2011

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

Richard F. Storrow*

* 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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Columbia, 1989; B.A., Miami University, 1987. Many thanks to the United States State
Department’s Bureau of Educational and Cultural Affairs and the Comisión Fulbright in Spain
for their generous research support under the auspices of the J. William Fulbright Scholarship
Program. Many thanks to the Department of Civil Law, Pompeu Fabra University, Barcelona,
for hosting me so graciously during my time in Spain. I am indebted to my friends and
colleagues at Pompeu Fabra, especially Josep Ferrer Riba, Esther Farnós Amorós, Mireia
Artigot Golobardes, Antoni Rubí Puig, Carlos Gómez Ligüerre, Josep Sandiumenge Farré,
Albert Azagra Malo, Margarida Garriga Gorina, Albert Lamarca Marquès, Pau Salvador
Coderch, Fernando Gómez Pomar, Joan Egea Fernández, Laura Alascio Carrasco, Rosa Milà
Rafel, Laura Allueva Aznar, Ariadna Aguilera Rull, Marian Gili Saldaña and Magalí Riera
Roca.

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. MA RILYN S TRATHERN, REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY,
². SUSAN MERRILL SQUIER, BABIES IN BOTTLES: TWENTIETH-CENTURY VISIONS OF
   REPRODUCTIVE TECHNOLOGY 2–4 (1994); see also ROBIN MARANTZ HENIG, PANDORA’S BABY:
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

\(^{3}\) 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

currents abroad.\textsuperscript{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,\textsuperscript{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 regulation \textsuperscript{14} 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”\textsuperscript{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.


\textsuperscript{15} Jan W. van Deth, \textit{Series Editor’s Preface}, in \textit{Comparative Biomedical Policy}, supra note 10, at xiii.
II. THERAPEUTIC CULTURES AND BIOMEDICAL REGULATION IN EUROPE

In contrast to the majority of countries, 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.

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. From the mid-1970s and into the early 1980s, judicial decisions and, later, legislation began to appear regarding the legality of, the legal requirements for, and the legal ramifications of alternative insemination.


17. Jacinto Gil Rodriguez, Prologue, ITZIAR ITZIBERREKUTA, 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.”).


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).


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. That same year, India became the second country to have a successful IVF birth, followed by Australia in 1980. 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. As of
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 government\(^{31}\) 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

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\(^{28}\) Id. at 1.

\(^{29}\) Id. at 2.

\(^{30}\) Id. at 7.


\(^{34}\) Une Histoire de Quarante Ans, supra note 24.
promulgated its bioethics law, which was slated for reexamination in 1999 and revised in 2011.

Victoria promulgated the first set of comprehensive laws regulating assisted reproduction techniques in 1984. 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. 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. The Act declared surrogacy contracts to be void and attached criminal penalties to commercial surrogacy and advertising related to surrogacy.

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. Spain and Sweden were next to pass comprehensive laws, both in 1988. 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, its law on in vitro fertilization permitted only heterosexual couples to use their own gametes in any attempt at “fertilization outside the human body.” Legislation in other countries followed in rapid succession, including Germany (1991), Denmark (1992) and Austria (1992). 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.
39. Id. at 454.
40. Id. at 458–59.
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.”

European legislation on ART generally fits within one of three classifications: (1) permissive; (2) cautious; and (3) prohibitive. Permissive jurisdictions such as the United Kingdom and Spain exhibit tolerance toward most well-known forms of assisted reproduction except commercial surrogacy. 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. Cautious jurisdictions such as France and Denmark do not have widespread restrictions but nonetheless have strict rules requiring anonymity in gamete donation and bans on surrogacy. 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. Cautious jurisdictions may, however, permit research on embryos that remain from couples who have completed their infertility treatment. In addition to these restrictions on practice, France permits only stable heterosexual couples to have access to assisted reproduction.

The prohibitive approach stands in contrast to the liberal approach by placing limits on embryo and stem cell research and embryo selection following PGD. 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.
50. Jones et al., supra note 48, at 65. Israel is another country of this type. Id.
51. Id. at 109–10.
53. Id.
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.\textsuperscript{56} Austria and Italy also prohibit sperm donation in IVF.\textsuperscript{57} In addition to banning these forms of third-party gamete donation, Switzerland prohibits PGD.\textsuperscript{58} It is joined in this restriction by several non-European countries including Chile, China, Ivory Coast, and the Philippines.\textsuperscript{59} Although it does not always require PGD, non-medical sex selection is banned in the United Kingdom, India, Canada, and Taiwan.\textsuperscript{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.”\textsuperscript{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.

\textsuperscript{56} Jones et al., supra note 48, at 47–48.
\textsuperscript{57} Id. at 46–48.
\textsuperscript{58} Id. at 100.
\textsuperscript{59} Id. at 101.
\textsuperscript{60} Id. at 95–96.
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 Daemmrich’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. Daemmrich 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. Daemmrich’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. 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.”

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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

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65. Daemmrich, supra note 62, at 11.
opposed to methods of human conception that do not involve sexual intercourse, i.e., techniques of assisted reproduction.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{72} Divorce, adultery, pre-marital sex, abortion, contraception and assisted reproduction all undermine the family as a community of persons.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75} By using ART, the couple is “manipulating and using their bodies” through a selfish desire for children.\textsuperscript{76} This is contrary to God’s will and an affront to human dignity.\textsuperscript{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.”\textsuperscript{78}

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

\textsuperscript{70} Id. at 311; Rachel Anne Fenton, \textit{Catholic Doctrine Versus Women’s Rights The New Italian Law on Assisted Reproduction}, 14 M. L. REV. 73, 86 (2006).


\textsuperscript{72} Id. at 40.

\textsuperscript{73} Id. at 43–45, 46, 48–56.

\textsuperscript{74} Id. at 46, 60.

\textsuperscript{75} Id. at 56.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id. (emphasis added).
embryos to have children, and surrogacy.\textsuperscript{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.\textsuperscript{80} The act of sexual intercourse is said to be essential to responsible procreation.\textsuperscript{81}

\textit{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,”\textsuperscript{82} \textit{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.\textsuperscript{83} As a response to advances in biomedicine, \textit{Donum Vitae} urges adherence to the teaching of the Church as the only defense to humankind “against the excesses of [its] own power.”\textsuperscript{84}

\section*{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.\textsuperscript{85} But today, although 94.2 percent of the Spanish citizens are baptized Catholics,\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{id} \textit{Id.} at 15–17.
\bibitem{id} \textit{Id.} at 14–15.
\bibitem{duggan} \textsc{Christopher Duggan}, \textit{A Concise History of Italy} 266 (1994).
\bibitem{donum} \textit{Donum Vitae}, supra note 79, at 19.
\bibitem{id} \textit{Id.} at 22.
\bibitem{payne} \textsc{Stanley G. Payne}, \textit{The Franco Regime, 1936–1975} at 560 (1987) [hereinafter \textsc{Payne, The Franco Regime}].
\end{thebibliography}
in particular has plummeted fifty-six percent in the last ten years.\textsuperscript{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.\textsuperscript{88} The reported 60 million
euro price tag for the event triggered a secular backlash.\textsuperscript{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,”\textsuperscript{90} their identity inextricably
conjoined with their faith.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{94} In contrast to the Italian fascism
of the same period, marked by its conflicts with the Church,\textsuperscript{95} Primo de
Rivera dubbed his movement a Christian one,\textsuperscript{96} and it was warmly embraced

\textsuperscript{87} Stephen Burgen, Spanish Priests Join Opposition to Costly Papal Visit, The
priest-oppose-pope-visit.

\textsuperscript{88} Benedictus, PP. XVI, Message of His Holiness Pope Benedict XVI for the Twenty-

\textsuperscript{89} Burgen, supra note 87.

\textsuperscript{90} STANLEY G. PAYNE, SPANISH CATHOLICISM: AN HISTORICAL OVERVIEW xii (1984)
[hereinafter PAYNE, SPANISH CATHOLICISM].

\textsuperscript{91} Id. at 8–9.

\textsuperscript{92} Id. at 24.

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

\textsuperscript{94} PAYNE, FASCISM IN SPAIN, supra note 93, at 31.

\textsuperscript{95} Id. at 30.

\textsuperscript{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. Later, Francisco Franco would use his regime’s strong Catholic identity in an attempt to distinguish Spanish from Italian fascism.

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.” 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. Simultaneously, the Church was stripped of authority and support by the Republican government that succeeded Primo de Rivera. This violent persecution for a short while succeeded in curtailing the power of the Church, but outrage and fear soon galvanized a Catholic political party that eventually became the most redoubtable single political force in Spain. 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 nationalism and horrific persecution of the Catholic establishment by their Republican opponents. “Catholic backing . . . became the most important single domestic pillar of the Nationalist movement.” 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” 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, and, later, the abolition of divorce. Church leaders thereafter began to voice their support of the

97. Payne, Fascism in Spain, supra note 93, at 28–29.
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.
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.\textsuperscript{110} Throughout the term of the war, the “absolute identification of the Nationalist cause with the church” became more and more fixed.\textsuperscript{111} Franco himself, raised a devout Catholic, believed firmly that Spain had a special religious mission and that faith and nationalism were inseparable.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{116} The most important political objective of the new state was a concordat with the Vatican.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{110} Id. at 198. This characterization continued to be made in the post-World War II period. Id. at 367.
\textsuperscript{111} Id. at 199.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 337.
\textsuperscript{114} Id. at 199–200.
\textsuperscript{115} Id. at 202–03.
\textsuperscript{116} Id. at 368.
\textsuperscript{117} Id. at 242.
\textsuperscript{118} Id. at 349.
embedded in social and political life to such an extent as to constitute a bona fide “national Catholicism.”

The Church granted Spain the fullest possible recognition in 1953 in an agreement that expanded the independence of the church within Spain. It would not be long, however, before the first indications of dissent and secularization began to appear.

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.” 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.

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. A highly vocal revolt primarily among younger priests rocked the clergy with strident demands for governmental reform. These events stoked rightist anticlericalism against “Marxist” priests who had infiltrated the church with their subversive ideas 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. 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.”\textsuperscript{131} He went to his grave “the last great avatar of the traditional Spanish national-Catholic ideology . . . .”\textsuperscript{132} He had resisted liberalization and democratization to the end.\textsuperscript{133}

In the post-Franco years, the Church experienced a dramatic decline.\textsuperscript{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.”\textsuperscript{135} The 1977 Constitution made explicit that Spain no longer had a state religion.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{138} Although the Spanish government did not reject the Church and in fact continued to sustain it in important ways,\textsuperscript{139} there has been “a liberal reaction against the spiritual formalism and social conformity of earlier times.”\textsuperscript{140} The Church in this more recent period has unsuccessfully opposed the legalization of divorce, abortion\textsuperscript{141} and same-sex marriage.\textsuperscript{142} The Church’s stance on these issues has placed it in opposition to the government rather than in alignment

\textsuperscript{131} Payne, The Franco Regime, supra note 85, at 620.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 640.
\textsuperscript{134} Payne, Spanish Catholicism supra note 90, at 218.
\textsuperscript{135} Patrick Hanafin, Conceiving Life: Reproductive Politics and the Law in Contemporary Italy 78 (2007).
\textsuperscript{136} Souto, supra note 100, at 691.
\textsuperscript{138} Id. at 230.
\textsuperscript{139} Payne, The Franco Regime, supra note 85, at 222.
\textsuperscript{140} Id. at 224 (talking about priests).
\textsuperscript{141} Id. at 226.
with it. 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.” 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. 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. 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.”

The issue of the intertwining of the Church with politics unquestionably has deeper roots, but it has been “a fact of daily life” since the founding of the Italian Republic in 1861. 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.
from holding public office or voting in national elections. 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. 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.” The non expedit was eventually lifted, allowing Catholics to vote in Italian elections for the first time in 1904.

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. 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. The Church remained the only institution not fully fitted within the totalitarian state. 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 religion and the right of the Church to control broad swaths of family life and religious instruction in public

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”).
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, rounded out the concessions made by the government to the Church.

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. 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. 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, setting the stage for the Church to inject itself “into every aspect of civil life . . . .” 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.

The political world was divided into saints and devils. 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. The party acted largely as an agent of the Church, stressing the sanctity of the family as against the claims of the State. 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. As in most Western nations, the 1960s

158. Id. at 267–68.
159. Id. at 255–56.
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, and a steep falling off of church attendance and membership. 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. 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. There were legislative developments as well, most notably the legalization of divorce in 1970 and of abortion in 1978. Public referenda failed to nullify those laws in 1974 and 1981, respectively. Although some believe the election of the non-Italian pope, John Paul II, in 1978 signaled the determinate of the Church to play a more restrained role in Italian affairs, in fact the Church’s influence continued to be felt in elections where the Church’s power was threatened. At such critical junctures, the Church called upon the faithful to “show their Catholicity,” but the tepid response, prompted in part by the view that the Church was merely a tool of the bourgeoisie, 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.”

By the 1990s, with legalized contraception and the rise of consumerism, Italy’s birthrate fell to the lowest in the world.

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171. Duggan, supra note 82, at 276.
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.
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. 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. Physicians groups and politicians were divided internally on the issue along secular-religious lines. 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.

The Church’s “interference in Italian political life has become increasingly pervasive and forceful . . . .” 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. 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. 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.

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.\textsuperscript{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 fertilized.”\textsuperscript{191} Post-enactment, scientists have criticized the law as anti-scientific and detrimental to human rights.\textsuperscript{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.\textsuperscript{193} Doctors were also involved in the subsequent attempt to overturn the law by referendum.\textsuperscript{194} However, the Church’s call for a boycott of the polls was successful, and the legislation remained in place.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{190} Id. at 61.
  \item \textsuperscript{191} Id. at 64. See also Antonello Miranda, \textit{In Vitro Veritas? The New Italian Human Fertilisation and Embryology Act 2004: Legal Issues Between Balance of Individual Interests and Social Priorities}, \textit{in Family Law: Balancing Interests and Pursuing Priorities} 270–74 (Lynn Wardle & Camille S. Williams eds., 2007).
  \item \textsuperscript{194} Hanafin, \textit{supra} note 135, at 65.
  \item \textsuperscript{195} Id. at 65–66.
\end{itemize}
at stake in this referendum."  

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.” 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.” 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.

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.


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. The court in Milan ruled that the law violates the right to form a family, including the right to have children. 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. 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. 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

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

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. 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. Currently the director of the Stem Cell Bank and Chairman of the European Society of Reproductive Medicine, Veiga has

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.


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).
foresaw everything that would happen, we knew something had changed with respect to reproduction. 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. 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. 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. 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. 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. 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. 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.” 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.

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


perpetrate discrimination against single mothers, gays and lesbians, the poor, and others deemed undeserving of parenthood. 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.” The final act passed in 1978 “allowed abortion on request during the first ninety days of pregnancy at the expense of the state.” 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. After the death of Franco, birth control and divorce were legalized and adultery eliminated as a criminal offense. 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). 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. In contrast,
assisted reproduction can be freely elected by minors of at least 16 years of age.\footnote{Id.}

As a general matter, the Catholic Church believes that permissive views toward assisted reproduction extend from an “abortion-mentality.”\footnote{Donum Vitae, supra note 79, at 10, 11.} 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.”\footnote{Id. at 19–20.} This view that assisted reproduction risks undermining the very fabric of civil society is a common theme throughout Donum Vitae, 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,”\footnote{Id. at 12, 13 and 19.} 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.\footnote{La FIV que practican muchos, Comment to Aguirre pide que no intenten enfrentarla a Cospedal por Cascos, HAZTEOR.ORG (Jan. 25, 2011, 12:52 PM), http://www.hazteoir.org/noticia/35486-aguirre-pide-que-no-intenten-enfrentarla-cospedal-cascos; ¿Estän realmente en contra el aborto? (Oct. 7, 2010), http://infocatolica.com/blog/cartadirector.php/1007050904-iestan-realmente-en-contra-de (commentary of Maurice Pinay).} Although this point of view too cavalierly assumes that those who employ assisted

\begin{itemize}
\item \textit{Id.}
\item \textit{Donum Vitae, supra note 79, at 10, 11.}
\item \textit{Id. at 19–20.}
\item \textit{Id. at 12, 13 and 19.}
\item \textit{Id. at 79.}
\item \textit{La FIV que practican muchos, Comment to Aguirre pide que no intenten enfrentarla a Cospedal por Cascos, HAZTEOR.ORG (Jan. 25, 2011, 12:52 PM), http://www.hazteoir.org/noticia/35486-aguirre-pide-que-no-intenten-enfrentarla-cospedal-cascos; ¿Estän realmente en contra el aborto? (Oct. 7, 2010), http://infocatolica.com/blog/cartadirector.php/1007050904-iestan-realmente-en-contra-de (commentary of Maurice Pinay).}
\end{itemize}
reproduction necessarily are in favor of a liberal abortion policy, 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 Socialists 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, leaving the medical profession to police itself even with respect to the minimal federally mandated reporting requirements that do exist. 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. There are no legal consequences for clinics that elect not to pursue accreditation under this program.

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.


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 “creating 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, and at the state level we find only a patchwork of disconnected provisions covering discrete aspects of reproductive technology.

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. Another is that no consensus exists at the national level on what form the regulation should assume. 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, politicians are loathe to become involved with this issue for fear of alienating certain constituencies. 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.

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.


247. Ouellette et al., supra note 237, at 433.
regarded as human beings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{253} This attitudinal disparity may

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\item \textsuperscript{250} Ouelette et al., \textit{supra} note 237, at 433; Keye, Jr., et al., \textit{supra} note 237, at 536 (noting that a majority of infertility clinics oppose governmental regulation but do not resist self-policing by the profession).
\item \textsuperscript{251} Benagiano & Gianaroli, \textit{supra} note 198.
\end{itemize}
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.\textsuperscript{254} No \textit{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.”\textsuperscript{255} In some cases, the medical profession may advance “self-regulation as a strategy of influencing and possibly preventing future state intervention.”\textsuperscript{256} Thereafter ensconced as “‘private interest governments,’” the medical profession may be “powerful enough to resist any policy change demanded by emerging groups”\textsuperscript{257} such as patients, the church, and women.\textsuperscript{258} Indeed, such emerging groups, specifically because they lack specialized technical knowledge “will often suffer from insufficient credibility to encourage policy change.”\textsuperscript{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.\textsuperscript{259} In this way, it will continue to be an outlier among nations that also have highly developed infertility industries.

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256. \textit{Id.}

257. \textit{Id.} at 11, 12

258. \textit{Id.} at 12.

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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. 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.

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.