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## Comments

# Italy's Family Values: Embracing the Evolution of Family to Save the Population

Mary E. Canoles\*

### **Abstract:**

The evolving notion of family in Italy has placed reproductive rights in the center of controversy. From the grass-roots campaign that led to the legalization of abortion in the 1970's, to Italy's current reputation as fertility pioneers, the people of Italy are changing. No longer are Italians following the views of the Roman Catholic Church, and no longer are Italian women relinquishing their careers for the sake of family. Italian values are changing, and as a consequence, the Italian population is declining. Some fear that Italians may become an endangered species. As a natural consequence of these changes, the legality of abortion and other reproductive technologies has come into question. Several forces impact the legislation introduced into Italian Parliament in this turbulent time. A lack of funding for women's health care, the education of young women, the laws of other European countries, and the Italian Medical Association impact the role that reproductive technologies have in the Italian culture. Now Italians must decide whether they wish to remain on the forefront of reproductive

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technology by following the requirements of the Women's Convention and by surrendering their rigid notion of family, or whether they will fold to the pressure of the European Council, the Roman Catholic Church and the Italian Medical Association and regulate fertility procedures.

## I. Introduction

Italy has the lowest number of births per child-bearing-aged woman in the world.<sup>1</sup> In 2000, the birth rate was 1.2 children per woman.<sup>2</sup> Some of the reasons for the decrease in birth rate are the rising costs of raising children, an increase in the higher education of women<sup>3</sup> and the change in status of females in Italian culture.<sup>4</sup> Italy's population outlook is grim.<sup>5</sup> If the birth rate continues at this rate,<sup>6</sup> the Italian population could be extinct in 200 years.<sup>7</sup> Even the Pope is urging Italian couples to reproduce.<sup>8</sup>

Despite the low birth rate, Italy is a country with one of the highest rates of post-menopausal pregnancies.<sup>9</sup> This is because Italy, unlike other European countries, does not regulate the fertility procedures<sup>10</sup> performed in privately funded clinics.<sup>11</sup> In 1999, Italy had 298 fertility clinics, 97 of which were privately owned, and no law governing fertility practices.<sup>12</sup> With Italy's impending doom, it is not surprising that the Italian government has not regulated the use of fertility procedures.

1. John Hooper, *Milan Offers Women Inducement to Refuse Abortion*, THE GUARDIAN (LONDON), February 11, 1999, at O13.

2. *Ethnic Italians an Endangered Species*, ABC NEWS ONLINE, Feb. 22, 2000, at <http://www.abc.net.au/pm/s102392.htm> (last visited Aug. 15, 2002)[hereinafter *Ethnic Italians*].

3. *Italy: Women's Status*, PBS, at <http://www.pbs.org/sixbillion/italy/it-status.html> (last visited Aug. 15, 2002)[hereinafter *Women's Status*]. In Italy, more women than men are studying to earn a degree in higher education.

4. *Ethnic Italians*, *supra* note 2; *Women's Status*, *supra* note 3. "Italian women are spending more time working outside of the home."

5. *Pope Wants More Italian Babies*, BBC News Online, Feb. 6, 2000, at <http://news.bbc.co.uk/2/hi/world/europe/633004.stm> (last visited Aug. 15, 2002)[hereinafter *Pope*].

6. *Ethnic Italians*, *supra* note 2.

7. *Id.*

8. *Pope*, *supra* note 5.

9. Alessandra Stanley, *Bill to Regulate Fertility Procedures Gains in Italy*, N.Y. TIMES, May 28, 1999, at A4.

10. The phrase fertility procedure is used interchangeably throughout this comment with the following terms: assisted conception, conception assistance, fertility assistance, fertility treatments, reproduction assistance, etc. The list is not exclusive or exhaustive and includes surgical procedures and drug assistance.

11. Stuart Hornett, *Embryos and Europe: What Prospects for Harmonisation?* NEW L.J., May 24, 1991, at 713.

12. Stanley, *supra* note 9, at A4.

However, conservative political groups, other European nations, and the Italian Medical Association ("IMA") are advocating for the regulation of fertility procedures. The proposed regulation threatens the rights of women and non-traditional families. With Italy's population forecast so dismal, can Italy afford to regulate fertility?

This comment examines the Italian population decline and suggests possible solutions that would increase the reproductive freedoms and fertility of Italian women. First, this comment explains Italian abortion law, the Italian government's first step in granting women reproductive freedom, and the evolution of law and policy in Italy regarding women's health issues and family planning. Second, this comment discusses the changing ideals of the Italian population regarding family, and the need for increased access to fertility assistance for non-traditional families. Third, this comment examines the United Nation's "Convention on the Elimination of All Forms of Discrimination Against Women." It will discuss how Italian law should be formed within the Convention's guidelines to increase Italy's birth rate, considering the societal controls and pressures from other European countries.

## II. The Legalization of Abortion

The legalization of abortion<sup>13</sup> in 1978<sup>14</sup> was the Italian government's first step in preserving limited reproductive rights for Italian women. The legislation, Law No. 140,<sup>15</sup> ("abortion legalization statute") allows abortions to be performed in Italy during the first three months of pregnancy,<sup>16</sup> and was passed after a grass-roots poll indicated that a majority of Italian citizens wanted abortion legalized.<sup>17</sup> Although

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13. This term is used synonymously throughout this comment with the term pregnancy termination procedure.

14. Gazz. Uff. May 22, 1978, No. 140 translated in *Italy: Abortion Contraception, and Maternity Protection*, 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978)[hereinafter *Abortion Legalization Statute*].

15. *Id.*

16. *Italy Resists Abortion*, 8 OFF OUR BACKS: A WOMEN'S NEWSJOURNAL 6 (1978).

17. A grass-roots movement has legislative force in Italy because the Constitution provides for the initiation of a public referendum when a petition to repeal a law having at least 500,000 signatures is filed with the government. Such a referendum was initiated to repeal the law criminalizing abortion. The Italian legislature then drafted and passed the current abortion law with its strict requirements before the referendum was complete. This allowed the legislature to impose restrictions that would have not otherwise been imposed if the referendum had passed, the effect of such would have been unrestricted abortion legalization. *Italy Resists Abortion*, *supra* note 16, at 6. See COST. [Constitution] art. 75. (Italy) which provides the following:

(1) A popular referendum shall be held to decide on the total or partial repeal of a law or of an act having force of law whenever it is requested by 500,000 voters or by five regional councils.

(2) Referenda shall not be allowed for tax or budget laws, amnesties or

the cost of the procedure is covered by the national health care system, the law established several requirements that both health care providers and women seeking abortions must follow.<sup>18</sup> First, women must meet the statutory requirements to have an abortion. Second, health care workers who perform abortions or assist in the procedure on women who do not meet the statutory requirements, will face criminal penalties.<sup>19</sup> Also, abortions may only be performed in hospitals or authorized nursing homes,<sup>20</sup> and parental consent is required for women under the age of eighteen.<sup>21</sup> Finally, abortions can only be requested for medical, psychological, or health reasons.<sup>22</sup>

#### A. *Abortion Inaccessible after Legalization*

Despite the legalization of abortion in 1978, there is currently a shortage of doctors in Italy who will perform abortions because a large number of Italian medical professionals are opposed to abortion.<sup>23</sup> Many of these doctors have registered as conscientious objectors<sup>24</sup> which allows a registered objector to avoid performing the procedure.<sup>25</sup> Conscientious objectors are health care providers who find abortion repugnant, and are permitted by the Italian government to refuse to

pardons, or laws authorizing the ratification of international treaties.

(3) All citizens entitled to vote for the election of the Chamber of deputies shall also be entitled to take part in a referendum.

(4) The proposal submitted to referendum shall be approved if a majority of those eligible have participated in the voting, and if it has received a majority of valid votes.

(5) The law shall establish the procedures for carrying out a referendum.

18. *Abortion Legalization Statute*, *supra* note 14, at 593. Health care providers are required to inform women seeking abortions of: their right to the use of social, health and welfare services, the legislation available that protects pregnant women, and the right to general assistance from the government and health care providers if the woman does not terminate her pregnancy. In addition, the voluntary termination of pregnancy may only be performed during the first ninety days of pregnancy, and only when there is a threat to a woman's life or a serious threat to the woman's physical or mental health. *Id.*

19. *Id.* at 595-597. Anyone who induces a voluntary termination of pregnancy can be imprisoned for more than 5 years depending on the age and circumstances of the procedure, and the woman who has the pregnancy terminated can be fined. *Id.* at 590-91.

20. *Id.* at 593.

21. *Id.*; *See also Italy Resists Abortion*, *supra* note 16, at 6. Some health care providers insist that a woman seeking an abortion show objective symptoms of medical or psychological distress if an abortion is to be performed. Others believe the women's subjective statements and perform the abortion without further inquiry. Jeff Israely, *In Italy, Battle over Abortion Law Continues Twenty Years Later: Both Sides Find Comfort in Text*, BOSTON GLOBE, July 22, 2001, at A21.

22. *Abortion Legalization Statute*, *supra* note 14, at 591; *See also Italy Resists Abortion*, *supra* note 16, at 6.

23. Israely, *supra* note 21, at A21.

24. *Abortion Legalization Statute*, *supra* note 14, at 592-593.

25. Israely, *supra* note 21, at A21.

participate<sup>26</sup> in abortion procedures by declaring their objections to provincial medical examiners or hospital administrators.<sup>27</sup>

The Italian government in a 1997 report to the United Nations ("U.N."), has admitted that roughly 60% of Italian gynecologists, 50% of Italian anesthesiologists, and 50% of Italian medical support staff are registered as conscientious objectors; and frequently, the entire staff of some southern Italian public hospitals are conscientious objectors.<sup>28</sup> Thus, the few medical facilities that offer pregnancy termination procedures<sup>29</sup> are inundated with patients, and it is common for such facilities to have month-long waiting lists.<sup>30</sup>

Conscientious objectors are suspected of abstaining from performing abortions for financial rather than moral reasons.<sup>31</sup> Some interest groups claim that medical professionals who registered as objectors in 1981 performed illegal abortions for approximately \$1000 per procedure prior to the legalization of abortion.<sup>32</sup> After the legalization of abortion, doctors became objectors to make it impossible for women to obtain legal abortions, thereby helping the objectors to continue their income with the illegal fee.<sup>33</sup> For example, in 1981, 600,000 illegal abortions were performed.<sup>34</sup>

Organizations opposing legalized abortion have developed creative tactics to sway women from choosing an abortion. Because the law requires a seven-day waiting period before a woman can have the procedure,<sup>35</sup> those arguing against abortion view that time as a chance to urge women to continue the pregnancy. Some municipal governments offer money for women considering an abortion to change their minds.<sup>36</sup>

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26. *Abortion Legalization Statute*, *supra* note 14, at 592. The translated text of the relevant section of the law reads, "Conscientious objection shall exempt health personnel and allied health personnel from carrying out procedures and activities specifically and necessarily designed to bring about the termination of pregnancy." *Id.*

27. *Id.* The translated text of the relevant section of the law reads, "Health personnel and allied health personnel shall not be required to assist in the procedures . . . if they have a conscientious objection, declared in advance. Such declaration must be forwarded to the provincial medical officer and, in the case of personnel on the staff of the hospital or the nursing home, to the medical director." *Id.*

28. Committee on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties under Article 18 of The Convention on the Elimination of All Forms of Discrimination against Women: Third Periodic Report Of States Parties. Italy, U.N. Doc. CEDAW/C/ITA/3, (1998)[hereinafter Third Periodic Reports of States Parties].

29. *See supra* note 13.

30. *Italy Resists Abortion*, *supra* note 16, at 6; Israely, *supra* note 21, at A21.

31. *Italy Resists Abortion*, 8 *supra* note 16, at 6.

32. *Id.*

33. *Id.*

34. *Italy: Abortion Lives*, THE ECONOMIST, May 23, 1981, at 50.

35. *Abortion Legalization Statute*, *supra* note 14, at 591.

36. Israely, *supra* note 21, at A21; *Ethnic Italians*, *supra* note 2.

In Milan, pregnant women who are financially unstable or unemployed can be paid between 375,000 and 750,000 lira per year for up to three years for *not* having an abortion.<sup>37</sup>

### B. *Statutory Mandate for Abortion Access Overlooked*

The shortage of doctors who perform abortions is contrary to the accessibility requirement in the abortion legalization statute. The accessibility requirement mandates that, "the percentage of pregnancy terminations that may be performed relative to the total number of surgical operations performed . . . shall be not less than 20%."<sup>38</sup> The statute provides that the Italian Minister of Health shall set the pregnancy termination to surgical procedure<sup>39</sup> ratio at 20% or higher.<sup>40</sup> If entire towns cannot find doctors to perform abortion procedures, it is clear that this 20% requirement is not being met.

### C. *Unintended Effects of Abortion Legalization*

The decrease in abortion since its legalization is also contrary to the fears of legalization opponents - that there would be a surge in terminated pregnancies.<sup>41</sup> The number of abortions performed in Italy has dropped by almost fifty percent since it was legalized.<sup>42</sup> Today, most of the women who have abortions are over the age of 25. Forty percent of women who undergo the procedure have already had one child, and less than one percent of Italian teenagers choose abortion.<sup>43</sup>

Statistics prove that abortion is not a substantial cause of Italy's population decline.<sup>44</sup> In fact, as the number of abortions has decreased, so has the birth rate.<sup>45</sup> The Italian population is not decreasing because abortion is legal, but because less Italian women are becoming pregnant. Changes in women's lifestyle choices and changes in women's social status are the cause for the decrease in the Italian birth rate.<sup>46</sup> Opponents of abortion consistently push for more severe limitations on abortion

37. Hooper, *supra* note 1, at O13.

38. *Abortion Legalization Statute*, *supra* note 14, at 592.

39. Surgical procedure refers to the total number of any surgical procedures performed at the health care facility. *Abortion Legalization Statute*, *supra* note 14, at 592.

40. *Id.*

41. *See Italy Resists Abortion*, *supra* note 16, at 6.

42. Israely, *supra* note 21, at A21.

43. *Id.*

44. *Third Periodic Reports of States Parties*, *supra* note 28.

45. Israely, *supra* note 21, at A21.

46. *Women's Status*, *supra* note 3.

rights because Italy's population is declining,<sup>47</sup> but limiting access to abortion is not the best solution for Italy's population dilemma. The Italian abortion laws already severely limit women's reproductive rights by requiring that the procedure only be performed on women whose lives are threatened by the pregnancy.<sup>48</sup> Increasing current limitations would essentially re-criminalize abortion.

The women seeking abortions in Italy today are not young women who want to start families; they are women who already have a family.<sup>49</sup> These women, over 25 years of age, are not the women who will rejuvenate the population, so it is senseless to limit their rights. Instead of further restricting abortion to increase the population, the Italian government should allow women greater access to family planning health care<sup>50</sup> and promote the use of fertility procedures to ensure the Italian population awareness and access.

### III. Increase Access to Women's Health Care to Increase the Population

#### A. *The Italian Health Care System*

The health care system in Italy is decentralized,<sup>51</sup> with each region controlling its health care independently of other regions.<sup>52</sup> Reproductive and family planning health care is available at government-subsidized family health centers. These centers are funded by municipal governments and provide a range of women's health services.<sup>53</sup> Because of this decentralized system, disparities in health care exist between regions as collective regional wealth varies. For example, the wealthier regions of Northern and Central Italy have more family health care centers than Southern Italy,<sup>54</sup> and thus women in Northern Italy receive

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47. Stanley, *supra* note 9, at A4.

48. *Abortion Legalization Statute*, *supra* note 14, at 591.

49. *Risks, Rights and Reforms*, WOMEN'S ENVIRONMENT AND DEVELOPMENT ORGANIZATION, March 1999, at 149.

50. The term family planning health care is used throughout this comment synonymously with terms like women's health care and reproductive health care.

51. Article Seventeen of the Italian Constitution provides that, "Within the limits of the fundamental principles established by State law, Regions shall legislate in regard to the following matters, provided that such legislation does not conflict with the interest of the Nation or of other Regions . . . Public charities and health and hospital care." COST. [Constitution] art. XVII. (Italy).

52. *Risks, Rights and Reforms*, WOMEN'S ENVIRONMENT AND DEVELOPMENT ORGANIZATION, March 1999, at 149.

53. *Id.* at 150.

54. Committee on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties under Article 18 of The Convention on the Elimination of All Forms of Discrimination against Women: Second Periodic Reports Of States Parties. Italy, U.N. Doc. CEDAW/C/ITA/2, (1996)[hereinafter Second Periodic

better care than women in Southern Italy.<sup>55</sup>

Although the government provides general health care, family health services are no longer fully paid by the government. Instead, family health services are merely subsidized and women must pay an additional fee for family planning health care. The fee is calculated on a sliding scale based on the patient's income.<sup>56</sup> Only 1.8 family health centers existed per 10,000 women aged 15-49 in 1997.<sup>57</sup> In the Italian government's 1997 report to the U.N., Italy admitted that women have inadequate access to care, especially in Southern Italy where the centers are less concentrated.<sup>58</sup>

### *B. Increased Access Requires Increased Government Funding*

For women to be fully informed about their health, women's health centers should be as accessible as general health care.<sup>59</sup> When health care is nationalized and therefore free for all citizens, women should not be required to pay for services that are vital to their overall well-being.<sup>60</sup> The allocation of government money for women's health care in Italy is contrary to what is reasonable and logical. The government offers pregnant women, who do not want to have children, compensation to forego abortions.<sup>61</sup> If a pregnant woman is poor and decides against abortion, the government pays the child's and the mother's living expenses after the child is born.<sup>62</sup> Instead of supporting women who do not want children, the money would be better spent to fund women's health centers and eliminate the fee currently required.

Ensuring that women receive proper reproductive health care throughout their lives is the best way to ensure fertility.<sup>63</sup> Women who do not use contraception and are not treated for sexually transmitted diseases are at a higher risk for infertility than women who are fully educated and informed about their reproductive health.<sup>64</sup> Government

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Report of States Parties].

55. *Risks, Rights and Reforms*, *supra* note 49, at 150.

56. *Id.* at 149.

57. Third Periodic Reports of States Parties, *supra* note 28.

58. *Id.*

59. Rebecca Cook, Human Rights and Reproductive Self-Determination, 44 AM. U. L. REV. 975 (1995).

60. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1980)[hereinafter *Women's Convention*].

61. *See supra* note 36 and accompanying text.

62. *Third Periodic Reports of States Parties*, *supra* note 28.

63. *See* Tamar Nordenberg, *Overcoming Infertility*, FDA CONSUMER, Jan./Feb. 1997, available at [http://www.fda.gov/fdac/features/1997/197\\_fert.html](http://www.fda.gov/fdac/features/1997/197_fert.html) (last visited Jan. 16, 2002)[hereinafter *Overcoming Infertility*].

64. *See Id.*

funding of women's health centers would increase the amount of women able to use the family health centers' services and increase women's knowledge of vital aspects of family health. This increased support and medical care is the foundation of fertility and essential to increasing the population in Italy.

The Italian government has made efforts to promote women's health.<sup>65</sup> For instance, in the late 1990s, the "National Health Plan" created projects to educate women on maternal and child health.<sup>66</sup> This type of education outreach is beneficial to Italian women,<sup>67</sup> but increasing the birth rate in Italy requires the education of women before they are pregnant and before they have children. The government's focus in past projects has been misplaced, and should have been directed to younger women, or women who do not have children.

Increasing fertility is a two-fold effort. The first part is preventative care. Women can gain access to preventative care if access to women's health is increased. The other component of the effort requires increased access to fertility procedures, which can be accomplished by preventing the regulation of those individuals who can undergo the procedures.

#### IV. Expand Fertility Treatment Use, Change Italy's Perception of Family, Increase Population

##### A. Available Fertility Procedures

Fertility procedures<sup>68</sup> encompass a wide range of medical procedures and medications, which enhance fertility<sup>69</sup> and the opportunity to conceive.<sup>70</sup> Some types of fertility procedures include *in vitro* fertilization,<sup>71</sup> egg donation,<sup>72</sup> embryo donation, and surrogacy.<sup>73</sup> In

65. Risks, Rights and Reforms, *supra* note 49, at 150.

66. *Id.*

67. Second Periodic Reports Of States Parties, *supra* note 54.

68. Referred to as assisted conception services in the scientific field by individuals like *in vitro* fertilization pioneer Patrick Skeptoe.

69. *Overcoming Infertility*, *supra* note 63. "Infertility is defined as the inability to conceive a child despite trying for one year. Eighty to ninety percent of infertility cases are treated with drugs or surgery." *Id.*

70. Darren Langdridge & Eric Blyth, *Regulation of Assisted Conception Services in Europe: Implications of the New Reproductive Technologies for 'The Family'*, 23(1) J. OF SOCIAL WELFARE AND FAMILY LAW 45, 59 (2001).

71. *Overcoming Infertility*, *supra* note 63. "IVF is often used when a woman's fallopian tubes are blocked. First, medication is given to stimulate the ovaries to produce multiple eggs. Once mature, the eggs are suctioned from the ovaries, and placed in a laboratory culture dish with the man's sperm for fertilization. The dish is then placed in an incubator. About two days later, three to five embryos are transferred to the woman's uterus. If the woman does not become pregnant, she may try again in the next cycle." *Id.*

72. *Id.* "Eggs are donated by another healthy woman and fertilized in the lab with

past decades, those who traditionally used fertility-enhancing procedures have been married heterosexual couples of childbearing age that have failed to conceive after a reasonable period.<sup>74</sup> Fertility procedures have also been beneficial to those women who have health conditions that prevent them from carrying children, and to those with genetically transmitted diseases.<sup>75</sup>

*B. Today's Fertility Drug Users Do Not Conform to Italy's Perception of Family*

In the past ten years, people outside the "traditional" fertility-treatment-user group have increasingly become frequent users of fertility procedures. While traditional users have been women of childbearing age in a heterosexual marriage, today, single women and lesbians also use artificial insemination,<sup>76</sup> gay men have surrogate mothers,<sup>77</sup> and embryos are cryogenically frozen to allow posthumous conception<sup>78</sup> for childbearing later in life.<sup>79</sup> Nontraditional users have forced the scientific community and Italian society to reevaluate the notion of family, and to reconsider what is ethical within that ideal.<sup>80</sup> Should only those who fit the mold of the traditional family have the right to conceive?

Italy is a predominately Roman Catholic country with conservative ideas about what constitutes a family.<sup>81</sup> The Christian Democratic Party

the male partner's sperm before being transferred to the female partner's uterus." *Id.*

73. *Surrogate Parenting*, WEBMD HEALTH, 1998, available at <http://my.webmd.com/content/article/1680.51225> (last visited Aug. 15, 2002). "It is an option when the female partner cannot ovulate and cannot carry a fetus. Here, a fertile surrogate mother is artificially inseminated with the male partner's sperm. This will produce a child that has the male's and surrogate's genes." *Id.*

74. The period of infertility is usually one year. *Overcoming Infertility*, *supra* note 63.

75. Langdrige & Blyth, *supra* note 70, at 46.

76. L. Rogers, *Baby Created from Two Mothers Raises Hopes for Childless*, THE SUNDAY TIMES, June 14, 1998, at 1-2.

77. M. Vaughan, *Dad's Out and Baby Goes Out Too*, THE HERALD, September 3, 1996. See also A. Stocks, *Tracie Matthews has had Two Babies of Her Own, Three Surrogate Babies and Six Babies as an Egg Donor. Now She's Giving Twins to Gay Lovers Barrie and Tony*, THE MAIL ON SUNDAY, September 19, 1999, at 22-23. See also J. Troup & P. Thompson, *Gay Dads, Baby No. 3*, THE SUN, June 1, 2000, at 1.

78. D. Blood, *Speech Given at Westminster School*, in 4(2) JOURNAL OF FERTILITY COUNSELING 9-12. See also S. Connor & C. Norton, *Parents Create Dead Daughter's Child*, THE SUNDAY TIMES, November 30, 1997, at 1.

79. Z. Brennan, *Woman to Freeze Embryo for the Sake of Her Career*, THE SUNDAY TIMES, August 16, 1998 at 1.

80. D. Morgan, *Surrogacy: an Introductory Essay*, in *Birthrights: LAW AND ETHICS AT THE BEGINNINGS OF LIFE* (R. Lee & D. Morgan eds., 1989).

81. See Hooper, *supra* note 1, at O13.

dissolved in 1990,<sup>82</sup> but former party members remain in the Italian Parliament. These former members have consistently introduced legislation<sup>83</sup> to limit the use of fertility procedures in order to maintain their traditional notion of family. The former Christian Democratic Party members' goals are to preserve the traditional family by allowing only heterosexual married couples to use fertility treatments.

These proposed restrictions would limit the population by preventing non-traditional fertility treatment users from starting a family. If the Italian perception of family could be expanded from accepting only the traditional married heterosexual family to including alternative families like single parent, homosexual, or mature adult families, the birth rate could be increased by allowing non-traditional families to take advantage of modern fertility technology.

Admittedly, cultural values are slow and difficult to change. However, there is an indication that the attitudes younger Italians have toward sex and reproduction are changing. Young Catholics believe that the Catholic Church is out of touch with the people.<sup>84</sup> As these young people become the older population of Italy, perhaps society's perceptions of family will change and Italian society will grow and learn to accept non-traditional families. The trend toward acceptance is not without obstacles.

Administrative, organizational and legislative controls remain as obstacles in the path to the increased availability to fertility procedures in Italy.

## V. Administrative, Organizational, and Legislative Controls of Fertility Procedure Availability

### A. *Administrative Controls*

In Italy, most fertility procedures are performed in private clinics that are not funded by the government and are not part of the public health care system.<sup>85</sup> This is because the Italian Health Minister issued an administrative regulation in 1985 mandating public hospitals to only perform fertility procedures that involve the sperm and egg of married

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82. Stanley, *supra* note 9, at A4.

83. See Celestine Bohlen, Politicians Lament Italy has Become a Mecca for Procreative Tourism. Push for Legislation Grows Alongside Fertility Business, THE DALLAS MORNING NEWS, April 9, 1995, at 21A. Fertility legislation has been introduced at least as early as 1995 and none has been passed into law. *Id.*

84. *Ethnic Italians*, *supra* note 2. Eighty-one percent of Italian Catholics would use condoms, although this is against the teaching of the Catholic Church. "There is a gap between what sins are for the church and what sins are for the people." *Id.*

85. Bohlen, *supra* note 83, at 21A.

couples.<sup>86</sup> Since private clinics receive no government funding, there has been no legal limit to what private clinics can accomplish.<sup>87</sup> Such policies have allowed older women who are no longer theoretically capable of conceiving, to have children with the assistance of private clinics.<sup>88</sup> These private clinics have helped several women over the age of 60 to conceive and give birth to healthy children.<sup>89</sup>

### B. *Organizational Control*

Liberal policies regarding access to reproductive assistance can potentially increase Italy's birth rate. Nevertheless, in 1995, the Italian Medical Association ("IMA") created rules to regulate fertility physicians. The IMA, which governs the conduct of Italian doctors, forbade doctors from artificially fertilizing: (1) women over 50 years of age, (2) single or widowed women, and (3) lesbians.<sup>90</sup> The punishment for doctors who do not follow the IMA's policies could face suspension or expulsion from the practice of medicine.<sup>91</sup>

### C. *Proposed Legislative Controls*

The Italian Parliament has proposed legislation to regulate private fertility clinics. A piece of legislation proposed in 1997, sought to outlaw surrogate motherhood and restrict the availability of artificial insemination to married women under the age of 50.<sup>92</sup> The proposed legislation allowed only for the fertilization of a husband's sperm with his wife's egg. The use of another woman's egg was to be permitted only under special circumstances. The law also proposed a ban on human cloning.<sup>93</sup> The proposed legislation gives the IMA enforcement power and authorizes the IMA to punish violators with suspension or expulsion.<sup>94</sup>

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86. *Id.*

87. Severino Antinori, an internationally renowned Italian embryologist, has helped women in their late fifties and early sixties conceive through *in vitro* fertilization. One patient had a child when she was 62 years old. Antinori now plans to help infertile men conceive by creating a human clone. S. Farrar, *Maverick Fertility Expert Plans First Human Clone*, THE SUNDAY TIMES, October 25, 1998, at 1.

88. *Improvised Guidelines on Motherhood's Brave New World*, THE GUARDIAN (LONDON), January 5, 1994, at 9.

89. *Id.*

90. Bohlen, *supra* note 83, at 21A.

91. William Montalbano, *Ethics Rules Set in Italy for Doctors Questionable Fertility Practices Addressed*, THE DALLAS MORNING NEWS, April 23, 1995, at 31A.

92. Richard Waddington, *Italy Bids to Ban 'Granny Mums'*, THE HERALD (Glasgow), October 25, 1997, at 12.

93. *Id.*

94. *Id.*

Although this bill has not passed into law, new legislation was introduced in 1999 to replace the 1997 bill. The Italian Parliament approved a second more restrictive draft law in 1999.<sup>95</sup> The second draft would punish doctors who use donated sperm to perform artificial insemination with imprisonment. The second bill passed the lower house of parliament but requires Senate approval, which has not yet been given.<sup>96</sup> The bill has the support of an increasingly political influence, the Roman Catholic Church.<sup>97</sup> The bill also includes language that would require lawmakers to re-examine the 1978 abortion legalization statute.<sup>98</sup>

The 1999 bill bans couples from using donor sperm or eggs, bans the freezing of embryos, and only allows women under 45 years of age to receive fertility treatments.<sup>99</sup> The 1999 draft law also allows for the creation of just three embryos in *in vitro* fertilization attempts and requires implantation of the embryos within three months of fertilization. Embryos must not be frozen for later use, especially if the father dies. Thus, the proposed legislation prevents widowed or single woman from becoming pregnant with the frozen embryos.<sup>100</sup> Restricting access to fertility treatments will work only to decrease the Italian population. Objective organizations such as the U.N. need to monitor individual countries' regulations of fertility rights.

#### VI. The U.N. Convention on the Elimination of All Types of Discrimination Against Women Supports Wide Access to Fertility Procedures

Italy adopted The Convention on the Elimination of All Forms of Discrimination Against Women<sup>101</sup> ("Women's Convention"; "The Convention") in 1979. The Women's Convention urges nations to provide women with equal access to health care services, which includes family planning.<sup>102</sup> The Women's Convention also advocates for women's health services for pre-pregnancy, pregnancy, and post-

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95. Hooper, *supra* note 1, at O13.

96. *Id.*

97. *Id.*

98. Alessandra Stanley, *Bill to Regulate Fertility Procedures Gains in Italy*, N.Y. TIMES, May 28, 1999, at A4.

99. Stanley, *supra* note 9, at A4.

100. *Id.*

101. Women's Convention, *supra* note 60; *See also* Cook, Human Rights and Reproductive Self-Determination, *supra* note 59, at 1002.

102. *Women's Convention*, *supra* note 60, art. 10, 12, 16. One-hundred-fifty-seven states have agreed to report regularly to the committee set up in the Women's Convention for states' accountability. *Id.* art. 18-22; *See also* Rebecca Cook & Mahmoud Fathalla, *Duties to Implement Reproductive Rights*, 67 NORDIC J. OF INT'L L. 1, 8 (1998).

pregnancy health, including the preservation of fertility.<sup>103</sup>

#### A. *Equal Access to Family Planning Services*

As previously discussed, the quality of the Italian health care system<sup>104</sup> varies by the wealth of each region.<sup>105</sup> Additionally, women must pay for family planning care, an essential component of their health care, while the government provides men with generalized health care through the national health care system.<sup>106</sup> This practice violates Article Twelve of the Women's Convention,<sup>107</sup> which states that, "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality for men and women, access to health care services, including those related to family planning."<sup>108</sup>

Women do not have equal access to health care services in Italy if they must pay for family planning services.<sup>109</sup> Men do not pay for their health care, and since family planning services and reproductive health care are an essential part of preserving women's health, the government should equally fund health care for men and women.

Complete funding of family planning services would promote the use of these services, by expanding availability and increasing women's reproductive health and awareness. Allowing women access to family planning services free of charge could increase women's use of services like contraception,<sup>110</sup> which protects against infertility.<sup>111</sup> Wide access to contraception will protect Italian women's fertility, and subsequently contribute to increasing the birth rate in Italy.

The Italian government admits that Italian women still do not have equal access to health care as Italian men. In a 1999 report to the United Nations Women's Commission,<sup>112</sup> Italian Representative Graziana Delpierre noted, "[e]ven in cases where there was no formal discrimination, women had [sic] more difficult access to health-care

103. Cook, Human Rights and Reproductive Self-Determination, *supra* note 59, at 1002.

104. See *supra* notes 51-55 and accompanying text.

105. Risks, Rights and Reforms, *supra* note 49, at 149.

106. *Id.* at 150.

107. *Women's Convention*, *supra* note 60, art. 12.

108. *Id.*

109. *Risks, Rights and Reforms*, *supra* note 49, at 149.

110. Failure to use contraception is a major cause of loss of fertility. *Overcoming Infertility*, *supra* note 63.

111. *Id.*

112. Convention for the Elimination of Discrimination Against Women, *Status of Women Commission Concludes Discussion of Women and Health, and Follow-Up To Beijing Conference*, 6<sup>th</sup> mtg., U.N. Doc. WOM/1105 (1999).

services.”<sup>113</sup> Italy must take proactive measures to ensure equal access to health care for women.<sup>114</sup>

Article Twelve<sup>115</sup> of the Women's Convention could be interpreted to require equal access to both general health care services and family planning services for men and women. This interpretation would allow the fee charged to women for family planning services because men are charged a fee for the use of family planning services as well.<sup>116</sup> However, family planning services are not ancillary to women's health. They are an essential component. Therefore, a fee charged to women for a service essential to their overall health is an inequity in access to general health care services.

### B. *The Italian Medical Association Discriminates against Women*

Article Two of the Women's Convention requires signatory nations “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>117</sup> Discrimination is defined in Article Two as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>118</sup>

The Italian Medical Association's regulations forbid physicians from artificially fertilizing women over 50 years of age, single or widowed women, and lesbians.<sup>119</sup> First, the Italian Medical Association is discriminating against women because it is considering a woman's marital status when evaluating a woman's access to conception assistance. It is doubtful that the Italian Medical Association would prohibit a single Italian male from using Viagra, which could be considered a conception assistance device. Second, the Italian Medical Association is discriminating against women by forbidding women over a certain age from obtaining reproductive assistance<sup>120</sup> when no prohibition exists to prevent older men from having children with

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113. *Id.*

114. *See supra* text accompanying notes 63-65.

115. *Women's Convention, supra* note 60, art. 12.

116. *See supra* text accompanying notes 51-58.

117. *Women's Convention, supra* note 60, art. 2(e).

118. *Id.* at art. 1.

119. *See supra* text accompanying notes 90-91.

120. *Id.*

younger women. This unequal treatment of men and women is exactly what the Women's Convention was drafted to address. Thus, the Convention requires Italy to eliminate the IMA's discriminatory policies.<sup>121</sup>

Article Two of the Women's Convention requires the Italian government to prevent the organization's discrimination by taking all appropriate measures to eliminate the organization's discrimination.<sup>122</sup> The Italian government has not taken measures to prohibit the Italian Medical Association's mandates to physicians. Instead, in 1985, the Italian Minister of Health issued an administrative regulation to public hospitals that requires them to only perform fertility procedures involving the sperm and egg of married couples.<sup>123</sup> In 1997, the IMA's organizational ban was partially lifted so only lesbians are prohibited from using assisted conception services. Nevertheless, proposed legislation still exists, which if enacted, would have the same discriminatory effects as the IMA's previous mandates.

It may be difficult for the Italian government and Italian society to accept non-traditional families, but allowing single women, older women, or homosexual couples access to fertility assistance follows the requirements of the Women's Convention and will potentially lead to an increase in Italy's population. Concerns that non-traditional families would not adequately provide for or care for their children are valid. However, other measures can be taken with all couples to insure that children will have stable homes, that parents will be financially independent, and that children will be in the care of a vital, healthy family.

### C. *The Right to Found a Family*

Article 16(1)(e) of the Women's Convention<sup>124</sup> proscribes that women shall have, in matters relating to marriage and family, "the same rights to decide freely and responsibly on the number and spacing of their children . . . and to have access to the . . . means to enable them to exercise these rights."<sup>125</sup> Allowing a woman to determine the number of children she wishes to have, and providing a means to exercise that right, supports accessibility to fertility treatments. However, this freedom is given in the context of "matters relating to marriage and family

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121. *Women's Convention*, *supra* note 60, art. 2(e).

122. *Id.*

123. *See supra* text accompanying note 100.

124. *Women's Convention*, *supra* note 60, art. 16(1)(e).

125. *Id.*

relations.”<sup>126</sup>

If the word “family” is defined as a traditional family,<sup>127</sup> then only women who are in a heterosexual marriage would have the right to fertility procedures. The acceptable definition of “family” ultimately defines a woman’s reproductive rights. A liberal interpretation of “family” would allow for increased access to fertility assistance, and a possible increase in the birth rate in Italy.

Suppose a woman decides she does not want to have children. Since Article 16(1)(e) of the Women’s Convention ensures that women shall have the same right as men to choose the number of children they will have,<sup>128</sup> in the context of “matters relating to marriage and family relations,”<sup>129</sup> the Convention gives her the right to marriage or family. Does that mean that the Women’s Convention only bestows that right upon women who are in a marriage or family? No.<sup>130</sup> The result is absurd and against the purpose and spirit of the Women’s Convention.<sup>131</sup> Unmarried women and women in non-traditional families have the right to determine the number and spacing of their children as well.<sup>132</sup>

If married and unmarried women have the right to decide the number and spacing of their children, then they must be permitted to exercise that right.<sup>133</sup> Article 14(2)(b) of the Convention requires Italy to allow all women to use fertility assistance as a, “means to exercise th[o]se rights.”<sup>134</sup> The means is the access to conception assistance.

The Women’s Convention does not require that a woman be married in order to have access to fertility assistance. It merely requires that if a woman, married or single, wants to have a family, that she be given access to the means to do so. However, Italy’s proposed legislation to regulate the access to fertility procedures requires a woman to be married.<sup>135</sup> This qualification requires the woman to have the consent of her husband with regard to the number and spacing of her

126. *Id.*

127. *See supra* text accompanying notes 76-81.

128. *Women’s Convention, supra* note 60, art. 16(1)(e).

129. *Id.*

130. Corinne Packer, *Defining and Delineating the Right to Reproductive Choice*, 67 NORDIC J. OF INT’L L 77, 85 (1998).

131. *Women’s Convention, supra* note 60, pmbl.

132. U.N. Committee for the Elimination of Discrimination Against Women, *Equality in Marriage and Family Relations*, UNITED NATIONS COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY THE HUMAN RIGHTS TREATY BODIES, General Recommendation 21, para. 22 at 124, U.N. Doc. HRJ/Gen/1/Rev.2 (1996); *See also* Packer, *supra* note 130 at 85. The Women’s Convention prefers that decisions to have children be made with the consultation of a spouse or partner. *Id.*

133. *Women’s Convention, supra* note 60, art. 16(1)(e).

134. *Id.*

135. *See supra* text accompanying notes 83-84.

children. The legislation is discriminatory and goes against the provisions of the Women's Convention.

It can be argued that single women, who have no husband to infringe on their right to decide the number and spacing of their children, do not need protection under the Women's Convention. However, in Italy, instead of a woman's husband infringing upon the right of a woman to decide the number and spacing of her children, the Italian Medical Association and the Italian government infringe upon a woman's right to have children by restricting access to fertility procedures by issuing mandates and regulations.<sup>136</sup>

Article Sixteen of the Convention does require that women decide "responsibly on the number and spacing of their children."<sup>137</sup> Opponents of the liberal interpretation of Article 16(1)(e)<sup>138</sup> argue that it is not responsible to have children unless a woman is of a childbearing age and in a stable heterosexual marriage. Therefore, unmarried, homosexual, or older women do not have the right to found a family as proscribed in the Women's Convention.

Nevertheless, difficulties exist in regulating the children a woman can have based on her responsibility. It cannot be assumed that married, heterosexual women of a childbearing age would responsibly use their right to decide the number and spacing of their children. One cannot assume that unmarried, mature,<sup>139</sup> or homosexual women are acting irresponsibly if and when they choose to have children.

## VII. Social Controls

The Italian government could take every measure required by international law and the Women's Convention to prevent discrimination against women, but social controls could still circumvent its efforts. Social controls are actions taken by a fixed group of people who believe a specific type of behavior is acceptable in order to mandate that an individual's actions conform to the collective morality of a population. Social controls on the family are not always as obvious as legal restrictions, but social controls can be more prohibitive.<sup>140</sup> For instance, when abortion was legalized in Italy in 1978,<sup>141</sup> social controls were used to circumvent the new law.<sup>142</sup> Conscientious objectors registered in large

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136. See *supra* text accompanying notes 90-91.

137. *Women's Convention*, *supra* note 60, art. 16(1)(e).

138. See *supra* text accompanying notes 125-126.

139. Mature is used to describe women who no longer able to biologically reproduce without medical assistance.

140. Langdridge & Blyth, *supra* note 70, at 55.

141. *Italy Resists Abortion*, *supra* note 16, at 6.

142. Israely, *supra* note 21, at A21.

numbers in certain regions of Italy to prevent the occurrence of legal abortions.<sup>143</sup> Subsequently, social controls made it impossible to have an abortion, despite the government's action to legalize the procedure.<sup>144</sup> This is an early example of the social control of abortion in Italy.

Currently the Italian Medical Association exercises a measure of social control over the availability of fertility procedures in Italy.<sup>145</sup> The restrictions<sup>146</sup> and penalties,<sup>147</sup> which the association imposes on doctors, have the same result the conscientious objectors had in socially controlling abortion.<sup>148</sup> Fertility procedures are frequently only available to those women in a traditional family.<sup>149</sup>

The Italian people are divided. Part of society is working against current social controls by using private fertility clinics.<sup>150</sup> Physicians like Severino Antinori,<sup>151</sup> a fertility pioneer, have pledged not to follow the IMA's restrictions.<sup>152</sup> The social norms of the majority of the Italian population will eventually determine the accessibility of fertility procedures as well as Italy's interpretation of the Women's Convention.<sup>153</sup>

#### VIII. Building Conflict with Laws of European Nations: Is Harmonization Necessary?

The harmonization of laws that regulate reproductive freedoms is desired among European nations because women can easily circumvent laws prohibiting fertility procedures in one country, by traveling to a neighboring country with less prohibitive laws.<sup>154</sup> One European country could completely ban fertility procedures, yet if a neighboring country allows all fertility procedures, the banning country's prohibition is virtually meaningless.<sup>155</sup> Advocates for harmonization argue that if fertility laws are not harmonized within Europe, it is conceivable that there will be free trade in sperm or ova.<sup>156</sup> The broad discrepancies that

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143. Third Periodic Reports of States Parties, *supra* note 28.

144. *Italy Resists Abortion*, *supra* note 16, at 6.

145. Montalbano, *supra* note 91, at 31A.

146. *Id.*

147. Bohlen, *supra* note 83, at 21A.

148. *Italy Resists Abortion*, *supra* note 16, at 6.

149. *See supra* text accompanying note 127.

150. *See supra* text accompanying notes 9-12.

151. *See supra* note 87 and accompanying text.

152. Farrar, *supra* note 87, at 1.

153. *See supra* text accompanying notes 101-139.

154. L. Nielsen, *Procreative Tourism, Genetic Testing and the Law*, in *FAMILIES ACROSS FRONTIERS*, (N. Lowe & G. Douglas eds., 1996).

155. Hornett, *supra* note 11, at 713.

156. *Id.*

exist between the laws of European nations<sup>157</sup> puts pressure on several countries, including Italy, to harmonize their respective fertility laws.

Greece prohibits *in vitro* fertilization; in Germany, it is illegal to use another woman's embryo to make a woman pregnant; in Italy, private clinics are not currently regulated.<sup>158</sup> The slow movement toward uniform laws began in the Parliamentary Assembly of the Council of Europe. The Assembly resolved that non-therapeutic research on live human embryos should be prohibited.<sup>159</sup> The Council also recommends, "that the availability of the artificial procreation techniques should be limited to heterosexual couples with medical need."<sup>160</sup> Despite variations in the laws, and the slow progress toward harmonization, certain procedures are disfavored by most of Europe: cloning, genetic manipulation, cross species implantation, the sale of embryos, and *in vitro* embryo growth for longer than fourteen days.<sup>161</sup>

Some question the need for harmonization and the infringement that harmonization might have on human rights.<sup>162</sup> Could harmonization influence countries to err on the side of conservatism?<sup>163</sup> If so, the harmonized regulations of the European Union would be that of the most prohibitive country,<sup>164</sup> which is currently Germany. Germany allows heterosexual married couples or unmarried heterosexual couples who are able to prove that they have been living together for at least two years to have fertility assistance.<sup>165</sup>

With harmonization, Europe's fertility laws would be of the most liberal country, which is currently Italy.<sup>166</sup> Italy's proposed legislation to limit fertility procedures is in part a result of pressure from other more restrictive countries. Liberal fertility policies are more conducive to increasing Italy's birth rate. Competing views of family in other European nations are threatening Italy's population by restricting fertility procedure use. The Italian government must find a way to balance the competing needs of other European countries and the needs of its own citizens to ensure the widest access to fertility treatments. Since diverse

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157. Langdridge & Blyth, *supra* note 70, at 48-49.

158. Hornett, *supra* note 11, at 713.

159. *Id.* at 714.

160. Council of Europe, *Human Artificial Procreation*, COUNCIL OF EUROPE (1989).

161. Hornett, *supra* note 11, at 714.

162. Langdridge & Blyth, *supra* note 70, at 56.

163. Giesen, D, *Artificial Reproduction Revisited: Status Problems and Welfare of the Child - a Comparative View*, in *Family Law Towards the Millennium: Essays for P.M. Bromley* (C. Bridge ed., 1997).

164. *Id.*

165. Langdridge & Blyth, *supra* note 70, at 49(explaining the Embryonenschutzgesetz, The Embryo Protection Act signed into law on December 13, 1990).

166. *Id.* at 54.

policies still exist throughout Europe, Italy should not be the only country required to compromise.

## IX. How Can Italy Change

### A. *Increase Amount of Women in Public Office*

Increased representation of women in the Italian Parliament and Senate could help to increase women's access to reproductive assistance, and ensure free access to family planning centers in accordance with the Women's Convention. Article Seven of the Women's Convention requires states to ensure that women are able to participate in the formation and implementation of public policy, as well as hold office and perform public governmental functions.<sup>167</sup> Increased representation of women in Italy is occurring. In 1992, a woman was appointed to the highest administrative post among officials appointed to the Prime Minister's Office. In addition, there has been a steady increase in the number of women in the Italian Parliament and Senate.<sup>168</sup>

With an increased number of women in public office, the Italian government will be more aware of women's needs: the need for increased access to family planning health care and the shift in the traditional notion of family. Women who are working, pursuing higher education, and raising children are more aware of the desire for non-traditional families to have children, and will ensure that any proposed legislation limiting access to fertility treatment takes the family's needs and women's needs into consideration.

### B. *Embrace Societal Trends*

Slowly, Italian society is coming to accept the prevalence of non-traditional families.<sup>169</sup> According to a report filed in compliance with the Women's Convention, family is increasingly defined as, "the quality of the emotional bonds uniting its family members, rather than on the coercive character of a formal marriage tie."<sup>170</sup> No longer are women staying at home to raise multiple children. In order to provide adequate support to their children, and to pursue career goals, Italian women are having fewer children.<sup>171</sup> Italian society is beginning to accept that women no longer desire multiple-child families. Providing access to

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167. *Women's Convention*, *supra* note 60, art. 7(b).

168. Second Periodic Reports of States Parties, *supra* note 54.

169. Third Periodic Reports of States Parties, *supra* note 28.

170. *Id.*

171. *Id.*

fertility assistance and family planning health care will increase fertility and ensure that modern Italian women and non-traditional families are able to conceive. Only with an open and accepting view of family, will the Italian birth rate increase.