

# THE INACCESSIBLE ROAD TO MOTHERHOOD — THE TRAGIC CONSEQUENCE OF NOT HAVING REPRODUCTIVE POLICIES FOR ISRAELIS WITH DISABILITIES

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## INTRODUCTION

The desire of an individual to become a parent can be very strong, especially in “child-centric” societies, where the idea of having children and raising a family is highly valued. In those societies, the prominent pro-natal nature translates into policies and laws regulating reproduction. The Jewish-Israeli society is a prime example of such a society where the use of state-funded Assisted Reproduction Technologies (“ARTs”) is the highest in the world—eight times higher than the international average.<sup>1</sup>

However, the road to becoming a parent is not as smooth for all members of Israeli society. A recent case that went all the way to the Israeli Supreme Court proved how the current Israeli reproductive policies, particularly surrounding third-party reproduction methods such as adoption or surrogacy, are inaccessible to people with disabilities (among other minority groups) who share the same great desire to become parents.<sup>2</sup>

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\* J.S.D. Candidate, Stanford Law School. Sitting in my office at one of the top floors of a Tel Aviv office building one morning, a few weeks before quitting my job at a private law firm and moving to Stanford, little did I know how a short news article I accidentally stumbled upon would lead to my involvement in the representation in the incredible case that stands at the heart of this piece, and later to the writing of it. I am grateful to have had the opportunity to get to know Ora and work with Avi Setty, her devoted attorney, and with Roni Rothler from the Disability Rights Clinic at Bar Ilan University’s faculty of law, and want to thank them for their terrific work. I would also like to thank Emily Polk for helping me organize, improve and clarify my ideas, to Sarah Mac Dougall and the editorial team at CJGL for their edits and remarks that helped improve this piece, and to Stephen Rosenbaum, Ella Callow, and I. Glenn Cohen for their comments and insights. This Article is dedicated to my beloved nieces Geffen and Tamar and to my own future children—I cannot wait to meet you, hopefully sooner than later.

1 Sigal Gooldin, *Emotional Rights, Moral Reasoning, and Jewish-Arab Alliances in the Regulation of In-vitro-fertilization in Israel: Theorizing the Unexpected Consequences of Assisted Reproductive Technologies*, 83 SOC. SCI. & MED. 90–91 (2013).

2 For a description and citations of the courts’ decisions on the *Ora Mor Yosef* case, see *infra* notes 143–153

The *Ora Mor Yosef* case revolves around a Jewish-Israeli woman with muscular dystrophy who could not bear a child because of her impairment. Her dream of becoming a mother was so powerful that after exhausting all of her other options, she used a surrogate, sperm donation, and egg donation to bring a baby into the world. However, the lack of genetic-biological connection to the baby led the courts to decide not to recognize Ora as the mother, meaning that she never had the chance to even see the baby.

This Article will examine the exceptional case of *Ora Mor Yosef* in a broad context and from a “Disability Legal Studies” perspective. It will compare Israeli socio-legal treatment of what I refer to as the right to become a parent with the United States legal system and will show how Israeli law makes it more difficult for women with disabilities to have children. It will continue with a discussion on the concept of disabled motherhood from a comparative Israeli-American perspective. This discussion will illuminate that there are still universal struggles and hardships for people with disabilities, specifically women, as they endeavor to become mothers and in raising their children. By using a Disability Legal Studies framework and a socio-legal analysis, this interdisciplinary Article will bring to the foreground issues and ramifications that were not found in the original reasoning of the Israeli courts’ rulings on the *Ora Mor Yosef* case and will demonstrate the crucial role legal institutions play in the social construction of disability and its treatment by society. It is my hope that this paper will therefore help bring more attention to the issue of disabled parents and prevent tragic instances like the one standing in the heart of this paper from recurring.

It is important to conduct a comparative analysis of the American and Israeli legal systems on this issue since the Israeli legal treatment of people with disabilities has been influenced by American disability rights academia, legislation, and activism. The Americans with Disabilities Act (“ADA”) was used as the model for the Equal Rights for People with Disabilities Law, which is the main Israeli legislation governing this population, and American legal scholars were even involved in its enactment.<sup>3</sup> Furthermore, the work of Bizchut—the Human Rights Center for People with Disabilities, the leading organization on promoting the rights of Israelis with disabilities—was influenced by the work of

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and accompanying text. For the expressed desire of women with disabilities to become mothers, see *infra* note 141.

3 Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305, 309 (2002); Stanley S. Herr, *The International Significance of Disability Rights*, 93 PROCEEDINGS OF THE 101ST ANN. MEETING (AM. SOC’Y OF INT’L L.) 332, 333 (1999); Arie Rimmerman, Michal Soffer, Dana David, Tsilly Dagan, Roni Rothler & Lior Mishaly, *Mapping the Terrain of Disability Legislation: The Case of Israel*, 30 DISABILITY & SOC’Y 46, 48 (2015); Neta Ziv, *Disability Law in Israel and the United States — A Comparative Perspective*, 28 ISR. Y.B. HUM. RTS. 171, 172–73 (1998).

American civil rights organizations.<sup>4</sup> The two systems differ, however, as Israel has signed and ratified<sup>5</sup> the United Nations Convention on the Rights of Persons with Disabilities (“UN CRPD”),<sup>6</sup> while the United States has declined to do so.<sup>7</sup> This is the first time that such a comparative analysis has been conducted on the issue of parents living with disabilities, and it helps shed light on the broader relationship between disability and law.

Part I introduces the socio-legal landscape regarding access to reproduction in Israel and the United States. In Part II, I provide an overview of the stigmas and legal treatment of disabled mothers in both legal systems. Part III will describe the *Ora Mor Yosef* case and the Israeli courts’ rulings on the matter. Finally, in Part IV, I will provide an analysis and critique of the court rulings using a Disability Legal Studies approach.

## I. A Comparative Socio-Legal Analysis of the Right to Become a Parent

### A. What is the Right to Become a Parent?

Development in ARTs, beginning in the early 1980s, has sparked a debate around the issue of who should be allowed to gain access to such technology.<sup>8</sup> The debate has developed from revolving solely around the use of technology to focusing on a much broader question of who should have the ability to have and raise children and on whether the state should regulate parenting in the same way it regulates and licenses “other potentially harmful activities.”<sup>9</sup> This debate about who should get the right to become a parent continues to

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4 Hila Rimón-Greenspan, *Disability Politics in Israel: Civil Society, Advocacy, and Contentious Politics*, 27 *DISABILITY STUD. Q.* (2007), available at <http://dsq-sds.org/article/view/47/47> [<http://perma.cc/6YJJ-T33J>]; Ziv, *supra* note 3, at 172–73.

5 Israel first signed the UN CRPD and became a formal state party on March 30, 2007 and ratified it on September 28, 2012. See United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en) [<http://perma.cc/Q7LD-ALGB>] [hereinafter UN CRPD].

6 UN CRPD, Dec. 13, 2006, 2515 U.N.T.S. 3.

7 ARIE RIMMERMAN, *FAMILY POLICY AND DISABILITY* 185–86 (2015); Tracy R. Justesen & Troy R. Justesen, *An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals With Disabilities: Why the United States Refuses to Sign this UN Convention*, 14 *HUM. RTS. BRIEF.* 36, 39–40 (2007).

8 ERIN NELSON, *LAW, POLICY AND REPRODUCTIVE ANATOMY* 273 (2014).

9 MUKTI JAIN CAMPION, *WHO’S FIT TO BE A PARENT?* 5 (1995); Hugh LaFollette, *Licensing Parents*, 2 *PHIL. & PUB. AFF.* 182, 184–86 (1980).

this day and usually focuses on historically underserved minority groups. This Article focuses on parenting for people with disabilities and even more specifically on mothers with disabilities.

The Fourteenth Amendment of the United States Constitution has protected a person's right to procreate without having the state interfere or prevent her from doing so.<sup>10</sup> In *Eisenstadt v. Baird*, the Supreme Court specifically drew a right to procreate from a person's right to privacy when it stated that if "the right of privacy means anything it is the right of the individual, married or not, to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>11</sup> Years later, in *Bragdon v. Abbott*, the Supreme Court has also recognized procreation as a "major life activity," while determining HIV infection to be a disability according to the ADA.<sup>12</sup> Nevertheless, and as implied, the right for privacy can only serve as the base for a narrow negative right to procreate.<sup>13</sup>

Scholars have named various rationales that lie behind the desire to procreate, in turn basing it on such noble ideas as human dignity, individual meaning of life, and identity.<sup>14</sup> Other values put forward include: the desire to achieve immortality by continuing to live through one's decedents; the desire to live vicariously through the child in a way and thus ensure a "second chance in life"; the desire to ensure that the family name will be carried on; and the longing to create a secure nest and achieve a deep and meaningful connection and relationship with their flesh and blood extension of self.<sup>15</sup> Those values and

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10 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

11 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); ROLAND DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 101–02 (1996).

12 *Bragdon v. Abbott*, 524 U.S. 624, 639–41 (1998). For further analysis of the decision, see Carl H. Coleman, *Conceiving Harm: Disability Discrimination in Reproductive Technologies*, 50 *UCLA L. REV.* 17, 33–36 (2002).

13 DWORIN, *supra* note 11, at 101–10; Daniel Statman, *The Right For Parenthood: An Argument for a Narrow Interpretation*, 10 *ETHICAL PERSP.* 224, 225–26 (2003).

14 JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 16 (1994); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 *BERKELEY J. GENDER L. & JUST.* 18, 49 (2008); Nicolette Priaulx, *Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters*, 16 *MED. L. REV.* 169, 175 (2008).

15 Carter Dillard, *Valuing Having Children*, 12 *J.L. & FAM. STUD.* 151, 171–98 (2010); Statman, *supra* note 13, at 226.

rationales have led to a broader, positive right, and this right requires the state to assist people to become parents.

It is important to clarify that the interest behind the right to procreate is not merely the idea of replicating one's genes. Although the idea of procreation for itself might appeal to some people more than to others, it should be safe to say that the primary interest behind the right to procreate is the desire to rear children and develop a meaningful relationship with them (an interest that can be satisfied even if the genetic connection is nonexistent). Therefore, the right to procreate can usually be framed as the right to become a parent or the right to parenthood.<sup>16</sup> This notion is reinforced by the United Nations Universal Declaration of Human Rights, which recognizes the right to found a family as a basic human right.<sup>17</sup> With regard to persons with disabilities, Article 23 of the UN CRPD requires party states to “take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to . . . parenthood.”<sup>18</sup> As such, for the rest of this paper, the right to procreate will be framed as the right to become a parent.

### **B. The Desire to Become a Parent—A Socio-Cultural Perspective**

A person's desire to become a parent has historically existed in most settings, cultures, and contexts. Nevertheless, as in the case of other social norms, this desire does not seem to manifest itself to the same extent within different groups and societies.

In 2014 the Danish government funded the “Do It for Denmark!” campaign aimed at boosting the country's low birthrate by convincing Danes to go on a holiday, since people are believed to have more sex when on vacation.<sup>19</sup> While it seems that a significant number of the people of Denmark do not seem to want to have any or many children, on the other

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16 Statman, *supra* note 13, at 225.

17 Article 16, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

18 UN CRPD, Dec. 13, 2006, 2515 U.N.T.S. 3; Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 MICH. ST. INT'L L. REV. 259, 267 (2012).

19 Michael Booth, *Sun, Sex and a Baby: The Unusual Package Holiday for Danes*, GUARDIAN (Mar. 30, 2014), <http://www.theguardian.com/world/shortcuts/2014/mar/30/sun-sex-baby-package-holiday-danes-denmark> [<http://perma.cc/A9D8-WHK7>]; Terrence McCoy, *'Do It for Denmark!' Campaign Wants Danes to Have More Sex. A Lot More Sex*, WASH. POST (Mar. 27, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/03/27/do-it-for-denmark-campaign-wants-danes-to-have-more-sex-a-lot-more-sex> [<http://perma.cc/4PJ8-8VVE>].

side of the spectrum are other societies that are much more “child-centric,” and Israel is one of them.

Research has shown that the Jewish-Israeli society is very family-oriented, with high marriage rates, relatively low divorce rates, and high birth rates.<sup>20</sup> The reasons for those pro-natal tendencies are said to include: biblical-religious perceptions; identification with the collective goal of fighting the “demographic threat” (i.e., the fear that the country’s Arab population might eventually outnumber the Jews); the aspiration to bring up more Jewish babies especially in the wake of the Holocaust; and the fear of losing a child in war or terrorist attack (as part of the mandatory army service).<sup>21</sup> For minority groups in Israel, such as the LGBTQ community, the “ticket into society” is to have a baby.<sup>22</sup> It is therefore not surprising that the theme of the 2014 annual gay pride week in Tel Aviv was “Proud Families,” with the main parade not ending at the traditional party on the beach, but at a nearby park where new gay parents could easily push their strollers and play with their children on the playground.<sup>23</sup>

With regard to the United States, according to a 2013 Gallup survey, most Americans have a desire to have children, and that attitude has remained unchanged over the past two decades. More than nine in ten adults say they already have children, are planning to have children, or wish that they had had children. The five percent of American adults who

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20 Daphna Birenbaum-Carmeli & Yoram S. Carmeli, *Reproductive Technologies Among Jewish-Israelis: Setting the Ground*, in KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS 1, 4–6 (Daphna Birenbaum-Carmeli & Yoram S. Carmeli eds., 2010); Yael Hahiloni-Dolev, *Between Mothers, Fetuses and Society: Reproductive Genetics in the Israeli-Jewish Context*, 12 NASHIM: J. JEWISH WOMEN’S STUD. & GENDER 129, 130 (2006).

21 SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 3–4 (2000); Birenbaum-Carmeli & Carmeli, *supra* note 20, at 6–8; Gooldin, *supra* note 1, at 91; Hahiloni-Dolev, *supra* note 20, at 130.

22 Unlike in the United States, the fight for marriage equality in Israel, a country that does not separate between state and religion, has not been considered the “holy grail.” This is because the fight for marriage equality is folded into a larger battle against religious control of the state institutions and family courts, which extends far beyond the gay agenda. As one observer noted: “for gay Israelis it’s not about the ring”; their real desire is to have the right and ability to have children. See Zvika Krieger, *Forget Marriage Equality; Israeli Gays Want Surrogacy Rights*, ATLANTIC (Apr. 4, 2013), <http://www.theatlantic.com/international/archive/2013/04/forget-marriage-equality-israeli-gays-want-surrogacy-rights/274639/> [http://perma.cc/NCE5-K4C8].

23 Danna Harman, *Gay in Israel 2014: It’s a Family Affair*, HAARETZ (June 10, 2014), <http://www.haaretz.com/travel-in-israel/gay-tel-aviv/tel-aviv-pride/1.597566> [http://perma.cc/H9ZK-JHGS].

do not want children has not changed much from the four percent found in 1990.<sup>24</sup> Still, Jewish-Israelis are more family-oriented and have more children (2.75 on average) than their United States (2.7 on average) and West European (1.47 on average) counterparts.<sup>25</sup>

Sociocultural norms tend to be translated into legal frameworks and policies,<sup>26</sup> specifically in the field of family law, which has gone through a process of increased intervention by the government in recent decades.<sup>27</sup> Policies regarding reproduction and creation of family also work the other way: they influence people's perceptions and understanding of the "rights and wrongs" on this highly sensitive issue.<sup>28</sup>

### C. Reproductive Policies in Israel

One can expect child-centric societies to enact laws that will support a positive right to become a parent. This hypothesis seems to be somewhat correct when it comes to the Israeli example. ART policy in Israel is regarded as exceptional in international terms: fertility treatments are funded by the state (for the first two live births per family) and are offered to women of all family statuses and sexual orientations up to the age of forty-five to fifty-one depending on whether or not a donor egg is needed.<sup>29</sup> Israel was found to have the world's highest number of In Vitro Fertilization ("IVF") treatment cycles per capita.<sup>30</sup> Israel also protects the right of a woman or a man to be absent from work for fertility treatments and prohibits employers from firing any employee who undergoes such

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24 Frank Newport & Joy Wilke, *Desire for Children Still Norm in the US*, GALLUP (Sept. 25, 2013), <http://www.gallup.com/poll/164618/desire-children-norm.aspx> [<http://perma.cc/HXM6-7GPN>].

25 Birenbaum-Carmeli & Carmeli, *supra* note 20, at 4.

26 Stewart Macaulay, Lawrence M. Friedman & Elizabeth Mertz, *The Impact of Society on Law*, in *LAW IN ACTION* 190–91 (Stewart Macaulay, Lawrence M. Friedman & Elizabeth Mertz eds., 2007).

27 ERIC A. POSNER, *LAW & SOCIAL NORMS* 68 (2000).

28 Daphna Birenbaum-Carmeli & Yoram S. Carmeli, *Adoption and Assisted Reproduction Technologies: A Comparative Reading of Israeli Policies*, in *KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS*, *supra* note 20, at 127 [hereinafter Birenbaum-Carmeli & Carmeli, *Adoption and ART*].

29 *Id.* at 129; Gooldin, *supra* note 1, at 91.

30 John A. Collins, *An International Survey of the Health Economics of IVF and ICSI*, 8 *HUM. REPROD. UPDATE* 265, 267 (2002); Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 *CAL. W. INT'L L.J.* 313, 315 (1999); Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In-Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 *NASHIM: J. JEWISH WOMEN'S STUD. & GENDER* 151, 154 (2006).

procedures.<sup>31</sup> However, when it comes to methods of having children without the woman carrying them in her womb, i.e., through adoption or surrogacy (whether with a gestational carrier or a “classic surrogate”),<sup>32</sup> the policies are much more restricted. The cross-cultural rationale for the stricter rules regarding those methods of third-party reproduction is that they are considered to be more susceptible to misuse and ethical concerns regarding the third-party.<sup>33</sup> A second, more local rationale for the sharp distinction between the ART and the third-party reproduction policies in Israel has to do with ensuring the religious-ideological-political idea of the natural Jewish family. Making sure that offspring are of common origin as the other Jewish collective is a disclosed interest of the Jewish state, which can only be guaranteed through ART and not third-party reproduction.<sup>34</sup>

Adoption in Israel is an excruciating process that entails much bureaucratic hassle and extensive waiting periods.<sup>35</sup> Domestic adoption is only available to those who fulfill strict conditions. Only heterosexual couples who are legally married (meaning married through

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31 Women’s Labor Act 5714-1954, 160 LSI 154 § 7(C)(4), 9(E) (1954) (Isr.).

32 A gestational carrier has a fertilized egg implanted in her uterus and thus does not hold any genetic connection to the baby, while in the older form of surrogacy, introduced in the 1980s, a woman was inseminated with sperm of the man who was not her partner in order to conceive the baby (with her egg), carry it and then give it to the man and his partner to rear. Today most couples use a gestational carrier. See Adrienne Asch & David Wasserman, *Reproductive Technology*, in INTERNATIONAL ENCYCLOPEDIA OF ETHICS 4547, 4548 (Hugh LaFollette ed., 2013). For convenience reasons, I would use the term “surrogacy” as an umbrella term for both methods.

33 *Id.* at 4551.

34 Birenbaum-Carmeli & Carmeli, *Adoption and ART*, *supra* note 28, at 139–40.

35 Birenbaum-Carmeli & Carmeli, *Adoption and ART*, *supra* note 28, at 132. Adrienne Asch has argued against recognition of the right to parenthood as a social or political right, suggesting that parents who use any type of third-party reproduction method should have an obligation towards the third-party and their child allowing them to know about each other:

Accepting this responsibility and the relationship-based understanding of parenting should lead professionals not so much to refuse access to ARTs or to adoption but rather to challenge the adults who seek their aid to ask themselves hard questions about whether they are up to the task of identifying with and responding to the needs of the child they are bringing into their lives . . . . Those parents must be willing to disclose their child’s origin to her in age appropriate ways, and to give her any information they have about the identity and medical history of the (other) biological contributors to her existence . . . . Gate-keeping should focus on ensuring that prospective parents are ready for that responsibility.

Adrienne Asch, *Licensing Parents: Regulating Assisted Reproduction*, in FAMILIES—BEYOND NUCLEAR IDEAL 123, 130, 132 (Daniela Cutas & Sarah Chan eds., 2012).



the rabbinical courts) for three years, who are not more than forty-three years older than the adopted child, and have no other children are eligible to adopt. The couple should also have at least twelve years of schooling, show that they have a regular source of income at least within the national average income, and that they have a home where the child could have her own room. The prospective adopting couple also needs to be of the same religion as the child's birth family, and the couple is assessed for their spousal, familial, and social functioning. Single individuals are only allowed to adopt children who could not be placed with an adoptive couple. The waiting period for a domestic adoption is five to six years on average.<sup>36</sup>

Inter-country adoption is also quite cumbersome. Foreign adoption is much less restrictive from the prospective parents' side in comparison with domestic adoption (applicants must only undergo a psychologist's assessment of their parenthood abilities and comply with the adoptee's country requirements). However, Israel is very suspicious of foreign adoption agencies, and those agencies are subject to strict investigation before approving the adoption. It needs to be mentioned that inter-country adoption is quite expensive and is usually equated to a person's entire annual income, meaning it is thus beyond the reach of most couples or single persons.<sup>37</sup>

Surrogacy in Israel is likewise a strictly regulated process. It is only available to heterosexual couples who can prove their infertility. The prospective parents and the surrogate must all share the same religion. The surrogate must be an unmarried woman (i.e., single, widowed, or divorced) who has a child of her own and cannot be biologically related to either of the prospective parents. Surrogacy in Israel is also illegal as a career.<sup>38</sup> Despite being a highly contentious issue,<sup>39</sup> "reproductive tourism" involving surrogacy

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36 Birenbaum-Carmeli & Carmeli, *Adoption and ART*, *supra* note 28, at 132–33. It should be noted that the adoption of a baby or an older child with disabilities or a health issue (such as drug addiction problem) would require a shorter waiting time, usually two years.

37 Birenbaum-Carmeli & Carmeli, *Adoption and ART*, *supra* note 28, at 134.

38 Rhona Schuz, *Surrogacy in Israel: An Analysis of the Law in Practice*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 35, 38–42 (Rachel Cook, Shelly Day Sclater & Felicity Kaganas eds., 2003); Irit Rosenblum, *Surrogacy in Israel*, NEW FAMILY OFFICIAL WEBSITE (2014), <http://www.newfamily.org.il/en/surrogacy-in-israel> [<http://perma.cc/8SXJ-VFQU>].

39 For a review of the feminist critique of surrogacy, see, e.g., Melissa Lane, *Ethical Issues in Surrogacy Arrangements*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES*, *supra* note 38, at 121, 126–28; Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Can be Answered?*, 68 *IND. L.J.* 205, 211–17 (1992); Hiring a Woman for Her Womb, *N.Y. TIMES OPINION PAGES, ROOM FOR DEBATE* (Sept. 22, 2014), <http://www.nytimes.com/>

abroad (especially in third world countries),<sup>40</sup> is quite popular in Israel due to the high demand. Many gay and straight couples turn to that option; they find a surrogate outside the country to be inseminated with a fertilized egg (containing the genetic materials of one or both prospective parents) and carry the baby. Once the baby is born, the parents bring her back to their home country.<sup>41</sup> This option requires not only a tremendous investment of time, money, and other resources, but it is also dependent on fast-changing policies of the foreign country,<sup>42</sup> and on a highly bureaucratic process of bringing the child back and determining her religion and citizenship status by proving the genetic connection to at least one of the parents.<sup>43</sup>

While the disparity between ART and the third-party reproduction methods of adoption and surrogacy in Israel might be justified, it obviously excludes or even discriminates against individuals and populations who cannot bear children like infertile women, single straight or gay men, gay couples, or people with disabilities. Specifically with regard to people with disabilities, although the Israeli legal treatment of this population was highly influenced by the American disability rights advocacy, academia, and legislation,<sup>44</sup> the Israeli counterpart for the ADA, the Equal Rights for People with Disabilities Law, was

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roomfordebate/2014/09/22/hiring-a-woman-for-her-womb [http://perma.cc/3KYU-T7CW].

For a discussion on the topic of “reproductive truism,” see, e.g., Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN’S L.J. 275 (2009); Susan Markens, *The Global Reproductive Health Market: U.S. Media Framing and Public Discourses About Transnational Surrogacy*, 24 SOC. SCI. & MED. 1745, 1746–47 (2012); Nita Bhalla, *India’s Surrogacy Tourism: Exploitation or Empowerment?*, THOMAS REUTERS FOUND. (Oct. 4, 2013), <http://www.trust.org/item/20131004162151-r5i0w> [http://perma.cc/5KFF-FTEC]; Sophia Jones, *Nepal’s Earthquake Shines An Unexpected Spotlight On Gay Rights In Israel*, WORLD POST (Apr. 30, 2015), [http://www.huffingtonpost.com/2015/04/30/nepal-earthquake-israel\\_n\\_7179708.html?utm\\_campaign=naytev&utm\\_content=554308b3e4b02ffe05cd18c&fb\\_ref=Default](http://www.huffingtonpost.com/2015/04/30/nepal-earthquake-israel_n_7179708.html?utm_campaign=naytev&utm_content=554308b3e4b02ffe05cd18c&fb_ref=Default) [http://perma.cc/4V83-TQK9].

40 Asch, *supra* note 35, at 125; I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1323–25 (2012). For an extensive review of surrogacy tourism in India, see Coffey, *supra* note 18, at 276–83.

41 Harman, *supra* note 23; Krieger, *supra* note 22.

42 Nilanjana Bhowmick, *Why People Are Angry About India’s New Surrogacy Rules*, TIME (Feb. 15, 2013), <http://world.time.com/2013/02/15/why-people-are-angry-about-indias-new-surrogacy-laws> [http://perma.cc/9H9E-GCSD].

43 Gavriel Fiske, *65 Surrogate Babies Born to Israeli Gay Couples Stuck in Thailand*, TIMES OF ISRAEL (Jan. 19, 2014), <http://www.timesofisrael.com/65-surrogate-babies-born-to-israeli-gay-couples-stuck-in-thailand> [http://perma.cc/7RFX-FY6J].

44 Ziv, *supra* note 3, at 172–73.

never interpreted by the Israeli courts to include procreation as a “major life activity” like the American Supreme Court had in *Bragdon v. Abbott*.<sup>45</sup> There is currently no Israeli legislation or significant body of case law that discusses reproductive and family policy for people with disabilities.

#### D. Reproductive Policies in the United States

In the United States, state regulation of ART plays a far less crucial role than in Israel, and more discretion is given to the medical profession.<sup>46</sup> Thus most fertility centers operate without written policies about whom to treat.<sup>47</sup> A form of gatekeeping does exist in the form of the Ethics Committee of the American Society for Reproductive Medicine (“ASRM”). In July 2013, the ASRM Ethical Committee stated that fertility clinics may choose their clients as long as they do not discriminate on the basis of disability or other impermissible factors such as race, religion, ethnicity, sexual orientation, or marital status.<sup>48</sup> It needs to be noted that ART clinics are legally forbidden to discriminate against people with disabilities.<sup>49</sup> This policy exists because ART services are also considered as public accommodations under either Title II (if the clinic is a state-run hospital) or Title III (being a professional office of a health care provider, hospital, or other service establishment) to the ADA.<sup>50</sup> Still a major obstacle for access to ART in the United States

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45 *Bragdon v. Abbott*, 524 U.S. 624, 639–41 (1998).

46 NELSON, *supra* note 8, at 264; Coleman, *supra* note 12, at 40–41.

47 Asch, *supra* note 35, at 125.

48 ETHICS COMM. OF THE AM. SOC’Y FOR REPRODUCTIVE MEDICINE, *Child-rearing Ability and the Provision of Fertility Services: a Committee Opinion*, ASRM PAGES, 50, 52–53 (July 2013), [http://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statements/childrearing.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/childrearing.pdf) [<http://perma.cc/9YJ4-UF2L>]. See also ETHICS COMM. OF THE AM. SOC’Y FOR REPRODUCTIVE MEDICINE, *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons: A Committee Opinion*, ASRM PAGES, 1524, 1526 (Dec. 2013), [https://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statements/fertility\\_gaylesunmarried.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/fertility_gaylesunmarried.pdf) [<http://perma.cc/9LKM-KXQW>].

49 However, empirical research has shown that United States IVF clinics collect data on their clients, including information on their mental health and HIV status, and refuse access to some on those bases. See I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 456–57 (2011); Andrea D. Gurmankin, Arthur L. Kaplan & Andrea A. Braverman, *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61, 63–64 (2005).

50 42 U.S.C. § 12181 (2012); NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 208–09 (2012) [hereinafter ROCKING THE CRADLE].

seems to be a financial one, depending on the existence and scope of the patient's health insurance coverage.<sup>51</sup>

With regard to paid surrogacy in the United States, laws vary widely from state to state.<sup>52</sup> However, generally, contractual surrogacy is allowed in the United States. Usually the parties who maintain a genetic connection to the child will receive the greatest legal protections by the courts and the legislature.<sup>53</sup> The ASRM Ethical Committee has recommended safeguards for both the gestational carrier and the prospective parent that include reasonable economic compensation, informed consent, and medical evaluation as well as psychological evaluations and considerations.<sup>54</sup> Therefore, at least in some states, there are no formal legal barriers preventing people with disabilities who cannot bear a pregnancy to become parents through surrogacy.<sup>55</sup>

Adoption in the United States is regulated both on the federal level by the Adoption and Safe Families Act ("ASFA")<sup>56</sup> and by state law. The ASFA, which deals with adoption of children from within the governmental child care system, requires states to find permanent homes for children that are in foster care in a timely manner and places a timeline to terminate parental rights of those who are found to be unfit parents.<sup>57</sup> State law determines

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51 NELSON, *supra* note 8, at 279–80.

52 Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 97 (2010).

53 Craig Dashiell, *From Louise Brown to Baby M and Beyond: A Proposed Framework to Understand Surrogacy*, 65 RUTGERS L. REV. 851, 856 (2013).

54 ETHICS COMM. OF THE AM. SOC'Y FOR REPRODUCTIVE MEDICINE, *Consideration of the Gestational Carrier: A Committee Opinion*, ASRM PAGES (2013), [https://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statements/Cosideration%20of%20the%20gestational%20carrier2013.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Cosideration%20of%20the%20gestational%20carrier2013.pdf) [http://perma.cc/J4UH-PBRR]. See also Coffey, *supra* note 18, at 283–85.

55 Interestingly, the first and most famous case involving surrogacy in the United States, the case of Baby M, involved a couple in which the wife was concerned about the possible health implications from getting pregnant since she was living with multiple sclerosis and thus decided to use a surrogate. See *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988). For a recent story involving surrogacy for a disabled woman who cannot bear a pregnancy in North Carolina, see Mia De Graaf, 'It Was the First Thing I Thought of When I Fell': Bride Paralyzed at Her Bachelorette Party Reveals How She Feared She Would Never Have Children as She Poses for Moving Photos with Her Surrogate Days Before Birth, DAILYMAIL.COM (Apr. 10, 2015), <http://www.dailymail.co.uk/news/article-3034526/It-thing-thought-fell-Paralyzed-bride-reveals-fears-wouldn-t-able-children-poses-moving-maternity-pictures-surrogate-days-birth.html> [http://perma.cc/6LDA-23YG].

56 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

57 Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for*

access of same-sex couples and single parents to domestic adoption. Only a few states have laws that block those groups from adopting.<sup>58</sup> With regard to people with disabilities, as in the case of ART clinics, formally Article II of the ADA<sup>59</sup> forbids discrimination of people with disabilities by public adoption agencies. Nevertheless, because of the tacit ranking system used by domestic adoption agencies, they are often completely precluded from adopting or are forced to wait for indefinite periods of time for a child.<sup>60</sup> Inter-country adoption in the United States is governed by standards of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which was ratified by the United States in 2008.<sup>61</sup> The formal policy prohibits discrimination against members of the LGBTQ community or disabled people (according to Article III of the ADA), but again as described, these groups encounter difficulties stemming from biases within the private agencies when trying to adopt, despite the law.<sup>62</sup>

## II. Disabled Mothers—Stigmas and Legal (Mis)Treatment

The right to become a parent has its limitations. In legal systems such as the United States and Israel, it is balanced against the state's right to protect the welfare of its citizen children from mistreatment of an unfit parent. The best interest of the child is a standard that is materialized differently by each state and society and according to the circumstances of each case.<sup>63</sup> Those ethical and moral concerns have affected people with disabilities who wanted to become parents across societies and countries. In some U.S. states, disability may be considered as a factor when determining the best interest of the child with regard to custody. In order to be considered as a factor, a nexus between the particularly disability at

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*the Termination of Parental Rights*, 28 *FORDHAM URB. L.J.* 1879, 1880–81 (2000).

58 Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, *WILLIAMS INST.* 1, 3 (2007).

59 42 U.S.C. §§ 12101–12213 (2012).

60 *ROCKING THE CRADLE*, *supra* note 50, at 188.

61 *ROCKING THE CRADLE*, *supra* note 50, at 185–86.

62 *ROCKING THE CRADLE*, *supra* note 50, at 186.

63 *See, e.g., Reno v. Flores*, 507 U.S. 292, 303 (1993); Ella Callow, Kelly Buckland & Shannon Jones, *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 *TEX. J. C.L. & C.R.* 9, 11 (2011) *SANTOSKY*, *SUPRA* NOTE 10, AT 766.

issue and the potential harm to the child needs to be proven.<sup>64</sup> Ella Callow, Kelly Buckland, and Shannon Jones argue that, although in most cases the state fails to prove such a nexus, many children of disabled parents are removed from their homes and put in foster care. In February 2015, the National Council on Disability, an independent federal agency advising the White House and Congress and other federal authorities, have officially recognized this issue to be a widespread problem and have stated that the removal of a baby from her disabled parent can constitute disability discrimination.<sup>65</sup>

The main reasons underlying removal of children from their disabled parents in the United States and of disabled persons' preclusion of access to third-party reproduction methods in Israel seem to be identical—and have to do with stigmas, biases, and fear towards people with disabilities, which is the notion underling the Social Model of Disability.<sup>66</sup> As will be further discussed below, women with disabilities face further stigmatizing treatment due to the intersectionality of their gender and disability identities.

In the past few decades, a new movement that challenged the over-medicalization and individualistic accounts of disability has risen. A cornerstone for this movement is the

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64 The requirement for state services to prove a nexus between the parent's disability and child welfare has been fleshed out in case law. See Callow et al., *supra* note 63, at 22; see also *J.C. v. Dep't of Children & Family Servs. (In the interest of G.C.)*, 6 So.3d 643, 651 (Fla. Dist. Ct. App. 2009) (“In other words, we must decide whether DCF [Department of Children and Families] demonstrated a nexus or predictive relationship between the past domestic violence or the Mother's mental health issues and future harm to the children.”).

65 Callow et al., *supra* note 63, at 17. Following a case in which a two-day-old baby was removed from her nineteen-year-old mother with developmental disabilities by welfare authorities in the state of Massachusetts, the National Council on Disability stated that, “Parents with disabilities are suffering significant discrimination . . . . States are removing these children for the sole reason of their parents having a disability.” *Feds: State Wrongly Took Mom's Child 2 Days After Birth*, N.Y. TIMES (Feb. 7, 2015), [http://www.nytimes.com/aponline/2015/02/07/us/ap-us-disabled-mother-baby-taken.html?\\_r=0](http://www.nytimes.com/aponline/2015/02/07/us/ap-us-disabled-mother-baby-taken.html?_r=0) [<http://perma.cc/X4BY-M4DJ>] (internal quotations omitted). Unlike many others, this specific case had a happy ending—after the Department of Justice and the Department of Health and Human Services investigated and found the state acts to constitute a disability discrimination according to the ADA, the baby was returned to the mother who now raises her with the help of the grandmother. Susan Donaldson James, *'We can keep her': Disabled mom wins daughter back after legal battle*, TODAY (Mar. 11, 2015), <http://www.today.com/parents/disabled-mom-gets-daughter-back-after-legal-battle-2D80545265> [<http://perma.cc/NTF4-CXK7>]; Elizabeth Picciuto, *Baby Taken Away Because Mom's 'Disabled'*, DAILY BEAST (Feb. 10, 2015), <http://www.thedailybeast.com/articles/2015/02/10/baby-taken-away-because-mom-s-disabled.html> [<http://perma.cc/8K2E-BYZB>].

66 Harlan Hahn, *The Politics of Physical Difference: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 42–43 (1988).

Social Model of Disability,<sup>67</sup> which stands in contrast to the Medical and Individual Models.<sup>68</sup> The Social Model emerged in England in the early 1970s with the Union of Physically Impaired Against Segregation (“UPIAS”), a group of physically disabled veterans who were inspired by the collective ideas of Marxism and rejected “mercy based” agendas of mainstream disability organizations and since gained universal recognition.<sup>69</sup>

In short, the Social Model argues that mainstream society constructs a set of norms that regards people with disabilities as an inferior group.<sup>70</sup> This model focuses on challenging society’s attitude towards people with disabilities. It views disability as a phenomenon dependent on wider social contexts (and not solely on the medical-pathological aspects) that is created as a result of complex processes of stigmatization, myths, and impressions regarding people with disabilities.<sup>71</sup>

The fear of having people with disabilities reproduce and act as parents was clearly manifested in sterilization policies that were widespread in the United States during the nineteenth and first half the twentieth century. In those days, American policy had taken active measures, implemented through legislation in thirty states, aiming to prevent the notion of disabled parenthood through involuntary sterilization of people labeled “feeble-minded,” a term used to describe mostly those with mental or developmental disabilities, but also those with sensory and physical disabilities.<sup>72</sup> In its notorious 1927 decision *Buck v. Bell*, the Supreme Court upheld the Virginia statute that authorized the sterilization of Carry Buck, an eighteen-year-old “epileptic and feeble-minded” young

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67 Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 *DISABILITY & SOC’Y* 325, 325–26 (1997).

68 Jerome E. Bickenbach, Somnath Chatterji, E.M. Badley & T.B. Üstün, *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 *SOC. SCI. & MED.* 1173, 1173–74 (1999).

69 Tom Shakespeare, *The Social Model of Disability*, in *THE DISABILITY STUD. READER* 266, 266 (Lennard Davis ed., 2010).

70 George Wolbring, *The Politics of Ableism*, 51 *DEV.* 252, 253 (2008).

71 SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 3 (2009); MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990).

72 David Pfeiffer, *Eugenics and Disability Discrimination*, 9 *DISABILITY & SOC’Y* 481, 482 (1994); Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 *GEO. WASH. L. REV.* 862, 867 (2004).

woman living in an institution who gave birth to a girl after being raped by a relative.<sup>73</sup> Those eugenic policies were justified as being in the best interest of society—preventing “socially inadequate” populations from reproducing and having their offspring be a burden on society because of their inability to take care of them.<sup>74</sup>

Although seven states currently still have legislation allowing sterilization of people with disabilities, most such laws were struck down by the 1970s, and other rules preventing sterilization have been enacted.<sup>75</sup> According to a 2010 survey, there are about 4.1 million parents with disabilities who have children under the age of eighteen in the United States.<sup>76</sup> Nevertheless it seems that similar negative attitudes and societal biases against the idea of people with disabilities having and rearing children prevailed and are commonplace today.<sup>77</sup>

Those same attitudes and biases exist towards people with disabilities in general but they seem to manifest themselves in much stronger ways when it comes to parents with disabilities, specifically mothers. Women with disabilities fall short of conforming to any of the socially perceived gender roles: they are socially perceived as inadequate to fulfill either the economically productive role that is traditionally attributed to men or the nurturing, reproductive roles traditionally reserved to women.<sup>78</sup> As Michelle Fine and Adrienne Asch argue, “[m]otherhood, the institution and experience that perhaps has dominated all cultural conceptions of women—eclipsing even expectations of beauty, softness, or ever-present sexuality—often has been proscribed for a woman with a disability.”<sup>79</sup> This idea relates to what has been noted in the literature about women with disabilities facing multiple

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73 Buck v. Bell, 274 U.S. 200, 205 (1927).

74 Paul A. Lombardo, *Medicine, Eugenics and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 3 (1996); Callow et al., *supra* note 63, at 14.

75 See RIMMERMAN, *supra* note 7, at 188–89; ROCKING THE CRADLE, *supra* note 50, at 43–44; Jana Leslie-Miller, *From Bell to Bell: Responsible Reproduction in the Twentieth Century*, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 136–37 (1997); Silver, *supra* note 72, at 863.

76 ROCKING THE CRADLE, *supra* note 50, at 49.

77 Callow et al., *supra* note 63, at 14.

78 RAVI MALHOTRA & MORGAN ROWE, EXPLORING DISABILITY AND DISABILITY RIGHTS THROUGH NARRATIVES: FINDING A VOICE OF THEIR OWN 153–59 (2013); Michele Fine & Adrienne Asch, *Disabled Women: Sexism without the Pedestal*, 8 J. SOC. & SOC. WELFARE 233, 233–34 (1981).

79 MICHELE FINE & ADRIENNE ASCH, WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS 21 (1988).



challenges arising from a double source of discriminatory attitudes.<sup>80</sup> Nevertheless, neither Israel nor America legally recognizes disabled mothers as a distinct category with certain legal rights.<sup>81</sup>

The universal stigma towards the idea of parenthood with disabilities can be broken down into five main common myths<sup>82</sup> that will be hereby refuted.

### A. Dependency

There is a tendency to see people with disabilities, and disabled women in particular, as helpless, passive, and entirely dependent on others to perform everyday tasks. Thus, as someone who needs “to be taken care of,” a disabled woman is not expected to be able to “take care” of a child.<sup>83</sup> It is true that mothers with disabilities admitted their need to balance their determination to be independent with the need to accept some help and be somewhat dependent.<sup>84</sup> Nevertheless, dependency is a feature that plays into the life experience of most people, and non-disabled parents often require some kind of assistance when caring

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80 See generally MARY JO DEEGAN & NANCY A. BROOKS, *WOMEN AND DISABILITY: THE DOUBLE HANDICAP* (1985); William John Hanna & Betsy Rogovsky, *Women with Disabilities: Two Handicaps Plus*, 6 *DISABILITY, HANDICAP & SOC'Y* 49 (1991); Lisa Schur, *Contending with the “Double Handicap,”* 25 *WOMEN & POL.* 31 (2003). The idea of double discrimination was recognized by the UN in the CRPD. See Coffey, *supra* note 18, at 266; *Women and Girls with Disabilities*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=1514> [<http://perma.cc/JUW6-FDT4>] (last accessed June 25, 2015).

81 As articulated by Linda Long-Bellil: “Mothers with disabilities are left to avail themselves of broader social policies that affect people with disabilities and mothers as separate categories, but rarely address their needs as a discrete group.” See Linda Long-Bellil, *Public Policy and Mothers with Disabilities*, in *TAKING CARE: LESSONS FROM MOTHERS WITH DISABILITIES* 101, 101 (Mary Grimley Mason & Linda Long-Bellil eds., 2012).

82 In their 1981 article, Shaul, Dowling, and Laden addressed similar myths regarding mothers with disabilities. It seems that not much has changed in almost thirty-five years with regard to the social stigma carried towards this group. See Susan Shaul, Pamela Dowling & Bernice F. Laden, *Like Other Women: Perspective of Mothers with Physical Disabilities*, 8 *J. SOC. & SOC. WELFARE* 364, 365 (1981).

83 HEATHER KUTTAL, *MATERNITY ROLLS: PREGNANCY, CHILDBIRTH AND DISABILITY* 76 (2010); Lars Grue & Kristin Tafford Lærum, *‘Doing Motherhood’: Some Experiences of Mothers with Physical Disabilities*, 17 *DISABILITY & SOC'Y* 671, 673 (2010); Carol Thomas, *The Baby and the Bath Water: Disabled Women and Motherhood in Social Context*, 19 *SOC. HEALTH & ILLNESS* 622, 639 (1997).

84 Mary Grimley Mason & Linda Long-Bellil, *Having a Child: From the Decision through the Postpartum Experience*, *TAKING CARE*, *supra* note 81, at 1, 2 [hereinafter Grimley Mason & Long-Bellil, *Having a Child*]; Carmit Noa-Shpigelman, *How to Support the Needs of Mothers with Physical Disabilities?*, 2014 *DISABILITY & REHABILITATION* 1, 3, 6.

for their children, and rightfully so.<sup>85</sup> The notion of interdependence in Disability Studies embraces this idea of mutual dependency and stresses the need for communal support.<sup>86</sup> Integrating the universal need for assistance as part of every human experience will help in the process of countering the shaming and devaluation of those in need of some help or care and will promote a better, more tolerant society, one that accepts human diversity and accommodates it.<sup>87</sup> Interdependence can therefore be a key concept in challenging the stigma about the “ultimate dependency” of disabled parents.

### B. Disability as Asexuality

Many people regard people with disabilities as asexual,<sup>88</sup> a notion that translates into seeing disabled women as incapable of conceiving and carrying a child.<sup>89</sup> This myth seems to be tied to sexual morality issues, frequently referred to as “family values” arguments, that are specifically dominant in court decisions, elections, and decision-making processes regarding policies within American society,<sup>90</sup> but also exists in other societies as well. In reality, people with disabilities, like most humans, have sexual urges. They are sexual beings who have intimate, loving relationships just like non-disabled people.<sup>91</sup>

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85 Thomas, *supra* note 83, at 639.

86 AL CONDELUCI, INTERDEPENDENCE: THE ROUTE TO COMMUNITY 90 (2d ed. 1995); Terry Beth Miller, *Stalking Grendel's Mother: Biomedicine and the Disciplining of the Deviant Body*, in *DISABILITY & MOTHERING: LIMINAL SPACES OF EMBODIED KNOWLEDGE* 49, 61 (Cynthia Lewiecki-Wilson & Jen Cellio eds., 2011).

87 Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, in *THE DISABILITY STUD. READER*, *supra* note 69, at 353, 363–64; Glen W. White, Jamie Lloyd Simpson, Chiaki Gonda, Craig Ravesloot & Zach Coble, *Moving from Independence to Interdependence: A Conceptual Model for Better Understanding Community Participation of Centers for Independent Living Consumers*, 20 *J. DISABILITY POL'Y STUD.* 233, 234 (2010).

88 Elizabeth F. Emens, *Compulsory Sexuality*, 66 *STAN. L. REV.* 303, 337 (2014); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 *N.Y.U. REV. L. & SOC. CHANGE* 517, 537 (1994); Tom Shakespeare, *Disabled Sexuality: Towards Rights and Recognition*, 18 *SEXUALITY & DISABILITY* 159, 160 (2000); Winiviere Sy, *The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity*, 23 *WHITTIER L. REV.* 545, 549 (2001).

89 Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 9; Corbett Joan O'Toole, *Sex, Disability And Motherhood: Access To Sexuality For Disabled Mothers*, 22 *DISABILITY STUD. Q.* 81, 87–89 (2002).

90 Perlin, *supra* note 88, at 517.

91 TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* 168 (2006).

### C. Passing on the Disability

Disability is most often believed to be contagious or passed on genetically. Therefore parents with disabilities have a greater chance to be “at risk” of having disabled offspring.<sup>92</sup> However, counter to public perception, only a relatively small percentage of disabilities are genetically based.<sup>93</sup> Nowadays, most prospective parents encounter some type of genetic counseling outlining the option for termination of the pregnancy if the fetus is likely to have congenital impairments. For prospective parents with disabilities, this encounter is obviously a much more charged one because it holds messages directly connected to their self-perception.<sup>94</sup> The Disability Studies critique of prenatal testing emphasizes the problematic messages conveyed in many cases where parents are advised to terminate the pregnancy including ideas that life with a disability is not worth living, that families and society are better off having no disabled members, or that parental love is dependent on the child’s health and abilities.<sup>95</sup> Disability rights advocates embrace the principle of a choice given to the parents after doctors lay out all the options for them in a way that does not paternalistically dismiss the possibility of having a disabled child.<sup>96</sup> This proposal, however, is not perfect and, as some critics point out, there are disparities in the way such a “choice” is presented to disadvantaged communities such as poor people and people with disabilities,<sup>97</sup> two categories that are closely connected.<sup>98</sup>

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92 ROCKING THE CRADLE, *supra* note 50, at 213–16; Trina Balanoff & Matthew Wappett, *Developmental Denial: How the Attitudes of Parents and Professionals Shape Sexuality Education for Youth with Intellectual Disabilities*, in YOUTH: RESPONDING TO LIVES—AN INTERNATIONAL READER 259, 272 (Andrew Azzopardi ed., 2013).

93 Shaul et al., *supra* note 82, at 365.

94 Thomas, *supra* note 83, at 627.

95 Ruth Hubbard, *Abortion & Disability: Who Should and Should Not Inhabit the World*, in THE DISABILITY STUD. READER, *supra* note 69, at 107, 114–15; Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: a Disability Critique*, 63 STUD. IN LAW, POLITICS & SOC’Y 113, 120 (Austin Sarat ed., 2014); Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing Reflections and Recommendations*, 29 HASTINGS CTR. REPORT 1, 2–3 (1999).

96 BAGENSTOS, *supra* note 71, at 95. For an alternative, feminist disability studies-inspired model for enabling choice when it comes to reproductive rights, see Marsha Saxton, *Disability Rights and Selective Abortion*, in THE DISABILITY STUD. READER, *supra* note 69, at 120, 129–31.

97 MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION 78 (2007); Cynthia Lewiecki-Wilson, *Uneasy Subjects: Disability, Feminism and Abortion*, in DISABILITY & MOTHERING: LIMINAL SPACES OF EMBODIED KNOWLEDGE, *supra* note 86, at 63, 75.

98 For the historic connection between poverty and disability, see, e.g., ROCKING THE CRADLE, *supra* note

Parents with disabilities have been found to be more open to the idea of having a child with disabilities.<sup>99</sup> In fact, two expecting parents of short stature (dwarfism) documented in a qualitative study were “[f]ar from being worried or anxious about having a child inherit their disability, they actually looked forward to sharing their experiences and knowledge.”<sup>100</sup> This is especially true for specific groups within the disability community who view themselves as having a distinct cultural identity that is different from the common social identity developed by the disability rights movement that relies on the Social Model.<sup>101</sup> Such notable groups are the neurodiverse community (which is comprised of people who are on the autistic spectrum),<sup>102</sup> the Deaf community,<sup>103</sup> and the community of people of short stature as organized by a group called “Little People of America.”<sup>104</sup> A Disability Studies perspective pushes towards the idea of viewing disability as a legitimate and natural variation of human diversity as opposed to a deviation from the norm and by that challenges the concept of “normalcy.”<sup>105</sup> This point of view will help legitimize the idea of having children with disabilities and cherish them.

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50, at 27; SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 16 (2009); Deborah L. Little, ‘*Sit Home and Collect the Check*’: *Race, Class and the Social Construction of Disability Identity*, in *DISABILITY AS A FLUID STATE* 183, 191 (Sharon Barnartt ed., 2010); Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 *NW. J.L. & SOC. POL’Y* 178, 184 (2011); Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 *OHIO ST. L.J.* 425, 431–33 (2001); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 *CALIF. L. REV.* 809, 809 (1966).

99 Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 6.

100 Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 6.

101 BAGENSTOS, *supra* note 71, at 18; Charles E. Drum, *Models and Approaches to Disability*, in *DISABILITY & PUB. HEALTH* 27, 36–37 (Charles E. Drum, Gloria L. Krahn & Hank Bersani, Jr. eds., 2009); Arlene S. Kanter, *The Law: What’s Disability Studies Got to Do With It or An Introduction to Disability Legal Studies*, 42 *COLUM. HUM. RTS. L. REV.* 403, 421–23 (2011); John Lawson, *Disability as a Cultural Identity*, 11 *INT’L STUD. SOC. EDUC.* 203, 206 (2001); Tom Shakespeare, *Still a Health Issue*, 5 *DISABILITY & HEALTH J.* 129, 129 (2012).

102 ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY* 263 (2012); *see generally* Joseph N. Straus, *Autism as Culture*, in *THE DISABILITY STUD. READER*, *supra* note 69, at 535–59.

103 BRENDA JO BRUEGGEMANN, *DEAF SUBJECTS: BETWEEN IDENTITIES AND PLACES* 9 (2009); SOLOMON, *supra* note 102, at 62; SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 28–29 (1996); Harlan Lane, *Construction of Deafness*, in *THE DISABILITY STUD. READER*, *supra* note 69, at 77, 78.

104 SOLOMON, *supra* note 102, at 115.

105 MARTHA RUSSELL, *BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT* 16–17 (1998); WENDELL, *supra* note 103, at 74–84; Lennard J. Davis, *Constructing Normalcy*, in *THE DISABILITY STUD. READER*, *supra* note 69, at 3, 4.

#### D. Disability as a Sad Miserable State

Non-disabled people often see disability as a tragic consequence and a dreary existence—certainly not a state that enables or allows one to bring children into it.<sup>106</sup> However, most people with disabilities live independently and have satisfying and happy lives.<sup>107</sup> There is an inherent dissonance between how society and its institutions, including the legal system, see disability (an “outside view”) and the way people living with disabilities perceive it (an “inside view”). While those on the outside think of disability as an “unhappy and needy place,” the inside view simply looks at it as “a mundane feature of a no-less-happy life, rendered inconvenient or disabling largely by interactions with the surrounding environment, which legal accommodations alter in ways that sometimes provide benefits to many.”<sup>108</sup> According to disabled mothers themselves, their disability has some benefits. They believe it brings to the table something unique in their role as parents: they are able to discuss things that other parents might not understand, give their children emotional support and teach them to be more independent.<sup>109</sup> They also argue that their children grow up to be more sensitive and sympathetic to other stigmatized individuals.<sup>110</sup>

#### E. How Do They Actually Do It?

Laypeople sometimes have a hard time grasping how people with a physical, sensory, or intellectual disability can rear a child, since they see mobility and IQ as essential elements of taking care of children. The answer to this concern is found in the concepts of

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106 Shaul et al., *supra* note 82, at 365.

107 In fact, empirical studies found that people with severe disabilities report high quality of life, findings that were known as “the disability paradox,” a phrase that emphasizes an “outside view” on disability. See Bernd Fellinghauer, Jan D. Reinhardt, Gerold Stucki & Jerome Bickenbach, *Explaining the Disability Paradox: a Cross-Sectional Analysis of the Swiss General Population*, 12 BMC PUB. HEALTH 655, 656 (2012).

108 Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1386. A similar notion can be found in a statement by Nancy Mairs, a writer who lives with MS. She writes that “[s]elf-pity is simply one of those sentiments more likely to be projected onto one from the outside than generated within.” NANCY MAIRS, *WAIST-HIGH IN THE WORLD: A LIFE AMONG THE NONDISABLED* 32 (1996).

109 Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 97; Ora Prilleltensky, *My Child is Not My Career: Mothers with Physical Disabilities and the Well-Being of Children*, 19 DISABILITY & SOC’Y 209, 217 (2004); Shaul et al., *supra* note 82, at 371.

110 Carolyn Gutman, *The Challenges and Rewards of Parenthood: Experiences of Disabled Parents in Israel*, 27 DISABILITY STUD. Q. (2007), <http://dsq-sds.org/article/view/46/46> [<http://perma.cc/QZ9C-MFM6>]; Shaul et al., *supra* note 82, at 371.

assistive technology, personal assistance, and accommodations.<sup>111</sup> Early research showed that disabled parents used to improvise and create for themselves devices that would help them take care of their children.<sup>112</sup> Nowadays, adaptive equipment, such as changing tables that allow wheelchairs to roll beneath them, and adapted services, such as special education classes for parents with developmental disabilities, are more attainable.<sup>113</sup> In California, for example, Adapted Baby Care is covered by the state means test insurance program, Medi-Cal.<sup>114</sup> Those accommodations are crucial when assessing the parenting skills of parents,<sup>115</sup> much like in the case of assessing the ability of an employee to perform the job in the hiring process (as required by the ADA).<sup>116</sup> Unfortunately, many parents who are involved with custody cases have not previously benefited from such resources because of lack of means and community support.<sup>117</sup>

Research has shown that most of the time when people with disabilities announce their desire to become parents or that they were already expecting a child, they encounter negative attitudes not only from society at large but also from members of their close family,<sup>118</sup> members of the medical profession,<sup>119</sup> professionals working on custody cases

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111 Long-Bellil, *supra* note 81, at 107–09.

112 Shaul et al., *supra* note 82, at 368.

113 Callow et al., *supra* note 63, at 19.

114 CAL. WELF & INST. CODE §§ 14132, 14059 (1937).

115 ROCKING THE CRADLE, *supra* note 50, at 174; Callow et al., *supra* note 63, at 19, 30–31. *See also* Seth Freed Wessler, *Should a Mental Illness Mean You Lose Your Child?*, PROPUBLICA (May 30, 2014), <http://www.propublica.org/article/should-a-mental-illness-mean-you-lose-your-kid> [<http://perma.cc/5H9Z-PM85>] (“[P]arents are often evaluated without a real analysis of their supports, of the life they actually live’ . . . [A]s a result, ‘the diagnosis starts to speak louder than real life.’”).

116 Section 12112(a) of the ADA determines that failing to accommodate a person with regard to the job application and the hiring process is considered discrimination. 42 U.S.C. § 12112 (1990).

117 ROCKING THE CRADLE, *supra* note 50, at 172–73.

118 Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 9.

119 KUTTAL, *supra* note 83, at 106–07; Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 9; Ella Callow, *Disabled Mothers: Misadventures & Motherhood in the American Courts*, in *DISABLED MOTHERS: STORIES AND SCHOLARSHIP BY AND ABOUT MOTHERS WITH DISABILITIES* 277, 282 (Gloria Filax & Dena Taylor eds., 2014); Long-Bellil, *supra* note 81, at 105.

(mostly the welfare system),<sup>120</sup> as well as lawyers and the courts themselves.<sup>121</sup> None of the abovementioned seem to be aware of the solutions and the progresses made over the years and still hold on to the prejudice, biases, and myths against the idea of parenthood with disabilities.

It also has been argued that for many years, discussions about women with disabilities as mothers were absent from scholarship and academic discourse.<sup>122</sup> Research on women's embodied experiences, including pregnancy, has been mostly discussed by feminist scholars, but for many years feminist research has ignored the experiences and "body knowledge"<sup>123</sup> of women and mothers with disabilities.<sup>124</sup> This is changing over time as a close alliance between Disability Studies and Feminist Studies has emerged.<sup>125</sup> This alliance can be traced to second-wave feminism, which embraced a "plurality of differences" into this scholarship<sup>126</sup> and is interconnected with the broad need to end all inequalities in the world associated with third-wave feminism.<sup>127</sup> The main reason for this connection has to do with the fact that feminist thinkers were the ones to note the most radical issues about cultural attitudes to the body that are common for the mistreatment of women as well as people with disabilities.<sup>128</sup> As a consequence, starting

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120 ROCKING THE CRADLE, *supra* note 50, at 90–91.

121 Callow et al., *supra* note 63, at 18; Callow, *supra* note 119, at 287, 290.

122 Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 418 (2001).

123 Susan Van Den Tillaart, Donna Kurtz & Penny Cash, *Powerlessness, Marginalized Identity, and Silencing of Health Concerns: Voiced Realities of Women Living with a Mental Health Diagnosis*, 108 INT'L J. MENTAL HEALTH NURSING 153, 157 (2009).

124 KUTTAL, *supra* note 83, at 61; Carol J. Gill, *The Last Sisters: Health Issues of Women with Disabilities*, in *WOMEN'S HEALTH: COMPLEXITIES AND DIFFERENCES* 96, 97–98 (Sheryl Burt Ruzek, Virginia L. Olesen & Adele E. Clarke eds., 1997).

125 Mark Sherry, *Overlaps and Contradictions Between Queer Theory and Disability Studies*, 19 DISABILITY & SOC'Y 769, 776 (2004).

126 Marjorie Pryce, *Critical Interdisciplinary, Women's Studies, and Cross-Cultural Insight*, 10 NAT'L WOMEN'S STUD. ASS'N J. 1, 1 (1998).

127 RORY DICKER, *A HISTORY OF U.S. FEMINISMS* 130 (2008).

128 Susan Wendell, *Toward a Feminist Theory of Disability*, in *THE DISABILITY STUD. READER*, *supra* note 69, at 336–37; see also Rosemarie Garland-Thomson, *Feminist Disability Studies*, 30 SIGNS: J. WOMEN IN CULTURE & SOC'Y 1557, 1558–59 (2005). For a discussion on the alliance between feminist legal scholars and disability rights scholars in the context of labor law, see Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from*

in the 1990s, memoirs and complete volumes of scholarship about disabled mothers have started to surface.<sup>129</sup>

Years later, the concept of disabled motherhood has also manifested itself into an iconic visual image that was displayed in the public sphere. In 2005, an eleven-foot-tall statue by the British artist Marc Quinn depicting seven-month-pregnant Alison Lapper, a visual artist herself who was born without arms and with shorter legs, was displayed in Trafalgar Square in London.<sup>130</sup> In 2012, a much larger inflatable replica was displayed in the opening ceremony of the London Paralympic Games.<sup>131</sup> Lapper, who has become an international symbol of disabled motherhood was also depicted, alongside her son Parys, in the BBC documentary series “Child of Our Time,” which follows twenty-five young British children from different backgrounds born around the millennium.<sup>132</sup> In a recent interview, Lapper discussed the struggles she still has to deal with on an every day basis being a single disabled mother. She talks about the looks she gets from strangers, the lack of awareness of health professionals, and her experiences with personal assistants she has hired over the years (to whom she refers as “my arms”). She also stresses the fear of social services that might take her child away at any moment if she makes even the smallest mistake.<sup>133</sup> These struggles, specifically the fear of losing custody of the child due to authorities’ suspicions, seem to exist across western societies and were found to be experienced by

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*the Social Model of Disability*, 91 DENVER U. L. REV. 893, 901–02 (2014).

129 For an incomplete list of scholarship and memoirs see GLORIA FILAX & DENA TAYLOR, *supra* note 119; ANNE FINGER, *PAST DUE: A STORY OF DISABILITY, PREGNANCY AND BIRTH* (1990); DENISE SHERER JACOBSON, *THE QUESTION OF DAVID: A DISABLED MOTHER’S JOURNEY THROUGH ADOPTION, FAMILY AND LIFE* (1999); KUTTAL, *supra* note 83; LEWIECKI-WILSON & CELLIO, *supra* note 86; GWYNNYTH LLEWELLYN, RANNVEIG TRAUSTADOTTIR, DAVID MCCONNELL & HANNA BJORG SIGURJONSDOTT, *PARENTS WITH INTELLECTUAL DISABILITIES: PAST, PRESENT AND FUTURES* (2010); MICHELE WATES & ROWEN JADE, *BIGGER THAN THE SKY: DISABLED WOMEN ON PARENTING* (1999); Grimley Mason & Long-Bellil, *supra* note 84.

130 Ann Millett-Gallant, *Sculpting Body Ideals: Alison Lapper Pregnant and the Public Display of Disability*, in *THE DISABILITY STUD. READER*, *supra* note 69, at 476.

131 Emine Saner, *Alison Lapper: ‘Disabled People are Looked at as a Drain on Society, and I’m Certainly Not That,’* *GUARDIAN* (Aug. 2, 2014), <http://www.theguardian.com/lifeandstyle/2014/aug/02/alison-lapper-disabled-people-drain-on-society> [<http://perma.cc/44TF-7FLE>].

132 Melissa Thompson, *‘He’s sulky and Xbox-obsessed and I’m so relieved’: Paralympics Icon Alison Lapper Happy Her Son is Typical Teenager*, *DAILY MIRROR* (Feb. 28, 2013), <http://www.mirror.co.uk/news/real-life-stories/alison-lapper-happy-son-parys-1734221> [<http://perma.cc/GPV3-AFUF>].

133 Saner, *supra* note 131.



disabled mothers in the United States,<sup>134</sup> Canada,<sup>135</sup> Norway,<sup>136</sup> Denmark,<sup>137</sup> England,<sup>138</sup> Australia,<sup>139</sup> and Israel.<sup>140</sup>

Therefore it seems that there is still a long way to go until the full acceptance and inclusion of disabled motherhood and parenthood in society. The case of *Ora Mor Yosef*, an Israeli woman living with muscular dystrophy, whose lifelong dream of becoming a mother came to an end before it even began highlights the role legal institutions play in subordinating and excluding the notion of parenthood for people with disabilities.

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134 ROCKING THE CRADLE, *supra* note 50, at 99; Callow, *supra* note 119, at 281–83.

135 Marjorie Aunos, Maurice Feldman & Georgette Goupil, *Mothering with Intellectual Disabilities: Relationship Between Social Support, Health and Well-Being, Parenting and Child Behaviour Outcomes*, 21 J. APPLIED RES. INTELLECTUAL DISABILITIES 320, 324 (2008) (finding mothers reporting stressful events involving the Youth Protection Agency).

136 Grue & Tafjord Lærum, *supra* note 83, at 678.

137 Jytte Faureholm, *Children and their Life Experiences*, in PARENTS WITH INTELLECTUAL DISABILITIES: PAST, PRESENT AND FUTURES, *supra* note 129, at 63, 71.

138 Thomas, *supra* note 83, at 633.

139 Carolyn Frohmader, Helen Meekosha & Karen Soldatic, *Unruly Mothers or Unruly Practices? Disabled Mothers Surviving Oppression State Practices in Australia*, in DISABLED MOTHERS: STORIES AND SCHOLARSHIP BY AND ABOUT MOTHERS WITH DISABILITIES, *supra* note 119, at 295, 300.

140 As indicated in a recent qualitative study done on disabled mothers in Israel, it was found that “the mothers preferred to ask for help from close family members . . . rather than government services (e.g., social welfare services).” Those mothers also “felt like they had to prove that they are not disabled and can fulfill the traditional mothering role . . . . Some of them even described it a *super-mom* identity[.]” Noa-Shpigelman, *supra* note 84, at 3–4. An earlier qualitative research done with Israeli visually impaired mothers showcased an experience by a young mother who

had faced the quizzical comments from the community nurse at the baby clinic during her pregnancy and then the insensitive behavior of the nursing staff and social workers at the hospital following the birth: within half an hour of giving birth she was “interrogated” about her abilities to function as a mother. Moreover, she was not allowed to hold or feed the baby or feed the baby if she was alone in her room.

Gutman, *supra* note 110. Recently, the Tel Aviv District Court has decided that a baby born to a woman with mental disabilities and was given to a foster care family at birth will be adopted by that family. The biological mother who is living in an institution and had no support from her family in raising the baby was found to be an unfit parent. She was never allowed to actually see the baby; however, the court has decided to give her access to photos and video of the baby. See File No. 3-14 DC (TA), *Anonymous v. Att’y Gen. of Israel* (Feb. 9, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

### III. The Case of Ora Mor Yosef

Ora Mor Yosef, a Jewish-Israeli woman who is in now her late forties, has been living with muscular dystrophy all her life. She resides independently in southern Israel alongside her large, supportive, and loving family and uses personal assistance. Like many other women with disabilities, Ora has always wanted to become a mother.<sup>141</sup> Due to her impairment, Ora could not bear a pregnancy and so she needed to use third-party reproduction methods which, as mentioned, are highly restricted in Israel. Therefore, she had to seek a doctor who would be willing to extract eggs from her ovaries so that she could later use them for IVF treatments. After getting rejected by many doctors because of her disability, her age (Ora was in her early forties then), and the possibility of medical hazards, Ora finally found a doctor who was willing to do the procedure. Luckily, three of Ora's eggs were successfully inseminated through IVF with the sperm of her then-partner, and three embryos were then created and frozen. Despite the fact that Ora passed the required parental efficacy evaluations done by the state, when she and her then-partner wanted to apply to go through a surrogacy process in Israel, they were rejected because they were not legally married.

After the couple broke up, the now-single Ora did not want to give up on her dream. For altruistic reasons, a relative volunteered to serve as her surrogate.<sup>142</sup> The two traveled to the United States on a lawful "reproductive tour" to try and insert the embryos in the surrogate's uterus. Unfortunately, the treatment did not succeed and a pregnancy did not develop.

At that point, Ora's dream was about to collapse, but her desire to have a child, boosted by the socio-cultural realities of her society and the support of her family, was so great she was determined to fulfill it. Since Ora is not considered a candidate for adoption in Israel, she got a sperm donation from an acquaintance (who promised to give up his parental rights), and an anonymous egg donation. She decided to try one more time to bring a child

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141 Grimley Mason & Long-Bellil, *Having a Child*, *supra* note 84, at 1, 11. As Heather Kuttai, a paraplegic mother, puts it, "[w]hen pregnant, I was often not the 'Other' for probably the first time in my life[.]" KUTTAL, *supra* note 83, at 71.

142 The altruistic agenda behind the surrogacy in this case makes it less vulnerable to feminist critique and ethical concerns, see Brenda M. Baker, *A Case for Permitting Altruistic Surrogacy*, 11 *HYPATIA* 34, 42 (1996). Nevertheless, some scholars who object to the idea of surrogacy altogether raised the question of whether an altruistic surrogate who is a friend or relative can really "provide a genuine informed consent." See, e.g., M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 *J. MED. ETHICS* 171, 171 (2009).

into the world. This time, Ora and the surrogate traveled to India where the IVF took place, and the embryo was successfully inseminated. Ora and the pregnant surrogate went back to Israel after spending ten days in India.

Upon their arrival, Ora headed to the formal state officials to register as the baby's mother before the birth. Ora was notified that she could not be registered as the parent because there was not genetic or gestational connection between her and the child. When the surrogate was nine months pregnant, Ora had filed for a declaratory judgment decree with the family court. A month later, a baby girl was born, and despite judicial efforts to declare Ora as her temporary guardian, the baby was put in foster care. It was held that the child would remain in foster care, and would not be put up for permanent adoption until a decision on Ora's request to declare herself as the legal parent of the baby would be made. She has never been allowed to see the baby.

The *Ora Mor Yosef* case is a challenging one. It involves extremely delicate circumstances of a single, disabled woman whose desire to have a baby drove her to "coordinate" one for herself, using the help of third-parties who all (excluding the egg donor, remained anonymous) had consented to giving the baby to Ora to raise. This story raises moral and ethical questions about who can be considered a parent; it is undisputable that Ora does not have a biological-genetic or gestational connection to the girl but she, as someone who initiated her existence and went to great lengths in order to bring her into the world, claims to have a profound emotional connection to her and sees herself as her mother. From Ora's perspective, giving the baby to a foster family who does not bear any biological connection to her either is absurd. This case demonstrates how far some people with disabilities are willing to go in order to become parents and the consequences of not having a clear policy on the matter that keeps pace with both technological developments and cultural-societal attitudes.

In June 2013, the family court denied Ora's petition for declaratory judgment.<sup>143</sup> The court stated that Israeli law, not Indian law, which would have permitted the procedure and declared Ora as the baby's mother, governed.<sup>144</sup> Israeli law does not recognize a private contractual agreement to have a baby without state regulation of the process.<sup>145</sup> The court has specifically stated that the main obstacle to the recognition of parental status in this

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143 File No. 50399-12-12 Family Court (BS), *M.Y. v. Anonymous* (June 20, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

144 *Id.* at article 38.

145 *Id.* at articles 30–32.

case is the lack of genetic connection between Ora and the baby. Under current Israeli law, the declaration of such status is impossible from a legal standpoint.<sup>146</sup> Missing from the family court decision was any attention to the fact that Ora is a woman with disabilities or any attention to the lack of options with regard to motherhood, available to Israeli women in her position.

Ora appealed this decision. Seven months after the family court decision, in January 2014, after requests for expedition were disregarded, a decision rejecting the appeal was given in the district court.<sup>147</sup> The appellate court agreed with the family court's decision to apply Israeli law (as opposed to the Indian law) and with the family's court's application of the requirement to have a genetic-biological connection in order to establish parental status.<sup>148</sup> The appellate court also mentioned some of the dangers in opening up the floodgates to "parenthood by contract" and warned against the dangers of allowing people to make deals for creating children.<sup>149</sup> The court briefly dismissed Ora's claim about disability discrimination by saying that, because the requirement for genetic connection is prominent with other groups including single mothers, LGBTQ individuals, etc., one cannot stress that disabled people are specifically being discriminated against on the matter.<sup>150</sup> Therefore, it should be an issue for the legislature to amend and the court has no power to guarantee a judgment declaring Ora as the baby's parent.<sup>151</sup>

Ora did not give up and submitted a request to appeal to the Israeli Supreme Court. Her request was granted and a hearing before an extended panel of seven justices was conducted in July 2014 (nearly a year after the first decision of the family court). This time Ora got the support of the Disability Rights Clinic of Bar-Ilan University's Faculty of Law, which joined the proceeding as an *amicus curiae* in an attempt to bring the disability issue to the forefront of the case. Shortly after the hearing, the Supreme Court gave a short unanimous decision to reject the appeal. Because of the urgent nature of the case, this decision was given without reasoning. The Supreme Court stated it will give the reasoning

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146 *Id.* at articles 48–50.

147 File No. 59993-07-13 DC (BS), *Anonymous v. Anonymous* (Jan. 22, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter "the District Court decision"].

148 *Id.* at articles 17–18.

149 *Id.* at articles 16, 18.

150 *Id.* at article 20.

151 *Id.* at articles 19, 22.

at a later stage.<sup>152</sup> At the hearing itself, Ora's attorneys requested that, if the court decides not to declare her as the baby's mother, she would at least get some say or special status in the adoption processes, which has not yet begun. When the Justices asked the government lawyers for their opinion, they argued that such special treatment was unacceptable because it would send the wrong message about the legality of the actions taken by Ora, which, they claimed, stand in contrast to public policy and open the door to such potential phenomenon as child trafficking. Therefore, the Supreme Court said that it would not decide on the question of giving special status to Ora in the adoption proceeding, and stated it would leave the decision to the family court if Ora submitted a later request regarding this issue.<sup>153</sup>

On April 1, 2015, the Israeli Supreme Court gave its reasoning for its decision in the case.<sup>154</sup> All the justices accepted the findings of the district and family courts on the matter. Out of the seven justices who gave their reasoning, only one justice, Justice Hanan Melcer, discussed the issue of Ora's disability in detail and mentioned the Equal Rights for People with Disabilities Law, as well as Article 23 to the UN CRPD. Justice Melcer pointed out the "normative void" that currently exists in Israeli law with regard to ensuring reproductive rights for people with disabilities and called for the legislature to intervene and enact laws and create policies in order to fill it.<sup>155</sup> Former Chief Justice Asher Grunis and Justice Neal Handel both explicitly said that this is an issue for the legislature, and that with all sympathy to Ora's unique situation, the court's hands in the current normative and legal landscape were tied.<sup>156</sup>

#### IV. What Did the Courts Miss? A Disability Legal Studies Analysis

The stated reasoning in the *Ora Mor Yosef* decisions focused on the need for a genetic-biological connection between a prospective parent and a baby in order to declare a parental status. The rationale given by the courts was concern about public policy drawn from a fear of a dystopian scenario where people are bringing children who have no

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152 File No. 11184/14 CA, *Anonymous v. Ministry of Soc. Affairs & Soc. Servs.* (July 13, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

153 *Id.*

154 File No. 11184/14 CA, *Anonymous v. Ministry of Soc. Affairs & Soc. Servs.* (Apr. 1, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter "the Supreme Court decision"].

155 Article 6 to Justice Melcer's opinion in the Supreme Court decision, *id.*

156 *Id.* at 4–5, 26.

clear roots and identity into the world for all sorts of illegal, immoral and certainly nerve-wracking goals.<sup>157</sup>

As mentioned, jurisdictions in the United States also tend to see great importance in the genetic connection when deciding on matters of custody and parenthood.<sup>158</sup> For example, the New Jersey Supreme Court decided against declaring a woman to be the mother of a child born by a surrogate, using an egg that was not hers, because of the lack of genetic connection, unless she would legally adopt the child.<sup>159</sup> In that case, however, the consequences of the decision were much less tragic than in Ora's because the woman had raised the child since birth with her husband (the baby was three years old when the court decision was made), and the baby was not taken away from them. It also should be noted that the New Jersey court was divided on the issue (three to three), and, because of the deadlock, the appellate court ruling was affirmed.<sup>160</sup> Interestingly, the case has been criticized for not implementing a gender-neutral policy, as contrastingly infertile men are immediately considered fathers when a baby is conceived using another man's sperm.<sup>161</sup> This case, therefore, resembles another Israeli Supreme Court ruling, which guarantees the spouse in Israeli same-sex couples who does not hold a genetic connection to a baby born from inter-country surrogacy immediate recognition as the other parent (and thus makes similar adoption proceedings imposed by

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157 See the District Court decision, *supra* note 147, at article 16; the Supreme Court decision, *supra* note 154 at articles 21 and 25 to Justice Hendel's opinion, article 4 to Chief Justice Miriam Naor's opinion, and article 2 to Justice Esther Hayut opinion. For the distinction between "baby selling" and surrogacy, see Coffey, *supra* note 18, at 289–90.

158 Dashiell, *supra* note 53, at 856. An exception to the rule is the model of "Parenthood by Intent" that was recognized by the 1998 decision by the California Court of Appeals involving Luanne and John Buzzanca, a married couple who contracted with a surrogate to carry an embryo that had no genetic connection to neither of them (while the identities of both the sperm and egg donors were unknown). After the couple separated, the woman petitioned to get custody of the baby and to declare her ex-husband as the lawful father in order to get child support, to the latter's objection. The Court of Appeal has recognized the couple as the parents, basing its decision on the couple's intention of having the baby and accepting a reasoning similar to that made by Ora: "Let us get right to the point: Jaycee [the baby] never would have been born had not Luanne and John both agreed to have a fertilized egg implemented in a surrogate." See *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410, 1412 (1998). For further discussion of the case, see, e.g., Halperin-Kaddari, *supra* note 30, at 321–22; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 607–10 (2002).

159 *In re T.J.S.*, 16 A.3d 386, 395–97 (N.J. Super. Ct. App. Div. 2011).

160 *In re T.J.S.*, 54 A.3d 263 (N.J. Super. Ct. 2012).

161 Dashiell, *supra* note 53, at 880.

the New Jersey court unnecessary in Israel).<sup>162</sup> Ora's case, however, presents unique and unprecedented circumstances that might have tipped the scales in another direction.

Although the concerns about parenthood by contract can be understood and are worthy of a broader and deeper discussion as well as the development of legislative means to prevent them from occurring, I would argue that they do not really manifest themselves in the special and specific circumstances of this case. I would also argue that the courts (with the exception of Justice Melcer's opinion) did not address the starting point for this story—and that is the notion of accessibility and discrimination against people with disabilities who do not hold access to reproductive policies that fit their needs. It seems that the courts were challenged by the idea of a disabled, single woman who wanted to become a mother and instead of evaluating her capability to raise and care for the baby, they chose the easy way out by dismissing her claim, relying on hypothetical concerns about possible child abuse, which did not exist in Ora's case. The courts did not bear in mind that the current Israeli legal system is designed in such a way that people like Ora cannot have children and, thus, are being left out of the 'child centric' society they were born into. Such a problematic lack of access needs to be addressed by the courts, regardless of whether it hurts only people with disabilities or other groups as well.

The notion of accessibility is prominent when discussing disability-related issues, and it has broader political implications than traditionally thought of the issue, such as providing ramps in the entrance to public buildings. Disability Studies scholars argue that participation in physical, social, and political systems was initially designed with only the needs of able-bodied persons in mind.<sup>163</sup> That design theory excludes people with disabilities from the public sphere as well as most areas of life, including the labor market and the mainstream education system.<sup>164</sup> Accessibility calls for removing social and physical barriers and allowing people with disabilities to be included in all areas of life. As articulated in Article 9 of the UN CRPD:

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162 File No. 11184/14 HCJ, *Mamat v. Ministry of Interior* (Jan. 28, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

163 Rob Imrie, *Oppression, Disability and Access in the Built Environment*, in *DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES* 129, 133 (Tom Shakespeare ed., 1998); Sally S. Scott, Joan M. McGuire & Teresa E. Foley, *Universal Design for Instruction: A Framework for Anticipating and Responding to Disability and Other Diverse Learning Needs in the College Classroom*, 36 *EQUITY & EXCELLENCE IN EDUC.* 40, 41 (2003).

164 Armantine M. Smith, *Persons with Disabilities as a Social and Economic Underclass*, 12 *KAN. J.L. & PUB. POL'Y* 13, 21 (2002–2003).

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications . . . and to other facilities and services open or provided to the public . . . . **These measures, which shall include the identification and elimination of obstacles and barriers to accessibility.**<sup>165</sup>

With regard to issues of custody, Article 9 should be read together with Article 23 of the UN CRPD, which requires party states to eliminate discrimination against people with disabilities with regard to parenting and raising a family.<sup>166</sup> As mentioned by Justice Melcer, since Israel has signed and ratified the convention,<sup>167</sup> there is a need for the Israeli legislature to fill in the current “normative void.”<sup>168</sup> Then again, although this declaration by Justice Melcer is worthy of esteem, and one could hope it will bring some future policy change, it does not manifest itself in a way that would allow Ora to have a relationship with the baby since it can only be considered as *obiter dictum*.

The courts’ focus on the lack of a genetic connection served as a reason for not allowing Ora the baby she desperately struggled to have. The underlying assumption of the Israeli (and some American) courts is that the biological connection predicts the child’s welfare, but this is not necessarily the case, especially when the parental skills of the prospective non-biological parent are assessed (as in adoption processes and also in Ora’s case).<sup>169</sup> As articulated by Dorothy E. Roberts, in a different context, it seems that “the genetic tie is inherently paradoxical. It is at once a means of connection and a means of separation. It links individuals together while it preserves social boundaries.”<sup>170</sup>

Ironically, the end result in Ora’s case was that the baby was given to others who do not have a genetic connection to her either, instead of to Ora who, as the district court

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165 See Art. 9 to the UN CRPD, *supra* note 6 (emphasis added); Coffey, *supra* note 18, at 268–70.

166 See Art. 23 to the UN CRPD, *supra* note 6.

167 See *supra* note 5.

168 Articles 4–6 to Justice Melcer’s opinion in the Supreme Court decision, *supra* note 154.

169 Asch, *supra* note 35, at 130; Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL’Y 279, 310 (2011).

170 Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 211 (1995).



clearly stated, is a fit parent who passed the official parental efficacy evaluations.<sup>171</sup> This decision, whether intentionally or not, conveys the message that the state focused its power on refusing to give the child to a disabled woman and preferred having it be raised by other, non-disabled parents.

In a way, the court's decision can be seen as a warning sign and punishment of Ora for acting in ways that do not align with the current legal system (although one could argue that since the issue of surrogacy outside the country is not formally regulated in Israeli legislation, Ora's move cannot be seen as illegal). The courts were concerned about the possibility of people who would act in such borderline unlawful ways of bringing babies into the world, then presenting the courts with a *fait accompli* when asking courts to recognize them as the parents.<sup>172</sup> Nevertheless, because the circumstances of this story are more unique, in that Ora had tried every other way of having a child and her final choice was her last resort, the courts should have ruled differently. Furthermore, I fail to see a specific legal source that would authorize the government to take a baby away from its parents, if it is believed that it was not conceived legally: as this is such a serious means of punishment, it should be stated clearly in the criminal law.

Given the circumstances of this story, international law, and the broader message the courts could have given regarding the participation and inclusion of people with disabilities in Israeli society, I argue that the courts should either allow Ora to adopt the baby, or in the alternative, come up with an arrangement that would have allowed her to have a substantial connection to the child. By doing so, the court would have assuaged the trauma caused to all parties, namely: Ora, the baby, the surrogate (who wanted Ora to have the baby), and the foster family. This kind of solution would have also allowed the baby to have a relationship not only with Ora, but also with the surrogate who carried her (because of the familial relationship between Ora and the surrogate). This kind of relationship would have strengthened the child's sense of belonging and identity and therefore is recommended in the literature.<sup>173</sup> Instead of following either of these prescriptions, some justices expressed hope that the family court that will discuss the future adoption proceedings would reach "a concrete, pragmatic and just solution in the matter,"<sup>174</sup>

171 See the District Court decision, *supra* note 147, at article 21.

172 Article 5 to Justice Salim Joubran's opinion, in the Supreme Court decision, *supra* note 154.

173 Asch, *supra* note 35, at 132; Mary Lydon Shanley & Sujatha Jesudason, *Surrogacy: Reinscribing or Pluralizing Understandings of Family?*, in *FAMILIES—BEYOND THE NUCLEAR IDEAL*, *supra* note 35, at 110, 118.

174 Words of Justice Yoram Danziger in article 5 to his opinion in the Supreme Court decision, *supra* note 154. See also article 5 to Justice Naor's opinion, *supra* note 154.

but refused to mandate any requirement that the family court give Ora some kind of special status in further proceedings.

A decision given by the England and Wales Family Court in Leicester, given in October 2014, known as the case of “Baby H,” represents an alternative way of handling a custody case involving parents with disabilities.<sup>175</sup> In that case, a couple with intellectual disabilities gave birth to a baby girl. After the social worker was not sure that the parents would be able to care for the child, the baby was placed with a foster family that was known and related to the parents, so that the parents would have some visitation rights until their parental skills could be properly assessed.<sup>176</sup> After eighteen months, a positive assessment of the parents’ skills was given and Baby H. was returned to them.<sup>177</sup> Nevertheless, the long wait due to “poor practices admitted by the local [welfare] authority,”<sup>178</sup> had an impact on both the parents and the foster family. The court recognized this impact and awarded them compensation for emotional distress.<sup>179</sup> In Ora’s case, the long proceedings (lasting much more than 18 months since the baby was born) and the fact that Ora had not seen the baby (although unlike in the Baby H. case, she was never recognized as the parent) were unjustly ignored by the Israeli courts.<sup>180</sup>

The relatively new field of Disability Legal Studies seeks to apply Disability Studies perspectives to law and examines the role legal institutions play in the social construction of disability.<sup>181</sup> Looking at the *Ora Mor Yosef* case through the Disability Legal Studies prism introduces new complexities in this challenging matter and shows it as a missed opportunity in terms of making an important statement for disabled people in Israel and beyond. In that respect, having only one justice (out of seven who adjudicated the case) addressing the issue of disability is highly concerning.

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175 *Re H (A Child)*, [2014] EWFC (Fam) 38 (appeal taken from Gr. Brit).

176 *Id.* at articles 13–15, 17.

177 *Id.* at article 38.

178 *Id.* at article 45.

179 *Id.* at articles 40–46, 82–83.

180 Adjudication or investigation time is of essence in American cases as well and has a grave influence on the chances of the parents ever getting custody of the child. *See Picciuto, supra* note 65.

181 Kanter, *supra* note 101, at 444; Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 *YALE J.L. & HUMAN.* 63, 64 (2006).

Ora's tragic story should be seen as a missed opportunity of recognizing the existence and hardships of disabled mothers and make a difference for their benefit. Taking into account the structural barriers within the legal system that stem from stigma and ignorance in society about the topic, could have progressed the wellbeing of the parties to this story as well as that of people with disabilities in general. This Article hopes to get this message across to jurists, policy makers, legislators, scholars, and others who might be able to guarantee similar cases in the future will not end in the same way.

## V. Final Thoughts

After losing her custody battle, Ora and her sister have turned to the family court, once again requesting that it allow the sister to adopt the baby so that Ora could have some relationship with her. A decision has yet to be made on the matter.<sup>182</sup>

One small ray of light with regards to access to parenthood for people with disabilities in Israel has shined in the midst of Ora's legal battle, although it did not seem to help her. In December 2013, the family court in Haifa has guaranteed the request of a married man with a mental disability (paranoid schizophrenia) to go through a state-funded surgical sperm retrieval procedure in order to attempt to have a child through ART (court approval is needed by law when involving persons who are under guardianship). Judge Esperanza Alon approved the procedure after she was convinced that the man has the support of his family and wife of eight years and by his desire to have a child. Judge Alon even went a step further by recognizing the international status of the "right to parenthood."<sup>183</sup> Although this decision is a step forward in the recognition of people with disabilities' right to become parents, this case deals with ART methods, which are known to be much more acceptable in the Israeli context than third-party reproduction methods, it also involves a married man who is not traditionally perceived to be the main caretaker for the child. One could only guess what would have been the decision if a woman had been the disabled spouse in that situation.

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182 Ora has turned to social media in an attempt to raise awareness of her story as well as of other people who lost custody of children to the Israeli welfare system. Unfortunately, it seems that her anger and frustration have caused her to become less diplomatic and more aggressive, including personal attacks on government social workers in social media posts. This behavior sends an unsettling message that might push the baby even further away from her.

183 File No. 6036-10-08 Family Court (Hi), *Anonymous v. Att'y Gen. of Israel* (Dec. 29, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).