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Religion, Feminism and Abortion: The Regulation of Assisted Reproduction in Two Catholic Countries

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RELIGION, FEMINISM AND ABORTION: THE REGULATION OF ASSISTED REPRODUCTION IN TWO CATHOLIC COUNTRIES

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Perspectives on abortion and religious values have been two primary influences on the development of the various regulatory regimes that govern

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This study benefited immensely from the interviews I conducted with six individuals each of whom has had some measure of involvement in developing the Spanish law of assisted reproduction. Marcelo Palacios, President and Founder of the International Society of Bioethics, is the physician and former member of the Spanish Parliament who was in charge of developing and drafting the 1988 law. Pedro Barri, director of the Department of Obstetrics, Gynecology and Reproduction at USP Institut Universitari Dexeus, and Anna Veiga, director of the Stem Cell Bank at the Center of Regenerative Medicine of Barcelona and Chairman of the European Society of Human Reproduction and Embryology, are physicians who oversaw the birth of the first IVF baby in Spain in 1984. Roberto Matorras, former President of the Spanish Fertility Society, heads the Human Reproduction Unit at the Hospital de Cruces, where the birth of the first IVF baby in the Spanish public health system took place in 1985. Jaime Vidal is a professor of law at the University of Valencia who has been writing on the implications of Spanish law for new reproductive technologies since the advent of IVF. Carlos Romeo directs the Interuniversity Chair in Law and the Human Genome at the University of Deusto and has been involved at several stages of the development of various bioethics laws in Spain.

assisted reproduction around the world. This paper examines why two countries with similar histories of allegiance to Roman Catholicism have developed highly divergent legal regimes to regulate assisted reproduction. Italy has enacted one of the most restrictive regimes known, Spain one of the most permissive. The comparative analysis employed here will afford insight into how the development of legislative responses to assisted reproduction correlate with religious commitments, feminist sentiment and the regulation of abortion.

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I. INTRODUCTION

Looking back on early work in the regulation of assisted reproductive technology (ART), one is struck by how far our reactions to reproductive technology have come since the decades leading up to the birth of the first in vitro fertilization (IVF) baby in 1978. No longer does IVF provoke the “futuristic fantasies and . . . doom-laden scenarios”¹ that populate the textual representations of reproductive technology of the 1920s and 1930s. In that long-ago era when most reproductive technology remained in the realm of speculation, there was plenty of hope that reproductive technology would be liberatory. At the same time, these flights of fancy fueled anxiety about what scientific intervention into human reproduction would mean for the future.²

1. MARILYN STRATHERN, *REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY, KINSHIP, AND THE NEW REPRODUCTIVE TECHNOLOGIES* 5 (1992).

2. SUSAN MERRILL SQUIER, *BABIES IN BOTTLES: TWENTIETH-CENTURY VISIONS OF REPRODUCTIVE TECHNOLOGY* 2–4 (1994); *see also* ROBIN MARANTZ HENIG, *PANDORA'S BABY: HOW THE FIRST TEST TUBE BABIES SPARKED THE REPRODUCTIVE REVOLUTION* 15 (2004) (“[I]n

That future is now, and through contemporary eyes looks comparatively bland: “IVF is no longer monstrous; today it is almost mundane.”³ This was not the case in the wake of the birth of Louise Brown, however, as European governments grappled with the possibility that assisted reproduction would have to be curbed, or at the very least subjected to strict guidelines, lest unregulated scientific experimentation in the realm of human reproduction collide with important societal interests and fan the flames of collective fear and panic.

It is well understood that the task of drafting laws to govern assisted reproduction places lawmakers in the unenviable position of attempting to strike a balance between the individual right to procreate and majoritarian convictions relating to responsible reproductive practices and parenting. European legislatures have placed several considerations in the balance, including the status of the embryo, the best interests of the child, reproductive autonomy, and the exploitation of women by technology. A legislature’s views on these issues tend to influence the relative permissiveness or restrictiveness of the resulting law. Some countries prize a genetic connection in parent-child relationships so highly that only techniques that employ the intending parents’ gametes are permitted. This narrow view of what constitutes a healthy family life results in tight controls on access to assisted reproduction. Countries with a less constrained view of the possibilities for organizing family life believe strong commitments to both individual autonomy and child welfare are compatible. Under this view, access to assisted reproduction is not limited to heterosexual couples but may extend to gay and lesbian couples and single individuals.

In addition to the impact family formation policies have on the welfare of children, beliefs about the status of the embryo are often raised in defense of or in opposition to the different ways ART might be regulated. The belief that embryos are human beings is most closely associated with restrictions on assisted reproduction, whether in the form of an outright ban on IVF, as in Costa Rica,⁴ or, as in Italy, a mandate that no embryo be subjected to pre-implantation genetic diagnosis, donated to science, or destroyed. A belief

the years before the first test tube baby . . . reasonable men and women . . . sincerely believed that IVF might unleash a scourge of woeful possibilities . . .”); Bernard Rubin, *Psychological Aspects of Human Artificial Insemination*, 13 *ARCHIVES OF GEN. PSYCHIATRY* 121 (1965).

3. HENIG, *supra* note 2, at 233.

4. The Inter-American Commission on Human Rights has determined that the ban violates the American Convention on Human Rights and has submitted the matter to the Inter-American Court on Human Rights. <http://www.cidh.oas.org/demandas/12.361Eng.pdf> (July 29, 2011).

that embryos are not due quite so much respect tends to vest decision-making control in the intending parents, whether they are using their own gametes in the process or have procured the gametes of third parties.

These issues were foremost in the minds of the drafters of the earliest legislative regimes governing assisted reproduction in Europe, where today we find a dizzying patchwork of differing laws. Within this patchwork, Italy and Spain, both countries with similar histories of allegiance to the Roman Catholic Church, stand out—Italy for its restrictive stance and Spain for its permissiveness. Ethicists react with equal alarm to restrictiveness and permissiveness, but there has been widespread attention paid only to the restrictive law Italy enacted in 2004.⁵ The Spanish approach to regulation⁶ has either been ignored,⁷ oversimplified,⁸ or subjected to cursory analysis.⁹ Notable, if not numerous, exceptions to these general trends do exist,¹⁰ but the trend itself is unfortunate primarily because there is in Spain a rich literature and an ongoing dialogue on bioethical issues generally and on assisted reproduction in particular.¹¹ This literature is not very well known outside of Spain, however. In a recent issue of *Cambridge Quarterly of Healthcare Ethics*, Cornell University Professor of Medical Ethics Pablo Rodríguez del Pozo commented: “The dissemination of ideas from the Spanish-speaking world has been nearly invisible to the English-speaking world of bioethics, isolated by language and culture from intellectual

5. Legge 19 febbraio 2004, n.40, in G.U. 24 febbraio 2004, n.45 (It.), available at <http://www.camera.it/parlam/leggi/040401.htm>.

6. Sobre Técnicas de Reproducción Humana Asistida (B.O.E. 2006, 9292), available at <http://www.boe.es/boe/dias/2006/05/27/pdfs/A19947-19956.pdf>.

7. E.g., THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES (Eric Blyth & Ruth Landau eds., 2004).

8. E.g., Antonio Pellicer, *The Italian Law on Assisted Reproduction: A View from Spain*, 11 REPRODUCTIVE BIOMEDICINE ONLINE 660 (2005).

9. E.g., Jaime Vidal Martínez, *The Legal Situation of Assisted Reproduction in Spain*, in CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION 287 (Donald Evans ed., 1996).

10. E.g., Julien Dubouchet & Ulrich Klöti, *ART in Spain: Technocratic Inheritance and Modernist Aspirations*, in COMPARATIVE BIOMEDICAL POLICY: GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGIES (Ivar Bleiklie et al. eds., 2004); José-Javier Hualde-Sanchez & Itziar Alkorta Idiaquez, *Génétique et procréations assistées en Espagne*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS 221 (Marie-Thérèse Meulders-Klein et al. eds., 2002).

11. In this connection, consider activities of the Interuniversity Network on Law and the Human Genome at the University of Deusto, available at http://www.catedraderechoygenoma.humano.es/revista_consejo.asp, and the UNESCO-sponsored Bioethics and Law Observatory at the University of Barcelona, http://www.pcb.ub.es/bioeticaidret/index.php?lang=es_ES.

currents abroad.”¹² In some measure, then, this study seeks to remedy this isolation by bringing Spanish perspectives into the English-language discussion of biomedical regulation.

Scholarship on the regulation of assisted reproduction tends to be country-specific. It does not, in most cases, make connections between countries with alternative approaches to regulation. Exceptions do exist,¹³ but even studies that purport to be comparative often simply present highly detailed and discrete descriptions of each jurisdiction’s legislative regime. They may even develop a taxonomy for categorizing the different degrees of regulation¹⁴ but nonetheless leave common themes and explanations of these differences unexplored. What is most notable is that these studies often lack any description of the legislative process that led to the legislation in question. This “ocean of country-specific details that usually characterizes cross-national empirical studies”¹⁵ is nonetheless a helpful point of departure for embarking on policy analysis in a more comparative vein. The bioethics literature on assisted reproduction is a useful complement to the country-specific studies, approaching the topic as it does through the lens of universal philosophical principles. Its major shortcoming, though, from the point of view of comparative policy analysis, is its lack of engagement with theories of legislation and the realities of the political process. In other words, bioethics seems often to ignore that what seems normatively correct may not be politically achievable. In an attempt to address the gap in comparative policy analysis on the regulation of ART, this article focuses on the legislative processes that have led to statutory enactments on assisted reproduction in two historically Catholic countries. This approach to the question of regulation will help elucidate the influence of physicians, the Roman Catholic Church, the feminist movement and the issue of abortion on the regulations that were ultimately enacted in Italy and Spain and how those influences might manifest themselves in debates over legislation that may one day be considered in the United States.

12. Pablo Rodriguez Del Pozo & Joseph J. Fins, *Guest Editorial: The Many Voices of Spanish Bioethics – An Introduction*, 18 CAMBRIDGE Q. OF HEALTHCARE ETHICS 214, 214 (2009).

13. E.g., Bill Atkin, *Regulation of Assisted Human Reproduction: The Recent New Zealand Model in Comparison with Other Systems*, 11 REVUE JURIDIQUE POLYNÉSIENNE 81 (2005).

14. E.g., Linda Nielsen, *Legal Consensus and Divergence in Europe in the Area of Assisted Conception—Room for Harmonisation?*, in *CREATING THE CHILD*, *supra* note 9, at 305, 306.

15. Jan W. van Deth, *Series Editor’s Preface*, in *COMPARATIVE BIOMEDICAL POLICY*, *supra* note 10, at xiii.

II. THERAPEUTIC CULTURES AND BIOMEDICAL REGULATION IN EUROPE

In contrast to the majority of countries,¹⁶ all countries in Europe have comprehensive legislative schemes governing assisted reproduction. The prevalence of legislation in this part of the world may be due to the prevailing sentiment that it is inconceivable in Europe that the public would not insist on regulation of something as monumental as the new reproductive technologies.¹⁷

But the question of regulating in this area did not simply arise with the birth of the first child conceived using IVF. It had already been proceeding with regard to alternative insemination for some time. By the 1960s, alternative insemination had become relatively familiar.¹⁸ From the mid-1970s and into the early 1980s, judicial decisions and, later, legislation began to appear regarding the legality of,¹⁹ the legal requirements for,²⁰ and the legal ramifications of alternative insemination.²¹

16. According to the International Federation of Fertility Societies' most recent *Surveillance*, assisted reproduction is governed by legislation in approximately 40 % of the countries surveyed. Howard W. Jones, Ian Cooke et al., *Surveillance 2010* (2011), INT'L FED'N FERTILITY SOCIETIES, http://www.iffs-reproduction.org/documents/IFFS_Surveillance_2010.pdf, at 10.

17. Jacinto Gil Rodriguez, *Prologue*, ITZIAR ALKORTA IDIAKEZ, REGULACIÓN JURÍDICA DE LA MEDICINA REPRODUCTIVA: DERECHO ESPAÑOL Y COMPARADO 19 (2003) (describing this insistence as "la compulsa del necesario control público de los nuevos métodos de procreación, habida cuenta de la necesario conjugación entre las elecciones individuales, la garantía científica y la trascendencia social de las singulares biotecnologías que, en cada caso, pretenden activarse.").

18. Charles P. Kindregan Jr., *Thinking About the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123 (2007).

19. 360 *Other Laws Affecting Parents and Children*, 10 ANN. REV. POPULATION L. 175, 175 (1983) (noting that French Minister of Justice declares artificial insemination not legally prohibited).

20. *Legitimacy of Children*, 1977 ANN. REV. POPULATION L. 53 (1977) (noting that Yugoslavia bars payment to sperm donors); *Fertility Regulation: Sterilization*, 1978 ANN. REV. POPULATION L. 12 (1978); *Other Laws Affecting Parents and Children*, 9 ANN. REV. POPULATION L. 155-57 (1982) (explaining comprehensive regulations promulgated in Czechoslovakia); 360 *Other Laws Affecting Parents and Children*, 9 ANN. REV. POPULATION L. 158 (1982) (explaining Hungarian Ministry of Health ordinance and obstetrics, gynaecology and urology societies' circular governing "the selection and examination of donors and recipients for artificial insemination"); *Other Laws Affecting Parents and Children*, 11 ANN. REV. POPULATION L. 133 (1984) (citing Sweden's Insemination Act).

21. *Filiation: Legitimacy of Children*, 1976 ANN. REV. POPULATION L. 105-06 (1976) (explaining that a French court ruled husband could renounce his paternity even if he had consented to his wife's medical insemination by donor); *Filiation of Children*, 1980 ANN. REV. POPULATION L. 168 (1980) (noting the law in Yugoslavia); *Other Laws Affecting Parents*

After the birth of Louise Brown in the United Kingdom in 1978, various European groups and the governments of Victoria and Queensland, Australia, began studying what social repercussions the use of assisted reproductive techniques might have.²² That same year, India became the second country to have a successful IVF birth,²³ followed by Australia in 1980.²⁴ Australia built upon this success with, all in 1984, the world's first IVF quadruplets, the first IVF birth using a donor egg, the first IVF birth using a donor embryo, and the first IVF birth using a frozen embryo. In 1986, the first IVF birth using a frozen egg occurred in Adelaide.²⁵ As of

and Children, 9 ANN. REV. POPULATION L. 154–55 (1982) (noting the law in Czechoslovakia); *Other Laws Affecting Parents and Children*, 11 ANN. REV. POPULATION L. 134 (1984) (noting the law in Sweden); M. Mandofia & M. Buergisser, *Les Difficultés de Réglementer la Procréation Assistée*, 13 DÉVIANCE ET SOCIÉTÉ 257, 258 (1989). Such laws coincided with the enactment of such laws in the individual U.S. states and the Canadian provinces. *Legitimacy of Children*, 1976 ANN. REV. POPULATION L. 114–16 (1976) (noting the law in Connecticut); *Rights of Spouses Within Marriage*, 9 ANN. REV. POPULATION L. 95 (1982) (noting the law in Quebec). *Legitimacy of Birth: Filiation of Children*, 9 ANN. REV. POPULATION L. 152 (1982) (noting a South African court determines child born via artificial insemination to be illegitimate); *Other Laws Affecting Parents and Children*, 10 ANN. REV. POPULATION L. 175–76 (1983) (noting a German court determined husband within certain period of time after birth could challenge legitimacy of child born to his wife via AID and with his consent); K., Stoyanovich, *Adultery: La Légitimité des Enfants Nés par Suite de L'Insemination Artificielle, en France et aux Etats-Unis d'Amérique*, 8 REVUE INTERNATIONALE DE DROIT COMPARÉ 264, 267–68, 270–71 (1956); *Insurance: Other Laws Affecting Parents and Children*, 8 ANN. REV. POPULATION L. 188 (1981) (noting the laws in France); *Other Laws Affecting Parents and Children*, 10 ANN. REV. POPULATION L. 176–77 (1983) (noting the laws in Germany).

22. JOSÉ ANTONIO COBACHO GÓMEZ & JUAN JOSÉ INIESTA DELGADO, COMENTARIOS A LA LEY 14/2006, DE 26 MAYO, SOBRE TÉCNICAS DE REPRODUCCIÓN HUMANA ASISTIDA (2007); Anita Stuhmcke, *The Criminal Act of Commercial Surrogacy in Australia: A Call for Review*, 18 J.L. MED. 601, 603 (2011).

23. T.C. Anand Kumar, *Advent of Medically Assisted Reproductive Technologies (MART) in India*, in THE ART AND SCIENCE OF ASSISTED REPRODUCTIVE TECHNIQUES (ART) 3, 3–4 (Gautam Allahbadia & Rita Basuray eds., 2004); Siddhartha Chatterjee, *Prof. Robert Edwards, Nobel Laureate in Medicine 2010—Tribute of an Indian with Joy and Sorrow*, 4 AL AMEEN J. MED. SCI. 1, 1 (2011).

24. BART FAUSER & PAUL DEVROEY, BABY-MAKING: WHAT THE NEW REPRODUCTIVE TREATMENTS MEAN FOR FAMILIES AND SOCIETY 10–11 (2011); *Une Histoire de Quarante Ans*, LE MONDE, Jan. 20, 1996.

25. Royal Commission on New Reproductive Technologies, Australian Inquiries Binder 3 (1991). National Library and Archives Canada, RG 33-154, accession no. 1993-94/531, Box 23, file no. 2500-3-2. The birth of multiples might not be considered a success today, given the widespread awareness of the threats to women's and children's health that arise in cases of multiple gestation. European Society of Human Reproduction and Embryology Task Force on Ethics and Law, *Ethical Issues Related to Multiple Pregnancies in Medically Assisted Reproduction*, 18 HUM. REPROD. 1976, 1977 (2003).

1991, Australia had engaged in more governmental inquiries into assisted reproduction techniques than any other country per capita.²⁶

Britain established the Committee of Inquiry into Human Fertilisation and Embryology in 1982, also known as the Warnock Committee, to study the social, ethical and legal ramifications of assisted reproduction.²⁷ In its report, published in 1984, the Committee acknowledged that the anxiety and moral indignation triggered by debates about these matters complicated its task;²⁸ however, it also found that no one was in favor of allowing innovations in infertility treatment to develop without limits.²⁹ Although the committee believed existing law to be inadequate to the task of responding to these new technologies, it nonetheless warned against regulating too rapidly or too extensively given that scientific advancement and public opinion would likely change briskly.³⁰ The Warnock Report made several important recommendations, including the need for a licensing agency to oversee the practice of ART, that were later supported by the government³¹ and adopted by Parliament in 1990.³² The Report was prescient in remarking that “[d]ifferent countries are at different stages in the development both of services and of a policy response. They have different cultural, moral and legal traditions, influencing the way in which a problem is tackled and the ways in which it might be resolved.”³³

The first French, Swedish, and Austrian IVF births occurred in 1982, and France’s consultative committee on the ethics of biosciences and health was created shortly thereafter, in 1983.³⁴ After years of debate, in 1994 France

26. Royal Commission on New Reproductive Technologies, *Australian Inquiries Binder 3* (1991). National Library and Archives Canada, RG 33-154, accession no. 1993-94/531, Box 23, file no. 2500-3-2.

27. DEPARTMENT OF HEALTH & SOCIAL SECURITY, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* iv (1984) (U.K.).

28. *Id.* at 1.

29. *Id.* at 2.

30. *Id.* at 7.

31. Jacqueline A. Priest, *Assisted Reproduction—Development in England*, 37 INT’L & COMP. L.Q. 535, 535 (1988).

32. Human Fertilisation and Embryology Act of 1990. Note that the Surrogacy Arrangements Act, banning commercial surrogacy, antedated the HFEA, having been enacted in 1985. 12 ANN. REV. POPULATION L. 326 (1985).

33. DEPARTMENT OF HEALTH & SOCIAL SECURITY, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* 6 (1984) (U.K.).

34. *Une Histoire de Quarante Ans*, *supra* note 24.

promulgated its bioethics law, which was slated for reexamination in 1999³⁵ and revised in 2011.³⁶

Victoria promulgated the first set of comprehensive laws regulating assisted reproduction techniques in 1984.³⁷ This act, the Infertility (Medical Procedures) Act of 1984, gave only heterosexual couples access to in vitro fertilization and permitted reimbursing gamete donors only to the extent of their travel and medical expenses.³⁸ The Act provided that intending parents and donors were entitled to non-identifying information about each other upon request, and that donors were entitled to non-identifying information about the children born from the use of their gametes.³⁹ The Act declared surrogacy contracts to be void and attached criminal penalties to commercial surrogacy and advertising related to surrogacy.⁴⁰

By the late 1980s, a full-fledged policy discussion about the law and ethics of assisted reproduction was underway in many European countries. Norway passed a law in 1987 permitting only married couples to have access to in vitro fertilization and requiring that they use their own gametes.⁴¹ Spain and Sweden were next to pass comprehensive laws, both in 1988.⁴² Spain's law permitted all known assisted reproductive techniques—save surrogacy—and did not restrict treatment to married couples. Although Sweden allowed artificial insemination by donor,⁴³ its law on in vitro fertilization permitted only heterosexual couples to use their own gametes in any attempt at “fertilization outside the human body.”⁴⁴ Legislation in other countries followed in rapid succession, including Germany (1991), Denmark (1992) and Austria (1992).⁴⁵ Many, albeit not all, of these legislative efforts of the late 1980s fit, as Anita Stuhmcke has observed, a pattern of responding to

35. *Id.*

36. *Le Projet de Loi Bioéthique Adopté*, LE MONDE, June 2, 2011.

37. *Other Laws Affecting Parents and Children and Child Welfare*, 11 ANN. REV. POPULATION L. 129, 130 (1984).

38. *Appendices*, 11 ANN. REV. POPULATION L. 302, 443–59 (1984).

39. *Id.* at 454.

40. *Id.* at 458–59.

41. *Appendix*, 14 ANN. REV. POPULATION L. 241, 358 (1987).

42. Sweden's law came into force on January 1, 1989. JENNIFER GUNNING & VERONICA ENGLISH, HUMAN IN VITRO FERTILIZATION: A CASE STUDY IN THE REGULATION OF MEDICAL INNOVATION 164 (1993).

43. *Assisted Reproduction Fertility Regulation*, 14 ANN. REV. POPULATION L. 51, 55 (1987).

44. *Assisted Reproduction Fertility Regulation*, 15 ANN. REV. POPULATION L. 52, 58 (1988).

45. GUNNING & ENGLISH, *supra* note 42, at 147, 151, 154.

biomedical developments “by initially applying the heavy-handed regulatory model of the criminal law and then subsequently [adopting] more nuanced and flexible regulatory frameworks.”⁴⁶

European legislation on ART generally fits within one of three classifications: (1) permissive; (2) cautious; and (3) prohibitive.⁴⁷ Permissive jurisdictions such as the United Kingdom and Spain exhibit tolerance toward most well-known forms of assisted reproduction except commercial surrogacy.⁴⁸ These jurisdictions typically allow the use of third-party gametes and embryos and do not limit access to assisted reproductive technology based on marital status or sexual orientation. Research using supernumerary embryos, the cloning of embryos for stem cell research, and the selection of embryos with the aid of pre-implantation diagnosis is also permitted in liberal jurisdictions.⁴⁹ Cautious jurisdictions such as France and Denmark do not have widespread restrictions but nonetheless have strict rules requiring anonymity in gamete donation⁵⁰ and bans on surrogacy.⁵¹ Cautious jurisdictions may allow pre-implantation genetic diagnosis (“PGD”) of embryos only in special cases and may prohibit the creation of embryos through in vitro fertilization or therapeutic cloning for research purposes.⁵² Cautious jurisdictions may, however, permit research on embryos that remain from couples who have completed their infertility treatment.⁵³ In addition to these restrictions on practice, France permits only stable heterosexual couples to have access to assisted reproduction.⁵⁴

The prohibitive approach stands in contrast to the liberal approach by placing limits on embryo and stem cell research and embryo selection following PGD.⁵⁵ Many assisted reproduction laws in Europe contain restrictions that impede some infertile couples and individuals from

46. Stuhmcke, *supra* note 22, at 605.

47. See Nielsen, *supra* note 14, at 306.

48. See generally H.W. Jones et al., *IFFS Surveillance 2010*, FERTILITY & STERILITY 13–14 (2010).

49. Frédéric Varone, Christine Rothmayr et al., *Comparing Biotechnology Policy in Europe and North America: A Theoretical Framework*, in THE POLITICS OF BIOTECHNOLOGY IN NORTH AMERICA AND EUROPE: POLICY NETWORKS, INSTITUTIONS, AND INTERNATIONALIZATION 1, 7, 9 (Eric Monpetit, Christine Rothmayr et al. eds., 2007) [hereinafter THE POLITICS OF BIOTECHNOLOGY].

50. Jones et al., *supra* note 48, at 65. Israel is another country of this type. *Id.*

51. *Id.* at 109–10.

52. THE POLITICS OF BIOTECHNOLOGY, *supra* note 49, at 9.

53. *Id.*

54. Jones et al., *supra* note 48, at 4.

55. THE POLITICS OF BIOTECHNOLOGY, *supra* note 49, at 9.

obtaining treatment in their home countries. The most common restrictions bar participation by third-party gamete donors and surrogates in the reproductive process, prohibit compensation of these third parties, or deny gamete donors any right to remain anonymous. Prohibitive countries such as Germany, Austria, Switzerland, and Italy also outlaw techniques that are elsewhere embraced as mainstream procedures. In these jurisdictions, oocyte donation is banned outright.⁵⁶ Austria and Italy also prohibit sperm donation in IVF.⁵⁷ In addition to banning these forms of third-party gamete donation, Switzerland prohibits PGD.⁵⁸ It is joined in this restriction by several non-European countries including Chile, China, Ivory Coast, and the Philippines.⁵⁹ Although it does not always require PGD, non-medical sex selection is banned in the United Kingdom, India, Canada, and Taiwan.⁶⁰

In general, restrictions on assisted reproduction aim to combat one or more of several evils believed to emerge from the laissez-faire approach to regulation: (1) the commodification of reproduction generally; (2) psychological harm to children; (3) health risks to egg donors; and (4) the danger to societal integrity posed by donor-created families. The restrictions themselves take several forms, whether barring participation by third-party gamete donors and surrogates in the reproductive process, prohibiting compensation of these third parties, or denying gamete donors any right to remain anonymous.

Despite the prevalence of legislation in Europe, Nielsen's classification scheme shows international disharmony. But even within individual countries, European observers point out the difficulty of achieving internal consensus on these questions that leads to complete coherence within any given legislative scheme. As was remarked early on in the history of the regulation of assisted reproduction in Europe, "[v]ery few countries achieve an internal consensus on all issues surrounding medically assisted conception, one that allows for a coherent and comprehensive national policy or legislation."⁶¹ Thus, what some perceive to be a patchwork of restrictions across countries turns out to be a patchwork of restrictions within countries as well.

56. Jones et al., *supra* note 48, at 47–48.

57. *Id.* at 46–48.

58. *Id.* at 100.

59. *Id.* at 101.

60. *Id.* at 95–96.

61. Bartha M. Knoppers & Sonia Lebris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 330–31 (1991).

That European regulation of assisted reproduction is so varied can be understood first and foremost as the natural outgrowth of the broad competence of individual countries to regulate human reproduction and the differing religious and moral values with which they do so. It is especially important, then, to consider the *therapeutic cultures* that contribute so significantly to the look and feel of whatever regulation ultimately comes into force. I borrow this term from Arthur Daemmrch's *Pharmacopolitics*, which defines a therapeutic culture in the field of drug regulation as the historical evolution of the often fraught relationships among of physicians, government regulators, the pharmaceutical industry and pressure groups that leads to particular regulation of pharmaceuticals.⁶² Daemmrch focuses on the United States and Germany, two capitalist states with similar technological advancement in, and governmental support for, medical technology. But the cultures of medical care delivery in these two countries differ sharply: in the United States it is a private good, in Germany a public entitlement. These understandings about appropriate medical care delivery are, of course, products of broader cultural beliefs and practices. Daemmrch's goal in approaching the question of drug regulation in this fashion is to better understand the role of politics in medicine and, more particularly, the politicization of drug testing and drug science.⁶³ From a wider perspective, delineating the therapeutic culture at work in any given instance "indicates how health-care provision practices are shaped by historical developments and interactions between different actors in the area of health care, which have led to nationally specific constellations of health-care provision."⁶⁴

62. ARTHUR A. DAEMMRICH, PHARMACOPOLITIC: DRUG REGULATION IN THE UNITED STATES AND GERMANY, 4, 11 (2004). This use of the term is in contrast to its use in literature on emotional health. E.g., Elaine Swan, "You Make Me Feel Like A Woman": *Therapeutic Cultures and the Contagion of Femininity*, 15 GEND. WORK & ORG. 88, 88 (2008) (defining therapeutic culture as "the congeries of practices, meanings and values connected by the belief that the psychological self, as opposed to the physical self, is the source of wellbeing."); Lisbet Borge and May Solveig Fagermoen, *Patients' Core Experiences of Hospital Treatment: Wholeness and Self-Worth in Time and Space*, 17 J. MENTAL HEALTH 193 (2008) (reflecting on the optimal therapeutic environment in which to treat mental illness). It is also in contrast to the work of social scientists writing on how a "therapeutic ethos" has pervaded American society. E.g., JONATHAN B. IMBER, THERAPEUTIC CULTURE: TRIUMPH AND DEFEAT (2004).

63. DAEMMRICH, *supra* note 62, at 5.

64. Erik Aarden et al., *Providing Preimplantation Genetic Diagnosis in the United Kingdom: A Comparative In-depth Analysis of Health Care Access*, 7 HUM. REPROD. 1542, 1543 (2009).

Daemmrich's generalizations about therapeutic cultures apply readily to other areas of medical policy. "Intense debates and very serious differences of opinion" are staples in policy debates on bioethical matters in particular, with each cultural constituent striving to establish itself as the most legitimate spokesperson or "obligatory 'point of passage'" on questions of regulation.⁶⁵ This state of affairs is discernible not only with respect to drug regulation but perhaps even more saliently in the regulation of assisted reproduction where there is little room to deny that religious, moral and cultural values play a prominent role in the formulation of policy.

III. THE CATHOLIC CHURCH'S INFLUENCE IN HISTORICAL PERSPECTIVE

The Roman Catholic Church is the dominant church in Latin countries around the world, recalling its founding at Rome and its inclusion in the colonial activities of the Romans and subsequently of the Spanish. Today, the religion is predominant in Southern Europe and Latin America. The Church claims 1.18 billion adherents⁶⁶ with noticeable growth in Africa and Asia.⁶⁷ Projections indicate that the power base of the Church, already on the wane in Europe in the wake of searing sex-abuse scandals, will reemerge in the more loyal southern hemisphere by mid-century.⁶⁸ Given the Church's predominance in many countries, it is more than capable of exerting an influence on legislative matters.

The Church takes two positions that cause it to disapprove of abortion and assisted reproduction. First, it is committed to protecting human life from the point of conception.⁶⁹ This means that it is morally opposed to abortion as a matter of principle, although it does not condemn abortion in cases of ectopic pregnancy. Second, a child must be the product of the sexual union of a married heterosexual couple. This means that the Church is

65. DAEMMRICH, *supra* note 62, at 11.

66. Francis X. Rocca, *Number of Catholics Worldwide Edges Up, Vatican Says*, THE CHRISTIAN CENTURY (Feb. 22, 2011), <http://christiancentury.org/article/2011-02/number-catholics-worldwide-edged-vatican-says>.

67. *Factfile: Roman Catholics Around the World*, BRITISH BROADCASTING CORPORATION (Jan. 1, 2005), <http://news.bbc.co.uk/2/hi/4243727.stm>.

68. Philip Jenkins, *The End of the European Church*, THE NEW REPUBLIC, Apr. 29, 2010, available at <http://www.npr.org/templates /story/story.php?storyId=126382767> (last visited Mar. 30, 2011).

69. Joseph G. Schenker, *Assisted Reproductive Practice: Religious Perspectives*, 10 REPRODUCTIVE BIOMEDICINE ONLINE 310, 311 (2005).

opposed to methods of human conception that do not involve sexual intercourse, i.e., techniques of assisted reproduction.⁷⁰

Both views are rooted in the idea of a communion of persons. Human beings are made in God's likeness to express love in "an all-encompassing self-surrender for the sake of others."⁷¹ This idea exists throughout Catholic theology and is prominent in its tenets regarding the family and sexuality. The familial communion of persons, defined as a married heterosexual couple who choose each other forever, who engage in procreative sex only within such a union and welcome all resulting children into the family, is the most important communion of persons.⁷² Divorce, adultery, pre-marital sex, abortion, contraception and assisted reproduction all undermine the family as a community of persons.⁷³ They are prohibited because they are acts of selfishness that conflict with the "total self-donation of one person to another" upon which the familial communion of persons is founded.⁷⁴

The Catholic Church considers the use of ART a serious abuse that destroys both love and life. ART is the product of a "contraceptive mentality" that destroys love by reducing sexual intercourse to "a merely biological function" and destroys life because it seeks to create children without sexual intercourse.⁷⁵ By using ART, the couple is "manipulating and using their bodies" through a selfish desire for children.⁷⁶ This is contrary to God's will and an affront to human dignity.⁷⁷ "The practice of artificial conception reduces procreation to a merely biological, laboratory act when it must be, by God's will, the fruit of a covenant, a *communion of persons*, as expressed in the conjugal embrace of a man and a woman joined in marriage."⁷⁸

The Church's views on ART were published in the 1987 instruction *Donum Vitae*, which specifically condemns the cryopreservation of embryos, procreation outside of marriage, a married couple's using donated gametes or

70. *Id.* at 311; Rachel Anne Fenton, *Catholic Doctrine Versus Women's Rights The New Italian Law on Assisted Reproduction*, 14 MED. L. REV. 73, 86 (2006).

71. RICHARD M. HOGAN & JOHN M. LEVOIR, COVENANT OF LOVE: POPE JOHN PAUL II ON SEXUALITY, MARRIAGE, AND FAMILY IN THE MODERN WORLD 37 (1985).

72. *Id.* at 40.

73. *Id.* at 43-45, 46, 48-56.

74. *Id.* at 46, 60.

75. *Id.* at 56.

76. *Id.*

77. *Id.*

78. *Id.* (emphasis added).

embryos to have children, and surrogacy.⁷⁹ The instruction likewise condemns techniques of assisted reproduction that permit a married couple to contribute their own gametes and gestation to the process of creating a child.⁸⁰ The act of sexual intercourse is said to be essential to responsible procreation.⁸¹

Donum Vitae is a political document. In direct contrast to the Church's stance in the early 1960s, when it sought "to distance itself from party politics (especially in Italy) and concentrate more fully on its universal spiritual and pastoral mission,"⁸² *Donum Vitae* urges legislatures to embrace its dictates as a blueprint for regulation. In particular, the instruction advocates provisions that vindicate the natural law concepts that lie behind its list of condemned practices. Not to do so would violate inalienable rights vested in each person by the Creator: the rights to life and integrity, the rights to family and marriage, but perhaps most importantly the right of each child to be created and raised by married heterosexual parents.⁸³ As a response to advances in biomedicine, *Donum Vitae* urges adherence to the teaching of the Church as the only defense to humankind "against the excesses of [its] own power."⁸⁴

A. Spain

Spain is a special case for the Catholic Church. Until the late 1960s, it was the most conservative of all the other major Catholic countries.⁸⁵ But today, although 94.2 percent of the Spanish citizens are baptized Catholics,⁸⁶ the country is increasingly secular. Spain's shift to democracy after the death of dictator Francisco Franco was accompanied by the increased separation of church and state. At present, and even though it is nominally represented by a strong opposition party, the Partido Popular, the Church simply has very little influence in the legislature. Interest in the Church among young people

79. *Donum Vitae*, ROMAN CATHOLIC CHURCH—CONGREGATION FOR THE DOCTRINE OF THE FAITH, 10, 12, 13, available at <http://www.ewtn.com/library/curia/cdfhuman.htm> [hereinafter *Donum Vitae*].

80. *Id.* at 15–17.

81. *Id.* at 14–15.

82. CHRISTOPHER DUGGAN, A CONCISE HISTORY OF ITALY 266 (1994).

83. *Donum Vitae*, *supra* note 79, at 19.

84. *Id.* at 22.

85. STANLEY G. PAYNE, THE FRANCO REGIME, 1936–1975 at 560 (1987) [hereinafter PAYNE, THE FRANCO REGIME].

86. *The Largest Catholic Communities*, http://www.adherents.com/largecom/com_romcath.html (last visited Mar. 30, 2011).

in particular has plummeted fifty-six percent in the last ten years.⁸⁷ In this connection, commentators note that it is no accident that the corporate-backed World Youth Day 2011, one of the mechanisms by which the Church hoped to reinvigorate itself, was held in Madrid.⁸⁸ The reported 60 million euro price tag for the event triggered a secular backlash.⁸⁹

Any attempted understanding of Spanish assisted reproduction policy cannot ignore the role of the Catholic Church in Spanish politics throughout the twentieth century. For centuries until the late twentieth century, the Spanish were “the most Catholic of peoples,”⁹⁰ their identity inextricably conjoined with their faith.⁹¹ The Church’s fortunes had of course waxed and waned with divergent political tides but held on and indeed achieved stunning political prominence during the rule of Francisco Franco, the head of the longest totalitarian regime of the twentieth century. Before Franco, under the parliamentary system of the late nineteenth and early twentieth centuries, the church had lost political ground because of its alignment with the old-line elites.⁹² But under Primo de Rivera, the dictator who rose to power and brought fascism to Spain in the 1920s, upsurges of Spanish nationalism, embracing a historic Spanish ideology to expand Christendom and to restore traditional Spanish values, gave the Church renewed political legitimacy.⁹³ “Religion, in fact, became the main single ideological force invoked to legitimize the new regime,” leading one prescient politician to lament that “the Church, ignoring all its traditions, placed itself at the service of force, against law and justice.”⁹⁴ In contrast to the Italian fascism of the same period, marked by its conflicts with the Church,⁹⁵ Primo de Rivera dubbed his movement a Christian one,⁹⁶ and it was warmly embraced

87. Stephen Burgen, *Spanish Priests Join Opposition to Costly Papal Visit*, THE GUARDIAN, Aug. 9, 2011, available at <http://www.guardian.co.uk/world/2011/aug/09/spain-priest-oppose-pope-visit>.

88. Benedictus, PP. XVI, *Message of His Holiness Pope Benedict XVI for the Twenty-Sixth World Youth Day (2011)*, available at http://www.vatican.va/holy_father/benedict_xvi/messages/youth/documents/hf_ben-xvi_mes_20100806_youth_en.html (last visited Mar. 30, 2011).

89. Burgen, *supra* note 87.

90. STANLEY G. PAYNE, *SPANISH CATHOLICISM: AN HISTORICAL OVERVIEW* xii (1984) [hereinafter PAYNE, *SPANISH CATHOLICISM*].

91. *Id.* at 8–9.

92. *Id.* at 24.

93. *Id.* at 25, 29, 32–33; STANLEY G. PAYNE, *FASCISM IN SPAIN, 1923–1977* at 4 (1999) [hereinafter PAYNE, *FASCISM IN SPAIN*].

94. PAYNE, *FASCISM IN SPAIN*, *supra* note 93, at 31.

95. *Id.* at 30.

96. *Id.* at 31; PAYNE, *THE FRANCO REGIME*, *supra* note 85, at 26.

by many Catholics, particularly middle-class adherents of the faith who formerly had had little role in politics.⁹⁷ Later, Francisco Franco would use his regime's strong Catholic identity in an attempt to distinguish Spanish from Italian fascism.⁹⁸

To some, "the Primo de Rivera dictatorship . . . seemed to provide the final proof that the Church was in league with repression and reaction and therefore must be brought to its knees."⁹⁹ After Primo de Rivera's resignation in 1930, rising anticlerical sentiment culminated in the worst persecution of the Catholic Church that had ever been seen in Western Europe.¹⁰⁰ Simultaneously, the Church was stripped of authority and support by the Republican government that succeeded Primo de Rivera.¹⁰¹ This violent persecution for a short while succeeded in curtailing the power of the Church,¹⁰² but outrage and fear soon galvanized a Catholic political party that eventually became the most redoubtable single political force in Spain.¹⁰³ Indeed, during the ensuing Spanish Civil War between the Nationalists, led by Franco, and the Republicans, there was enthusiastic Catholic response to the cause of nationalism¹⁰⁴ and horrific persecution of the Catholic establishment by their Republican opponents.¹⁰⁵ "Catholic backing . . . became the most important single domestic pillar of the Nationalist movement."¹⁰⁶ Although loyalty to the Catholic church had not been overt at the beginning of the conflict, once the initial rebellion had erupted into a full-scale civil war, "the military leadership moved to take advantage of Catholic backing"¹⁰⁷ by pledging and eventually fashioning a Catholic Spain that would require, among other things, the teaching of Catholic doctrine in schools, the installation of crucifixes in classrooms, the segregation of educational activities by gender,¹⁰⁸ and, later, the abolition of divorce.¹⁰⁹ Church leaders thereafter began to voice their support of the

97. PAYNE, *FASCISM IN SPAIN*, *supra* note 93, at 28–29.

98. PAYNE, *THE FRANCO REGIME*, *supra* note 85, at 362.

99. PAYNE, *SPANISH CATHOLICISM*, *supra* note 90, at 150.

100. *Id.* at 168; *see also* José Antonio Souto Paz, *Perspectives on Religious Freedom in Spain*, 2001 *BYU. L. REV.* 669, 670–71, 685 (2001).

101. PAYNE, *SPANISH CATHOLICISM*, *supra* note 90, at 154.

102. *Id.* at 38.

103. *Id.* at 41; PAYNE, *FASCISM IN SPAIN*, *supra* note 93, at 44.

104. PAYNE, *THE FRANCO REGIME*, *supra* note 85, at 132.

105. *Id.* at 198.

106. *Id.*

107. *Id.*

108. *Id.* at 198, 207, 366.

109. *Id.* at 362.

Nationalist cause, some likening it to a religious crusade.¹¹⁰ Throughout the term of the war, the “absolute identification of the Nationalist cause with the church” became more and more fixed.¹¹¹ Franco himself, raised a devout Catholic, believed firmly that Spain had a special religious mission and that faith and nationalism were inseparable.¹¹² Indeed, during World War II, Franco declared Catholicism to be the primary reason Spain assumed a stance of complete neutrality: “Spain could never be joined to other governments that did not hold to Catholicism as first principle.”¹¹³

Interestingly, the Vatican did not rush to recognize the Nationalist government during the Spanish Civil War. But Spanish prelates, forming a united front, described the Civil War to the Holy See as an act of piety that had reestablished and reinvigorated Catholicism in a Spain that now wanted to cleave to the church after a period of profaning and destroying it.¹¹⁴ To do so, according to this narrative, would be consistent with a return to what had historically been Spain’s essential culture and ethos.¹¹⁵ Fascism in Spain would be absolutely and truly Catholic in a manner that fascism in Italy never desired to be. Over time, relations between Spain and the Vatican would warm considerably.

Post-Civil War Spain was marked by repression within the country and ostracism from without. Along with “the broadest assortment of religious regulations seen in any twentieth-century western state,” regulations that blurred the distinction between religious and daily life, the church hierarchy became firmly intertwined with the workings of government and benefited from handsome public subsidies.¹¹⁶ The most important political objective of the new state was a concordat with the Vatican.¹¹⁷ Efforts to achieve this were delayed by World War II, but at war’s end Franco intensified efforts to burnish the Catholic image of his regime “in order to win the support of the Vatican.”¹¹⁸ Despite Spain’s general ostracism by world leaders in the post-war period, the Vatican, though cautious, was pleased with the emergence of a strong Catholic culture in Spain, one in which religious observance became

110. *Id.* at 198. This characterization continued to be made in the post-World War II period. *Id.* at 367.

111. *Id.* at 199.

112. *Id.*

113. *Id.* at 337.

114. *Id.* at 199–200.

115. *Id.* at 202–03.

116. *Id.* at 368.

117. *Id.* at 242.

118. *Id.* at 349.

embedded in social¹¹⁹ and political¹²⁰ life to such an extent as to constitute a bona fide “national Catholicism.”¹²¹ The Church granted Spain the fullest possible recognition in 1953 in an agreement that expanded the independence of the church within Spain.¹²² It would not be long, however, before the first indications of dissent and secularization began to appear.¹²³

The rapid urbanization and economic prosperity brought about by the industrialization of the 1960s and 1970s “reoriented social psychology, which became attuned to the common consumerist and hedonist culture of the western world in the second half of the twentieth century.”¹²⁴ This social and cultural shift accompanied by greater wealth and foreign cultural influences had a strong influence on Spaniards’ commitment to Catholicism:

A highly urban, sophisticated, materialist, nominally educated, and hedonistic Spain, increasingly attuned to the secular and consumerist life of western Europe, simply ceased to be Catholic in the traditional manner. Though the majority of Spaniards did not reject their religious identity, they no longer identified with the traditional values and practices of the religion per se.¹²⁵

The lay populace was not the only constituent of the church affected by the upheaval. Given its prior conservatism, “the Church in Spain was one of the branches of Catholicism most profoundly affected by the cultural and religious crisis stemming from Vatican II” in 1965.¹²⁶ A highly vocal revolt primarily among younger priests rocked the clergy¹²⁷ with strident demands for governmental reform.¹²⁸ These events stoked rightist anticlericalism against “Marxist” priests who had infiltrated the church with their subversive ideas¹²⁹ but did not succeed in stamping out more and more widespread clerical calls for reform in the direction of democratic pluralism and more autonomy for itself.¹³⁰ By 1973, two years before Franco’s death, the Church

119. *Id.* at 363.

120. *Id.* at 435.

121. *Id.* at 413.

122. *Id.* at 420.

123. *Id.* at 421, 439.

124. *Id.* at 483–84.

125. *Id.* at 492.

126. *Id.*

127. *Id.* at 492, 560.

128. *Id.* at 560–61.

129. *Id.* at 561.

130. *Id.* at 562, 563; *see also* Souto, *supra* note 100, at 687.

was slipping inexorably out of the regime's control. In his death message, Franco proclaimed, "I sought always to live and die as a Catholic."¹³¹ He went to his grave "the last great avatar of the traditional Spanish national-Catholic ideology"¹³² He had resisted liberalization and democratization to the end.¹³³

In the post-Franco years, the Church experienced a dramatic decline.¹³⁴ A long-awaited moment had been reached for embracing "liberal models of government as a reaction to the repressive Catholic conservatism of the Franco period."¹³⁵ The 1977 Constitution made explicit that Spain no longer had a state religion.¹³⁶ In the 1977 parliamentary elections, the Church issued a statement entitled "Moral Responsibility of the Vote" calling upon Catholics "to assess carefully the program of the various parties in light of their 'ideological or operative commitments' which affect religious values or fundamental human rights."¹³⁷ The statement in part condemned the proposal of certain parties to legalize abortion. But the position of the Church as a political force to be reckoned with was weakened by the heterogeneity of political views within the Church itself. By the spring of 1979, "the Spanish population was sharply divided in terms of religiosity, feelings towards the Church, and opinions on the role of the Church in society."¹³⁸ Although the Spanish government did not reject the Church and in fact continued to sustain it in important ways,¹³⁹ there has been "a liberal reaction against the spiritual formalism and social conformity of earlier times."¹⁴⁰ The Church in this more recent period has unsuccessfully opposed the legalization of divorce, abortion¹⁴¹ and same-sex marriage.¹⁴² The Church's stance on these issues has placed it in opposition to the government rather than in alignment

131. PAYNE, *THE FRANCO REGIME*, *supra* note 85, at 620.

132. *Id.*

133. *Id.* at 640.

134. PAYNE, *SPANISH CATHOLICISM* *supra* note 90, at 218.

135. PATRICK HANAFIN, *CONCEIVING LIFE: REPRODUCTIVE POLITICS AND THE LAW IN CONTEMPORARY ITALY* 78 (2007).

136. Souto, *supra* note 100, at 691.

137. RICHARD GUNTHER ET AL., *SPAIN AFTER FRANCO: THE MAKING OF A COMPETITIVE PARTY SYSTEM* 223-24 (1986).

138. *Id.* at 230.

139. PAYNE, *THE FRANCO REGIME*, *supra* note 85, at 222.

140. *Id.* at 224 (talking about priests).

141. *Id.* at 226.

142. Giles Tremlett, *Gay Marriage Law Alarms Spain's Religious Leaders*, *THE GUARDIAN*, Apr. 22, 2005, available at <http://www.guardian.co.uk/world/2005/apr/22/spain.gayrights?INTCMP=ILCNETTXT3487>.

with it.¹⁴³ Spain's constitutional court recently stripped the Church of what had long been its right to fire teachers of religious education in state schools "who do not follow Catholic precepts in their relationships."¹⁴⁴ The 2010 visit of the Pope to Spain was marked by, if not a chilly reception from the government, at least one that was noticeably lukewarm. President Zapatero did not attend the mass celebrated to consecrate the basilica of La Sagrada Familia in Barcelona and spent a mere five "cordial" minutes with the Pope in an airport hangar as the pontiff was preparing to embark on his return to Rome.¹⁴⁵ The image was a powerful reminder that Spain, in stark contrast to the Franco years, is currently noticeably estranged from the Catholic Church.

B. Italy

Like Spain and other European countries with totalitarian pasts, Italy today touts its commitment to democracy and pluralism. But underlying this public image is a long history of patriarchy and Catholicism that still has strong undercurrents on many different levels in contemporary Italian society.¹⁴⁶ Saying Italy is a Catholic country really means that "Italian views of marriage, the family, and social justice, along with Italian cultural values and education, have remained very largely Catholic."¹⁴⁷

The issue of the intertwining of the Church with politics unquestionably has deeper roots,¹⁴⁸ but it has been "a fact of daily life" since the founding of the Italian Republic in 1861.¹⁴⁹ The new state was founded upon a commitment to the separation of church and state that rankled the Church and inspired it to withhold its recognition and to forbid the faithful

143. PAYNE, SPANISH CATHOLICISM, *supra* note 90, at 226.

144. Giles Tremlett, *Spain Ends Church Control over Religion Teachers' Married Lives*, THE GUARDIAN, Apr. 20, 2011, available at <http://www.guardian.co.uk/world/2011/apr/20/spain-catholic-church-religion-teacher?INTCMP=ILCNETTXT3487>.

145. El Papa se reúne con Zapatero al término de su visita a Barcelona, LA VANGUARDIA, Nov. 7, 2010, available at <http://www.lavanguardia.es/ciudadanos/noticias/20101107/54065821708.html>.

146. Jeff Pratt, *Catholic Culture*, in ITALIAN CULTURAL STUDIES: AN INTRODUCTION 129, 140–42 (David Forgacs & Robert Lumley eds. 1996) (discussing how Catholic culture goes beyond attending church services).

147. INTRODUCTION TO MODERN ITALY: A TOPICAL HISTORY SINCE 1861 xxviii (Edward R. Tannenbaum & Emiliana P. Noether eds., N.Y. Univ. Press 1974).

148. Carlo Ungaro, *The Catholic Church and Italian Politics*, OPEDNEWS (Feb. 2, 2011), <http://www.opednews.com/articles/The-Catholic-Church-and-It-by-Carlo-Ungaro-110202-940.html>.

149. ROSANNA MULAZZI GIAMMANCO, THE CATHOLIC-COMMUNIST DIALOGUE IN ITALY: 1944 TO THE PRESENT 84 (1989).

from holding public office or voting in national elections.¹⁵⁰ The Church knew that the separation of church and state was likely to create a crisis of identity among the populace that could cause the new republic to founder.¹⁵¹ In the words of Italian historian Alberto Acquarone: “Italy differed from all other European nation-states because the centuries-old special connection between Italian society and the Catholic church was bound to provoke a permanent, if only latent, crisis of identity in the most politically conscious Italians, an emotional strain that could even upset non-believers.”¹⁵² The *non expedit* was eventually lifted, allowing Catholics to vote in Italian elections for the first time in 1904.¹⁵³

As did Spain, Italy fell to fascism in the 1920s. Under Mussolini, the country pursued an imperialist agenda the strength of which was said to depend upon the will of women to become committed reproducers of the nation and increase the birth rate.¹⁵⁴ A legal framework was constructed to advance these aims. Part of this framework was the criminalization of birth control and abortion, the bachelor tax and birth bonuses for large families.¹⁵⁵ The Church remained the only institution not fully fitted within the totalitarian state.¹⁵⁶ Mussolini, sensing an opportunity to galvanize his power with Church support, paid a high price to enter into the Lateran Pacts which made the Vatican a sovereign city-state with the pope at its helm and granted the Church numerous desirable properties in exchange for its recognition of the Italian government and its relinquishment of its claim to its extensive former territorial holdings, the Papal States. The Pacts also established Catholicism as the official state religion¹⁵⁷ and the right of the Church to control broad swaths of family life and religious instruction in public

150. MARIO B. MIGNONE, *ITALY TODAY: AT THE CROSSROADS OF THE NEW MILLENNIUM* 255 (1998); HARRY HEARDER, *ITALY: A SHORT HISTORY* 203 (1990).

151. D.A. BINCHY, *CHURCH AND STATE IN FASCIST ITALY* 61 (1941) (noting that Pope Leo XIII hoped “that a complete boycott of the polling-booths by Catholic voters would undermine the already shaky foundations of [modern] Italy”).

152. Alberto Acquarone, *A Closing Commentary: Problems of Democracy and the Quest for Identity*, in *MODERN ITALY: A TOPICAL HISTORY SINCE 1861* 355, 359 (1974).

153. HEARDER, *supra* note 150, at 209.

154. HANAFIN, *supra* note 135, at 15–16; VICTORIA DE GRAZIA, *HOW FASCISM RULED WOMEN: ITALY 1922-1945*, at xi (1992) (“[T]he Duce’s regime fell back on the traditional authority of family and religion to enforce biologically determined roles as mother and caretakers.”).

155. HANAFIN, *supra* note 135, at 16.

156. BINCHY, *supra* note 151, at 684.

157. MIGNONE, *supra* note 150, at 255, 258.

education. Handsome public subsidies, phased out nearly sixty years later,¹⁵⁸ rounded out the concessions made by the government to the Church.¹⁵⁹

Unlike in Spain, where democratic reforms occurred rapidly following the death of Franco, the dismantling of fascism in Italy around 1945 did not lead to any deep alteration in the sociopolitical terrain.¹⁶⁰ The “patriarchal model of social relations” remained strong. The first Italian Constitution of 1948 was very much infused by Roman Catholic natural law perspectives on responsible family relations; fascist-era laws on abortion and contraception remained in place. According to Patrick Hanafin, the “textual fantasy of pluralism” in the Constitution simply did not include women.¹⁶¹ What further exacerbated social division was the Church’s penchant for meddling in politics. The Constitution granted the Church privileges unlike any other democratic country,¹⁶² setting the stage for the Church to inject itself “into every aspect of civil life”¹⁶³ The Church attempted to control the political sphere during this period via an edict of excommunication against any Catholic who voted for a Communist or a Socialist, read or distributed communist literature or merely sympathized with those parties’ positions.¹⁶⁴ The political world was divided into saints and devils.¹⁶⁵

From 1948 until the mid-to-late-1960s, Catholics for the most part, with the encouragement of the Vatican, supported the Christian Democratic Party, ensuring the Church’s continued political influence.¹⁶⁶ The party acted largely as an agent of the Church,¹⁶⁷ stressing the sanctity of the family as against the claims of the State.¹⁶⁸ After the death of Pius XII, the Church appeared to distance itself from politics as it grappled with concerns of a more spiritual and pastoral nature.¹⁶⁹ As in most Western nations, the 1960s

158. *Id.* at 267–68.

159. *Id.* at 255–56.

160. See ROBERT WALLACE, *THE ITALIAN CAMPAIGN*, 178–92 (1978).

161. HANAFIN, *supra* note 135, at 17.

162. MIGNONE, *supra* note 150, at 251.

163. *Id.* at 258.

164. GIAMMANCO, *supra* note 149, at 4. See also MIGNONE, *supra* note 150, at 258 (recounting that Pope Pius XII issued a decree prohibiting Catholics from joining the communist party “and from writing, reading, publishing, or distributing any communist literature”); DUGGAN, *supra* note 82, at 265.

165. MIGNONE, *supra* note 150, at 260.

166. GIAMMANCO, *supra* note 149, at 6, 85. See also MIGNONE, *supra* note 150, at 257 (“At election time, the Church, from the pope down to the parish priest, stated that it was a religious duty to vote for the [Christian Democrats]”); DUGGAN, *supra* note 82, at 254.

167. GIAMMANCO, *supra* note 149, at 84.

168. DUGGAN, *supra* note 82, at 260.

169. *Id.* at 266.

and 1970s brought a period of increasing secularization to Italy, disaffection with the Christian Democrats who had for so long remained in power,¹⁷⁰ and a steep falling off of church attendance and membership.¹⁷¹ Consistent with this change, in the late 1960s the Constitutional Court began to issue decisions that declared entrenched gender inequality in family relations and the workplace to be in violation of constitutional guarantees.¹⁷² As a part of this move toward more individual rights-based interpretations of the Constitution, the court nullified a notorious criminal adultery law that punished a wife's adultery more severely than a husband's.¹⁷³ There were legislative developments as well, most notably the legalization of divorce in 1970 and of abortion in 1978.¹⁷⁴ Public referenda failed to nullify those laws in 1974 and 1981, respectively.¹⁷⁵ Although some believe the election of the non-Italian pope, John Paul II, in 1978 signaled the determination of the Church to play a more restrained role in Italian affairs,¹⁷⁶ in fact the Church's influence continued to be felt in elections where the Church's power was threatened.¹⁷⁷ At such critical junctures, the Church called upon the faithful to "show their Catholicity,"¹⁷⁸ but the tepid response, prompted in part by the view that the Church was merely a tool of the bourgeoisie,¹⁷⁹ proved that the Catholic Church's ascendancy over family matters had suffered a noticeable setback. By 1975 "a decisive majority of Italians had stated implicitly that religious doctrine was not to be the basis of the country's laws or social life."¹⁸⁰

By the 1990s, with legalized contraception and the rise of consumerism, Italy's birthrate fell to the lowest in the world.¹⁸¹ Italy had for a long time

170. HANAFIN, *supra* note 135, at 21–23.

171. DUGGAN, *supra* note 82, at 276.

172. Luisa Passerini, *Gender Relations*, in *ITALIAN CULTURAL STUDIES: AN INTRODUCTION* 144, 145–46 (David Forgacs & Robert Lumley eds., 1996); SPENCER M. DISCALA, *ITALY: FROM REVOLUTION TO REPUBLIC, 1700 TO THE PRESENT* 314 (1995).

173. HANAFIN, *supra* note 135, at 22.

174. *Id.* at 23.

175. Miele Paolo, *Femministe di sinistra sedotte dallo scientismo*, *CORRIERE DELLA SERA*, May 3, 2011, at 46; ARTURO CARLO JEMOLO, *CHIESA E STATO IN ITALIA NEGLI ULTIMI CENTO ANNI* 553 (1971); DUGGAN, *supra* note 82, at 274.

176. MIGNONE, *supra* note 150, at 254.

177. GIAMMANCO, *supra* note 149, at 84.

178. *Id.* ("At such times, they aggressively remind the Italian population of its Catholic roots and urge it to vote in unison for the Christian Democratic Party.")

179. MIGNONE, *supra* note 150, at 262.

180. *Id.* at 262–63.

181. DISCALA, *supra* note 172, at 314; PAUL GINSBORG, *ITALY AND ITS DISCONTENTS: FAMILY, CIVIL SOCIETY, STATE 1980–2001*, at 69 (2003).

been gaining a reputation as a country that was on the cutting edge of reproductive science. It was a place where it was possible to acquire even unusual forms of assisted reproduction. Cases of postmenopausal mothers and even claims by one doctor that he had perfected and achieved human reproductive cloning stoked the outside world's view of Italy as a place where anything was possible.¹⁸² There was support for some form of regulation going back to the birth of the first IVF baby in Italy in 1983, but the vast ideological divide between positions made any movement in the direction of legislation infeasible.¹⁸³ Physicians groups and politicians were divided internally on the issue along secular-religious lines.¹⁸⁴ Politicians in Italy have tended to avoid issues of bioethical controversy because of the fear of a conservative backlash and concomitant loss of political support. Thus, for many years, there was a lack of political will to proceed.¹⁸⁵

The Church's "interference in Italian political life has become increasingly pervasive and forceful"¹⁸⁶ The Church has mobilized to create alliances with the government that constitute a theo-conservative backlash against what are perceived to be legislated threats to the traditional family.¹⁸⁷ Throughout the 1990s and into the 2000s, the Catholic Church has been managing its alliance with the government through its strategy of engaging directly in political action. It has been able through these efforts to tap into a religiosity that had gone dormant under the influence of an increasingly consumerist culture.¹⁸⁸ At the same time, the government has found a useful ally with whom to trade favors. In short, the Church made a deal with the government that if it would pass a strict law on assisted reproduction then it could count on the Church's backing on other issues.¹⁸⁹

In 2001, with the emergence of a stable coalition in Parliament, a government that had remained relatively agnostic about assisted reproduction finally became very interested in enacting restrictive legislation. Little Parliamentary opposition arose because the opposition party was comprised of many avowed Catholics. The leader of the opposition simply made the lackluster statement that the membership should be able to vote their

182. HANAFIN, *supra* note 135, at 55.

183. *Id.* at 54.

184. *Id.*

185. *Id.* at 56.

186. Ungaro, *supra* note 148.

187. HANAFIN, *supra* note 135, at 25.

188. *Id.* at 54 ("The levels of religiosity remain comparatively high in Italy in relation to other European Catholic countries such as, for example, Ireland and Spain."). *See also id.* at 66, 80; DiSCALA, *supra* note 172, at 313.

189. HANAFIN, *supra* note 135, at 60–61.

consciences on such a volatile issue.¹⁹⁰ The resulting legislation is breathtakingly restrictive. In addition to restricting access to stable heterosexual couples, the law also outlaws heterologous forms of assisted reproduction and prohibits pre-implantation genetic diagnosis and cryopreservation. Before the provision was questioned by the Constitutional Court, the law also forbade the creation of more than three embryos in any one IVF cycle and the insertion of all embryos created in the patient's uterus.

Inconsistencies in the Italian legislation reveal the lack of control that physicians had over the final legislation, in sharp contrast to the way Spain's legislation was brought about. This lack of physician control can be seen in Article 6.3, which allows an individual's consent to the procedure to be withdrawn only up to the point at which the egg is fertilized. According to Hanafin, "this leads to a bizarre result whereby the woman involved could potentially be forced to go through with the procedure once the egg is fertili[z]ed."¹⁹¹ Post-enactment, scientists have criticized the law as anti-scientific and detrimental to human rights.¹⁹² On the ground, clinicians began in earnest to report the effects that the law was having on outcomes. Some reported unfavorable outcomes, but other clinicians saw the issue differently, suggesting that the law had had a positive effect on spontaneous embryonic loss in single and multiple pregnancies.¹⁹³ Doctors were also involved in the subsequent attempt to overturn the law by referendum.¹⁹⁴ However, the Church's call for a boycott of the polls was successful, and the legislation remained in place.¹⁹⁵ To some, the failure of the referendum was not so much a product of Vatican meddling as it was the inability of the populace to identify with the problems of the infertile. Perhaps too, Italians were not only uninformed but apathetic, worn out by years of referenda that could not achieve a quorum. They were "drained of curiosity or civic responsibility. They simply couldn't be bothered to inform themselves of what exactly was

190. *Id.* at 61.

191. *Id.* at 64. See also Antonello Miranda, *In Vitro Veritas? The New Italian Human Fertilisation and Embryology Act 2004: Legal Issues Between Balance of Individual Interests and Social Priorities*, in *FAMILY LAW: BALANCING INTERESTS AND PURSUING PRIORITIES* 270–74 (Lynn Wardle & Camille S. Williams eds., 2007).

192. Fabio Poletti, *Il Tribunale: La Legge 40 Viola Il Diritto A Formare Una Famiglia, Fecondazione assistita, è scontro anche Milano ricorre alla Consulta*, LA STAMPA, Feb. 4, 2011, at 18.

193. Giovanni Battista La Sala, *Pregnancy Loss and Assisted Reproduction: Preliminary Results after the Law 40/2004 in Italy*, 13 *REPROD. BIOMEDIC. ONLINE* 65–70 (2006).

194. HANAFIN, *supra* note 135, at 65.

195. *Id.* at 65–66.

at stake in this referendum.”¹⁹⁶ Early constitutional challenges to the law also failed. The decisions seemed to be imbued by the spirit behind the original law, which was “the protection of ‘Life’ itself in the abstract.”¹⁹⁷ In the words of Patrick Hanafin, the Italian embryo now occupies legal space.

At this point in time, and in the current political climate, it seems highly unlikely that any sort of reform will emanate from the legislature in Italy. Instead, the fight over Italy’s assisted reproduction law has now moved to the courts. In early 2010, the Italian Constitutional Court struck down provisions in the Italian law mandating the production of at most three embryos in any one IVF cycle and requiring the immediate return of all embryos produced to the uterus. The primary objection of the court was that, in purporting to protect embryonic life, the law made no account of the medical fact that “it is impossible to procreate without a certain degree of early embryo loss.”¹⁹⁸ A second objection was that the law rendered clinical judgment practically irrelevant in the treatment of patients despite the individualized circumstances of different patients. The Italian Constitutional Court was unwilling to defer to the legislature where a less intrusive approach—the resort to medical judgment—was available. In 2011, the European Court of Human Rights accepted a case brought to challenge the anti-PGD provisions of the Italian law as a violation of the right to private life and the anti-discrimination provisions of the European Convention on Human Rights.¹⁹⁹

Other aspects of the Italian law may also fail to satisfy the Convention. In outlawing all forms of heterologous reproduction, the legislature’s stated goal was to reaffirm the heterosexual couple as the only appropriate locus for family formation and to avert the dangers that attend the introduction of third-party gametes or embryos into the reproductive process, namely: (1) the threat to a couple’s relationship of having children not biologically related to both of them; (2) the psychological danger to a child who does not know the identity of and is not raised by both of his biological parents; and (3) injury to Italian society at large due to increases in marital breakdown and psychologically damaged children. But the prevalence with which Italian citizens, burdened by the restrictive law, seek assisted reproductive care in

196. *Id.* at 66 n.24.

197. *Id.* at 68. Both of the constitutional cases involved couples who wanted to ensure that their embryos would not be affected by beta thalassemia. *Id.* at 67–68.

198. Giuseppe Benagiano & Luca Gianaroli, *The Italian Constitutional Court Modifies Italian Legislation on Assisted Reproduction Technology*, 20 REPROD. BIOMEDIC. ONLINE 398–402 (2010).

199. Margherita De Bac, *Fecondazione negata a noi malati: La Corte europea accoglie il ricorso*, CORRIERE DELLA SERA, June 28, 2011, at 22.

other countries calls into question what harms Italy's ban on heterologous reproduction is aimed at combating. Via cross-border reproductive travel, which admittedly cannot be outlawed if it takes place within the European Union, all of the feared dangers to patients, children, and society become subject to importation into Italy when patients return from abroad and give birth. Nonetheless, Italian legislators have not moved to enact provisions to combat these dangers or temper their ill effects. Despite the supposed importance of biological ties, the law itself makes clear that a gamete provider has no parental rights or obligations and that the commissioning couple is indisputably the child's parents. Despite the fragility of family bonds that are thought to attend third-party gamete donation, the law contains no provision requiring the couple to adopt the child so as to solidify those bonds. It fails even to make a symbolic gesture in favor of the child's right to know his biological parents. Absolutely no consequences whatsoever attend the use of third-party gametes abroad; indeed, life proceeds as normal upon the delivery of the child in Italy.

Despite these anomalies, it seems probable that Italy's prohibition on reproducing with donated gametes or embryos will remain in place. The Constitutional Court was asked to consider the question after cases were brought to nullify the law in lower courts in Milan, Florence and Catania.²⁰⁰ The court in Milan ruled that the law violates the right to form a family, including the right to have children.²⁰¹ The Constitutional Court did not decide the question but remanded the cases to the respective lower courts to reconsider their decisions in light of *S.H. v. Austria*, a European Court of Human Rights decision upholding Austria's restrictions on certain forms of heterologous reproduction.²⁰² In *S.H.*, the European Court determined that Austria was owed deference to legislate as it saw fit, given that moral and ethical responses to assisted reproduction are ever changing in an area so punctuated by fast-moving medical and scientific developments.²⁰³ The remand of the challenges to the ban on heterologous reproduction may be a signal that Italy's constitution will not be a vigorous source of support, at

200. Simona Ravizza, *Fecondazione eterologa alla Consulta*, CORRIERE DELLA SERA, Feb. 4, 2011, at 6; Margherita De Bac, *La legge sulla fecondazione torna alla Consulta*, CORRIERE DELLA SERA, Oct. 7, 2010, at 13.

201. Poletti, *supra* note 192, at 18.

202. Margherita De Bac, *Consulta, rimane il divieto della fecondazione eterologa*, CORRIERE DELLA SERA, May 23, 2012, at 29. *S.H. v. Austria* is available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=894729&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

203. *S.H. v. Austria*, Application no. 57813/00, Nov. 3, 2011, at ¶ 97.

least in the near term, for Italians who require the participation of gamete and embryo donors in order to have children.

IV. THE ROAD TO REGULATION: PHYSICIANS, FEMINISM AND ABORTION

Europe is the area of the world that presents the most disparities and contradictions in the fields of family planning and reproductive and sexual health.²⁰⁴ The most glaring discrepancies exist between Western and Eastern Europe:

Family planning in Western Europe has been the story of the people against the authorities. In Central and Eastern Europe it has been the opposite. It has been the story of the government against the people. That essential difference still explains most of the discrepancies between the two parts of Europe.²⁰⁵

Within Western Europe, too, there are wide discrepancies, at least as regards the regulation of assisted reproduction. In the 1980s, infertile couples in Spain felt great shame about their inability to conceive. It was important to keep it a secret because of the general ignorance that kept infertility enshrouded in stigma. That the “cure” for infertility would entail decoupling reproduction from copulation inspired fear and controversy in many quarters rather than curiosity and rational thought. In the words of Marcelo Palacios, the “father” of the assisted reproduction law in Spain and currently President of the International Society of Bioethics, the advent of IVF forced Spain, a technologically backward country, to confront the future head on, and almost without warning.²⁰⁶ Pedro Barri, who along with Anna Veiga delivered the first IVF baby in Spain, remembers that the ensuing social debate revealed the general inability of the Spanish populace to comprehend that infertility was a problem that could be addressed through advancements in science. Indeed, reproductive technology was not considered science at all but some form of sorcery or witchcraft.²⁰⁷ Currently the director of the Stem Cell Bank and Chairman of the European Society of Reproductive Medicine, Veiga has

204. COUNCIL OF EUROPE, STEERING COMMITTEE FOR EQUALITY BETWEEN WOMEN AND MEN, GUARANTEEING FREEDOM OF CHOICE IN MATTERS OF REPRODUCTION, SEXUALITY AND LIFESTYLES IN EUROPE: TRENDS AND DEVELOPMENTS 52 (1999).

205. *Id.* at 52–53.

206. Interview with Marcelo Palacios, President and Founder, International Society of Bioethics (Nov. 23, 2010).

207. Interview with Pedro Barri, Director, Department of Obstetrics, Gynecology and Reproduction, USP Institut Universitari Dexeus (Dec. 9, 2010).

a similar recollection. People in general had no capacity to understand the science, and this led them to jump to emotional conclusions that were at times incompatible. People would vacillate between a reactive desire to protect embryos and their heartfelt view that infertile people should have access to a miraculous new science.²⁰⁸ There was very little consistency or lucidity in the public debate. The general ignorance, even though it was fertile ground for fearful reactions and contributed to the volatility of the issue, made it easier for those with superior knowledge to obtain the permissive law they desired.²⁰⁹ Spain stands in contrast, then, to many countries where the climate of fear that has arisen in response to new reproductive technologies has led to legal restrictions on techniques and access.

In order to ensure progress and the expansion of scientific research, physicians took the lead in defining the terms of the debate in Spain.²¹⁰ Unlike medical groups in Italy, which were unable to present a unified stance on assisted reproduction,²¹¹ the medical sector in Spain banded together in favor of scientific progress.

The agenda of infertility physicians in Spain was first to convince the public that infertility is a disease. The hope was that steering the public's understanding toward this view would lead to social acceptance of the medical techniques that had been developed and that would be developed in the future to address the problem. "Our goal," writes Veiga in her book *The Miracle of Life*, "was to provide the necessary information so that the public would understand what we were really doing."²¹² Part of the campaign involved using media channels as educational tools. Physicians' second important effort was in the direction of regulation. Unlike in the United States, where physicians tend to dislike and oppose regulation, in Spain, "[w]e realized we needed regulation because even though we could not

208. We see the same sort of vacillation with respect to embryonic stem cell research today. A broad swath of Spanish society believes that embryos should be protected, but do not reject therapeutic cloning. Interview with Carlos Romeo, Director, Interuniversity Chair in Law and the Human Genome, University of Deusto (Nov. 12, 2010).

209. In reference to the Warnock Report, Strathern notes, "[t]hus, the knowledge and interests of those directly involved in research or in clinical practice sometimes appeared juxtaposed to what they saw as the public misunderstanding of science or as unfounded nightmare scenarios, as well as to the overt needs of those for whom such developments offered hope and relief." STRATHERN, *supra* note 1, at 4.

210. Dubouchet & Klöti, *supra* note 10, at 102.

211. HANAFIN, *supra* note 135, at 54.

212. ANNA VEIGA, *EL MILAGRO DE LA VIDA: DE LA FECUNDACIÓN IN VITRO A LAS CÉLULAS MADRE* 145 (2011).

foresee everything that would happen, we knew something had changed with respect to reproduction.”²¹³ In particular, physicians saw how their colleagues abroad had no shield against legal conflicts that had already occurred and were bound to occur with more frequency if a preemptive legal framework was not formally established. Thus, infertility physicians in Spain were eager to align themselves with politicians who were examining the issue around 1986. Barri and three other physicians accepted an invitation from Marcelo Palacios to address the congressional commission that had been created to examine the issue. Committee members looked to these physicians for information on the medical aspects of assisted reproduction.

Palacios and others recall that the feminist opposition to a permissive law regulating assisted reproduction was weak. There was initially an outcry and some demonstrations, but, as Veiga recollects, feminists did not present a unified front, unlike the feminists in Italy who, in the 1970s, had been able to establish an impressive power base in an era that saw the dismantling of proscriptions on abortion, contraception, and divorce.²¹⁴ Instead, some were in favor of assisted reproduction and some were against it. But neither group was thinking in much detail about the techniques or in a sufficiently serious manner about them. The dichotomy within feminist perspectives on assisted reproduction was also evident at the time Italy was debating placing restrictions on assisted reproduction. The mass feminist movement of the 1970s had broken apart, and its stance on assisted reproductive technologies was not uniform.²¹⁵ After the Spanish law on assisted reproduction was enacted, Matorras perceived the feminist movement to be more univocal. He recalls that Spanish feminists did not like the law initially because they saw IVF as a technique created by males for the purpose of experimenting on women’s bodies. Later, however, they began to defend IVF, because the law in Spain allows single women to give birth to and rear children with a minimum of male interference.²¹⁶ Matorras is probably referring to the radical feminist perspective when he remembers the early opposition to the law. Feminist responses to reproductive technology are varied and have broken down largely along the lines of radical and liberal perspectives. Radical feminists note that, despite the high incidence of male infertility

213. Interview with Anna Veiga, Director, Stem Cell Bank, Center of Regenerative Medicine of Barcelona; Chairman, European Society of Human Reproduction and Embryology (Nov. 15, 2010).

214. HANAFIN, *supra* note 135, at 27.

215. *Id.* at 53–54.

216. Interview with Roberto Matorras, Director, Human Reproduction Unit, Hospital de Cruces (Nov. 11, 2010).

worldwide, infertility is invariably cast as a female problem.²¹⁷ Institutional ignorance about the environmental causes of infertility and a myopic focus on women's reproductive capacity to the detriment of other health issues of concern to women become entrenched.²¹⁸ Consequently, to satisfy the masculine insistence on having a biological connection to offspring, the bodies both of infertile women and of those who are paired with infertile men become subject to a host of medical interventions, including not only invasive in vitro fertilization but also experimentation that is of little benefit to them.²¹⁹ The general hostility some feminist adherents bear toward reproductive technology arises from the view "that women's choice to participate in infertility treatments is so conditioned by the socially constructed stigma of infertility and a socially imposed norm of maternity as to be no real 'choice' at all."²²⁰ By contrast, liberal feminists believe that reproductive technology enhances the role of choice in procreative decision-making. Through this lens, even assisted reproductive arrangements involving surrogate motherhood appear unproblematic, at least if measures are taken to ensure full and fair disclosure and to safeguard against overreaching.²²¹

A unifying feature of both the radical and the liberal perspectives is their common commitment to opposing discrimination. Both radical and liberal feminists fear that the reproductive technology industry may attempt to channel people in the direction of "responsible" procreation and thereby

217. Arthur L. Greil, *Infertile Bodies: Medicalization, Metaphor, and Agency*, in INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES 101, 101 (Marcia C. Inhorn & Frank van Balen eds., 2002); Frank van Balen & Marcia C. Inhorn, *Interpreting Infertility: A View from the Social Sciences*, in INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES 3, 19 (Marcia C. Inhorn & Frank van Balen eds., 2002).

218. Federico Neresini & Franca Bimbi, *The Lack and the "Need" of Regulation for Assisted Fertilization: The Italian Case*, in BODIES OF TECHNOLOGY: WOMEN'S INVOLVEMENT WITH REPRODUCTIVE MEDICINE 207, 210 (Ann Rudinow Saetnan, Nelly Oudshoorn, et al. eds., 2000); see also Marcia C. Inhorn & K. Lisa Whittle, *Feminism Meets the "New" Epidemiologies: Toward an Appraisal of Antifeminist Biases*, 53 SOC. SCI. & MED. 553, 559-61 (2001) (discussing the view of current biomedical and public health models).

219. See PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 14-18, 29 (1993) (referring to feminist objections to using IVF to treat male-factor infertility).

220. JANET GALLAGHER, *Eggs, Embryos and Foetuses: Anxiety and the Law*, in REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 138, 146 (Michelle Stanworth ed., 1987).

221. Karen H. Rothenberg, *Feminism, Law, and Bioethics*, 6 KENNEDY INST. ETHICS J. 69, 70, 75 (1996).

perpetrate discrimination against single mothers, gays and lesbians, the poor, and others deemed undeserving of parenthood.²²² On this issue, feminists transcend the labels “radical” and “liberal” to express a common concern about the perpetuation of inequality and exploitation by powerful institutions.

On another front, Veiga recalls that there was some opposition to the law from anti-abortionists. In Italy and Spain, abortion, disallowed for most of the twentieth century, became the subject of intense debate in the late 1970s and early 1980s. In Italy, “the attack on the abortion law was led by the women’s liberation movement.”²²³ The final act passed in 1978 “allowed abortion on request during the first ninety days of pregnancy at the expense of the state.”²²⁴ In Spain, under Franco, abortion, birth control and divorce were illegal, and women found guilty of adultery could be sent to prison for up to six years.²²⁵ After the death of Franco, birth control and divorce were legalized and adultery eliminated as a criminal offense.²²⁶ The abortion prohibition remained the law until 1985, when a “grounds-system model” was enacted to permit abortion where the women’s physical or mental health was at risk (at any time during the pregnancy), where the pregnancy was the result of rape and the rape has first been reported to the police (up to twelve weeks), and in cases of fetal impairment (up to twenty-two weeks).²²⁷ This law was changed in 2010 in a shift to a “time-system.” Now, abortion in Spain tends to be more of a medical question than a religious or political one. Even minors (up to 17) can choose to have an abortion in consultation with their physicians, without the consent of their parents, although they must show that at least one of their parents has been informed.²²⁸ In contrast,

222. Hilary Rose, *Victorian Values in the Test-Tube: The Politics of Reproductive Science and Technology*, in REPRODUCTIVE TECHNOLOGIES, *supra* note 220, at 172 (“Now it is precisely this agreement (between obstetrician and ethicist)—that doctors naturally are the right profession to decide who is a suitable case for infertility treatment or gene therapy—that must be a major source of political and particularly feminist concern.”).

223. COLIN FRANCOME, ABORTION FREEDOM: A WORLDWIDE MOVEMENT 144 (1984).

224. *Id.* at 145–46.

225. *Id.* at 211–12.

226. *Id.* at 212.

227. Isabel Zurita Martín, *British and Spanish Legislation on Abortion: A Brief Comparative Overview*, 163 L. & JUST. 127, 128 (2009).

228. María R. Sahuquillo, *Los médicos decidirán se las menores pueden abortar solas*, EL PAÍS, May 25, 2010, available at <http://www.elpais.com/articulo/sociedad/medicos/decidiran/menores/pueden/abortar/solas/elpepisc/20100525elpepisc3/Tes>.

assisted reproduction can be freely elected by minors of at least 16 years of age.²²⁹

As a general matter, the Catholic Church believes that permissive views toward assisted reproduction extend from an “abortion-mentality.”²³⁰ Abortion and assisted reproduction are intertwined, because abortion “deprives a category of human beings of the protection which civil legislation must accord them,” thus undermining the principle of equal treatment, and legalizing techniques of assisted reproduction exposes the resulting children to this same risk. Legalization threatens “the very foundations of a state based on law.”²³¹ This view that assisted reproduction risks undermining the very fabric of civil society is a common theme throughout *Donum Vitae*,²³² but was not effective in undermining support for a liberal law in Spain. Veiga remembers that in her debate with anti-abortionists, they came across as uninformed and confused about the distinctions between abortion and assisted reproductive technology. In sharp contrast to Italy, where “the Church drove the design and implementation of [assisted reproduction] legislation on its terms,”²³³ the Catholic Church’s opposition in Spain was weak and ineffective in gaining the ear of the committee studying the issue.

Feminist and anti-abortion opposition to assisted reproduction might have been more forcefully voiced at the time of the enactment of the Spanish provisions, but if so, it was inaudible. At a later stage of the legislative process, the Partido Popular, the party most in alignment with Catholic perspectives, was headed by a single woman, María Dolores de Cospedal, who became a single mother with the aid of IVF. Some constituents submit that de Cospedal’s and other party members’ use of IVF renders them insufficiently Catholic to be authentically against abortion.²³⁴ Although this point of view too cavalierly assumes that those who employ assisted

229. *Id.*

230. *Donum Vitae*, *supra* note 79, at 10, 11.

231. *Id.* at 19–20.

232. *Id.* at 12, 13 and 19.

233. *Id.* at 79.

234. *La FIV que practican muchos*, Comment to *Aguirre pide que no intenten enfrentarla a Cospedal por Cascos*, HAZTEOIR.ORG (Jan. 25, 2011, 12:52 PM), <http://www.hazteoir.org/noticia/35486-aguirre-pide-que-no-intenten-enfrentarla-cospedal-cascos>; *¿Están realmente en contro el aborto?* (Oct. 7, 2010), <http://infocatolica.com/blog/cartadirector.php/1007050904-iestan-realmente-en-contra-de> (commentary of Maurice Pinay).

reproduction necessarily are in favor of a liberal abortion policy,²³⁵ it nonetheless points out that conservative views about assisted reproduction are unlikely to have any effect on Spain's liberal law even now that the Partido Popular has wrestled power from the Socialists²³⁶ who controlled the legislature at the time the law was passed.

V. IMPLICATIONS FOR REGULATION IN THE UNITED STATES

In contrast to Italy and Spain and other countries in Europe, with their comprehensive legislative regimes governing assisted reproduction, the United States is largely devoid of governmental regulation of this controversial area of medicine,²³⁷ leaving the medical profession to police itself even with respect to the minimal federally mandated reporting requirements that do exist.²³⁸ The American Society of Reproductive Medicine (ASRM) and its affiliate the Society for Assisted Reproductive Technology (SART), the dominant professional societies in this area of medical practice, have developed a voluntary accreditation program that requires clinics to adhere to its guidelines and practices standards.²³⁹ There are no legal consequences for clinics that elect not to pursue accreditation under this program.²⁴⁰ This state of affairs appears to be firmly entrenched,

235. CAROLYN SAVAGE & SEAN SAVAGE, *INCONCEIVABLE: A Medical Mistake, the Baby We Couldn't Keep, and Our Choice to Deliver the Ultimate Gift* (2010) (showing that this assumption may well be false among Catholics in particular). Observant Catholic, Carolyn Savage, attempting to have a child via IVF with her husband Sean, was implanted with the wrong embryo. The couple's strong views against abortion made aborting the fetus an untenable solution to their problem. After Carolyn gave birth, the couple surrendered custody of the child to his genetic parents.

236. Álvaro Carvajal, *El PP arrolla al PSOE en las urnas*, EL MUNDO, May 23, 2011, <http://www.elmundo.es/elmundo/2011/05/21/espana/1306012078.html>.

237. Alicia Ouelette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J. L. & MED. 419, 422 (2005) (“[N]o comprehensive policy governs ART in the U.S.”); see also William R. Keye, Jr. et al., *A Survey of the Practices and Opinions of the Domestic Members of the American Society for Reproductive Medicine*, 82 FERTILITY & STERILITY 536 (2004).

238. Ouelette et al., *supra* note 237, at 427 (noting that data reporting by infertility clinics, although mandated by federal law, is in effect voluntary).

239. See David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, in REPRODUCTIVE TECHNOLOGIES: A READER 1, 9 (Thomas A. Shannon ed., 2004). Members, however, are not required to adhere to the ASRM Ethics Committee's opinions. *Id.* at 8 (describing the ASRM's ethical pronouncements as “creat[ing] standards for self-regulation”). Eighty-three percent of respondents to a survey of ASRM members reported following ASRM Ethics Committee opinions. See Keye, Jr. et al., *supra* note 237, at 537.

240. Ouelette et al., *supra* note 237, at 430.

given that at the federal level there is virtually no debate about regulating assisted reproduction,²⁴¹ and at the state level we find only a patchwork of disconnected provisions covering discrete aspects of reproductive technology.²⁴²

What accounts for this longstanding legal vacuum is a matter of some speculation. One theory for the absence of federal legislation is that reproductive technology lies outside the purview of what Congress may regulate.²⁴³ Another is that no consensus exists at the national level on what form the regulation should assume.²⁴⁴ At the state level, where we would expect regulation of the medical profession to originate, self-regulation of the infertility industry is also the prevailing norm. One possible roadblock to regulation is the battle over abortion that continues to rage in the United States in ways that seem incomprehensible in Europe. Since the regulation of assisted reproduction invariably brings up questions of the status of the embryo,²⁴⁵ politicians are loathe to become involved with this issue for fear of alienating certain constituencies.²⁴⁶ Even in states where anti-abortion sentiments are strong, it is possible that assisted reproduction, a technology aimed at helping people have children, is so bound up with notions of reproductive freedom and privacy that many would be uncomfortable asking the government to dictate how it can and cannot be used.²⁴⁷

Despite the hesitancy of politicians to advance legislation in this area, the regulation of assisted reproduction is a popular wedge issue employed by those opposed to abortion who have less interest in reproductive technology per se than they have in advancing the position that embryos should be

241. *Id.* at 433.

242. Deborah Spar, *Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531, 532 (2005).

243. Ouelette et al., *supra* note 237, at 433 (“Sovereignty complications also arise, with some issues requiring attention on the state level.”); Robert L. Stenger, *The Law of Assisted Reproduction in the United Kingdom and the United States*, 9 J.L. & HEALTH 135, 138 (1994–95); Howard W. Jones, Jr., *The Status of Regulation of Assisted Reproductive Technology in the United States*, 10 J. ASSISTED REPROD. & GENETICS 331, 331 (1993).

244. Michelle N. Meyer, The Nelson A. Rockefeller Institute of Government, *States’ Regulation of Assisted Reproductive Technologies: What Does the U.S. Constitution Allow?*, at 14 (2009), available at http://www.rockinst.org/pdf/health_care/2009-07-States_Regulation_ART.pdf.

245. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 186 (2010).

246. Alan Zarembo, *Fertility: A Very Private Practice*, L.A. TIMES, Feb. 14, 2009, at 1 (referring to the “minefield of reproductive rights” triggered by the topic of governmental regulation of assisted reproduction).

247. Ouelette et al., *supra* note 237, at 433.

regarded as human beings.²⁴⁸ Wedge-issue politics using ART regulation as a cover has met with some success in the area of embryo disposition (called “adoption” in this context) and embryonic stem cell research. New attempts are being made to advance an anti-abortion agenda through the issues of sex selection, the safety of egg donors, and the well-being of donor-conceived children.²⁴⁹ These efforts will not lead to anything resembling comprehensive legislation but, assuming success, will only exacerbate the problem of idiosyncratic and inconsistent legislation at the state level.

In addition to the political fallout that might attend an attempt to regulate assisted reproductive techniques is the fact that the infertility industry itself disfavors governmental regulation of its activities.²⁵⁰ This may be a valid fear, given the example of Italy, whose regulation has wreaked havoc on the ability of infertility physicians to help their patients and was partially struck down for its micromanagement of the physician-patient relationship.²⁵¹ The Italian Constitutional Court objected that the law rendered clinical judgment practically irrelevant in the treatment of patients despite the individualized circumstances different patients invariably present. The situation in the United States, though, is hardly akin to pre-2004 Italy, at least politically speaking. It is true that women’s groups are no more unified here than they were in Italy,²⁵² but the prevailing religious winds in the United States, unlike those in Catholic Italy, are Protestant. While the influence of the Roman Catholic Church has inculcated in many Europeans the belief in “unconditional human dignity,” the Protestant ethic of the United States emphasizes individual responsibility.²⁵³ This attitudinal disparity may

248. Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them from Harm?*, 2004 UTAH L. REV. 57, 74 (2004).

249. Mara Hvistendahl, *Blaming Abortion for Disappearing Girls*, SALON, Jun. 30, 2011, available at http://www.salon.com/life/feature/2011/06/30/abortion_sex_selection_debate; Richard F. Storrow, *Eggsploitation and Abortion Politics*, FEMINIST LAW PROFESSORS, Aug. 6, 2010, available at <http://www.feministlawprofessors.com/2010/08/eggsploitation-abortion-politics/>; Eric Blyth & Wendy Kramer, *‘My Daddy’s Name is Donor’: Read with Caution!*, BIONEWS, Jul. 10, 2010, available at http://www.bionews.org.uk/page_65970.asp.

250. Ouelette et al., *supra* note 237, at 433; Keye, Jr., et al., *supra* note 237, at 536 (noting that a majority of infertility clinics oppose governmental regulation but do not resist self-policing by the profession).

251. Benagiano & Gianaroli, *supra* note 198.

252. NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 5–7 (2009); Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 308 (2006).

253. Scott Sayare, *In Europe, a Chorus of Outrage over a U.S. Execution*, N.Y. TIMES, Sept. 23, 2011, at A13.

explain to some degree why Protestants, some strands of which are admittedly vehemently opposed to abortion, are not as a group opposed to assisted reproduction.²⁵⁴ No *Donum Vitae* or analogous document exhorts members of any Protestant denomination to refrain from resorting to medical science for the purposes of procreation. Although there have been attempts in some state legislatures to bar certain classes of people from having access to assisted reproduction, there has to date been no concerted effort, as was the case in Italy, to ban certain techniques altogether.

If there is any future movement toward a comprehensive legislative scheme governing ART in the United States, doctors will likely be the primary movers of policy as they were in Spain. As Varone et al. observe, the medical profession is organized and has a vested interest in policy development and so, armed as they are with specialized knowledge, are the first group of actors to whom the state will turn to ask for participation in the development of biotechnology policies or “are likely to be the first to turn to state actors to demand such policies.”²⁵⁵ In some cases, the medical profession may advance “self-regulation as a strategy of influencing and possibly preventing future state intervention.”²⁵⁶ Thereafter ensconced as “private interest governments,” the medical profession may be “powerful enough to resist any policy change demanded by emerging groups” such as patients, the church, and women.²⁵⁷ Indeed, such emerging groups, specifically because they lack specialized technical knowledge “will often suffer from insufficient credibility to encourage policy change.”²⁵⁸

With the abortion wars raging and an infertility industry content to operate free of any governmental regulation, legislative regulation of the infertility industry, at least in the United States, remains little more than an academic topic of conversation and will likely remain one well into the future. If anything, the United States will see nothing more than issue-specific legal regulation of assisted reproduction.²⁵⁹ In this way, it will continue to be an outlier among nations that also have highly developed infertility industries.

254. Howard Jones & Jean Cohen, *IFFS Surveillance 07, Preface* (2007), 87 FERTILITY & STERILITY Sup. 1, S5 (2007), http://www.iffs-reproduction.org/documents/Surveillance_07.pdf (“[M]any religious organizations of various persuasions, as well as a large segment of the population, take the position that the developing human conceptus does not deserve protection by society during early development.”).

255. THE POLITICS OF BIOTECHNOLOGY, *supra* note 49, at 11.

256. *Id.*

257. *Id.* at 11, 12.

258. *Id.* at 12.

259. Rosato, *supra* note 248, at 74; Stenger, *supra* note 243, at 137–38.

VI. CONCLUSION

The story of the legal regulation of assisted reproduction in Spain and Italy is the story of which interest group—the medical community, the Roman Catholic Church, or feminists—most effectively influenced legislators. Physicians in Spain in the early 1980s desired that Spain embrace assisted reproductive technology and join a group of countries committed to scientific advancement. This commitment to being at the forefront of scientific achievement resulted in a permissive law that would have been impossible to achieve just a little over ten years earlier in Franco-controlled Spain, even if IVF technology had been possible at that time. Feminist groups and the Church were impotent to challenge this dominant discourse because either, in the case of feminists, they assumed uninformed and contradictory stances toward the technology, or, in the case of the Church, were marginalized by a political system with too vivid a memory of the close connection with Franco the Church had pursued and exploited during the long decades of authoritarian rule.

In Italy, the influence of physicians and the Church took a divergent course. Just as in post-Franco Spain, the Catholic Church's influence over law and policy had waned during the turbulent 1970s and 1980s when social changes in many forms had swept across Italy. But in contrast to Spain, the fractured political party system and differences of opinion among physicians and feminists about the proper regulatory course meant that years would be spent in a legal vacuum that encouraged Italy to become a venue for any and all forms of assisted reproduction. Once a more united government entered power and the opposition refused to take a stand against restrictions on reproduction, the stage was set for the reemergence of the Church as a potent political force. Although the Church stopped short of suggesting that the tenets of *Donum Vitae* should become the law of the land, it was powerful and influential enough to persuade the government to enact the most restrictive set of regulations on assisted reproduction ever seen in Europe.

Neither the Spanish nor the Italian approach to assisted reproduction is likely to change anytime soon. Constitutional challenges to the Spanish law failed in the 1990s, and although Italy's Constitutional Court struck down the limitation on the number of embryos that could be created in any one IVF cycle, it does not follow that it will rule that the prohibition on egg, sperm and embryo donation is unconstitutional on either equality or liberty grounds. Indeed, the Court was emboldened by *S.H. v. Austria* simply to remand cases

to lower courts that had declared the prohibition unconstitutional.²⁶⁰ This may suggest that the European Court of Human Rights, which decided *S.H.*, will prefer to remain deferential to the positions national legislatures adopt on assisted reproduction. However, the Court has declared admissible a case brought to challenge the anti-PGD provisions of the Italian law as a violation of the right to private life and the anti-discrimination provisions of the European Convention on Human Rights.²⁶¹

A critical lesson to be drawn from this examination of the regulation of assisted reproduction in two Catholic countries is that those who introduce legislation and maintain control of the narrative are likely to see their positions become law. Once legislation is enacted, it tends to be difficult to repeal or alter in the absence of some dramatic change in attitudes or opinions. This leaves those who disagree with the state of the law on ART with little hope of dismantling those legislative regimes in the short term.

A country like the United States, with virtually no regulation, might appear to be fertile ground for a group hoping to influence the direction of ART policy. In fact, however, the kind of process that led to legislation in Spain and Italy, where a dominant group with a consistent message controlled the legislative process from introduction to enactment, has already occurred in the United States. Unlike in Spain and Italy, where the controlling group desired legislation, however, the American infertility industry is opposed. That is why, in the final analysis, the state of regulation in the United States has much more in common with Spain than it does with Italy. For better or worse, physicians have already set and will continue to set the policy that prevails in the United States today.

260. See *S.H. & Others v. Austria*, App. No. 57813/00, Eur. Ct. H.R. (2010).

261. Margherita De Bac, *Fecondazione negata a noi malati, La Corte europea accoglie il ricorso*, CORRIERE DELLA SERA, June 28, 2011, at 22.