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# Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud

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# Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, *In Vitro* Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud

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I. INTRODUCTION

MICHAEL R. MOODIE, S.J.\*

To function as a vital force in the life of a society, a system of law must express those values considered fundamental to the society's continued existence. Thomas Aquinas, when considering the nature of law and the appropriate object of legislation, emphasized the essential link between morality and law: whereas law expresses a moral judgment, and some actions support or do not support the good of society, not all morality is enacted into law. Rather, only those values central to the life of the society and the welfare of its citizens play a part.

A study of comparative law discloses the variety of fundamental values in diverse legal systems. The contrast between varying legal values helps delineate the underlying values and themes in one's own legal matrix—values and themes often difficult to perceive because of the proximity of one's perspective. In an increas-

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ingly interrelated world, an appreciation of competing values may increase opportunities for mutual understanding, cooperation, and respect.

This symposium offers perspectives from three religious law traditions: Roman Catholicism, Islam, and Judaism. Each of the three legal traditions offers a comprehensive, normative system that translates doctrine into practice and religious values into concrete directives. While the place of theological law differs in the respective religious bodies, each body asserts a binding authority over its confessional members.

In preparing the symposium, the editors adopted a format of responses to specific fact patterns that raise pertinent issues in familial life. These fact patterns were presented to legal writers from the three traditions, who were then asked to respond to the situations within the context of their own religious law. It is interesting to note that not only do the authors' conclusions differ on each subject, but so do their underlying beliefs about the pertinent issues raised by the fact patterns. Our laws express values that are rooted in religious doctrine and belief; as the beliefs differ, so do their concrete expressions in the law.

The editors wish to acknowledge and thank Gerald T. McLaughlin, Dean of Loyola Law School, for both suggesting the topic of the symposium and assisting in its development. It is through such comparative studies that jurists may more thoroughly understand the manifold contributions of religious legal systems to American law and the particular religious values that provide the basis for American legal thought.

## II. DUTY TO EDUCATE—FACT PATTERN

### Part A

Fred and Ethel are a married couple living in rural Ruritania. They are wealthy farmers, as were their parents before them. They have a child named Johnny, who is lovingly raised by them.

Ruritania provides free education for every citizen; however, education is not compulsory. Neither Fred nor Ethel were formally educated, so they see no reason for Johnny to receive a formal education. They consider no other future for Johnny other than farming. Therefore, they do not allow him to obtain a formal education, even though Johnny appears bright and says that he wants to go to school and learn.

Later, when Johnny reaches adulthood, he has his intelligence tested. He is discovered to be a near genius in natural ability. No university, however, will take this unschooled young man. He is now locked into a farming career, as his options have been narrowed significantly by his lack of formal education. Johnny is so unhappy with his situation that he wishes to sue his parents for a breach of the duty to educate him. He comes to you to inquire whether your laws can help him. His parents desire the same advice.

### Part B

David and Mary share the same religious faith and are actively committed to it. As their children approach school age, however, David and Mary become increasingly concerned about the moral environment the children will find in school. They agree that no social environment is value-free, and that the public school system fosters an environment of moral relativism repugnant to them. They consider this environment to constitute a secular religion that contradicts their own faith.

David and Mary also believe they have the fundamental right to choose the educational environment of their children, as they, not the state, are primarily responsible for their children's welfare. David and Mary conclude that their tax money spent on education should be allocated to the school of their choice. For the state to refuse to allocate funds to the school of their choice would be tantamount to establishing a secular religion and thus denying individuals the free exercise of their own. They plan to bring suit and desire your advice.

#### *A. Roman Catholic Response*

JAMES CONN, S.J.\*

### Part A

As in Anglo-American law, the Roman Catholic moral and canonical traditions require both a substantive and procedural analysis of the instant case. Substantively, the question is whether Johnny has a right to a formal education. If the answer is yes, we

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must then analyze the procedures by which Johnny may vindicate that right.

The relevant legislation on the issue of Johnny's right to be educated is found in the most recent Code of Canon Law,<sup>1</sup> based on the teaching of the popes and of the Second Vatican Council. Specifically, there are sixteen canons that enumerate the obligations and rights of the Christian faithful.<sup>2</sup> For example, Canon 217 assures all members of the Church "the right to a Christian education by which they will be properly instructed so as to develop the maturity of a human person and at the same time come to know and live the mystery of salvation."<sup>3</sup> In referring here and elsewhere to "Christian education" or "Catholic education" of the young, the Code does not intend to limit the object of the right to religious instruction. Human maturity that comes from proper instruction in a variety of disciplines is seen as an antecedent condition to knowledge of the things of God.<sup>4</sup> Canon 795, found in the section of the Code that deals with the Church's teaching function, further elucidates this principle when it says:

Since a true education must strive for the integral formation of the human person, a formation which looks toward the person's final end, and at the same time toward the common good of societies, children and young people are to be so reared that they can develop harmoniously their physical, moral and intellectual talents, that they acquire a more perfect sense of responsibility and a correct use of freedom, and that they be educated for active participation in social life.<sup>5</sup>

While the Code does not consider formal schooling to be the only appropriate means of education, it recognizes such institutionalized learning as most common. In fact, the next provision, Canon

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1. 1983 CODE.

2. *Id.* cc.208-223.

3. *Id.* c.217.

4. The source for Canon 217 as cited in the Code is Paragraph 2 of the Second Vatican Council's Declaration on Christian Education. Paragraph 2 emphasizes the religious character of Christian education. Paragraph 1, on which Paragraph 2 builds, deals with education as a means of promoting brotherly association among peoples, as well as unity and peace on earth. Education is to rely on advances in psychology and in the art and science of teaching. The universal and inalienable right to education has been a consistent teaching of the twentieth century popes, beginning with the Encyclical Letter of Pope Pius XI, *Divini Illius Magistri* (Dec. 31, 1929), reprinted in 2 JOSEPH HUSSLEIN, S.J., SOCIAL WELLSPRINGS (1942) [hereinafter Encyclical Letter].

5. 1983 CODE c.795.

796, describes schools to be “[a]mong educational means the Christian faithful should greatly value.”<sup>6</sup>

Attendant to the right to education is the obligation of parents, schools, and the Church and its pastors to educate. Canon 226, one of the central enumerated rights and obligations listed at the beginning of the Code’s treatment of “The People of God” in Book II, states: “Because they have given life to their children, parents have a most serious obligation and enjoy the right to educate them; therefore Christian parents are especially to care for the Christian education of their children according to the teaching handed on by the Church.”<sup>7</sup>

Indeed, the education of children falls within the Code’s very definition of marriage, as it states: “The matrimonial covenant, by which a man and woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring. . . .”<sup>8</sup>

The role of schools is ancillary but significant. According to Canon 796, schools “are of principal assistance to parents in fulfilling their educational task.”<sup>9</sup> Similarly, the clergy and the Church at large have a responsibility to aid parents in educating children. Canon 528, for example, obliges the parish priest to take special care for the Catholic education of children and young adults.<sup>10</sup> Once again, it should be noted that Catholic education is not restricted to religious indoctrination. Rather, the whole person is to be developed by an integrated educational philosophy ideally rooted in Christian and Catholic principles. Elsewhere, Canon 794 affirms that the “duty and right of educating belongs in a unique way to the Church which has been divinely entrusted with the mission to assist men and women so that they can arrive at the fullness of the Christian life.”<sup>11</sup> Bishops and clergy, therefore, “have the duty to arrange all things so that all the faithful may enjoy a Catholic education.”<sup>12</sup>

From the foregoing prescriptions of canon law, the following seems evident: Johnny has a right to a Catholic education. Further,

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6. *Id.* c.796, § 1.

7. *Id.* c.226, § 2.

8. *Id.* c.1055, § 1.

9. *Id.* c.796, § 1.

10. *Id.* c.528, § 1.

11. *Id.* c.794, § 1.

12. *Id.* § 2.

that right is to be broadly understood as including education in the areas of cultural literacy that contribute to human maturity and integration and provide a foundation for intellectual and spiritual formation in the Christian tradition. Johnny's parents have an obligation to provide him with an education that reasonably accommodates his intellectual abilities. Formal education in schools is a recognized means of fulfilling this obligation. Indeed, the clergy and the Church itself shared Johnny's parents' responsibility and, thus, contributed to their failure.

How, then, might Johnny vindicate this violated right? While the procedural question is answerable in theory, it is, practically speaking, a more complicated problem than it may first appear. In the sixth chapter of his First Letter to the Corinthians, Saint Paul wrote:

When one of you has a grievance against a brother, does he dare go to law before the unrighteous instead of the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels? How much more, matters pertaining to this life! If, then, you have such cases, why do you lay them before those who are least esteemed by the church? I say this to your shame. Can it be that there is no man among you wise enough to decide between members of the brotherhood, but brother goes to law against brother, and that before unbelievers?<sup>13</sup>

This injunction against Christians who settled disputes among themselves by consulting secular authority gave rise to the adjudication of such conflicts by ecclesiastical authority, first by the bishop himself and later by an ecclesiastical tribunal to which the bishop had delegated his judicial power. Over the centuries, decisions of ecclesiastical tribunals were recognized and enforced by secular powers. Today, ecclesiastical courts are popularly viewed as dealing exclusively with matters of Church discipline and, more specifically, with the validity of marriage.

At least in theory, however, the law of the Church extends the ecclesiastical tribunal's authority much farther. Canon 1400 states that the object of an ecclesiastical trial is "to prosecute or to vindicate rights of physical or juridic persons, or to declare juridic facts"

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13. 1 *Corinthians* 6:1-5 (Revised Standard Version).



and "to impose or declare the penalty for offenses."<sup>14</sup> Physical persons are individuals, while juridic persons in canon law are equivalent to corporations. Johnny, by virtue of his baptism, is a person with rights and duties.<sup>15</sup> Those rights can be vindicated before a tribunal. The right to education, as we have seen, is guaranteed by the Code and, while it is not the sort of spiritual matter over which the Church would claim exclusive jurisdiction,<sup>16</sup> it is at least the object of the Church's jurisdiction, concurrent with that of secular power. In Ruritania, for example, the Church would have special cause for concern because the absence of a compulsory education statute suggests that children may not be considered as having a civil right to education over the objection of their parents. Johnny would have had no cause of action in a Ruritanian civil court.

It is important to note that Church tribunals do not ordinarily deal with disputes like the one between Johnny and his parents. Because of the unusual character of the case, if Johnny were to seek the service of a tribunal to vindicate his right, it is likely that the judge would require Johnny to have an advocate, or canon lawyer, present Johnny's case to the tribunal. Parties may freely choose their advocates. While the law permits petitioners and respondents to act *pro se* in ecclesiastical trials, the judge may require the services of an advocate.<sup>17</sup> It should be noted, however, that while an advocate can be helpful, his role is not crucial because a canonical trial is not adversarial. The judge has broad discretion to act in the interests of justice, regardless of whether the advocates make the requisite arguments or not. Johnny would be well advised, as would his parents, to locate a canonist reasonably well-versed on the issue. Both parties could find this a difficult task, however, as most canon lawyers who deal with ecclesiastical courts do so in the circumscribed field of matrimonial jurisprudence.

Through his advocate, Johnny would then be obliged to submit a complaint (*libellus*) which must, among other things, "indicate the basis for the petitioner's right and at least in general the facts and proofs which will be used to prove what has been alleged."<sup>18</sup>

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14. 1983 CODE c.1400, § 1.

15. *Id.* c.96.

16. *Id.* c.1401.

17. *Id.* c.1481, § 1.

18. *Id.* c.1504, 2°.

When a judge has competence and a petitioner has standing, a properly executed complaint can only be rejected "if from the *libellus* itself it is certainly obvious that it lacks any basis whatsoever and that it is impossible that any such basis would appear through a process."<sup>19</sup> Strange as it may appear, therefore, Johnny's complaint is valid on its face.

Although canonical justice is not an adversarial system, a canonist should be cautious about giving advice to contentious parties, and should definitely avoid doing so once the process begins. Prior to filing the complaint, however, I would advise Ethel and Fred that their best argument would be that they provided for Johnny's education through means other than formal schooling. After all, Canon 793 allows parents the choice of "those means and institutions through which they can provide more suitably for the Catholic education of the children according to local circumstances."<sup>20</sup> While the facts do not suggest such a hypothesis, parents could reasonably argue that they withheld their children from the public school system because it was inimical to Catholic faith and morals. Even if this were the case, however, Fred and Ethel were apparently prosperous enough to send Johnny to a private school, Catholic or otherwise, if one existed in their area. Based on the details of the case as presented, there seems little by way of tenable argument for the behavior of Fred and Ethel.

It is not clear what sort of damages Johnny is seeking to recover from his parents. Certainly, money damages would be appropriate to provide for remedial education. Anything beyond that, such as compensation for lost earning power in the profession of his choice, would appear to fall outside the scope of the right to education as guaranteed by canon law. Ecclesiastical tribunals rarely award money damages, although the Code permits them to do so.<sup>21</sup>

A further matter to be considered is the binding force of a judgment in Johnny's favor. Could civil authority order Fred and

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19. *Id.* c.1505, § 2, 4°.

20. *Id.* c.793, § 1.

21. For example, Section 2 of Canon 1655, which provides for the manner in which the appropriate bishop of the diocese executes a judge's sentence, reads as follows: [A]s regards personal actions, when the respondent is condemned to furnish something mobile, to pay money, or to give or to do something else, the judge in the text of the sentence, or the executor with personal discretion and prudence is to set a time limit for fulfilling the obligation . . . .

*Id.* c.1655, § 2.

Ethel to pay Johnny the damages awarded by the ecclesiastical court? It could perhaps be argued that their Church membership and participation in the ecclesiastical trial created a quasi-contract to which they agreed to be parties. Otherwise, the enforcement would be left to the authority of the bishop executing the judgment, who would have at his disposal the Church's penal remedies to impose on the party failing to comply.

While many of the foregoing comments are theoretically valid, they would likely strike diocesan judges as altogether impractical, as such judges are faced with a heavy burden of marriage cases. They would probably recommend, as does the law itself,<sup>22</sup> that the parties submit themselves to a form of mediation or arbitration. Many dioceses have mechanisms in place that are intended to function as the Pauline injunction provides, namely, to have fellow believers not take one another to law but to submit themselves to the judgment of someone within the community of faith.

Finally, both parties to the dispute should consider the even more radical advice of Saint Paul: "To have lawsuits at all with one another is defeat for you. Why not rather suffer a wrong? Why not rather be defrauded? But you yourselves wrong and defraud, and that even your own brethren."<sup>23</sup>

## Part B

Some elements of the argument in favor of David and Mary are well grounded in traditional Catholic teaching on both the right of parents to choose schools for their children and the principle of distributive justice. The principle of distributive justice holds that the state should render appropriate financial assistance to parents so that they can effectively exercise their right to choose a school for their children; such financial support by the state of parental educational choice is consistent with Catholic teaching. It is quite a different matter, however, to assert that public schools constitute the establishment of a secular religion, and that the refusal of financial support to parents who choose other schools infringes upon their free exercise of religion. The former is a proposition of social ethics and moral theology; the latter is a question of constitutional law.

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22. *See id.* cc.1716-1731.

23. 1 *Corinthians* 6:7-8 (Revised Standard Version).

The assertion of David and Mary that parents, and not the state, are primarily responsible for their children's welfare is in perfect harmony with the classic teaching on the subject by Pope Pius XI. In Paragraph 31 of his 1929 Encyclical Letter, he writes:

The family therefore holds directly from the Creator the mission and hence the right to educate the offspring, a right inalienable because inseparably joined to a strict obligation, a right anterior to any right whatever of civil society and of the state, and therefore inviolable on the part of any power on earth.<sup>24</sup>

In Paragraph 36 of the same letter, Pius XI cited the U.S. Supreme Court's decision in *Pierce v. Society of Sisters*<sup>25</sup> as confirming authority for the view that natural law forbids the state from forcing children to be instructed exclusively in public schools.<sup>26</sup>

Canon 1374 of the 1917 Code of Canon Law prohibited Catholic children from attending non-Catholic, neutral, or mixed schools.<sup>27</sup> Public schools in the United States fell into the second category of "neutral" schools, wherein religious instruction is optional, omitted, or positively excluded. Only the local bishop, following instructions from the Holy See, could determine the circumstances and the precautions against the perversion of faith and morals that made such schools tolerable for Catholic children to attend. Such circumstances included the total absence of Catholic schools or their unsuitability for the education of children with special needs; even then, public schools were permissible only if proper safeguards protected faith and morals.<sup>28</sup>

While these legal restrictions reflected a negative presumption about public schools and were not included in the 1983 Code, the natural law principle remains that children are not to be exposed to situations and institutions that will be dangerous to their faith and morals. Catholic parents are, therefore, "obliged and enjoy the right to educate their offspring. In addition, Catholic parents have a duty and a right to select those means and institutions through which they can provide more suitably for Catholic education under

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24. Encyclical Letter, *supra* note 4, at 97.

25. 268 U.S. 510 (1925).

26. Encyclical Letter, *supra* note 4, at 99.

27. 1917 CODE c.1374.

28. See T. LINCOLN BOUSCAREN, S.J. & ADAM C. ELLIS, S.J., CANON LAW: A TEXT AND COMMENTARY 762-64 (2d ed. 1951). See also JAMES J. CONN, S.J., CATHOLIC UNIVERSITIES IN THE UNITED STATES AND ECCLESIASTICAL AUTHORITY 15-16 (1991).

local circumstances.”<sup>29</sup> More specifically, the law requires Catholic parents “to entrust their children to those schools in which Catholic education is provided.”<sup>30</sup> In the United States, obviously, their choice would be limited to private schools and, in all practicality, to Catholic schools. Instead of forbidding attendance at public schools, the canon focuses on the parents’ obligation to provide religious education. According to the Canon, “if they are unable to [send their children to a school that provides Catholic education], they are bound to provide for their suitable Catholic education outside the schools.”<sup>31</sup> Discretion is left to the parents themselves in determining when they are “unable” to send their children to Catholic schools. Issues to be considered could reasonably include location, cost, and quality.

The view of David and Mary that the state should give financial support to their educational choice is upheld by the classic view articulated by Pope Pius XI, who states in his 1929 Encyclical Letter:

And let no one say that in a nation where there are different religious beliefs, it is impossible to provide for public instruction otherwise than by neutral or mixed schools. In such a case it becomes the duty of the state, indeed it is the easier and more reasonable method of procedure, to leave free scope to the initiative of the Church and family, while giving them such assistance as justice demands.<sup>32</sup>

The Second Vatican Council takes up this same theme in its Declaration on Christian Education, where it states:

Parents, who have the first and inalienable duty and right to educate their children, should enjoy true freedom in their choice of schools. Consequently, public authority, which has the obligation to oversee and defend the liberties of citizens, ought to see to it, out of a concern for distributive justice, that public subsidies are allocated in such a way that, when selecting schools for their children, parents are genuinely free to follow their consciences.<sup>33</sup>

The 1983 Code offers a variation on the theme, not by imposing an obligation on the state, but by affirming the right of parents

29. 1983 CODE c.793, § 1.

30. *Id.* c.798.

31. *Id.*

32. Encyclical Letter, *supra* note 4, at 114, para. 83.

33. WALTER M. ABBOTT, S.J., THE DOCUMENTS OF VATICAN II 644 (1966).

“to make use of those aids to be furnished by civil society which they need in order to obtain Catholic education for their children.”<sup>34</sup> The Code further urges the faithful to exercise their influence as citizens so that the government will provide parents with resources to ensure educational choice and, thus, make suitable provision for religious and moral education consistent with the conscience of parents.<sup>35</sup>

Neither the Council nor the 1983 Code condemn public education. It would, therefore, be difficult for David and Mary to argue that support of public education through their tax dollars is contrary to the moral teaching of the Catholic religion. Indeed, there are reasonable grounds for arguing that they have a moral obligation as good citizens to contribute to the legitimate educational objectives of the state. It would be difficult to argue on Establishment Clause grounds that public education constitutes a civil religion, for religion is more than a moral code. Further, there is no evidence to suggest that the schools to which David and Mary object are fostering religion as it is commonly understood. As long as David and Mary have the right to choose a private school for their children, their Free Exercise rights have not been violated. The Supreme Court has not yet held that the financial inability of citizens to exercise a right constitutes an infringement of that right by the government. Even if David and Mary were to argue that exemption from taxes in support of public schools would render them financially capable of choosing a religious school for their children, the government’s contention that it has a legitimate interest in taxing all of its citizens to support public education would probably prevail, especially given the current climate of the U.S. Supreme Court.

David and Mary correctly assert their right to choose their children’s schools. They properly represent the consistent teaching of the Catholic Church that the state should enable parents to subsidize the school of their choice. Their constitutional arguments, however, are weak. The government has not directly denied David and Mary their Free Exercise right of choice by compelling all children to attend public schools. Nor does the morally neutral or inimical teaching of public schools constitute an establishment of

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34. 1983 CODE c.793, § 2.

35. *See id.* cc.797, 799.

religion, as public schools prescind from religion in the ordinarily accepted sense of the word as "divine belief" and "worship."

### B. *Islamic Response*

AZIZAH Y. AL-HIBRI\*

This problem involves at least four issues relevant to Islamic law: (1) the Islamic position on education; (2) the obligation of parents to educate their children; (3) the nature of relations within the Muslim family; and (4) available remedies against one's parents.

#### Part A

##### 1. The Islamic Position on Education

Prophet Muhammad, who carried the message of Islam, was illiterate. The first divine word revealed to him was the imperative: "Read."<sup>1</sup> The rest of the *Qur'an* is replete with verses that emphasize the importance of the pursuit of knowledge. For example, the *Qur'an* exhorts Muslims to ask God to increase their knowledge.<sup>2</sup> It underscores the importance of knowledge: "God elevates by several degrees the ranks of those of you who believe and those who have knowledge."<sup>3</sup> The *Qur'an* even asks rhetorically in one passage, "Say, are those two equal: those who know and those who do not know?"<sup>4</sup>

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1. The first part of the *surah* says in full: "Read in the name of God the Creator. God created the human being from a [mere] clinging clot. Read and God is the most noble, who taught with the pen. He taught the human being what that being did not know." QUR'AN XCVI:1-5 (A. Yusuf Ali trans., 1983). Although the author generally relies on this translated version of the *Qur'an*, the translation was modified whenever the author deemed it appropriate.

2. *Id.* at XX:114.

3. *Id.* at LVIII:11.

4. *Id.* at XXXIX:9.

The Prophet himself emphasized the importance of knowledge and education. Because his statements (the *Hadith*) are an important source of Islamic jurisprudence, second only to the *Qur'an*, they are a useful guide on this subject. The most famous statements are the following: "Scholars are the heirs of prophets";<sup>5</sup> "all that is in heaven and earth asks God's forgiveness for a scholar";<sup>6</sup> "pursuit of knowledge is the duty of every Muslim";<sup>7</sup> and "pursue knowledge even if you have to go as far as China."<sup>8</sup>

Many Islamic jurists viewed education as either completely or practically compulsory based on an *ayah* (*Qur'anic* verse) that states: "[T]hose who conceal [from people] the clear Signs and Guidance which we revealed, after we have made them clear to people in the Book [the *Qur'an*], shall be cursed by God and others who [are entitled to] curse."<sup>9</sup>

Imam al-Shafi'i, an important ninth-century jurist, went so far as to argue that if the inhabitants of one of the provinces of a Muslim state unanimously agree to abandon learning, it is the duty of the ruler to force them to pursue it.<sup>10</sup>

In the case of Fred and Ethel, we have a different scenario: an individual situation involving two parents refusing to educate their child, Johnny. Al-Qabisi, a prominent tenth-century jurist, noted that, if parents are financially unable to educate their children, the

5. 1 ABU ABD ALLAH AL-BUKHARI, SAHIH 25 (Istanbul n.d.) (ninth century).

6. 1 ABU ABDULLAH IBN MAJAH, SUNAN IBN MAJAH 81 (Muhammad Abd al-Baqi ed., Cairo n.d.) (ninth century).

7. *Id.*

8. 1 MUHAMMAD NASIR AL-DIN AL-ALBANI, SILSILAT AL-AHADITH AL-DA'IFAH WA AL-MAWDU'AH 413 (expanded 4th ed. Beirut 1977) (1959). This *Hadith* is viewed by major scholars as weak, i.e., its attribution to the Prophet has not been satisfactorily established. It is, nevertheless, important to include here, if only because of the popularity of this *Hadith* among the Muslim masses. Indeed, it is the first *Hadith* they are likely to quote on the subject. Thus, the impact of this *Hadith*, despite its weakness, on the consciousness of Muslims throughout the Ages has been quite significant. This fact makes it specially deserving of mention in this paragraph, especially because it is consistent with the *Qur'an* and the authenticated *Hadith*.

9. QUR'AN, *supra* note 1, at II:159. Many modern scholars have discussed this topic and concluded that education in Islam is compulsory. See, e.g., 1 ABD ALLAH 'ULWAN, TARBIYAT AL-AWLAD FI AL-ISLAM 257-58 (expanded 3d ed. Beirut 1981); MUHAMMAD ATTIYAH AL-IBRASHI, AL-TARBIYAH AL-ISLAMIYAH WA-FALSAFATUHA 53-59 (3d ed. Cairo 1975) (arguing that education of the public is practically compulsory in Islam); MAJID AL-KILANI, TATAWUR MAFHUM AL-NAZARIYAH AL-TARBAWIYAH AL-ISLAMIYAH 64, 93 (expanded 2d ed. Beirut 1985). For an overview of the Islamic position on education and learning, see generally AHMAD BIN SHU'AYB AL-NASA'I, KITAB AL-'ILM (Va. 1993) (ninth century).

10. AL-KILANI, *supra* note 9, at 93 (quoting al-Bayhaqi on the matter).



community must pay to educate them instead.<sup>11</sup> This is not the situation here, as Fred and Ethel are financially able and the education in Ruritania is also free. Therefore, we must look further into the matter.

## 2. The Obligation of Parents To Educate Their Children

Many jurists interpreted the *Qur'anic* injunction: "O ye who believe! Save yourselves and your families from a fire. . . ."<sup>12</sup> as an injunction to educate their children.<sup>13</sup> This interpretation was bolstered by other *Qur'anic* verses and the Prophet's own statements. Primary among the latter is the following: "Each of you is a shepherd and each is responsible for your flock."<sup>14</sup>

The underlying reasoning is as follows: because parents are the ones who are primarily responsible for the proper upbringing of their children (they are the shepherds), then educating the children properly would teach them the difference between right and wrong and would thus protect them and their parents<sup>15</sup> from hell.

Ibn al-Qayyim, an influential fourteenth century jurist, addressed this issue in some detail. He quoted other jurists as saying that, on Judgment Day, God will ask the parent about the child before asking the child about the parent. He reasons that this is because children have rights against their parents, just as parents have rights against their children. Al-Qayyim concludes that parents who neglect teaching their children that which is of benefit to them and let the children go to waste will have committed a grave wrong in the eyes of God.<sup>16</sup>

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11. AHMAD AL-AHWANI, *AL-TARBIYAH FI AL-ISLAM* 103 (Cairo n.d.) (the author approximates the date of the Cairo version to be 1980, although the source itself contains no date).

12. QUR'AN, *supra* note 1, at LXVI:6. The rest of the *ayah* describes the fire as being fueled by men (who have committed wrongs) and stones. It also describes the angels that are appointed over it.

13. See, e.g., ABD AL-FATTAH FUAD, *FI AL-'USUL AL-FALSAFIYAH LIL-TARBIYAH 'IND MUFAKKIRI AL-ISLAM* 112-13 (Alexandria 1983) (also quoting Ibn al-Qayyim's views on the rights of children against their parents for a proper education). See also MUHAMMAD SUWAYD, *MANHAJ AL-TARBIYAH AL-NABAWIYAH LIL-TIFL* 25-27 (expanded 2d ed. Kuwait 1988).

14. AL-BUKHARI, *supra* note 5, at 215.

15. The parents would go to hell for failing to educate their children, because they are charged with the children's upbringing.

16. For a similar discussion of al-Qayyim's views on this subject, see SUWAYD, *supra* note 13, at 27. See also FUAD, *supra* note 13, at 112-15.

Still, generally, if parents refuse to educate their children, the Muslim ruler must educate the parents regarding their Islamic duty to educate their own children, and must inform them of the gravity of the consequences of their actions in the eyes of God. She may even impose upon them a suitable form of penalty or punishment until they mend their ways.<sup>17</sup> Such penalty or punishment is permissible as long as it is consistent with the text and general spirit of the *Qur'an* and the authenticated *Hadith*.

By opting for a noncompulsory system of education, it appears that Ruritania has chosen not to impose such a temporal penalty or punishment for actions by parents like Fred and Ethel. This view leads to the conclusion that Johnny is limited to a remedy in the afterlife. Such a conclusion is unwarranted, however, because Ruritania has clearly made available its courts for suits by individuals like Johnny. The possible penalties and punishments for behavior like that of Fred and Ethel are perhaps specified in Ruritania's tort laws, among others. Furthermore, the fact that any punishment or penalty against the parents must be decided by going through the court system is very much in accord with the Islamic principles of democracy and justice, although it puts the burden of initiating the suit on Johnny.<sup>18</sup> As we will see later, this burden raises for Johnny other religiously significant issues that he must consider before reaching a final decision about bringing suit against his parents.

### 3. The Nature of Relations Within the Muslim Family

According to the *Qur'an*, God created humans from a single *nafs* (soul) and made from this *nafs* a mate so that the mate can dwell in tranquility with that *nafs*.<sup>19</sup> In another passage, the *Qur'an* says: "And among His Signs is that He created for you, from your own *anfus* [plural of *nafs*], mates so that you may dwell in tranquility with them, and has put between you affection and

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17. This kind of punishment that a Muslim ruler may impose is a form of *Ta'zir* (a category that includes all those temporal punishments not specifically referred to in the *Qur'an* and that do not fall into two other categories discussed by jurists: *Hudud* and *Qisas*). Cf. AL-AHWANI, *supra* note 11, at 103 (quoting al-Qabisi, who argues that the ruler may pressure the parents but may not force them). The Shafi'i point of view, discussed earlier, is closer to *Qur'anic* and prophetic teachings on the central place of learning in Islam. Therefore, it represents the better view.

18. For more on this point, see generally Azizah al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1 (1992).

19. QUR'AN, *supra* note 1, at VII:189.

mercy.”<sup>20</sup> Thus, the relationship within the family, which is primarily defined by the relationship between the parents, is one of affection and mercy, not of conflict or hostility.

As stated earlier, each of the parents and children have rights, duties, and obligations with respect to each other. Among the basic rights of children are the right to life, the right to legitimacy and good name, the right to equal treatment regardless of gender, the right to maintenance and health care, and the right to religious training and a good education.<sup>21</sup>

Among the basic obligations of Muslim children towards their parents are the obligation to love and honor them, especially in their old age, and the obligation to obey them, *except when they stray from the straight path*. The *Qur'an* enjoins the children to consort with their parents in kindness, show humility, and ask God to forgive them.<sup>22</sup>

When asked by a Muslim, “Who deserves my companionship most?,” the Prophet answered, “Your mother, your mother, your mother, then your father.”<sup>23</sup> When a Muslim immigrated expressly for the purpose of joining other Muslims in defending Islam, the Prophet asked him, “Did you obtain your parents’ permission?” The immigrant indicated that he had not. The Prophet then told him to go back and obtain the parents’ permission. He added that if the parents refused to grant it, then the man should be a dutiful son and stay with them.<sup>24</sup>

Another less reliable *Hadith* states that the child who pleases his parents will have both doors of Heaven open to him, whereas the child who angers them will have both doors of Hell open to him.<sup>25</sup> This *Hadith* is not unusual, except that it goes on to state that this is the case even if the parents were unjust. Al-Ghazali

20. *Id.* at XXX:21.

21. ABDEL RAHIM OMRAN, FAMILY PLANNING IN THE LEGACY OF ISLAM 30-39 (1992). This is an excellent English-language work. The author’s discussion is clear and concise, and all quotes and cites from the *Qur’an* and *Hadith* have been authenticated by a committee of distinguished scholars at al-Azhar.

22. QUR’AN, *supra* note 1, at IV:36, XVII:23-24, LXXI:28.

23. 7 AL-BUKHARI, *supra* note 5, at 69.

24. 9 ABU BAKR AL-BAYHAQI, AL-SUNAN AL-KUBRA (Beirut 1935) (eleventh century).

25. 2 ABU HAMID AL-GHAZALI, ‘IHYA’ ‘ULUM AL-DIN 216 (Cairo 1939) (twelfth century).

points out that this *Hadith* is weak in its attribution to the Prophet.<sup>26</sup> His comment is not insignificant for our purposes here.

Many *Qur'anic* verses, as well as passages in the *Hadith*, require children to exhibit a spirit of affection and humility towards their parents, even in instances where the parents are clearly in the wrong. But the *Qur'an* does permit dutiful children to disobey their parents' wishes if the parents go astray. Therefore, the better view on parental disobedience is that, even if the parents act unjustly, the children must still treat them kindly, yet the children are not obligated to accept or participate in the injustice.

In fact, the children are likely to have a positive duty to eliminate the injustice created by their parents. First, several *Qur'anic* verses make it the collective responsibility of all Muslims to enjoin the right, prohibit the wrong, and advance the cause of justice.<sup>27</sup> Second, by righting their parents' wrongs and asking God to forgive the parents, dutiful children are mitigating the consequences of their parents' unjust acts and improving their parents' chances for forgiveness.

#### 4. Available Remedies

In the instant case, Fred and Ethel clearly violated their religious obligation to educate Johnny. But the violation was not committed with malice; they simply made a terrible mistake in judgment and did not know any better. Indeed, one wonders why Fred and Ethel were not educated by their own parents. Under these circumstances, the Muslim community in Ruritania should have discussed the matter with Fred and Ethel and explained the Islamic position on education, urging them to educate Johnny. In the absence of such communal advice, they did their best.

Still, Johnny is in the position of a seriously wronged child and does not have to accept this gross injustice. Therefore, he should find an institution that will educate him, even at this late date. With his exceptional natural abilities, Johnny may be able to catch up with the others quickly. If free state education is no longer available to him at this point, his parents are obligated to pay for a private tutor or some other adequate remedial alternative. In fact, I would advise them to do so if they want to meet God with a clear conscience.

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26. *Id.*

27. *QUR'AN*, *supra* note 1, at III:104, XVI:90-92.

On the other hand, Johnny's idea of suing his parents runs counter to the Muslim understanding of family relations. There is no indication in the facts of any malice or willful violation by the parents. Furthermore, it is not clear what Johnny would achieve by suing. Any willingness by his parents to spend money to educate him would represent a significant attempt to correct the prior unintentional injustice.

If Johnny's parents refuse to right their wrong, the Muslim community should educate them about their Islamic duty to educate their offspring and encourage them to fulfill it. If the parents persist in their refusal, then Johnny can sue his parents because their continued refusal to educate Johnny and to financially support his remedial education, in the face of a religious imperative to do so, rises to such a level of willful injustice that Johnny is entitled to sue. Yet, such a course of action should be undertaken with an eye to fair settlement.

It is important to note that, if Johnny simply wants to punish his parents for their serious past error, his action contradicts the Islamic spirit of kindness and humility with respect to one's parents, even when they are wrong. Further, if he is attempting to sue in order to obtain damages for lost opportunities, then his actions may again represent a conflict-oriented view of the family which is foreign to Islam. This depends on the equities in the case determined in light of Johnny's continued potential to produce and other relevant circumstances. In the absence of unusual circumstances, the better alternative would be for Johnny to trust in God and immediately start the long road of educating himself. God will reward him for his kindness to his parents, perhaps in this life, and most certainly in the afterlife.

## Part B

This question poses the issue of educating a Muslim in the public school system of a non-Muslim state. As such, it involves the developing Islamic jurisprudence *Fiqh al-Aqalliyyat*, which derives special rules for Muslims living in non-Muslim countries, taking into account their special circumstances.

Whether David and Mary have a basis for their suit is really a matter of American constitutional law. From the Islamic perspective, if an adequate basis does indeed exist, then they should certainly bring suit in order to fulfill their duty of ensuring that their

children get the best possible education. In Islam, such an education carefully balances temporal knowledge with spiritual and moral education.

If the case appears to be constitutionally viable, then David and Mary should contact other Muslims, People of the Book (mainly Christians and Jews), as well as other Americans who may share a similar position. I would recommend that they consider the possibility of these other individuals joining them in the suit to give the suit a broader base and a greater chance of success.

On the other hand, if the suit by David and Mary is not viable, they should attempt to supplement their children's education through additional instruction at home. If they conclude, however, that this is useless in light of overwhelming negative influences and pressures in the local public schools, and if they cannot discover any alternative resolutions that protect their children's well-being, David and Mary ought to contemplate moving to a more suitable community in the United States. After all, the *Qur'an* clearly recognizes the efforts of those who immigrate for God's sake.<sup>28</sup> Such a move, however, should be undertaken only as a last resort because it is preferable to advance the cause of morality in one's own community.

### C. Jewish Response

MICHAEL J. BROYDE\*

"Rabbi Judah states: Anyone who does not teach his children a profession, it is as if he has taught them robbery."<sup>1</sup>

#### Part A

As the above quote makes clear, Jewish law requires that one teach one's children a profession.<sup>2</sup> This duty is part of the specific

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28. *Id.* at IX:20.

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1. BABYLONIAN TALMUD, *Kiddushin* 29a, 30b.

2. Interestingly, it is unclear if the word "livelihood" is synonymous with the word "profession" in this context. A profession appears to mean more than a way to earn a

obligation to educate one's own children.<sup>3</sup> Generally, Jewish law on the parental obligation to teach one's children has three different, yet interrelated, components. The first is the obligation to educate one's children in accordance with the tenants of the faith, both in matters of theology and in matters of ritual practice.<sup>4</sup> The second is the obligation to teach one's sons *torah*, the corpus of classical Jewish law and ethics that all are obligated to study.<sup>5</sup> The third and final obligation is to train one's children in a trade or livelihood.<sup>6</sup> The second and third obligations are mentioned in the *Talmud* and Responsa in various forms and places,<sup>7</sup> and are the focus of this Essay.<sup>8</sup>

The duty to teach a child *torah* (Jewish law and ethics) is a clear biblical obligation upon the father that is recited every day in

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living; it denotes specific skills. As implied by Rabbi Joshua Boaz, a parent does not fulfill this obligation merely by providing a child with an ongoing source of income such as a trust fund, or by providing the child with an income-producing business that the child derives income from but cannot run. Rabbi Joshua Boaz, *Shelta'i Gibborim*, in BABYLONIAN TALMUD, *Kiddushin* 12a(1) (Rif pages). Instead, the law appears to obligate parents to provide a skill for the child. On the other hand, providing children with the skills needed to be farmers, rather than just providing the farm, would certainly fulfill this obligation. See Rabbi Shlomo Yitzchaki (Rashi), in BABYLONIAN TALMUD, *Kiddushin* 30b (stating that Rabbi Yehuda's ruling was predicated on the belief that, absent work to occupy the child's time, the child might turn to robbery out of boredom). See also Rabbi Abraham Gumbiner, *Magen Avraham*, in SHULCHAN ARUCH, *Orach Chaim* 156 [hereinafter *Magen Avraham*].

3. See generally 16 ENCYCLOPEDIA TALMUDICA, *Chinuch* 162 (1978).

4. For a general discussion of this *mitzvah* and its parameters, see *id.*

5. SHULCHAN ARUCH, *Yoreh Deah* 245:1. For a very detailed discussion of the parameters of a woman's obligation to study Jewish law, see SHOSHANA PANTEL ZOLTY, AND ALL YOUR CHILDREN SHALL BE LEARNED: WOMEN AND THE STUDY OF TORAH IN JEWISH LAW AND HISTORY chs. 1, 2, 3, 9 (1993). This book is an extraordinary survey of the topic and deserves reading by all interested.

6. Rabbi Asher ben Yecheil, *Commentary of Rosh*, in BABYLONIAN TALMUD, *Kiddushin* 29a, 30b; see also Rabbi Nathan Weil, *Karban Nethanial*, in BABYLONIAN TALMUD, *Kiddushin* 29a.

7. It is worth noting that the rule requiring that one teach one's child a trade is not cited explicitly in either Maimonides' code or *Shulchan Aruch*. As demonstrated by Rabbi Jacob Emden, this does not mean that these authorities reject such an obligation. See RABBI JACOB EMDEN, RESPONSA SHELAT YAVETZ 2:68; RABBI OVADIA YOSEF, RESPONSA YACHAVE DAAT 3:75.

8. Indeed, this answer assumes that the practical religious education of Johnny is somehow taken care of independently from the issue of providing a trade for him. According to the Jewish tradition, it is clearly prohibited for Fred and Ethel to deprive Johnny of educational opportunities within the field of Judaic studies or Jewish law, even if they could so deprive him of a secular education and confine him to life on the farm. For a long essay on this topic, see ENCYCLOPEDIA TALMUDICA, *supra* note 3, at 162-202.

the prayer service. This is one of the basic obligations of a parent.<sup>9</sup> Indeed, in situations where the parent is incapable or unwilling to fulfill the obligation, others must do so at the father's expense.<sup>10</sup> Thus, one must make one's children as literate and competent as possible in the fields of *Judaica*.<sup>11</sup> Yet, because one reaches adulthood at the age of twelve or thirteen in Jewish law,<sup>12</sup> a father is certainly not obligated to educate his son or daughter beyond legal adulthood.<sup>13</sup> Thus, the duty ends upon legal maturity.

The duty to train a child to earn a livelihood is not explicitly found in any of the classical post-*talmudic* codes, although it is clearly an obligation under Jewish law. This duty is also created by a specific rabbinic commandment.<sup>14</sup> It is unclear how precisely one needs to teach a child such a livelihood, particularly when the need to earn a living conflicts with the obligation or inclination to study Jewish law or other aspects of Judaism.<sup>15</sup> Yet, it is clear that an obligation does exist.<sup>16</sup> Thus, the pressing question is whether Jewish law requires a father to provide for the intellectual training of a child, in addition to training for technical matters of earning a livelihood or *Torah* study. Jewish legal tradition indicates that it does not. Except for the child who wishes to pursue advanced studies in *Judaica*, the father who is willing and able to provide a child with career training through which he may earn a living, even in a discipline that the son does not find intellectually attractive, has clearly fulfilled the obligation. Thus, it appears that Fred and Ethel have

9. This is found in *Deuteronomy* 11:19, and is one of the three paragraphs recited every day with the *Shema* and its related prayers.

10. SHULCHAN ARUCH, *Yoreh Deah* 245:2, 3, 7. It is worth noting that, when a parent is unavailable and a guardian has been appointed, the guardian is under an obligation to educate the child. See RABBI EZRA BATZRI, *DINNAI MAMMONUT* 3:353 (2d ed. Machon HaKatav 1990).

11. See generally *Magen Avraham*, *supra* note 2; see also *supra* notes 2-6; 1 ENCYCLOPEDIA TALMUDICA Av 5 nn.108-14 (2d ed. Yad Harav Herzog 1972).

12. Twelve for a girl and thirteen for a boy. SHULCHAN ARUCH, *Orach Chaim* 55:9, *Even Haezer* 155:12. This age also requires signs of physical maturity. *Id.*

13. There is, however, a series of decrees by the Israeli Chief rabbinate that requires a parent to support the children into adulthood. These decrees are not discussed in this Essay.

14. Indeed, as recounted in the *Babylonian Talmud*, this obligation supercedes one particular aspect of the Sabbath laws. BABYLONIAN TALMUD, *Ketubot* 5a.

15. See YOSEF, *supra* note 7, at 3:75 (addressing the issue of whether one should send a child to a trade school or an institution of higher study of Judaism). Rabbi Yosef concludes that the obligation to teach a child about Judaism supersedes the obligation to teach them to errand a living. *Id.*

16. See *supra* notes 2-6 and accompanying text.



fulfilled the third part of the duty to educate their son, namely, to provide for his livelihood on the farm with the necessary skills to become a farmer.

It is unlikely, however, that Fred has fulfilled his mandate to teach his son *Judaica* to the full extent mandated by Jewish law. Was Johnny given instruction in Jewish law, the various codes, and *talmudic* texts? Was he exposed to the breadth and depth of Jewish learning? While it is true that one need not expose one's children to all secular disciplines<sup>17</sup> as part of the religious mandate to educate one's children, within *Judaica* more exposure is better.

Under Jewish law, a community may force parents to educate their children properly.<sup>18</sup> What is clear from the Jewish perspective, however, is that the obligations a child has to a father, and a father to his child, are not financially actionable retrospectively.<sup>19</sup> Instead, Jewish law retrospectively sees the parents' failure as a violation of a divine obligation, not remediable by the civil law. Therefore, the son has no cause of action to sue his father for the father's failure to educate him; similarly, the father may not sue his son for his son's failure to honor him.<sup>20</sup>

If a son were to take advantage of a secular cause of action and sue for breach of duty to educate under the common law<sup>21</sup> of the secular courts, I would remind him that Jewish law prohibits, at least for Jews, resorting to the secular legal system to resolve these types of disputes. The *Babylonian Talmud* prohibits this kind of lawsuit in secular court when it states:

17. This is not to say that the exposure to all things secular is prohibited or unwise, but merely that it is not mandated by Jewish law. See generally RABBI NORMAN LAMM, *TORAH UMADAH passim* (1992).

18. See sources cited *supra* note 10.

19. In other words, no *damages* may be sought by a person against his parents for their failure to educate him.

20. The sole actionable financial claim is for the ongoing obligation to support, whether it be parents by children or children by parents. See generally GERALD BLIDSTEIN, *HONOR THY FATHER AND MOTHER: FILIAL RESPONSIBILITY IN JEWISH LAW AND ETHICS* chs. 3-4 (1975).

21. It is clear that, historically, there has been a common law duty to educate one's children, as in Jewish law. The common law, however, occasionally would recognize in tort a failure to educate. See Frank D. Aquila, *Educational Malpractice: A Tort en Ventre*, 39 CLEV. ST. L. REV. 323 (1991); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (particularly material cited in note 280); John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992). But see Kathryn J. Parsley, Note, *Constitutional Limitations on State Power To Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441 (1991).

Rabbi Tarfon stated: In all situations where one finds Gentile courts, even if their laws are the same as Jewish law, one may not use them for judgment, because the Bible states; "these are the laws that you shall place before them," that is to say, "before the Jews" and not before Gentiles.<sup>22</sup>

Indeed, Rabbi Karo clearly states that "[i]t is prohibited to be judged before Gentile judges or their courts, even if they apply Jewish law and even if both litigants agree to be judged by them."<sup>23</sup>

Thus, even if the child could show a valid cause of action under the law of the state in which he or she resides, such an action would be improper. First, the plaintiff violates the above prohibitions by initiating a suit against the wishes of the other party who would prefer a Jewish tribunal. Second, it is akin to thievery when the plaintiff is awarded damages that Jewish law would not otherwise award.<sup>24</sup>

In sum, Johnny should not sue. As a matter of substantive Jewish law, there is a clear duty to educate one's children, but there is no remedy in tort for the breach of that duty. Further, even if such a remedy existed, Johnny suffered no damages because his parents provided him instruction in a trade. Additionally, any suit would violate Jewish law because resorting to secular courts is prohibited.

If he wishes, Johnny may leave his parents and seek the education he desires. Jewish tradition avers that Rabbi Akiva did not begin to pursue Judaic studies until he had reached the age of forty; however, after diligent study that he began at an age much older than Johnny is now, Rabbi Akiva became the preeminent scholar of his generation.<sup>25</sup> There is no need for Johnny to harbor a grudge, as his parents did for him what they thought was in his best interest.

In final words of advice to Johnny's parents, Jewish law requires that Fred (and Ethel) educate their children. The obligation is not limited merely to the duty to teach them technical aspects of observing ritual law, but also to teach them all aspects of Jewish

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22. BABYLONIAN TALMUD, *Gittin* 88b. For more on this issue, see generally Michael J. Broyde, *The Practice of Law According to Halacha*, 20 J. HALACHA & CONTEMP. SOC'Y 5 (1992).

23. SHULCHAN ARUCH, *Choshen Mishpat* 26:1.

24. See Rabbi Akiba Eiger, in SHULCHAN ARUCH, *Choshen Mishpat* 26:1; RABBI ISRAEL MEYER MIZRACHI, *RESPONSA PRI HAARETZ*, *Choshen Mishpat* 1:13.

25. See AKIBA BEN JOSEPH, *THE JEWISH ENCYCLOPEDIA* 1:304-10 (1901).

law and the intellectual love for learning and studying *Torah*, such as Jewish law, *Bible*, and *Mishnah*. They did not fulfill that mandate with Johnny, who now feels deprived. According to technical rules under Jewish law, they are under no ongoing obligation to provide for Johnny's further education. Yet, they must do better by their remaining children; they should send them to a Jewish school where the children will receive both a Jewish and a secular education. Additionally, it would be the charitable thing to do to support Johnny while he pursues his goals of a higher education.<sup>26</sup>

### Part B

The issue presented in this case has nothing to do with substantive Jewish law. The Jewish education network educates nearly 400,000 children every year.<sup>27</sup> There is an acute money shortage within the Jewish education system that undoubtedly hampers its effectiveness, and at every opportunity the Jewish community seeks to expand the asset-base available to support Jewish education.<sup>28</sup> Indeed, this cross-religious alliance to expand governmental support for parochial schools is most likely the single most significant forum of interfaith cooperation functioning in the United States.<sup>29</sup>

Clearly, allowing parents to pay for the private Jewish education of their children out of money that would otherwise be spent on educating them in public schools would vastly increase the number of Jewish children attending Jewish schools.<sup>30</sup> An increase in Jewish education would, over the course of a number of years, vastly increase the pool of educated Jews, which would lead to an increase in Jewish activity in every facet of American life. There is

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26. SHULCHAN ARUCH, *Yoreh Deah* 251:3.

27. See Sergio Dellapergola and Uziel Schmelz, *Demography and Jewish Education in the Diaspora*, in JEWISH EDUCATION WORLDWIDE: CROSS CULTURAL PERSPECTIVES 43, 55 (Harold Himmelfarb & Sergio DellaPergola eds., 1989).

28. For example, one who compares the rate of attendance at Jewish day schools in Canada and the United States notes that the Canadian rate is markedly higher, undoubtedly due to the reduced burdens of tuition. See generally Jerome Kutnick, *Jewish Education in Canada*, in JEWISH EDUCATION WORLDWIDE, *supra* note 27, at 135.

29. For example, in *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980), the Union of Orthodox Jewish Congregations filed an amicus brief supporting the right of the Roman Catholic Archdiocese of Milwaukee to use taxpayer-provided money for job training. These alliances cross profound theological barriers. *Id.*

30. See, e.g., Ya'acov Rubel, *Jewish Education in Argentina*, in JEWISH EDUCATION WORLDWIDE, *supra* note 27, at 185 (noting the precipitous decline in enrollment in Argentina's Jewish schools as tuition increased).

a clear statistical correlation between Jewish education and involvement in every area of Jewish existence.<sup>31</sup>

What David and Mary seek is a wonderful idea and a glorious dream. Nonetheless, the constitutional claim that they are seeking to litigate has no chance of succeeding in the milieu of American jurisprudence, and has been rejected repeatedly by every court that has examined it in the last twenty years.<sup>32</sup> Thus, I would urge them to abandon any idea of suing, even as I commend their outrage.<sup>33</sup> David and Mary have no chance to succeed through a lawsuit and it will benefit no one except the lawyer they employ.

I would, however, suggest that David and Mary involve themselves politically in this cause.<sup>34</sup> Much can be changed in local school boards. They should involve themselves by running for office or joining a political action committee. If a time comes when a lawsuit might succeed, they should then file one. Until that time, they should do what the rest of the committed Jewish world has done; send their children to a Jewish day-school, even at great personal sacrifice.

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31. See, e.g., Geulah Solomon, *Jewish Education in Australia*, in JEWISH EDUCATION WORLDWIDE, *supra* note 27, at 395, 431 (noting the correlation between early Jewish education and adult involvement in communal Jewish issues).

32. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1214-26 (2d ed. 1988) (reviewing the various cases). As described by Tribe, it is abundantly clear that this lawsuit would have no chance of succeeding.

33. There is no tension between the right to sue permitted under Jewish law and the prohibition to sue noted in Part A of this Essay. In this case, David and Mary would sue the school district, whereas in the suit contemplated in Part A, Johnny would sue his parents. Public causes of action, such as those actions created by secular governments under the rubric, "The law of the land is the law," that aid the government in its task of governing, may often be litigated in secular court. One may unquestionably litigate against the government or its agents or agencies, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service. Also permitted is any litigation where the primary cause of action was created by the secular government and involves public litigation in order to "make the world a better place" (*tikkun ha'Olam*). See, e.g., SHULCHAN ARUCH, *Choshen Mishpat* 369:8; RABBI JOSHUA FALK, *SEFER MEIROT AYNAYIN* (SEMA) 269:21. It is sometimes difficult to determine whether an action is public or private according to Jewish law. See generally Steven Resnicoff, *Bankruptcy—A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5 (1992) (discussing whether bankruptcy and discharge are public or private actions).

34. As noted by Laurence Tribe, it is clear that a school district can legally provide large amounts of aid to parochial schools *if it wishes to*. See TRIBE, *supra* note 32, at 1214-26 (discussing the various permissible and impermissible types of aid).

### III. ABORTION—FACT PATTERN

Matilda is married and pregnant with her second child. In her third month of pregnancy, doctors diagnose Matilda with cancer of the uterus. The doctors tell her that, unless the cancerous uterus is removed within two months, she will almost certainly die. If they remove her uterus within two months, however, she has a fifty percent chance to recover and live. She understands that this procedure will result in the death of the child in her womb. She also understands that, if she does nothing and allows the cancer to proceed, she has a fifty percent chance of delivering a healthy newborn by caesarean section. This latter course, however, will result in Matilda's death.

She requests some time to think about her options. Approximately one month later, Matilda passes into a coma, having made no decision. Both Matilda's husband and her parents approach the doctors, making contradictory requests. The husband feels that the pregnancy should be allowed to continue, while Matilda's parents want the cancerous uterus removed. Both Matilda's husband and mother claim to know what Matilda would have wanted if she had been able to decide before she went into a coma. Due to recent inconsistent rulings by the Supreme Court, the law of the state provides no clear guidance. The family in question and the hospital are each affiliated with your religious tradition. The doctors approach you to ask if a particular course is either illegal or recommended. What is your response? They also want to know whose directives are to be followed, the husband's or the parents'.

#### A. *Roman Catholic Response*

PETER J. CATALDO, PH.D.\*

The first part of this Essay explains principles of Catholic moral teaching pertinent to Matilda's case. These principles are: (1) the inviolability of human life; (2) the duty to conserve human life; (3) informed consent; and (4) the "double effect." As will be shown, there is no single moral principle in the Church's teaching that specifically binds a party to one option over another in the case. The second part of the Essay will apply these principles to Matilda's situation.

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## 1. Catholic Moral Principles

Catholic moral teaching in the area of the human life issues is premised on the principle that *innocent* human life is inviolable. The direct taking of an innocent human life, no matter what the particular circumstances, can never be morally justified. An act that is in itself against innocent human life is directly contrary to God's creation of that life in His own image. Thus, every innocent human life is inviolable because it has been created by God in His own image. This truth has been reiterated in recent Church documents. For example, *The Declaration on Procured Abortion* states that "what is immediately willed [by God] is life, and in the visible universe every thing has been made for man, who is the image of God and the world's crowning glory . . . ."<sup>1</sup> Additionally, Vatican II declared that life "must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes."<sup>2</sup> In 1987, *Donum Vitae* proclaimed the inviolability of innocent human life:

Thus the fruit of human generation, from the first moment of its existence, that is to say from the moment the zygote has formed, demands the unconditional respect that is morally due to the human being in his bodily and spiritual totality. The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.<sup>3</sup>

The duty to conserve human life naturally flows from the principle that human life is inviolable. Because innocent human life must never be taken directly, there is a duty to conserve one's own life and the lives of others for which one has responsibility. In fact, to an extent, one has conserved life by fulfilling the duty not to kill.

The Catholic Church recognizes that the duty to conserve life is founded in Holy Scripture, as well as in the official magisterium and theological tradition of the Church. Recent official teachings have summarized and reaffirmed this duty: "The gift of life which God the Creator and Father has entrusted to man calls him to appreciate the inestimable value of what he has been given and to

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1. *The Declaration on Procured Abortion (Quaestio de abortu)* (Nov. 18, 1974).

2. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.51.

3. *The Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation (Donum Vitae)* pt. 1, sec. 1 (Feb. 22, 1987).

take responsibility for it . . . .”<sup>4</sup>; and, “Everyone has the duty to care for his or her own health or to seek such care from others. Those whose task it is to care for the sick must do so conscientiously and administer the remedies that seem necessary or useful.”<sup>5</sup>

Through its teaching and theological tradition, the Church has always held that the duty to conserve human life is evident in natural law as well as in Scripture. Both Scripture and natural law show that an inherent component of the duty to conserve human life is its proportionate fulfillment. This means that the duty to conserve human life must always be proportionate to the circumstances of the life being conserved. For example, to fulfill the duty, the circumstances of the person’s life may necessitate anything from a nutritionally balanced diet to medical or surgical care, or the application of ice chips and other palliative care measures.

The intrinsic quality of this feature of the duty is explained by St. Thomas Aquinas:

It is natural for each individual to love his own life and things pertaining thereto, but in due measure: that they are loved not as if the end of life were rooted in them, but that they must be used in view of the ultimate end of life. Hence failure to love these things in due measure is contrary to the natural inclination, and consequently, a sin.<sup>6</sup>

In sum, proportionate fulfillment is part of the very intelligibility of the natural inclination to conserve life. The duty, I would argue, is in itself absolute. This follows from the absolute character of the inviolability of life and the basis of the duty found in natural law. The fulfillment of the duty, however, must not be confused with the absolute nature of the duty as an obligation, which would wrongly require every possible means at all times.

Given that the human person is created in the image of God with faculties of reason and free will, there is an obligation to give consent to acts in an informed way, and a corresponding duty to facilitate that informed consent. “Man’s dignity,” *Gaudium et Spes* teaches, “therefore requires him to act out of conscious and free

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4. *Id.* at *Introduction* n.1.

5. The Declaration on Euthanasia pt. 4 (1980).

6. THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, question 126, art. 1, *reprinted in* THE POPE JOHN CENTER, *CONSERVING HUMAN LIFE* (Daniel A. Cronin trans., Russell E. Smith ed., 1989).

choice, as moved and drawn in a personal way from within, and not by blind impulses in himself or by mere external constraint.”<sup>7</sup> Because the objects of reason and free will are truth and good respectively, we respect the dignity of man every time these capacities are used according to their objects. These are the Church’s fundamental reasons why informed consent must be given and secured for medical care.

Finally, the principle of the “double effect” has had a long tradition as a moral guide in particular cases. The principle serves as a moral guide for preserving the integral goodness of a particular act already judged to be intrinsically good, or for preventing a morally indifferent act from becoming bad. The integrity of a good act consists of three elements: (1) the act is good in kind (or at least morally indifferent); (2) the act is performed with the right intention; and (3) the circumstances surrounding the act are in due proportion. Assuming the fulfillment of the first component, the principle of the double effect guides the judgment process for the fulfillment of the other two components.

Thus, the principle may be configured according to preconditions and conditions. There are two preconditions for the valid use of the principle: The proposed act is intrinsically good or morally indifferent and has good effects; and the goodness or moral indifference of the act is threatened by bad effects. The conditions for retaining an act’s integral goodness or for preventing a morally indifferent act from becoming bad are: (1) that the bad effect is not directly intended; (2) that the bad effect is not the means by which the good effect is achieved; and (3) that the good effect is proportionate to the bad effect. Additionally, in connection with the last condition, no other reasonable way may exist to obtain the good effect except together with, but not by means of, the bad effect. Keeping these principles in mind, I will now discuss them as applied to Matilda’s case.

## 2. Catholic Moral Principles Applied to Matilda

It seems doubtful from the facts in this particular case that Matilda was given all of the information she needed to make an informed decision. Apparently, no one informed Matilda that she may lapse into a coma before the two month period expired, or she would have made her decision sooner. If a coma was likely with

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7. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.17.



any delay, she presumably would not have taken the amount of time that she did to deliberate. Moreover, there is no indication that she was given any information or counselling about the ethical aspects of her case.

Both options (either removing the uterus and losing the baby, or refusing treatment for the cancer and saving the baby) would be justified by, or at least would not violate, the three principles discussed above. The principle of the inviolability of human life would not be violated because no *innocent* human life would be directly killed. The duty to conserve life is fulfilled by means of directly treating Matilda's pathology. The object of the action is the treatment of her pathology and will have the probable good effect of restoring Matilda's health. The good effect of Matilda's health is proportionate to the foreseen, but unintended, bad effect of the child's death, because the lives of both mother and child would be conserved to the extent possible. The death of the child is unavoidably concomitant with the good effect, but is not the means by which the good effect is achieved.

Though it would result in the certain death of Matilda, the option of refusing treatment would not violate the principle of the inviolability of human life, as she would not be acting to end her life either by commission or omission, but to save the life of the child. Matilda fulfills the duty to conserve life insofar as she does not directly take her own life, and because she conserves it in proportion to the circumstances of conserving her child's life. Her act of refusing the proposed treatment is not in itself morally bad, and has the good effect of saving her child. This good effect is proportionate to the foreseen, but unintended, bad effect of Matilda's death, because the lives of both mother and child would be conserved to the extent possible. Matilda's death would likely be concomitant with the good effect, but not at any time the means by which the good effect is achieved.

The patient and her surrogates are bound by the same moral principles in reaching judgments about the options. Hence, neither the husband nor the parents can claim moral authority simply on the grounds of their particular conclusions. As I have shown, either option would be morally permissible. In the absence of any facts on the relationships between Matilda and her husband or between Matilda and her parents, the moral presumption for surrogacy should go in favor of the husband based upon the nature of

marriage. This presumption is made because "married love" is a total love in which "husband and wife generously share everything"<sup>8</sup> in an indivisible unity, and because by "its very nature the institution of marriage and married love is ordered to the procreation and education of the offspring."<sup>9</sup> Moreover, "the marriage of those who have been baptized is," according to the teaching of *Humanae Vitae*, "invested with the dignity of a sacramental sign of grace, for it represents the union of Christ and his Church."<sup>10</sup> Matilda and her husband both need to inform their consciences properly with the teachings of the Catholic Church; then, informed with the truth, they must choose and act in good conscience.

### B. Islamic Response

Wael B. Hallaq\*

It is a fundamental legal postulate in Islamic law that the right of parents to conserve their lives, be it the father's or the mother's life, may override their right to conserve the life of their child when a choice between the two must be made.<sup>1</sup> The source (*asl*) simply has priority over and against the derivative (*far'*); here, the mother is the source, and the fetus is the derivative.

In the case at hand, Matilda was diagnosed with cancer of the uterus during the third month of her pregnancy, and she passed into a coma during the fourth month, before 120 days had lapsed. During this period, Islamic law does not deem the fetus to be endowed with a soul. Thus, it does not possess the legal capacity of a person.<sup>2</sup> Hence, the choice of saving the life of the mother over that of the unensouled fetus is clear, despite the fact that the mother has only a fifty percent chance of living if she removes the cancer (simultaneously removing the fetus). The choice of saving the mother at the expense of the fetus is further strengthened by the fact that, if no operation to remove the cancer is performed, the probability of delivering a healthy infant is only fifty percent.

This being the case, Islamic law provides no grounds on which to grant the husband's request for the pregnancy to proceed. It is

8. Paul VI, *Humanae Vitae* n.9 (1968).

9. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.48.

10. Paul VI, *supra* note 8, at n.8.

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1. 3 FAKHR AL-DIN B. MANŞÜR AL-AWZAJANDI, FATAWA QADIKHAN 439, 449 (1980).

2. See BASIM MUSALLAM, SEX AND SOCIETY IN ISLAM 57-59 (1983).

the directive of Matilda's parents, in favor of an operation, that Islamic law supports and that must be followed.

### C. Jewish Response

ELLIOT N. DORFF\*\*

Life is sacred within the Jewish tradition. Consequently, although abortion is permitted in some circumstances and even required in others, it is not viewed as either a morally neutral matter of individual desire, or an acceptable form of *post facto* birth control. Contrary to the opinions of many contemporary Jews, Judaism restricts the legitimacy of abortion to a narrow range of cases. It does not give blanket permission to abort.

Judaism does not see all abortion as murder because Rabbinic sources developmentally understand the process of gestation. The fertilized egg cell, and even the egg and sperm alone, are potential life and, therefore, must not be destroyed without reason; they do not, however, have the same legal status as a person already born. According to the *Talmud*, the zygote is "simply water" within the first forty days after conception.<sup>1</sup> Another *talmudic* source distinguishes the first trimester from the remainder of gestation.<sup>2</sup> These temporal demarcations are not based on a theory of ensoulment at a particular moment in the uterus; instead, the physical development of the fetus determines them. These demarcations effectively make abortion during the early periods more acceptable than during the rest of pregnancy.<sup>3</sup>

The fetus does not attain the full rights and protections of a human being until birth, specifically, when the forehead emerges.<sup>4</sup> The mother, of course, has full human status. Consequently, if the fetus threatens the life or health of the mother, then the mother may (and in some cases must) abort it, as the *Mishnah* graphically

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1. BABYLONIAN TALMUD, *Yevamot* 69b. See also RABBI IMMANUEL JAKOBOVITS, *JEWISH MEDICAL ETHICS* 275 (1975) (noting that "forty days" in *talmudic* terms may mean just under two months in our modern way of calculating gestation, due to improved methods of determining the date of conception).

2. BABYLONIAN TALMUD, *Niddah* 17a.

3. See DAVID FELDMAN, *MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW* 265-66, ch. 15 (1968).

4. If it is a breech birth, full rights and protections are attained when most of the body emerges. BABYLONIAN TALMUD, *Niddah* 3:5.

explains: "If a woman has life-threatening difficulty in childbirth, one dismembers the embryo in her, limb by limb, because her life takes precedence over its life. Once its head or its 'greater part' has emerged, it may not be touched, for we do not set aside one life for another."<sup>5</sup>

While all Jewish sources permit and even require abortion in order to preserve the life or organs of the mother,<sup>6</sup> authorities differ widely on how much of a threat to a woman's health the fetus must pose to justify an abortion. Many modern authorities permit an abortion to preserve the mother's mental health, based on a *responsum* by Rabbi Israel Meir Mizrahi in the late seventeenth century.<sup>7</sup> In modern times, this goal of "preservation" of mental health has been construed narrowly by some and leniently by others.<sup>8</sup> In sum, to the extent that Jewish law makes special provision for an unusually young or old mother, an unmarried mother, the victim of a rape, or the participant in an adulterous union, it permits abortion to preserve the mother's mental health.<sup>9</sup>

There is no justification in the traditional sources for aborting a fetus for reasons pertaining to the health of the fetus; only the mother's health is a consideration. As a result, some people object to performing an amniocentesis at all, even to determine whether to abort a malformed fetus.<sup>10</sup> Others reason in precisely the opposite direction: they justify the abortion of a defective fetus on the basis of preserving the mother's mental health. Yet, this is only where it is clear that the mother is unable to cope with the prospect of bearing or raising such a child.<sup>11</sup>

Many Conservative and Reform rabbis, not to mention a few contemporary Orthodox rabbis, have handled the matter in a completely different way. They reason that traditional sources recognize only threats to the mother's health as grounds for abortion

5. BABYLONIAN TALMUD, *Oholot* 7:6. There are variant versions of this. See, e.g., JERUSALEM TALMUD, *Shabbat* 14:4 ("its greater part"), *Tosefta Yevamot* 9:9 ("its head"); BABYLONIAN TALMUD, *Sanhedrin* 72b ("its head"); JERUSALEM TALMUD, *Sanhedrin* 8 ("its head or its greater part").

6. See JAKOBOVITS, *supra* note 1, at 186-87, 378-79 n.173.

7. RABBI ISRAEL MEIR MIZRAHI, *RESPONSA PRI HA'ARETZ*, 2 *Yoreh Deah* (1899).

8. See FELDMAN, *supra* note 3, at 284-94; 12 MOSHE HALEVI SPERO, *JUDAISM AND PSYCHOLOGY: HALAKHIC PERSPECTIVES* 168-80 (1980).

9. *Id.*; see also JAKOBOVITS, *supra* note 1, at 189-90.

10. J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* 112-15 (1977); 9 *JEWISH BIOETHICS* 161, 175 n.97 (Fred Rosner & J. David Bleich eds., 1979).

11. See FELDMAN, *supra* note 3, at 284-94.

because, until recently, it was impossible to know anything about the genetic or medical make-up of the fetus before birth. These rabbis believe that our new medical knowledge should establish the fetus' health as an independent consideration.<sup>12</sup>

Although I personally agree with this latter approach, it still has problems. Aside from the fact that it would represent an innovation in well-established tradition, it raises the extremely difficult issue of determining what constitutes a sufficient defect to warrant abortion. The "clear" cases are those in which the fetus has minimal brain tissue, as in anencephaly, or a degenerative disease, such as Tay-Sachs or Lesch-Nyhan syndrome.

Other cases are not as clear, such as those involving Huntington's Chorea, where degeneration does not begin until age thirty-five or forty. I believe abortion is not justified in such cases, as the person will live an extended period of time without suffering from any of the disease's debilitating effects. Additionally, there is reasonable hope that such people may have children of their own. Moreover, it is not unreasonable to expect that a cure may be developed in that time. But where do we draw the line? At twenty-five years? Fifteen years? Ten years? Further, what should constitute a "defect" to justify abortion in the first place, and how should we treat varying degrees of the same defect? Should a slight degree of mental retardation be enough? Blindness? Deafness? In trying to answer any of these questions we quickly slide into the danger of defining qualifications for a master race.

The difficulty of making these decisions does not mean that we can, or should, shrink from them. Human life is full of difficult decisions. Judaism believes that we need not accept whatever nature gives us; rather, we have the right and the duty to intervene medically as a partner of God. Advances in modern medical science have created a whole new spectrum of decisions that must be confronted responsibly, although we may prefer not to have to make them.

In the area of abortion, we will undoubtedly find that it is *clearly* justified or unjustified in some cases. In other cases, however, the matter is more ambiguous. In the more difficult cases, the

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12. ELIEZER WALDENBERG, RESPONSA TZITZ ELIEZER 9:51, 13:102; SAUL ISRAELI, AMUD HAYEMINI, Responsum no. 35 (cited in NO'AM, 16 (K.H.) 27, note); 2 LEVI GROSSNASS, RESPONSA LEV ARYEH 205; ALEX J. GOLDMAN, JUDAISM CONFRONTS CONTEMPORARY ISSUES 52-62 (1978).

traditional method of judging the issue on the basis of the mother's mental reaction to the defect may be the wisest. For some mothers, while raising a mentally retarded child is not pleasant, it is manageable. For others, it is beyond their psychological competence to handle. As a result, only psychologically strong and stable mothers would have the responsibility of raising such children, a result that would be unfair. Moreover, if most families abort "defective" children, one wonders about the degree to which society will tolerate imperfections and provide for the people born afflicted. Thus, the very sensitivity of society to the sanctity of life is at stake. Even so, we must develop guidelines for making these decisions, at least in the relatively clear cases. We must also foster sensitivity among medical and religious professionals in order to help families facing these excruciating decisions where no guidelines are possible.

In practice, much of this discussion is moot. Jews engage in abortion almost indiscriminately to the extent that, in recent years, there have been more abortions than live births among Jews in Israel. This is a particularly problematic phenomenon for the contemporary Jewish community because Jews are barely reproducing in Israel and are reproducing even less in North America, where the Jewish reproductive rate is approximately 1.6 or 1.7 children per couple. Consequently, even those rabbis who liberally interpret Jewish abortion law are calling for Jews to marry and have children so that Judaism can continue for generations to come.

Therefore, the case before us is relatively simple from the standpoint of Jewish law. The fetus, although valued as a potential life, is not yet a full-fledged human being with all the rights and protections of the law; this status comes only at the moment of birth. The mother, however, is obviously a full-fledged human being. Therefore, even before Matilda went into a coma, she was *required* by Jewish law to have an abortion to save her life. Matilda is not permitted to give birth to the child, as suicide is prohibited and the doctors have no doubt that death will result if she goes ahead with the pregnancy. Similarly, once Matilda falls into the coma, anyone entrusted with her care—whether her husband or her parents—*must* try to save her life, even though the action causes the fetus to die. Neither the third parties' nor Matilda's wishes matter in such a case. This is a clear example of how Jewish

law is based on duties, in contrast to the emphasis in American law on individual rights.

If, however, there is effectively no chance to save Matilda's life, the doctors must try to save the life of the fetus by caesarean section, whether or not the survivors want the baby born under such circumstances. For the survivors, too, it is a matter of a duty defined by Jewish law, and not an option open for autonomous choice.

#### IV. *IN VITRO* FERTILIZATION—FACT PATTERN

In their six years of marriage, Diane and George have been unsuccessful in starting a family. After a series of medical examinations, the couple discover that Diane has blocked fallopian tubes. Although ovulation takes place, the eggs are unable to move to the uterus. The condition cannot be corrected by surgery.

Diane and George find that their sole means of having a child of their own is to submit to *in vitro* fertilization. This is accomplished by George masturbating and ejaculating into a specimen jar. Diane's ova will be surgically removed from her ovaries. Later, the doctors will introduce the ova to the sperm in order to produce several embryos. Five live embryos are produced, which is more than necessary, in order to avoid the repetition of the procedures required to obtain ova and sperm specimens. It usually takes several attempts at implantation to impregnate the woman successfully. After successful implantation occurs, the remaining embryos are usually destroyed. Before submitting to this process, Diane and George come to you and seek your legal advice. What do you advise?

You never hear from Diane and George again, until you find out that they are currently battling each other in court. You learn that the couple is now divorced and Diane has claimed custody of the embryos. She wishes to have them implanted in her womb and hopes to give birth to children out of wedlock. If successful, Diane expects child support for these children from George. George, therefore, has brought this suit to either win custody of the embryos in order to have them destroyed or, failing that, to enjoin her from implantation. Should either option fail, he wants the court to find that he is not obligated in any way to provide support for the children that may result from Diane's unilateral action of implantation. What do you advise?

## A. Roman Catholic Response

RUSSELL E. SMITH, S.T.D.\*

## 1. The Ethical Questions

The case of Diane and George involves the moral aspects of infertile couples choosing from the many forms of fertility intervention. This Essay develops six ethical issues: (1) the ethical propriety of *in vitro* fertilization ("IVF") itself; (2) the concomitant issue of masturbation to obtain the husband's semen; (3) the retrieval of multiple *in vitro* conceptions of embryos; (4) the associated issue of freezing/storing excess embryos; (5) the destruction of unwanted embryos; and (6) the issues of custody, possession, parental obligation, survival, and destruction of frozen embryos in the event of divorce. As to the last issue, this Essay analyzes the destiny of the embryos and the obligations of the genetic parents.

## 2. The Church's Teaching

The Catholic Church's long-standing teaching on the moral issues involved in this case has been rearticulated most recently in two magisterial documents: *The Declaration on Procured Abortion*<sup>1</sup> and *The Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*,<sup>2</sup> both from the Congregation for the Doctrine of the Faith. The content of the former is summarized in its own words: "The tradition of the Church has always held that human life must be protected and cherished from the beginning, just as at the various stages of its development . . . [P]rocured abortion, even during the first days, [is] objectively a grave sin."<sup>3</sup> This echoes the teaching of the Church's supreme magisterium, the Second Vatican Ecumenical Council, that "abortion and infanticide are abominable crimes (*nefanda crimina*)."<sup>4</sup>

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1. *Quaestio de abortu* (Nov. 18, 1974) [hereinafter *The Declaration*].

2. *Donum Vitae* (Feb. 22, 1987) [hereinafter *The Instruction*]. The extended introduction in *The Instruction* sets forth the moral values, Christian anthropology, and fundamental criteria for moral evaluation. Three sections follow: the first deals with questions regarding respect for human embryos; the second with intervention into human procreation; and the third with the relationship between moral and civil law.

3. *The Declaration*, *supra* note 1, at 6-7.

4. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.51.



*The Instruction* provides a more expansive treatment of the issues involved in this case. The two phrases of its long title are the two principles by which certain questions of contemporary medical technology should be evaluated.

*The Instruction* highlights two foundational values: (1) human life itself; and (2) the means of transmitting human life. Concerning the former, the Church teaches that while physical life "does not itself contain the whole of a person's value, the supreme good being eternal life with God, it does constitute in a certain way the 'fundamental' value, precisely because upon this physical life all the other values of the person are based and developed."<sup>5</sup> Therefore, "[t]he human being must be respected as a person from the very first instant of his existence."<sup>6</sup> Hence, the Church teaches that we are to respect human life as personal and inviolable. This is most evident in the abortion debate.

Concerning the second value regarding the transmission of human life, the Church teaches that the covenant of heterosexual marriage is the only appropriate forum for sexual expression. It also holds that the loving union of the spouses and the "begetting of offspring"<sup>7</sup> are the two essential purposes of marriage, expressed most dramatically in the conjugal act.<sup>8</sup>

Two general moral implications follow from this. First, the foundational value of human life derives from the fact that there is no way to make a credible distinction between a human *being* and a human *person*; critics have severely criticized any attempt to do so. Second, the foundational value of the transmission of human life also carries a moral implication, namely, that one cannot deliberately separate the two meanings of the conjugal act without embracing (at least implicitly) in a utilitarian manner a philosophical dualism that renders the physical nature subordinate to the spiritual nature. This is the rational basis for the Catholic doctrine forbidding contraception.

The moral implications that apply in the area of *suppressing* fertility apply also in the area of *achieving* fertility. Paradoxically,

5. See generally *The Instruction*, *supra* note 2.

6. *Id.*

7. See discussion *infra* p. 50 (discussing the difference between procreation and reproduction).

8. "*Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum . . .*" 1983 CODE c.1055, § 1.

the same mentality that champions contraception and abortion also supports fertility technology, as the same technological ideology presents both sets of possibilities. This ideology depersonalizes some patient populations, such as fetuses and the permanently unconscious, and then proceeds to depersonalize *integral features* of a patient's humanity. It is a depersonalization that claims dominion not just over pathology, but also over the "new medical commodities" of *life* and *death*. This ideology implies that we have a right to someone's *death* by abortion or physician-assisted suicide, as well as a right to someone else's *life*. The ideology is presupposed, explicitly or implicitly, by the technological imperative that states that we should do all that we are technologically capable of doing.

*The Instruction* teaches that "science and technology are valuable resources for [humanity] when placed at [its] service and when they promote [humanity's] integral development of the benefit of all, but they cannot of themselves show the meaning of existence and human progress."<sup>9</sup> This points to the necessity of the moral question. *The Instruction* states that "[i]t would on the one hand be illusory to claim that scientific research and its applications are morally neutral; on the other hand one cannot derive criteria for guidance from technical efficiency alone."<sup>10</sup> Science without moral reflection, therefore, is catastrophic.

These two perennial values and their moral implications, versus the dualism implied by technological culture, form the matrix in which the painful situation of infertility is examined. The basic conclusion of *The Instruction* is best summarized as follows: Whereas *assisted* insemination can be morally licit because it is essentially a therapeutic intervention, an act of technology cannot *replace* the conjugal act.

*The Instruction* then states the following regarding the arena of fertility intervention:

First, concerning fetal life and its dignity:

(1) Fetal human life is inviolable. The pursuit of offspring cannot include an intention to terminate their life, such as if there is a defect or disease. Procured abortion terminates innocent, personal human life. Concretely, diagnosis of disease should not be tantamount to a death sentence. There should be no discarding of embryos once conceived.

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9. *The Instruction*, *supra* note 2, at *Introduction*.

10. *Id.*

(2) The dignity of fetal human life precludes freezing the embryo as well as non-therapeutic experimentation.

(3) The Church teaches that the unborn child has a *right* to be procreated, born and raised in a family composed of his/her parents. It is in the family that the child can discover his/her own identity and achieve his/her own proper human development.

(4) Fertility intervention, which *replaces* the conjugal act rather than therapeutically assisting it, offends the dignity of the offspring by treating a human person as a "product" of technology, rather than as an "offspring" of one's parent's conjugal act.<sup>11</sup>

There is a world of difference between "reproducing" and "procreating." Making human persons a product of technological industry presumes that human life is a *commodity* about which "clients" may be selective. It emerges from a worldview in which life itself can be manufactured, marketed, and distributed with concern for the buyer, not the object. The Church teaches that, while the personal dignity and inherent worth of an individual are not cheapened or compromised by the *way* they are conceived, nevertheless, a petri dish is not a worthy site of creation.

Four issues exist concerning the worthy transmission of life (the second perennial value). First, *procreation should take place only within marriage*. This precludes all practices of heterologous fertilization, including all techniques that "obtain a human conception artificially by the use of gametes coming from at least one donor other than the spouses who are joined in marriage."<sup>12</sup> These procedures include artificial insemination by a donor ("A.I.D."), heterologous *in vitro* fertilization, and surrogate motherhood.

Second, *the unitive and procreative aspects of the conjugal act are inseparable*. Just as one cannot suppress the procreative aspect of the conjugal act by contraception, one also cannot suppress the unitive meaning of the marital goods in pursuit of the procreative by artificial fertility interventions. Consequently, all forms of homologous artificial fertilization<sup>13</sup> are precluded. For example, artificial insemination by the husband ("A.I.H.") and homologous *in vitro* fertilization are prohibited. Additionally, masturbation severs

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11. *Id.* § 2.

12. *Id.*

13. In other words, creating conception by using the gametes of spouses.

the two integral meanings of the conjugal act by depriving it of its unitive dimension.<sup>14</sup>

Third, *The Instruction* analyzes the question of suffering caused by infertility in marriage. The Church teaches that “the suffering of spouses who cannot have children or who are afraid of bringing a handicapped child into the world is a suffering that everyone must understand and properly evaluate.”<sup>15</sup> The desire for a child is integral to the vocation to parenthood, which is inherent in conjugal love. Suffering is particularly acute, therefore, for those couples whose infertility appears to be incurable. Yet, in spite of what we have said so far, it is still true that the end does not justify the means. Given the milieu of technological culture and its tempting axiom that we should proceed to do all that we can technologically do, the suffering of infertility may drive couples into the easy choice of an option at odds with the landscape of larger values, and may actually cause the moral depreciation of the child they so desperately desire.

On this score, *The Instruction* states:

[M]arriage does not confer upon the spouses the right to have a child . . . . A true and proper right to a child would be contrary to the child’s dignity and nature. The child is not an object to which one has a right, nor can [s/he] be considered as an object of ownership; rather, a child is a gift (the supreme gift) and the most gratuitous gift of marriage, and is a living testimony of the mutual giving of . . . parents.<sup>16</sup>

In other words, no one has a *right* to another person.

Without denying the suffering of those couples who are infertile, the Church warns against the commodification of that which defies objectification and subordination to industry, namely, the human person. Research that is directed by proper moral protocol is again encouraged and its results praised.

Finally, the relationship between moral and civil law deserves a brief discussion. *The Instruction* maintains that the task of civil law is to ensure the common good of people through the recognition and defense of fundamental rights and through the promotion of peace and public morality. Those responsible for public policy should force society to recognize and respect inalienable rights of

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14. *The Instruction*, *supra* note 2, § 2(B)(6).

15. *Id.* § 2(B)(8).

16. *Id.*

persons, especially those rights that pertain to human nature and the creative act from which persons take their origin.<sup>17</sup>

In summary, the Church's teaching derives from two perennial values: (1) the dignity of human life itself; and (2) the dignity of the worthy transmission of human life. These two principles, usually applied in the area of abortion and contraception (the latter of which involves the *suppression* of fertility and the pursuit of the unitive over the procreative aspect of sexuality), are consistently applied in the area of fertility intervention technology. This involves the *achieving* of fertility, and often pursues the procreative aspect over the unitive.

### 3. Diane and George

In light of the above analysis, the answers to the couple's questions become clear. I would advise the couple to avoid IVF for both ethical and medical reasons. In addition to sundering the meaning of the conjugal act itself, IVF is not very successful medically. It is both ethically and medically incorrect to claim that IVF is their only chance to have a child; Diane and George should explore other procedures, such as the modified Gamete Intrafallopian Transfer ("G.I.F.T."), and their consultant should present adoption as a most generous option. The humiliation of masturbation would also be avoided as well as the depersonalizing procedures of multiple conception and the storage of embryonic human life. Furthermore, the "death sentence" of abortion would be avoided, which ironically undergirds the theory of some forms of fertility technology. Counseling should also attempt to overcome the understandable, but ultimately self-defeating, notion of a "right" to have a child. This notion rests on a generally unspoken assumption of depersonalizing the child by employing the marketing language of commodity. Such an attitude, coupled with the business interests of fertility technologies, can easily manipulate vulnerable and suffering infertile couples.

Frozen embryos conceived through IVF are the human victims of injustice. Even if they are not illegitimate, their conception has occurred in a depersonalized fashion, and they are undeserving of their present state of hibernation. The Court should consider them as human beings and not as property. In custody battles, custody should be awarded to the spouse who intends to permit gestation

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17. *Id.* § 3.

of the embryos. In the event of the regrettable situation that neither of the genetic parents desire the gestation of the embryos, the parents should make the embryos available for adoption by a stable family; the adopting family should include the gestational mother and her legitimate husband. The law should allow children to be nurtured and raised by the adopting family without intervention from either genetic parent.

### B. Islamic Response

WAEEL B. HALLAQ

In Islamic law, marriage is an institution within the bounds of which lawful sexual intercourse takes place, chiefly for the purpose of procreation.<sup>1</sup> All other reasons for marriage, such as restraining sexual desire and sexual activity to a licit framework, are secondary. Accordingly, Islamic law encourages Diane and George to submit to *in vitro* fertilization, as long as this remains their last recourse for having children.

Yet, the very practice of producing four extra embryos through *in vitro* fertilization raises a question of legality regarding this fertilization procedure. If the remaining embryos are destroyed once pregnancy is successful, this would amount to abortion. Abortion is generally deemed illegal in Islamic law except under one condition, namely, when pregnancy threatens the health of the mother.<sup>2</sup> In the case of Diane, no threat is perceived and, if five embryos are to be produced, the assumption must be that all of them will eventually be implanted in the womb of the mother. Instead, Diane should produce and implant in her womb one embryo at a time, in order to avoid such a complex situation with the resultant destruction of the embryos. If pregnancy fails to take place, the entire procedure should be repeated, again with only one embryo produced at a time. If Diane and George agree to produce

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1. SAYYID ISMĀ'IL SULAYMĀN, *AL-MAR'Ā BAYNA AL-SHARĪ'Ā WAL-QĀNŪN* 138 (1984); HISHĀM QABLĀN, *ĀDĀB AL-ZAWĀJ* 41-42 (1983); MUHAMMAD 'ABD AL-ĤAMĪD, *AL-AĤWĀL AL-SHAKHSIYYA* 11-12 (1984).

2. All Islamic legal schools (*madhāhib*) agree that abortion is prohibited, as it contravenes God's will. Yet, they hold that the fetus is not ensouled during the first 120 days of its formation and, thus, it is not considered to be a person. Therefore, although Islamic law prohibits killing a fetus during this period, the act does not require penalty, as it would if the fetus were killed after the lapse of the first 120 days. See BASIM MUSALLAM, *SEX AND SOCIETY IN ISLAM* 57-59 (1983) (and sources cited therein); QABLĀN, *supra* note 1, at 166.

five embryos, therefore, they must attempt to implant all of the embryos successively into Diane's womb, in order to avoid committing the illegal act of abortion.

Diane and George have *deliberately* opted to take the latter course, namely, to have more embryos produced than immediately needed. Because the couple already has a claim before the court, the pressing issue becomes whether the court may grant their divorce in light of the existing embryos.

For an irrevocable divorce to take effect, the waiting period (*'idda*) must lapse. The purpose of the waiting period is to establish that no pregnancy is in progress;<sup>3</sup> if pregnancy *is* in progress, the court will determine paternity and obligate the father to pay child-support.

The question remains whether, under these particular circumstances, the waiting period will ever lapse as long as the embryos still exist. Because the embryos represent the beginnings of pregnancies in Diane's situation, Diane will be in a constant waiting period while they exist. Divorce, therefore, will become final only after every embryo has been successfully or unsuccessfully implanted into Diane's womb. Specifically, if the last implantation is successful, the divorce will become final upon delivery of the baby; if unsuccessful, it will become final upon the completion of her third menstruation cycle.

If the embryos' existence precludes Diane's legal divorce, she has a right to have the embryos implanted in her womb. She is not free to limit the number of embryos to only two, but must submit to the successive implantation of all remaining embryos. No matter how many implantations are successful, George is obliged to provide support for each child born as a result. Moreover, these children are legitimate in the eyes of Islamic law and, therefore, have, *inter alia*, the unabridged right to their stipulated shares of inheritance.<sup>4</sup>

Finally, it must be noted that, in demanding that the embryos be implanted in her womb, Diane was not, strictly speaking, acting unilaterally; the initial decision to produce five embryos and, thus, five potentially successful pregnancies had the consent of her husband.

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3. 2 SYED AMEER ALI, MAHOMMEDEN LAW 499-500 (5th ed. 1985).

4. 1 AL-FATAWA AL-HINDIYYA 560 (al-Shaykh Nizâm ed., 1980).

## C. Jewish Response

ELLIOT N. DORFF

Because Judaism places such a high regard on children, it is not surprising that rabbinic authorities have permitted creative ways of conception for couples who cannot otherwise conceive. Nevertheless, there are objections to some of the procedures.

When the semen of a man is united artificially with his wife's ovum, there are no objections whatsoever.<sup>1</sup> This artificial insemination may be accomplished either by placing the man's semen at the opening of the woman's cervix or by inserting his sperm into the woman's uterus directly. When these methods do not work, as in this case, their sperm and ovum are united in a test tube and the fertilized egg cell is then inserted into the woman's uterus. Because of Judaism's appreciation of medicine as an aid to God, the religion does not abhor such methods merely because they are artificial. Instead, the only issue is the means by which the husband's sperm is obtained. Some rabbis prefer couples to use the method of collecting the sperm from the vaginal cavity after intercourse rather than through masturbation to insure that there is no "destruction of the seed in vain."<sup>2</sup> Others, however, permit masturbation on the ground that the man's ejaculation to produce semen for artificial insemination of his wife is not "in vain."<sup>3</sup>

The matter becomes more complicated when the donor is not the husband or the bearing mother is not the wife. In these situations, some rabbis object to artificial insemination on grounds of adultery. For many, however, adultery takes place only when the penis of the man enters the vaginal cavity of the woman, which does not occur when insemination takes place artificially. With artificial insemination, not only is the physical contact missing, but the intent to have an illicit relationship is also absent.

If the donor is anonymous, there is also the possibility of unintentional incest in the next generation, such as the product of the artificial insemination marrying his or her natural half-brother or

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1. RABBI IMMANUEL JAKOBOVITS, *JEWISH MEDICAL ETHICS* 264 (1975); J. DAVID BLEICH, *JUDAISM AND HEALING: HALAKHIC PERSPECTIVES* 82-84 (1981).

2. See BLEICH, *supra* note 1, at 84 n.3 (listing sources on this issue).

3. *Id.*



half-sister. This issue dissolves if the donor is known or, at least, if it is known that the donor is not Jewish.<sup>4</sup>

Some have voiced concern about the morality of using someone else's body or semen in this way, and others worry that artificial insemination will increase the prospects of widespread licentiousness. Rabbi Immanuel Jakobovits,<sup>5</sup> author of the first English book on Jewish medical ethics, voices these moral concerns:

If Jewish law nevertheless opposes A.I.D. [artificial insemination by a donor] without reservation as utterly evil, it is mainly for moral reasons, not because of the intrinsic illegality of the act itself. The principal motives for the revulsion against the practice is the fear of the abuses to which its legalization would lead, however great the benefits may be in individual cases. By reducing human generation to stud-farming methods, A.I.D. severs the link between the procreation of children and marriage, indispensable to the maintenance of the family as the most basic and sacred unit of human society. It would enable women to satisfy their craving for children without the necessity to have homes or husbands. It would pave the way to a disastrous increase of promiscuity, as a wife, guilty of adultery, could always claim that a pregnancy which her husband did not cause was brought about by A.I.D., when in fact she had adulterous relations with another man. Altogether, the generation of children would become arbitrary and mechanical, robbed of those mystic and intimately human qualities which make man a partner with God in the creative propagation of the race.<sup>6</sup>

Some ancillary concerns also exist, but most are addressed relatively easily. While Jewish law has recognized and applauded adoption, it has not replaced the child's natural parentage under the law. For example, if an orphan is the child of a descendant of Aaron and is, therefore, a priest (*Kohen*), but his adoptive father is a Jew with no hereditary connection to the priests and Levites in the ancient Temple (a *Yisrael*), the child retains his natural father's status at birth. If the natural father's status is not known, however, the child is treated as a *Yisrael* by default. Because Jewish law de-

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4. Incest is not a concern in this latter situation because, even though such a couple may be *physically* related, Jewish law does not consider them to be *legally* related, which they must be for Jewish law to consider the relationship incestuous.

5. Immediate past Chief [Orthodox] Rabbi of the British Commonwealth.

6. JAKOBOVITS, *supra* note 1, at 244-50, 272-73; see also BLEICH, *supra* note 1, at 81-84; ALEX J. GOLDMAN, JUDAISM CONFRONTS CONTEMPORARY ISSUES 74-86 (1978).

termines a person's Jewish identity based on the religion of the bearing mother, the fact that a donor father's identity is unknown does not present a problem. If necessary, a child can be converted to Judaism as an infant.

Under Jewish law, the provider of the semen is the father. Consequently, even if the adoptive father assumes all of the responsibilities of parenthood, consenting to have his wife impregnated by another man's seed does not fulfill the *mitzvah* of procreation. As a result, Rabbi J. David Bleich, an American Orthodox rabbi specializing in medical ethics, reduces artificial insemination by a donor to a matter of personal desire, which must be weighed against the legal problems of adultery, wasting of seed, and incest in the next generation.<sup>7</sup> Although Rabbi Bleich usually takes the harshest position possible, even he grudgingly permits artificial insemination under certain restrictions.

Most rabbis, however, take a more liberal position toward artificial insemination, even if the insemination is accomplished through a donor. These rabbis point out that people who want to be licentious will find many ways to do so, without resorting to artificial insemination. Moreover, in our own day, the diminishing number of Jews is a critical problem, calling our very existence as a people into question. As a community, we must encourage young married couples to have children however they can. Couples will not normally resort to artificial insemination unless they have gone through the frustration and anguish of failure to conceive through sexual union. Communal support for artificial insemination, therefore, is crucial for both humane and Jewish reasons. Along these lines, one rabbi has suggested that, where the husband is the donor, he should be credited with fulfilling the *mitzvah* of procreation, because the *mitzvah* is to produce two viable children for which both intercourse and artificial insemination are preparations.<sup>8</sup> This severs the command to procreate from the emotional bonding that commonly accompanies sexual intercourse. Instead, the command is fulfilled by the couple's intent to produce children and their success in doing so.

Other problems will undoubtedly arise as reproductive medical procedures become more sophisticated. Yet, as medical knowl-

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7. BLEICH, *supra* note 1, at 80.

8. Rabbi Morris Shapiro, Paper Prepared for the Committee on Jewish Law and Standards of the Rabbinical Assembly (Conservative) 3 (1978).

edge about how to help infertile couples advances, some of the new procedures may become unnecessary and the moral problems they raise would then become moot. While rabbis have sanctioned the new, artificial methods of conception in varying degrees, they clearly prefer methods that will help the couple have children through their own sexual intercourse—as the couples undoubtedly prefer as well. When medical intervention is solely to aid a natural process, the emotional values of coitus and reproduction can be preserved.

When a couple cannot have children, adoption is an available option. Adoption probably existed during Biblical times, although the evidence is equivocal and is not specified in any legal source of the Bible. In later Jewish law, adoption is not a defined institution as such, but Rabbinic law provides for the approximate equivalent. The Rabbinic court, “the father of all orphans,”<sup>9</sup> appoints guardians for orphans and children in need, and the guardians have the same responsibilities as natural parents. They must care for the child’s upbringing, education, and physical accommodations, and must administer the child’s property. If the guardian dies, his estate continues to be responsible for the child’s care. In fact, guardianship responsibilities in Jewish law are so strong that they were recently invoked in a New York case to extend the obligations of the adoptive father beyond the demands of civil law.<sup>10</sup>

Contrary to modern adoption procedures, however, under Jewish law the natural parents have continuing obligations to the child; the personal status of the child in matters of Jewish identity, ritual, and marriage depends upon the status of the natural parents.<sup>11</sup> One Rabbinic source, however, states that the people who raise the child, and not the natural father and mother, are called the parents;<sup>12</sup> perhaps Jewish law will develop in that direction. The contemporary need to increase Jewish ranks certainly makes it imperative for Jews to encourage infertile Jewish couples to adopt children and raise them as Jews. Additionally, it is in everybody’s interest to cement the ties between children and adoptive parents as much as possible. A legal recognition of the adoptive parents as

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9. BABYLONIAN TALMUD, *Bava Kamma* 37a, *Gittin* 37a.

10. *Wener v. Wener*, 59 Misc. 2d 959, 301 N.Y.S.2d 237 (1969); cf. *Wener v. Wener*, 35 A.D.2d 50, 312 N.Y.S.2d 815 (1970).

11. See *ENCYCLOPEDIA JUDAICA* 2:298-303, 3:218-22, 12:1478-80 (1972).

12. *EXODUS RABBAH* 46:5; see also *BABYLONIAN TALMUD*, *Sanhedrin* 19b.

the child's parents in every sense would help to accomplish these objectives.

Thus, in our case, Diane and George are not only permitted, but are encouraged to try *in vitro* fertilization if they cannot possibly conceive a child through sexual intercourse. If surgery performed on either Diane or George would make them fertile, they would be *permitted* to have the surgery as long as the procedure would not pose an undue risk to their life or health. They would never be *required* to undergo such surgery, for the obligation to procreate is secondary to the duty to preserve one's life and health. Because of the danger involved in any surgery, Diane would *not* be permitted to produce eggs for implantation in a surrogate mother simply because, for example, Diane wants to avoid pregnancy for reasons of career or convenience. Most couples who contemplate having *in vitro* fertilization, however, do so for the reasons that Diane and George did—namely, that, through normal sexual intercourse, they have failed to conceive. In such cases, *in vitro* fertilization is both permitted and encouraged.

The preferred embryos to be used in transplantation are those that medically have the greatest chance of surviving to birth. If all embryos have equivalent chances, then those to be used may be chosen at random. The remaining embryos should be either frozen for future use or destroyed.

In the later action brought by Diane, rabbinic law views the embryos as George's property because the embryos were not part of the property brought into the marriage by Diane. Because the embryos have not been born, however, they are not considered human beings; rather, they are property. Moreover, rabbinic opinion in recent years has tended to look askance at single women being impregnated artificially, for it prevents the resulting child from having the benefit of both a mother and father in his or her upbringing. When the lack of a parent happens naturally through divorce or death, the then-single parents and their children have to deal with the problems that arise as best they can, and the community should be as supportive as possible; but we should not knowingly create such situations when we have the possibility to avoid them.<sup>13</sup> Therefore, for property considerations, and to avoid an in-

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13. RABBI DAVID GOLINKIN, *Artificial Insemination for a Single Woman*, in RESPONSA OF THE VA'AD HALACHA OF THE RABBINICAL ASSEMBLY OF ISRAEL 83-92 (1988).

herently undesirable situation for the child, the dictates of Jewish law require the judge to award the embryos to George.

If, for some reason, the judge awarded the embryos to Diane and she produced children from them, then George would, indeed, be responsible for child support. This is true until and unless the children are adopted by any new husband of Diane. Therefore, George would have yet another property interest in preventing Diane from having children with their joint embryos.

## V. PRENUPTIAL AGREEMENTS—FACT PATTERN

John and Deborah are young professionals in their early thirties. They come from different religious backgrounds. In their professional careers, both have acquired significant financial assets. After dating for several years, the couple decides to marry. Although they are sure that their love will last forever, John and Deborah are also aware that divorce does occur, and are concerned about the religious upbringing of their children as well as the considerable financial investments each has made. In consultation with an attorney, the couple is preparing to sign an agreement that would settle property disputes in the event of divorce. The agreement also indicates that they desire to have two children, the first to be raised in the religion of the father and the second in the religion of the mother.

One week before the document is ready to be signed, John begins to have serious doubts about the propriety of such an action. He is now appalled at the notion of planning for divorce while planning for marriage. He has come to question Deborah's commitment to the marriage and whether the prenuptial agreement itself precludes a legally valid marriage. He comes to you for advice.

### A. Roman Catholic Response

MICHAEL R. MOODIE, S.J.

From the perspective of Roman Catholic canon law,<sup>1</sup> John and Deborah's prenuptial agreement raises the question of conditioned

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1. Canon law is not of exclusively Roman Catholic usage. The Eastern Orthodox churches, as well as some sectors of the Anglican Church, refer to their laws as "canon law." The term *canon* comes from the early centuries of Christianity. The Greek word *Κανον*, meaning a "rule" or "measure," was used to refer to the laws passed by Church Councils; distinguish this from the *Νομοι*, or "imperial laws."

consent; do the conditions placed upon the marriage result in its invalidity? The question itself arises from a particular legal and doctrinal context that requires some explanation before a canonical answer to John's query can be given.

Early in its history, the Catholic Church adopted the Roman law principle of marital contract: that marriage comes into being solely and exclusively through the mutual consent of the parties. This principle remains a foundational element of canon law.<sup>2</sup> To this Roman law concept, however, Catholic doctrine added an important qualifying element—the irrevocability of marital consent. Consent, once given, could not be rescinded. In Catholic law and doctrine, therefore, marriage is indissoluble and divorce impossible.<sup>3</sup>

Because the marital bond created by the mutual consent of the parties could not be broken, the only possible remedy in cases of *de facto* broken marriages was to prove that the original consent was substantially defective; that is, that true and binding consent had never been given. Without true consent, the marriage contract would be invalid *ab initio*, leaving the parties free to marry. Consequently, legal attention focused on the conditions necessary to give valid consent.

The Roman law of contracts recognized that parties could place conditions on an agreement. Because marriage is a contract, the parties could conceivably place conditions on their consent. Opposing that legal principle, however, was the Christian notion that marriage is a divinely-established institution and, therefore,

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2. Thus, Pope Nicholas (d. 867) decreed: "*Sufficiat solus secundum leges consensus eorum, de quorum quarumque coniunctionibus agitur.*" Decree of Gratian, C.27 q.2 c.2, in 1 CORPUS IURIS CANONICI 1063 (Aemelius Friedberg ed., 1959). This principle found expression in the 1917 Code of Canon Law: "*Matrimonium facit partium consensus inter personas iure legitime manifestatus, qui nulla humana potestate suppleri valet* [Consent legitimately manifested between persons legally qualified creates the marriage of those parties]." 1917 CODE c.1081, § 1; see also 1983 CODE c.1057, § 1 (repeating the Latin version of Canon 1081 verbatim).

3. The basis for the doctrine of indissolubility is found in the Christian scriptures. *Luke* 16:18 states: "Everyone who divorces his wife and marries another is guilty of adultery, and the man who marries a woman divorced by her husband commits adultery." JERUSALEM BIBLE, *Luke* 16:18. Similarly, *Corinthians* adds: "For the married I have something to say, and this is not from me but from the Lord: a wife must not leave her husband—or if she does leave him, she must either remain unmarried or else make it up with her husband—nor must a husband send his wife away." *Id.* 1 *Corinthians* 7:10-11.

not completely subject to positive law.<sup>4</sup> The resolution of actual cases helped to clarify the law.

In 1187, the Bishop of Exeter forwarded a case to Pope Alexander III. A nobleman in the bishop's jurisdiction had betrothed a woman; at that time, betrothal was a solemn, sworn act binding a party to marriage and giving the other party the legal right to insist upon marriage. After the betrothal, however, the nobleman experienced a call to the monastic life. The question presented was whether the marriage should proceed. On the one hand, the sworn betrothal legally obligated the nobleman to marry. On the other hand, the nobleman had a divine vocation to monastic life. This posed a complicated problem for twelfth century Christendom.

Pope Alexander III replied with the decretal *Commissum*.<sup>5</sup> He decreed that because of the nobleman's sworn oath, the nobleman should proceed with the marriage, but only on the condition that the marriage not be consummated. Then, his obligation to marry fulfilled, the nobleman could separate from his spouse and enter monastic life.<sup>6</sup> The profession of monastic vows would dissolve the unconsummated marriage, leaving the woman free to contract a new marriage.

The legal precedent set by *Commissum* clearly indicated that a contracting party could place binding conditions upon marital consent and still validly contract marriage. Legal scholars, however, questioned the content of *Commissum*. Granted that some conditions might be placed on marital consent, the actual condition in question was against sexual intercourse, an essential element of marriage according to natural law.<sup>7</sup> How could one consent to

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4. See Lynda A. Robitaille, *Conditioned Consent: Natural Law and Human Positive Law*, 26 *STUDIA CANONICA* 76 (1992) (discussing in greater detail the qualifications that a natural law approach places on the marriage contract).

5. 2 *CORPUS IURIS CANONICI*, *supra* note 2, at 667, bk. 4, tit. 1, ch. 16.

6. The Catholic Church accepted the Roman law principle that consent created marriage with a qualification adopted from Germanic law: Consent created marriage, but marriage only became absolutely indissoluble when marital rights were concretely exchanged, i.e., when sexual intercourse occurred. After consent, a marriage was considered *ratum* (ratified). When sexual intercourse took place, the marriage became *ratum et consummatum* (ratified and consummated) and, consequently, indissoluble. The nobleman's marriage would be *ratum sed non consummatum* (ratified but not consummated), and, therefore, could be dissolved by the act of professing a perpetual vow of chastity.

7. Thus, the 1917 Code of Canon Law defined marital consent as: "*Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad proles generationem* [An act of the will by

marriage and not consent to sexual intercourse, an essential element of that same thing?

The conclusion reached in *Commisum* could not last. In 1232, Pope Gregory IX clarified the law on conditions in the decree *Si conditiones*, effectively overturning the precedent set by Pope Alexander III:

If conditions are placed against the substance of marriage; for example, if one party should say to the other: "I contract with you, if you avoid the generation of children," or: "until I might find someone more honorable and talented," or: "if you give yourself to adultery for profit," then the marriage contract, no matter how favorable it may be, lacks all effect; granted that other conditions may be placed on marriage, if they are immoral or impossible, they should be considered as not having been made because of the favor [marriage enjoys].<sup>8</sup>

The decree recognized three categories of conditions: (1) conditions against the substance of marriage; (2) conditions not contrary to the substance of marriage but immoral or impossible; and (3) conditions that are both moral and possible.

The first category of conditions would render a marriage invalid. In the second category of immoral or impossible conditions, the conditions were to be considered as never having been made, and would not affect the validity of the marriage. The third category would condition the contract, and the validity of the marriage would depend upon the fulfillment of the condition.

*Si conditiones* became the precedent governing all subsequent jurisprudence on conditioned consent. When canon law was codified in 1917, Canon 1092 transformed the decree into a statute:

Can. 1092 - A condition once placed and not revoked:

1° If it is a condition regarding the future that is necessarily impossible or immoral, but not contrary to the substance of marriage, it must be held as not having been placed;

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which each party hands over and accepts a permanent and exclusive right of the body for those acts which are *per se* apt for the generation of children]." 1917 CODE c.1081, § 2.

8. The untranslated version of the decree reads:

*Si conditiones contra substantiam coniugii inserantur, puta, si alter dicat alteri: 'contraho tecum, si generationem prolis evites,' vel: 'donec inveniam aliam honore vel facultatibus digniorem,' aut: 'si pro quaestu adulterandam te tradas,' matrimonialis contractus, quantumcumque sit favorabilis, caret effectu; licet aliae conditiones appositae in matrimonio, si turpes aut impossibiles fuerint, debeant propter eius favorem pro non adiectis haberi.*

Decretal of Gregory IX, IV 5.7, in 2 CORPUS IURIS CANONICI, *supra* note 2, at 684.



2° If it is a condition regarding the future that is contrary to the substance of marriage, it renders the marriage invalid;

3° If it is a licit condition regarding the future, it suspends the validity of the marriage;

4° If it is a condition regarding the past or the present, the marriage will be valid or not insofar as that which is conditioned exists or not.<sup>9</sup>

The legal situation of conditioned consent finally seemed settled, after almost seven hundred years of consistent jurisprudence.

When Pope John XXIII called for a revision of canon law, conditioned consent once again came under discussion. The Second Vatican Council<sup>10</sup> taught that marriage is "an intimate partnership of life and love" that is constituted as "a mutual giving of two persons."<sup>11</sup> The essence of marriage is a mutual self-donation of two persons, and any conditioning of that self-gift seems contradictory.<sup>12</sup> The commission responsible for the revision of marriage law voted to abrogate the existing law and make all conditions regarding the future invalidating.<sup>13</sup> The new norm became law on November 27, 1983.<sup>14</sup>

John and Deborah's prenuptial agreement places two conditions upon the marriage; namely, a disposition regarding property in the event of a civil divorce, and an agreement regarding the

9. The untranslated version of Canon 1092 reads as follows:

*Conditio semel apposita et non revocata:*

1° *Si sit de futuro necessaria vel impossibilis vel turpis, sed non contra matrimonii substantiam, pro non adiecta habeatur,*

2° *Si de futuro contra matrimonii substantiam, illud reddit invalidum;*

3° *Si de futuro licita, valorem matrimonii suspendit;*

4° *Si de praeterito vel de praesenti, matrimonium erit validum vel non, prout id quod conditioni subest, existit vel non.*

1917 CODE c.1092.

10. The Second Vatican Council was held from 1963 to 1965.

11. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.48.

12. Ladislav Orsy, S.J., very succinctly points out the problem: "When the act of consent is conditioned, the covenanting party intends, with the very same act, to commit himself and to suspend the effect of the commitment." LADISLAV ORSY, S.J., MARRIAGE IN CANON LAW 146 (1986).

13. See 3 *Communicationes* 77 (1971).

14. Canon 1102 states: "§ 1. Marriage cannot be validly contracted under condition regarding the future. § 2. Marriage entered into under condition regarding the past or the present is valid nor not insofar as that which is conditioned exists or not." 1917 CODE c.1102.

The untranslated version of the same Canon reads: "§ 1. *Matrimonium sub condicione de futuro valide contrahi nequit.* § 2. *Matrimonium sub condicione de praeterito vel de praesenti initum est validum vel non, prout id quod conditioni subest, existit vel non.*" *Id.*

number of children and their religious education. Although present Catholic discipline discourages individuals from placing conditions of any sort on their marriage, the technical and legal consequences of the two conditions differ.

Prenuptial financial agreements are an ancient practice. Dispositions regarding land, dowry, and ownership of assets were an integral part of Germanic tribal laws that governed much of feudal society, and ecclesiastical courts recognized these dispositions as binding. Moreover, the law did not consider prenuptial financial agreements as conditions regarding the future, but as sincere promises regarding the present. A licit condition regarding the future suspended the validity of the marriage until the conditions were fulfilled. Financial agreements, however, were simply open-ended; that is, the event of some occurrence, such as death, abandonment, abduction, or disappearance in time of war would not dissolve the agreement. The purpose of the agreement was to protect the families and, particularly, the woman from some unexpected event not explicitly intended by the consenting parties.<sup>15</sup>

Contemporary life has changed from that of feudal Europe, and so has the Catholic Church's attitude toward prenuptial financial arrangements. The agreement would still be generally considered a condition regarding the present and, therefore, not invalidating. The Church, however, in response to American society's favorable attitude to divorce, would question the sincerity of the parties' commitment to the marriage. Planning for divorce before the marriage hardly seems a sign of total commitment. Despite this hesitancy toward financial conditions, such an agreement would not invalidate the consent.

The condition regarding children, however, *would* invalidate the marriage. Canonical legal tradition is clear in asserting that the very nature of marriage is directed to the generation and education of children.<sup>16</sup> Conditions upon the generation and education of children would be against the substance of marriage and would, therefore, invalidate the marriage. John and Deborah have agreed not to raise one of the children in the faith. The education of chil-

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15. On the other hand, if one party intended to divorce after a certain period of time, that would constitute a condition against an essential marital element, namely, permanence, and would render the marriage invalid.

16. "*Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum . . .*" 1983 CODE c.1055, § 1.

dren, and specifically the handing down of the faith, is considered to be a divine imperative. The Catholic tradition would consider a condition not to educate a child in the faith as contrary to divine law and, therefore, invalidating.

In sum, canon law does not accept the prenuptial agreement between John and Deborah. While the Church will tolerate the financial disposition, albeit with reservations, it will not tolerate the disposition regarding the children. Rather, the latter disposition directly violates the law prohibiting future conditions. Therefore, the Church would consider such a conditioned marriage to be invalid.

### B. Islamic Response

AZIZAH Y. AL-HIBRI\*

The two areas of focus here are prenuptial agreements and agreements regarding the religious upbringing of children. Regarding the first, John and Deborah have no need for a prenuptial agreement to protect their separate financial investments. Regarding the second, the agreement is void and unenforceable on the merits.

Before starting the analysis, it should be noted that this Essay makes several assumptions. Under the given scenario, John must be the Muslim partner, because Muslim jurists unanimously agree that a Muslim woman cannot enter into a valid marriage contract with a non-Muslim.<sup>1</sup> Although the *Qur'an* contains no clear bar to a marriage where the prospective husband is one of the "People of the Book,"<sup>2</sup> some jurists have interpreted certain *ayahs* (verses) as imposing such a bar.<sup>3</sup> The underlying reasoning behind this posi-

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\* I would like to thank Professor Peter Swisher, the T.C. Williams School of Law, and Dr. Fathi Osman, Resident Scholar at the Islamic Center of Southern California, for their valuable comments on earlier drafts of this Essay.

1. See, e.g., 4 ABD AL-RAHMAN AL-JAZIRI, *KITAB AL-FIQH 'ALA AL-MADHAHIB AL-ARBA'AH* 75-77 (Beirut 1969) (1928); 7 WIHBAH AL-ZUHAYLI, *AL-FIQH AL-ISLAMI WA ADILLATUH* 152-55 (Damascus 1984).

2. "People of the Book" is a term that refers to Christians and Jews, each of whom believes in a holy "Book" revealed by God, the God of all Abrahamic religions. Some scholars have used this term to refer to certain other religions as well.

3. See, e.g., AL-JAZIRI, *supra* note 1, at 75; al-Zuhayli, *supra* note 1, at 152. See also MUHAMMAD ABU ZAHRAH, *AL-AHWAL AL-SHAKHSIYAH* 102 (3d ed. Cairo 1957). More recently, Muslim leaders and scholars such as Hassan al-Turabi and the late Mahmoud Abu Saud have stated on different occasions that they have not found a clear bar in the *Qur'an* to such marriages, but that the bar is derived from a certain jurisprudential understanding.

tion is complex; most obviously, it involves the predominantly patriarchal nature of the institution of marriage, and the negative effect of this institution on the Muslim woman in a non-Muslim community. Muslim scholars feared that the traditional prohibition on interfaith marriages imposed by other religions (including Christianity and Judaism) upon their followers, when combined with the patriarchal nature of the marriage institution in a marriage where the husband is a non-Muslim, would result in the effective denial of the Muslim wife's right to the free exercise of her religion. To protect the Muslim woman from being denied such a basic human right, they barred her from marrying a non-Muslim altogether.<sup>4</sup>

Therefore, Deborah is the non-Muslim partner in this case, and her marriage to John must be based on a Muslim marriage contract for it to be recognized under Islamic law. If Deborah is either an atheist or a pagan, she cannot enter into a valid Islamic marriage contract with John. On the other hand, if she is either a Christian or a Jew, i.e., one of the "People of the Book," she can validly enter into the contract while still fully adhering to her own religion.<sup>5</sup> Her rights will be similar to those of her Muslim sister, with some important exceptions.<sup>6</sup> Furthermore, Deborah's right to the free exercise of her religion will be guaranteed under Islamic law, because Muslims share her belief in God and the prophets of her religion.<sup>7</sup>

### 1. Prenuptial Agreements Under Islamic Law

Under Islamic law, prenuptial agreements are superfluous because the marriage contract itself usually contains provisions specifying all legitimate conditions agreed upon by the parties, including a provision that describes the *mahr* (dowry) of the woman.<sup>8</sup> Con-

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4. AL-ZUHAYLI, *supra* note 1, at 152; ABU ZAHRAH, *supra* note 3, at 100.

5. AL-ZUHAYLI, *supra* note 1, at 153; AL-JAZIRI, *supra* note 1, at 76.

6. See *infra* notes 14, 17 and accompanying text (while the non-Muslim woman is entitled to the full payment of her *mahr*, there is a question as to whether she and her husband may inherit from each other). See also ABU ZAHRAH, *supra* note 3, at 105.

7. See, e.g., AL-JAZIRI, *supra* note 1, at 76; AL-ZUHAYLI, *supra* note 1, at 153.

8. See AL-ZUHAYLI, *supra* note 1, at 250-315, for a detailed discussion of *mahr*. See also AL-JAZIRI, *supra* note 1, at 94-107. Child support is determined under another part of Islamic law, and is not part of the *mahr*. ABU ZAHRAH, *supra* note 3, at 174; AL-ZUHAYLI, *supra* note 1, at 277. While it is usually preferable to indicate the *mahr* in the marriage contract, its mention may be omitted without invalidating the contract. In fact, the contract is valid even if the parties agree not to have *mahr* at all. Even so, the husband will

trary to general belief, the *mahr* is the personal property of the wife and may not be used by either her parents or her husband.<sup>9</sup> Some view the *mahr* as the wife's consideration for entering into the marriage contract. Consideration is required because, for example, the wife usually undertakes a new life and new responsibilities such as childbearing, or loses the opportunity of an uninterrupted career.<sup>10</sup>

*Mahr* is usually divided into two parts, with only the first part due immediately upon marriage; the second part is due later, often upon divorce or the husband's death. Social custom, not religion, requires this division and defines the proportion of the first part to the second. Some women use the first part of the *mahr* to facilitate their preparations for the marriage. Others may use it as capital to start their own businesses after marriage. Therefore, such women tend to want a large first installment. In contrast, well-to-do women tend to specify a first installment of negligible, yet symbolic, value. Still, in either case, women like to have a substantial second installment of the *mahr* because they view it as security for later years.<sup>11</sup> Furthermore, under no condition is the husband entitled to a share of his wife's money, regardless of whether she brought such money into the marriage or earned it after the marriage.<sup>12</sup>

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still be obligated to pay an appropriate *mahr*. See ABU ZAHRAH, *supra* note 3, at 169. A modern Islamic state may decide to require that every marriage contract contain a *mahr* provision to protect further the prospective wife. Such a law would supplement divine law with legislation that responds to the needs of society at that time; such supplementation is totally acceptable. For more on this subject, see Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 7-9 (1992).

9. See, e.g., SUBHI MAHMASSANI, *FALSAFAT AL-TASHRI' FI AL-ISLAM* 495-96 (3d ed. Beirut 1961). See also AL-ZUHAYLI, *supra* note 1, at 251, 283; 5 ABD AL-HALIM MUHAMMAD ABU SHUQQA, *TAHRIR AL-MAR'AH FI 'ASR AL-RISALAH* 57 (Kuwait n.d.) (the author approximates the date of the Kuwaiti version to be 1992, although the source itself contains no date).

10. See, e.g., AL-ZUHAYLI, *supra* note 1, at 251; cf. ABU ZAHRAH, *supra* note 3, at 169-70 (arguing that *mahr* is not consideration, but a gift to the wife and a token of affection).

11. When Khalifah (Caliph) Omar spoke in a mosque in support of placing an upper limit on *mahr*, an old woman, recognizing the importance of *mahr* to a woman's financial security, rose in opposition. She cited the *Qur'an* as the source of a woman's right to freely specify the amount of her dowry with no upper limits. The Khalifah then withdrew his proposal and admitted his error. AL-ZUHAYLI, *supra* note 1, at 255-56; ABU HAMID AL-GHAZALI, 'IHYA' 'ULUM AL-DIN' 50 (Cairo 1939) (eleventh century). This story is often recounted by jurists as an example of true democracy in early Islam because the old woman was able to publicly contradict the Khalifah and succeed.

12. ABU ZAHRAH, *supra* note 3, at 231, 245-46; AL-ZUHAYLI, *supra* note 1, at 253; MAHMASSANI, *supra* note 9, at 495; MUHAMMAD HUSNI IBRAHIM SALIM, *HUQUQ AL-ZAWJAH FI AL-FIQH AL-ISLAMI* 221 (Cairo 1983).

The most that a husband in financial need can do is hope that his wife will freely choose to help him. Nevertheless, she is under no legal obligation to do so.

Where the marriage contract contains a *mahr* provision, the provision must state the exact amount of money or sufficiently describe the property promised to the wife as first and second installments.<sup>13</sup> Promising as a second installment "half of all of the husband's possessions at the time such installment is due" would not satisfy the requirement because it is impossible to know at the time of marriage the exact value of such a promise.

To the extent that any amount or property of the *mahr* remains unpaid or undelivered, it becomes a debt of the husband upon the death of either spouse.<sup>14</sup> That debt is different from the wife's determinate share in her husband's estate, which is distributed only after all debts, including the remainder of the wife's *mahr*, are satisfied.

In this case, John has no right to be appalled at the notion of planning for divorce while planning for marriage. Indeed, Islamic law requires such planning in a marriage contract in order to protect both spouses from later problems and uncertainties. Under the Islamic approach, John also has no reason to worry about his financial investments. Deborah is not entitled to them, except to the extent promised by John in the marriage contract, and to the extent that Islamic law requires John to support her during their marriage. John is required to support Deborah in accordance with his means and her station. His refusal or failure to do so will affect negatively his rights within the family and Deborah's obligations toward him. Deborah also will become entitled to a variety of other remedies, including divorce. She has no reason to worry about her own financial investments because John is not entitled to any of her money, whatever its source, during her life. This conclusion is true despite the fact that Deborah is not a Muslim, because she properly entered into a valid and binding Islamic contract with John.<sup>15</sup>

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13. See, e.g., AL-ZUHAYLI, *supra* note 1, at 263; see also 4 AL-JAZIRI, *supra* note 1, at 103.

14. See, e.g., ABU ZAHRAH, *supra* note 3, at 174; see also 1 ABD AL-AZIM SHARAF AL-DIN, *AHKAM AL-AHWAL AL-SHAKHSIYAH FI AL-SHARI'AH AL-ISLAMITYAH* 406-07 (Cairo 1987); MAHMASSANI, *supra* note 9, at 495.

15. See *supra* notes 1-5 and accompanying text.

If either John or Deborah is concerned about the amount the other may ultimately inherit, they should look to Islamic inheritance and estate planning laws. Although parties usually deal with such matters after marriage, through a will, John and Deborah may want to do so prior to marriage by signing collateral agreements.<sup>16</sup> It is also possible that they use the second installment of the *mahr* as an additional vehicle for achieving the goals of their inheritance agreement. The extent to which they can do that, however, is beyond the scope of this Essay.<sup>17</sup>

Because both John and Deborah live in the United States, they are subject to the family laws of the applicable state. If they plan to have a civil marriage, their Islamic contract must precede the civil contract in order to have the force of a prenuptial agreement. Timing is, therefore, quite important in this case.

## 2. Religious Upbringing of the Children

The proposed agreement between John and Deborah regarding the religious upbringing of the children is void and unenforceable for several reasons. First, Islamic law charges Muslim parents with, among other things, the duty to provide their children with a proper Islamic upbringing.<sup>18</sup> This is not a duty that they can avoid. From its inception, Islam permitted inter-faith marriages in an effort to build bridges with the two other Abrahamic faiths.<sup>19</sup> Nevertheless, such bridge-building remains subject to Islamic law and is never in contravention of it. In the instant case, if John attempts to opt out of this requirement, he will be shirking a basic Islamic duty. Therefore, Muslim courts could not possibly legitimize, let alone honor, John's breach of such duty.

Once children come of age, the responsibility regarding their religious beliefs shifts from their parents to them. Thus, if the chil-

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16. See *supra* notes 13-14 and accompanying text.

17. Some jurists have argued that Muslim and non-Muslim spouses may not inherit from each other. See, e.g., 6 IBN QUDAMAH, AL-MUGHNI 294-95 (Riyadh 1981) (thirteenth century). In such jurisdictions, John and Deborah need to make their arrangements early on. Any debt, however, owed by the husband to the wife must be paid. See sources cited *supra* note 14.

18. For a detailed discussion, see 1 ABD ALLAH NASIH 'ULWAN, TARBİYAT AL-AWLAD FI AL-ISLAM 148-61 (3d ed. Beirut 1981).

19. See ABU ZAHRAH, *supra* note 3, at 100; see also AL-ZUHAYLI, *supra* note 1, at 153; AL-JAZIRI, *supra* note 1, at 76.

dren later choose to adopt different religions, they are personally responsible to God for their own choices.<sup>20</sup>

Further, the very notion of "splitting the children" goes against the Islamic concept of the child's right against her parents, not to mention the best interests of the child and of the family in general. What is at stake here is not a piece of property that may lend itself to mechanical division. Rather, the issue calls into question a set of beliefs and commitments, first to God and then to one's family and community. If John subscribes to Islamic religious beliefs and takes them seriously, he then has the obligation towards God and his children to raise the children in the best way he knows how; namely, in accordance with his Islamic beliefs.

In Islam, the family is viewed as the basic source of harmony and moral guidance.<sup>21</sup> Raising two siblings in the same household in two different religions, determined as to each child by essentially flipping a coin, does not provide either child with sufficient moral guidance. Instead, it is likely to create confusion, pressure, and perhaps tension among siblings who may not understand, for example, why Amy can freely consume pork while her brother, Sam, may not do so; or why Amy is taught that marriage to her first cousin is tantamount to incest, while the father's family encourages Sam to marry his first cousin.

Additionally, the Muslim child will grow up in a society where his religious group is in the minority. His experiences at school, for example, will demand a great deal more resilience and patience than those of the average child. His sibling, on the other hand, will have a less demanding experience because she is more likely to fit in with the rest of the predominantly Judeo-Christian society, at least in matters of religion. Further, both siblings will have difficulty explaining the "split" to their friends, and will not escape it without emotional and spiritual costs. Consequently, this mechanical experience in *false* tolerance turns out to be a "cop out" by parents who did not have the foresight to think through their proposal in light of the best interests of their children.

Overall, the situation will cause the children to view religion as yet another group of preferences, somewhat akin to cultural preferences, devoid of transcendental truths and having only inter-sub-

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20. See al-Hibri, *supra* note 8, at 5 n.15.

21. 'ULWAN, *supra* note 18, at 31; Azizah Y. al-Hibri, *Marriage Laws in Muslim Countries*, 4 INT'L REV. COMP. PUB. POL. 242 (1992).



jective value. This view is likely to result from the children's inability to appreciate philosophical differences among the three Abrahamic religions. Therefore, despite their parents' best intentions, such children may flounder spiritually in, or even totally reject, the very milieu from which they were supposed to have derived their early guidance and support.

It is for these reasons that parents must provide their children with solid guidance until they are old enough to properly understand questions in life and make their own choices. American family law lent its support to this point of view when many states decided not to honor agreements among parents relating to "splitting" the children along religious lines. Instead, these states chose to entrust the primary caretaker with the religious upbringing of the children, regardless of any prior agreements between the two parents.<sup>22</sup> It would be advisable for John and Deborah to discuss these potential problems thoroughly prior to marriage.

### *C. Jewish Response*

MICHAEL J. BROYDE

There are two aspects of John and Deborah's prenuptial agreement that require analysis. First, the agreement purports to allow John and Deborah to raise their two children in separate faiths. Second, the agreement dictates the financial circumstances of a future divorce. Although the latter is not definitionally problematic in the Jewish tradition, the agreement is completely void with respect to the religious upbringing of their children.

#### 1. Intermarriage in the Jewish Tradition

Before discussing the prenuptial agreement itself, it is important to note that the hypothetical raises a serious problem under Jewish law; namely, interfaith marriages are completely prohibited according to the Jewish tradition. The statement of Rabbi J. David Bleich as to the nature of the violation is clear, unambiguous, and to the point. He states:

Among Jews no practice is more widely abhorred than is intermarriage. Commitment to take as a marriage partner only a fellow member of the Jewish community is not only a matter of religious obligation but the bedrock of Jewish ethnic identity.

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22. See, e.g., PETER N. SWISHER ET AL., *VIRGINIA FAMILY LAW* §§ 3-7 (1992 Supp.).

A popular folk saying observes that wherever there are two Jews, there are three opinions. It seems that in the area of *Halacha* the number of opinions often increases geometrically, according to the number of authorities writing about or discussing any given topic. In the area of intermarriage, however, this is not the case; there is little, if any, disagreement, and there are very, very few hairs to split.<sup>1</sup>

Accordingly, because Jewish law does not recognize interfaith marriage as legally binding, it would allow and encourage both parties to terminate the relationship at any time.<sup>2</sup>

## 2. Religious Upbringing of Children in the Jewish Tradition

Although intermarriage is forbidden under Jewish law, it is still a practical reality that intermarriages do occur. Thus, Jewish law still governs problems arising within intermarriages, such as the prenuptial agreement proposed between John and Deborah.

As to the agreement's provisions concerning the religious affiliation of their children, the agreement would be void in the eyes of Jewish law because Jewish law seeks to have all children raised in the faith of the mother. In fact, Jewish law recognizes the faith of the mother as being the faith of her children.<sup>3</sup> Indeed, it does not recognize paternity as legally established in the case of intermarriage; this is true whether the father is Jewish and the mother is not, or vice versa.<sup>4</sup> No paternal relationship is legally established. Thus, according to Jewish law, the child of a Jewish-Gentile mar-

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1. Rabbi J. David Bleich, *The Prohibition Against Intermarriage*, 1 J. HALACHA & CONTEMP. SOC'Y 5 (1980). Rabbi Bleich is a Professor of Law at Benjamin Cardozo School of Law, *Rosh Yeshiva*, Yeshiva University. He is one of the premier writers and influencers of Jewish law in America. [Admittedly, some do theorize about the precise nature of the prohibition on intermarriage. Yet, on a practical level, intermarriage is clearly forbidden.]

2. Like incestuous marriages and adulterous marriages, these "marriages" are void and of no legal significance. SHULCHAN ARUCH, *Even Haezer* 16:1-2.

3. *Id.* at 8:4.

4. There are situations in Jewish law where, even in the course of a sexual relationship, no paternity is established. According to Jewish law, the child of a relationship between a Jew and a Gentile always assumes the legal status of its mother. The child bears no legal relationship to its father. See BABYLONIAN TALMUD, *Yevamot* 22a-b; Jacob ben Asher, *Tur*, in SHULCHAN ARUCH, *Even Haezer* 16. This is equally true in cases of artificial insemination. *Id.*

riage always assumes the legal status and religion of its mother and bears no legal relationship to its father.<sup>5</sup>

### 3. Acceptability of Financial Planning Under a Prenuptial Agreement

The question of the validity of the financial aspects of the agreement under Jewish law in the case of an intermarriage is nearly a question of first impression to this author. The most likely answer is that the agreement is valid in this respect, as Jewish law recognizes the right to contractually regulate financial activity through mutual agreement; this is true even if the agreement is contrary to Jewish financial law and concerns a prohibited transaction—in this case, an intermarriage.<sup>6</sup> Nevertheless, this issue requires further analysis that is beyond the scope of this Essay.

### 4. Conclusion

In short, John and Deborah should not sign the prenuptial agreement and, more significantly, should not enter into a marriage. A commitment to religious values entails a commitment to same-faith marriages. An intermarriage is equivalent to an abandonment of the Jewish faith.

## VI. CONTRACEPTION—FACT PATTERN

Helen and Herbert have been married for three years. They are childless. Helen and Herbert have no economic concerns, as they are beneficiaries of a rather generous trust. Helen has decided that she does not wish to bear children and sees a doctor to obtain a birth control device. Helen believes that natural methods are too uncertain, and she is concerned about the side effects of birth control pills. She chooses to have one of the new “safer” Intrauterine Devices (“IUDs”) inserted into her uterus. In the event that the IUD fails, however, Helen is open to the option of abortion.

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5. See BABYLONIAN TALMUD, *Yevamot* 22a-b; RABBI JACOB BEN ASHER, TUR, *Even Haezer* 16; SHULCHAN ARUCH, *Even Haezer* 8:4.

6. See SHULCHAN ARUCH, *Choshen Mishpat* 208. This result is agreed to by my colleague, Rabbi Howard Jachter of Congregation Beth Judah, Brooklyn, N.Y., an expert on prenuptial agreements. For a similar case with a similar result, see Rabbi Chaim Shlomo Shan, *Summoning the Plaintiff to Secular Court*, in *TECHUMIN* 12:257-58 (1990).

Helen makes these decisions unilaterally, without consulting Herbert. After Herbert discovers Helen's feelings on children, he becomes very upset. Herbert married Helen expecting to raise a medium-sized family, and feels that he cannot enjoy a future without the family he always envisioned. Helen knew Herbert's feelings before, but never contradicted him. Although she never said how she felt, she now claims that Herbert never asked. Their disagreement nearly leads to the dissolution of their marriage. In order to avoid this catastrophe, they have agreed that you should counsel them.

### A. Roman Catholic Response

WILLIAM E. MAY\*

My first assumption is that Helen and Herbert are Catholics, or that at least one of them is Catholic, and that they married with the approval of the Church. My second assumption is that, in coming to me for moral advice, they desire to discover the truth. Therefore, I will not advise them to "follow their consciences," because they surely know that they should do this. What they need is to have their consciences properly informed so that they can make true moral judgments.

The first question is whether or not, at the time of the wedding, Helen already had a firm belief against having children; it is important to know whether she deliberately excluded the possibility of children from the marriage. If so, I would be obliged to inform Helen and Herbert that they are not truly married because they did not consent to "marriage" as understood by the Church. The Church defines marriage as an "intimate partnership of life and love . . . ordered to the procreation and education of children."<sup>1</sup> Indeed, the Church teaches that "for matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, *ordered to the procreation of children.*"<sup>2</sup> Consequently, "if . . . either or both of the parties should by a posi-

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1. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.48; cf. *id.* n.50 ("Marriage and married love are by nature ordered to the procreation and education of children.").

2. 1983 CODE c.1096, § 1 (Canon Law Society of Great Britain and Ireland et al. trans.) (emphasis added).

tive act of the will exclude marriage itself or any essential element of marriage, or any essential property, such party contracts invalidly.”<sup>3</sup>

If, at the time of the wedding, Helen had, “by a positive act of the will,” excluded acceptance of children within the marriage, then the marriage is invalid. I would then advise them to refrain from engaging in sexual relations until the marriage is validated; such sexual relations could not be considered marital, but rather instances of fornication, and I would advise them not to fornicate. I would urge Helen, however, to consider validating their marriage by changing her mind and expressing a willingness to accept children within the marriage. Herbert, who I presume gave valid marital consent, would still have to renew his consent to the marriage.<sup>4</sup> If Helen remains determined to exclude children from their marriage, however, I would reluctantly advise Herbert to have the Church formally invalidate the marriage to enable him to marry someone else.

If my inquiry showed that Helen *had* given valid marital consent on their wedding day (i.e., she did not decide against having children until after the marriage), I would speak to the couple about the goodness of children; children are a blessing, or good, of marriage. Indeed, as Vatican Council II instructs us, “Children are the supreme gift of marriage and greatly contribute to the good of the parents themselves.”<sup>5</sup> It is good for married men and women to have children. In fact, as Vatican Council II again reminds us, “Married couples should regard it as their proper mission to transmit human life and to educate their children; they should realize that they are thereby cooperating with the love of God the Creator.”<sup>6</sup>

It is possible, however, that they mutually came to the understanding that it would be better not to have children because of a serious health problem caused by a genetic disease, such as Lesch-Nyhan Syndrome. In this situation, Herbert and Helen would have a just reason not to procreate. I might suggest, however, that they adopt a child.

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3. *Id.* c.1101, § 2.

4. *Id.* c.1159; *cf.* c.1055, para. 1 (essentially stating that marriage is a reality open to the gift of children).

5. GAUDIUM ET SPES, Pastoral Const., Vatican Council II n.50.

6. *Id.*

Another area that deserves discussion is Helen's willingness to use abortion and contraception. First, as to abortion, Helen apparently believes that abortion is morally justifiable. Yet, deliberately procured abortion is the killing of an innocent human being. In all likelihood, Helen does not regard the entity conceived or implanted in the womb to be a human being; at a minimum, she does not view it as a human being endowed with the same rights as those human beings who have survived life in the womb. It is likely that Herbert does not agree with her on this matter, and I would elicit his help in persuading her that neither scientific evidence nor philosophical arguments support her position. Assuming Helen is a Catholic, I would appeal to her Catholic upbringing and remind her of the Church's traditional treatment of abortion and the humanity of the unborn. If she in any way believes that the Bible is the Word of God, I would ask her to read such passages as *Psalms* 139, where the Psalmist says: "For thou didst form my inmost parts, thou didst knit me together in my mother's womb . . . when I was being made in secret . . . thy eyes beheld my unformed substance."<sup>7</sup> I would also ask her to read *Luke* 1:44, where Elizabeth, pregnant with her son John, exclaims when Mary visits her, "[W]hen the voice of your greeting came to my ears, the *babe* in my womb leaped for joy."<sup>8</sup>

Because Herbert apparently is opposed to abortion, I would point out to Helen that it is horribly unfair and unjust for her to involve him in abortion. Any child she might conceive is also *his* son or daughter, and he has an obligation to respect and protect the life of his child. Helen cannot honestly say that she loves Herbert if she is willing to bring about the death of his children and cause him such grief.

In discussing abortion, I would explain that Helen's IUD is not a contraceptive, but instead acts as an early abortifacient;<sup>9</sup> it does not *prevent* the fertilization of her ova, but affects the lining of her uterus so that the child conceived cannot implant there. In fact,

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7. OLD TESTAMENT, *Psalms* 139:13, 15 (Revised Standard Version 1952).

8. NEW TESTAMENT, *Luke* 1:44 (Revised Standard Version 1948).

9. "IUDs seem to interfere . . . with the implantation of the fertilized egg in the lining of the uterine cavity. The IUD does not prevent ovulation." PHYSICIANS DESK REFERENCE 1646 (36th ed. 1988).

the pills currently in use in the United States frequently act as abortifacients and not as a means of preventing conception.<sup>10</sup>

It is important to compare the use of contraceptives when there are serious reasons for doing so, with the practice of periodic abstinence or natural family planning. Regarding periodic abstinence, it is as effective in enabling spouses to avoid a pregnancy as artificial contraceptives, although it is not as effective as sterilization.<sup>11</sup> Yet, it obviously does not have the serious disadvantages of a sterilizing operation. Additionally, periodic abstinence has no medical risks, is inexpensive and can be effectively taught by simple practical instruction. Married couples can also use periodic abstinence when conceiving children, as it places responsibility on both husband and wife to communicate their feelings, desires, and ideals, thus enhancing the marital union.<sup>12</sup>

Helen and Herbert should meet with a married couple or couples who use natural family planning or fertility awareness in order to meet their spousal and parental obligations. They would learn that the divorce rate is much lower for couples who, for religious or moral reasons, refuse to practice contraception.<sup>13</sup> Married couples are more likely to remain married when they seek to harmonize their marital love with the serious responsibility of respecting the good of human life in its transmission.

After explaining these matters, I would provide Herbert and Helen with some philosophical and theological arguments to show that it is always wrong to contracept, i.e., one may never choose to adopt a proposal to impede the beginning of new human life that one reasonably believes will begin when one chooses to engage in an act of genital union. An explanation of the basic reasons why

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10. "Oral contraceptives frequently function as abortifacients. They do not always prevent fertilization of the ovum; rather they prevent implantation of a fertilized ovum in the uterine wall." BEVERLY WILDUNG HARRISON, *OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION* 303 n.68 (1983). Harrison is one of the most outspoken feminists of our day, standing firmly in favor of both contraception and abortion. Yet, she freely acknowledges the abortifacient character of the pills now used in the United States. She continues this passage by saying, "The IUD also functions to prevent not conception but implantation." *Id.*

11. Cf. JOHN F. KIPPLEY, *THE EFFECTIVENESS OF NATURAL FAMILY PLANNING* passim (1986).

12. Cf. BENEDICT ASHLEY, O.P. & KEVIN O'ROURKE, O.P., *HEALTH CARE ETHICS THEOLOGICAL ANALYSIS* (2d ed. 1989); JOHN AND SHEILA KIPPLEY, *THE ART OF NATURAL FAMILY PLANNING* (2d ed. 1989).

13. Cf. ROBERT T. MICHAEL, "WHY DID THE DIVORCE RATE DOUBLE WITHIN A DECADE"?—RESEARCH IN POPULATION 361-99 (1988).

one ought not to contracept is beyond the scope of this Essay.<sup>14</sup> Yet, in my discussion with Herbert and Helen, I would enter into this matter in detail—of course, assuming that they would be willing to do so. I would seek to show Herbert and Helen that the slogan of those who advocate contraception and abortion, “No unwanted child ought ever to be born,” is utterly superficial and demeaning to human beings. Rather, the truth is that no human being, including unborn children, ought to be unwanted. Our challenge is to create a society in which all human beings of whatever age, race, condition, or sex are loved as God loves them and are, thus, wanted.

These philosophical arguments may not persuade Helen and Herbert of the truth, and they are free to make their own choices. But they should realize that they can make a bad moral choice. If they wish to be truly happy Catholics, they must seek to conform their choices to the truth.

### B. *Islamic Response*

WAEEL B. HALLAQ

Islamic law contains three governing principles in the case of contraception. First, the chief reason for marriage is procreation. Therefore, a married couple that is capable of having children and that has the means to raise them, as Helen and Herbert indeed do, would be interfering with God's ways if they resort to contraception.

Second, contraception is lawful only in a situation in which pregnancy may prove detrimental to the health of the mother.<sup>1</sup> This is clearly not Helen's case.

Third, in such matters as relate to family life, the husband's wishes override those of the wife; the wife may, and should, disobey those wishes of the husband that pertain to and violate the wife's religious duties.<sup>2</sup>

Even if Helen resorted to contraception with the consent of Herbert, this would only mean that *both* of them were violating the

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14. See Germain Grisez et al., *Every Marital Act Ought To Be Open to New Life: Toward a Clearer Understanding*, 52 THOMIST 365, 365-426 (1988) (discussing the matter in detail).

1. BASIM MUSALLAM, *SEX AND SOCIETY IN ISLAM* 57-59 (1983).

2. 2 MUHAMMAD MITWALLI SHA'RAWI, *AL-FATAWA* 186, 249 (al-Sayyid al-Jamili ed., 1983).



first two principles of Islamic law. If Helen chose to act unilaterally, however, contradicting Herbert's wishes, her acts would also violate Herbert's legal rights. Yet, they may amicably resolve the problem if Helen ceases to use contraceptives and joins her husband in the wish to have children. Otherwise, if she continues to use contraceptives, she will have violated Herbert's right by disobeying his wishes (*nushûz*). In this case, Herbert may seek to legally enjoin Helen from using contraceptives. If she still persists, he is entitled to divorce her and, because she has violated his rights, he is under no obligation whatsoever to provide maintenance for her.<sup>3</sup>

### C. Jewish Response

ELLIOT N. DORFF

Marriage and children are the epitome of blessing in Jewish law. As our Rabbis taught, "A man without a wife lives without blessing, without life, without joy, without health, and without peace."<sup>1</sup> A later mystic source carries this one step further: "The divine presence can rest only upon a married man because an unmarried man is but half a man and the divine presence does not rest upon that which is imperfect."<sup>2</sup> So important is it to take a wife that one "may sell a scroll of the Torah for the purpose of having enough money to marry."<sup>3</sup>

Once married, propagation of children is both a commandment and a blessing. Specifically, the biblical commandment, "Be fruitful and multiply"<sup>4</sup> is fulfilled, according to the rabbis, when one has two children,<sup>5</sup> although couples are supposed to have as many children as they can. Conversely, "A man without children is as if he were dead."<sup>6</sup> In our contemporary society with large numbers of unmarried Jews, that statement seems harsh. It does, how-

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3. 1 AL-SHAYKH AL-NIZAM, *AL-FATAWĀ AL-HINDIYYA* 545 (1980); 'ABD AL-HAMĪD, *AL-AHWĀL AL-SHAKHSIYYA* 349 (1984).

1. MIDRASH PSALMS, *Psalms* 59:2.

2. ZOHAR HADASH 4.50b.

3. BABYLONIAN TALMUD, *Megillah* 27a.

4. *Genesis* 1:28.

5. MISHNAH, *Yevamot* 6:6. The rabbis actually consider the biblical commandment to be fulfilled only when one creates as God did (*Genesis* 1:27), namely, when one produces a male and a female. Moreover, for exegetical and economic reasons, the rabbis understood the obligation to rest upon the male, not the female, even though men obviously cannot have children without women.

6. BABYLONIAN TALMUD, *Nedarim* 64b.

ever, articulate our ancestors' views on marriage and procreation until well into this century.

With this in mind, one can understand that traditional Judaism looked askance at interruptions in the process of conception and birth. Normally, one was supposed to marry and have children. Masturbation, birth control, sterilization, and abortion were both physically and ideologically counterproductive.

Regarding masturbation, Jews shared other societies' abhorrence of the act. Interestingly, while they did not debate the prohibition of masturbation, legal writers had difficulty locating a biblical basis for it. For this reason, even the great authority Maimonides claimed that the court could not punish masturbation because no commandment explicitly forbade it.<sup>7</sup> In part, the prohibition undoubtedly stemmed from assumptions about the medical consequences of ejaculation. According to Maimonides:

Semen constitutes the strength of the body, its life, and the light of the eyes. Its emission to excess causes physical decay, debility, and diminished vitality. Thus Solomon, in his wisdom, says: "Do not give your strength to women" (Proverbs 31:3). Whoever indulges in sexual dissipation becomes prematurely aged; his strength fails; his eyes become dim, a foul odor proceeds from his mouth and armpits; the hair of his head, eyebrows, and eyelashes drop out; the hair of his beard, armpits, and legs grow abnormally; his teeth fall out; and besides these, he becomes subject to numerous other diseases. Medical authorities have stated that for each one who dies of other maladies, a thousand are the victims of sexual excess.<sup>8</sup>

Jewish sources discussing ejaculation specifically in the context of masturbation do not base the prohibition on medical reasons. Rather, the prohibition is based on concerns about self-pollution and the murder of unborn generations. Of the two concerns, the former is far more pronounced,<sup>9</sup> but the mystic tradition in Judaism gave particular emphasis to the latter thesis. This tradition held that such a man was guilty not only of murder, but murder of his own children; therefore, he was a criminal more reprehensible than

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7. Maimonides, *Commentary to the Mishnah, Sanhedrin 7:4*.

8. MISHNEH TORAH, LAWS OF ETHICS 4:19.

9. See DAVID FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 120 (1968); see generally *id.*, pt. 3.

any other.<sup>10</sup> Moreover, the mystics claimed that even *involuntary* emissions of semen created demons.<sup>11</sup>

Folk literature proliferated such notions of demons created by improper ejaculation. Thus, the narrator in I.B. Singer's book says: "I was not born. My father . . . sinned as did Onan, and from his seed I was created—half spirit, half demon . . ."<sup>12</sup> These notions give graphic expression to the belief that exposed semen somehow contaminates the environment and taints its holiness. In contrast, ejaculation in non-adulterous, heterosexual relations is prized even in non-procreative situations, for no "murder" is said to take place and the forces of evil are not enhanced.<sup>13</sup>

Despite the above (including the command to have two children, the ideal of having more, and the general prohibition against "wasting the seed"), the Jewish tradition permits, and even requires, contraception under certain circumstances. In general, the command to propagate is directed towards the male and not the female, both for exegetical and economic reasons. Therefore, in addition to the prohibition against masturbation, male forms of contraception are generally not permitted. Nevertheless, female methods are sometimes allowed. The specific conditions under which female contraception is permitted or required depend upon one's interpretation of the following Rabbinic ruling:

Rabbi Bebai recited before Rabbi Nahman: There are three classes of women who employ an absorbent for purposes of contraception: a minor, a pregnant woman, and a nursing mother. . . . [a] minor lest she become pregnant and die, a pregnant woman lest abortion result, and a nursing mother lest she become pregnant and prematurely wean the child so that it dies. And what is a minor? From the age of eleven years and a day until the age of twelve years and a day. One who is under or over this age carries on her marital intercourse in the usual manner—so says Rabbi Meir. But the other Sages say: The one as well as the other carries on her marital intercourse in the usual manner, and mercy be vouchsafed from Heaven, for [as Scripture says in Psalms 116:6], "The Lord preserves the simple."<sup>14</sup>

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10. ZOHAR, *Vay'hi* 219b.

11. *Id.* Genesis 19b, 54b.

12. ISAAC BASHEVIS SINGER, *From the Diary of One Not Born, in GIMPEL THE FOOL* 169, 169 (Saul Bellows et al. trans., 1980) (1953).

13. ZOHAR, *Emor* 90a.

14. BABYLONIAN TALMUD, *Yevamot* 12b.

The law follows the majority opinion, namely, that of the Sages. There is some question, however, as to what the Sages actually mean. As the translation indicates, the Hebrew text uses the present-tense indicative verb "employ" in the first clause. If that verb is taken to mean that there are three classes of women who *may* use a contraceptive device, it implies that other women *may not*, even according to Rabbi Meir. With that understanding, the Sages' opinion does not permit the three classes of women to use contraception, regardless of whether their health or the health of their babies is at stake. Rashi, the most famous commentator on the *Talmud*, takes this position.<sup>15</sup> Later commentators adopting Rashi's interpretation<sup>16</sup> were, nevertheless, generally convinced that the Sages permitted contraception when someone's life or health depended upon it. Consequently, they allowed contraception when medical reasons required it, but not otherwise.

Alternatively, if the operative verb in the above quotation is interpreted to mean that there are three classes of women who *should* or *must* use an absorbent, this implies that other women may use contraceptive devices for other purposes as well. Those other purposes may be strictly or leniently defined. Rabbenu Tam, one of Rashi's grandsons, is followed by many in his adoption of this approach.<sup>17</sup> While Rabbi Luria would permit all women to use contraceptive devices, even for nontherapeutic purposes, others of this school would restrict their use in one way or another.

Because propagation is a commandment, we must assume that even the more liberal school would limit the use of contraceptives to those couples who have already fulfilled the commandment by having two children—except, of course, if the medical condition of the woman or fetus requires contraception.<sup>18</sup> In contemporary times, when couples frequently postpone marriage until after they have completed their extended education and initiated their careers, modern movements have varied widely in their response to the ability and desirability of family planning. Some allow contra-

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15. Rashi, *m'shamshot b'mokh*, in BABYLONIAN TALMUD, *Yevamot* 12b.

16. *E.g.*, Rabbi Meir Posner of eighteenth century Danzig; Rabbi Akiva Eger of nineteenth century Posen in Prussia; and Rabbi Moses Sofer of nineteenth century Pressburg.

17. Including Rabbi Asher ben Yehial (the "Rosh") of late thirteenth century and early fourteenth century Germany and Spain; Rabbi Solomon Luria of sixteenth century Poland; and Rabbi Isaac Halevi Herzog, first Ashkenazic Chief Rabbi of the State of Israel.

18. See FELDMAN, *supra* note 9, at 224-25.

ception even before having children; the vast majority of Jews practice this. Yet, because of the losses of Jewish population, the high rate of intermarriage, and the extremely low birth rate among Jews, Jewish religious leaders have increasingly stressed the need for Jews to propagate. Therefore, these factors have tempered an otherwise liberal approach to contraception on the part of many non-Orthodox rabbis and most Jews.

The same concerns govern the issue of sterilization but, additionally, Jewish law prohibits Jews from mutilating their bodies, as the body is the property of God. Although sterilization procedures are rather new, there are a few rabbinic rulings available on the issues of vasectomies and tubal ligations. Both traditional and liberal commentators forbid male sterilization, based on the rabbinic interpretation and extension of two principles: First, *Deuteronomy* 23:2 states, "No one whose testes are crushed . . . shall be admitted into the congregation of the Lord";<sup>19</sup> and, second, *Leviticus* 22:24 states, "That which is mauled or crushed or torn or cut you shall not offer unto the Lord; nor shall you do this in your land."<sup>20</sup> The commentators more easily permit female sterilization, both because a woman does not come under these prohibitions and because she is not obligated to procreate. All commentators agree, however, that even male sterilization is permitted, and perhaps required, when the man's life or health makes it necessary.<sup>21</sup>

In the case presented, Jewish law very clearly favors Herbert's position. Neither Helen nor Herbert seem to have a medical condition that requires them to use contraceptive methods to save their health or lives. Further, they have not yet had any children, so Helen cannot justify using contraceptives on the basis of having already fulfilled the obligation to procreate. Some liberal, contemporary rabbis would permit the couple to use contraceptives while finishing their education, but certainly not to the point that it would be difficult for them to conceive and bear healthy children.

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19. For the extended rabbinic interpretation, see MAIMONIDES, *MISHNAH TORAH, Laws of Forbidden Intercourse* 16:2, :6; SHULCHAN ARUCH, *Even Haezer* 5:2.

20. For the extended rabbinic interpretation, see BABYLONIAN TALMUD, *Shabbat* 110b.

21. See J. DAVID BLEICH, *JUDAISM AND HEALING* 65 (1981); *COMPENDIUM ON MEDICAL ETHICS* 46-47 (David M. Feldman & Fred Rosner eds., 1984) (on the traditional perspective); SOLOMON FREEHOF, *REFORM RESPONSA* 206-08 (1960) (on the liberal perspective).

Moreover, Helen's duplicitous behavior in this case only adds to the justice and moral correctness of Herbert's case.

## VII. MARITAL FRAUD—FACT PATTERN

Alex and Phyllis have dated for four years. They have begun to think seriously about marriage. Throughout the years of dating, Phyllis has often expressed her desire to have a large family; her love of children is well-known. Alex has always agreed with her and apparently loves children as well.

Alex, however, is aware that, because of a childhood illness, he is sterile. He realizes that Phyllis' desire for a large family is so strong that she would probably not marry him if she knew he could not father children. He decides not to tell her, thinking that, once they are married, she will accept not having children or will be amenable to adoption.

After two years of marriage, Phyllis becomes concerned because she is not yet pregnant. After a thorough medical exam, the doctor tells her that nothing is physically wrong. She later insists that Alex make an appointment for a similar checkup, and Alex finally admits the truth. Phyllis is devastated by his deception. She returns to her parents' home and consults an attorney. Because both Alex and Phyllis are of your confession of faith, they request that you provide an *amicus curiae* brief for the court to consider.

### A. Roman Catholic Response

MICHAEL R. MOODIE, S.J.

Apart from specific and rare exceptions, Catholic Church doctrine does not admit the possibility of divorce.<sup>1</sup> Consent to marry, once given, cannot be revoked; the resulting marriage is legally indissoluble. Because of this doctrine of indissolubility, the attention of canonists has historically focused upon the conditions necessary to give the binding consent necessary to enter marriage.

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1. A word of clarification regarding Catholic doctrine is needed here. The Catholic Church teaches that marriage between two baptized Christians, whether Catholic, Protestant, Orthodox, etc., is a sacrament. A sacramental marriage, once consummated, can never be dissolved. Divorce, consequently, is impossible. The Catholic Church also teaches, however, that marriages between non-baptized persons, although intrinsically permanent, can be dissolved "in favor of the faith." Only the Church can dissolve these marriages, that is, grant a divorce. The Catholic Church does not recognize any other type of divorce, whether religious or civil, as dissolving an existing marriage bond.

In any practical judgment, a due proportion must exist between a person's knowledge and freedom and the responsibilities assumed. The more serious the moral obligations, the greater the required knowledge and freedom because no one is bound to what is morally impossible.<sup>2</sup> Given the consequences of consent—absolute perpetuity—the consent given by a party must be proportionately free and knowledgeable. When reasonable freedom and knowledge are lacking, consent is vitiated and the marriage invalid.

Phyllis' and Alex's situation is one of deceit prior to consent. Canon law did not historically accept deceit as a source or title of nullity. The classical Roman law of contracts, incorporated into canon law, considered deceit irrelevant in questions of validity. Contracts in Roman law were generally held valid because of the words and actions placed at the time of contract, whether or not deceit was present.<sup>3</sup> Although the *ius gentium* of the Praetors eventually accepted deceit as affecting the validity of some forms of contracts, canon law did not adopt this principle. Instead, canonists argued that, because marriage is a more perfect state of life, even a person deceived into marriage would, in effect, receive a benefit.<sup>4</sup> Therefore, even when given under deception, consent would bind the parties involved.

Although classical canon law rejected in theory the principle that deceit could vitiate marital consent, actual marital situations demanded more nuanced responses. In a culture where marriages were usually arranged, difficult situations arose; for example, it seemed incorrect to recognize a marriage in which the wife's family had arranged for their daughter to marry the first heir of a noble family, only to discover after the ceremony that the daughter married the family's *second* son. To give consent to the wrong person was no minor matter when questions of inheritance and succession were at stake; deceit was most certainly present. Yet, because the Church did not recognize deceit as invalidating, ecclesiastical courts could not declare the marriage invalid on that basis. Rather, these courts judged that the deceived party's *error* vitiated consent. Therefore, if a person thought that she was marrying one party

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2. Canon law accepts this as a fundamental legal principle, as it states: "*Nemo potest ad impossibile obligari.*" Decretals of Boniface VIII, *Liber Sextus*, Rule of Law 6, in *De Regulis Iuris*, 2 CORPUS IURIS CANONICI 1122 (Aemelius Friedberg ed., 1959).

3. See Kevin W. Vann, *Dolus: Canon 1098 of the Revised Code of Canon Law*, 47 JURIST 373 (1987).

4. See *id.* at 374.

when, in fact, she was marrying another, the person contracted invalidly. Because the intended object of consent (the eldest son in the above example) was different than the actual object (the second son), no real consent could be said to exist.

The ecclesiastical courts' rejection of deceit and their alternative acceptance of error as affecting the validity of marital consent began centuries of legal application of the notion of error as a source of nullity. From the obvious case of the above error in the identification of a person, canonical jurisprudence hesitantly concluded that error regarding a quality or characteristic of a person could also vitiate consent, as long as that quality or characteristic was directly intended and was the principal intention of consent. Judges reasoned that a particular quality of a person could be so fundamentally a part of consent that the later discovery of the absence of that characteristic would be equivalent to mistaking the actual, physical person.

When canon law was codified in 1917, this evolving jurisprudence of error became part of the statutory law.<sup>5</sup> Under the provisions of the 1917 Code, Phyllis could petition her case only in terms of error. To prove nullity on the basis of error was difficult and rare. Although judges developed complex arguments to bring factual situations of deceit under the umbrella of error, the statutory law itself was unsatisfactory. Because the statutory law did not recognize the influence of deceit, courts were constrained to argue in terms of error even though they realized that the real issue was the other party's deception.

At the beginning of his pontificate, Pope John XXIII mandated a complete revision of canon law. The revision process began in 1967. During the period of revision, the committee responsible for marital law proposed that a new canon be added specifying the invalidating effects of deceit upon marital consent.<sup>6</sup> The revised Code, promulgated on January 25, 1983, incorporated the following: "One who enters marriage misled by deceit, perpe-

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5. Canon 1083 states:

§ 1. Error regarding the person renders a marriage invalid. § 2. Error regarding a quality of the person, even if it gives cause to the contract, only invalidates marriage:

1° if the error of quality redounds into error of person;

2° if a free person contracts marriage with a person whom he/she considers to be free, but is in fact a slave in the proper sense of the term.

1917 CODE c.1083, §§ 1-2.

6. 3 *Communicationes* 76-77 (1971).



trated in order to obtain consent, regarding some quality of the other party which by its very nature can seriously disturb the partnership of conjugal life, invalidly contracts."<sup>7</sup>

Assuming that the marriage of Alex and Phyllis took place after November 27, 1983, the date that the new law took effect, their case would fall under the prescripts of the above canon.<sup>8</sup> As even a cursory reading of Canon 1098 reveals, not every type of deceit invalidates marriage. To invalidate a marriage, deceit must (1) be perpetrated in order to obtain consent, (2) regard a quality of the other party, and (3) be objectively serious enough to disrupt conjugal life.<sup>9</sup> Adequate proof of deceit would require the deceived party to prove unawareness of the truth and that discovery of the deceit precipitated the end of the marriage.<sup>10</sup>

Under canon law, Phyllis could petition to invalidate the marriage on the grounds of deceit. The mere fact that Alex is sterile would not invalidate the marriage.<sup>11</sup> If both parties had known of the sterility, or if Alex had been ignorant of the sterility, the validity of consent would not have been affected.

In sum, therefore, the invalidation is caused by the deceit itself, not the quality giving rise to the deceit. Although Alex's sterility in itself is not invalidating, it is a quality which, by its nature,

7. "*Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit.*" 1983 CODE c.1098.

8. According to Canon 9, laws are not retroactive. The legislation regarding deceit would, therefore, not apply to marriages that took place prior to November 27, 1983. If Phyllis and Alex had married before November 27, the case would have to be heard under the title of error—a much more difficult allegation to prove. Admittedly, though, this limitation of the law is a disputed point. Some canonists argue that being misled by deceit is not purely positive law but pertains to the natural law. A judge is thus entitled to apply the law to any marriage. An adequate discussion of the reasoning on both sides of the issue, however, is beyond the scope of the present analysis. 1983 CODE c.9.

9. The quality must be more than merely irritating to suffice. It must *of its nature* be serious. This is pointed out by Justice Burke in a recent case: "[A] quality is not relevant under the canon unless it involves an objectively grave defect which *of itself* tends to seriously disturb the 'consortium' of conjugal life. Minor defects, even if one of the parties finds them annoying, cannot be said of *their* nature to carry the potential for the serious disturbance of married life." *Coram* Burke, Oct. 25, 1990, No. 14, in 26 *STUDIA CANONICA* 238 (1992) (emphasis in original).

10. See *THE CODE OF CANON LAW: A TEXT AND COMMENTARY* 781 (James A. Coriden et al. eds., 1985).

11. Canon 1084, Section 3 states, "Sterility does not prohibit nor invalidate marriage, with due regard for [C]anon 1098." 1983 CODE c.1084, § 3. Canon 1098, as already mentioned, defines the invalidating effects of deceit. 1983 CODE c.1098.

can disrupt conjugal life.<sup>12</sup> Thus, the conditions for the application of the Canon are fulfilled. Because Phyllis' discovery of the deception precipitated the end of the marriage, an ecclesiastical court could reasonably conclude that the marriage was invalid due to deceit. On the other hand, should Phyllis decide to forgive the deceit and remain with Alex, her action would "validate" her consent. In this case, because she still chooses marriage with Alex after knowledge of the deceit, Phyllis is showing that Canon 1098 does not apply in her case, and she no longer has a cause of action to invalidate the marriage on these grounds.

### B. Islamic Response

AZIZAH Y. AL-HIBRI\*

#### 1. Introduction

Islamic law requires the satisfaction of certain initial conditions before a marriage contract is recognized as valid. Among these conditions are the willingness of the two parties to enter the marriage union voluntarily, and the absence of any bar to marriage. If these initial conditions are not satisfied, the marriage is generally held to be either void or voidable.<sup>1</sup>

Bars to marriage range from familial factors, such as the existence of certain blood or milk relations between the contracting parties, to physical and medical factors, such as the existence of certain types of bodily defects, diseases or illnesses in either or both of the parties. An example of a milk relation barring marriage is one where the mother of the prospective spouse is found to have nursed the other prospective spouse in his or her childhood. This relationship would make the spouses "siblings-in-milk." Besides creating a permanent bar to their marriage, their status as "siblings" also entitles both of them to the full range of rights to

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12. See *supra* note 9.

\* For their valuable comments on earlier drafts of this essay, I would like to thank Professor Peter Swisher of the T.C. Williams School of Law, Dr. Fathi Osman, Resident Scholar at the Islamic Center of Southern California, and Dr. Hassan Hathout, Islamic scholar and member of the Islamic Center of Southern California.

1. The best treatises on this subject include: 4 ABD AL-RAHMAN AL-JAZIRI, *KITAB AL-FIQH 'ALA AL-MADHAHIB AL-ARBA'AH* (Beirut 1969) (1928); 7 WIHBAH AL-ZUHAYLI, *AL-FIQH AL-ISLAMI WA ADILLATUH* (Damascus 1984); 2 FADL IBN AL-HASAN AL-TABARSI, *AL-MU'TALAF MIN AL-MUKHTALAF BAYN A'IMMAT AL-SALAF* (Qumm 1990) (twelfth century).

which blood siblings are entitled, excluding certain rights such as inheritance rights.<sup>2</sup>

Scholars disagree on the scope of diseases and illnesses that constitute a bar to marriage. They agree, however, on two basic defects that make intercourse incomplete or impossible: (1) impotence, which includes, for example, the presence of an unusually small penis; and (2) the absence of a penis altogether. With few exceptions, scholars agree also on an additional defect: the lack of testicles.<sup>3</sup> Such defects detract from the sexual enjoyment of the wife, a basic right of the woman in an Islamic marriage. These defects also contradict the basic goals of marriage, which include sexual enjoyment and procreation.

Islamic literature also briefly addresses the issue of sterility. The discussion of the issue is brief due to a previous absence of adequate medical technology for determining sterility with certainty. Still, in light of the Islamic principles and methodologies of *ijtihad*,<sup>4</sup> it is possible to extrapolate a ruling on this matter based on all available information, including the treatment of analogous matters by Muslim scholars of various schools of *ijtihad*.

Therefore, it is important at this point to ask Phyllis and Alex about the school of Islamic thought to which they adhere or prefer, whether it be Shafi'i, Hanafi, Maliki, Hanbali, or Ja'fari, and then provide an analysis based on that school's rationale. Most likely, neither Alex nor Phyllis have thought much about this issue, although Muslims in certain geographical areas tend to identify themselves as adherents to one school of thought or another. In the United States, however, it is most likely that the attorney for each party will pick the school most sympathetic to his or her client.

## 2. Arguments Permitting Annulment—Different Islamic Schools of Thought

A major goal of Islamic marriage is procreation.<sup>5</sup> A Muslim wife has the right to have children. This right is fundamental and is

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2. See, e.g., AL-ZUHAYLI, *supra* note 1, at 129-41 (providing a detailed discussion of these issues).

3. For a thorough discussion of these matters, see AL-JAZIRI, *supra* note 1, *passim* (especially pp. 180-98).

4. For more on this theory and the place of *ijtihad* in Islam, see Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1 (1992).

5. See, e.g., AL-ZUHAYLI, *supra* note 1, at 107, 517; 1 ABD AL-'AZIM SHARAF AL-DIN, *AHKAM AL-AHWAL AL-SHAKHSIYAH FIAL-SHARI'AH AL-ISLAMIYAH* 167 (3d ed. Egypt 1987).

generally recognized in other areas of Islamic law as well. For example, most scholars would argue that, while Muslims may practice *coitus interruptus* and other forms of birth control, such practices may not be adopted by the husband without the consent of the wife; this is because such practices deny her both the right to have a child and the right to undiminished sexual enjoyment.<sup>6</sup>

As noted earlier, the three male defects recognized by jurists as voiding a marriage do not expressly include sterility. Instead, discussion of sterility has been traditionally replaced with an analysis of such lower-threshold issues as the inability to ejaculate, a topic usually treated as part of the discussion on eunuchs. These lower-threshold issues were a reflection of the dominant concerns at the time. Significantly, these issues also recognized the centrality of sexual intimacy and procreation in ordinary family life.

Directly on point, however, is the story of Khalifah (Caliph) Omar Ibn al-Khattab. Khalifah Omar was asked by a man who believed himself to be sterile whether the man was obligated to reveal that defect to his prospective bride. Khalifah Omar advised the man to inform his prospective bride of his condition so that she could make an informed choice about marrying him.<sup>7</sup> This story provides a very important precedent in the literature on such matters. Ibn al-Qayyim, a fourteenth century Muslim scholar, used this story to argue that a party may choose to end a marriage whenever the other party has any defect whatsoever that is repugnant to the first party, which defect was not revealed to the first party prior to marriage.<sup>8</sup> Malikis, on the other hand, recognize the wife's right to annul her marriage from a eunuch if he cannot ejaculate, even if he can still have an erection.<sup>9</sup> Clearly, therefore, ejaculation is an important function of sexual enjoyment and procreation, according to Malikis. Indeed, both are widely recognized as basic goals in marriage.

Hanbalis, however, are clearer on this point. Where the man was a eunuch prior to marriage, and the wife has no notice of his defect, Hanbalis argue that the wife has the right to annul the mar-

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6. See AZIZAH Y. AL-HIBRI, *Family Planning and Islamic Jurisprudence*, in RELIGIOUS AND ETHICAL PERSPECTIVES ON POPULATION ISSUES 2-11 (1993). See also AL-TABARSI, *supra* note 1, at 154; ABD AL-RAHIM OMRAN, *FAMILY PLANNING IN THE LEGACY OF ISLAM 152-67* (1992).

7. AL-ZUHAYLI, *supra* note 1, at 519; SHARAF AL-DIN, *supra* note 5, at 167.

8. AL-ZUHAYLI, *supra* note 1, at 519.

9. AL-JAZIRI, *supra* note 1, at 183.

riage, regardless of whether the husband is capable of ejaculation or not.<sup>10</sup> The reason given is that such a defect detracts from the wife's sexual enjoyment. Thus, mere intercourse is not sufficient in the Hanbali view to preserve the marriage. Full enjoyment by the wife is a required aspect of intercourse. Indeed, Hanbalis argue that any defect that prevents the full and perfect realization of the goals of marriage should be accepted as a legitimate basis for annulment. Based on this Hanbali *ijtihad*, we may extrapolate that the wife's intercourse with a sterile husband may, depending on the woman, detract from the woman's full enjoyment of intercourse and, thus, provide a basis for annulment. Therefore, a wife's inability to end such a marriage would contradict one of the basic goals of marriage in Islamic law.

Shafi'is go even further in asserting the Muslim woman's right to sexual enjoyment. Shafi'is give her the right to annul the marriage in the case where the husband has no penis, even if she was the one who severed it.<sup>11</sup>

One reason for stressing the wife's right to sexual enjoyment is that it protects her from adultery. Various schools have held that, if the marriage did not provide her with a satisfactory sexual relationship, she may become vulnerable to the advances of others. Therefore, it is the husband's responsibility to see to it that his wife is sexually satisfied.<sup>12</sup>

In the instant case, Phyllis highly values procreation and has stated that fact repeatedly. Alex, however, is incapable of fulfilling her legitimate desire for children. Furthermore, he did not inform her of his defect prior to the marriage.<sup>13</sup> In light of the preponderance of evidence supporting the wife's right to annul in such circumstances, and in light of the very clear and important precedent of Khalifah Omar, Phyllis must be given the right to annul the marriage.

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10. *Id.* at 196.

11. *Id.* at 194.

12. *See, e.g., AL-ZUHAYLI, supra* note 1, at 106-07.

13. Dr. Hassan Hathout offers another argument for annulment. According to Dr. Hathout, the lack of notice was fraudulent. Therefore, because the Islamic marriage contract is subject to contract law like any other contract, establishing fraud here provides legitimate grounds for "rescission." There is some support for this view in AL-JAZIRI, *supra* note 1, at 198; AL-TABARSI, *supra* note 1, at 149.

### 3. Arguments Against Annulment

While all Muslims believe in a woman's right to sexual enjoyment, it is not clear that sterility detracts significantly from it. As for procreation, there is no such thing as a sterile person, because God, not modern technology, determines sterility. To explain, the *Qur'an* clearly tells the story of Abraham and Sarah. Sarah was not only considered sterile, but she was also elderly. Nevertheless, God informed Abraham that he would give them children, and He did.<sup>14</sup> For God, nothing is too difficult or impossible, regardless of what our technology tells us. Further, Islamic literature has established that a bride may live with an impotent husband (*anin*) for a full year without losing the right to request an annulment.<sup>15</sup> The wait was not viewed as a waiver because jurists wanted to give the groom a fair chance to recover from his condition.

In the case of sterility, the situation is somewhat analogous. A husband may succeed in impregnating his wife in their later years. This is especially true in today's world of ever-developing technology. For that reason, a husband's fair chance to vindicate himself should not be limited to one year. Finally, if God wanted the wife to have children, she would, regardless of the husband's purported condition.

Hanafis, in particular, adamantly limit the defects permitting annulment to the three listed at the beginning of this essay. They base this position on the view that marriage is no less sacred than other familial bonds.<sup>16</sup> Hence, if either one of the spouses has a defect other than the three listed, the unafflicted spouse must help the other spouse by providing all the necessary support that would be provided for any other member of the family.

If this seems unusually harsh, Hanafis note that a prospective spouse is responsible for thoroughly investigating the other prospective spouse prior to marriage. That he or she did not adequately do so is not a good reason to permit annulment. In the present case, Phyllis had adequate opportunity to discover Alex's infertility. Now that she has married him, she should help him, not leave him.<sup>17</sup> In fact, Phyllis had a better chance in our modern

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14. QUR'AN XI:69-74 (A. Yusuf Ali trans., 1983); see also *id.* XIX:1-15 (recounting the story of Zakariyah and his old wife).

15. See, e.g., AL-JAZIRI, *supra* note 1, at 186, 191, 195-96.

16. See *id.* at 180.

17. *Id.*

technological society of ascertaining Alex's fertility than women had in earlier societies. For example, she could have insisted on having him medically tested prior to marriage. In a modern Islamic state, the state may *require* such a test, including disclosure of the results to the prospective spouse, as a prerequisite for marriage. Such specific laws that supplement laws provided in the *Qur'an* are acceptable in Islamic law as a proper part of *Shari'ah* in that state. They may differ from those adopted in other Islamic states due to the states' different customs and/or needs.

As a condition of the marriage, Phyllis also had the right to specify in the marriage contract that Alex must be free from any defects. Phyllis did not include such a condition in her contract with Alex and, thus, waived her rights regarding this matter. She cannot, therefore, later use Alex's defect as a basis for annulment.

This position is not new. Hanafis, for example, recognize the legitimacy of including specific conditions in the marriage contract. Where a condition is violated, the affected party has the right to an annulment.<sup>18</sup> It is also worth noting that Hanafis do not recognize the woman's right to annulment where the husband is a eunuch capable of an erection, even if he is not capable of ejaculation.<sup>19</sup> This shows that some scholars do not view procreation as an essential part of the marriage or its goals. Indeed, some of them believe that penetration, even without ejaculation, is sufficient to sustain the legality of the marriage.<sup>20</sup>

If a wife does not want to continue in such a marriage, she may choose divorce, which is permitted in Islamic law.<sup>21</sup> The wife may then marry another, this time with a more detailed marriage contract that fully specifies her conditions for marriage.

#### 4. Conclusion

While both arguments are compelling, the arguments in favor of annulment more accurately reflect the Islamic position. Here, the case is clearly one of marriage fraud. Divorce is much more difficult than annulment, though the wife may be in a better finan-

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18. For a more detailed discussion of the validity of conditions in the marriage contract, see Azizah Y. al-Hibri, *Marriage Laws in Muslim Countries*, 4 INT'L REV. COMP. PUB. POL. 227-44 (1992).

19. See AL-JAZIRI, *supra* note 1, at 192. See also *supra* notes 9-10 and accompanying text.

20. See AL-TABARSI, *supra* note 1, at 153.

21. Certain scholars have relied on this fact to deny annulment. See *id.* at 149.

cial position under the latter. The argument that God can do the impossible provides a slippery slope that most scholars would not approve of; for example, the argument could later be used to deny other well-established Islamic rights like those of inheritance. The argument, thus, would be that "if God wanted to give someone money, God would have done so anyway." In short, Islamic courts are charged with the responsibility of applying Islamic law carefully and vigorously and are not entitled to vaguely speculate regarding God's will. Phyllis should, therefore, be permitted to annul her marriage to Alex.

### C. Jewish Response

MICHAEL J. BROYDE

This hypothetical raises two interrelated issues under Jewish law: First, whether Phyllis may divorce Alex in light of the discovery; and, second, whether Phyllis may choose to remain married to Alex even though he cannot procreate.

According to normative Jewish law, every man is obligated to procreate and have, at a minimum, one boy and one girl.<sup>1</sup> Under normative Jewish law, however, a woman is not obligated to follow the commandment to procreate.<sup>2</sup> Thus, Jewish law would deem it proper if Phyllis were happy to continue in a marriage without having children with her husband.<sup>3</sup>

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1. SHULCHAN ARUCH, *Even Haezer* 1:5. To have more than the minimum is to fulfill a rabbinic commandment. *Id.* at 5-8.

2. SHULCHAN ARUCH, *Even Haezer* 1:13. Different rationales are presented for the reason that Jewish law excluded women from the obligation to procreate. Lord Jacobivitz suggests that it is because a woman's instinct is already so strong that there is no need to add a legal obligation. Julius Preuss suggests that this was done to prevent "a kind of well motivated promiscuity." DAVID FELDMAN, *MARITAL RELATIONS, BIRTH CONTROL AND ABORTION IN JEWISH LAW* 54 (1975) (citing JULIUS PREUSS, *BIBLISCH-TALMUDISCHE MEDIZIN* 479 (n.d.)). The *Talmud* linguistically derives it from the woman's exception from combat. BABYLONIAN TALMUD, *Yevamot* 65b. Rabbi Moshe Sofer appears to relate the exception to the risks of childbirth. RABBI MOSHE SOFER, CHATAM SOFER, *Even Haezer* 20.

It has been suggested that there is a rabbinic obligation to procreate applicable to women. Rabbi Noach Chaim Tzui, *Atzay Arazim*, in SHULCHAN ARUCH, *Even Haezer* 5:9; RABBI YITZCHAH SHEMELKES, *RESPONSA BEIT YITZCHAK*, *Even Haezer* 91. This is very difficult to accept in light of the clear statements to the contrary cited above. See SHULCHAN ARUCH, *Even Haezer* 1:4 (proposing a possible way to resolve this tension). See also FELDMAN, *supra* note 2, at 55.

3. The same could not be said if the case were reversed. Because Jewish law obligates a man to have children, a man is discouraged from staying in a relationship where children cannot be produced, assuming he had no children from a prior relationship. The



On the other hand, Jewish law also recognizes the right of a woman to have a child if she wishes; indeed, it accepts that she may seek to end a marriage if the man is incapable or unwilling to have children with her.<sup>4</sup> Jewish law also recognizes that a woman has a right to an ongoing sexual relationship with her husband.<sup>5</sup> Should the husband be incapable of an ongoing sexual relationship, the wife may end the relationship on those grounds.<sup>6</sup>

Phyllis, therefore, has the ultimate choice of whether to remain married to Alex or divorce him. If she chooses to remain in the marriage, she may choose not to have children, to adopt children, or, according to many authorities, to be artificially inseminated. Regardless of which route Phyllis chooses, she must be aware of the consequences of her choice under Jewish law, and the differences in American law on the same issues.

### 1. The Alternative of Adoption for Phyllis and Alex<sup>7</sup>

Jewish law does not have an institution called adoption. Although adoption must have been well known in *talmudic* times because of its widespread use in Roman law,<sup>8</sup> the codifiers of Jewish law denied that the law recognized an institution of adoption. Rather, they created an institution that they called "a person who raises another's child."<sup>9</sup> Unlike either Roman law or current U.S.

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ancient custom, however, is not to scrutinize these matters closely, even when people are marrying in situations where no children will be produced. See Rabbi Moshe Isserless, in SHULCHAN ARUCH, *Even Haezer* 1:3, 154:10.

4. SHULCHAN ARUCH, *Even Haezer* 154:6. As noted by Rabbi Samuel Pardu, this assumes that she has no children from a previous relationship. Rabbi Samuel Pardu, *Beit Shemuel*, in *id.* at 154:10-11.

5. See SHULCHAN ARUCH, *Orach Chaim* 240:1 (discussing the precise parameters of this obligation).

6. SHULCHAN ARUCH, *Even Haezer* 154:6-7.

7. Much of this discussion is based on the author's previous analysis of adoption and artificial insemination, in Michael J. Broyde, Note, *The Establishment of Maternity and Paternity in Jewish and American Law*, 3 NAT'L JEWISH L. REV. 117 (1988).

8. F.P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 72 (1920). Although it is commonly thought that adoption is a relatively recent phenomenon, it is not. Adoption was recognized in the *Babylonian Code of Hamurabi*. THE CODE OF HAMURABI, KING OF BABYLON arts. 185-186 (R.F. Harper trans., 1904). It was also regulated in ancient Greek, Egyptian, and Roman civilization. See John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922); Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956) (summarizing various ancient adoption laws).

9. See BABYLONIAN TALMUD, *Sanhedrin* 19b. This is viewed as a righteous deed. See also EXODUS RABBAH ch. 4. Although the institution under Jewish law is different

adoption law,<sup>10</sup> in Jewish law, this act does not change the legal status of the child's parentage.<sup>11</sup> One who raises another's child is an agent of the natural parent and, like any agency rule in Jewish law,<sup>12</sup> if the agent fails to accomplish the task delegated, the obligation reverts to the principal. Thus, the biblical obligations, duties, and prohibitions of parenthood still apply between the natural parents and the child whose custody they no longer have.<sup>13</sup>

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than commonly accepted notions of adoption, the author uses the terms "adopted child" and "adoptive parents" for ease of communication.

10. Adoption in the United States is one of the few areas of law where common law had no influence, in contrast with England, where the common law rejected *in toto* the institution of adoption. See C.M.A. McLauliff, *The First English Adoption Law and Its American Precursors*, 16 SETON HALL L. REV. 656, 659-60 (1986). Thus, from its legal inception, adoption law in America rejected Jewish law's analysis of adoption as a type of agency, and instead accepted the Roman model of legally changing the parenthood of the child. As with Roman law, such a change was apparently total and complete, virtually stripping the child of his prior identity. See Sanford N. Katz, *Re-writing the Adoption Story*, 5 FAM. ADVOC. 9, 9-13 (1982).

Adoption laws were intended to put children in an environment where society could not determine that they had been adopted; even the children themselves many times did not know. U.S. law reflected this, severing all parental rights and duties with an adopted child's natural parents, and establishing those rights and duties with the adoptive parents, again following the Roman model. *Id.* The "right to know" controversy has resulted in a number of state statutes governing an adoptee's ability, upon attaining the age of majority, to access adoption information, including information identifying the biological parents. See, e.g., VA. CODE ANN. § 63.1-236 (1993); GA. CODE ANN. § 19-8-23(4)(D) (1993); MICH. STAT. ANN. § 710.68 (1992); MO. REV. STAT. § 453.121 (1992); TENN. CODE ANN. § 36-1-141 (1993); D.C. CODE ANN. § 16-311 (1993). Each of these statutes has different standards for revealing "identifying" versus "non-identifying" information, with the former standards predictably much harder to meet due to privacy concerns. Once children have a right to know who their natural parents are, the adoption law must reflect the dichotomous relationship between one's natural parents and one's adoptive parents. See generally Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children To 'Stay in Touch' with Blood Relatives*, 22 J. FAM. L. 59 (1983); Marshall A. Levin, *Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity*, 8 U. BALT. L. REV. 496 (1979). These tensions have not yet been resolved in American law. Most states still ascribe to adoption law the ability to recreate maternal and paternal relationships, notwithstanding the knowledge of one's biological parents. States also maintain the ability to legally destroy any such relationships. It is well within the power of the state to not only create new parental rights and duties, but also to remove the rights of a parent towards its child; this is true not only for the rights towards the child, but also for the duties of a parent to a child. Levin, *supra*, at 496-97.

11. Although it is true that there are four instances in the Bible in which adopted parents are called actual parents, these are assumed to be in a non-legal context. See 1 *Chronicles* 4:18; *Ruth* 4:17; *Psalms* 77:16; 2 *Samuel* 21:8; cf. BABYLONIAN TALMUD, *Sanhedrin* 9b.

12. I.H. LEVINTHAL, *THE JEWISH LAW OF AGENCY* 58-73 (1923).

13. SHULCHAN ARUCH, *Even Haezer* 15:11.

Conversely, one who raises another's child does not assume the biblical prohibitions associated with one's own child. For example, regardless of who is currently raising the child, it is never permitted for a natural parent to marry his or her child. So too, the assumption of custody cannot raise to a biblical level the prohibition of incest between a parent and the adopted child.<sup>14</sup> Further, the *Talmud* explicitly discusses whether or not adopted children raised in the same home may marry each other, and concludes that such marriages are permitted.<sup>15</sup>

On the other hand, certain non-biblical family guidelines promulgated by the rabbis have placed greater emphasis on custody than parenthood. For example, in *talmudic* times, it was decreed that the possessions, earnings, and findings of a minor child belong to his father.<sup>16</sup> Although the wording of the *Talmud* refers only to the father, it is clear from later discussions that this law applies to anyone who supports the child, including adoptive parents.<sup>17</sup> The reasoning behind this rabbinic decree was equity; one who supports a child should get the earnings of that child.<sup>18</sup> Thus, a financially independent minor does not transfer his income to his parents because he is supporting himself.<sup>19</sup> Similarly, the earnings of a dependent adopted child go to his adoptive parents, as the rationale for the decree applies equally to adopted and biological children.<sup>20</sup>

Other examples of adoptive parents being treated as natural parents can be found in the area of ritual law. For example, while the rabbis prohibited two unrelated, unmarried people of the opposite sex from rooming together alone,<sup>21</sup> some argue that these rules do not apply in the adoption scenario. Specifically, although

14. *Id.* ("It is permitted to marry one's adopted sister.")

15. BABYLONIAN TALMUD, *Sotah* 43b. One medieval authority, Rabbi Judah ben Samuel, decreed that such marriages not be performed. JUDAH BEN SAMUEL OF REGENSBURG (HA'CHASID), SEFER HA'CHASIDIM sec. 829 (Rebeun Margolies ed., 1956) [hereinafter SEFER HA'CHASIDIM]; see also BABYLONIAN TALMUD, *Sotah* 43b. This decree has not been generally accepted. See RABBI M. SOFER, RESPONSA, 2 *Yoreh Deah* 125. Although legally permitted, few such marriages are actually performed. *Id.*

16. BABYLONIAN TALMUD, *Bava Metzia* 12b.

17. SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

18. Rabbi J. Falk, *Meirat Einaim*, in SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

19. SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

20. *Id.*; see also Rabbi Z. Mendal, *Be'er Haytaiv* § 4, in SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

21. In Hebrew, these are the laws of *yichud*. See Shulchan Aruch, *Even Haezer* 22:2.

some commentators disagree,<sup>22</sup> many maintain that it is permissible for an adopted child to live with his adopted family,<sup>23</sup> notwithstanding the *prima facie* violations of the above prohibition.<sup>24</sup> As one of these commentators noted, without this lenient rule, the institution of raising another's child would disappear.<sup>25</sup>

Another example of the different treatment of adopted children under ritual law is the adopted children's lack of obligation to recite the mourner's prayer (*kaddish*) upon the death of their natural parents, and the incumbent obligation for them to mourn upon the death of their adoptive parents.<sup>26</sup> This is so because the institution of mourning is rabbinic in nature.<sup>27</sup> There exist numerous other examples of rabbinic institutions not strictly applied in the context of raising another's child, as Jewish law encourages this activity.<sup>28</sup>

Notwithstanding the high praise given by Jewish law to a person who raises another's child,<sup>29</sup> it is critical to realize that the institution of adoption in Jewish law is radically different from U.S. adoption law. The natural parents are always the "parents"; the adopted parents never are. While a number of incidental areas of parental rights are associated with custody rather than natural parenthood, they are the exception, not the rule. Jewish law focuses entirely on natural relationships to establish parental rights and duties.

22. 4 RABBI M.M. SHNEERSON, *ZICHRON AKEDAT YITZCHAK* 33-37. For a complete list of authorities agreeing with this position, see Azarya Berzon, *Contemporary Issues in the Laws of Yichud*, 13 J. HALACHA & CONTEMP. SOC'Y 77, 108 (1986).

23. For example, this occurs when a couple adopts a boy and the boy's adoptive father later dies, leaving the adopted child living alone with a woman not his natural mother.

24. See 6 RABBI ELIEZER WALDENBERG, *TZITZ ELIEZER* 40:21; RABBI C. DAVID HALEVI, *ASEH LECHA RAV* 194-201. Rabbi Joseph B. Soloveitchik has also been quoted as permitting this. See Melech Schacter, *Various Aspects of Adoption*, 4 J. HALACHA & CONTEMP. SOC'Y 93, 96 (1982); see also RABBI MOSHE FEINSTEIN, *IGROT MOSHE*, 4 *Even Haezer* 64:2.

25. 6 WALDENBERG, *supra* note 24, at 40:21.

26. RABBI M. SOFER, *RESPONSA 1 ORACH CHAIM* 164. Rabbi Sofer also notes the praise Jewish law gives to one who raises another's child.

27. This issue is in dispute. Compare SHULCHAN ARUCH, *Yoreh Deah* 398:1 with Rabbi Moshe Isserless, *in id.* 399:13.

28. See generally SHULCHAN ARUCH, *Orach Chaim* 139:3; see also Rabbi Abraham Gumbiner, *Magen Avraham*, in SHULCHAN ARUCH, *Orach Chaim* 156; 1 RABBI MOSHE FEINSTEIN, *IGROT MOSHE*, *Yoreh Deah* 161.

29. See *supra* note 9 and accompanying text.

Thus, if one chooses to adopt, it would be a laudable action. Yet, the adoptive parent must realize that the natural parents will always remain the true "parents" of the adopted child.

## 2. The Alternative of Artificial Insemination

Along with the traditional options of adoption and childless marriages, a woman whose husband is sterile could have children through artificial insemination. The permissibility of artificially inseminating a married woman with sperm other than her husband's is the subject of a multi-sided dispute in Jewish law, and touches on issues of adultery, legitimacy, and modesty.<sup>30</sup>

There are four basic positions that discuss this issue. The first position, held by Rabbi Moshe Feinstein, permits artificial insemination<sup>31</sup> and establishes the paternity of the child by the genetic relationship between the child and the father.<sup>32</sup> Thus, he who donates the sperm is the father. Further, Rabbi Feinstein believes that the act of artificial insemination does not violate Jewish law,<sup>33</sup> and does not constitute an act of adultery by the woman.<sup>34</sup>

The second position, held by Rabbi Teitelbaum, is identical to the first in that it acknowledges the legal significance of the genetic relationship and recognizes that paternity is established solely through the genetic relationship.<sup>35</sup> Yet, this position also maintains

30. According to Jewish law, non-biological relationships such as those created by adoption are not recognized as creating a prohibition against marriage. BABYLONIAN TALMUD, *Yevamot* 21a. Indeed, as noted in the *Shulchan Aruch*, it is permissible to marry one's adopted sibling, even if he or she was raised in the same house. SHULCHAN ARUCH, *Even Haezer* 15:11. Thus, it is safe to say that, according to Jewish law, parental relationships are granted to the natural parent and cannot later be changed to be in harmony with custodial relationships. Unlike American law, Jewish law typically presents no problems for establishing parental status because, in almost all situations, the identity of the parent is legally clear. *Id.*

31. See Feinstein, *supra* note 24, at 1:10, :71, 2:11, 3:11. For another vigorous defense of his own position, see RABBI MOSHE FEINSTEIN, DIBROT MOSHE, *Ketubot* 233-48.

32. As discussed in my previous response to the Prenuptial Agreement fact-pattern, there are situations in Jewish law where, even in the course of a sexual relationship, no paternity is established. According to Jewish law, the child of a relationship between a Jew and a Gentile always assumes the legal status of its mother. The child bears no legal relationship to its father. See BABYLONIAN TALMUD, *Yevamot* 22a-b; Jacob ben Asher, *Tur*, in SHULCHAN ARUCH, *Even Haezer* 16. This is equally true in cases of artificial insemination. *Id.*

33. Feinstein, *supra* note 24, at 2:11.

34. In normal circumstances, this would lead to the classification of the child as illegitimate. SHULCHAN ARUCH, *Even Haezer* 4:13. If done intentionally, it would mandate separation of the couple. *Id.*

35. 2 RABBI YOEL TEITELBAUM, *DIVREI YOEL* 110, 140.

that the genetic relationship predominates in establishing illegitimacy and the legal propriety of these actions. Thus, Rabbi Teitelbaum views heterologous artificial insemination as an act of adultery.<sup>36</sup> In sum, while Rabbis Feinstein and Teitelbaum agree on how paternity is established, they differ as to how illegitimacy is established.

The third position, held by Rabbi Waldenberg, posits that an act of adultery occurs when the act of heterologous insemination occurs, and not when the sperm mixes with the egg. Therefore, because this act is physically analogous to adultery, it is not permitted.<sup>37</sup> This view is not based on the presence or absence of genetic relationships between child and father, but rather upon the belief that the injection of sperm is itself a prohibited form of adultery.<sup>38</sup> Further, Rabbi Waldenberg maintains that such conduct violates the rules of modesty, which are of rabbinic origin.<sup>39</sup> Thus, he would prohibit such conduct in all circumstances, regardless of whether it technically violates the biblical prohibition against adultery.<sup>40</sup>

The fourth and final position, held by Rabbi Breish, believes that heterologous insemination is neither an act of adultery nor a biblical violation.<sup>41</sup> Nonetheless, Rabbi Breish maintains that, "from the point of view of our religion these ugly and disgusting things should not be done, for they are similar to the deeds of the land of Canaan and its abominations."<sup>42</sup>

The essence of this dispute revolves around a single *talmudic* source found in Tractate *Hagigah*,<sup>43</sup> which discusses artificial insemination *en passant*. Tractate *Hagigah* states:

Ben-Zomah was asked: May a pregnant virgin marry a High Priest? Do we assume that Samuel is correct, when he states that one can have intercourse many times without removing the physical characteristics of virginity, or perhaps this is unlikely?

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36. *Id.*

37. See 9 TZITZ ELIEZER, *supra* note 24, at 51:4.

38. *Id.*

39. *Id.* Rabbi Waldenberg maintains that this conduct violates the laws of marital modesty (*dat yehudit*). See BABYLONIAN TALMUD, *Ketubot* 72a.

40. Rabbi Waldenberg would also prohibit surrogate motherhood on the same grounds. See Rabbi E. Waldenberg, *Test Tube Infertilization*, 5 SEFER ASYA 84-92 (1986).

41. 3 RABBI YAKOV BREISH, CHELKAT YAKOV 45-48 [hereinafter CHELKAT YAKOV]; see also 3 RABBI YEHEIL YAKOV WEINBERG, SREDAI EISH 5 [hereinafter SREDAI EISH].

42. 3 CHELKAT YAKOV, *supra* note 41, at 45-51.

43. BABYLONIAN TALMUD, *Hagigah* 14b-15a.

He replied: Samuel's position is unlikely, and we assume that the woman was artificially inseminated.<sup>44</sup>

The simple explanation of the *talmudic* text is that artificial insemination does not create legal prohibitions that are normally based on prohibited sexual conduct. Through silence, the *Talmud* implies that it establishes paternity, for the *Talmud* would have explicitly stated that it did not establish paternity.<sup>45</sup>

Citing additional support for the first position, Rabbi Feinstein quotes a ruling by Rabbi David Halevi (*Taz*) of the seventeenth century, which is itself based on a *Responsa* of Rabbi Peretz, an eleventh century Jewish scholar.<sup>46</sup> Rabbi Peretz stated that, "in the absence of sexual intercourse, the child resulting from the mixing of sperm and egg is always legitimate."<sup>47</sup>

Based on this source, Rabbi Feinstein reaches a critically important conclusion: If there is no forbidden sexual act, the child is legitimate under Jewish law.<sup>48</sup> Additionally, this child is not even stigmatized to the extent that he is forbidden to marry someone of priestly descent,<sup>49</sup> because all of the stigmas associated with the child of an illicit relationship are dependent upon the presence of prohibited intercourse, not upon the genetic combination of two

44. According to Jewish law, the High Priest may only marry a woman who has never had intercourse before her marriage to him. See *Leviticus* 21:13; see also MAIMONIDES, MISHNAH TORAH, *Sefer Kedusha, Hilchot Issurai Biah* 17:13.

45. This is the near unanimous opinion of the decisors. See 2 RABBI OBADIA YOSEF, YABIAH OMER, *Even Haezer* 1:6; 3 SREDAI EISH, *supra* note 41, at 5; Rabbi Samuel ben Uri, *Chelkat Mechokeq*, in SHULCHAN ARUCH, *Even Haezer* 1:6; IGROT MOSHE, *supra* note 24, at 1:10, :71; RABBI MENASHE KLEIN, 4 MISHNAH HALACHOT 160; 3 TZITZ ELIEZER, *supra* note 24, at 27:3; 2 DIVREI YOEL, *supra* note 35, at 110, 140; RABBI S. DURAN (TASHBETZ), 3 RESPONSA 263; Rabbi Samuel Pardu, *Beit Shmuel*, in SHULCHAN ARUCH, *Even Haezer* 1:10; RABBI J. ETTLINGER, ARUCH LENEIR, *Yevamot* 10; 2 RABBI JACOB EMDEN, SHELAT YAVETZ 96. It is sometimes claimed that the *Turai Zahav* (*Taz*) disagrees with this. See Rabbi David Halevi, *Turai Zahav*, in SHULCHAN ARUCH, *Even Haezer* 1:8 [hereinafter *Turai Zahav*]. It is not necessarily true that the *Taz* is only referring to the question of the fulfillment of the commandment to have children, and not also the establishment of paternity. See generally Fred Rosner, *Artificial Insemination in Jewish Law*, in JEWISH BIOETHICS 105, 111 (Fred Rosner & J. David Bleich eds., 1979).

46. IGROT MOSHE, *supra* note 24, at 1:10. See *Turai Zahav*, *supra* note 45, *Yoreh Deah* 195 n.7. The original work by Rabbi Peretz has been lost. The authenticity, however, is not in doubt, as this position has been frequently cited in his name. See Rabbi Joel Sirkes, *Bayit Chadash* (*Bach*), in JACOB BEN ASHER, TUR, *Yoreh Deah* 195; Rabbi Samuel Pardu, *Beit Shmuel*, in SHULCHAN ARUCH, *Even Haezer* 1:10; Rabbi I. Rozanz, *Mishnah Le'Melech*, in MAIMONIDES, MISHNAH TORAH, *Sefer Nashim, Hilchot Ishut* 15:4.

47. IGROT MOSHE, *supra* note 24, at 1:10, 2:11, 3:11.

48. *Id.* 1:10.

49. DIBROT MOSHE, *supra* note 31, *Ketubot* 239-43.

people prohibited to each other.<sup>50</sup> Furthermore, Rabbi Feinstein accepts the literal interpretation of the *talmudic* text in Tractate *Hagigah* and states that the genetic father is also the legal one.

In support of the second position, Rabbi Teitelbaum relies on radically different sources than that of Rabbi Feinstein. Specifically, Rabbi Teitelbaum relies on a position articulated by Rabbi Moses ben Nachman (Nachmanides), a twelfth century commentator on both the *Talmud* and the Bible. In Nachmanides' explanation on the verse, "One may not have intercourse with one's neighbor's wife for seed [or sperm],"<sup>51</sup> Nachmanides focuses on the final two words of the verse "for seed." He claims that these two words seem to be unnecessary, but raises the possibility that they were placed in the text to emphasize one reason for the prohibition of adultery—that society will not know from whom the child is descended.<sup>52</sup> Accepting this as one of the intellectual bases for the prohibition of adultery, Rabbi Teitelbaum claims that heterologous insemination, even without any physical act of intercourse, is biblically prohibited because, had there been intercourse, it would have been categorized as an act of adultery.<sup>53</sup> Therefore, he concludes that the genetic combination of two people who are prohibited to marry leads to illegitimacy, even when there is no sexual intercourse.<sup>54</sup>

In support of the third position, Rabbi Waldenberg relies to a great extent upon the same material as Rabbi Teitelbaum. Yet, Rabbi Waldenberg does not emphasize the genetic relationship in the mixing of sperm and egg; rather, he notes that, according to Nachmanides, the injection of sperm is itself an act of adultery analogous to intercourse.<sup>55</sup> Thus, he maintains that the act of insemination is prohibited because it is the legal equivalent of actual

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50. IGROT MOSHE, *supra* note 24, at 1:10. In this Responsum, Rabbi Feinstein advances an alternative explanation of why the child is permitted to marry a priest.

51. *Leviticus* 18:20.

52. Rabbi Moses ben Nachman (Nachmanides), commenting on *Leviticus* 18:20.

53. 2 DIVREI YOEL, *supra* note 35, at 110, 140.

54. *Id.* Rabbi Teitelbaum also devoted considerable time and effort to defending his reliance upon a biblical commentary to derive principles of Jewish law. He noted that, while some authorities believe that the reliance upon commentaries on the Bible is not acceptable because such commentaries were not intended to be used as sources for establishing Jewish law, these sources ought to serve as a guide and furnish us with a better understanding of the scope of the law. This is particularly true when these sources indicate that our conduct should become stricter rather than more lenient. For Rabbi Feinstein's reply, see DIBROT MOSHE, *supra* note 31, at 238-39.

55. 9 TZITZ ELIEZER, *supra* note 24, at 51:4; 3 *id.* at 27:1.



intercourse, just as anal intercourse is legally identical to normal intercourse.<sup>56</sup> Rabbi Waldenberg also vigorously disputes Rabbi Peretz's conclusions, quoting a number of early decisors who disagree with Rabbi Peretz.<sup>57</sup> It is worth noting that, according to Rabbi Waldenberg, one may conclude that the one who injects the sperm is culpable of committing the act of adultery.<sup>58</sup> Another commentator has gone so far as to assert that the person who injects the sperm is the legal father, because he is the one committing adultery.<sup>59</sup> This position has been widely attacked as based on an illogical premise that neither the genetic father nor the husband of the wife would be considered the father of the child.<sup>60</sup>

As to the fourth and final position, Rabbi Breish represents the intellectual hybrid of the positions of Rabbis Feinstein and Waldenberg. Rabbi Breish concedes that the child resulting from artificial insemination is legitimate (a major concession according to Rabbi Feinstein).<sup>61</sup> Rabbi Breish hesitates, however, in permitting this conduct in contravention of the legal rules of adultery, in contrast to Rabbi Waldenberg's position. Rabbi Breish maintains that permitting conduct that people widely assume to be prohibited will result in the general decline of moral values.<sup>62</sup> Thus, he prohibits this conduct because it is the top of a slippery slope that he is not willing to slide down.<sup>63</sup>

56. See Isserless, *supra* note 3, at 20:1.

57. See 3 TZITZ ELIEZER, *supra* note 24, at 27:1.

58. *Id.*

59. Shapiro, *Artificial Insemination*, 1 NOAM 138-42 (1957).

60. See Menachem Kasher, *Artificial Insemination*, 1 NOAM 125-28; 3 CHELKAT YAKOV, *supra* note 41, at 47.

61. 3 CHELKAT YAKOV, *supra* note 41, at 45-46.

62. *Id.* at 48-51. For an earlier articulation of this concept, see SEFER HA'CHASIDIM, *supra* note 15, ch. 829. Rabbis Feinstein and Breish engaged in vigorous written correspondence on these various topics. See DIBROT MOSHE, *supra* note 31, at 232-48.

63. The jurisprudential analysis used by normative U.S. law is completely contrary to the principles used in Jewish law. U.S. law, unlike its Jewish counterpart, does not view the identity of the natural parent as the critical question in establishing legal paternity; rather, it views that question only as the starting point of the analysis. In the United States, the power is reserved to the legal system to harmonize parental rights with other values such as custodial parenthood or the best interest of the child. 2 AM. JUR. 2D *Adoption* § 2 (1962); 2 J. McCahey et al., *CHILD CUSTODY & VISITATION LAW AND PRACTICE* §§ 10.01-03, 11.0(1) (1987); H. GAMBLE, *THE LAW RELATING TO PARENTS AND CHILDREN* 169 (1981).

Heterologous insemination presents two issues in U.S. law. The first issue regards the rights and responsibilities of a husband to a child who is not genetically his own. The second regards the rights and duties of a sperm donor to his genetic child. The leading case on the duties of a husband towards a child not genetically his own is *People v. Sorensen*, 437 P.2d 495 (Cal. 1968). See also *S. v. S.*, 440 A.2d 64 (N.J. 1981); *In Re Adoption of*

### 3. The Alternative of a Childless Marriage

As explained above, there is no Jewish obligation for a woman to have children.<sup>64</sup> If a woman is comfortable without children, Jewish law recognizes that personal decision as completely proper and within the individual's discretion. Yet, there are a number of related concerns. Most significantly, if a woman's husband recovered from an illness-imposed sterility later in life, he, like his wife, would be within his rights under Jewish law to seek a divorce if, at that time, the woman could not provide him with children.<sup>65</sup> This choice must be made on an individual basis.

### 4. The Possibility of Divorce

Like all Jewish marriages, should either party wish to end the marriage, the couple is required to execute a *get*, or Jewish divorce. Indeed, a marriage formed in accordance with Jewish law cannot

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Anonymous, 345 N.Y.S.2d 430 (1973); *Noggle v. Arnold*, 338 S.E.2d 763 (Ga. 1985); *R.S. v. R.S.*, 670 P.2d 923 (Kan. 1983); *Mace v. Webb*, 614 P.2d 647 (Utah 1980); *In re Custody of D.M.M.*, 404 N.W.2d 530 (Wis. 1987); *L.M.S. v. S.L.S.*, 312 N.W.2d 853 (Wis. 1981); *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987).

Only one case has found that children who are the product of consensual heterologous artificial inseminations are illegitimate. See *Gursky v. Gursky*, 242 N.Y.S.2d 406 (1963) (yet holding that the husband's consent estopped him from litigating the issue of his financial duty to support the children). Thus, U.S. law is nearly settled that children resulting from heterologous insemination are legitimate. Further, all of the states that have commented on the issue have accepted that, once a man consents to the artificial insemination of his wife, he is legally obligated to support the resulting children. This obligation is based on one of two theories: the theory of equitable estoppel, which prohibits the husband from litigating the paternity of a child resulting from heterologous insemination to which he consented; or the theory of adoption, which states that the husband, by his consent, has formally or informally adopted the children.

Most states strip the sperm donor (the father) of his rights when he donates through artificial insemination and a sperm bank. See Note, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055, 1062 n.79 (1985). Few American cases discuss the rights of a sperm donor. See *C.M. v. C.C.*, 377 A.2d 821 (N.J. 1977) (ruling that the donor was the natural father of the child and entitled to visitation rights); see also *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (involving the informal donation of sperm to a woman without the presence of a physician).

64. As a side issue, if a woman dies childless and without a will, her husband will inherit her estate. SHULCHAN ARUCH, *Even Haezer*, 90:1. If her husband predeceases her, her estate goes to her immediate relatives. *Id.*, *Choshen Mishpat* 246:1-3 (noting the order or priorities of heirs). For an overview of the issues involved regarding wills, see Judah Dick, *Jewish Law and the Conventional Last Will and Testament*, 2 J. HALACHA & CONTEMP. SOC'Y 5 (1982); see also IGROT MOSHE, *supra* note 24, 1 *Yoreh Deah* 109.

65. SHULCHAN ARUCH, *Even Haezer* 1:5-6, 154:10; see also Isserless, *supra* note 3, at 1:5-6, 154:10 (explaining the terminology used in that section).

be ended, in the eyes of Jewish law, through a civil divorce.<sup>66</sup> Thus, one who is married religiously and divorced only civilly remains married according to Jewish law. This is no trivial matter, as all sexual relationships by a person still religiously married to another (other than with the spouse) are classified as adulterous. Children fathered by a man other than the husband are illegitimate.<sup>67</sup> Upon divorce, an individual is free to search for another to marry.<sup>68</sup>

Should it prove impossible to execute a religious divorce,<sup>69</sup> it is possible that the marriage is void due to sufficient fraud in its enactment. The essential issue then becomes whether the inability to father children, without impotence, is sufficient fraud in any given case.<sup>70</sup> Particularly because the facts of this case state only that Phyllis would *probably* not marry Alex if she knew he could not father children, the resolution of this issue is uncertain. Unquestionably, the preferred option is that a *get* be issued.<sup>71</sup>

## 5. Conclusion

The choice of remaining in the marriage belongs to Phyllis. If she wishes, she may continue in a marriage with a husband who is sterile. If she chooses to remain, she may choose not to have children, to adopt children, or, according to many authorities, to be artificially inseminated. On the other hand, if she wishes to end this marriage, that option is also valid. The choice is ultimately hers to make.

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66. For a complete discussion of this issue, see IRVING BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* chs. 1-3 (forthcoming 1994).

67. SHULCHAN ARUCH, *Even Haezer* 15:16-18.

68. One cannot, however, marry a Cohen after being divorced. SHULCHAN ARUCH, *Even Haezer* 6:1.

69. This is called an *agunah*, or "a chained woman." For various reasons, an *agunah* cannot have a Jewish divorce executed. For a discussion of this issue and various alternative solutions to this problem, see generally BREITOWITZ, *supra* note 66.

70. It is crucial to distinguish between impotence and sterility in this issue, as they are treated differently under Jewish law. See OTZAR HAPOSKIM SHULCHAN ARUCH, *Even Haezer* 39:5(32), 44:4(16); see also SHULCHAN ARUCH, *Even Haezer* 44:4.

71. Thus, for example, Rabbi Feinstein states that a man who is impotent and enters into a marriage, but does not inform his prospective spouse of his impotency, has used fraud in the enactment of the marriage. If no *get* can be issued, the woman may remarry without a *get*. IGROT MOSHE, *supra* note 24, at 1:79; see also *id.* at 1:80, 4:113 (adopting the same posture concerning uninformed lunacy and closet homosexuality); see also RABBI SHMUEL STERN, 7 RESPONSA EVEN HAEZER 6 (applying to venereal disease). Again, it is important to distinguish between impotence and sterility, as they are treated differently under Jewish Law. See SHULCHAN ARUCH, *Even Haezer* 154:6-7 (regarding the husband's ability to fulfill the obligation of an ongoing sexual relationship).