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I. Introduction

Sexual reproduction, also known as making babies the old-fashioned way, has always brought with it significant challenges for family law, especially regarding protecting the best interests of children, and the identification of parents with the right and responsibility to rear them. But these challenges often seem mundane in the face of what has evolved since physicians have been injected into baby making and thus into novel parent-child relationships. The addition of physicians and their "new" medical technologies, sometimes called Assisted Reproductive Technology (ART), have forced the law to reconsider the very definition of motherhood and have radically altered society's view of the human embryo. ART has also raised entirely new questions involving deceased fathers, contract children for single people and single-sex couples, post-menopausal pregnancy, as well as the prospects for cloning and germline genetic enhancements.

Whether these biotechnologically based changes should be the domain of family law or health law, or even international law, continues to be contested.[1] As recently as fifty years ago, there still were no "new" reproduc-

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1. *See generally* RUTH DEECH & ANNA SMAJDOR, FROM IVF TO IMMORTALITY: CONTROVERSY IN THE ERA OF REPRODUCTIVE TECHNOLOGY (2008); SANFORD N. KATZ, FAMILY

tive technologies, only the established technique of artificial insemination by donor. Emphasis in the field of what we now know as reproductive medicine was almost exclusively centered on preventing conception and terminating unwanted pregnancies rather than on developing new ways to have a baby.

A fifty-year retrospective on ART can be usefully informed by three writings from the 1950s. The first is the warning from then President Dwight W. Eisenhower about the growing power of the military-industrial complex to confine what should be matters of public deliberation to the private, for-profit sector. Today there is a parallel concern with the growing power of the medical-genetics industry to make its own rules in the developing field of "reprogenetics."[2]

The second and third are the 1958 publication of the American edition of *Lolita* by Vladimir Nabokov, and the 1956 publication of *Long Day's Journey into Night* by Eugene O'Neill, both profound observations of America and the American family. Nabokov's novel was a scandalous best seller in the United States. Humbert's confessional recounting of his life with Lolita contains not just astute psychological insights, but even asides about family law in the 1950s. Driving from one motel to another with Lolita, Humbert muses, for example, about guardianship of the twelve year old and consults family law texts to try to understand his legal position:

> Query: is the stepfather of a gaspingly adorable pubescent pet, a stepfather of only one month's standing, a neurotic widower of mature years and small but independent means, with the parapets of Europe, a divorce and a few mad houses behind him, is he to be considered a relative, and thus a natural guardian?[3]

Humbert wonders whether he should file a petition for guardianship of Lolita. He consults treatises, finding among other things:

> The many books on marriage, rape, adoption and so on, that I guiltily consulted at the public libraries of big and small towns, told me nothing beyond darkly insinuating that the state is the super-guardian of minor children, Pilvin and Zapel, if I remember their names right [he doesn't], in an impressive volume of the legal side of marriage, completely ignored stepfathers with motherless girls on their hands and knees.[4]

In his *Foreword* to Eugene O'Neill's *Long Day's Journey into Night*, Harold Bloom writes that:

LAW IN AMERICA (2003); Bruce Lord Wilder, *Current Status of Assisted Reproduction Technology in 2005: An Overview and Glance at the Future*, 39 FAM. L.Q. 573 (2005).

2. *See generally* LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD (1997).

3. VLADIMIR NABOKOV, LOLITA 172 (1955).

4. *Id.* at 174.

> No dramatist to this day has matched O'Neill in depicting the nightmare realities that can afflict American family life in the twentieth century Western world. The helplessness of family love to sustain, let alone heal, the wounds of marriage, of parenthood, of sonship, have never been so remorselessly and so pathetically portrayed . . . .[5]

Lolita and *Long Day's Journey into Night* can both be read as meditations on the dark side of the American family, and lawyers are generally consulted only when there is a major breakdown in the family. Physicians, especially those in the relatively new field of reproductive medicine, are generally consulted only when couples are unable to have children without the assistance of medical technology—to help create a family rather than to help dissolve one. How has the rise of physicians as reproductive assistants empowered with new biotechnologies changed the family, and thus family law, over the past fifty years?

There are many possible ways to approach this question. As I have already suggested, for the first half of this period, preventing conception or terminating pregnancy were the most important fertility-related medical advances. Thus, oral contraceptives made sex without reproduction dependable for the first time in human history, radically altering pre-marital and extramarital sexual patterns. Likewise, advances in surgery made early abortion safe for women, helping to lead to the U.S. Supreme Court's 1973 ruling in *Roe v. Wade*.[6] In *Roe*, the Court held that there was no state interest strong enough to interfere with a woman's decision to terminate her pregnancy in the first trimester because at that point pregnancy termination was medically safer for the woman than carrying the pregnancy to term. Although *Roe* was a classic "negative rights" decision, it was taken up by the supporters of the new reproductive technologies as being consistent with the creation of a new positive right, the right to "procreative liberty."[7]

Roe was and remains one of the two or three most important legal developments in family law (and in health law and perhaps in constitutional law as well) in the past fifty years. But my subject is the impact of physician-controlled reproductive technologies on family law—and I will spend the rest of this article looking at the impact of the most important ART of the past fifty years: in vitro fertilization (IVF). I will briefly examine the policy implications of IVF as seen from a 1983 perspective, then explore two judicial opinions from the late-1990s that review the central family law issues raised by ART, and conclude with an overview of the

5. Harold Bloom, *Foreword* to EUGENE O'NEILL, LONG DAY'S JOURNEY INTO NIGHT, at xii (1987).

6. 410 U.S. 113 (1973).

7. *See generally* JOHN A. ROBERTSON, CHILDREN OF CHOICE (1994).

impact of globalization and ethical arbitrage on family law issues of the early twenty-first century.

II. Early Policy Considerations of IVF

One reason I was asked to write this retrospective is that I had written two relevant articles for the *Family Law Quarterly* on reproductive technologies during the fifty year period under review, one in 1979 and the other in 1983. In the 1979 article, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, I argued that "[c]urrent [Artificial Insemination by Donor] AID practices are based primarily on consideration of protecting the interests of practitioners and donors rather than recipients and children."[8] I also made six specific recommendations, three of which are worth repeating today: (1) requiring practitioners of AID to keep permanent records on all donors that they can match with recipients, (2) establishing national standards regarding AID by professional organizations with input from the public, and (3) conducting research on the psychological development of children who have been conceived by AID and their families.[9]

Maintaining accurate records is essential because the most important, and as yet unresolved, issue in the use of donor gametes is whether and when the resulting child should have a right to learn the identity of his or her genetic parent. This question, of course, has nothing to do with any new technology, but with the nature of the family itself and the rights and interests of children. In fact, the very unsatisfactory male model of protecting sperm donors more than the resulting children has been used to develop practice guidelines for all subsequent reproductive technology developments, most directly ova donation but also surrogate motherhood.

My colleague obstetrician and geneticist, Sherman Elias, and I dealt with what can now be seen as the major medical technology breakthrough of the past fifty years in our 1983 article, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family.*[10] In that article, we, like most commentators, applauded the new technique of In Vitro Fertilization (IVF), which permitted "infertile couples" to have children, the first being Louise Brown; born in England in 1978 (the first U.S. IVF baby was born in December 1981). But we also argued that IVF raised significant policy and practice issues that demanded attention: "serious social issues regarding indications, selection, consent, donor oocytes,

8. George J. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1, 12 (1979).

9. *Id.* at 12-13.

10. George J. Annas & Sherman Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199 (1983).

donor embryos, and surrogate childbearers."[11] IVF closed the circle opened by oral contraception: the latter enabled sex without reproduction, the former enabled reproduction without sex. How would this affect the family?

In our article we noted that, in his 1982 speech to the Section of Family Law at the American Bar Association Annual Meeting in San Francisco, Father Robert F. Drinan, S.J., former chairman of the Section and former editor-in-chief of this journal, called the new reproductive technologies the "greatest challenge" facing the Section in the next twenty-five years.[12] Looking backwards, it is remarkable how prescient Father Drinan was in that assertion. In our own analysis, we concluded that while model legislation was premature, "[c]aution and prudence are demanded. Professional standards regarding research in IVF, [then still an experimental procedure] are laudable and should continue to be developed. Public discussion should be encouraged. Donor embryos and surrogate childbearing for IVF should, at least at this time, be discouraged."[13] We also recommended against adopting market values in this sphere, arguing against payment for surrogacy and payment for embryos, but in favor of record-keeping for oocyte donors. Overall, we cautioned against prohibitory legislation and favored policies protecting the interests of children:

> Although we do not recommend legislation to prohibit surrogacy, or any other form of human sexual reproduction . . . legislative and regulatory proposals [short of prohibition] should be strictly examined to insure that their primary thrust is to protect the unrepresented third party involved: the would-be child.[14]

Finally, we took a strong stance on what has been perhaps the central family law issue raised by IVF when either a donor oocyte or a so-called surrogate mother or gestator is employed: who is the child's mother? This is perhaps the most remarkable legal accomplishment of the new reproductive technologies: putting the very meaning of "mother" in play. Although at least some courts and state statutes have favored the so-called "intended" or "contracting" mother as the legal mother, I continue to believe that Dr. Elias and I were right to insist that the woman who gives birth to a child should always be considered the child's legal mother for the reasons we stated in 1983:

> We believe that the current legal assumption should remain any contract to the contrary notwithstanding; i.e., the [gestational] mother should continue to be considered the natural mother of the child. This not only provides for certainty of identification at the time of birth (a protection for both the mother and the

11. *Id.* at 223.
12. *Id.* at 200.
13. *Id.* at 223.
14. *Id.* at 222.

> child), but also recognizes the biological fact that the [gestational] mother has contributed more of herself than the genetic mother to the child and therefore has a greater interest in it.[15]

IVF was the most important new reproductive technology of the past fifty years because it divorced reproduction from sex, moved the embryo and embryo creation outside the body and into the laboratory, permitted the separation of genetic and gestational motherhood, and led to techniques to screen and manipulate extracorporeal embryos. All of these, as Daniel Callahan has noted about biotechnologies in general, change not just what we can do, but also how we think—in this case, how we think about the family and children, and even how we think about human embryos.

III. Courtroom Confrontations and Contracts

Two emblematic decisions from the late 1990s illustrate the major legal controversies around IVF that have thus far resisted consensus. These cases, one from California and the other from New York, both suggest that existing medical practices, primarily based on enforcing preconception contracts, are inadequate to protect the interests of either children or their medically assisted parents.[16]

A. California and Parental Identification

The California case involved Luanne and John Buzzanca who used IVF with a donor egg and sperm to create an embryo.[17] The embryo was subsequently implanted into a genetically unrelated woman (denoted the "surrogate" mother) for gestation and childbirth with the original intention that the Buzzancas would rear the resulting child as their own. Before the child, Jaycee, was born, the couple separated, and John disclaimed any interest in the child.

At a trial to determine the legal parents of Jaycee, the genetic parents were not identifiable, and the gestational mother disclaimed any interest in the child. Because neither John nor Luanne was genetically or biologically related to Jaycee, the trial court judge astonishingly concluded that Jaycee had no legal parents and was parentless. The appellate court decided that the sperm donor model, which could be termed the male model, should be directly applied to pregnancy and childbirth and should determine the outcome of this case. Specifically, the court determined under

15. *Id.*

16. This section is adapted from George J. Annas, *The Shadowlands: Secrets, Lies, and Assisted Reproduction*, 339 NEW ENG. J. MED. 935 (1998).

17. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

California law that just as a husband who consents to his wife's artificial insemination becomes the legal father of the child, "so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents."[18] The court therefore concluded that Luanne and John were Jaycee's legal parents.[19]

Nonetheless, the court conceded that unlike fatherhood, which involves only two possible fathers, the genetic and the rearing, there are at least three mothers: the genetic, the gestational, and the rearing. The court asked how the "tie" among them can be broken. It decided that rather than choose between genetics and gestation on the basis of biology or investment of effort, the intention that "*sets in motion* a medical procedure that results in the birth of a child" should govern.[20] This is because the legislature has determined that it is the intention of the wife's husband that matters in determining paternity in the case of using unrelated sperm. Applying this rule, the court determined that John was the father because he intended that his wife have a child that he planned to treat as his own. The court goes even further, writing that "for all practical purposes John caused Jaycee's conception every bit as much as if things had been done the old fashioned way."[21] And later, "In plainer language, a deliberate procreator is as responsible as a casual inseminator."[22] Likewise, because the court believed that John "caused" the birth of Luanne simply by signing a contract, the court had no problem concluding that the same logic that made him the "father" made his wife the "mother," since she agreed to the procreative project at its inception.[23]

Ultimately, however, the court seemed unsatisfied with its conclusion and unpersuaded by its own arguments because it concluded its analysis by saying that it preferred the legislature to set the rules in this arena: "we still believe it is the Legislature . . . which is the more desirable forum for lawmaking."[24] And at the very end of the opinion, the court seemed unable to

18. *Id.* at 282.

19. To make sure no one missed the analogy used, the court later expands on this conclusion, saying that gestational surrogacy and artificial insemination are "exactly analogous in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie." *Id.* at 286. The court didn't like the idea of people who are responsible for the creation of a child "turning around and disclaiming any responsibility," *id.* at 287, after the child is born.

20. *Id.* at 289.

21. *Id.* at 291.

22. *Id.* at 292.

23. *See id.* at 292–93.

24. *Id.* at 293.

help itself in trying to reassure John, the now new father, that things may work out for the best. The court noted that John may have agreed to the surrogate mother arrangement simply "as an accommodation to allow Luanne to surmount a formality" but noted that "human relationships are not static; things done merely to help one individual overcome a perceived legal obstacle sometimes become much more meaningful."[25]

Of course, there is no legal basis for such a conclusion, so the court resorted to quoting literature to bolster its opinion. The court referred approvingly to *Shadowlands*, a play written by the English playwright William Nicholson about the life of C.S. Lewis and his marriage to an American citizen to permit her to stay in England. Just as a deeper relationship developed between Lewis and Joy, the court seemed to say that a deeper relationship may develop between John and Jaycee, if not between the now divorced John and Luanne.

B. "Donating" IVF Embryos for Medical Research in New York

On the opposite coast, a New York case involved an attempt by Maureen Kass to become pregnant by IVF with her husband Steven.[26] In this attempt, Maureen had undergone five egg-retrieval processes and nine embryo transfers, none resulting in a live birth. Prior to what turned out to be the final attempt, Maureen's sister agreed to try to carry the couple's embryos, and the couple signed four consent forms supplied by the hospital. Included in an addendum to one of the forms was a determination that if the couple "no longer wish[ed] to initiate a pregnancy or [were] unable to make a decision regarding the disposition of [their] stored, frozen pre-zygotes, . . . [they] may . . . be disposed of by the IVF program for approved research investigation as determined by the IVF program."[27] After Maureen's sister failed to become pregnant, and decided not to make another attempt, the couple decided to divorce.

During the divorce proceeding, Maureen sought sole custody of the remaining frozen embryos so that she could undergo another implantation procedure. Steven opposed the request. The trial court granted custody of the embryos to Maureen, but an appeals court reversed in a split decision, a plurality deciding that the provision in the consent forms that provided that the embryos be turned over for research should be enforced.[28] The case was further appealed to the New York Court of Appeals. That court affirmed the decision that the couple's prior agreement ruled and gave one

25. *Id.* at 294 n.22.
26. *See* Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).
27. *Id.* at 176–77.
28. *Id.* at 177.

basic reason for its conclusion: "Advance directives, subject to mutual change of mind that must be jointly express, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."[29] If such a document evidences informed, mutual consent, it should be honored by the courts. In the court's concluding words:

> As they embarked on the IVF program, appellant and respondent—"husband" and "wife," signing as such—clearly contemplated the fulfillment of a life dream of having a child during their marriage. The consents they signed provided for other contingencies, most especially that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes. These parties having clearly manifested their intention, the law will honor it.[30]

C. Problems with Enforcing Preconception IVF Contracts

These two cases seek to hold couples planning to have children to the agreements they make prior to conception. In neither case is divorce seen as a sufficient reason to overcome the presumption that the pre-divorce agreement should stand if either member of the couple wants it to remain in force. In the California case, this rule resulted in the award of child support to a woman by a now divorced husband; in the New York case, the now divorced husband was able to prohibit his former wife from using embryos created during the marriage to attempt a pregnancy. The result in both cases seems reasonable, and the contract-based solution adopted by both courts has much appeal. This is because enforcing contracts seems to put very private, procreation-related decision-making in the hands of the married couple, and puts the court simply in the position of interpreting and enforcing their voluntary agreements. The problem, however, is that much more than contract law (or even family or health law) is at stake in these cases. Neither court simply affirmed the contents of a contract; both made much more profound and wide-ranging decisions about the status of embryos, the interests of children, and the identification and responsibility of their parents than either acknowledged.

The California court, for example, seemed to be simply honoring an agreement made prior to Jaycee's conception. But in fact, the court implicitly held that the determination of motherhood should be governed by exactly the same rules that the legislature has applied to the determination of fatherhood. The court seemed to see this as an example of

29. *Id.* at 180.

30. *Id.* at 182. *Contra* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

"gender neutrality," but applying the male model of sperm donation to pregnancy and childbirth devalues both pregnancy and childbirth. In fact, in the court's analysis, not only the genetic mother (who, as a donor of the ovum used in the "procreative project," could arguably be treated like a sperm donor, even though donating or selling ova is much more painful and risky than producing sperm), but also the birth mother was eliminated from being considered the child's mother. And this was not done on the basis of time and effort involved by the various women, or by a consideration of the best interests of the resulting child, but solely on the basis of a contract made prior to conception. The court thus went out of its way to deny the fact that Jaycee had three mothers, a genetic mother, a gestational or birth mother, and a contracting-rearing mother. Further, the court went out of its way to determine that only one will be considered the legal mother, and that this determination will be based on contract because contracts have been used to determine the legal status of fathers.

Because all of these propositions can be vigorously and persuasively disputed, it is perhaps not surprising that the court concluded its opinion with reference to *Shadowlands* rather than to the law. *Shadowlands* is a compelling play, but to cite the play for the proposition that "a deeper relationship" may develop between a man and a woman than that contemplated at the time of a marriage of convenience misses the point not only of the play itself, which is about the meaning of suffering, but of the case itself, in which the marriage had already ended in divorce. For Lewis, the real world was "no more than the shadowlands" from which we will emerge in the afterlife. On the other hand, the play does have its gender equality moments, such as when Lewis's future wife, Joy, meets some of Lewis's stuffy Oxford colleagues. One of them explains the difference between men and woman to Joy, saying, "I regard the soul as an essentially feminine accessory[.] This is how I explain the otherwise puzzling difference between the sexes. Where men have intellect, women have soul." Joy quite properly responds, "[I] need a little guidance here. Are you being offensive, or merely stupid?"[31] The California court, of course, tried to be neither; but its real insight seemed to be that courts cannot make meaningful public policy in the realm of assisted reproduction by deciding individual disputes after the fact, as they somewhat randomly come before them. The legislature really is the preferred law-making body in this arena.

The New York court did not do much better. While affirming the contract, the court failed to even examine the public policy implications of its terms. For example, although informed consent is necessary for human

31. WILLIAM NICHOLSON, SHADOWLANDS (BBC Wales 1985).

embryo research, as in any research, the gamete donors retain the right to withdraw their consent at any time. To the extent that the consent of both parties was necessary for valid consent, which is what the consent form required, the withdrawal of consent by either should mean that the research cannot proceed. The court should also be expected to know this, since human embryo research has been among the most controversial forms of human research in the United States.[32] Finally, to the extent that the court was correct in concluding that the couple embarked on IVF and signed the form "clearly contemplat[ing] the fulfillment of a life dream of having a child during their marriage,"[33] their divorce put an end to this dream and radically altered their circumstances sufficiently to at least call that agreement, like the marriage agreement itself, into question and to provide each party with the opportunity to revoke it.

D. Regulation and Alternatives to Contract Enforcement in IVF

These courts probably did as well as they could, and reliance on prior contract as a way to resolve continuing controversies has been espoused by leading legal commentators as well.[34] Nonetheless, the California court seems correct in asking for the legislature to set the rules in this arena. The court's opinion, for example, gave no guidance as to what would or should happen if the surrogate mother or the ovum donor changed her mind and wanted to be designated the legal mother with the rights and responsibilities to rear Jaycee. Do we really need to look to contracts to decide who a child's mother is at the time of birth? Should commerce, money, and contracts really have more to say about motherhood than pregnancy and childbirth? If we take the best interests of children more seriously than the best interests of commerce, it would seem that children would be best protected by a universal rule that presumed that the woman who gave birth to the child was the child's legal mother with, among other things, the right to make treatment decisions for the child and the responsibility to care for the child. This is not because this is the "traditional" or

32. It may be that the court missed this point because it adopted the language of the consent form and used the meaningless term "pre-zygote" instead of "embryo." Other clinics have used "pre-embryo," but virtually everyone has now abandoned the "pre" designation because of the realization that one could just as easily call the embryo a "pre-child" or a "pre-adult." Moreover, the real distinction is between preimplantation extracorporeal embryos, over which both male and female gamete providers have equal say, and implanted embryos, over which the pregnant woman has the ultimate decision-making authority herself. The terms employed are not irrelevant to the analysis, and thus, even though the court says that it is adopting the terms used in the consent form, in the opinion itself, the court uses three different terms for the same entities almost at random: embryos, fertilized eggs, and pre-zygotes.

33. *Kass*, 696 N.E.2d at 182.

34. *See* ROBERTSON, *supra* note 7.

"natural" rule; this is because the birth mother is the only one of the three potential mothers who we know will be present at the child's birth and available to make decisions on behalf of the child. Treatment and caring decisions will often need to be made immediately for the child; the issues of long-term care, relinquishment of parental rights, and adoption can be made later.

Likewise, the New York court acknowledged in its opinion that the New York Task Force on Life and the Law had recently "issued a comprehensive report . . . together with recommendations for regulation . . . [and] addresses a wide range of relevant subjects."[35] The court, however, took no position on the recommendations themselves, perhaps because the report was released only a week before the court's opinion was published.

The report of the New York Task Force, the first comprehensive legislative report on assisted reproduction ever done in the United States, was followed by more than a decade of similar reports in the United Kingdom and Australia, and a later report in Canada.[36] The United States has been slow to regulate the assisted reproduction industry because of our continuing controversies over abortion and embryo research and our basic belief that couples and their physicians should be able to make their own decisions in this arena. Even though procreative decisions are private, however, certain aspects of them have such a strong impact on issues that require public scrutiny and rule making, such as the welfare of children, the social identity and responsibility of parents, basic informed consent requirements, and record keeping. It has become clear that the assisted reproduction industry caters to the wishes of adults and that their wishes consistently trump the interests of the resulting children; that the abortion model has been used to resist regulation; and that the male sperm donor model has been consistently applied to ova "donation," pregnancy, and childbirth, even though none of these are equivalents. Perhaps the most disturbing application of the male sperm donor model to all ART is its allegiance to secrecy to such an extent that records about the sperm donor and the donation are either routinely destroyed or kept from the resulting child, who is systematically and consciously deprived of knowledge of his or her genetic parents. Worse, parents are often counseled to lie to their children about their genetic heritage, even though we know from adoption studies that family secrets can be toxic to children.

Depending upon how one counts, the New York Task Force made recommendations for approximately sixty changes in professional guide-

35. *Kass*, 696 N.E.2d at 178 n.2.

36. The most impressive report to date has come to be known as the "Warnock Report." *See* MARY WARNOCK, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (1984).

lines, thirty changes in state regulation of gamete banks, and eleven recommendations for new state laws. One need not agree with all of these recommendations to appreciate the vastness of the field and the numerous possible regulatory points. The task force was concerned about the growing number of multiple pregnancies induced by fertility drugs and the implantation of multiple embryos that either result in multiple births with their problems of prematurity or fetal reductions. The task force was also concerned with the lack of uniformity of standards, variations in consent procedures and forms, counseling, screening, record keeping, success reporting, ova donation, and embryo research.

The most important decision the task force made was to adopt a child-centered analysis that took the protection of the interests of children seriously. The task force did this, for example, by giving children legally responsible parents and requiring clinics to keep records on their behalf. The most important specific recommendation was that the legislature determine by statute that the birth mother of the child is the child's legal mother, regardless of contracts to the contrary, even if the child was "not conceived with the woman's egg."[37] This rule would have entirely avoided the California dispute, since the gestational mother and her husband would have been Jaycee's legal parents and would have had to give her up through standard adoption procedures. The task force's recommendations could also have solved the *Kass* dispute, since it recommended that use of frozen embryos should always require the agreement of both gamete providers, thus giving each veto power.

The task force's report is more important for its attempt to move the regulation of assisted reproduction out of the "shadowlands" of the private clinics and the public realm of private disputes (the courts) and into the light of democratic lawmaking and regulation (the legislature). The regulation of both medicine and family relations have historically been dealt with as state law questions. Thus, it has been seen as reasonable for the states to handle these issues themselves and for law to develop on a state-by-state basis. Nonetheless, to the extent that the new reproductive technologies have become big business and are more accurately characterized as commercial than as medical or family-related activities, regulation of the interstate commercial aspects on a national level is vital.

Other countries that have developed uniform standards for the reproductive medicine industry have had to appoint a committee or commission to study the industry and make legislative recommendations. It seems likely that if we want to seriously consider uniform commercial standards

37. N.Y. STATE TASK FORCE ON LIFE & LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 351 (1998).

in this country, a similar panel will have to be appointed by the president, with the specific charge of developing national regulatory standards for the reproductive medicine industry. The President's Council on Bioethics took a baby step in this direction in 2004 when it made a series of relatively feeble recommendations regarding data collection, reporting requirements, patient protection measures, and professional oversight. The panel properly, nonetheless, emphasized that it is critical to "[t]reat the child born with the aid of assisted reproductive procedures as a patient."[38]

States will, of course, continue to have jurisdiction over determining motherhood, fatherhood, child custody, and related family law issues. But national commerce standards could be developed in this arena as we have developed them for organ transplantation, including the content of informed consent, in terms of the risks to parents and children; standard ovum and sperm donor screening and record-keeping requirements; the ability of the resulting child to learn the identity of his or her genetic and gestational parents; rules for research on human embryos; time limits on the storage of human embryos; a prohibition on the use of gametes of the deceased to produce children; limits on the number of embryos that can be implanted per cycle and monitoring and stop rules for ovarian stimulation drugs; and the addition of human ova and embryos to the list of human tissues that cannot be purchased or sold in the United States. Of course, U.S. law can only cover U.S. reproductive practices, and it is no secret to anyone that Internet advertising specifically and globalization in general has made what has become known as "reproductive tourism" (going to another country for reproductive services) a growing industry.

IV. Globalization and Genetic Engineering

A. Ethical Arbitrage

The globalization of reproductive medicine has raised two new regulatory problems. The first involves currently available reproductive technologies, and the second involves experimentation with novel techniques. Both move us from the traditional domestic family-law arena into the much wider legal arena of international human rights law. As to the first, the ability of infertility clinics in India, for example, to advertise to and attract large numbers of clients from the United States and Europe, means, of course, that whatever laws and practices we have agreed to in the United States will have no affect on the practice of medicine in China or

38. PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 215 (2004).

India—or in any other country for that matter.[39] Thus, even if we were to outlaw the purchase and sale of embryos, or to limit the compensation of so-called surrogate mothers (who are real mothers), these restrictions would not apply elsewhere. This leads to calls of international regulation, but without an international structure for such regulation, it is currently not possible. Accordingly, it is difficult to see a way out of what I have termed "ethical arbitrage," countries continuing to loosen whatever ethical rules or guidelines they have regarding the new reproductive technologies to attract more paying customers.[40]

It is frustrating that we cannot regulate the new reproductive technologies on an international level. But it is potentially disastrous that we have as yet found no way to regulate reproductive research, especially that focused on modifying human embryos to create "better babies," on the international level. I strongly disagreed with the President's Bioethics Commission when it concluded, during the first term of George W. Bush, that the federal government should not fund embryo research designed to make medicine. On the other hand, I agreed with their deeper concern that embryo research, federally funded or not, should not be conducted to try to produce either a cloned baby or a genetically modified baby.[41]

B. Cloning and the Prospect of Genetic Genocide

The continuing worldwide debate on cloning and germline genetic engineering is a fitting note on which to end this article on IVF and its potential progeny. At the 2001 United Nations Conference on Racism in Durban, South Africa, I suggested that using the new genetics to try to make a "better human" by genetic engineering should be resisted because it raises the prospect of "genetic genocide."[42] Was this inflammatory language justified? I continue to believe that it was, although I certainly acknowledge that we can argue about the probability of the danger and the effectiveness of steps we can take to minimize it.

The project of genetic engineering will begin (when it does) with the genetic replication of humans by somatic cell nuclear transfer, known

39. *See, e.g.*, Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9; Heather Won Tesoriero, *Infertile Couples Head Overseas for Treatments*, WALL ST. J., Feb. 19, 2008, at D1.

40. *See generally* George J. Annas, *The ABCs of Global Governance of Embryonic Stem Cell Research: Arbitrage, Bioethics and Cloning*, 39 NEW ENG. L. REV. 489 (2005); Rosario M. Isasi & George J. Annas, *Arbitrage, Bioethics, and Cloning: The ABCs of Gestating a United Nations Cloning Convention*, 35 CASE W. RES. J. INT'L L. 397 (2003).

41. *See* George J. Annas & Sherman Elias, *Politics, Morals and Embryos: Can Bioethics in the United States Rise Above Politics?*, 431 NATURE 19 (2004).

42. *See* George J. Annas, *Genism, Racism, and the Prospect of Genetic Genocide*, 6 PAC. ECOLOGIST 43 (2003).

simply as cloning. Cloning to create a child who is a genetic replica of an existing human makes a mockery of human dignity, both by undermining the individuality and liberty of the clone child and by turning the child into a product of our own will and technique. The immediate danger, of course, is that, as products, the human rights of the clone children will be suspect, and as copies, they will inevitably be treated (and treat themselves) as second-class citizens. Of course, domination and exploitation can occur in the absence of cloning, and *Lolita* again provides a horrific example as Humbert fantasizes about whether or not to marry or dispose of his Lolita when she grows up:

> I must confess that depending on the condition of my glands and ganglia, I could switch in the course of the same day from one pole of insanity to the other—from the thought that around 1950 I would have to get rid somehow of a difficult adolescent whose magic nymphage had evaporated—to the thought that with patience and luck I might have her produce eventually a nymphet with my blood in her exquisite veins, a Lolita the Second, who would be eight or nine around 1960, when I would still be *dan la force de l'age*; indeed, the telescopy of my mind, or un-mind, was strong enough to distinguish in the remoteness of time, *a viellard encore vert*—or was it green rot?—bizarre, tender, salivating, Dr. Humbert, practicing on supremely lovely Lolita the Third the art of being a granddad.[43]

Humbert did not consider attempting to clone Lolita and hiring surrogate mothers to supply him with as many Lolitas as his sexual appetite desired—but had Nabokov written the book after the birth of Dolly the sheep, he may well have included the possibility of cloning in Humbert's perverted musings.[44] Cloning, however, is only the beginning of the genetic engineering project. The next steps involve attempts to "cure" or "prevent" genetic diseases, and then to "improve" or "enhance" genetic characteristics to create the superhuman or posthuman. It is this project that creates the prospect of genetic genocide as its most likely conclusion. This is because, given the history of humankind, it is extremely unlikely that we will see the posthumans as equal in rights and dignity to us, or that they will see us as equals. Instead, it is most likely that we will see them as a threat to us, and thus seek to imprison or simply kill them before they kill us. Alternatively, the posthumans will come to see us (the garden variety humans) as an inferior subspecies without human rights to be enslaved or slaughtered preemptively.

It is this potential for genocide based on genetic difference, that I have termed "genetic genocide," that makes species-altering genetic engineer-

43. NABOKOV, *supra* note 3, at 174.

44. *See generally* SILVER, *supra* note 2; JOEL GARREAU, RADICAL EVOLUTION: THE PROMISE AND PERIL OF ENHANCING OUR MINDS, OUR BODIES—AND WHAT IT MEANS TO BE HUMAN (2004).

ing a potential weapon of mass destruction, and makes the unaccountable genetic engineer a potential bioterrorist. The hopeful aspect of the new genetics is that it can lead us to see our species in new and deeper ways, and help us to form what Vaclav Havel has termed our "species consciousness." A species-level consciousness will help us to imagine the likely consequences of our genetic science and to take effective steps to try to prevent predictable disasters.

In 2001, I also suggested, with my coauthors Lori Andrews and Rosie Isasi, that the threat by cults and others operating on the margins of human society to clone a human being created an opportunity for the world to act preventively in ways that have been either extremely difficult or impossible.[45] Specifically, we believed it was reasonable and responsible to suggest that the United Nations Educational, Scientific and Cultural Organization's Universal Declaration on the Human Genome and Human Rights, and the overwhelming repulsion of peoples and governments around the world to the plan to clone humans, could be followed by a formal treaty on The Preservation of the Human Species. Such a treaty would ban species-endangering experiments, including cloning and germline genetic alterations. This does not mean that these techniques could never be used, but rather that no individual or corporation would be given the moral warrant to put the entire human species at risk without a worldwide discussion and a modification in the treaty. To the extent that it is concluded that the fear of genetic genocide is too extreme or overblown, the treaty could be time-limited and expire automatically after the human species has gone 100 years, for example, without a genocide.

Species-endangering experiments directly concern all humans and should only be authorized by a body that is representative of everyone on the planet. These are the most important decisions our species will ever make. And they are of special concern to the human rights community. It is not that the human species is perfect the way it is (far from it), or that changes in humanity driven by evolution are not inevitable (they are). Rather, it is that to the extent that human rights law is grounded in our understanding of what it means to be human, changing the nature of humanity at least puts at risk our understanding of human rights themselves.[46]

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45. *See generally* George J. Annas, Lori B. Andrews & Rosario M. Isasi, *Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations*, 28 AM. J.L. & MED. 151 (2002). This article was updated in GEORGE J. ANNAS, AMERICAN BIOETHICS: CROSSING HUMAN RIGHTS AND HEALTH LAW BOUNDARIES 43–58 (2005).

46. *See* ANNAS, *supra* note 45, at 43–58. *But see* JOHN HARRIS, ENHANCING EVOLUTION: THE ETHICAL CASE FOR MAKING BETTER PEOPLE (2007); ENGINEERING THE HUMAN GERMLINE: AN EXPLORATION OF THE SCIENCE AND ETHICS OF ALTERING THE GENES WE PASS TO OUR CHILDREN (Gregory Stock & John Campbell eds., 2000). James Watson has also consistently argued

This treaty should also contain a democratic and accountable enforcement mechanism through a monitoring and review body. No experiments in the species-altering or species-endangering categories would be legal without this body's prior review and approval. By shifting the burden of proof to scientists and corporations to demonstrate that their interventions would more likely be beneficial than harmful to the species, the treaty would adopt the environmental movement's precautionary principle to species-altering and species-endangering interventions. Action to date has resulted not in a treaty but in a nonbinding declaration which, I think, is overly broad in that it seeks to prohibit not only cloning to make a baby, but also cloning to make medicine.[47] Given the nature of the human species, it now seems likely that no further action will be taken on a cloning and germline treaty unless or until a real disaster occurs in these areas.

We have a tendency to simply let science and medicine take us wherever they will. But science and medicine have become so powerful, both in terms of making our lives better and raising the risk of species suicide, that we can no longer abdicate our mutual responsibility to each other as members of the human species. Reprogenetics, with its promise of better babies and ultimately a better class of humans, presents a unique challenge to law generally, and to family law in particular.

Lolita ended tragically—with the death of Humbert in prison while awaiting trial, and the death of Lolita herself in childbirth. But in choosing verses from English poet Dante Gabriel Rossetti to emphasize his pessimism toward both family life and America, O'Neill challenges us all to change our ways (and, in this case, take the best interests of children seriously) or pay the consequences of abdicating responsibility for our children, our families, and our country:

> "Look in my face. My name is Might-Have-Been; I am also called No More, Too Late, Farewell."[48]

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against any sort of international agreement on genetic engineering:

> I think it would be complete disaster to try and get an international agreement. I just can't imagine anything more stifling. You end up with the lowest possible denominator. Agreement among all the different religious groups would be impossible. About all they'd agree upon is that they should allow us to breath air . . . I think our hope is to stay away from regulations and laws whenever possible.

ENGINEERING THE HUMAN GERMLINE, *supra*, at 87.

47. *See generally* Rosario Isasi & George Annas, *To Clone Alone: The United Nations Human Cloning Declaration*, 24 LAW & HUM. GENOME REV. 13 (2006).

48. O'NEILL, *supra* note 5, at 171.