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NOTES

THE RIGHT TO HER EMBRYOS: AN ANALYSIS OF *NAHMANI v. NAHMANI* AND ITS IMPACT ON ISRAELI *IN VITRO* FERTILIZATION LAW

I. INTRODUCTION

On September 13, 1996, in a landmark decision on reproductive rights, the Israeli Supreme Court ruled that a childless woman, Ruti Nahmani, estranged from her husband, Danny Nahmani, could have their frozen embryos[1] implanted in a surrogate against her husband's wishes.[2] The *Nahmani* Court, consisting of an eleven-member panel of judges, voted 7-4 that the right of the woman to be a mother outweighed the estranged husband's objections to fatherhood.[3] The Supreme Court decision ended a four-year legal battle for control of eleven embryos created when Mrs. Nahmani's eggs were fertilized with her husband's sperm through a process called *in vitro* fertilization ("IVF").[4]

This Note will examine the history and development of the *Nahmani* case and study how the Israeli Supreme Court determined the rights of each party in cases where disagreements (i.e. divorce or disputes between couples) arose. Part II of this Note will discuss IVF and the cryopreservation technique.[5] Part III will review the history leading to the 1996 *Nahmani* decision. Part IV will explore the *Nahmani* case and how it addresses the rights of the parties involved in the IVF process in Israel. Finally, Part V will provide an in-depth analysis of the 1996 Supreme Court case, delving into the underlying social, cultural, and religious policies that contributed to the outcome of the decision. This Note will

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1 Frozen embryos are scientifically known as "cryopreserved pre-zygotes." York v. Jones, 717 F. Supp. 421, 422 (E.D. Va. 1989). The pre-zygote is frequently described in the press and legal journals as a "frozen embryo." Davis v. Davis, 842 S.W. 2d 588, 589 (Tenn. 1992). Due to the general use of the term "frozen embryos," this Note will hereinafter refer to pre-zygotes as "frozen embryos."

2 Joel Greenberg, *Israeli Court Gives Wife the Right to Her Embryos*, N.Y. TIMES, Sept. 13, 1996, at A4 [hereinafter Greenberg].

3 *Id.*

4 Greenberg, *supra* note 2.

5 *See infra* text accompanying notes 6-18.

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conclude that the majority, under a legal subterfuge, upholds its society's long-standing veneration of life and procreation.

II. IVF DEFINED

In vitro Fertilization gives infertile couples the chance to produce their own biological children.[6] The first stage in the IVF process is to induce ovulation by treating the woman with infertility drugs.[7] This method increases the woman's egg production, also known as superovulation.[8] The eggs are then surgically removed and fertilized with the prospective father's sperm.[9] Once fertilized, the eggs are implanted into the woman's uterus through a process known as egg transfer (hereinafter "ET").[10] If there are no complications, a normal, non-coital pregnancy will usually result.[11]

Sometimes problems occur which make women unsuitable for ET immediately following IVF, such as uterine bleeding, illness, fever, or the inability to pass a catheter through the neck of the womb at ET.[12] There are also severe cases, like that of Mrs. Nahmani, where, as a result of cervical cancer, she underwent a hysterectomy and, as a consequence, was forced to have the ET

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6 Infertility comes in many forms, including tubal complications, mucus abnormalities, immunity to spermatozoa, or male dysfunctions. *See generally* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS (1995) [hereinafter BLANK & MERRICK].

7 Bill E. Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131 (1993).

8 *Id.* at 134. Recovery of ten or more eggs during a single cycle is the common practice. John A Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990).

9 Davidoff, *supra* note 7. If all the eggs are inseminated, more embryos will result then can securely be situated in the uterus. Robertson, *supra* note 8, at 407. Fertilization transpires in over 90 percent of cases in which eggs are inseminated. *Id.* at 407.

10 Davidoff, *supra* note 7. To avert the chance of mutifetal pregnancy, three or five embryos is the most that can safely be implanted in the uterus. Robertson, *supra* note 8. Once the ET is performed, the IVF embryo is basically the same as an embryo conceived *in vivo*. Tamara L. Davis, *Protecting the Cryopreserved Embryo,* 57 TENN. L. REV. 507, 510 (1990). The embryo must implant in the uterine wall or it will pass out of the woman's body during menstruation. *Id.* If the embryo implants it will evolve into a fetus and will be born approximately nine months later, excluding any spontaneous or induced abortions. *Id.*

11 Davidoff, *supra* note 7.

12 John F. Leeton, et al., *IVF and ET: What it is and how it works, in* TEST TUBE BABIES, A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES AND FUTURE POSSIBILITIES at 9 (William Walters & Peter Singer eds. 1982).

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performed on a surrogate at a later time.[13] A procedure for embryo storage by freezing, also known as cryopreservation, would allow time to correct these problems so that transfer could be carried out.[14] The process of cryopreservation involves the packaging of the embryo culture, resulting from the IVF process, with cryoprotectants.[15] The culture is then placed in a container, and subsequently frozen and stored in liquid nitrogen.[16] When the IVF patient or surrogate is ready for the embryo to be transferred into the uterus, thawing is induced by means of reversing the process.[17]

These frozen embryos are at the heart of the various legal disputes that arise. Because the cryopreservation process allows the embryo to survive outside of the womb, circumstances such as divorce, death, or disputes between couples raise difficult questions regarding the status of the frozen embryos.[18] These questions define the crux of the *Nahmani v. Nahmani* dilemma.

III. Setting the Stage for *Nahmani* 1996

Ruti and Danny Nahmani made legal history for the first time in 1988.[19] They embarked on a battle in Israel's Supreme Court for

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13 Ina Friedman, *A Victory for Life*, Jewish Week, Sept. 20, 1996, at 1, 39 [hereinafter Friedman]. This technique could also assist the woman who has the embryo transferred into her own womb and pregnancy does not occur during the first implantation attempt. Robertson, *supra* note 8, at 408. It increases the chances of pregnancy during any one cycle because at least three or four embryos are readily available for transfer. *Id.* It also alleviates the physical burden and costs of undergoing ovarian stimulation and egg retrieval during later attempts at IVF pregnancy. *Id.* Additionally, it heightens the chances of pregnancy in later cycles since thawed embryos will be placed in the woman during a natural cycle, free of the stimulating drugs and surgical imposition. *Id.*

14 Blank & Merrick, *supra* note 6, at 133.

15 Blank & Merrick, *supra* note 6, at 134.

16 Blank & Merrick, *supra* note 6, at 134. The recommended storage life of human embryos may be five or ten years. Edward F. Fugger, *Clinical Status of Human Embryo Cryopreservation in the United States of America*, 52 Fertility & Sterility 986, 988 (1989).

17 Blank & Merrick, *supra* note 6, at 133.

18 Blank & Merrick, *supra* note 6, at 132.

19 Evelyn Gordon, *Ruti Nahmani Gets Her Chance For Motherhood*, Jerusalem Post, Sept. 21, 1996, at 1, 3 [hereinafter Gordon]. Prior to this victory, the Nahmanis were barred by Israel's Ministry of Health from using the services of a surrogate mother to solve their infertility problems. Lea Levavi, *Health Ministry Must Defend Its Ban On 'Surrogate Mother,'* Jerusalem Post, Apr. 1, 1991, at 1, *available in* LEXIS, News Library, JPost File [hereinafter Levavi]. The Nahmanis wanted a full surrogacy procedure done – where Mrs. Nahmani provides the ovum and the surrogate mother provides the womb – as opposed to partial surrogacy – where the surrogate mother is artificially inseminated by the husband of the childless couple. *Id.* The success rate for partial surrogacy is much higher then full surrogacy (with a 10-12 percent success rate) since the surrogate mother is both the genetic

the right to have Mrs. Nahmani's eggs fertilized *in vitro* with Mr. Nahmani's sperm and then implanted in a surrogate mother in the United States.[20] In 1992, however — after the eggs had been fertilized,[21] but before the Nahmanis could deliver the embryos to a surrogate — Mr. Nahmani left his wife and moved in with another woman, with whom he has since had two children.[22] Mr. Nahmani subsequently made it known that he no longer wanted a child with his estranged wife, and denied Assuta Hospital, where the embryos were stored, permission to release the frozen embryos.[23] The em-

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and biological mother. *Id.*, (quoting Professor Yosef Schenker, Chief of Gynecology at Hadassah University Hospital and Advisor on IVF to the Ministry of Health).

[20] Gordon, *supra* note 20. Regulation 11 of the Public Health Regulations (In-Vitro Fertilization) of 1987 forbids the implantation of an embryo in a woman who will not be the child's mother. Felix Asher Landau, *Surrogate Motherhood a Knesset Matter,* JERUSALEM POST, July 24, 1995, at 7, *available in* LEXIS, News Library, JPost File [hereinafter Landau, *Surrogate Motherhood*]; *see also* Rhona Schuz, *The Right to Parenthood: Surrogacy and Frozen Embryos, in* INTERNATIONAL SURVEY OF FAMILY LAW 237-56 (Andrew Bainham ed. 1996). Rhona Schuz is a lecturer in law at Bar-Ilan University in Tel Aviv, and in her Article, she comprehensively analyzes the Nahmani case and the issues involved. A compromise was reached in 1991 whereby the Supreme Court, overriding the Ministry of Health's surrogacy ban, held that the couple could solicit a surrogate mother abroad with ova fertilized in Israel. Larry Derfner, *Nachmani vs. Nachmani: The Right to Become a Mother Loses to the Right not to Become a Father,* Baltimore Jewish Times, Apr. 7, 1995, at PG [hereinafter Derfner]. The Court gave the Health Ministry 45 days to show cause as to why the Nahmanis should not be allowed to use a surrogate. Levavi, *supra* note 19. The Health Ministry failed to do so. Judy Siegel, *Single Women Granted Right to Ovum Donations. Ova Ban to be Lifted When Surrogate Mother Bill is Passed,* Feb. 14, 1996, at 3, *available in* LEXIS, News Library, JPost File [hereinafter Siegel, *Single Women*]. The Supreme Court later ruled that the issue of surrogacy should not be governed by regulations issued by the Health Ministry but, rather, by Knesset legislation. Landau, *Surrogate Motherhood* (citing *Zabaro v. Sneh,* H.C. 5087/94). The Knesset (the Israeli parliament) is the highest legislative body in the legal system of the State of Israel. MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES, VOL. 478 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publication Society ed. 1994). A law approved by the Knesset is therefore supreme legislation. *Id. See infra* note 68 (for an overview of the resulting 1996 Surrogacy legislation). The Nahmanis eventually arranged for a surrogate mother in the United States. Uriel Masad, *In vitro Case Leads to Ruling: Parenthood Cannot Be Forced,* JEWISH TELEGRAPHIC AGENCY, Apr. 4, 1995, at PG [hereinafter Masad].

[21] After the Nahmanis won the surrogacy case, Mrs. Nahmani underwent a year of hormonal treatments that yielded 11 ova. Friedman, *supra* note 13. The ova were then surgically extracted from her ovaries by insertion through an abdominal incision of a long hollow needle where the ovaries were detected and aspirated in order to procure immature eggs, which were drawn out through the needle. Davis, *supra* note 10, at 508-9. The eggs were subsequently fertilized by Mr. Nahmani's sperm and frozen until a surrogate mother could be found. Friedman, *supra* note 13.

[22] Gordon, *supra* note 19. At the time of this writing, the Nahmanis were engaged in divorce proceedings. Ian MacKenzie, *Israeli Woman Wins Forced Parenthood Case,* Reuters, Sept. 12, 1996, at 1 [hereafter MacKenzie].

[23] MacKenzie, *supra* note 22.

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bryos represented Mrs. Nahmani's last chance to have a biological child of her own since she was unable to produce more eggs.[24]

In 1993, Mrs. Nahmani filed suit to obtain custody of the embryos in Haifa District Court, which ruled in her favor.[25] In the September 12 ruling, the District Court ordered that the embryos be turned over to Mrs. Nahmani, citing not only her right to them, but also criticizing her husband's "jealousy and callousness, accompanied by cynicism, egotism and no little [male] chauvinism."[26] The Court held that Mr. Nahmani's opposition constituted breach of contract.[27] It found this contract in Mr. Nahmani's initial agreement to have a child with his wife, and, according to the Court, he could not withdraw his agreement once the IVF had been performed.[28] It was therefore ordered that the fertilized eggs be given to Mrs. Nahmani so that she could proceed with the surrogate ET.[29]

Mr. Nahmani immediately appealed to the Supreme Court which, in a 4-1 decision, overturned the District Court's ruling in 1994.[30] The majority anchored its ruling in basic human rights and equality between the sexes.[31] It dealt first with a person's rudimentary right to freedom and privacy, together with "personal autonomy."[32] The Court articulated that the right to parenthood imposed no duty on an unwilling spouse to be a parent or assist the other spouse to be one; there was an equal right not to be a parent.[33] It held that parenthood imposed unique lifetime responsibilities.[34] Based on this rationale, the majority maintained that it would not be proper for the Court to impose parentage on an un-

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24 *Id. See infra* note 124.

25 Friedman, *supra* note 13.

26 *Id*; Schuz, *supra* note 20, at 238.

27 Itim, *Court Delays Ruling in Controversial Embryo Case*, JERUSALEM POST, Feb. 9, 1994, at 14 [hereinafter Itim].

28 Schuz, *supra* note 20, at 238; *see also* Evelyn Gordon, *Fatherhood Cannot Be Forced*, JERUSALEM POST, Mar. 31, 1995, at 20 [hereinafter Gordon, *Fatherhood*].

29 Itim, *supra* note 27; Schuz, *supra* note 20.

30 *Id.*

31 Masad, *supra* note 20. The Court expounded, "The decision to become a parent is recognized, as is the decision to decline to be a parent, both basic human rights. But once these two rights are in conflict with each other, it must not be up to the legal system or the state to decide between them." *Id*; Schuz, *supra* note 20, at 238.

32 Asher Felix Landau, *A Frozen Attempt At Motherhood: A Father's Right To Say 'No,'* JERUSALEM POST, Apr. 17, 1995, at 7 [hereinafter Landau].

33 *Id.*

34 Landau, *supra* note 32.

willing party, as it would ultimately infringe upon his right to "personal autonomy."[35]

The Court then deliberated over the maxim of equality in the present context.[36] It articulated that, under certain circumstances, a woman is permitted to have an abortion.[37] She does not require her husband's permission and could reject his opposition to the abortion.[38] In that connection, the majority said, if motherhood could not be forced on a woman, analogously, fatherhood could not be forced on a man.[39] "Just as it is wrong to impose pregnancy upon a woman when she objects to it, or to forbid her to have an abortion, it is also wrong to impose parenthood upon a man against his will," argued the Court.[40] It would, therefore, be inappropriate for the Court to impede on Mr. Nahmani's basic right to choose not to be a father.[41] Thus the Court determined that it should not thrust parenthood on Mr. Nahmani, regardless of his initial agreement to be a father.[42] The justices decided that if natural

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[35] Landau, *supra* note 32. The Court buttressed this conclusion by citing several U.S. cases and legal writings:

> Personal autonomy has been clearly recognized for some time in the [United States] as strongly linked to privacy; in Doe v. Bolton (1973) Douglas J. said: "*The right to privacy* means freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, education, and upbringing of children."

C.A. 5587/93, Nahmani v. Nahmani, 12 P.D. 499, 528 (emphasis in original) (quoting H. FENWICH, CIVIL LIBERTIES 295 (1993)).

[36] Landau, *supra* note 32; Schuz, *supra* note 20, at 247-48.

[37] Landau, *supra* note 32; Schuz, *supra* note 20, at 238. In Israel, abortion is legal if: (i) the woman is under 17 or over 40; (ii) the pregnancy resulted from rape, incest, or occurred out-of-wedlock; (iii) the fetus is likely to be physically or mentally defective; or (iv) continuing the pregnancy is likely to jeopardize the woman's life, or compromise her physically or emotionally. Schuz, *supra* note 20, at 246.

[38] Schuz, *supra* note 20, at 246.

[39] Schuz, *supra* note 20, at 246. The Court further stated that forced fatherhood is against the "public interest" (defined as "the values, interests, and central and vital principles which a given society wishes to uphold, preserve and develop, at a given time") and judicial policy. *supra.* It cited C. Shalev, *A Man's . . . Right to be Equal: The Abortion Issue*, 18 IS. L. REV. 381 (1983) to support this view. *Nahmani*, C.A. 5587/93 at 501.

[40] Masad, *supra* note 20; Schuz, *supra* note 20, at 245.

[41] Landau, *supra* note 32; Schuz, *supra* note 20, at 245.

[42] Landau, *supra* note 32. The Court cited § 10 of the Adoption of Children Law of 1981, which permitted a parent to withdraw his consent to the adoption of a child given before the child is born, to reinforce this view. *Id.* Section 10 states:

> On the application of a parent, a court may invalidate his consent given before the birth of the adoptee or obtained by improper means, and it may, for special reasons which shall be recorded, permit a parent to withdraw his consent so long as the adoption order has not been made.

Adoption of Children Law, 1981, 35 L.S.I. 360 (1980-81).

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parenthood could not be forced upon a woman, neither could parenthood be imposed on a man by technological means.[43]

Legal approaches taken in Canada, Australia, England and the United States guided the Court in its decision.[44] It noted that the majority of these countries require mutual consent by both parties at every stage of the IVF process.[45]

The Court then examined sections 8 (b) (3) and 14 (b) of the Public Health Regulations (IVF) of 1987.[46] In Israel, the IVF issue is dealt with only in health regulations by the Ministry of Health, rather than in Knesset law.[47] The Supreme Court held that the regulations are only intended as a directive for the health authorities and do not define personal rights and duties in the highly sensitive and complicated context of artificial fertilization.[48]

Contract law was also contemplated by the Court in assessing the *Nahmani* dispute.[49] Consideration was given to the framework of the "agreement" between the Nahmanis and Mr. Nahmani's right to renege on their agreement under their estranged circumstances.[50] The Court then addressed whether the Nahmanis' agree-

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43 Landau, *supra* note 32; Schuz, *supra* note 20, at 245-60.

44 Landau, *supra* note 32; Schuz, *supra* note 20, at 245-60. *See* Human Fertilization and Embryology Act, 1990 (Schedule 3, § 4); *see also* Stern, *The Regulation of Assisted Conception in England*, 1 EUR. HUMAN REPROD. J. HEALTH LAW (1994); Dickens, *The Ontario Law Reform Commission Project on Human Artificial Reproduction*, *in* Law Reform and Human Reprod. 47, 69 (1992).

45 Landau, *supra* note 32; Schuz, *supra* note 20, at 245-60.

46 Landau, *supra* note 32; Schuz, *supra* note 20, at 245-60.

47 Gordon, *Fatherhood*, *supra* note 28. The regulations state, "If a woman . . . is divorced, and the egg was fertilized with her husband's sperm before the divorce — the egg shall be implanted only with the consent of her former husband." Gordon, *Fatherhood*, *supra* note 28. *See* Israel: The Public Health (invitro Fertilization) Regulations of 1987 [Israel IVF Regulation] *reprinted in* 38 INT'L DIGEST OF HEALTH LEGIS. 779 (1987). The Court concluded that while the Nahmanis were never actually divorced, the principles were entirely related. Gordon, *Fatherhood*, *supra* note 28. The Haifa District Court cited the Public Health Regulations of 1987 in support of their ruling for Mrs. Nahmani, interpreting these rules as merely regulations and not legislation. Landau, *supra* note 32.

48 Landau, *supra* note 32; Schuz, *supra* note 20, at 239. *See also* Landau, *Surrogate Motherhood*, *supra* note 20.

49 Landau, *supra* note 32; Schuz, *supra* note 20, at 249-51.

50 Schuz, *supra* note 20, at 249-51. The Nahmani Court acknowledged that the parties had an original intent for the birth process to be completed. Schuz, *supra* note 20, at 249-51. However, the Court asserted that this was no ordinary contract, but a contract in the area of "human relationships of love, friendship and social intercourse." Schuz, *supra* note 20, at 249-51. "The area of human . . . relations in the family, and the human relationships of love, of friendship and of social intercourse 'simply can not [sic] be the object of a legally binding agreement" Nahmani, C.A. 5587/93 at 508-09. The majority considered the Nahmani's agreement in the context of an agreement to marry and held that although

ment was legally "frustrated"[51] by some outside influence beyond the parties' control.[52] Mrs. Nahmani argued that the agreement

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"breach-of-promise" actions were denounced in Israel, their abolishment should be a matter for the legislature. Schuz, *supra* note 20, at 249-51. By Israeli law, a contract cannot be enforced if it involves "forcing someone to do, or accept, personal work or service." Schuz, *supra* note 20, at 249-51. § 3(2) of Contracts (Remedies for Breach of Contract) Law, 1970 states in part:

> The injured party is entitled to the enforcement of the contract unless one of the following obtains: . . .
> (2) the enforcement of the contract consists in compelling the doing or acceptance of personal work or a personal service.

25 L.S.I. II 11, (1970-71). Assuming that the Court interpreted the language of § 2 as pertaining to Mr. Nahmani's potential obligation to pay child support, *see* § 3 of the Family Amendment (Maintenance) Law, 1959, which states:

> (a) A person is liable for the maintenance of his minor children and the minor children of his spouse in accordance with the provisions of the personal law applying to him, and the provisions of this Law shall not apply to that maintenance.
> (b) A person who is not liable for the maintenance of his minor children of his spouse according to the provisions of the personal law applying to him, or to whom a personal law does not apply, is liable for the maintenance of his minor children and the minor children of his wife, and the provisions of the Law shall apply to that maintenance.

13 L.S.I. 73, (1958-59). According to Section One, a minor is a person who has not yet reached the age of eighteen years old. *Id. But see infra* note 79 (which provides an exemption to this rule). *See also infra* note 115.

[51] Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. Section 18 of the Contracts (Remedies for Breach of Contract) Law, 1970 considers "[e]xemption by reason of constraint or frustration of contract." It states in part:

> (a) Where the breach of contract is the result of circumstances which at the time of making the contract the person in breach did not know or foresee and need not have known of or foreseen, and which he could not have avoided, and performance of the contract under these circumstances is impossible or fundamentally different from what was agreed between the parties, the breach shall not give cause for enforcement of the contract or for compensation . . . .

Contracts (Remedies for Breach of Contract) Law, 1970, 25 L.S.I. 11, (1970-71).

[52] Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. The Court concluded that since the agreement was derived from intimate emotions, and the Nahmanis' relationship had been fundamentally altered, the agreement was therefore impossible to realize. Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. In lieu of these circumstances, the Court found that Mr. Nahmani could not be held to his original consent to the IVF process being completed. Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. Under § 3(1) of Contracts (Remedies for Breach of Contract) Law, 1970, the Court held that Mrs. Nahmani was not entitled to enforcement of the agreement since, under the circumstances surrounding the case, it was "impossible of performance." Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. § 3(1) established enforcement as the principal remedy for breach of contract. Nili Grabelsky-Cohen, *The Nature of the Undertaking to Effect a Transaction*, *in* 4 TEL AVIV UNIV. STUDIES IN LAW 33, 50 (Yoram Schachar et al. eds., 1980). It states in part: "The injured party is entitled to the enforcement of the contract unless one of the following obtains: . . . (1) the contract is impossible of performance." Contracts (Remedies for Breach of Contract) Law, 1970, 25 L.S.I. 11, (1970-71). Once this is estab-

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fell under sections 25 and 26 of the Contracts (General Part) Law of 1973[53] and that this legislation could be used to find in her husband's consent an intent for culmination of the IVF process, which the Court rejected.[54] Mrs. Nahmani also argued that her husband was estopped from reneging on the agreement.[55] It could not be said, the Court maintained, that his consent encapsulated the possibility of their breaking up, or that Mrs. Nahmani had agreed to the process on the basis of Mr. Nahmani's promise to see it completed even if they became estranged.[56]

> In all cases where an equity created by estoppel is raised, the party raising the equity has acted or abstained from acting on an assumption or expectation as to the legal relationship between

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lished the question of who is responsible for inducing the situation is irrelevant, the Court contended. Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251.

[53] Section 25 states:

> (a) A contract shall be interpreted in accordance with the intention of the parties as appearing therefrom or, in so far as it does not so appear, as appearing from the circumstances.
> (b) Where a contract is capable of different interpretations, an interpretation preserving its validity is preferable to an interpretation according to which it is void.
> (c) Expressions and stipulations in a contract which are customarily used in contracts of that kind shall be interpreted in accordance with the meanings assigned to them in such contracts . . . .

Contracts (General Part) Law, 1973, 27 L.S.I. 117, (1972-73). § 26 states:

> Particulars not determined by or under the contract shall be in accordance with the practice obtaining between the parties or, in the absence of such a practice, in accordance with the practice customary in contracts of that kind, and such particulars shall also be regarded as having been agreed.

27 L.S.I. 117, (1972-73).

[54] Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251.

[55] Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. The Contracts (Remedies for Breach of Contract) Law, 1970 is silent on the remedy of estoppel. *See generally* 25 L.S.I. 11, (1970-71).

[56] Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 251. The Court examined the following sources: "Equitable estoppel is a rule of fairness by which the courts protect the reliance and expectations of innocent parties from defeat by those who have induced those reliance and expectations." Nahmani, C.A. 5587/93 at 277 (quoting M.P. Thompson, *From Representation to Expectation: Estoppel as a Cause of Action* 42 CAMBRIDGE L.J. 257, 277 (1983)).

All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption of either of fact or of law — whether due to misrepresentation or mistake, makes no difference — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands." *Id.* at 527 (quoting Amalgamated Property v.Texas Bank, Q.B. 84, 122 (C.A.) (1982)). It ultimately rejected these authorities and concurred with the legal analysis. *See* text accompanying note 57 *infra*.

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> himself and the party who induced him to adopt the assumption or expectation . . . Though the party raising the estoppel may be under no mistake to the facts, he assumes that a particular legal relationship exists or expects that a particular legal relationship will exist between himself and the party who induced the assumption or expectation. The assumption or expectation may involve an error of law. Thus, a promissory or a proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration.[57]

Lastly, the Court examined the issue of whether the "point of no return" in a spouse's agreement to a surrogate pregnancy is at the time of in vitro fertilization or only after the embryos are implanted in the surrogate's womb.[58] The majority concluded that, until and including the stage of implementation, a couple's joint and ongoing agreement "is called for from every possible legal standpoint."[59] Based on the preceding analysis, the Court concluded that, despite Mrs. Nahmani's plight, granting her the relief she sought would ultimately be unlawful and an offense against Mr. Nahmani's basic rights as an individual.[60] The Court said:

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57 Nahmani, C.A. *5587/93,* at 527 (alteration in original) (quoting Gardner, *Equitable Estoppel, Unconscionability and the Enforcement of Promises*, 104 L.Q. REV. 362, 420-21 (1988).)

58 Itim, *supra* note 27; *see* Schuz, *supra* note 20, at 255.

59 Itim, *supra* note 27; *see* Schuz, *supra* note 20, at 255.

60 Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 238. Justices Aharon Barak, Dov Levin and Yitzhak Zamir concurred with Justice Strassberg-Cohen's holding. Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 238. Justice Zeva Tal, the lone minority and only observant Jew on the panel, dissented, quoting the Torah and Talmud on the sanctity of motherhood. Derfner, *supra* note 20; *see* Schuz, *supra* note 20, at 246-47. The Justice noted that a man's basic right must submit to the freedom, dignity, privacy autonomy of others. Landau, *supra* note 32. He further stated:

> A man, like Lot, who unknowingly makes a woman pregnant, or a man deceived that his partner was using preventive measures, has good reason not to be saddled with paternity. And yet, her honor, autonomy and privacy are preferred to his. All the more so should this be the case where a man willingly agreed to fatherhood, but later changed his mind. In this case too there was active intervention in Ruti's body which brought her to her present pass. Her same basic rights, as those enjoyed by Dani, had been infringed. Why should his rights be preferred to hers? Who has weighed fatherhood and motherhood in scales? It was he who changed his mind and caused this serious infringement of her rights. There is no legal norm to guide the court in this dilemma. The real question was whether to impose fatherhood on the man or childlessness on the woman. Forced childlessness involved depriving a woman of her basic and most fundamental right. Fatherhood forced on the man was dwarfed against his deprivation. Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 238.

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> We are conscious of and sensitive to Ruti Nachmani's part in this, her involvement in the IVF procedure which was greater – physically and emotionally – then Dani's, and her understandable expectations that the procedure would end with her achieving her long sought-after goal. But the procedure is only the beginning of a road which the couple would have to travel together, making joint decisions. [Ruling against Dani Nachmani] would mean forcing someone who no longer wants to travel that road to do so for the rest of his life."[61]

On March 30, 1995, the Supreme Court granted judgment for Mr. Nahmani.[62]

IV. *Nahmani v. Nahmani* 1996: Breaking New Ground

Immediately after the 1994 Supreme Court case was decided, the Court granted Mrs. Nahmani a second hearing before an expanded panel of justices.[63] Never before had a subsequent hearing been granted in the Supreme Court on a case originally heard by more than three judges.[64] On September 12, 1996, a board of eleven justices overturned the 1993 adjudication in a 7-4 ruling.[65] The seven justices unanimously agreed that the right to be a parent prevails over the right not to be a parent.[66]

On the issue of expectations, the Justice wrote:

> The wife underwent a difficult, invasive and painful procedure on her body to produce ova, based on her husband's agreement to fertilize them. Upon this fertilization, the wife was denied any alternative way of fertilizing her ova, such as with the sperm of a 'donor' . . . . By the husband's opposition to his wife's wish, he seeks to extinguish her last ember of hope to become a mother, while he has built a new home for himself and become a father. If there is a solution that also grants the wife her wish – this would seem to me more just.

Derfner, *supra* note 20; *see* Schuz, *supra* note 20, at 252-53.

61 Derfner, *supra* note 20 (alteration in original); *see* Schuz, *supra* note 20, at 249-251.

62 Landau, *supra* note 32; *see* Schuz, *supra* note 20, at 238.

63 Gordon, *supra* note 19; *see* Schuz, *supra* note 20, at 239. The now-retired Supreme Court President, Meir Shamgar, approved the expansion after Mrs. Nahmani appealed for a broader judicial review of the *Nahmani* case. Friedman, *supra* note 13, at 39. In the Supreme Court, sitting as a Court of Civil Appeals, President Justice Aharon Barak and Justices Gavriel Bach, Eliezer Goldberg, Theodore Orr, Eliyahu Mazza, Ya'acov Kedmi, Yitzhak Zamir, Tova Strassberg-Cohen, Dalia Dorner, Zevi Tal, and Ya'acov Tirkel. Landau, *Nahmani Case: Final Say Is With The Mother*, Jerusalem Post, Oct.14, 1996, at 7, *available in* LEXIS, News Library, JPost File [hereinafter Landau, *Nahmani*].

64 Gordon, *supra* note 19.

65 Greenberg, *supra* note 2. The majority consisted of Justices Tal, Dorner, Goldberg, Kedmi, Tirkel, Bach and Mazza. Landau, *Nahmani*, *supra* note 63. Justices Strassberg-Cohen, Orr, Zamir and Barak dissented. *Id.*

66 Gordon, *supra* note 19.

A. *The* Nahmani *Majority*

The majority began its vast opinion by noting that the dispute before them was a case of first impression since it did not recognize any statutory provisions that would govern the issue presented.[67] The Court came to this conclusion after it considered the applicability of existing laws and statutes, including the Surrogacy Agreements Law of 1996,[68] the Contracts (General Part) Law of 1973,[69]

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[67] Asher Felix Landau, *A Father May Not Say 'No.'* Jerusalem Post, International Edition, Oct. 7, 1996, at 7, *available in* LEXIS, News Library, JPost File [hereinafter Landau, *Father*]; *see* Schuz, *supra* note 20, at 239.

[68] Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 242. In March 1996, the Israeli parliament ratified a benchmark bill that legalized surrogacy arrangements, making Israel the first country to have national legislation on controlling the practice of surrogacy. Todd M. Krim, *Comparative Health Law: Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother,* 5 ANN. HEALTH L. 193, 219 (1996) (citing Judy Siegel, *Health Ministry Tackles TB,* JERUSALEM POST, Apr. 7, 1996, at 5). The legislation necessitates that the surrogate and the couple "ordering" the child to sign a contractual agreement. Krim, *supra* note 68; *see* Schuz, *supra* note 20, at 240-42. Health Minister Ephraim Sneh appointed a seven-member cabinet (composed of two gynecologists/obstetricians, a clinical psychologist, a public representative, a social worker, an internal medicine specialist, and a clergyman) that is authorized to approve these contracts. Krim, *supra* note 68; *see* Schuz, *supra* note 20, at 241. The cabinet will be responsible for approving surrogacy agreements between a commissioning couple and a surrogate if they are "certain the deal was reached freely by both sides, and there is no danger to the health of the mother or to the health and the rights of the baby." Krim, *supra* note 68 (quoting Judy Siegel, *Health Ministry Tackles TB,* JERUSALEM POST, Apr. 7, 1996, at 5); *see* Schuz, *supra* note 20, at 241. The statute directs that the commissioning father provide the sperm, and that the baby be conceived by IVF. Krim, *supra* note 68 (citing Judy Siegel, *Surrogate Mother Bill Must Soon be Law,* JERUSALEM POST, Dec. 19, 1995, at 3); *see* Schuz, *supra* note 20, at 241. As for the surrogate, the legislation generally orders that she be an unmarried Israeli resident. Krim, *supra* note 68; *see* Schuz, *supra* note 20, at 241 The surrogate is entitled to monetary compensation for her suffering and loss of time and income, as well as legal costs and insurance. Krim, *supra* note 68; *see* Schuz, *supra* note 20, at 242-43. However, any payment beyond that point is strictly prohibited. Krim, *supra* note 68; *see* Schuz, *supra* note 20, at 242-43 The Surrogate is also entitled to change her mind and keep the baby – subject to court approval —, or to abort the fetus is she so decides – in accordance with existing abortion laws). Krim, *supra* note 68; *see* Schuz, *supra* note 20, at 243-44. "[T]he Court will not allow this unless, in light of the Welfare Officer's report, it finds that there has been a change in the circumstances justifying her change of mind and that this would not harm the welfare of the child." Schuz, *supra* note 20, at 249. Consequently, the majority found that the Surrogacy Agreements Law of 1996 was not applicable to the immediate case because it primarily covered the relationship between the IVF parents and the surrogate mother, and was not meant to be applied toward the relationship of the parents themselves. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 242. *But see* Friedman, *supra* note 13 ("Israel's surrogacy law . . . requires both parents to appear before a special panel chosen by the Health Ministry and express their agreement to the embryos being implanted in a surrogate womb"); *see* Schuz, *supra* note 20, at 240-42.

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and the Foundations of Law Act of 1980.[70] The Court ultimately found that since there was "no normative framework to cover the present dispute, which fell entirely in the emotional, moral, social and philosophical areas . . . [t]he issue, nevertheless, was justifiable, and the court was obliged to decide it. Each judge, therefore, would have to rule on the basis of his own principles and feelings."[71]

> When a case comes before a court for decision, it may be that nothing can be drawn from the sources heretofore mentioned; there may be no statute, no judicial precedent, no professional opinion, no custom bearing on the question involved, and yet

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69 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249. Section One of the Contracts (General Part) Law, 1793 states generally: "A contract is made by way of offer and acceptance in accordance with the provisions of this chapter." 27 L.S.I. 117 (1972-73). Section Two further states: "[a] person's proposal to another person constitutes an offer if it attests to the offeror's resolve to enter into a contract with the offeree and is sufficiently definite to enable the contract to be concluded by acceptance of the offer . . . ." Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249. On the form and contents of the contract, Section Twenty-three of the statute states: "A contract may be made orally, in writing or in some other form unless a particular form is a condition of its validity by virtue of Law or agreement between the parties." Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249. The Court maintained that there was no formal agreement between the Nahmanis and therefore, the general law of contracts did not cover an agreement dealing with procreation. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249.

70 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249. The Foundations of Law Act states in part: "[w]here a court finds a legal issue requiring decision cannot be resolved by reference to legislation or judicial precedent, or by means of analogy, it shall reach its decision in the light of the principles of freedom, justice, equity, and peace of the Jewish heritage (*moreshet Yisr'el*). Menachem Elon, 4 Jewish Law: History, Sources, Principles 1828 (Bernard Auerbach & Melvin J. Sykes trans., The Jewish Publication Society ed. 1994). The principles of Jewish Heritage represents a basic directive for the Israeli legal system. *Id.* at 1832. A court is required to adjudicate a case in light of the standards of the Jewish heritage when it is faced with "a legal issue requiring decision," as the Foundation of Law Act provides. *Id.* at 1835. The Supreme Court has construed the language — "a legal issue requiring decision" – to be a reference only to situations where the failure of the existing legal sources to provide the "solution to a particular legal issue" produces a lacuna; the court ruled that the legislation is not applicable "where there is no lacuna but rather an issue involving interpretation of a subsisting legal provision, a part of established law that is susceptible of differing interpretations, and the court is called upon to determine which interpretation is correct." *Id.* at 1835-36 (quoting *Hendeles v. Bank Kupat Am*, 35 (ii) P.D. 785, 799 (1981). The *Nahmani* Court found that there was no recourse under the "Jewish Heritage" section of the Foundations of Law statute since that particular law related to a lacuna in the law, while in the present case, there was no lacuna. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246-7. Rather, the Court said this was a dispute that arose from modern scientific and genetic developments that presented a new predicament. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246-7.

71 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 251-2.

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> the court must decide the case somehow; the decision of cases is what courts are for . . . And I do not know of any system of law where a judge is held to be justified in refusing to pass upon a controversy because there is no person or book or custom to tell him how to decide it. He must find himself; he must determine what the law ought to be; he must have recourse to the principles of morality.[72]

Believing that the law is subjective depending on the manner in which it is applied, the Court asserted that the concept of justice should be exercised in this case because it is "one of the fundamental values that dominate our legal system."[73] It stressed that the justice applied by the Court should be "human justice, based not only on reason but also on human considerations coming from the heart."[74]

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[72] *F.H. (c) 2401/95, C.A. 5587/93, Nahmani v. Nahmani*, 1, 34-35 (Sept. 12, 1996) (unpublished case, on file with author) (quoting J.C. GRAY, SOURCES OF THE NATURE AND THE LAW 302 (1921)). "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." *Id.* at 64.

[73] Evelyn Gordon, *Supreme Court Reverses Itself, Rules Right to Be a Parent Outweighs Right not to be One*, JERUSALEM POST, Sept. 13, 1996, at 3, *available in* LEXIS, News Library, JPost File [hereinafter Gordon, *Supreme Court*]; *see* Schuz, *supra* note 20, at 251-2. "Justice is not some 'thing' which can be captured in a formula once and for all. It is a process, a complex and shifting balance between many factors, including equality." Gordon, *Supreme Court, supra.* As Friedrich observed, "[j]ustice is never given, it is always a task to be achieved." *Nahmani*, F.H. (c) 2401/95 at 29 (quoting DIAS, JURISPRUDENCE 66 (1985)).

> Lawyers . . . draw a clear and absolute line between law and morals, or what is nearly the same thing, between law and justice. Judges and advocates are, to their minds, not concerned with the morality or justice of the law but only with the interpretation of it and its enforcement . . . This is a great mistake. It overlooks the reason why people obey the law.

Id. at 104-5 (citation omitted).

[74] Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 251-2.

> Ever since men have begun to reflect upon their relations with each other and upon the vicissitudes of the human lot, they have been preoccupied with the meaning of justice . . . I choose at random a miscellany of the adjectives which, in my reading I have found attached to different kinds of justice — distributive, synallgamatic, natural positive, universal, particular, written, unwritten, political, social, economic, commutative, recognitive, jurisdictional, sub-jurisdictional, constitutional, administrative, tributary, providential, educative, cooperative, national, international, parental. A very little ingenuity would extend the vocabulary indefinitely. There seems to be no end to this classification and subclassification and its instructiveness is not always proportionate to its subtlety. There is a danger of the cadaver being so minutely dissected that little of its anatomy is left visible to normal.

Nahmani, F.H. (c) 2401/95 at 27 (quoting C.K. ALLEN, ASPECTS OF JUSTICE 3 (1958)).

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> In the end, however, political theory can make no contribution to how we govern ourselves *except by struggling* against all the impulses that drag us back into our own culture, *toward generality* and some reflective basis for deciding which of our traditional distinctions and discriminations are genuine and which spurious, which contribute to the flourishing of the ideals we want, after reflection, to embrace, and which serve only to protect us from the personal costs of that demanding process. We cannot leave justice to convention and anecdote.[75]

The Court relied on section 1 of the Basic Law of 1992: The Dignity and Freedom of Man[76] and section 15 of the Basic Law of 1984: Judicature[77] which defines the powers of the Supreme Court sitting as a High Court of Justice to support its conclusion.[78] The *Nahmani* Court also cited section 9 of the Family Law Amendment (Maintenance) Law of 1959,[79] which empowers the Court to relieve the obligation of child support based on certain grounds, to justify the Court's use of justice as a measuring stick.[80] It further cited section 30 of the Contracts (General Part) Law of 1973, which, according to the majority, introduced the concept of justice.[81]

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75 *Nahmani,* F.H. (c) 2401/95 at 27 (alteration in original) (quoting RONALD DWORKIN, MATTER OF PRINCIPLE 219 (1986)).

76 Section One stipulates, "The purpose of this Basic Law is to protect human dignity and freedom, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state." BASIC LAW: HUMAN DIGNITY AND FREEDOM (1992), ISRAEL'S WRITTEN CONSTITUTION 12 (A.G. Publications Ltd. trans., 1993).

77 Section 15 states in part:

(a) The seat of the Supreme Court is Jerusalem.

(b) The Supreme Court shall hear appeals against judgments and other decisions of the District Courts.

(c) The Supreme Court shall sit also as a High Court of justice. When so sitting, it shall hear matters in which it deems necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court (beit mishpat or beit din)

. . .

(e) Other powers of the Supreme Court shall be prescribed by Law.

Basic Law: Judicature, *1984, 38 L.S.I. 101, (1983-84).*

78 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 239.

79 Section Nine of the Family Law Amendment (Maintenance) Law of 1959 states, "The Court may, if it thinks it just and equitable so to do, exempt a person from the whole or part of the duty of maintenance by reason of shameful behavior of the person entitled to maintenance toward that person." 13 L.S.I. 73, (1958-59).

80 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 243-4.

81 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249. The doctrine of public policy in Israeli law is rooted in Section Thirty of the Contracts (General Part) Law-1973, which sets forth, *inter alia*, that a contract contrary to public policy is void. Gabriela Shalev, *Standard Contracts Under Israeli Law, in* 10 TEL AVIV STUDIES IN LAW 229, 231 (Daniel Friedman et al. eds., 1991). Section 30 states specifically, "A contract the making,

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With no legal criteria but the notion of justice to guide the Court in resolving the IVF issue at hand, the Majority fashioned a three-prong test to scrutinize (i) the conflicting interests of the parties; (ii) the parties' legitimate expectations; and (iii) the appropriate public policy to be applied.[82]

In assessing the first prong, the *Nahmani* Court found that conflicting interests were based on the right to be a parent versus the right not to be a parent.[83] Forced to rule between these two rights, the Court had to decide which prevailed over the other.[84] The Majority therefore advanced three different courses of action it could take to resolve this conflict.[85] The first action required a uniform rejection of parenthood under the existing circumstances;[86] the second involved an assiduous partiality for parenthood;[87] and the third option, which the Court eventually relied on, struck a balance between the parties' conflicting rights and the fundamental circumstances surrounding these rights.[88]

The *Nahmani* Court contended that parenthood is a person's most basic goal.[89] It postulated that as a general rule, the positive right of parentage prevailed over the negative right of refusal.[90] The Court held that "[i]n balancing [the Nahmanis'] conflicting in-

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contents or object of which is or are illegal, immoral or contrary to public policy is void. *Contract Law,* (General Part) 1973, 27 L.S.I. 117 (1972-73).

82 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244.

83 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244.

84 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244.

85 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244. This applies at the stage prior to implantation. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244.

86 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244. This view was adopted by the majority in the 1994 *Nahmani* case. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244.

87 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244.

88 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 244. The Court said, "In this difficult judgment, [we]. . .choose life." Nathan Lewin, *A Jewish Bias Toward Life,* JERUSALEM POST, International Edition, Sept. 28, 1996 [hereinafter Lewin].

89 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 245. "The United States Supreme Court in *Skinner v. Oklahoma* recognized [that] the right to procreate is one of a citizen's "basic civil rights." *Nahmani,* F.H. (c) 2401/95 at 6 (quoting *Davis,* 842 S.W.2d at 1535)(citation omitted).

90 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 246-47. The Court held that the right to parenthood warranted an incomparably higher value than the right of refusing parentage and therefore the emotional, moral and economic obligations which parenthood imposed were escapable. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246-47. The Court viewed the fertilization of an ovum as a "fait accompli" during which a "new entity" is created. Friedman, *supra* note 13, at 39; *see* Schuz, *supra* note 20, at 249. The Court articulated that "[O]nce the IVF is accomplished, the positive right to be

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terests, we must remember that despite the symmetrical language – 'to be a parent' and 'not to be a parent' – these interests are not equal . . . The interest in parenthood is a basic and existential value, both for the individual and for society as a whole. In contrast, there is no intrinsic value to the absence of parenthood."[91] The Majority then resorted to the Torah and the writings of religious sages which regard deprivation of parenthood as loss of a person's soul.[92] "It was true an unwilling parent would have responsibilities but, onerous as they could be, they could not be compared with the loss of his soul," the Justices articulated.[93] Antithetically, the *Nahmani* Court regarded the interests of not being a parent a right of unequal weight.[94] It distinguished this right as a claim grounded on privacy and freedom to make intimate decisions, which is invalidated by the axiomatic right to be a parent.[95]

The justices further explored the different categories of rights recognized, including basic versus fundamental, general versus specific, absolute versus relative, and narrow derivative rights.[96] In this case, the Court characterized the rights of Mrs. Nahmani in the context of specific versus general.[97] Mr. Nahmani sought to impose on what appeared to be a specific limitation of Mrs. Nahmani's right to be a parent by restricting her to the use of embryos fertilized from his semen.[98] However, the majority contended, the limitation was in fact general since she had no practical alternative to

a parent generally overpowers the negative right not to be [one]." Friedman, *supra* note 13, at 39; *see* Schuz, *supra* note 20, at 247.

91 Gordon, *Supreme Court*, *supra* note 73; *see* Schuz, *supra* note 20, at 246-47.

92 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 246-47.

93 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 246-47.

94 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 246-47. "Allowing women the exclusive right to decide whether the child should be born may discriminate against men, but at some point[,] the law must recognize that there are differences between men and women . . . and must reflect those differences." *Nahmani*, F.H. (C) 2401/95 at 47 (quoting R.A. Gilbert, *Abortion: The Father's Rights,* 24 CIN. L.R. 443 (1973)).

95 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 245. This notion overturned the previous Supreme Court ruling which sanctioned the right to refuse parentage based on an individual's personal autonomy. *See supra* text accompanying notes 32-43.

96 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 246-47.

Claims, Liberties, Powers and Immunities are subsumed under the term 'rights' in ordinary speech, but for the sake of clarity and precision it is essential to appreciate that this word has undergone four shifts in meaning. They connote four different ideas concerning the activity, or potential activity, of one person with reference to another. *Nahmani*, F.H. (c) 2401/95 at 6-7 (quoting DIAS, JURISPRUDENCE 23 (1985)).

97 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 246-47.

98 Landau, *Father*, *supra* note 67; *see* Schuz, *supra* note 20, at 247.

create another child[99] and adoption was also not a viable alternative since it was not available to her.[100] On the contrary, since Mr. Nahmani could still retain his right to be or not to be a parent, the Justices concluded that the limitation being imposed on his right was specific, relating only to parentage in the particular framework of this case.[101]

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered . . . the rule does not contemplate the creation of an automatic veto . . ."[102]

Hence, the *Nahmani* Court felt that the "scales of justice" leaned in Mrs. Nahmani's favor.[103]

On the rights of the IVF parent as discerned in the context of abortion rights, the Court disagreed with the prior *Nahmani* ruling.[104] The Justices asserted, "[a]s a man may not demand the termination of . . . pregnancy even if based on fraud . . . so is he precluded from demanding the cessation of the fertilization and implantation process. Both cases involve intervention in a wo-

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99 *See supra* p. 9-10.

100 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 247. The alternative of adoption is not an option for Mrs. Nahmani since the Israeli Health regulations prohibit single parents to adopt. Section Three of the Adoption of Children Law stipulates:

> An adoption shall only be made by a man and his wife jointly: Provided that a court may grant an adoption order to a single mother —
>
> (1) if his spouse is a parent of the adoptee or has previously adopted him;
>
> (2) if the parents of the adoptee are dead and the adopter is related to the adoptee and unmarried.

35 L.S.I. 360, (1980-81).

101 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 247.

102 *Nahmani*, F.H. (C) 2401/95 at 63 (citation omitted). "If the right to reproduce and the right to avoid reproduction are in conflict, favoring reproduction is not unreasonable when there is no alternative way for one party to reproduce." *Id.* at 69 (quoting J.A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L. J. 407, 420 (1990)).

103 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 247.

104 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 246. *See supra* pp.13-15. The Court expressed no opinion on the question of when the embryo became a legal person or what its rights were but, based on its sense of values, the Court was of the opinion that the very existence of potential life tilted the balance in Mrs. Nahmani's favor. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 249.

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man's body, desecrating her dignity and modesty, which the law will not recognize."[105]

> [T]here is no legal, ethical or logical reason why an in vitro fertilization should give rise to additional rights on the part of the husband. From a propositional standpoint[,] it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization and fertilization of the ovum is the inception of the reproductive process. Biological life exists from that moment forward . . . To deny a husband rights while an embryo develops in the womb and grant a right to destroy [it] while it is in a hospital freezer is to favor situs over substance.[106]

The Court relied on additional U.S. sources to bolster its abortion analogy:

> There are several forms which a disagreement between progenitors could take. The woman may want the embryo to be brought to term, and the man may want the embryo terminated. In that case, it would seem appropriate for the woman to be allowed to gestate the embryo. The Supreme Court's abortion and contraception decisions have indicated that the right of procreation is the right of an individual which does not require the agreement of the individual's partner. In particular, the woman has been held to have a right to abort without the husband's consent and the right not to abort over the wish of the husband that she abort.[107]

The Court continued:

> But what if the positions were reversed and the woman wished to terminate the embryo and her male partner wished to have it brought to term? When an embryo conceived naturally is developing within a woman during the first two trimesters, it is clear

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[105] Landau, *Nahmani*, *supra* note 63; *see* Schuz, *supra* note 20, at 247-48. The Court cited a U.S. Supreme Court case to support its view:

> We recognize . . . that when a woman, with the approval of her physician, but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

Nahmani, F.H. (C) 2401/95 at 47-48 (alteration in original)(quoting Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

[106] *Id.* at 64.

[107] *Id.* at 50 (quoting L.B. Andrew, *The Legal Status of The Embryo*, 32 LOY. L. REV. 357 (1986)).

> that the woman's decision whether or not to terminate it takes precedence over the desires of the man who provided the sperm . . . it is at least arguable that the man's wishes should be honored when the embryo's continued existence need not be balanced against the physical and psychological needs of the woman carrying it. The man clearly would not have the right to force the female progenitor to gestate the embryo, but there seems to be no reason not to give him custody of the embryo for gestation in a surrogate mother.[108]

Furthermore, the Court did not deem the rights of a man and a woman equal in this situation because a woman had complete rights over her own body and she alone could decide whether to continue or terminate pregnancy.[109]

Propagating the inquiry on opposing rights, the Court opined that while imposing a duty of parenthood on an unwilling individual was a substantive breach of his freedom, it concluded there was no such duty being forced on Mr. Nahmani in this case.[110] The majority reached this conclusion by making a "substantive and basic distinction" between forcing Mr. Nahmani to surrender his sperm to the IVF process in pursuit of parenthood (substantive) and denying him the right to impose a barrier on Mrs. Nahmani's desire to have a child (basic).[111] In the majority's view, the only right Mr. Nahmani lost was his opportunity to restrain Mrs. Nahmani from using the contested embryos after he already consented to the IVF process.[112] By leaving his marriage, he abandoned his right to prevent the inception of his child and the Court added that "[a]t this stage [of the IVF process], nothing more was required of him."[113]

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108 *Id.*

109 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 245-46. "Allowing women the exclusive right to decide whether the child should be born may discriminate against men, but at some point[,] the law must recognize that there are differences between men and women, and must reflect those differences." *Nahmani*, F.H. (C) 2401/95 at 47 (quoting R.A. Gilbert, *Abortion: The Father's Rights*, 24 U. CIN. L. REV. 443 (1973)). The Court's assertion does not correlate with the State of Israel's abortion law which permits legalized abortions under certain limited circumstances. *See supra* note 37.

110 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246.

111 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246.

112 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246. The Court said, "[N]obody is trying to force [Mr. Nahmani] to do anything . . . [h]e is being deprived only of his right to prevent [Mrs. Nahmani] from using her eggs, fertilized by his seed with his full consent." Gordon, *Supreme Court, supra* note 73; *see* Schuz, *supra* note 20, at 249-51.

113 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246.

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The Court recognized that Mr. Nahmani could not be fully indemnified if he were required to support a child he did not want and since his family situation had changed, his emotional opposition to the continuation of the IVF process was understandable.[114] In response, it proposed that Mrs. Nahmani be granted the embryos subject to the condition that she agree not to claim money from Mr. Nahmani to aid any child or children born from their embryos.[115] After weighing the relevant factors, the *Nahmani* Court determined that Mrs. Nahmani's right to be a parent prevailed in the struggle between the opposing interests.[116] "A woman's right to be a parent is stronger than a man's right not to be a father," proclaimed the Court.[117]

The *Nahmani* Court next deliberated over the expectations of the parties.[118] Since the Court posited that this matter was not covered by ordinary contracts law,[119] it elected to find a "just" solution by analyzing the circumstances surrounding the *Nahmani* dispute.[120] The Majority focused primarily on Mrs. Nahmani's reliance on Mr. Nahmani.[121]

> [T]he doctrine of reliance should be applied to resolve a dispute between the gamete providers. The consistent application of a

114 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246.

115 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 246. Section 12 of the Family Law Amendment (Maintenance) Law, 1959 allows agreements as to the waiver of child support, subject to the court's discretion. It designates in part:

> (a) An agreement as to, or a waiver of, the maintenance of a minor does not bind the minor so long as it has not been confirmed by the Court . . .
>
> (c) An agreement, as to maintenance confirmed by the Court shall have the effect of a judgment of the Court in a matter of maintenance.

13 L.S.I. 73, (1958-59). Section 13 of the Law allows the court to "vary the provisions of an agreement, a waiver or a judgment if it thinks fit so to do in view of circumstances which have come to the knowledge of the applicant, or of a change in circumstances which has occurred, after the agreement, waiver or judgment." 13 L.S.I. 73, (1958-59).

116 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 251.

117 MacKenzie, *supra* note 22

118 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 252-53. The Court viewed this analysis as an important way to weigh "judicial legislation" when the court, in the absence of any precedence or legislation dealing with a case of first impression, had to find its own solution. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 252-53.

119 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 252-53; *see supra* text accompanying notes 49-57 and note 69.

120 Landau, *Nahmani, supra* note 63. *But see* Section 25 of the Contract (General Part) Law, 1973, *supra* note 53. ("A contract shall be interpreted in accordance with the intention of the parties as appearing therefrom or, in so far as it does not so appear, as *appearing from the circumstances*") (emphasis added).

121 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 253-54.

reliance based theory of contract law to enforce promises to reproduce through IVF will enable IVF participants to assert control over their reproductive choices by enabling them to anticipate their rights and duties, and to know with reasonable certainty that their expectations will be enforced by the courts.[122]

The Justices held that Mrs. Nahmani detrimentally relied on her husband's initial consent to the IVF process when she underwent a pre-fertilization procedure which the Court felt "caused [her] continuous severe physical suffering and even threatened her life."[123] The Court also pointed out that the embryos most likely signified Mrs. Nahmani's final chance to become a biological mother since they represented her last remaining ova,[124] which she fertilized with her husband's sperm in reliance of his consent to father her child.[125]

One fact is of vital importance in making this judgment; the spouse who opposes implantation wanted a child at one time and submitted to the IVF process with that end in mind. The two spouses once agreed on this issue and initiated the IVF procedure in reliance on that mutual wish. Given this background, the greater injustice would be to deny implantation to the spouse who detrimentally relied on the other's words and conduct.[126]

Tapping into their "own principles and feelings," the Court expressed animosity toward Mr. Nahmani for leaving his wife to be with another woman only two months after signing the contract with the surrogate institute in the United States.[127] The Court had no doubt that Mr. Nahmani's change of mind reflected a capriciousness that "destroyed] [Mrs. Nahmani's] last spark of hope."[128] It asserted that to allow Mr. Nahmani to whimsically withdraw his

122 *Nahmani*, F.H. (c) 2401/95 at 67-68 (quoting *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide*, 24 CREIGHTON L. REV. 1302, 1303 (1991)).

123 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 253; *see supra* note 9.

124 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 253-54. The Court came to this conclusion by considering Mrs. Nahmani's mature age, forty-four, and her poor state of health, which it felt contributed to her inability to produce more ova. Friedman, *supra* note 13.

125 Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 253-54; *see* Derfner, *supra* note 60.

126 *Nahmani*, F.H. (c) 2401/95 at 112 (quoting A.R. Pnitch, Note, *Davis Dilemna: How To Prevent Battles Over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 547 (1991)).

127 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 253-54; *see* Masad, *supra* note 21. The name of the United States surrogate institute is undisclosed.

128 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 253-54.

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consent at any time was to give a power of veto over the continuing IVF process which, to the Court, was "clearly unacceptable" in conjunction with equality before the law.[129]

> One approach would be a to require mutual spousal consent as a prerequisite to implantation of all preembryos created through IVF. This approach would require obtaining consent twice from each spouse - once when the IVF procedure is initiated and again before each implantation .... This rule would ... have disadvantages, however. Most significantly, it would grant tremendous power to one spouse over the other. It would mean that even though both spouses initially consented to having a child through IVF, neither could proceed with certainty that the other would not truncate the process. Such an outcome would surely frustrate the spouse seeking implantation, who will have invested large financial expense, time, energy, and in the wife's case[,] physical pain. The required second consent for implantation could become a tool for manipulation and abuse between spouses, especially under circumstances of a pending divorce. Any spouse ultimately denied the chance to have a child through IVF would probably suffer considerable emotional stress."[130]

To remedy Mrs. Nahmani's unjust detriment, the Court turned to the doctrine of estoppel.[131]

> Protection against this sort of injustice is recognized by the well established doctrine of estoppel ... The elements of estoppel are satisfied in a dispute such as Davis. The knowing action of the objecting spouse is the undertaking of IVF for the purpose of producing a child. The prejudice to the other spouse consists of the time, money, and psychological commitment necessarily expended in pursuing the full procedure. The injury would include not only the time and money spent, but also the last opportunity to have a child.[132]

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[129] Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 253-54. The Court noted that exceptional circumstances such as genetic or medical changes that endangered the embryo's existence would justify Mr. Nahmani's objection to the IVF process continuing. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 254. The Court also commented that had the situation been reversed, it would have ruled in Mr. Nahmani's favor. Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 254.

[130] Nahmani, F.H. (c) 2401/95 at 43 (alteration in original) (quoting A.R. Pnitch, *The Davis Dilemna: How To Prevent Battles Over Frozen Preembryos,* 41 CASE W. RES. L. REV. 543 (1991)). *But see* p. 22.

[131] Landau, *Father, supra* note 67; *see* Schuz, *supra* note 20, at 253-54.

[132] Nahmani, F.H. (c) 2401/95 at 43-44 (alteration in original) (quoting B.L. Henderson, *Achieving Consistent Disposition of Frozen Embryos in Marital Dissolution Under Florida*

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Finally, addressing the last prong of their analysis, the Court held that public policy demanded the parties' consent be secured in as short a time as possible in order to maintain legal stability and certainty.[133] The Majority noted that not only were the IVF couple involved, but also the medical institutions and the surrogate mother.[134] It maintained that the prospect of a one-sided veto was likely to lead to various difficulties affecting the whole procedure.[135] Following this logic, the Court examined when the "the point of no return" was after both parties agreed to the IVF procedure.[136] Contrary to the belief that "point" is reached when the embryo is implanted in the womb, the Court asserted that once the ovum has been fertilized by the sperm, a party cannot back out of that agreement.[137] The Court felt strongly that the possibility of a new "being" created during the point of fertilization warranted continuation of the IVF process in the face of a one-sided objection.[138] Moreover, the Court wanted to encourage couples unable to procreate children naturally to utilize the IVF process by eliminating any obstacles that they may encounter.[139]

Ergo, by majority decision, the 1994 *Nahmani* judgment was set aside and the Haifa District court's decision for Mrs. Nahmani was restored.

B. *The* Nahmani *Dissent*

While the *Nahmani* majority relied heavily on the concept of justice to make their ruling, the *Nahmani* minority, in sharp contrast, focused on already existing laws.[140] The dissenting justices did not concur with the majority view that the case presented a

Law, 17 NOVA L. REV. 549 (1992)). The *Nahmani* Court also considered the Nahmanis' legal struggle to obtain a surrogate mother and the money they expended to pursue the expensive IVF process. Landau, *Nahmani, supra* note 63.

133 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 255.

134 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 255.

135 Landau, *Nahmani, supra* note 63; *see supra* text accompanying notes 58-60.

136 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 253.

137 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 255. However, the Court acknowledged that a couple's joint decision to interrupt the IVF process was acceptable since "the parts played by both the man and the woman in the creative process were not inseparable." Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 249-50.

138 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 249-50.

139 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 250.

140 Asher Felix Landau, *To Be Or Not To Be a Parent*, Jerusalem Post, Oct. 21, 1996, at 7, *available in* LEXIS, News Library, JPost File [hereinafter Landau, *Parent*]; *see* Schuz, *supra* note 20, at 244, 251-52.

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normative vacuum.[141] Rather, they believed that the case fell under the jurisdiction of present legislation, and that the Supreme Court was compelled to apply that law.[142] To them, what was legal was just.[143]

Rejecting the majority's contention that the *Nahmani* case presented a normative vacuum, the minority analyzed current regulations to ascertain a proper determination.[144] The dissenting justices held the position that the relevant issue was whether Mrs. Nahmani had a legal right to demand Mr. Nahmani's consent to the progression of the IVF process.[145] It enunciated that since the whole foundation of the IVF agreement no longer exists, the law rendered Mrs. Nahmani no right to force such an imposition.[146]

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141 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251-52.

142 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251-52.

143 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251-52. Elaborating on the conception of justice, the minority split it into two categories; general and particular. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251-52. The dissenters cited the 1994 findings of a government commission — which recommended that both of the parties' consent be realized at every stage of the IVF process — as an example of general justice. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251-52. The committee was appointed in 1991 to examine various aspects of IVF and surrogacy in an effort to reevaluate its fertility laws. Krim, *supra* note 68, at 218 (citing Judy Siegel, *Experts Recommend Legalization of Surrogate Motherhood*, JERUSALEM POST, July 27, 1994, at 12); *see* Schuz, *supra* note 20, at 241. The group was comprised of a retired district court judge, a gynecologist, a sociologist, a philosopher, a social worker, a gynecologist/medical ethicist rabbi, and a psychologist. Krim, *supra* note 68, at 218 ; *see* Schuz, *supra* note 20, at 241. Recommendations made by the board included the appointment of an interdisciplinary board of experts to exclusively supervise all IVF and surrogacy procedures. Krim, *supra* note 68, at 218 ; *see* Schuz, *supra* note 20, at 241. Particular justice was defined as protecting Mr. Nahmani's right not to have a child over Mrs. Nahmani's pain and suffering throughout the IVF process, which the minority found to be the more just alternative. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 246-47. Additionally, the dissenting judges pointed out that justice demanded Mr. Nahmani oppose the IVF process in good faith. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 246-47. The Court examined the circumstances — that the loss of love and trust between married couples was a part of life which occurred without any intention to hurt the other partner — and found that Mr. Nahmani had acted in accordance with the standard of good faith. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 252-53.

144 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251-52.

145 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 249-50.

146 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 251. In the minority's judgment, parenthood was a basic freedom and privilege, not an obligation. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 251. As the judiciary could not force marriage on an individual, it could not force parenthood on them either. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 245-47. Moreover, parenthood did not only involve a monetary obligation, but also a commitment to promote the child's welfare in all respects, enforceable by both the civil and criminal law. Landau, *Nahmani, supra* note 63. Consequently, the Court could not impose such an extreme burden on

Finding that the former couple's agreement to embark on the IVF process was strictly verbal, and therefore not an ordinary contract, the minority consulted sections 25(a)[147] and 61[148] of the Contracts (General Part) Law of 1973, which required that such a contract be construed on the basis of the surrounding circumstances, as well as the parties' conduct, in order to unearth their intrinsic intentions.[149] "In family or quasi-family situations[,] there is always the question whether the parties intended to create a legally binding contract between them. The more general and less precise the language of the so-called contract, the more difficult it will be a infer that intention."[150] The minority perceived Mr. Nahmani's original covenant to the IVF process as based on the consent of a husband who loved his wife and fully intended to have a family with her.[151] However, the dissenting judges said Mr. Nahmani's intention evaporated when he left his wife for another woman; there was no indication that his initial consent was meant to survive an estrangement.[152] As a result, the dissent made emphatic that Mr. Nahmani's consent was necessary at every stage of the IVF proceeding.[153]

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either party whereby denying them the freedom to choose whether to have children or not. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 245-47. As a result, mutual consent is needed to achieve both justice and equality. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 245-47. The dissenting justices distinguished the present case from the abortion case, based on out of body status of the embryo. Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 245-47; *compare supra* text accompanying notes 104-109.

147 *See supra* note 53.

148 Section 61 posits:

> (a) The provisions of this Law shall apply where no other Law contains special provisions regarding the matter in question.
>
> (b) The provisions of this Law shall, as far as appropriate and mutatis mutandis, apply also to legal acts other than contracts and to obligations not arising out of a contract.

Contracts (General Part) Law, 1973, 27 L.S.I. 117 (1972-73).

149 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 249-51.

150 *Nahmani*, F.H. (c) 2401/95 at 139 (quoting SCOTT M. PARRY, THE LAW RELATING TO COHABITATION 234 (London ed., 1993).

151 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 249-50.

152 Landau, *Nahmani, supra* note 63; *see* Schuz, *supra* note 20, at 249-50. The minority said human experience and common sense dictated that if asked whether his consent would apply under any circumstances, Mr. Nahmani would have said "no." Landau, *Parent, supra* note 140.

153 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 249-50. By way of analogy, the minority cited the adoption laws which sanctions a parent, who initially subscribed to the adoption, to withdraw his/her consent, if later circumstances justified that course. Landau, *Nahmani, supra* note 63. *See supra* note 42. It also related Sections Two, Five and

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Additionally, the court professed that Mrs. Nahmani knew the IVF process was full of pitfalls, that it would be a long and expensive endeavor which prescribed her husband's joint effort and consent at every juncture.[154] They based this dogma on the Nahmanis' application for IVF under section 14 of the Public Health Regulations (IVF) of 1987[155] and their agreements with third parties, inclusive of the IVF hospital,[156] the surrogacy institution in the United States,[157] and the pre-arranged surrogate mother.[158] The court concluded that the mere fact that Mr. Nahmani was enjoined in the initiation of the IVF proceeding and the selection of the surrogacy institution, in addition to the surrogate mother, was a manifest substantiation of his mandatory consent to the consummation of the process.[159] This requirement transcended the Nahmanis' separation and to find otherwise would offend the concept of having children within a marital partnership and would be unjust to

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Seven of the Surrogacy Agreements Law of 1996 (delineated by the dissent to mean that the legislature favored the prerequisite of mutual consent) to the IVF scenario. Landau, *Parent, supra* note 140. *See supra* note 68 (for more information on the Surrogacy Agreements Law). *But see* Landau, *supra* note 68 (for the majority's opinion).

154 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 250-53.

155 Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 250-53. The Nahmanis submitted their application to the IVF hospital under the Public Health Regulations (in vitro fertilization) of 1987, which the minority interpreted as requiring their joint consent to every phase of the transaction. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 250-53. The minority also examined Sections 2(a), 8(b)(1)(2), (3), 8(c)(3), 9(a)(b), and 14(c) of the IVF regulations in assessing this conclusion. Landau, *Parent, supra* note 140; *see* Schuz, *supra* note 20, at 250-53; *see* Gordon, *supra* note 47.

156 Landau, *Parent, supra* note 140. The minority pointed out that the Assuta Hospital had agreed to the fertilization on the basis of a joint application by both Nahmanis. Landau, *Parent, supra* note 140.

157 Landau, *Parent, supra* note 140. The dissent appraised the provisions in the U.S. surrogate institution contract, which the Nahmanis signed. Landau, *Parent, supra* note 140. The provisions state in part, "In the event that, in the opinion of the Center's physician, the contemplated pregnancy has not occurred within a reasonable time, this agreement shall terminate by any party or the center's physician giving notice to all parties." *Nahmani*, F.H. (c) 2401/95 at 142. It further states, ". . . [T]he center is engaged in the practice of arranging surrogate agreements and administration of agreements *for couples* who are unable to bear their own children . . ." *Id.* at 145 (alteration in original). The surrogacy contract also goes on to say, "Prospective parents shall meet with and have the final decision as to the selection of any potential surrogate . . ." *Id.* Furthermore, married couples, who are "*living together*" are desired for "entering into the following agreement . . ." *Id.* at 146 (alteration in original). Finally, the agreement stipulates that "[t]he Center has advised prospective parents that surrogate parenting is a very expensive procedure and has many unknown implications." *Id.* at 147.

158 Landau, *Parent, supra* note 140.

159 Landau, *Parent, supra* note 140.

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Mr. Nahmani.[160] Accordingly, the minority's dissension converged into the opposition of the majority's holding that Mr. Nahmani was estopped from denying the frozen embryos based on Mrs. Nahmani's reliance on his initial consent to the IVF process.[161] The minority would therefore have upheld Mr. Nahmani's appeal and denied Mrs. Nahmani the frozen embryos.

V. "BE FRUITFUL AND MULTIPLY": BEHIND THE MIND OF A PRONATALIST[162] COURT

With the 1996 *Nahmani* decision, the Israeli Supreme Court ushered in a vision of reproductive rights so paramount as to override the intrinsic right of personal autonomy.[163] Only before a Jewish court embodying judges "with a uniquely Jewish reverence for life" could Mrs. Nahmani have succeeded in her pursuit to have a child, using the frozen embryos fertilized by her estranged husband against his will.[164] To understand the majority's "unique" perspective, one must canvass the rich social, cultural, and religious history of a society that has a "deeply rooted, unequivocal, imprinted commitment to children."[165]

It is a fundamental canon in Judaism[166] that life is of unfathomable worth and that each moment of life is equal to seventy years thereof.[167] "In Jewish law, all biblical and rabbinic commandments are set aside for the predominant conception of saving a life."[168] Concomitantly, Judaism overwhelmingly values children, considering them the prospect for the future and the foundation

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160 Landau, *Parent, supra* note 140.

161 Landau, *Parent, supra* note 140; *see supra* text accompanying notes 118-132.

162 A phrase coined by Rabbi David M. Feldman to define the benefits of procreation. David M. Feldman, *The Case of Baby M, in* JEWISH VALUES IN HEALTH AND MEDICINE 165 (Levi Meier ed., Univ. Press of America, Inc. 1991).

163 *See supra* text accompanying notes 88-95.

164 Lewin, *supra* note 88.

165 Shoshana Matzer-Bekerman, *The Jewish Child, in* HALAKHIC PERSPECTIVES 7 (1984).

166 *See infra* note 176. Judaism, as a legal system, is rigidly grounded on a religious world view. Edward H. Rabin, *Symposium: The Evolution & Impact of Jewish Law,* 1 U.C. DAVIS J. INT'L L. & POL'Y 49, 51 (1995). The law pertaining to the indebtedness that men and women owe to God (ritual and religious) and the law that dictates the duties people owe to each other (civil and criminal) were conventionally examined together. *Id.* The corresponding methods of legal reasoning and hermeneutics were extracted from identical origins and bestowed with the same sanctity. *Id.*

167 FRED ROSNER, MODERN MEDICINE AND JEWISH ETHICS 108 (2d ed. 1991).

168 *Id.*

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for the perpetuation of the Torah.[169] This enthusiastic spirit stems from the incessant perils (both from internal and external forces) the Jewish community faced throughout its extended career, and its consistent emphasis on the duty to procreate in order to survive developed as a result.[170] "If self-preservation is the first law of nature, the injunction "Be fruitful and multiply" is properly the first Commandment, but not merely because it occurs in the opening chapter of Genesis but because it is the cornerstone of Jewish life, upon which all else depends."[171] This commandment (*mitzvah*) of procreation has undergone many changes, shifting with the four main stages of Jewish history[172] which shall briefly be addressed.

All through the biblical period,[173] when Jewish life was sound, laid open only to the common risks that are part of the human state of being, the sensibility toward reproduction was insouciant; children were regarded as blessings.[174] During the Return after the

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169 Matzner-Bekerman, *supra* note 165, at 9. "Torah" is defined as "directive," "instruction," "teaching," "guidance," and "law." ROBERT GORDIS, THE DYNAMICS OF JUDAISM: A STUDY IN JEWISH LAW x (1990). It is the most essential and comprehensive term in Judaism which was formerly applied to condensed instruction manuals for priests; it was then broadened to include the first five books of the Bible, the *Oral* and the *Written Torah,* the entire corpus of law and lore of the Rabbis (culminating in the *Mishnah*), the *Gemara,* all treatises and commentaries assembled after the finalization of the *Talmud*, and the complete *Aggadah*. *Id.* *See id.* at ix-x (for a glossary and guide to of the rabbinic sources). The Torah permeates itself into every aspect of the Jewish individual's personal and interpersonal life. FRED ROSNER & J. DAVID BLEICH, JEWISH BIOETHICS 102 (1979). *See also* THE JPS TORAH COMMENTARY (Sarna & Potok, eds., Jewish Publication Society, 1994). *See generally* THE TANAKH (Jewish Publication Society, 1985) (contains a translation of the entire Hebrew Bible).

170 Gordis, *supra* note 169, at 186.

171 *Id.*

172 *Id.* at 186.

173 The biblical account of creation (Genesis 1:18) reads: "God blessed them, and God said to them, 'Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.'" *Id.* The same prescription was also given to the sons of Noah after the Flood when God blessed Noah and his sons, and said to them, "Be fruitful and multiply, and fill the earth." (Genesis 9:1). *Id.* Again, the blessing is extolled on Jacob and his descendants: "God said to him, 'I am God Almighty: be fruitful and multiply: a nation and a company of nations shall come from you, and kings shall spring from you.'" (Genesis 35:11). *Id.*

174 *Id.* at 186-187. Many factors contributed to form the disposition toward children as a blessing, including the economic benefit they produce and the continuance of the family name. *Id.* at 187. During this period, the conception of two children were enough to satisfy the *mitzvah*. *Id.* Adam and Eve, the ideal of the human family had two sons, with Seth being born after the fatal altercation between Cain and Abel. *Id.* Sarah and Abraham bore only one son; Isaac and Rebecca had two; Amram and Jochebed sired two sons and a daughter; Aaron fathered four sons; and Moses had two... *Id.*

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Babylonian Exile until the end of the Tannaitic period, the third century C.E., the Jewish population was concentrated in Palestine where there were no significant threats to Jewish survival.[175] This period marked the emergence of the Jewish belief and practice in the Halakhah[176] as the rudimentary composition of Jewish life.[177] The blessing of procreation was subsequently metamorphosed into a *mitzvah,* an obligation binding upon the Jew.[178] There was yet no demand for extensively abundant families since Jewish life still remained normal.[179]

As time progressed to the Middle Ages, during the protracted period of the Galut, Jewish life no longer centered around Palestine.[180] The Jews were scattered throughout Europe, North Africa, and western Asia, where they were looked upon as aliens, living at the expense of their host country.[181] They became perpetual "victims of persecution, expropriation, expulsion, and massacre at the hands of their neighbors."[182] As a consequence, Jewish preservation was always uncertain — for the mass numbers of east European Jewry, this plight continued into the twentieth century.[183]

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175 *Id.* at 188. Politically Jews were independent or autonomous during this period. *Id.*

176 Jewish law is a subgroup of the halakha, which literally means "the way" or the correct path. Rabin, *supra* note 166, at 50. Halakhic literature bears upon "law" only in a specialized sense; it embodies the laws of religion and ritual, as well as the laws overseeing civil and criminal affairs. *Id.* Conventional halakhic scholars ordinarily do not find it essential to demarcate law, morality and religion since all derived from God's word, and therefore had to be obeyed. *Id.* While the separation between the religious/ritual laws and civil/criminal laws was sometimes critical, this differentiation was not pivotal to the analysis of halakha. *Id.* Both types of inquiries were explained by citing to the same sources and would be approached by analogous types of legal rationalization. *Id.* *See generally* JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN (1983). *See, e.g.*, MENACHEM ELON, 1 JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Bernard Auerbach & Melvin Sykes, trans., 1st Eng. ed., 1994). *See, e.g.*, ABRAHAM COHEN, EVERYMAN'S TALMUD (Schocken Books, 1975). *See, e.g.*, SAMUEL N. HOENIG, THE ESSENCE OF TALMUDIC LAW AND THOUGHT (Jason Aronson ed., 1993).

177 Gordis, *supra* note 169, at 192.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* at 191.

182 *Id.*

183 *Id.* Both natural and manmade conditions rendered elevated levels of infant and child mortality among Jews during this period. *Id.* "There was no house without its dead" (Exod. 12:30). *Id.* According to rough statistics by New Testament scholar Adolf Harnack, there were four million Jews in the Roman Empire at the commencement of the Christian Era – approximately ten percent of the population. *Id.* In 1070, the world Jewish population had been diminished to one million and not until the eighteenth century did it once more arrive at four million. *Id.*

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Fearing extinction of the Jewish population, Medieval Jewish leaders, determining that more children were needed to replenish the diminishing populace, introduced the rule that the commandment "be fruitful and multiply" had to take priority "over other considerations of health, convenience, or personal desire."[184] This attitude eventually became the norm in traditional Judaism.[185] The remaining era, which lasted only 150 years, witnessed the French Revolution and the birth of Nazism.[186] During this modern age, the *mitzvah* of procreation went into total eclipse on account of highly urbanized and mobile Jews — mostly situated in central and western Europe and North America — who curtailed their birthrate at a more excessive rate than did the rest of the population in that area.[187] However, a majority of the world Jewry, living in Eastern Europe, still retained the Jewish lifestyle of the middle ages and were faithfully employed in replenishing the diminishing

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[184] *Id.* The rabbinic leaders were convinced that the survival of Jews predominated over a person's health and personal desires and needs. *Id.* at 194. *Compare* the *Nahmani* Court's similar adherence to this view *supra* pp. 37-39 and notes 89-95. These leaders presented two standards derived from biblical verses cited in the Talmud. *Id.* at x. The Talmud is a massive collection of law and lore produced by rabbanic Judaism and it is the central document in Jewish law. Rabin, *supra* note 166, at 58. For a more detailed description, *See id.* at 53. *See generally* HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD (Isaac Epstein, ed., Maurice Simon et al., trans., London: Soncino Press, 1990). *See also* THE TALMUD (Adin Steinsaltz, ed., New York: Random House, 1989). *See* THE TALMUD OF THE LAND OF ISRAEL (Jacob Neusner, trans., Missoula, Chico, then Atlanta: Scholars Press for Brown Judaica Studies, 1982). The two verses were cited as follows: "He created the earth not for chaos, but for habitation [*lashevet]*" (Isa. 45:18) (this passage conveyed the maxim of *lashevet,* the obligation to have beget as many offspring as possible); and "In the morning sow your seed, and in the evening . . . do not be idle, for you cannot tell which will prosper, or whether both shall have equal success" (Eccles. 11:6) (this stipulated that procreation should be practiced throughout one's entire lifetime). Gordis, *supra* note 169, at 191-192. These two principles nullified the previous idea that two children were enough to satisfy the *mitzvah* of procreation. *Id.* at 191.

[185] *Id.* at 192.

> "Even though a man has fulfilled the mitzvah of procreation, he is commanded by the Sages not to desist from procreating so long as he has the strength, for whoever adds a single soul in Israel it is as though he has built a world [*Mishneh Roah,* Hilkhot 'Ishut, 15,4]."

Id.

[186] *Id.* at 194.

[187] *Id.* The most optimistic figures show that American Jewish couples have an average of 1.7 children, not adequate to replenish themselves much less manifest a pattern of expansion. *Id.* The is a trend toward intermarriage is also viewed as a contributing factor to the population shortage. *Id.* at 195. The difficulty of intermarriage is as antiquated as the Jewish people itself, as evidenced in the Book of Deuteronomy, "Not because you are the most numerous of people has the Lord set His heart on you, indeed you are the smallest of peoples" (7:7). *Id.* at 204.

denomination of Jews in Germany, Austria, Holland, Belgium, France, Great Britain, and Italy, in addition to the United States.[188] The advent of the Holocaust wiped out this fountain of replenishment and decreased the world Jewish population from sixteen million to eleven million.[189]

In the aftermath of century-old discrimination, persecution, and mass extermination, "[o]ne of the hallmarks of modern Jews is their preoccupation – or obsession – with Jewish survival and the preservation of Jewish identity."[190]

> A number of contemporary Jewish thinkers have urged an increase in the Jewish birthrate on grounds which are essentially extra-theological. The calamitous losses of the Holocaust, coupled with defection as a result of assimilation and intermarriage, have decimated the Jewish population. If demographic trends are not reversed, it is argued, the prospects for Jewish survival are precarious. Thus, higher birthrates within the Jewish community must be encouraged if Jews are to remain a viable ethnic group capable of continuing the uniquely Jewish contribution to human civilization.[191]

It should follow from the Jewish community's aggressive promotion of conception that infertility is declared an "illness."[192] This posture has, consequently, led to a "less conservative and

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188 *Id.*

189 *Id.* The latter estimate includes the Jews killed in Soviet Russia, numbering two million or more. *Id.* Six of the seven million Jews existing in Europe in 1933 were executed by 1945. *Id.* at 204. The Holocaust effectively lowered the number of Jews worldwide by more than a third. *Id.* at 197. Since the initiation of the Bolshevik Revolution in 1917, the Soviet Union has been persecuting Jews, engaging in "the campaign of spiritual genocide against Jewish survival." *Id.* at 204.

190 *Id.* at 201.

191 J. DAVID BLEICH, JUDAISM AND HEALING: HALAKHIC PERSPECTIVES 52 (1981).

> Since the time of our ancestors Abraham and Sarah, a common bond has united all Jewish parents in all four corners of the earth in every generation. This bond, the force that binds the major elements of Judaism together, has contributed to Jewish survival despite a history of exile, trauma, and oppression.

Matzner-Bekerman, *supra* note 165, at 7.

192 David M. Feldman, *The Ethical Implications of New Reproductive Techniques, in* JEWISH VALUES IN BIOETHICS 180 (Levi Meier ed., 1986). Infertility is considered a curse, for a "man without children is considered like the blind, the pauper, and the leper – as a dead man." Matzner-Bekerman, *supra* note 165. Women, from the beginning of Jewish history, who did not become pregnant "suffered great mental anguish as a result of their infertility. Our ancestors Sarah, Rebecca and Rachel exemplify the desperation of women who were infertile and were redeemed when God blessed them with a child. Failure to bear children involves more than just personal frustration; indeed, a person who chooses not to have children diminishes the image of God. *Id.*

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noninterventionalist stance on IVF and surrogacy" in Israel.[193] The IVF procedure is reckoned to be "a meritorious deed" which helps couples fulfill its procreative *mitzvah*.[194] "[W]here the natural alternative is not available, these resourceful ways of bringing about the desideratum become acceptable. Enabling a woman to fulfill the maternal yearning, or a couple to fulfill the *mitzvah*, is itself a *mitzvah*."[195] IVF has met with great disapproval by some Catholic theologians on the assertion that it is immoral and violative of natural laws.[196] However, this argument is foreign to Judaism since it does not postulate a doctrine of natural law but rather, examines IVF "solely in light of possible infraction of biblical proscriptions. In the absence of a specific prohibition, man is free to utilize scientific knowledge in order to overcome impediments of nature."[197]

It is quite evident that the *Nahmani* Court concurs with the Jewish community's social, cultural, and religious practice of placing a preeminent value on potential life and, accordingly, structured their opinion around this conviction. This illustrates why the Court's opinion is flawed in many respects.[198] Unlike the dissent, which objectively examined the case under existing legislation, the majority conducted their deliberation on a subjective level, which seemingly undermines their decision. A bifurcated approach to

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193 Krim, *supra* note 68.

> [W]e are "partners with God in completing the Creation," in continuing the work of creation. Nature is not sovereign, it is in the service of man. We are to control nature, not be controlled by it. This is what mandates our use of lightning rods, our damming rivers, even our use of heaters and air conditioners . . . If blocked Fallopian tubes impede the natural process of fertilization, or if sperm must be strengthened by combining ejaculates, there should be no objection to making use of the laboratory or the Petri dish under these circumstances. This, too, is a matter of controlling nature, especially in view of the desirability of the goal, namely making conception possible.

Feldman, *supra* note 192, at 175-176.

194 Feldman, *supra* note 192, at 177.

195 *Id.* at 180.

196 Bleich, *supra* note 191, at 86.

197 *Id.* "One of the outstanding characteristics of Jewish law is its pragmatic attitude towards advances in medicine . . . Rabbinical rulings are in line with the Jewish moral framework and offer a flexible and pragmatic solution to a powerful dilemma." Matzner-Bekerman, *supra* note 165, at 22.

198 (i) The Court's analogy of abortion cannot be properly drawn because the preference shown a woman in that circumstance is derived from the fact that the embryo is part of her body, whereas in IVF, it is not. (ii) As the dissent asserted, Mr. Nahmani's initial agreement to the IVF process could not reasonably be construed to continue through a separation, and therefore the majority's contention that Mr. Nahmani's consent need not be obtained through all stages of the IVF process is far-reaching.

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law-making, however, is apparently not realistic in the State of Israel, with its intertwining system of law and religion.[199] It is therefore imperative to view the decision in light of Jewish conventions surrounding procreation in order to get a proper perspective of what the Court was trying to achieve. In addition, this ruling is predicated on the specific circumstances surrounding the case. The Court harbored great sympathy for Mrs. Nahmani's barren circumstances mitigated by the fact that she was being deprived of her last chance to have a child. She was left with no other alternative. It is clear that the Supreme Court, branding the shield of justice, sought to alleviate Mrs. Nahmani's infertile suffering by elevating her to *mitzvah* status.

*Janie Chen**

199 Israeli family law is largely dominated by halakha. Rabin, *supra* note 16.

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