. 57, and art. 586 of the Quebec Civil Code, supra, n. 39.
99. See, e.g., Proposition de Loi de M. Ferratti, presented to the National Assembly in 1978.
100. See, e.g., supra n. 54.