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# CULTURAL PRIORITIES REVEALED: THE DEVELOPMENT AND REGULATION OF ASSISTED REPRODUCTION IN THE UNITED STATES AND ISRAEL

*Ellen Waldman*

## INTRODUCTION

Although the birth of Louise Brown, the world's first test-tube baby,<sup>1</sup> was England's singular achievement, Assisted Reproductive Technology (ART) is now a global industry. Advances in the scientific facilitation of conception offer individuals and infertile couples<sup>2</sup> a cornucopia of options, ranging from the relatively low-tech process of artificial insemination (AI) to the more complex mixing and matching involved in *in vitro fertilization* (IVF) and surrogacy.<sup>3</sup> The growing

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<sup>1</sup> Louise Brown was born in 1978 in Oldham, England. Her *in vitro* birth resulted from collaboration of Oldham gynecologist, Patrick Steptoe, and two Cambridge physicians, Robert Edwards and Barry Bavister. Ms. Brown's own views regarding her provenance capture modern ambivalence over our new-found control over the procreative process. When interviewed in her twenties about the forward march of the new ART frontiers, Ms. Brown stated that if she proved to be infertile, she would not avail herself of the new technologies. See BabyCenter, *Babies of the Century, Science Makes Miracle Babies, Louise Brown*, <http://www.babycenter.com/general/9811.html> (last visited Jan. 12, 2006).

<sup>2</sup> Infertility is traditionally defined as the inability to get pregnant after one year of unprotected sex. MILLER-KEANE ENCYCLOPEDIA & DICTIONARY OF MEDICINE, NURSING, & ALLIED HEALTH 927 (Marie T. O'Toole ed., Elsevier Science 7th ed. 2003). Although "infertility" refers to heterosexual couples being unable to conceive for physiological reasons, ART techniques are also used by single women seeking to mother, but not mate, as well as, lesbians and gay men who wish to become parents.

<sup>3</sup> Artificial insemination is a non-surgical procedure whereby sperm from someone other than the woman's husband is placed in her cervix or uterus. See Mathew Tomlinson & Chris Barratt, *Donor Insemination*, in GOOD CLINICAL PRACTICE IN ASSISTED REPRODUCTION 86, 86-96 (Paul Serhal & Caroline Overton eds., 2004). *In vitro fertilization* involves retrieving a woman's eggs, fertilizing them in a culture dish, and transferring the fertilized eggs back into the woman's uterus. See Tim J. Child et al., *Techniques for IVF*, in GOOD CLINICAL PRACTICE IN ASSISTED REPRODUCTION 129, 129-42 (Paul Serhal & Caroline Overton eds., 2004). Last, surrogacy involves having a woman, other than an intended mother, gestate and deliver

ingenuity and efficacy of fertility-enhancing therapeutics has spurred the development of markets in gametes,<sup>4</sup> surrogates,<sup>5</sup> and advanced clinical techniques.<sup>6</sup> At the same time, it has challenged each nation to answer the puzzling question: what stance should we take toward these developing markets? Do we celebrate our growing power over the “natural” processes of reproduction, or fear its hubris? Do we seek to expand every individual’s capacity to achieve biological parenthood, or view reproductive potential as appropriately bounded?

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the baby. In this situation, the egg can be harvested from the intended mother, the surrogate, or another woman; and the sperm can likewise be from any source. See Peter R. Brinsden, *Surrogacy*, in GOOD CLINICAL PRACTICE IN ASSISTED REPRODUCTION 199, 199-207 (Paul Serhal & Caroline Overton eds., 2004). See also AM. SOC’Y FOR REPROD. MED., THIRD PARTY REPRODUCTION (DONOR EGGS, DONOR SPERM, DONOR EMBRYOS, & SURROGACY): A GUIDE FOR PATIENTS 4, 13 (1996), available at <http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf>.

<sup>4</sup> There are 428 fertility clinics in the U.S., reporting over 115,000 cycles performed annually. Ninety-nine percent of these clinics offer IVF treatment; 90 percent offer egg donation and implantation; and 60 percent provide embryo transfer treatments. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 13, 71 (2004), available at <http://www.cdc.gov/ART/ART02/PDF/ART2002.pdf>.

<sup>5</sup> A brief jaunt down the information super-highway reveals numerous matchmaking sites for surrogates and intended parents. Surrogates interested in plying their services may either post ads on the internet or visit an attorney or broker who will assist in pairing them with an interested couple. See Law Offices of Theresa M. Erickson, <http://www.surrogacylawyer.net/surrogate.htm> (last visited Jan. 12, 2006) and The American Surrogacy Center, <http://www.surrogacy.com> (last visited Jan. 12, 2006).

<sup>6</sup> The ability to manipulate gametes has spawned a full menu of clinical procedures available to individuals and couples suffering biological impediments to conception. Gamete intrafallopian transfer (GIFT) is similar to IVF, but the combined egg and sperm are placed in the fallopian tubes prior to fertilization. Combining characteristics of IVF and GIFT, in zygote intrafallopian transfer (ZIFT) fertilization occurs in the culture dish, but the zygote is placed in the fallopian tubes, rather than in the uterus. See Ehab Kelada & Ian Craft, *Alternatives to In Vitro Fertilization: Gamete Intrafallopian Transfer and Zygote Intrafallopian Transfer*, in GOOD CLINICAL PRACTICE IN ASSISTED REPRODUCTION 256, 256-63 (Paul Serhal & Caroline Overton eds., 2004). In intracytoplasmic sperm injection (ICSI), a single sperm is injected directly into the cytoplasm of a mature egg. Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?* 2004 UTAH L. REV. 57, 58 n.4 (2004). The newest innovation in fertility therapies is egg freezing, which allows women to delay child-bearing choices, avoid entanglements with sperm donors, and ensure the availability of high quality eggs. The freezing and thawing process is still a work in progress, but some clinics have reported an 80 percent success rate in thawing viable eggs. See Claudia Kalb, *Fertility and the Freezer*, NEWSWEEK, Aug. 2, 2004, at 52, available at <http://www.msnbc.msn.com/id/5505094/site/newsweek>.

A nation's approach to the burgeoning ART industry reflects deep-rooted cultural imperatives.<sup>7</sup> Choices regarding how ART should be regulated and funded, as well as how ART-related disputes should be mediated, reflect both specific attitudes toward family and parenthood, as well as broader notions about the role of the state in encouraging or impeding novel family forms. A nation's religious character, history, and culturally idiosyncratic response to world events all play a role. A brief survey of countries wealthy enough to nurture a technology-intensive fertility industry reveals a wide variety of practices. Countries with strong ties to the Catholic Church generally adopt restrictive policies, in deference to the faith-based notion that creating life falls within God's exclusive jurisdiction.<sup>8</sup> More secular nations

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<sup>7</sup> The term "culture" has many definitions. Traditionally, it is thought to embody the shared perceptions of a given people. A slightly more precise label, offered by anthropologists Spradley and McCurdy, maintains that culture contains the "categories, plans and rules people employ to interpret their world and act purposefully in it." CONFORMITY AND CONFLICT: READINGS IN CULTURAL ANTHROPOLOGY 2-3 (James Spradley & David W. McCurdy eds., Allyn & Bacon 2005) (1974). Additionally, anthropologist John Bodley has argued that all culture includes the following properties: it is shared, learned, symbolic, transmitted cross-generationally, adaptive, and integrated. JOHN H. BODLEY, CULTURAL ANTHROPOLOGY: TRIBES, STATES, AND THE GLOBAL SYSTEM 9-10 (3rd ed. 2000).

<sup>8</sup> Thus, Italy and Austria have adopted stringent controls on ART use while a recently empanelled commission in Ireland has called for regulation of that country's nascent ART industry. In Italy, for instance, government funded clinics may only perform fertility procedures that utilize the sperm and egg of a married couple, and doctors are forbidden from artificially fertilizing single or widowed women and lesbians. Mary E. Canoles, Comment, *Italy's Family Values: Embracing the Evolution of Family to Save the Population*, 21 PENN. ST. INT'L L. REV. 183, 194 (2002); See also Clara Park, *Italy Holds Referendums on Assisted Reproduction*, WOMEN'S ENEWS, Apr. 18, 2005, <http://www.womensenews.org/article.cfm/dyn/aid/2261/context/archive> (last visited Jan. 13, 2006) (discussing Italy's Law 40 that "establishes the legal rights of an embryo," limits physicians to implanting a maximum of three fertilized embryos at one time, and "restricts artificial insemination to 'stable' heterosexual couples"). In Austria, IVF may not use sperm from a third party donor. Kathryn Venturatos Lorio, *The Process of Regulating Assisted Reproductive Technologies: What We Can Learn From Our Neighbors—What Translates and What Does Not*, 45 LOY. L. REV. 247, 263 (1999). Ireland is currently host to fewer than ten ART clinics. Services provided must be privately funded, and many providers are uncomfortable offering ART treatments to lesbians and single women. See COMM'N ON ASSISTED HUMAN REPROD., REPORT OF THE COMMISSION ON ASSISTED REPRODUCTION XI, 21 (2005). Article 40 of the Irish Constitution protects the "unborn" and it remains unclear how that provision will affect the production, storage and ultimate disposition of surplus embryos created during IVF or other procedures. Ir. CONST., 1937, art. 40.3.3, available at <http://www.taoiseach.gov.ie/upload/publications/297.htm> (last visited Nov. 13, 2005). The Commission recommends that "[a]ppropriate guidelines should be put in place by the regulatory body to govern the options available for excess frozen embryos. These would include voluntary donation

whose highest cultural priority is to protect individual dignity and personhood look askance at ART techniques they believe accord too little respect to early life forms.<sup>9</sup> And, countries with more communitarian, socialist traditions settle for a regime in which ART techniques are permitted, but heavily regulated and supervised by government agencies.<sup>10</sup>

The United States and Israel are widely regarded as possessing two of the most ART-friendly environments in the world. Both countries stand at the epicenter of fertility-related research and practice and support the supply and demand sides of the ART market with avidity.<sup>11</sup> Yet, the flourishing of ART in each country takes a different form, shaped by divergent legal and financial policies reflecting deeper cultural values.<sup>12</sup>

Israeli ART policies are unapologetically pronatalist. Baby-making in Israel is perceived as a positive good, and both religious and secular authorities are surprisingly supportive of medical technol-

of excess healthy embryos to other recipients, voluntary donation for research or allowing them to perish." COMM'N ON ASSISTED HUMAN REPROD., *supra*, at XV. It should be noted that adoption of this provision was not unanimous. *Id.*

<sup>9</sup> John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. OF TRANSNAT'L L. 189, 194-95 (2004) (noting that both World War II and "the searing experience of the Holocaust" have led Germany and other European nations to privilege the honor and dignity of all persons above the primacy of individual autonomy).

<sup>10</sup> See generally Loane Skene, *An Overview of Assisted Reproductive Technology Regulation in Australia and New Zealand*, 35 TEX. INT'L L. J. 31 (2000).

<sup>11</sup> A survey of the geographical distribution of publications in two leading journals in the infertility field, *Fertility and Sterility* and *Human Reproduction*, reveals that both the United States and Israel are highly prolific contributors. The United States produced the most publications in absolute numbers, accounting for 28 percent of all publications in both journals combined. Taking country size and wealth into account, however, Israel was most impressive, generating the greatest number of publications relative to its population and gross domestic product. See Jan A. M. Kremer et al., *Geographical Distribution of Publications in Human Reproduction and Fertility and Sterility in the 1990s*, 15 HUM. REPROD. 1653, 1655 (2000).

<sup>12</sup> John Robertson makes this point eloquently in his comparative work on American and German approaches to ART, embryonic stem cell research, cloning and preimplantation genetic diagnosis. Robertson notes that German law, congruent with European law, generally, is shaped by that region's transition from a feudal hierarchy with sharp status differentiations to a more democratic conception of individual worth. Consequently, honoring each individual's dignitary interests remains of paramount concern. In America, by contrast, the preservation of individual liberty and autonomy drives legal and political decision-making. As Robertson notes, "The reception of ARTs in the United States cannot be adequately understood without an appreciation of the country's long tradition of individual liberty, free market and free enterprise orientation, and grants of wide autonomy to physicians and other professionals." Robertson, *supra* note 9, at 192.

ogy capable of lending infertile women a procreative assist. Despite the conservative pull Jewish scripture exerts over Israeli law, the fertility industry in Israel services married couples, lesbians, and single women alike, and religious authorities appear complicit with providers in a “don’t ask—don’t tell” partnership of mutual avoidance. Fertility clinics do not keep statistics on the numbers of non-traditional families they help create and religious authorities have chosen not to agitate against the possible *Halachic*<sup>13</sup> violations implicit in ART activities. Beginning with the premise that government owes each citizen access to a minimum standard of healthcare, Israel defines ART as part of that basic package. To that end, Israel adopts ART-friendly legal and financial policies, while exacting a price from aspiring parents in terms of privacy and control.

In the United States, where government-sponsored healthcare is the exception, not the rule, free-market preferences combined with ambivalence about ART’s “brave new world” capacities yield an unruly, unregulated patchwork environment. This regulatory vacuum has allowed ART suppliers to offer their wares with little interference from either federal or state governments. ART consumers enjoy considerable choice and autonomy in deciding how to pursue parenthood, but they proceed in a caveat emptor environment with little financial assistance and scant legal protection. As in most arenas of American bioethics, concern for individual autonomy appears the predominant value.<sup>14</sup> Yet, in the unique area of assisted reproduction, the impulse to further procreative choice chafes against an ingrained suspicion of novel family forms.

This article takes a comparative approach to assisted reproduction practices and regulation in Israel and the United States, focusing on the imprint of cultural priorities on each nation’s legal framework and financial policies. Part I examines Israeli and American cultural features that influence emerging ART practices. Part II reviews the use and financing of artificial insemination and IVF in Israel and the United States, including the state’s role in the delivery of these services. Part III turns to ART’s aftermath—examining how disputes regarding the disposition of frozen embryos are handled in each country.

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<sup>13</sup> The *Halacha*, or religious laws of the Jewish people, consist of the *Torah*, the five books of Moses and two additional texts of *Talmud*, the *Mishnah* and the *Gemarah*. The latter two texts, dating from 100 B.C contain interpretations and commentary on the Torah. See JACQUELINE PORTUGUESE, *FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER, AND NATION* 45 (1998).

<sup>14</sup> See CARL E. SCHNEIDER, *THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS AND MEDICAL DECISIONS* (1998).

The swift pace of innovation in the fertility industry will force each nation to confront the disparate visions that ignite legal and ethical debate about ART. The future of ART will be shaped by how the culture wars in each country are fought and won. And, while it seems clear that culture will powerfully mark the development of ART, it remains unclear whether the relationship between national values and ART might someday become more mutually transforming. If today ART serves primarily as a map on which we can read a nation's cultural geography, perhaps in the future a nation's experience with ART will inspire change in traditional understandings of kinship, parenthood, and the state's role in facilitating family.

## I. CULTURAL CONTEXT

### A. Israel

Israeli culture sanctifies child-bearing as a crucial life task. As the head of Israel's largest IVF clinic commented, "In Israel, a family without children is nothing. . . . Couples who do not have children soon find themselves outsiders. They feel they have no place in society. . . ." <sup>15</sup> The cultural bias that defines life with children as meaningful and life without them as fundamentally lacking has religious, historical, psychological and political roots.

Religious mandates to "be fruitful and multiply" <sup>16</sup> echo throughout a number of authoritative Jewish texts. The curse of the barren woman unites several of the biblical matriarchs' narratives, reminding the reader that the quest for children reaches back to time immemorial. Sara, Rachael, Rebekah, and Hannah were all infertile, and their desperate desire for children guided their every action. Rebekah's misery prompted her husband, Isaac, to plead with God for a child, <sup>17</sup> while Rachel, overcome with disappointment over her childlessness, begged her husband "Give me children, or else I [will] die." <sup>18</sup> Sara and Rachel both gave their husbands to handmaidens to bring children into their household, <sup>19</sup> while Hannah importuned God herself, promising that if He gave her a son, she would give him back to do the

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<sup>15</sup> Nicky Blackburn, *I Will Become a Mother at Any Cost*, TIMES ONLINE, July 19, 2004, <http://www.timesonline.co.uk/article/0,,7-1181778,00.html> (last visited Jan. 13, 2006) (quoting Professor Shlomo Mashiach).

<sup>16</sup> *Genesis* 1:28 (King James).

<sup>17</sup> *Genesis* 25:21 (King James).

<sup>18</sup> *Genesis* 30:1 (King James).

<sup>19</sup> *Genesis* 16:2 (King James) (Sara); *Genesis* 30:3 (King James) (Rachel).

Lord's work.<sup>20</sup> In each case, God performs a miracle, taking pity on the childless woman, "remembering her,"<sup>21</sup> and opening her "closed womb"<sup>22</sup> so that she can conceive a child.

Reproduction as a means by which a tribe gains and consolidates power is also a powerful theme in the *Torah*. God's pact with the people of Israel is portrayed as a covenant of fertility, awarded in return for the Israelites' monotheism. God promises Abraham that fidelity, as marked by the practice of circumcision, will be rewarded with fecundity. "This is my covenant with you. You shall be the father of a multitude of nations. I will make you exceedingly fertile."<sup>23</sup> Later, Moses tells the wayward Israelites,

[I]f you do obey these rules . . . the Lord your God will maintain faithfully for you the covenant that He made on oath with your fathers. . . . He will favor you and bless you and multiply you. . . . You shall be blessed above all other peoples: there shall be no sterile male or female among you or among your livestock.<sup>24</sup>

Because biblical narratives such as these permeate Israeli culture, even most secular Israelis accept them as part of a foundational literary, cultural, and historic text. Those Israelis who may not accept or agree with every aspect of Jewish law are still subjected to a powerful current of pro-childbirth messages from childhood forward.

Israel's pro-creation perspective is further linked to the tragic history of the Jews in the last century. The Holocaust, which claimed the lives of six million Jews and wiped out nearly two-thirds of European Jewry,<sup>25</sup> catalyzed Israel's existence and looms large in the

<sup>20</sup> 1 *Samuel* 1:11 (King James).

<sup>21</sup> When Hannah finally became pregnant, it was because "the Lord remembered her." 1 *Samuel* 1:19 (King James).

<sup>22</sup> See *Genesis* 29:31 (King James) (Leah) and *Genesis* 30:32 (King James) (Rachel).

<sup>23</sup> *Genesis* 17:4, 6 (King James). After telling Abraham "I will multiply you exceedingly," God demands, "on your part, you and your descendants after you must keep my covenant throughout the ages . . . every male among you shall be circumcised . . . and that shall be the mark of the covenant between you and me." *Genesis* 17: 10-11 (King James).

<sup>24</sup> *Deuteronomy* 7:12-14 (King James). Because a large family will consolidate status and wealth of the family line, a blessed man's wife "shall be a fruitful vine; and children like olive plants around the table." *Psalms* 128:3 (King James).

<sup>25</sup> Over three million Jews were killed in gas chambers in extermination camps; others faced death by shooting, random acts of terror, and starvation. Nancy S. Williams, Comment, *Political Question or Judicial Query: An Examination of the Modern Doctrine and Its Inapplicability to Human Rights Mass Tort Litigation*, 28



nation's collective consciousness. Enormous pressure exists to "replace" that lost population, creating new family trees in recognition of the many families whose genealogies came to a crushing end in the Nazi death-factories.<sup>26</sup>

Concerns that intermarriage and assimilation are diluting Jewish identity also figure into supportive attitudes toward Jewish reproduction. A 1990 survey sponsored by the United Jewish Communities and the Jewish Federation system reported that over half of all "born Jews" were married to non-Jews. This statistic prompted vocal handwringing and campaigns to reverse assimilationist trends seen as "destr[oying] the Jewish people in a microcosmic way."<sup>27</sup> Despite official condemnation by religious<sup>28</sup> and

PEPP. L. REV. 849, 850 n.5 (2001) (citing United States Holocaust Memorial Museum, <http://www.ushmm.org/outreach/fsol.htm> (last visited July 10, 2005)). See also DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 4 (1996). Nearly five thousand communities were destroyed and cities that had for centuries prospered as centers of Jewish learning and culture were razed flat. For instance, Jews had been in Lithuania since 997. Starting in 1941, a genocidal extermination effort spanning three years, wiped out 96 percent of the Jewish population. Samoilas Kacas & Mause Bairakas, *The Kaunas Jewish Religious Community Report* (2004), [http://www.wcjs.org/materials/311004/Jews\\_in\\_Lithuania.doc](http://www.wcjs.org/materials/311004/Jews_in_Lithuania.doc). Likewise, prior to WWII, Warsaw had been home to the largest number of Jews in any city in Europe. In a single day, over fifty-six thousand Jews in Warsaw were killed and their homes destroyed, along with the Great Synagogue. As the German General Strop succinctly stated in his telegraph back to Berlin, "[t]he former Jewish quarter of Warsaw has ceased to exist." Peter K. Gessner, *For Over Two Months . . .*, available at <http://info-poland.buffalo.edu/classroom/uprising.html> (last visited Dec. 30, 2005).

<sup>26</sup> SUSAN MARTHA KAHN, *REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL* 4 (2000).

<sup>27</sup> RHODA ANN KANAANEH, *BIRTHING THE NATION: STRATEGIES OF PALESTINIAN WOMEN IN ISRAEL* 45 (2002) (citing Craig Horowitz, *Are American Jews Disappearing?*, N. Y. TIMES MAG., July 17, 1997, at 108).

<sup>28</sup> Jewish law, considered binding by Orthodox and Conservative Jewry, forbids intermarriage and Orthodox leaders are prohibited from officiating at interfaith weddings. See JUDY PETSONIK & JIM REMSEN, *THE INTERMARRIAGE HANDBOOK: A GUIDE FOR JEWS AND CHRISTIANS* 64-65 (1988). See also Shelley Leveson & Cecily Ruttenberg, *Marrying Outside the Tribe—A Growing Trend*, JEWISH COMMUNITY NEWS, June 2004, available at [http://www.jewishsiliconvalley.org/jcn/06\\_2004/intermarriage.html](http://www.jewishsiliconvalley.org/jcn/06_2004/intermarriage.html). While Reform rabbis are authorized to preside over marriages between Jews and non-Jews, an estimated half of them choose not to. Julie Wiener, *Survey: Intermarriage Acceptance Growing*, JEWISH TELEGRAPHIC AGENCY, Oct. 31, 2000, at 1. Textual support for this prohibition comes from the writings of Ezra, who counseled Israeli men to divorce their non-Jewish wives. When Ezra returned to rebuild the commonwealth he admonished, "So now, do not give your daughters to their sons, and do not wed their daughters to your sons. . . ." *Ezra* 9:12 (King James). "[S]eparate yourselves from the people of the land, and from the strange wives." *Ezra* 10:11 (King James).

political leaders,<sup>29</sup> the intermarriage rate among American Jews—a significant portion of world Jewry<sup>30</sup>—appears to have stabilized at around 52 percent,<sup>31</sup> causing concern that absent a rise in Jewish-baby-making, Jewish traditions, identity,<sup>32</sup> life-styles, and cohesion will ultimately become extinct.<sup>33</sup>

Politically, Israel's unique status as a democratic Jewish state with a burgeoning minority population of Israeli Arabs also pushes toward a pronatalist stance. Anxiety over Israel's "demographic time-bomb"

<sup>29</sup> See, e.g., Daniel J. Elazar, *Backing Into A Jewish Majority in Israel*, <http://www.jcpa.org/dje/articles2/majority.htm> ("It is one of the saddest ironies of our times that . . . the Jewish people are in the midst of a demographic self-destruction of major proportions"). See also *WHEN VICTIMS RULE: A CRITIQUE OF JEWISH PRE-EMINENCE IN AMERICA* ch. 15, <http://holywar.org/jewisht/15assim.htm> (last visited Jan. 14, 2006) ("Any rabbi who officiates [at an intermarriage] is approving it. It will destroy the character, the uniqueness of the Jewish people, which we are obligated to perpetuate'. . . . 'No Judaism, halikhic or otherwise sanctions marriage between Jews and non Jews without threatening Jewish continuity at its foundations.'") (citations omitted).

<sup>30</sup> There are 5.2 million Jews in the United States and 5.5 million in Israel. These are the two largest centers of Jewry in the world. *After 1,000 Years, Israel is Largest Jewish Center*, *ISR. NAT'L NEWS*, May 1, 2005, available at <http://www.arutzsheva.com/news.php3?id=81071>.

<sup>31</sup> See United Jewish Cmty's: The Fed'n's of N. Am., *NJPS: Differences with the 1990 NJPS Highlights Report*, [http://www.ujc.org/content\\_display.html?ArticleID=83912](http://www.ujc.org/content_display.html?ArticleID=83912) (last visited Jan. 14, 2006) (explaining that close examination of the 2000-2001 research data reveals a 52 percent intermarriage rate, which is the same as the data gathered in 1990, despite the fact the 2000-2001 report initially reported a 43 percent intermarriage rate; the discrepancy is attributable to a narrower definition of "born Jews" employed in the latter study).

<sup>32</sup> Concerns that intermarriage results in children with weaker religious and/or cultural identity appear valid. For example, in an extensive survey of college freshman, conducted in 2001 and sponsored by the Hillel Foundation for Jewish Campus life, researcher Linda J. Sax found that over 92 percent of subjects with two Jewish parents self-identified as being Jewish, whereas subjects with only one Jewish parent did so at a much lower rate. Thirty-seven percent with only a Jewish mother self-identified as Jewish, while only 15 percent with only a Jewish father did so. LINDA J. SAX, *AMERICA'S JEWISH FRESHMEN: CURRENT CHARACTERISTICS AND RECENT TRENDS AMONG STUDENTS ENTERING COLLEGE 54* (2002), available at [http://www.hillel.org/Hillel/NewHillel.nsf/fcb8259ca861ae57852567d30043ba26/0ef7a4133951f0ba85256bdc004ca04b/\\$FILE/AJF\\_web.pdf](http://www.hillel.org/Hillel/NewHillel.nsf/fcb8259ca861ae57852567d30043ba26/0ef7a4133951f0ba85256bdc004ca04b/$FILE/AJF_web.pdf).

<sup>33</sup> To combat this trend toward intermarriage and assimilation, the Israeli government, in conjunction with funding from various Jewish organizations in America, initiated a two hundred million dollar program, called "Birthright Israel," to give young American Jews round-trip airfare to Israel to strengthen their bond with Israel and Judaism. See generally the funding description at Taglit-birthright Israel, <http://www.birthrightisrael.com> (follow "About Us" hyperlink). Another program, called "Newlywed Israel Incentive" provides Jews who marry with \$2,000 to take their honeymoon in Israel. Ron Hayes, *Israel Honeymoon Stipends Help Teach Faith*, *PALM BEACH POST* (FL.), July 24, 2000, at 1B.

dates back almost to Israel's birth, when Jews constituted roughly 86 percent of Israel's population.<sup>34</sup> In 1949, the state sought to raise the Jewish birth rate by establishing an award for "heroic mothers" who bore at least ten children.<sup>35</sup> Interest in incentivizing childbirth continued throughout Ben Gurion's nearly fifteen-year reign as prime minister,<sup>36</sup> leading, in 1968, to the establishment of a demographic center within the prime minister's office devoted to the goal of increasing Jewish reproduction.<sup>37</sup>

If anything, the consistent gulf between Jewish and Arab birth-rates has heightened Israel's "demographic obsession."<sup>38</sup> Average Jewish birth rates have declined from a rate of 3.9 births per woman in the early 1950s to a consistent flat-line of 2.8.<sup>39</sup> Births to Arab Muslim women peaked at 9.3 in the mid-1960s but fell dramatically to reach a rate of 4.6 twenty years later, where it remains to the present day.<sup>40</sup> Even with the decline in Arab fertility rates, Israeli demographers estimate that without dramatic changes in the configuration of state borders, Jews will comprise only 42 percent of Israel's population by the year 2020.<sup>41</sup>

<sup>34</sup> Israeli Central Bureau of Statistics, Statistical Abstract of Israel, No. 55, at 5, available at <http://www.israelipalestinianprocon.org/populationpalestine.html> (last visited Dec. 30, 2005).

<sup>35</sup> NUR MASALHA, *A LAND WITHOUT A PEOPLE: ISRAEL, TRANSFER AND THE PALESTINIANS 1949-96* 144 (1997). The award was discontinued when it became evident that Arab women were the consistent recipients. *Id.*

<sup>36</sup> DOV FRIEDLANDER & CALVIN GOLDSCHIEDER, *THE POPULATION OF ISRAEL* 120-22, 130-38 (1979).

<sup>37</sup> NIRA YUVAL-DAVIS, *ISRAELI WOMEN AND MEN: DIVISIONS BEHIND THE UNITY* 61 (1982). See also FRIEDLANDER & GOLDSCHIEDER, *supra* note 36, at 138.

<sup>38</sup> Will Youmans, *Understanding the Existential Threat: Israel's Demographic Obsession*, COUNTERPUNCH, Dec. 7, 2002, <http://www.counterpunch.org/youmans1207.html>; Elisha Efrat, *Demographic Obsession over Jerusalem*, NEW MIDDLE EAST MAG., Apr. 1994, at 30; Michael Freund, *Opinion, Bordering on Obsession*, JERUSALEM POST, Dec. 18, 2002, at 9, available at <http://web.israelinsider.com/Views/1761.htm>.

<sup>39</sup> See Dov Friedlander, *Fertility in Israel: Is the Transition to Replacement Level in Sight?*, in *COMPLETING THE FERTILITY TRANSITION* 440, 441-43 (2002), available at <http://www.un.org/esa/population/publications/completingfertility/RevisedFriedlanderpaper.PDF>. See also Ruth Landau, *Israel: Every Person has the Right to Have Children*, in *THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES* 129, 130 (Eric Blyth & Ruth Landau eds., 2004).

<sup>40</sup> Friedlander, *supra* note 39, at 443.

<sup>41</sup> ARNON SOFFER, *ISRAEL, DEMOGRAPHY 2000-2020: DANGERS AND OPPORTUNITIES* 18 (2001). See also Hasan Abu Nimah, *Defusing Israel's "Demographic Bomb"*, ELECTRONIC INTIFADA, Mar. 9 2005 (noting Palestinian population in Israel and occupied territories exceeds 5.3 million, while the Jewish population is 5.2 million; behind Israel's Green line, the population breaks down as follows: 5.2 million Jews, 1.3 million Israeli Arabs, and 290,000 other minorities).

Fear that Arab encroachment on majority status will create a tipping-point, altering Israel's character as a Jewish State, has led to a spate of political proposals that may radically reshape this corner of the Middle East. The withdrawal of settlements in Gaza<sup>42</sup> and other movements toward disengagement<sup>43</sup> from the occupied territories signal a recognition that Israel's democratic commitments don't square with the "demographics on the ground." Still, until more dramatic land reforms occur, the political arithmetic that tallies new-born babies as a rough proxy for political dominance will continue to focus attention and garner support for reproductive interventions such as ART.

### B. United States

If Israel's approach to ART reflects a deep commitment to child-bearing as a cultural imperative, American approaches reflect cultural allegiances that run in schizophrenic directions. Concern for individual choice and autonomy, suspicion of government regulation of market forces, and disinclination to support non-traditional families combine to create an awkward *mélange* of ART policies and procedures.

America's romance with autonomy is linked to its deep commitment to liberal individualism, a philosophy that seeks to maximize individual liberty. According to this philosophy, individuals should be granted wide latitude in their activities and barred only from actions that trench upon the rights of others.<sup>44</sup> This expansive view of individual agency questions the existence of a societal "common good" apart from the interests of individual members, and shrinks from claims made on behalf of the community.<sup>45</sup> Government is thinly con-

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<sup>42</sup> See *Israel Completes Gaza Withdrawal*, BBC NEWS, Sept. 12, 2005, [http://news.bbc.co.uk/2/hi/middle\\_east/4235768.stm](http://news.bbc.co.uk/2/hi/middle_east/4235768.stm) (reporting departure of Jewish settlers and Israeli troops from the Gaza strip thirty-eight years after annexation).

<sup>43</sup> See *Ariel Sharon's Disengagement Plan*, MIDEASTWEB GATEWAY, Apr. 14, 2004, <http://www.mideastweb.org/disengagement.htm> (proposing withdrawal from Gaza and four settlements in the West Bank).

<sup>44</sup> See Roger B. Dworkin, *Getting What We Should from Doctors: Rethinking Patient Autonomy and the Doctor-Patient Relationship*, 13 HEALTH MATRIX 235, 238 (2003) (quoting John Stuart Mill's statement, "my right to swing my fist stops at your nose").

<sup>45</sup> Liberalism's emphasis on the individual over the community is well articulated by Carlos Ball in distinguishing liberal from communitarian theory. See Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 113 (2005). As Ball notes,

Liberalism views the self as fully constituted prior to its attachments to others. In other words, the most important shared capacities of human beings

ceived<sup>46</sup> as existing primarily to support self-definition by “unencumbered” rights-bearing individuals.<sup>47</sup> Market regulation and other constraints on economic and political actors are viewed with suspicion and a rights-oriented discourse predominates.<sup>48</sup>

Bioethics, the field most instrumental in shaping medical advances, including ART, has particularly strong links to liberal individualism. An off-shoot of the civil rights movements of the 1960s, bioethics was nurtured by the same revolutionary impulses that challenged the social subordination of blacks and women.<sup>49</sup> Animated by a desire to destabilize existing power structures in the medical sphere, philosophers, lawyers, and other activists turned their attention to physician paternalism and patient rights.

Bioethics began by questioning physicians’ decisional authority in the doctor-patient relationship and enhancing patients’ rights to determine the course of their care.<sup>50</sup> Advancing from that initial beach-

pre-exist relationships with others or membership in groups. Liberal theory, therefore, views individuals as existing separately and independently from others. For liberalism, a regime of government and laws must protect what it views to be a condition of freedom and autonomy that pre-exists the state.

*Id.*

<sup>46</sup> See, e.g., JOHN STUART MILL, ON LIBERTY 9 (1869) (stating “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”).

<sup>47</sup> MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 12 (1996) (critiquing liberal theories of the self that fail to recognize constitutive moral obligations to family, tribe, and community. Individuals, according to Sandel, should be viewed as fundamentally “encumbered” by relational obligations whose nurturance is also essential for meaningful self-governance).

<sup>48</sup> MARY ANN GLENDON, RIGHTS TALK: IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. . . . In its neglect of civil society, it undermines the principal seedbeds of personal and civic virtue.

*Id.*

<sup>49</sup> See Alan Meisel, *Managed Care, Autonomy, and Decisionmaking at the End of Life*, 35 HOUS. L. REV. 1393, 1398 (1998-1999); ALBERT R. JONSON, THE BIRTH OF BIOETHICS (1998).

<sup>50</sup> All of bioethics’ central projects relate to expanding patient capacity for self-governance. The doctrine of informed consent, probably bioethics’ most salient achievement, divests physicians of the right to make decisions on a patient’s behalf and facilitates patient self-rule by requiring physicians to share sufficient information to permit patients to make knowing, informed choices. See *Canterbury v. Spence*, 464 F.2d 772, 787-89 (D.C. Cir. 1972). The legal and ethical doctrines guiding end-of-life decision-making strive to maintain decisional power in the hands of competent pa-

head, bioethics has worked to ensure patients maximal self-governance in their role as research-subjects, in end-of-life care,<sup>51</sup> and in the aftermath of medical error. And, while American bioethics has come under attack for being unduly obsessed with autonomy,<sup>52</sup> its individualistic orientation, nonetheless, continues to shape its approaches to innovations in reproductive technology.

Although powerfully felt preferences for autonomous choice and unfettered markets are consistent with liberal individualism, these preferences, in the ART context, hit cross-currents that tug in opposite directions. Fear that reproductive technology might lead to the overthrow of traditional family forms pushes toward constraints on ART use. A laissez-faire ideology that would preserve a free market in ART delivery and consumption bumps up awkwardly with concerns about ART's subversive potential. Together, these schizophrenic impulses have led to a relatively unregulated legal environment, pock-marked by case law and statutory initiatives that accept ART use for married heterosexuals, but express hostility to the myriad novel family forms that ART helps bring into being.

The bias against untraditional family forms appears to have deep historical roots. It mixes traditional gender stereotypes about the ability of women to function effectively without men with rigid notions about what children need to grow up happy and healthy. These in-

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tients and to ensure decision-making for incompetent patients remains true to their previously expressed wishes. *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990). Moves toward physician-assisted suicide are likewise prompted by concerns that legal impediments should be removed from suffering patients who seek to determine the time and manner of death. *See OR. DEP'T OF HUMAN SERVS., FIFTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 13* (Katrina Hedberg & Melvin Kohn eds., 2003), <http://egov.oregon.gov/DHS/ph/pas/docs/year5.pdf>. The Supreme Court has deferred to the states in determining whether to approve of or ban assisted-suicide. *See Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793, 808-09 (1997).

<sup>51</sup> *See* Bruce Jennings, *The Liberal Neutrality of Living and Dying: Bioethics, Constitutional Law, and Political Theory in the American Right-to-Die Debate*, 16 J. CONTEMP. HEALTH L. & POL'Y 97, 97 (1999).

<sup>52</sup> Daniel Callahan, *Bioethics: Private Choice and Common Good*, 24 HASTINGS CENTER REP., May-June 1994, at 28, 28 (criticizing bioethics for its "tendency to reduce the problem of the common good to justice, and the individual moral life to the gaining of autonomy"). *See also* Renee C. Fox & Judith P. Swazey, *Examining American Bioethics: Its Problems and Prospects*, 14 CAMBRIDGE Q. HEALTHCARE ETHICS 361, 362 (2005) (noting the commonly articulated critique that American bioethics represents "[t]he 'triumph' of a rational, highly individualistic conception of autonomy over all other moral principles, and an emphasis on individual rights, choice, and welfare that outbalances the invocation of responsibilities, obligations, and duties").

grained suspicions about female-headed families are woven tightly into the fabric of modern American society.

Puritan distrust of women raising babies outside the sanctity of marriage probably immigrated to America during the founding of the first colonies. Nathaniel Hawthorne's celebrated novel, *The Scarlet Letter*, examines the fear and religious zeal that led colonial society to exclude Hester Prynne and her illegitimate daughter from the benefits of community. The shame of non-marital childbearing is made literal by the scarlet letter Hester must wear, and her status as an outsider is marked by her banishment to a hut at the edge of the wilderness. Hester has "broken a law of civilization and is constantly in danger of becoming wild and one with the wilderness."<sup>53</sup>

Religious condemnation of unmarried women having sex and raising families remained constant throughout the nineteenth and early part of the twentieth century, but the theory that reproduction outside of marriage was not only spiritually corrupt, but also economically and culturally self-destructive was not widely disseminated until the 1960s, when the Moynihan Report was published with great fanfare. In that manifesto, Senator Daniel Patrick Moynihan identified single-parenthood as a primary source of the black community's ills, arguing that, "[T]he Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male."<sup>54</sup>

Today, the erosion of the traditional family can no longer be tagged as any one community's "problem." The social trends of steadily high divorce rates and increases in non-marital child-bearing cut across all ethnicities and demographics.<sup>55</sup> Teen pregnancy, parenting

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<sup>53</sup> CLAUDIA DURST JOHNSON, UNDERSTANDING THE SCARLET LETTER: A STUDENT CASEBOOK OF ISSUES, SOURCES, AND HISTORICAL DOCUMENTS 40 (1995). Pearl, Hester's preternaturally intuitive daughter, captures some of the fear and fascination that mid-nineteenth century American society brought to the issue of illegitimate unions. Mysteriously beautiful, honest, and prescient, Pearl is also wild and ungovernable. "Pearl, who 'could not be made amenable to rules,' thus grows up being more at home in the forest than in the town, where she and her mother are both considered to be freaks. Like the wilderness, she is uncontrollable." *Id.* at 40 (quoting NATHANIEL HAWTHORNE, THE SCARLET LETTER 80 (First Signet Classic Printing 1999) (1959)).

<sup>54</sup> Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 39, 75 (1967).

<sup>55</sup> In 1999, 22 percent of white non-Hispanic women who gave birth were unmarried. This is up from 9 percent in 1980 and 17 percent in 1990. Forty-two percent of Hispanic women who gave birth were unmarried, which is up from 24 percent in 1980 and 37 percent in 1990. Sixty-nine percent of black women who gave birth were unmarried in 1999, which is up from 56 percent in 1980 and 67 percent in 1990.

among unmarried co-habitants, and child-bearing among single, older career women have combined to chip away at two-parent families' majority status. According to the United States Government's Forum on Child and Family Statistics, in 2004, less than 55 percent of existing families consisted of a couple and their biological or adoptive children.<sup>56</sup> Although the actual effects of this social transformation are unclear, the imagined consequences have prompted lamentations from numerous quarters.

Religious leaders, social conservatives and fathers' rights advocates all claim that single-mother parenting is responsible for a cascade of social ills, including "teen drug use, urban violence, unemployment, [ ] declining international competitiveness, federal budget deficits, [ ] individual 'narcissism' [and the] 'collapse of family values.'"<sup>57</sup> Although existing data suggests poverty, not single-parenthood, generates poor outcomes for children,<sup>58</sup> the current administration has launched a crusade to "strengthen families" on the theory that children raised by a married mom and dad will thrive in ways that children in single-parent homes will not.<sup>59</sup> Current initia-

Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-99*, NAT'L VITAL STAT. REP., Oct. 2000, at 1, 6, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48\\_16.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf).

<sup>56</sup> Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being 2005: Family Structure and Children's Living Arrangements*, available at <http://www.childstats.gov/americaschildren/pop6.asp> (last visited Jan. 31, 2006).

<sup>57</sup> Bernie D. Jones, *Single Motherhood by Choice: Libertarian Feminism, and the Uniform Parentage Act*, 12 TEX. J. WOMEN & L. 419, 431 (2002-2003) (citing STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 6 (1997)). See also D. Blankenhorn, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995) (stating, "Father-hunger is the primary cause of the declining well-being of children in our society and is associated with social problems such as teenage pregnancy, child abuse, and domestic violence against women."). See also Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), 42 U.S.C. § 601 (2000) (Congressional Findings stating that "[t]he negative consequences of out-of-wedlock birth . . . are well documented" and include increased likelihood of welfare dependency, increased risks of low birth weight, poor cognitive development, child abuse and neglect, and teenage parenthood, and decreased likelihood of having an intact marriage during adulthood).

<sup>58</sup> See MELISSA LUDTKE, *ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA* 422-23 (1997) (pointing out that children raised by financially stable, older mothers will likely not suffer the behavioral difficulties and poor outcomes identified with the children of poor, adolescent single moms).

<sup>59</sup> A press release issued by the White House in 2002 outlined the Bush Administration's welfare policy and stated,

Children reared by married parents in intact families are more likely to complete high school and are less likely to be poor, to commit crimes, or to have mental health problems than are children reared in single-parent fami-



tives to encourage marriage and decrease out-of-wedlock births include tax relief,<sup>60</sup> a one and a half billion dollar “healthy marriages campaign,”<sup>61</sup> and a host of carefully tailored state subsidies.<sup>62</sup>

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lies. It is no criticism of single parents to acknowledge the better outcomes for children of married-couple families. Rather, it is simply wise and prudent to reorient our policies to encourage marriage, especially when children are involved.

Press Release, Pres. George W. Bush, Working Toward Independence 2 (Feb. 2002), <http://www.whitehouse.gov/news/releases/2002/02/welfare-reform-announcement-book.pdf>.

<sup>60</sup> Tax laws not only encourage marriage, but also encourage a marriage where one spouse is the breadwinner and the other is the homemaker. “For [f]amilies with two earners, joint [filing] requires an accounting of who comes first” (e.g., the primary and secondary earner). The secondary earner (generally the wife) is taxed at a higher rate. Jennifer R. Johnson, *Preferred by Law: The Disappearance of the Traditional Family and Law’s Refusal to Let It Go*, 25 WOMEN’S RTS. L. REP. 125, 127 (2004). In addition, married workers with non-earning spouses (or spouses with significantly lower earnings) receive a bonus and have a lower tax liability than single, equal earning workers. The current system, thus, creates an incentive for couples to conform to the traditional family model. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 309 n.7 (2004). Although single parents are eligible for a higher standard deduction if they file as head of household, rather than if they file as single, they do not receive as many exemptions and deductions as a married couple filing jointly, where one spouse does not work outside the home. INTERNAL REVENUE SERV., PUBL’N NO. 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 7 (2005), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>. The policies behind these benefits are clear. In a press conference announcing the top priorities of the 109th Congress, one Senator stated,

I think making the marriage tax relief permanent is, obviously, of the highest priority. . . . People felt better about getting married and having their families when we had marriage tax relief and child tax credits. . . . We want people to know that their taxes, when they get married, are going to stay the way they are now.

*Transcript: GOP Legislative Agenda*, WASH. POST, Jan. 24, 2005, <http://www.washingtonpost.com/ac2/wp-dyn/A33106-2005Jan24> (last visited Jan. 14, 2006).

<sup>61</sup> The money will finance training “to help couples develop interpersonal skills that sustain ‘healthy marriages.’” Robert Pear & David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N. Y. TIMES, Jan. 14, 2004, at A1.

<sup>62</sup> The federal government carefully oversees the states’ aims through PRWORA, which requires that every state must specify annual numerical goals for decreasing its number of single pregnancies, and devise and explain its plan for preventing and reducing the number of out-of-wedlock pregnancies. Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341, 344-45 (2001). The Act “funds state programs designed to encourage marriage and two-parent families, and is so broadly worded that the programs need not be targeted exclusively to needy families, but can instead aim to reach non-needy families as well.” Hamilton, *supra* note 60, at 310 n.8. Hungry for federal dollars, states have implemented a host of programs in step with

The current multi-pronged plan to discourage families that fail to track the “married with children” model reflects the deeply embedded belief that alternative family forms disadvantage children and degrade the quality of our communal moral life. As non-traditional families increase in both number and visibility, our culturally driven impulse to honor choice and autonomy in intimate life choices bumps up against a visceral distaste for social chimeras that combine singleton status and reproduction in unconventional ways. This tension, salient in existing ART policies, explains why the ability to access and enjoy the benefits of ART in the United States is influenced, in part, by marital status and the type of family one seeks to create.

## II. ARTIFICIAL INSEMINATION AND *IN VITRO* FERTILIZATION IN ISRAEL AND THE UNITED STATES

### A. Israel

Israel’s pronatalism is evidenced by the sheer volume of fertility assistance taking place within its borders. Boasting more fertility clinics per capita than any other nation,<sup>63</sup> the percentages of ART-assisted births in Israel far exceeds that of other nations.<sup>64</sup> Data collected between 1993 and 1996 reveals that 2 percent of all Israeli births in that three-year span were a product of *in vitro fertilization*. During that same period, IVF births in the United States were 0.2 percent of all births, ten times lower than the rate in Israel.<sup>65</sup> More recent data shows Israeli usage of ART to be steadily increasing. Currently, Israel provides 3,400 IVF treatments per one million people, boosting the percentage of test-tube babies born to a

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PRWORA’s goals of “end[ing] the dependency of needy parents on government benefits by promoting job preparation, work, and marriage . . . , prevent[ing] and reduce[ing] the incidence of out-of-wedlock pregnancies. . . . and encourag[ing] the formation and maintenance of two-parent families.” 42 U.S.C. § 601 (Supp. II 1994). For example, in West Virginia, parents on welfare are eligible to receive bonuses for raising children as married couples. Jones, *supra* note 57, at 430.

<sup>63</sup> See KANAANEH, *supra* note 27, at 37. Israel has four times as many fertility clinics as the U.S. SUSAN MARTHA KAHN, RABBIS AND REPRODUCTION: THE USES OF NEW REPRODUCTIVE TECHNOLOGIES AMONG ULTRAORTHODOX JEWS IN ISRAEL 2 (1998), available at <http://www.brandeis.edu/hbi/wp3.pdf>. See also KAHN, *supra* note 26, at 2.

<sup>64</sup> See also KAHN, *supra* note 26, at 2.

<sup>65</sup> See Ruth Landau, *Religiosity, Nationalism and Human Reproduction: The Case of Israel*, 23 INT’L J. SOCIOLOGY & SOC. POL’Y, 64, 68 (2003).

whopping 5 percent.<sup>66</sup> These numbers do not include women who pursue parenthood via donor insemination because records of this group's usage are not kept. Anecdotal data, however, suggests that the numbers of ART-assisted births using this less complex form of medical intervention remain high.<sup>67</sup>

Israelis resort to ART in such high numbers, in part, because the Israeli government heavily subsidizes their choice. Prior to 1996, insurance coverage for health care in Israel was voluntary and incomplete. Employers provided access to the "Sick Funds" authorized to provide care, but some Israelis, and a larger number of unemployed Arabs, could not obtain coverage.<sup>68</sup> With the passage of the National Health Insurance Law, healthcare became compulsory and universal. Funding for the provision of care comes from employers, the government and subscribers in the form of deductibles and caps on particular treatments.<sup>69</sup> Although care is explicitly rationed, all citizens have access to a basic package.

Remarkably, this basic package includes unlimited fertility treatments of all types, up to the birth of two living children.<sup>70</sup> This benefit is available to both single and married women, and is limited only by conditions designed to enhance medical success.<sup>71</sup> This financial support is part of a larger government package that seeks to shift the substantial financial burden of raising children from couples and individuals to the State, thereby spreading the costs of reproduction to the community at large.<sup>72</sup> Single parents, in particular, receive a series of

<sup>66</sup> See Nicky Blackburn, *supra* note 15. Currently, IVF accounts for 5 percent of babies born in Israel. *Id.* One percent of babies born in the U.S. were artificially conceived. Ctrs. for Disease Control & Prevention, Division of Reproductive Health: Activities—ART Surveillance System, <http://www.cdc.gov/reproductivehealth/DRH/activities/ART.htm> (last visited Jan. 14, 2006).

<sup>67</sup> KAHN, *supra* note 26, at 2.

<sup>68</sup> See Revital Gross, *Implementing Health Care Reform in Israel: Organizational Response to Perceived Incentives*, 28 J. HEALTH POL. POL'Y & L. 659, 664 (2003).

<sup>69</sup> *Id.*

<sup>70</sup> National Health Insurance Law art. 12 § 5.2 (1995), <http://www.un.org/esa/gopher-data/ga/cedaw/17/country/israel/C-ISR-P3.EN> (last visited Nov. 19, 2005).

<sup>71</sup> For women using their own ova, the maximum age allowed is forty-five; for women using donated ova, the maximum age is fifty-one. Regulations require that the total number of treatment cycles not exceed six per year. Landau, *supra* note 65, at 70.

<sup>72</sup> For example, in 1968, Israel created the "Fund for Encouraging Birth," which offered low-interest loans to young couples seeking to expand their families. These funds, originally available to all Israelis, was later limited to families "who have relatives who have served in the Israeli army," effectively excluding the Israeli Arabs who had been its former primary recipients. See PORTUGUESE, *supra* note 13, at

tax, mortgage, rent, and other subsidies designed to render child-rearing on one salary feasible.

The extension of Israeli pronatalism to unpartnered women was explicitly endorsed by the Aloni Commission, an expert body empanelled by the Ministry of Justice to explore the legal, social, ethical, and religious issues raised by reproductive technology. Faced with the question of whether the financial benefits available to incentivize child-bearing ought to be selectively disbursed to married women only, the Aloni Commission concluded that disbursement should be universal and that non-traditional family-formation was consistent with existing Israeli norms and values.

The Commission prefaced its findings by acknowledging limits to the entitlements that ART-seeking individuals could claim. While beginning with the premise that privacy rights are central to any "progressive society," the Commission acknowledged that "the right to privacy does not obligate the State to allow innovative reproductive or genetic engineering techniques which may injure the child-to-be or prejudice the fundamental principles of society or delicate fabric of society."<sup>73</sup> In deciding what level of access was consistent with preserving the "delicate fabric of society,"<sup>74</sup> the Commission determined all individuals should have the opportunity to pursue parenthood through ART and deemed marital status an irrelevant consideration in recognizing individual rights to "privacy and intimacy in their personal lives."<sup>75</sup> Thus, in Israel, single parenthood is not seen as fraying the nation's moral fiber, but as a life choice consistent with regnant social values that support child-bearing.

That Government support for ART remains strong, despite its flouting of traditional family forms, is particularly remarkable given ART's uneasy relationship with Halacha (Jewish law) and the prominent role of religious authorities in shaping secular policy. In Israel, rabbinic courts have exclusive jurisdiction over questions of personal status including marriage, divorce, child custody and adoption. Additionally, religious values are disproportionately visible and influential

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97 (discussing Israel's Law for Families Blessed with Children, which provided financial benefits to families having at least four children). See also KANAANEH, *supra* note 27, at 35-36. Other benefits remain available to single Jewish women with three or more children, including advantageous mortgage rates, rent supplements, reduced kindergarten fees, social security allowances, tax exemptions, reductions in municipal property taxes, and discounted payments to National Health Funds. KAHN, *supra* note 26, at 16.

<sup>73</sup> ISRAEL MINISTRY OF JUSTICE, THE REPORT OF THE PUBLIC-PROFESSIONAL COMMISSION IN THE MATTER OF IN VITRO FERTILIZATION 12 (1994).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 17.

in legislative debates due to the swing-vote power that religious parties enjoy in Parliamentary politics. Without the support of conservative religious parties, the reigning secular leadership—usually Labor or the Likud—loses the votes necessary to maintain power. Consequently, religious parties exert more control than their sheer numbers would suggest and they play their valuable political chips when issues of religious significance come before them.<sup>76</sup>

One might imagine that religious authorities would insist on a restrictive approach to ART use because certain aspects are highly problematic under Jewish law. First, most ART techniques require male masturbation, which violates the strict prohibition against “*hotza'at zera levatalah*”—“emission of seed other than within the context of sanctioned sexual activity.”<sup>77</sup> More importantly, use of donor sperm threatens to create children who might be stigmatized as mamzers (bastards). Mamzers, children of incestuous or adulterous relations, are social outcasts who are denied marital relations with all but other mamzers. If a married woman were to use Jewish donor sperm, it could be argued that her child was a mamzer because the biological parents consist of a married woman and a man not her husband. Additionally, a single woman using anonymous donor sperm could have a child who marries the child of another single woman who used the same donor. Those children would be half siblings and their progeny would be mamzers.

Although some rabbis have gone on record against the use of ART, others have devised ingenious ways around the apparent halachic prohibitions.<sup>78</sup> Some have interpreted the prohibitions against adultery to exclude the union of egg and sperm accomplished through medical manipulation.<sup>79</sup> Others have suggested that if single women use non-Jewish donor sperm their grandchildren need not suffer the

<sup>76</sup> PORTUGUESE, *supra* note 13, at 47-51.

<sup>77</sup> Yoel Jakobovits, *Assisted Reproduction Through the Prism of Jewish Law*, JEWISH ACTION, Spring 2005, at 26, 27.

<sup>78</sup> *Id.*

Most rabbinic authorities maintain that [the *hotza'at zera levatalah*] restrictions are overridden when the sperm is procured for procreative purposes. Where cancer chemotherapy might cause infertility, some, though not all, authorities even permit banking the sperm of an unmarried man for future use, since he also has the mitzvah of procreation. The preferred method is collection of semen during marital relations. Impregnation during the *niddah* period should be avoided. If otherwise impossible, however, Rav Moshe Feinstein permits AI where ovulation occurs before the woman goes to the mikvah.

*Id.* (citations omitted).

<sup>79</sup> See D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL 193 (2005).

threat of mamzer-status because a non-Jewish donor's lineage is considered "neutral;" that is, siblings of the same non-Jewish father would, nonetheless, not be considered halachically related to one another.<sup>80</sup> Although some rabbis contend that the absence of a clear Halachic bar should not foster too lenient an attitude from the rabbinic community,<sup>81</sup> in fact, there has been no organized resistance to burgeoning ART use within the Conservative or Orthodox religious community.<sup>82</sup>

Governmental support, abetted by tacit acquiescence on the part of the religious community, does not come free, however. Women seeking to avail themselves of state assistance in their quest to procreate must submit to extensive intrusion and control. According to Ministry of Health regulations, women seeking donor insemination must be above the age of thirty, but below the age of fifty, and must participate in a screening interview with a government social worker designed to assess their psychological and financial aptitude for motherhood.<sup>83</sup> Eligibility hinges on the social worker's evaluation of the woman's attitudes and attributes. Under scrutiny are the aspiring mother's emotional capability, relationship stability, understanding of the responsibilities being assumed, state of health, support systems, motivation to become a mother, self-image, and future vision of the family.<sup>84</sup> Although biological parenthood is usually considered beyond the ambit of state intervention, the route to donor insemination

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<sup>80</sup> See Jakobovits, *supra* note 77, at 27.

<sup>81</sup> KAHN, *supra* note 26, at 57 (noting objections of the Israeli conservative rabbi, David Golinkin, that ART use among single women undermines the "holy family" which is "still the most important thing").

<sup>82</sup> *Id.* at 58-59 (discussing fertility clinics' decision not to maintain data on the numbers of single women pursuing ART for fear that the Rabbanut, if made conscious of its wide-spread usage, might grow concerned about unintentionally incestuous unions from the progeny of anonymous sperm donors. As one fertility doctor explained, "[t]he less said about this phenomenon [(single women using ART)] the better it will be for the fertility doctors and for the unmarried women who seek artificial insemination.").

<sup>83</sup> KAHN, *supra* note 26, at 28. The requirement that women be at least age thirty before receiving donor insemination is designed to ensure that they have pursued alternative paths to motherhood with adequate zeal and that resulting offspring have the chance to achieve adulthood before maternal decrepitude sets in. *Id.* Originally, Health Ministry regulations required single women be interviewed and evaluated by a psychiatrist and a social worker, requirements not imposed on married women. *Id.* at 81. In 1996, an unmarried woman challenged the regulations on the grounds that they discriminated based on marital status. *Id.* The petition was successful, and the regulations were revised. *Id.* at 83. The revised regulations retained the social worker evaluation for all women, married and unmarried. *Id.* The psychiatric evaluation requirement was eliminated. *Id.*

<sup>84</sup> *Id.* at 28.

more closely resembles adoption proceedings. Would-be parents are vetted to determine their suitability for the task.<sup>85</sup> As one social worker noted,

This is a government service. *The* government is supplying the sperm and we are given the mandate of deciding who is fit and who is not. . . . There are women for whom it would be a tragedy to have a child as a single parent and it is our job to tell them this.<sup>86</sup>

Once eligibility is determined, most women seek assistance from public clinics where patient privacy is accorded little respect and sperm is selected for them by attending physicians or nurses. As described by Susan Kahn in her foundational analysis of assisted reproduction in Israel, "Most Israeli fertility clinics . . . were busy and unadorned, much like other public healthcare clinics in Israel. . . . Doors were left ajar during examinations, diagnoses were yelled across waiting rooms, prescriptions were announced loudly."<sup>87</sup> Nurses and doctors gave advice to patients, "as if they were speaking to their own cherished, yet somehow errant, children."<sup>88</sup> By law, donor identity must remain anonymous and women are given little information or ability to select for characteristics beyond European or North African/Asian origin.<sup>89</sup> Women are encouraged to choose donors who share their coloration—"light/Ashkenazi" or "dark/Sephardic."<sup>90</sup> In this way, "mixed" progeny are avoided, recognizable ethnic categories are perpetuated, and the offspring of these "matches" can be comfortably slotted into existing niches in Israeli society.<sup>91</sup>

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<sup>85</sup> See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 954 (1991) (discussing screening mechanisms of adoption agencies).

<sup>86</sup> KAHN, *supra* note 26, at 28-29. Despite these intrusive interviews, the state's screening filter appears extremely porous. Few women are actually denied permission to proceed, despite precarious economic or social circumstances. Only women in desperate financial straits or with clear emotional pathologies are denied the benefits of parenthood. *Id.* at 32.

<sup>87</sup> *Id.* at 25.

<sup>88</sup> *Id.* at 25.

<sup>89</sup> *Id.* at 33.

The matchmaking element surrounding sperm selection for unmarried women extends directly into matching the donor and recipient's Jewish ethnicity, which interestingly is assumed to be either Ashkenazi or Sephardi, either "light" or "dark," despite the fact that many Jews in Israel are of mixed ethnic origins.

*Id.* at 36.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 34-39.

The trade-offs in Israel's ART practices are clear. Women's reproductive ambitions are legitimated through the financial and moral support of the state. But, in proffering this support, the State transforms these procreative efforts from a private life quest into a public works project. Women seeking donor sperm are conceptualized and treated not as consumers pursuing private preferences, but as citizens engaged with the State in a communal baby-making enterprise. Just as shoppers at a government-run food-store in China or Russia in the 1950s would likely face long lines and limited selection, Israeli women seeking ART through government clinics find their choices limited and their intimacies revealed. Though state involvement brings an assembly-line, production mentality to the highly personal business of choosing sperm and achieving conception, it makes child-bearing possible for the many modest-income women who might otherwise find their dreams of parenthood out of reach.

### B. United States

ART treatment and funding is handled very differently in the United States. These differences reflect America's more penurious conception of the proper role of government in providing healthcare and a basic ambivalence about the degree to which the quest for parenthood, via technological innovation, should be supported through public subsidies. Unlike Israel, which includes ART treatment as part of the basic package of health benefits guaranteed by the government, ART expenses are viewed in the United States primarily as a luxury expenditure, the costs of which should be shouldered primarily by fertility consumers, themselves.

With the exception of Medicare and Medicaid, healthcare in the United States is privately provided. Healthcare in America is not conceived of as a moral right, but as a good like any other—available for purchase, if the funds exist. Private insurance coverage is shaped by a variety of factors, none of which are perfectly synchronized. Market forces and the preferences of contracting employers, individual subscribers, physician groups, hospitals, and insurance providers mold the terms and conditions under which healthcare services are financed and delivered. Courts exercise some oversight when private insurance arrangements appear to violate civil rights or run afoul of basic tort law duties.<sup>92</sup> And, state legislatures impose

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<sup>92</sup> Judicial oversight of managed care organizations (MCOs) is greatly hindered by the federal ERISA statute, which preempts suits related to the administration of employer-provided benefits, including benefits due under employer-sponsored health plans. Lawsuits challenging MCO decisions that have led to the provision of



funding mandates, reflecting popular sentiment about the type of medical care that should be offered independent of their ability to pay. Lobbying efforts to expand coverage for particular conditions reflect both interest-group activity and broad-based sympathy for the type of care and category of patient involved. For example, after HMO efforts to shrink costs led to reduced hospital-stay coverage for new mothers, consumer groups successfully lobbied for the enactment of laws in twenty-nine states mandating insurers extend coverage for post-birth hospital stays.<sup>93</sup> Infertility advocacy groups have pressed for similar laws requiring coverage of ART in employee-sponsored benefit plans, but their efforts have been only partially successful.

Existing state legislation is a patchwork, with less than a quarter of the nation's states requiring various levels of ART coverage. Some states provide coverage for IVF, but may exclude other related ART treatments. Other states exclude IVF while providing coverage for less expensive measures. Still others require insurers to tell employers about infertility coverage, but do not require employers to include such coverage in the plans they actually purchase.<sup>94</sup>

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sub-standard healthcare have been interpreted as suits relating to eligibility and plan administration, and, thus, within ERISA's preemptive reach. *See, e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and Aaron Kesselheim & Troyen A. Brennan, *The Swinging Pendulum: The Supreme Court Reverses Course on ERISA and Managed Care*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 451 (2005).

<sup>93</sup> David A. Hyman, *Drive-Through Deliveries: Is "Consumer Protection" Just What the Doctor Ordered?*, 78 N.C. L. REV. 5, 24 (1999).

<sup>94</sup> *See, e.g.,* ARK. CODE ANN. § 23-86-118 (2005), ARK. CODE ANN. § 23-85-137 (2005) (requiring all health insurers that cover maternity benefits to also cover *in vitro* fertilization with the exception of HMO providers); CAL. HEALTH & SAFETY CODE § 1374.55 (West 2000) (requiring certain insurers to offer infertility diagnosis and treatment to employers, however the law does not require those insurers to provide the coverage, nor does it require employers to purchase the additional coverage for their employees); CONN. GEN. STAT. ANN. § 38a-536 (West 2005) (requiring health insurers to offer infertility diagnosis and treatment to employers); HAW. REV. STAT. § 431:10A-116.5 (1993), HAW. REV. STAT. § 432:1-604 (1993) (requiring certain insurance plans to provide a one-time only benefit for outpatient costs resulting from IVF); 215 ILL. COMP. STAT. ANN. 5/356m (West 1993), ILL. COMP. STAT. ANN. 125/5-3 (West 1993) (requiring certain insurance policies to cover costs of diagnosis and treatment of infertility); MD. CODE ANN., INS. § 15-810 (West 2002), MD. CODE ANN., HEALTH-GEN. § 19-706 (West 2005) (requiring those insurance policies that provide pregnancy-related benefits to also cover outpatient costs of IVF); MASS. GEN. LAWS ANN. ch. 175, § 47H (West 2005), MASS. GEN. LAWS ANN. ch. 176A, § 8K (West 2005), MASS. GEN. LAWS ANN. ch. 176B, § 4J (West 2005), 211 MASS. CODE REGS. 37.03-37.07 (1987) (requiring HMO's and insurers that cover pregnancy-related benefits to also cover infertility diagnosis and treatment expenses); MONT. CODE ANN. § 33-22-1521 (2005) (requiring HMO's to cover infertility costs as part of basic preventive health care services); N.J. STAT. ANN. § 17B:27-46.1x (West Supp. 2005), N.J. STAT. ANN. § 26:2J-4.23 (West Supp. 2005), N.J. STAT. ANN. § 17: 48-6x

Even in states with generous mandates, state magnanimity is limited to ART candidates whose successful treatment would create a family according to traditional definitions. Hidden within the statutes' facially neutral language are hurdles for single or lesbian women who would avail themselves of the state's largesse to create non-traditional families. The first hurdle lies in the statutes' initial definition of infertility. Most states define infertility as "the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception."<sup>95</sup> For lesbians and single women who could become pregnant through sexual intercourse but are seeking physician assistance in conceiving via intrauterine insemination, establishing the condition of "infertility" may be impossible. A similar catch-22 emerges in states conditioning insurance benefits on a showing that the infertility treatment is "medically necessary."<sup>96</sup> Again, lesbians and single women may be medically capable of conception, but require artificial insemination with donor sperm to satisfy a personal rather than medical need.

The statutes' specification of who is qualified to participate in covered IVF procedures constitutes a second hurdle. Arkansas, Hawaii, and Texas have mandated that insurers cover IVF, but eligibility is limited to women being fertilized with their spouse's sperm. Consequently, even if gay and single women can show that intensive technological therapy is medically necessary, they are excluded from insurance coverage as a result of their use of donor sperm to create a non-marital family unit.

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(West Supp. 2005) (requiring certain insurance policies to cover the costs of infertility diagnosis and treatment); N.Y. INS. LAW § 3221(k)(6) (McKinney 2000 & Supp. 2005), N.Y. INS. LAW § 4303(s) (McKinney 2000 & Supp. 2005) (requiring insurers to cover the diagnosis and treatment of correctable medical conditions, however IVF is excluded from this requirement); OHIO REV. CODE ANN. § 1751.01 (LexisNexis 2005) (requiring HMO's to cover basic preventive health services, including infertility); R.I. GEN. LAWS § 27-18-30 (2002), R.I. GEN. LAWS § 27-19-23 (2002), R.I. GEN. LAWS § 27-20-20 (2002), R.I. GEN. LAWS § 27-41-33 (2002) (requiring HMO's and insurers that cover pregnancy services to also cover the costs of medically necessary infertility diagnosis and treatment); and W. VA. CODE ANN. § 33-25A-2 (LexisNexis 2003) (requiring HMO's to cover basic health care services, which sometimes includes infertility services).

<sup>95</sup> CAL. HEALTH & SAFETY CODE § 1374.55 (West 2000). *See also* 215 ILL. COMP. STAT. ANN. 5/356m (West 1993); and N.J. STAT. ANN. § 17B:27-46.1x (West Supp. 2005).

<sup>96</sup> *See, e.g.*, OHIO REV. CODE ANN. § 1751.01 (LexisNexis 2004); and MASS. GEN. LAWS ANN. ch. 175, § 47H (West 2005), MASS. GEN. LAWS ANN. ch. 176A, § 8K (West 2005), MASS. GEN. LAWS ANN. ch. 176B, § 4J (West 2005), 211 MASS. CODE REGS. 37.03-37.07 (1987).

On the other hand, if lesbians and single women can pay for ART out-of-pocket, they can proceed through the sperm selection process unimpeded by the intrusions foisted upon their Israeli counterparts. In the United States, single and gay women seeking donor insemination are treated like any woman seeking biological parenthood. No audition for the job is required; rather, they pay their money and proceed, untrammelled by social work interviews or screening procedures.<sup>97</sup> Sperm collection and provision in the United States is a private function, with multiple sperm banks competing for women's business by providing detailed medical and social profiles of each donor. Women may learn a prospective donor's college grades, high-school sport, favorite food, and long-term life-goals.<sup>98</sup> Some companies even make audio tapes available in which a donor is encouraged to talk about his reasons for donating and speculate about whether he would be willing to meet prospective off-spring when they turn eighteen.<sup>99</sup> Women engaged in sperm-shopping on the internet might well think they had inadvertently clicked onto an on-line dating site, where the market imperatives of product differentiation and branding have created dizzying selection opportunities and dilemmas.

Access to ART in the United States is highly stratified. Those of modest means often find obtaining access to high-tech services costly and difficult. But, with the right amount of money, access to ART and choice in donor gametes can be obtained in the sensitive, pampering atmosphere of a Barneys' boutique. In Israel, the government store is crowded and sells only two varieties. In America, a personal shopper is likely available to bring one hundred different samples to your door. In Israel, everyone can enter the store but in America, only the

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<sup>97</sup> Fertility physicians, however, may withhold their services from women they feel are ill-suited or unprepared for motherhood, and thus, an informal screening process may occur at the bedside between doctor and patient. See The Ethics Comm. of the Am. Soc'y for Reprod. Health, *Child-Rearing Ability and The Provision of Fertility Services*, 82 FERTILITY & STERILITY 564, 564 (2004) (determining that "[f]ertility programs may withhold services from prospective patients on the basis of well-substantiated judgments that those patients will be unable to provide or have others provide adequate child-rearing for offspring"). Additionally, some fertility physicians refuse to service single women and lesbians. This practice of patient selection may run afoul of existing civil rights legislation. See *Benitez v. North Coast Women's Care Med. Group, Inc.*, 106 Cal. App. 4th 978 (Cal. Ct. App. 2003). See also Elliot Spagat, *Appeals Court Hears Case of Lesbian Denied Fertility Treatment*, SAN JOSE MERCURY NEWS, Oct. 11, 2005, available at [http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern\\_california/12875684.htm](http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern_california/12875684.htm).

<sup>98</sup> See, e.g., California Cryobank, Donor Profiles, <http://www.cryobank.com/Profile.cfm?page=41&sub=72> (last visited Nov. 19, 2005).

<sup>99</sup> See, e.g., California Cryobank, Donor Audio Interviews, <http://cryobank.com/taped.cfm?page=41&sub=74> (last visited Nov. 19, 2005).

financially comfortable can shoulder the extravagance of a personal shopper.

Although American women may proceed absent state intervention (or assistance) in selecting, purchasing, and using sperm to become parents, their status as autonomous consumers becomes precarious once they seek to preserve the integrity of their ART-created families in the face of external challenges. Whereas state law recognizes the familial bonds and boundaries of families created by married women using donor sperm, the family relationships created by single women have not received the same degree of deference.

Cases dating from the early days of ART technology set the tone for judicial opinions to come. These cases looked unsympathetically upon the aspirations of single women and lesbians to raise children on their own. In *C.M. v. C.C.*, a 1977 New Jersey case, the court, unaided by statutory guidance, granted visitation rights to a known sperm donor who conceived a child with an unmarried woman.<sup>100</sup> Unabashed in its support for traditional family models, the court grounded its decision in a judicial policy “favoring the requirement that a child be provided with a father as well as a mother.”<sup>101</sup> The birth mother characterized the donor as a friend or acquaintance who, she expected, would simply be “a visitor in her home—much as any of her other friends.”<sup>102</sup> The donor characterized his relationship with the birth mother as intimate and romantic and stated that he anticipated he would assume a parental role toward any resulting progeny.<sup>103</sup> Ignoring the birth mother’s intent and expectations, the court found she “had a long-standing dating relationship” with the donor and “no one else . . . was in a position to take upon himself the responsibilities of fatherhood when the child was conceived.”<sup>104</sup> Operating on the presumption that “[i]t is in a child’s best interests to have two parents whenever possible,” the court supplied a second parent over the strenuous objections of the birth mother.<sup>105</sup> Paying little attention to the birth mother’s understanding of the family she was creating, the court held that the donor’s “consent and active participation in the procedure leading to conception . . . place[ed] upon him the responsibilities [—and also the privileges—] of fatherhood.”<sup>106</sup>

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<sup>100</sup> *C.M. v. C.C.*, 377 A.2d 821, 825 (N.J. Super. Ct. 1977).

<sup>101</sup> *Id.* at 824.

<sup>102</sup> *Id.* at 822.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 824.

<sup>105</sup> *Id.* at 825.

<sup>106</sup> *Id.*

A statute of the same 1970s vintage similarly ignored the possibility that unmarried women might be drawn to ART's possibilities. Although drafted to formalize familial relations and confer substantive equality on children regardless of their parent's marital status,<sup>107</sup> the Uniform Parentage Act (UPA), as originally written, failed to discuss unmarried women's use of ART, leaving them vulnerable to parental claims by donors.

Section 5 of the UPA made clear that a married woman inseminating with donor sperm under the supervision of a physician need not worry about a donor asserting parental rights. The Act specified that a consenting husband is the legal father and the donor is simply the donor—not a father—in the eyes of the law.<sup>108</sup> The Act, however, did not address donor status when an unmarried woman sought to use the sperm. This omission left judges vast discretion to welcome donors into the nuclear family that unmarried women thought they had secured.

Some states, in an effort to expand the protection provided by the UPA to unmarried, as well as married women, omitted the word "married" from their state statutes protecting women who inseminated using donor sperm. Thus, some state legislatures adopted language clarifying that a donor who is not the husband of the birth mother "shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination."<sup>109</sup> Despite legislative intent to bring single women within the protective fold previously reserved

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<sup>107</sup> UNIF. PARENTAGE ACT, *Prefatory Note*, 9B U.L.A. 378, 378-79 (1973). Since 1968, a series of decisions rendered by the United States Supreme Court under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution has mandated equal legal treatment of legitimate and illegitimate children in a broad range of substantive areas, one exception being the right of intestate succession. . . . [I]n providing substantive legal equality for all children regardless of the marital status of their parents, the present Act merely fulfills the mandate of the Constitution.

*Id.*

<sup>108</sup> *Id.* at § 5.

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. . . . The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

*Id.*

<sup>109</sup> See, e.g., IDAHO CODE ANN. § 39-5405 (2005); OKLA. STAT. tit. 10, § 555 (2005); and OR. REV. STAT. § 109.239 (2003).

for married couples, judges preferred to maintain single women's vulnerability in the face of donor claims, and proved unable to implement the bright-line bar to donor intrusion that the statutes appear to contemplate.

In *Jhordan C. v. Mary K.*,<sup>110</sup> the California appellate court was called upon to interpret a statute,<sup>111</sup> that, like the UPA, stated that a married woman inseminated with donor sperm, with the consent of her husband and under the supervision of a physician, could be certain that her husband was the legal father and that the donor would have no parental rights.<sup>112</sup> The statute also specified that donors could claim no paternal rights.<sup>113</sup> Focusing on the reference to physician supervision, the donor maintained that because he had provided his semen directly to the birth mother without the intercession of a physician, the statute's bar to donor parental rights did not apply.<sup>114</sup> Additionally, the donor argued he had donated his semen in reliance on an agreement with the birth mother that he would be permitted to assume parental rights and responsibilities.<sup>115</sup> The birth mother denied the existence of any such agreement, characterized the statute's discussion of physician involvement as merely hortatory and argued that the statutory intent to clearly exclude donors from parental status should guide the court's decision.<sup>116</sup>

The birth mother argued that any reading of the California statute that would provide unmarried women less protection than married women violated the Equal Protection clause of the Constitution. Because other paternity statutes preclude donor paternity claims when a married woman undergoes artificial insemination with semen not provided to a physician, the birth mother asserted that Equal Protection requires unmarried mothers receive the same protection.<sup>117</sup> While accepting the factual claim that a network of state statutes protects married, but not unmarried women, from donor paternity claims, the court rejected the Equal Protection claim outright.<sup>118</sup> Married and unmarried

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<sup>110</sup> 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

<sup>111</sup> *Id.* at 531. See CAL. CIV. CODE § 7005 (West 1975) (repealed 1994); now codified in CAL. FAM. CODE § 7613 (West 2005) ("If, under the supervision of a licensed physician . . . and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

<sup>112</sup> *Jhordan C.*, 224 Cal. Rptr. at 531.

<sup>113</sup> *Id.* at 534.

<sup>114</sup> See *id.*

<sup>115</sup> *Id.* at 532.

<sup>116</sup> *Id.* at 532-35.

<sup>117</sup> *Id.* at 535-37.

<sup>118</sup> *Id.* at 535-36.

women, the court seemed to say, are not equally situated when it comes to the protection their ART-assisted families deserve. Supporting this conclusion, the court maintained:

In the case of a married woman, the marital relationship invokes a long-recognized social policy of preserving the integrity of the marriage. . . . No such concerns arise where there is no marriage at all. Equal protection is not violated by providing that certain benefits or legal rights arise only out of the marital relationship.<sup>119</sup>

While the court insisted its decision made no statement about the desirability of non-traditional families,<sup>120</sup> it is difficult not to read the court's language as preferring families that include a dad, regardless of the birth mother's desires or intent.

Similar biases are obvious in *McIntyre v. Crouch*,<sup>121</sup> an Oregon case that also involved a filiation action by a sperm donor who provided semen directly to an unmarried woman. Like the California statute, the Oregon statute clearly specified that the consenting husband of a married woman was the legal father of any child born through artificial insemination using donor sperm. Further, it provided limited protection for unmarried women by stating that a sperm donor—not the birth mother's husband—shall “have no right, obligation or interest with respect to a child born as a result of the artificial insemination.”<sup>122</sup>

The court understood the statute's aims to include “allow[ing] an unmarried woman to conceive and bear a child without sexual intercourse” and clarifying “an unmarried mother is freed of any claims by the donor of parental rights.”<sup>123</sup> Despite this grasp of legislative intent, the court chose to invade the safe harbor offered to single women. Troubled by the donor's claim that “he gave [respondent] his semen . . . in reliance on an agreement . . . that he ‘would remain active’ in the child's life,” a claim the birth mother categorically denied, the court found that the Due Process Clause of the Constitution forbids any statutory reading that would categorically bar a biological father's efforts to assert the rights and responsibilities of fatherhood.<sup>124</sup> Refer-

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<sup>119</sup> *Id.* at 536 (internal citations omitted).

<sup>120</sup> *Id.* at 537 (stating “We wish to stress that our opinion in this case is not intended to express any judicial preference toward traditional notions of family structure or toward providing a father where a single woman has chosen to bear a child.”).

<sup>121</sup> 780 P.2d 239 (Or. Ct. App. 1989).

<sup>122</sup> *Id.* at 242.

<sup>123</sup> *Id.* at 243.

<sup>124</sup> *Id.* at 241.

encing case law dealing with the rights of nonmarital, biological fathers who sire children through sexual intercourse, the court held that the Due Process Clause protects an "unwed father" who "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child. . . ." <sup>125</sup> Ignoring the possibility that a donor might initially liken his function to that of a blood donor but later change his mind, the court held that a donor who could establish the existence of a pre-conception agreement to share parental responsibilities would receive the support of the Oregon courts. <sup>126</sup> As one judge wrote in dissent, the majority's creation of a Trojan horse bringing donors within the legal walls women thought protected their family units "turns [a] statutory policy [designed to] assur[e] the stability of all the parties' lives" into a "house of sand." <sup>127</sup>

Courts in Colorado have similarly chosen to eviscerate the protection conferred by its legislature. Following California and Oregon's lead, Colorado adopted the UPA, but also omitted the word "married." Thus, Colorado, like California, sought to "provide a legal mechanism for married and unmarried women to obtain a supply of semen for use in artificial insemination." <sup>128</sup> The statute's protective reach, however, was drastically curtailed by a judicial reading that excluded known sperm donors and unmarried women from its application. Ruminating over the drafters' intent, the court surmised that the UPA's authors clearly meant to bar donor claims where married women or anonymous donors were involved. <sup>129</sup> They could not believe, however, that UPA drafters intended to universally reject claims of non-anonymous donors who had agreed to provide sperm to unmarried women. <sup>130</sup> Surely, the court opined, donor expectations and post-agreement conduct were relevant to a determination of parental rights if the mother is unmarried or the donor is known. The statute, though, makes no

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<sup>125</sup> *Id.* at 245.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 248 (Richardson, J., dissenting).

The statutes contemplate that the ultimate relationship, or absence of one, must be defined before the child is conceived in order to facilitate informed decisions about whether to donate and to conceive. The statutory policy assures the stability of all the parties' lives in the aftermath of the decisions. The holding of the lead opinion turns the statutory scheme into a house of sand.

*Id.*

<sup>128</sup> *In re R.C.*, 775 P.2d 27, 30 (Colo. 1989).

<sup>129</sup> *Id.* at 33.

<sup>130</sup> *Id.* at 33-34 ("The role of an agreement between the parties under the model UPA and section 19-4-106 is least clearly understood when the semen donor is known and the recipient is unmarried.").



mention of such factors and appears to abjure this sort of weighing and balancing.<sup>131</sup> Despite the breadth of the statute's text—devised explicitly to include unmarried women within its scope—the court held, “the General Assembly neither considered nor intended to affect the rights of known donors who gave their semen to unmarried women for use in artificial insemination with the agreement that the donor would be the father of any child so conceived.”<sup>132</sup> Once again, a sperm donor claiming an agreement to co-parent was allowed to press parental claims, despite the clear language of the statute.

Although the single women in these cases uniformly deny the existence of a pre-conception agreement, courts are eager to provide donors a forum in which to push for a place at the family table. When male claims for involvement with biological progeny come face to face with a women's privacy, the women's privacy claims consistently give way. Their rhetoric to the contrary, American judges reflect their culture's zeitgeist—which is riven with anxiety about non-traditional families. Given an opportunity to knit together a man and a woman to assume joint care for a biologically related child, courts will respond with enthusiasm. Statutes can be read, and case law can be spun, to achieve this goal. The match may be imperfect, the results may be psychologically devastating, and privacy rights may suffer, but a simulacrum of a “normal” family may be achieved.<sup>133</sup>

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<sup>131</sup> *Id.* at 34.

<sup>132</sup> *Id.* at 35.

<sup>133</sup> It would appear that some circumstances do exist, however, where the courts will not leap to supply a “dad” to a fatherless household. In *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005), the trial court held that a man who had offered his semen for insemination by the birth mother should be awarded parental rights over the objection of the birth mother. The trial court noted, “Other than [Steven], there is no presumed or biological father. [Steven] is the genetic father; to find that [Steven] is not the father would deny to the child the emotional and financial support a second parent can provide.” *Id.* at 485 (bracketed text in source). In an abrupt departure from the usual policy of finding a dad if a sperm donor exists, the appellate court held that California's version of the UPA barred the man's claim. Because the donor had been sexually intimate around the time the insemination occurred, he argued that the statute should not apply. The court rejected this argument, stating that the words of the statute were clear and that “there is no indication that the Legislature intended to establish a public policy against donating sperm for use by a woman who is not the donor's wife, even where there is an intimate relationship.” *Id.* at 487. The court's opinion, however, can be read as supporting, rather than subverting traditional notions of family since they were likely swayed by the fact the sperm donor was married to another woman at the time that he was assisting conception by supplying sperm via artificial and more traditional modes of insemination. *Id.* at 321-24.

### III. FROZEN EMBRYO DISPUTES IN ISRAEL AND THE UNITED STATES

#### A. Israel

Israel's pronatalist approach to ART and openness to alternative family structures is apparent in its handling of disputes arising in the wake of egg-extraction, cryopreservation, and storage. Frozen embryo disputes arise when couples marry, pursue fertility treatment that result in cryopreserved embryos, and then divorce, holding different ideas about what should happen to their jointly-created embryos. These cases have achieved a degree of celebrity in both the United States and Israel, yet the approaches taken in each country could not be more different. In Israel, a woman's desire to achieve biological parenthood is viewed with reverence and accorded substantial weight when balanced against competing concerns. In the United States, the valences run in different directions. The autonomy of the objecting parent is privileged over conflicting reproductive aspirations, and courts are loathe to allow single divorcees the opportunity to start a family over the objections of their former spouses.

Israel's policy regarding frozen embryos is consistent with its generally pronatalist stance. Guiding precedent was set by Ruti and Danny Nachmani in a judicial odyssey that reached conclusion at a full-panel hearing before the Israeli Supreme Court.<sup>134</sup> Initially, Ruti and Danny Nachmani were united in their quest to start a family.<sup>135</sup> Early in the marriage, Ruti had a hysterectomy, and Ruti and Danny together successfully challenged Israeli national health regulations that prohibited gestational surrogacy.<sup>136</sup> Having won that battle, Ruti and Danny underwent IVF, froze and stored eleven embryos, and then signed an agreement with a surrogacy agency in California.<sup>137</sup> Less than two months later, Ruti and Danny broke up, and the battle over the embryos' fate began.<sup>138</sup>

Ruti, still intent on becoming a mother, was willing to relinquish all marital property so long as she could use the embryos to create a biologically related child.<sup>139</sup> Danny objected to her proposed use of

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<sup>134</sup> See WEISBERG, *supra* note 79, at 84.

<sup>135</sup> *Id.* at 67.

<sup>136</sup> *Id.* at 70-75.

<sup>137</sup> *Id.* at 76.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 77 (Before the rabbinical court charged with approving their divorce, Ruti told the judges: "I don't want anything from Danny. I'll give him everything. I don't want money. I don't want the restaurant. Just let me use our embryos. This is

the embryos and instructed the Tel Aviv hospital storing the embryos not to release them into Ruti's custody.<sup>140</sup> Ruti responded with a legal petition that would ultimately focus international attention on her own family drama, as well as the broader question of how embryo disputes should be addressed.

Ruti's petition for release of the frozen embryos was heard initially by a judge at the Haifa District Court, who found in favor of Ruti on contractual grounds.<sup>141</sup> The judge held that Danny's initial consent to extraction and fertilization constituted consent to the entire process, including implantation into a surrogate.<sup>142</sup> Withdrawal of consent once the egg extraction and embryo fertilization had occurred was tantamount to a breach of contract, which the court would not sanction.<sup>143</sup>

In private interviews following the case, the judge also revealed his impressions regarding the implications of the case for equality between the sexes. Characterizing Danny's position as "chauvinistic," the judge stated,

Slowly, we are improving the status of women. I didn't like the fact that Danny could rule his wife, that he could say, 'O.K., I don't want a child, so we have to put an end to these embryos and that's the way it is going to be'. . . . Is it reasonable that the fate of a woman who wishes to continue with birth resulting from IVF should be determined by the changing moods of the husband whenever it suits him?<sup>144</sup>

Danny appealed to the Israeli Supreme Court, arguing that the lower court's ruling violated his right to avoid fatherhood with its associated social and financial responsibilities.<sup>145</sup> Additionally, Danny disputed the district court's contract analysis, maintaining that his initial consent to sperm donation did not imply consent to embryo implantation. Rather, he argued that individual consent was required for each stage of the IVF/surrogacy process.<sup>146</sup>

The Israeli Supreme Court, in a five-panel opinion, ruled that Danny's rights to avoid parenthood superseded Ruti's rights to

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my one chance to be a mother.").

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 79.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 80.

<sup>144</sup> *Id.* at 80-81.

<sup>145</sup> *Id.* at 82.

<sup>146</sup> *Id.*

achieve it.<sup>147</sup> When the dual interests in becoming and resisting parenthood clashed, the court felt it would be “improper to enlist the legal system to force parenthood on someone who does not want it.”<sup>148</sup>

In support of its conclusion, the court drew on principles established in Israeli abortion and service contract cases. When a woman seeks an abortion, the court noted, a husband has no right to oppose the termination of the embryo; consequently, to preserve gender equity, a wife should not be given the authority to oppose a husband’s request to terminate the existence of a jointly-created embryo.<sup>149</sup> Additionally, the court interpreted Ruti’s request for embryo custody as “forcing Danny to have a child.”<sup>150</sup> Drawing on traditional contract principles that render personal service contracts unenforceable, the court held that Ruti’s request required personal services on Danny’s part that were beyond the court’s power to require.<sup>151</sup> In response to Ruti’s argument that she had endured the rigors of egg extraction in reliance on Danny’s consent to embryo implantation, the court stated that both Ruti and Danny’s consent to participate in the IVF process were predicated on the existence of an intact marriage.<sup>152</sup> Consequently, reliance on consent procured in anticipation of parenting within the bonds of matrimony could not be binding once the marriage dissolved.<sup>153</sup>

The Head of the Israeli Supreme Court ordered a rehearing due to the importance and ground-breaking nature of the case. A panel of eleven justices reheard the case, focusing their attention on the scope of Danny’s consent and his rights to refuse consent once the IVF process had been set into motion.

After deliberating for over a year, the Israeli Supreme Court, sitting in full, reversed the earlier decision and ordered the frozen embryos be released to Ruti for implantation.<sup>154</sup> Although four justices dissented, the remaining seven were clear that Ruti’s right to biological parenthood was to assume priority status.<sup>155</sup> Parenthood, the majority opinion asserted, is “a basic value for the individual and society . . . . Taking parenthood away from a person is like taking away that

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 83.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 85.

<sup>155</sup> *Id.* at 85-89.

person's soul."<sup>156</sup> Conversely, an individual's autonomy interests in refusing parenthood could not be accorded primary status because "there is no value, in and of itself, in the absence of parenthood."<sup>157</sup>

The majority opinion rejected the notion that Danny's consent was valid only so long as he and Ruti remained married and that additional consent was needed at each stage of the IVF process. Instead, they considered Danny's original consent to be valid and irreputable.<sup>158</sup> Rather than perceive the IVF process as requiring the consent of both parties for its continuation, the court viewed the process as something that, once begun, could only be stopped with the consent of both parties. Stressing the joint collaboration that generated the embryo, one concurring justice wrote, "[I]t is not reasonable after the completion of a joint creation, that one of the partners would be able to destroy the creation against the wishes of the other who wants to continue the process."<sup>159</sup>

Emphasis on child-bearing as an essential life-task—as expressed in religious law and scripture—is woven throughout the opinion. The majority and concurring opinions quoted the *Torah* and the *Mishnah* liberally to emphasize traditional notions that children are necessary both to give life meaning and leave a legacy for the future.<sup>160</sup> Although sympathetic to Danny's plight,<sup>161</sup> the judges' opinions respond to and reflect Israel's cultural imperative toward reproduction. Respect for and deference to desires to remain autonomous and free of family ties does not touch the same cultural nerve and receives less legal deference. In the United States, cultural imperatives have generated very different legal responses to frozen embryo disputes.

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<sup>156</sup> *Id.* at 86.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (The court also rejected the earlier panel's reasoning regarding abortion on the grounds that a woman retains an absolute prerogative regarding whether to continue or terminate a pregnancy because her bodily integrity is at stake. Because a husband's bodily integrity is not at issue, he gains no absolute prerogative to destroy the embryo unilaterally.).

<sup>159</sup> *Id.* at 87.

<sup>160</sup> See, e.g., "Be fruitful and multiply," "He who does not have children is considered to be dead," and "Give me children, or I will die." *Id.* at 90-91.

<sup>161</sup> *Id.* at 88 (both Justice Goldberg and Justice Mazza conditioned the award of the embryos to Ruti on an agreement that Danny be absolved from child support payments).

## B. United States

To date, six state supreme courts have ruled on couples' frozen embryo battles.<sup>162</sup> In each case, the court found in favor of the objecting party and against the party seeking use of the embryos to achieve biological parenthood. Although the analytical route taken to this destination has differed, the courts have uniformly valorized autonomy rights and minimized the interest in becoming a parent.

The first and most oft-cited frozen-embryo case is *Davis v. Davis*,<sup>163</sup> decided nearly fifteen years ago in Tennessee. Although cognizant of their duties to obtain informed consent, fertility clinics at that time were not alert to the many sticky situations that might arise in the aftermath of embryo-cryopreservation. Gamete contributors might die, become disabled or divorce, but clinics had not yet begun to require couples to sign dispositional agreements discussing what to do should those contingencies arise. Consequently, in the *Davis* case, Junior and Mary Sue had neither signed a dispositional agreement nor discussed what should be done with the embryos in the event of divorce.<sup>164</sup>

The couple did divorce and adopted different views regarding the embryos' fate. Junior Davis sought to have them destroyed, while Mary Sue wished to donate them to a childless couple.<sup>165</sup> Although supportive of the power of contract law to sort out such muddles, the court had no express or implied contract to rely on, so they turned to constitutional principles for guidance.<sup>166</sup>

The court's constitutional discussion is perplexing because it begins by asserting the parity of the dual rights of achieving and avoiding parenthood, but ends by establishing a presumption that significantly favors procreation-avoidance.<sup>167</sup> Paying lip service to "the joys of parenthood" and weighing those joys against the "relative anguish

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<sup>162</sup> *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (ruling that agreements between gamete donors about disposition of pre-zygotes should be assumed valid and binding); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1051 (Mass. 2000) (holding "that a consent form signed by the parties on the one hand and the clinic on the other, providing that, on the parties' separation, preembryos were to be given to the wife for implantation, was unenforceable"); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (ruling husband was entitled to custody of preembryos in divorce settlement); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (holding that a "statute governing child custody did not apply to frozen embryos").

<sup>163</sup> *Davis*, 842 S.W.2d at 588.

<sup>164</sup> *Id.* at 590.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 590-91.

<sup>167</sup> *Id.* at 601.

of a lifetime of unwanted parenthood," the court initially maintained that "Mary Sue . . . and Junior . . . must be seen as entirely equivalent gamete-providers."<sup>168</sup> Yet, after considering Junior Davis's prediction that having a biological heir raised outside the sanctity of an intact nuclear family would be psychologically torturous, the court could no longer view the Davis' interests as equally weighted.<sup>169</sup> Instead, the court ruled in favor of Junior Davis and adopted a presumption that tilts strongly in favor of the spouse who would destroy the embryos to avoid "unwanted parenthood."<sup>170</sup>

The *Davis* case, splashed as it was across the covers of national newspapers, sensitized fertility clinics to the possibility that the embryos they were helping couples create could later become the subject of heated litigation. To avoid getting caught in litigation crossfire, fertility clinics began inserting dispositional agreements into their treatment consent forms.

The next case, *Kass v. Kass*,<sup>171</sup> arose five years later. The Kassess, New Yorkers who sought treatment at the John T. Mather Memorial Hospital, signed forms that contained two provisions relating to embryo disposition.<sup>172</sup> The first provision stated, "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."<sup>173</sup> The second provision, triggered by "death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes," presented a number of options for embryo disposition, including thawing, adoption by an infertile couple and donation to a research lab.<sup>174</sup> The Kassess opted for the latter.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 603.

<sup>170</sup> The court held that when spouses' interests regarding frozen embryos collide, "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question." *Id.* at 604.

<sup>171</sup> 696 N.E.2d 174 (N.Y. 1998).

<sup>172</sup> *Id.* at 176.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 176-77. In addition to the triggering language quoted above, the form also contained language that stated that the elected choice for embryo disposition should be followed if "we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes." *Id.* Although a plain reading of this language would suggest that the clause was meant to apply in the event of death or incapacity, consistent with the triggering language at the beginning of the consent form, the court chose to interpret the language to cover the situation where the couple disagreed and failed to reach a unified position regarding the fate of the embryos.

Although the court could have read the forms to merely indicate that the Kasses intended a family court rule on the embryos' fate should their marriage come to an end, the court instead held that the forms revealed the couple's unequivocal intent to relinquish the embryos for research.<sup>175</sup>

To reach this conclusion, the court had to engage in considerable interpretive gymnastics. First, they had to find that language written with death or disability in mind also applied when the couple was alive and well, but simply at loggerheads as to what to do. The court extended the contingency language applicable when "neither of us [is] able to determine the disposition of [the embryos]"<sup>176</sup> to cover the situation where each member of the couple was fully capable of forming and expressing an opinion regarding the embryos' disposition. Similarly, the court had to find the Kass' research-election, when "[we] are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes,"<sup>177</sup> was meant to apply when each had definitely made a decision regarding the embryos, but the decisions did not converge. Finally, the court had to find that divorce fell within the category of "unforeseen circumstance . . . result[ing] in neither of us being able to determine . . . disposition,"<sup>178</sup> when, in fact, the possibility of divorce had been explicitly contemplated and provided for in another section of the form.<sup>179</sup>

These logical contortions can be explained only by acknowledging the court's pre-determination to destroy the embryos. The reasons for this are likely linked to the same concerns that led the *Davis* court to weigh the constitutional value of avoiding procreation so heavily.<sup>180</sup> Judges assume the creation of unwanted familial ties portend psychological devastation.<sup>181</sup> They do not approach a life of

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<sup>175</sup> *Id.* at 178.

<sup>176</sup> *Id.* at 176.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (The other part of the form stated, "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.").

<sup>180</sup> *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

<sup>181</sup> This worry was clearly expressed in Justice Friedmann's concurring opinion at the intermediate court level in *Kass*. Advocating for an stronger procreation-avoidant approach than that articulated in *Davis*, Friedmann explained,

Once a child is born, there is no way to end biological ties, and very few ways to end emotional ones. . . . Put somewhat differently, '[e]ven if no rearing duties or even contact result[s], the unconsenting partner [former spouse] will know that biologic offspring exist, with the powerful attendant



unrequited yearning and forced childlessness with the same apocalyptic vision.<sup>182</sup>

Since *Davis* and *Kass*, judicial attitudes toward frozen embryo disputes have, if anything, become even clearer. Indeed, even when an agreement clearly vests one party with custody of the embryos in the event of divorce, courts have refused to enforce the agreement on the grounds that enforcement would violate public policy. In *A.Z. v. B.Z.*, the Massachusetts Supreme Court looked to legislative enactments and judicial decisions involving adoption and surrogacy agreements to discern a public policy against binding individuals to previously reached decisions that impose unwanted family ties.<sup>183</sup>

The New Jersey Supreme Court discovered similar state policies in its family law precedents and, similarly, found dispositional agreements resulting in coerced parenthood against public policy.<sup>184</sup> Again, court speculation regarding the psychological impact of creating unwanted parenthood seemed to drive the decisions.<sup>185</sup> The objecting spouse in *J.B.* was relieved of any possible social or financial burdens because the child/children of the resulting embryo would be adopted by an infertile couple.<sup>186</sup> Nevertheless, the court found this fact irrelevant to larger consideration of the objecting spouse's welfare.<sup>187</sup> Implantation, it observed, if successful, would result in the birth of a biological child and could have life-long "emotional and psychological repercussions."<sup>188</sup>

Judicial concern over the psychological effects of forced parenthood likewise drove the decision in *In re Marriage of Witten* to leave the disputed frozen embryos in storage indefinitely.<sup>189</sup> The petitioner, Tamera Witten, was childless and sought to use the eggs for implantation in a surrogate to create a genetically linked child.<sup>190</sup> She testified that upon a successful pregnancy, "she would afford Trip [(her ex-

reverberations of guilt, attachment, or responsibility which that knowledge can ignite.

*Kass v. Kass*, 235 A.D.2d 150, 166 (1997) (Friedmann, J., concurring) (internal citations omitted).

<sup>182</sup> See Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J. L. & GENDER 285 (2005).

<sup>183</sup> 725 N.E.2d 1051, 1057-59 (Mass. 2000).

<sup>184</sup> *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001).

<sup>185</sup> See *id.*

<sup>186</sup> *Id.* at 711.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 717.

<sup>189</sup> 672 N.W.2d 768, 783 (Iowa 2003).

<sup>190</sup> *Id.* at 772.

husband)] the opportunity to exercise parental rights or to have his rights terminated.”<sup>191</sup> Trip testified that he did not want Tamera to use the embryos, did not want them destroyed, and would permit donation to another couple.<sup>192</sup> Characterizing prior judicial treatment of frozen embryo disputes as following a contractual approach, balancing test, or contemporaneous mutual consent model, the court adopted the latter, finding it most protective of an objecting spouse’s right to change his or her mind.<sup>193</sup> Once again, one spouse’s desire to be a biological parent took a back seat to the other spouse’s interest in avoiding unwanted biological ties.

## CONCLUSION

Comparative analysis provides a perch from which to view our own practices from a different perspective. American political rhetoric reverberates with the constant invocation of family values and the “culture of life.” Yet, a market-driven approach to health care and deep ambivalence about whether infertility is a disease that demands treatment or forbearance leads to policies that leave infertile couples largely on their own in seeking access to costly ART treatments. Additionally, legal protection for lesbians and single women who use ART to pursue non-traditional family relations is weak and subject to judicial subversion. Conversely, Israeli enthusiasm for child-bearing cuts across all categories of family structure. Legal and financial support for single and gay-headed families is robust, and judicial rulings ruminating on the tensions between rights to create and avoid family invariably find the rights of creation more compelling. Placing Israeli and American approaches side by side, it is hard to conclude that America offers the more “family-friendly” regime.

In both countries, skepticism exists regarding ART’s impact on the traditional nuclear family. In Israel, the concerns reside mainly within the religious community. In America, fears for the physical and psychological health of “children of choice”<sup>194</sup> are wide-

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 773.

<sup>193</sup> *Id.* at 779, 782-83. In awarding preembryos to a protesting husband in a disposition dispute, the Washington Court of Appeals held that the husband “can exercise his right not to procreate in a limited way that allows the preembryos to develop but avoids placing him in the unwanted parenting role.” *In re Marriage of Litowitz*, 10 P.3d 1086, 1092 (Wash. Ct. App. 2000), *rev’d sub nom.* *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

<sup>194</sup> See generally JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 3-4 (1994) (author stating “[t]he goal of this book is to show the importance of procreative liberty . . . in devising the framework

spread.<sup>195</sup> This is likely due to the deep-seated gender-bias and prejudice that imbues current thinking about healthy family environments. Initial inquiries into the emotional/psychological health of ART's progeny, however, are encouraging.<sup>196</sup> On standard psychosocial measures, children born via unconventional methods into nontraditional families where they are loved and wanted fare as well as children conceived and reared in more traditional arrangements.<sup>197</sup>

Further empirical work is needed and continued assessments of ART's safety should accompany each new innovation. But, even if all the news is good, it remains to be seen whether our cultural priorities are susceptible to change. ART forces us to ask unsettling questions about the nature and identity of family ties. How we answer those questions will depend, in part, on how open and porous our cultural norms are to the new data that experience with ART creates.

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for resolving the controversies that reproductive technology creates").

<sup>195</sup> Press Release, Johns Hopkins Med. Insts., Expert Panel to Examine Health Effects of Assisted Reproductive Technologies on Children (June 11, 2003), <http://www.dnapolicy.org>.

There have been a number of reports in recent years on the health and developmental outcomes of children conceived through Assisted Reproductive Technology (ART). These reports have generated news and opinion pieces in the popular press that have caused some concern and confusion among patients, the public, and policy makers.

*Id.* (citation omitted).

<sup>196</sup> See generally Sheila A.M. McLean, Assisted Reproduction and the Welfare of the Child (July 2005) (unpublished manuscript, available at <http://www.ccels.cf.ac.uk/literature/publications/2005/mcleanpaper.pdf>) (arguing that restrictions on ART services based on the "welfare of the child" often instantiate unfounded bias and prejudice against individuals based on sexual orientation, marital status and the like).

<sup>197</sup> Susan Golombok et al., *The "Test-Tube" Generation: Parent-Child Relationships and the Psychological Well-Being of In Vitro Fertilization Children at Adolescence*, 72 CHILD DEV. 599 (2001).