

**YOU CAN'T PUT THE GENIE BACK IN THE  
BOTTLE: POTENTIAL RIGHTS AND  
OBLIGATIONS OF EGG DONORS IN THE  
CYBERPROCREATION ERA**

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*"Cyberprocreation": Using the Internet to Create Human Life*

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## I. INTRODUCTION

The earth is, possibly, more than four billion years old;<sup>2</sup> but a great deal can happen in ten. In 1999, a married couple advertised in Harvard and Princeton campus newspapers offering \$50,000 for the eggs of an Ivy League egg donor who was 5'10" or taller and scored over 1400 on her S.A.T.s.<sup>3</sup> They wanted a donor with those characteristics and campus newspapers probably seemed the most logical way to find one. At that time, only 40% of the American population sixteen years and older accessed the Internet;<sup>4</sup> today over 73% do.<sup>5</sup> An October 14, 2009 Google search generated about 326,000 hits in response to "egg donor wanted" in 0.13 seconds<sup>6</sup> and there is little doubt that donees will find donors online in the future.<sup>7</sup> This article contends that while the Internet increased the availability of, and the market for, donor eggs to a larger audience than ever

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<sup>2</sup> AllAboutCreation.org, How Old is the Earth? Natural Chronometers, <http://www.allaboutcreation.org/how-old-is-the-earth.htm> (last visited Dec. 26, 2009).

<sup>3</sup> See Barbara Katz Rothman, *The Potential Cost of the Best Genes Money Can Buy*, CHRONICLE OF HIGHER EDUC., June 11, 1999, at A52. Interestingly, the dollar amount did not seem to bother anyone. "[It] was] the height requirement that pushed the news to ask "why so tall?". *Id.*

<sup>4</sup> Media Awareness Network, Internet Use (U.S.), [http://www.media-awareness.ca/english/resources/research\\_documents/statistics/internet/internet\\_use.cfm](http://www.media-awareness.ca/english/resources/research_documents/statistics/internet/internet_use.cfm) (last visited Dec. 26, 2009).

<sup>5</sup> See Sydney Jones & Susannah Fox, *Generations Online in 2009*, Jan. 28, 2009, available at <http://pewresearch.org/pubs/1093/generations-online>. To provide additional perspective, in 2009, 56% of Americans accessed the Internet using wireless means. JOHN HERRIGAN, PEW INTERNET & AM. LIFE PROJECT, WIRELESS INTERNET USE 3 (2009), available at <http://www.pewinternet.org/Reports/2009/12-Wireless-Internet-Use.aspx>. Currently, an additional 16% of the population uses wireless to get to the Internet than even accessed the Internet in 1999. *See id.*

<sup>6</sup> Google.com, <http://www.google.com>, (last visited Jan 22, 2010) (search "egg donor wanted").

<sup>7</sup> See Reuters.com, First-Ever Egg Donor Web Portal Becomes One of the Largest Resources for Aspiring Parents in the U.S., <http://www.reuters.com/article/pressRelease/idUS145328+24-Jun-2009+PRN20090624> (last visited Dec. 26, 2009) (discussing the formation of the "Donor Network Alliance" or "DNA."). DNA is the "industry's first ever web-based collective of egg donors." *Id.* As of June 2009, DNA featured more than one thousand donor candidates and, according to its co-founder, has "close to 2,000 additional donor candidates to add to the website and it's our goal to reach 8,000 by the end of the year." *Id.* It will also be easier to selectively search for prospective donors. *See* Posting of Jennifer Adaeze Anyaegbunam to Paging Dr. Gupta, <http://pagingdr Gupta.blogspot.com/2009/08/12/ivy-league-women-get-offers-for-their-eggs/> (Aug. 12, 2009, 10:49 EST) (noting that Facebook advertising for donors allows those seeking eggs to target women attending specific schools).

envisioned, it also created significant and unimagined legal concerns for egg donors.<sup>8</sup> You can't put the genie back in the bottle.

Before proceeding there is an immediate caveat; the obvious risk of traveling unexplored lands is that there is no map. Potential egg donor rights and liabilities are only nominally discussed,<sup>9</sup> and not judicially well-settled.<sup>10</sup> As a result, we must frequently look to analogous research, commentary, and case law in this article. Much of that guidance comes from sperm and embryo issues. These analogies are appropriate because the federal government appears to treat eggs, sperm, and embryos as "reproductive tissues,"<sup>11</sup> as do international regulatory bodies.<sup>12</sup>

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<sup>8</sup> For purposes of this article, "egg donor" means a woman who actually produces an egg, or eggs, for donation. Although the common term is "donor," most egg donors expect to be compensated in cash for their time and inconvenience. See The Egg Donor Program, *Becoming an Egg Donor*, <http://www.eggdonation.com/becoming-an-egg-donor/r.php> (last visited Dec. 14, 2009); see also The Egg Donor Program, *Becoming an Egg Donor*, <http://www.eggdonation.com/becoming-an-egg-donor/BecominganEggDonor.php> (promising to reward donors with gifts and the highest level of compensation) (last visited Dec. 14, 2009); Laura Marquez, *College Students Targeted for Egg Donation*, ABC NEWS, May 19, 2006, <http://abcnews.go.com/Health/story?id=1981899&page=1> ("I'm not going to kid anybody. The dollar signs were there first and foremost," said New York University student, Carrie Specht, upon spotting a newspaper ad seeking egg donors.). We will also discuss "egg suppliers" as necessary. An egg supplier is any source supplying eggs to a recipient, but that source does not actually produce the egg. A common example is a fertility clinic.

<sup>9</sup> See discussion *infra* Part IV.

<sup>10</sup> See discussion *infra* Part IV.

<sup>11</sup> See 21 C.F.R. § 1271.3(d) (2009).

Human cells, tissues, or cellular or tissue-based products (HCT/Ps) means articles containing or consisting of human cells or tissues that are intended for implantation, transplantation, infusion, or transfer into a human recipient. Examples of HCT/Ps include, but are not limited to, bone, ligament, skin, dura mater, heart valve, cornea, hematopoietic stem/progenitor cells derived from peripheral and cord blood, manipulated autologous chondrocytes, epithelial cells on a synthetic matrix, and *semen or other reproductive tissue*.

*Id.* (emphasis added); see also Human Cells, Tissues, and Cellular and Tissue-Based Products; Establishment Registration and Listing, 66 Fed. Reg. 5447 (Jan. 19, 2001) (codified at 21 C.F.R. pt. 1271).

Several comments questioned the need for the regulation of reproductive cells and tissues, citing current oversight from professional organizations, other Federal agencies, and States. Comments opposed registration for programs involved in egg donation, egg retrieval, semen processing, semen evaluation, or in vitro fertilization (IVF) in assisted reproductive technologies. . . . We stand by our decision to extend regulatory requirements to reproductive cells and tissue.

At least some authors discuss them this way as well.<sup>13</sup> This article is more a discussion of what is likely to be than what definitively will be, but it is a discussion we must undertake now as the “first generation”<sup>14</sup> of Internet egg donors and resulting children will soon be looking for each other online,<sup>15</sup> and egg

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*Id.*

<sup>12</sup> See Council Directive 2004/23, On Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells, 2004 O.J. at (L 102) 48 (EC), available at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32004L0023&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32004L0023&model=guichett) (“This Directive should apply to tissues and cells including haematopoietic peripheral blood, umbilical-cord (blood) and bone-marrow stem cells, reproductive cells (eggs, sperm), foetal tissues and cells and adult and embryonic stem cells.”).

<sup>13</sup> See B. Jason Erb, *Deconstructing the Human Egg: The FDA’s Regulation of Scientifically Created Babies*, 5 ROGER WILLIAMS U. L. REV. 273, 277, 299 (1999) (discussing whether the FDA can broaden its regulatory scope by treating reproductive tissues (semen and ova) and their product (embryos) as biological products); see also Michelle Bercovici, *Biotechnology Beyond the Embryo: Science, Ethics, and Responsible Regulation of Egg Donation to Protect Women’s Rights*, 29 WOMEN’S RIGHTS L. REP. 193, 200 (2008) (discussing reproductive tissue donors as both egg and sperm donors); Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUS. J. HEALTH L. & POL’Y 245, 263 (2008), available at <http://www.dnapolicy.org/resources/PGD&parentalpreferences.pdf> (noting that the FDA regulates facilities handling human reproductive tissues such as sperm and eggs).

<sup>14</sup> Certainly donors and children attempted to find each other in the past, but “first generation” refers to the first groups who are investigating, identifying, locating, and communicating with each other using the Internet as the primary tool. See Tony Allen-Mills, *Meet Sperm Donor No. 150, Your Daddy*, THE SUNDAY TIMES (London), Feb. 18, 2007, available at <http://donorsiblingregistry.com/london/times.pdf>; see also The Donor Sibling Registry, *Educating, Connecting, and Supporting Donor Families*, [www.donorsiblingregistry.com/index.php](http://www.donorsiblingregistry.com/index.php) (last visited Dec. 14, 2009) (describing a website established in 2000 for the purpose of matching donors, offspring, and donor siblings).

<sup>15</sup> The first website was created to help sperm babies and fathers try to find each other online in approximately 2000, although it now encompasses egg donors as well. See The Donor Sibling Registry, *supra* note 14. One authority contends that children conceived using donor eggs are not yet old enough to look for their mothers online. See e-Mail from Wendy Kramer, Owner/Creator of DonorSiblingRegistry.com website, to Dawn Swink (July 27, 2009, 5:27 p.m. CST) (on file with author). That may or may not be accurate but, if it is, they soon will be and we see no reason that egg babies would be less curious about their biological parents than sperm babies, so they should also seek out donor identities. Additionally, it appears that egg donors might be highly receptive to such efforts. See, e.g., Wendy Kramer et al., *U.S. Oocyte Donors: A Retrospective Study of Medical and Psychosocial Issues*, HUM. REPROD. 1 (2009). Out of 155 respondents, 151 (97.4%) answered that they were open to contact with a child conceived by use of their egg, if it was requested. *Id.* at 2, 5. While 2.6% were uncertain about such contact, no respondent said they would refuse contact

donorship is increasingly big business.<sup>16</sup>

Part I of this article provides background for various Assisted Reproductive Technology procedures, concentrating on In Vitro Fertilization. We will see that egg donation is increasingly important and that recent advances in medical technology, such as early egg retrieval and an innovative new preservation process, should make donation even more appealing in the near future.

Part II discusses the Internet's impact on Assisted Reproductive Technology. While the Internet increased the level of information available on virtually any subject,<sup>17</sup> this section addresses two significant Cyberprocreation developments. First, the Internet allows prospective donors and donees to locate each other and engage in commerce with previously unheard of accessibility and specificity. Second, it is rapidly changing how

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with recipient families if it was requested. *Id.* Although curious to know the "outcome of the egg donation[,] [d]onors frequently had not sought information [about donor children] because of confusion about the definition of 'anonymity' or 'confidentiality.'" *Id.*; see also Laura Witjens, *Egg Donation: Why I Gave Up My Right to Remain Anonymous*, BIONEWS, June 8, 2009, [http://www.bionews.org.uk/page\\_45436.asp](http://www.bionews.org.uk/page_45436.asp) (noting Laura Witjen's assertion that she is "happy to make myself available to the child born out of my donation.") (last visited Dec. 14, 2009). It is also possible that health concerns may drive legislation that would record donor identity, potentially making it easier to discover. See Jennifer Schneider, Center for Genetics and Society, *It's Time for an Egg Donor Registry and Long-Term Follow-Up* (Nov. 14, 2007), <http://donorsiblingregistry.com/cgs.pdf> (noting the need for an egg donor registry to allow donors to communicate health risks to donees) (last visited Dec. 20, 2009).

<sup>16</sup> See, e.g., LIZA MUNDY, *EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD*, 21 (1st ed. 2007) (reporting that the country's largest fertility clinic, Shady Grove Fertility in Rockville, Maryland, performed approximately eight hundred donor egg procedures between the years 2000 and 2004; but was scheduled to perform five hundred donor egg procedures in the year 2005 alone); see also CTRS. FOR DISEASE CONTROL & PREV., 2006 ASSISTED REPROD. TECH. (ART) REPORT: SECTION 5 –ART TRENDS, 1996-2006 (2008), available at <http://www.cdc.gov/ART/ART2006/508PDF/2006ART.pdf> [hereinafter 2006 ART REPORT] (reporting that the number of Assisted Reproduction Technology cycles performed in the U.S. more than doubled from 1996 to 2006); see also *Conceive Abilities, Egg Donor Compensation*, [http://www.conceiveabilities.com/donor\\_pg\\_4a.htm](http://www.conceiveabilities.com/donor_pg_4a.htm) (noting that egg donors get paid between \$5,000 to \$10,000, while compensation beyond \$10,000 is considered unethical) (last visited Dec. 14, 2009).

<sup>17</sup> See, e.g., eHow, <http://www.ehow.com> (last visited Dec. 20, 2009) (where one can learn "How to Do Just About Everything"); see also *HowStuffWorks, How Egg Donation Works*, <http://health.howstuffworks.com/egg-donation.htm> (last visited Dec. 4, 2009) (describing how egg donation works).

and where people pursue Assisted Reproductive Technology procedures, a development known as “Reproductive Tourism.”

Part III surveys egg donor regulation. We look at international, federal, state, and voluntary association regulation of, where possible, donor compensation, screening, and egg storage. Despite the significant danger posed by defective eggs,<sup>18</sup> and the considerable investment some recipients are willing to make,<sup>19</sup> these areas are virtually unregulated.

Part IV analyzes potential egg donor rights and responsibilities. We initially examine whether donors have rights to post-harvest, but pre-fertilization, eggs and then examine whether donors have parental rights toward any children actually conceived. We then address potential donor responsibilities for such children, specifically, whether donors and recipients can contract away potential child support obligations. We will see that there are no uniform answers and, as a result, piecemeal equitable remedies are used to provide subjective, “fair as they see it,” resolutions regardless of the parties’ intentions, promises, or contracts.

Finally, Part V shifts the focus from paternity liability to products liability. This section addresses potential breach of contract, strict products liability, and negligence causes of action against egg donors and suppliers. The article concludes with predictions and recommendations as our society continues forward in the Cyberprocreation Era.

## II. IN THE BEGINNING . . .

Traditionally conception occurred through intercourse between a male and female, with the male supplying the sperm and the female providing the eggs. Assisted Reproductive Technology (“ART”) is the umbrella term for various medical technologies creating conception through means other than coital reproduction. ART developed, and is developing, because many

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<sup>18</sup> See, e.g., Barbara Pinto, *When Anonymous Egg Donors Have Genetic Diseases*, ABC NEWS, Mar. 28, 2008, <http://abcnews.go.com/Health/story?id=4544449&page=1> (last visited Dec. 6, 2009) (explaining the danger of defective donor eggs).

<sup>19</sup> See, e.g., Susan Donaldson James, *Bringing Out Baby: Who Pays for IVF?*, ABC NEWS, Apr. 8, 2008, available at <http://abcnews.go.com/Health/story?id=4607004&page=2> (reporting that Fay Johnson paid for one In Vitro Fertilization child through a second home mortgage and for a second using the couple’s inheritance after already paying for two failed procedures).

people cannot conceive a child through intercourse.<sup>20</sup> There are a number of ART strategies.<sup>21</sup> One of the oldest and most common is Artificial Insemination (“AI”).<sup>22</sup> Another popular technique,

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<sup>20</sup> This is an increasing problem. See JON LUOMA, CHALLENGED CONCEPTIONS: ENVTL. CHEMICALS AND FERTILITY 2 (2005) available at [http://www.healthandenvironment.org/working\\_groups/fertility/pubs](http://www.healthandenvironment.org/working_groups/fertility/pubs) (reporting that an estimated 7.3 million American women aged fifteen to forty-four reported some impaired ability to have children in 2002, compared with 6.1 million in 1995, and 4.9 million in 1988) (citing CTRS. FOR DISEASE CONTROL AND PREV., FERTILITY, FAMILY PLAN., AND REPROD. HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NAT'L SURVEY OF FAMILY GROWTH, 2 (2005) [hereinafter Family Growth], available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_025.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf)); see also American Society for Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited Jan. 23, 2010) (stating that infertility impacts about 12% of the reproductive-age population in the United States) (citing Family Growth, *supra*, at 2). The theories behind this are beyond the scope of this egg-focused paper. However, we would be remiss if we did not acknowledge the evidence that increased fertility has some relationship to the “[d]emise of [the] human sperm.” See John Robbins, *They Can Sow But Can't Reap: The Demise of Human Sperm*, EARTHSAVE, <http://www.earthsave.org/environment/sperm.htm> (last visited Jan. 23, 2010). Stated summarily, human sperm count is lower than it was fifty years ago. See Elisabeth Carlsen et al., *Evidence for Decreasing Quality of Semen During Past 50 Years*, 305 BRIT. MED. J. 609–13 (1992); see also Richard M. Sharpe & Niels E. Skakkebaek, *Are Oestrogens Involved in Falling Sperm Counts and Disorders of the Male Reproductive Tract?*, 341 THE LANCET 1392–95 (1993); R. M. Sharpe, *Declining Sperm Counts in Men --Is There an Endocrine Cause?* 136 J. OF ENDOCRINOLOGY, 357–60 (1993); Constance Holden, ed., *The Hazards of Estrogens*, 28 SCI. 1238–39 (1993).

<sup>21</sup> Examples of such techniques include intracytoplasmic sperm injections (ICSI) (injecting a single sperm directing into an egg), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and, embryo transfer, and increasingly, surrogacy. See DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 17, 89 (2006); American Pregnancy Association, Gamete Intrafallopian Transfer: GIFT, <http://www.americanpregnancy.org/infertility/gift.html> (last visited Jan. 23, 2010) (“GIFT is an assisted reproductive procedure which involves removing a woman’s eggs, mixing them with sperm and immediately placing them into [the] fallopian tube.”); American Pregnancy Association, Zygote Intrafallopian Transfer: ZIFT, <http://www.americanpregnancy.org/infertility/zift.html> (last visited Jan. 23, 2010) (“ZIFT is an assisted reproductive procedure similar to [IVF] and embryo transfer with the difference that the fertilized embryo is transferred into the fallopian tube instead of the uterus.”).

<sup>22</sup> Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 L.A. L. REV. 1641, 1643 (1984). AI, the least intrusive ART procedure, takes previously ejaculated sperm and implants it into a woman’s cervix or intrauterine lining. *Id.* There are several forms of insemination processes such as standard vaginal insemination and intrauterine insemination. See Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women’s Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN’S L.J. 185, 191 (2003). There are two forms of AI but they differ based on who is providing the sperm: artificial

and of particular interest for purposes of this article, is In Vitro Fertilization (“IVF”).<sup>23</sup>

Originally, IVF was for married women under the age of thirty-five who suffered specific physiological problems and could not conceive naturally.<sup>24</sup> Today, IVF remains the primary strategy for these women, but is increasingly an option for new user groups such as younger women with other reproductive problems,<sup>25</sup> people without infertility issues who want their own newborn child,<sup>26</sup> and particularly, women aged thirty-five and

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insemination by husband, where the husband is the donor, and artificial insemination by donor, where the donor is someone other than the recipient-mother’s husband. Lorio, *supra*, at 1643.

<sup>23</sup>

[L]iterally meaning fertilization “in glass,” [IVF] is a procedure whereby an egg is fertilized by sperm outside the woman’s body. A woman, either the one who will carry the child or an egg donor, must first undergo fertility treatments to stimulate egg production before the eggs may be removed from her body. Once the eggs are removed, one or more eggs are mixed with sperm, from a husband or third-party donor, in the lab, and the fertilized eggs are then implanted into a woman, either the intended mother or a surrogate.

Sandy Varnado, *Who’s Your Daddy?: A Legitimate Question Given Louisiana’s Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 616 (2006).

<sup>24</sup> See MUNDY, *supra* note 16, at 27 (“We limited our cases at first to those women who had had their Fallopian tubes removed.”).

<sup>25</sup> See 2006 ART REPORT, *supra* note 16, at 15 (“The largest group of women using ART services were women younger than 35, representing 39% of all ART cycles carried out in 2006.”).

<sup>26</sup> Single men are pursuing ART services using IVF. See, e.g., Denise Winterman, *I’m the Daddy*, BBC NEWS MAG., May 17, 2006, available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/4986804.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/4986804.stm) (discussing “the . . . man in the U.K. to have his own children without a female partner”); see also Robert Mendick, *A Surrogacy Clinic in India Is Advertising Babies for Sale to Single Men in Britain*, LONDON EVENING STAND., June 8, 2009, available at <http://www.thisislondon.co.uk/standard/article-23704774-details/Single+men+buying+children+for+15,000+at+’baby+factory’/article.do>; Ronni Berke, *Single Men Turning to Surrogates*, CNN, Dec. 23, 2008, <http://www.cnn.com/2008/HEALTH/12/23/single.men.parenting/index.html> (last visited Jan. 23, 2010). Recently well known figures such as Ricky Martin (see Lalate, *Ricky Martin Gestational Surrogacy*, <http://news.lalate.com/2008/08/20/ricky-martin-gestational-surrogacy/>) (last visited Jan. 23, 2010)) and Michael Jackson (see Posting of Lindsey O’Neill to Michael Jackson’s Kids and the “Parent Child Relationship” - An Intro to Legal Issues with Surrogacy, Third Party Reproduction, and Adoption, <http://blog.lawinfo.com/2009/07/01/surrogacy-third-party-reproduction-assisted-conception-and-adoption-an-introduction/> (July 1, 2009)) had children born through IVF procedures.

Lesbian women and couples are also pursuing IVF. See, e.g., Lisa Marsh, *Fertility News in June - How Gay Women and Men Figure in the Global*

older who recognize that their fertility will not last indefinitely.<sup>27</sup> Worldwide, it is estimated that over three million babies were born using IVF and related procedures<sup>28</sup> and, if the trend within the “women [thirty-five] and older” demographic is indicative, that number will increase.<sup>29</sup>

It is probably difficult for most to grasp the incredibly rapid evolution of the IVF marketplace and technological advancement. The world’s first IVF child was born just over thirty years ago.<sup>30</sup> Approximately three years later the United States celebrated the birth of its first IVF-conceived baby.<sup>31</sup> As of early 1983

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Fertility Industry Now, <http://ezinearticles.com/?Fertility-News-in-June---How-Gay-Women-and-Men-Figure-in-the-Global-Fertility-Industry-Now&id=2462955> (last visited Jan. 23, 2010) (“[L]esbians can now give their ‘extra’ eggs to other women in exchange for a discount on their own IVF.”). Gender selectors are also pursuing IVF. See The Ethics Committee of the American Society of Reproductive Medicine, *Sex Selection and Preimplantation Genetic Diagnosis*, 72 FERTILITY & STERILITY 595 (1999) (explaining the ART methods that may be used to preselect the gender of the child).

<sup>27</sup> See 2006 ART REPORT, *supra* note 16 (“The average age of women using ART services in 2006 was 36.”); see also Linda J. Heffner, *Advanced Maternal Age- How Old is Too Old?*, 351 NEW ENG. J. MED. 1927 (2004):

The past decade has seen a remarkable shift in the demographics of childbearing in the United States. The number of first births per 1000 women 35 to 39 years of age increased by 36 percent between 1991 and 2001, and the rate among women 40 to 44 years of age leaped by a remarkable 70 percent. In 2002, 263 births were reported in women between 50 and 54 years of age.

<sup>28</sup> See Mary Rice, *Three Million Babies Have Been Born Using Assisted Reproductive Technologies*, MED. NEWS TODAY, June 25, 2006, available at <http://www.medicalnewstoday.com/articles/45720.php> (citing a 2002 report by the International Committee for monitoring Assisted Reproductive Technologies estimating the use of one million ART cycles a year, producing 200,000 babies a year worldwide).

<sup>29</sup> See 2006 ART REPORT, *supra* note 16, (showing that 61% of the women in the U.S. who used ART in 2006 were age thirty-five or older). In 2006, the number of births to women thirty to thirty-four rose to its highest rate since 1964. JOYCE A. MARTIN ET AL., NAT’L CTR. FOR HEALTH STAT., BIRTHS: FINAL DATA FOR 2006, 57 NAT’L VITAL STAT. REP. 1, 5–6 (2009), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf). In 2006, births to women ages thirty-five to thirty-nine reached a record high. *Id.* at 6. “The number of births to women aged 40-44 years [was] more than twice the number reported for 1990 . . .” *Id.* Finally, the number of births to women fifty to fifty-four—ages when it is extremely unlikely that a woman will conceive naturally—rose by an annual average of 15% from 1997 to 2006. *Id.* The report specifically concluded that “[t]he increase in birth rates for women 35 years of age and over during the last 20 years has been linked, in part, to the use of fertility-enhancing therapies.” *Id.* at 7.

<sup>30</sup> Louise Brown was born on July 25, 1978. SPAR, *supra* note 21, at 24.

<sup>31</sup> Elizabeth Carr, America’s first IVF-conceived child, was born two years and eighteen months after the birth of the world’s first child conceived by IVF

approximately 150 babies were conceived by IVF.<sup>32</sup> In 1986, there were 41 IVF clinics in the United States,<sup>33</sup> but there were at least 430 by 2007.<sup>34</sup> In 2006, at least 54,656 babies were born in the United States using IVF and IVF-related procedures.<sup>35</sup>

While IVF traditionally used donor semen to fertilize a woman's eggs (which she would then gestate to birth), egg donation is becoming increasingly important in IVF as well. ART processes are not single, point-in-time activities; they are, more accurately, a series of steps over different periods of time. The Centers for Disease Control ("CDC") refers to these as "cycles of treatment"<sup>36</sup> or, for purposes of this article, "cycles." The number of ART cycles performed in the United States more than doubled in ten years (from 64,681 cycles in 1996 to 138,198 in 2006)<sup>37</sup> and resulted in a record-breaking number of babies born.<sup>38</sup> ART cycles increasingly need donor eggs,<sup>39</sup> and that reliance will continue because of demonstrated success<sup>40</sup> and an unfortunate, but inevitable, increase in demand.<sup>41</sup>

While frequent and necessary, ART procedures using donated eggs are also expensive. The average cost for a single-cycle of IVF is roughly \$10,000-12,000 but can reach as much as \$20,000 per cycle if features such as donor gametes or intracytoplasmic sperm injection (ICSI) are added.<sup>42</sup> And, while the rate of success

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in Oldham, England. *See* SPAR, *supra* note 21, at 24, 28.

<sup>32</sup> SPAR, *supra* note 21, at 28.

<sup>33</sup> *See* MUNDY, *supra* note 16, at 37.

<sup>34</sup> *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, ASSISTED REPROD. TECH. (ART) REP.: NAT'L SUMMARY (2007), *available at* <http://apps.nccd.cdc.gov/ART/NSR.aspx?SelectedYear=2007>.

<sup>35</sup> *See* 2006 ART REPORT, *supra* note 16.

<sup>36</sup> "Because ART consists of several steps over an interval of approximately two weeks, an ART procedure is more appropriately considered a cycle of treatment rather than a procedure at a single point in time." *See* 2006 ART REPORT, *supra* note 16, at 4. Typically, a "cycle" begins with a woman taking hormone medications "to stimulate egg production or starts ovarian monitoring with the intent of having embryos transferred." *Id.*

<sup>37</sup> *See* 2006 ART REPORT, *supra* note 16, at 61.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 63 (reporting the number of fresh-donor cycles with ICSI increased from 857 in 1996 to 7039 in 2006).

<sup>40</sup> *See id.* at 64 (reporting that during reporting year 2006, fresh donor eggs with ICSI were used the most among all donor cycles).

<sup>41</sup> *See* Family Growth, *supra* note 20; *see also* American Society for Reproductive Medicine, *supra* note 20.

<sup>42</sup> *See* Marcia C. Inhorn & Michael Hassan Fakh, *Arab Americans, African Americans, and Infertility: Barriers to Reproduction and Medical Care*, 85 FERTILITY & STERILITY 844, 844 (2006) (estimating the mean cost of IVF in the

has grown considerably, most women need more than one cycle to accomplish pregnancy.<sup>43</sup> Using an egg broker or lawyer adds more to the overall costs<sup>44</sup> and couples may spend \$100,000 just to attempt to conceive.<sup>45</sup> Egg donation is currently a \$38 million a year industry<sup>46</sup> but it will continue to grow based on past usage rates,<sup>47</sup> current egg supply and need,<sup>48</sup> and two very recent

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United States in 2002 at \$9,547). Cost varies by region and clinic. *Id.* Costs are generally paid directly by patients as most health insurance plans do not include fertility treatment. *Id.* Currently only fourteen states have legislation requiring insurance providers to either cover (eleven states) or offer to cover (three states) treatment for fertility diagnostics and treatment. See American Fertility Ass'n, *Diagnosis and Treatment of Infertility: Am I Covered?*, [http://www.theafa.org/library/article/diagnosis\\_and\\_treatment\\_of\\_infertility\\_am\\_i\\_covered/](http://www.theafa.org/library/article/diagnosis_and_treatment_of_infertility_am_i_covered/) (last visited Jan. 23, 2010). Even when coverage is required, reimbursement can be limited by the marital status (some states limit coverage to married couples only) or the type of treatment (some laws specifically exclude coverage for IVF). See Nat'l Conference of State Legislatures, *State Laws Related to Insurance Coverage for Infertility Treatment* (2009), <http://www.ncsl.org/default.aspx?tabid=14391> (last visited Jan. 23, 2010). "Costs" generally encompass medical fees, egg fertilization, embryo transfer, and the variable cost of the donor's egg(s). See AMERICAN FERTILITY ASS'N, *EMBRYO DONATION: PROSPECTIVE RECIPIENTS* 8 (2005) available at [http://www.theafa.org/pubs/AFA\\_Embryo\\_Donation\\_Recipients.pdf](http://www.theafa.org/pubs/AFA_Embryo_Donation_Recipients.pdf).

<sup>43</sup> See CTRS. FOR DISEASE CONTROL & PREV., *2005 ASSISTED REPROD. TECH. SUCCESS RATES NAT'L SUMMARY AND FERTILITY CLINIC REP.* 6 (2005), available at [http://www.cdc.gov/art/ART2005/508PDF/2005\\_ART508.pdf](http://www.cdc.gov/art/ART2005/508PDF/2005_ART508.pdf). Ironically, success rates actually decrease with each additional cycle: 2005 figures indicate out of 97,442 cycles started, only 85,713 progressed to retrieval, of which 78,797 then progressed to transfer, from which 33,101 pregnancies resulted, culminating in only 27,047 live births. *Id.* at 17.

<sup>44</sup> See Sherri A. Jayson, Comment, "*Loving Infertile Couple Seeks Woman Age 18-31 to Help Have Baby. \$6,500 Plus Expenses and a Gift: Should We Regulate the Use of Assisted Reproductive Technologies by Older Women?*", 11 ALB. L.J. SCI. & TECH. 287, 329 (2001). For an example fee schedule see TINY TREASURES, LLC, *PROSPECTIVE PARENTS' FEES*, <http://www.tinytreasuresagency.com/parents/fees/index.html> (last visited Jan. 23, 2010).

<sup>45</sup> See SPAR, *supra* note 21, at 46. This is true even when the patient knows the probability of success is low. See Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 631 (1997). Patients are frequently willing to pay nearly \$30,000 for a 10% chance of having a baby. See Melinda B. Henne et al., *The Combined Effect of Age and Basal Follicle-Stimulating Hormone on the Cost of a Live Birth at Assisted Reproductive Technology*, 89 FERTILITY & STERILITY 104, 107 (2008).

<sup>46</sup> Gigi Stone, *Egg Donation: Is it Worth the Big Money?*, ABC NEWS, Jan. 11, 2008, <http://abcnews.go.com/print?id=4121158> (last visited Nov. 3, 2009).

<sup>47</sup> According to the Center for Disease Control ("CDC"), donor egg use increased threefold in nine years, with donor eggs used in almost one in every eight ART cycles. See 2005 ART REPORT, *supra* note 43, at 56, 61. Births using donated eggs are increasing at an amazing rate; while the entirety of the 1990s saw approximately 8075 egg procedures resulting in live births in the United States (see Suriya E.P. Jayanti, *Guarantors of Our Genes: Are Egg Donors*

technological developments.

The first is early egg retrieval (“EER”). Traditional egg extraction, while improved over time, still requires mature eggs for harvest.<sup>49</sup> EER is a new protocol allowing immature egg retrieval from a woman’s ovaries.<sup>50</sup> The eggs then mature in a laboratory setting before being frozen.<sup>51</sup> There are several advantages to this process. First, and of greatest applicability, taking immature eggs reduces the need for patients and donors to receive ovulation-inducing hormone injections. Second, as only the eggs are frozen, there is no need for donor sperm at this

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*Liabli for Latent Genetic Disease?*, 58 AM. U. L. REV. 405, 407 (2008)), 2004 brought 6653 (*id.* at 412), and 2006, the most recent year of recorded statistics, had over 7,500. See 2006 ART REPORT, *supra* note 16.

<sup>48</sup> Fertility clinics are reporting a dramatic increase in the number of egg donations and procedures performed each year. This is particularly true in these desperate economic times. Fertility clinics nation-wide report an increase of “average” donors coming forward. See, e.g., Stephanie Smith, *Dim Economy Drives Women to Donate Eggs for Profit*, CNN NEWS, Aug. 8, 2008, <http://cnn.com/2008/HEALTH/08/05/selling.eggs/index.html> (last visited Jan. 23, 2010) (reporting Chicago clinics fielding thirty to fifty inquiries a day from potential donors compared to last year’s ten to thirty, while the Reproductive Science Center of the Bay Area received 158 calls in July 2008, in contrast to 120 in July 2007); Juju Chang & Kiran Khalid, *Less Money Means More Egg Donors*, ABC NEWS, Oct. 27, 2008, <http://abcnews.go.com/print?id=6119578> (last visited Jan. 23, 2010) (stating fertility experts throughout the country reported a 30% to 40% increase in applicants); Judy Keen, *Recession Finds Fertile Field of Egg, Sperm Donors*, USA TODAY, July 7, 2009, at 1A, available at [http://www.usatoday.com/printedition/news/20090707/1afertility07\\_st.art.htm](http://www.usatoday.com/printedition/news/20090707/1afertility07_st.art.htm) (reporting that Health News, an Irvine, California company that operates a national donor referral service, had a 40% increase since February, 2009). As of 2008 more than 100,000 young women sold or donated eggs to approximately 470 IVF clinics in the United States (see Schneider & Kramer, *supra* note 15, at 2), and approximately seventy-seven percent of American Fertility Clinics provided services involving donor eggs. See Sarah Terman, Note, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 NW. J. L. & SOC. POL’Y 167, 169 (2008).

<sup>49</sup> See MUNDY, *supra* note 16, at 35. Historically egg retrieval required hospitalizing the patient, placing her under full anesthesia, and performing a laparoscopy—a process of cutting through the abdomen to get to the ovaries, a small organ hidden behind other abdominal organs— for one egg. *Id.* at 34–37. The current process requires that both donor and donee take drugs; the donor receives hormone injections to induce super ovulation so that her reproductive cycle aligns with the donee’s. See Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 117–18 (2001). The donee’s drugs, such as progesterone, prepare her womb for pregnancy; the eggs are then removed from the ovaries using a needle. *Id.* at 118.

<sup>50</sup> See generally Ri-Cheng Chian et al., *Live Birth After Vitrification of In Vitro Matured Human Oocytes*, 91 FERTILITY AND STERILITY 372, 372–73 (2009) (discussing immature oocyte retrieval).

<sup>51</sup> *Id.* at 373.

point, an attractive option for those recipients keeping future options open. Third, estrogen is no longer increased prior to treatment. Such increase was procedurally necessary for women wishing to be egg recipients, but detrimental to those suffering from a disease such as cancer.<sup>52</sup> Conception from EER is a very recent development, so the probabilities of success are not yet known<sup>53</sup> but, if proven effective, it should entice a larger supply of donors, particularly because the hormonal injection requirement is dramatically less than in the traditional process.<sup>54</sup>

The second potentially significant breakthrough is an improved egg freezing process.<sup>55</sup> While sperm has been successfully frozen and banked since the 1950s<sup>56</sup>, and embryos since the early 1970s<sup>57</sup>, effectively storing unfertilized eggs was almost impossible until 2004.<sup>58</sup> That year an Italian endocrinologist, Eleanora Porcu, developed a new slow-freeze/rapid-thaw preservation method.<sup>59</sup> A United States company that works with fertility clinics across the country recently licensed that process.<sup>60</sup> While data is limited, one study showed that eggs

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<sup>52</sup> *Id.* at 372.

<sup>53</sup> *See id.* Initial trials involved the retrieval of eighteen immature eggs. Seventeen were then cryopreserved in liquid nitrogen. *Id.* Subsequently four eggs survived the thawing process two months later. *Id.* Three were fertilized by injection of a single sperm and transferred to the patient's womb two days later. *Id.* At thirty nine weeks of gestation, the patient delivered a healthy 7.5 lb. baby girl. *Id.* at 373–74.

<sup>54</sup> *See generally* Robert Steinbrook, *Egg Donation and Human Embryonic Stem-Cell Research*, 354 *NEW ENG. J. MED.* 324, 324–25 (2006) (donors would likely increase as current procedures involve hormone injections which are uncomfortable and have side effects). *See* MUNDY, *supra* note 16, at 36–37 (explaining how EER had become easier to perform in comparison to traditional procedures).

<sup>55</sup> *See* Press Release, National Institute of Health, *New Technique Could Sustain Cancer Patients' Fertility* (July 14, 2009), *available at* <http://www.nih.gov/news/health/jul2009/nichd-14.htm> (last visited Dec. 12, 2009).

<sup>56</sup> *See* California Cryobank, *Sperm Banking History*, <http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History/> (last visited Jan. 23, 2010).

<sup>57</sup> *See* Advanced Fertility Center of Chicago, *Embryo Freezing after IVF: Human Blastocyst and Embryo Cryopreservation and Vitrification*, <http://www.advancedfertility.com/cryo.htm> (last visited Jan. 23, 2010).

<sup>58</sup> *See* Aina Hunter, *Why Worry? Put Your Eggs on Ice!*, *ABC NEWS*, Apr. 9, 2008, *available at* <http://www.abcnews.go.com/print?id=4591877> (indicating that until recently storage of unfertilized eggs had been nearly impossible because eggs have a high water content which results in a tendency to produce destructive ice crystals).

<sup>59</sup> *Id.*

<sup>60</sup> Cherie Black, *Seattle Women Now Have Option to Freeze Eggs*, *SEATTLE PI*, [http://www.seattlepi.com/local/350763\\_eggfreezing11.html](http://www.seattlepi.com/local/350763_eggfreezing11.html) (last visited Jan. 12,

survive the new storage process 85% of the time<sup>61</sup> and the successful fertilization rate is 70%.<sup>62</sup> Babies are born from frozen eggs,<sup>63</sup> but this process is also not yet well proven.<sup>64</sup> If it is reliable and effective, we should see women banking their own eggs for future use so that they can take the time to make partner and still “have it all.”<sup>65</sup>

### III. . . . ENTER THE ‘NET

*“Selling ova to another woman is at once impossibly intimate and wholly impersonal, a connected but highly distributed process of exchange.*

*It is a transaction well suited to the Internet . . . .”<sup>66</sup>*

In 1999<sup>67</sup> the Buick LeSabre was the most popular full size car sold,<sup>68</sup> Texas Governor George W. Bush announced that he would

2010).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also University of Kentucky Healthcare, *Frozen Donor Eggs Offer New Option for Infertility Treatment*, <http://ukhealthcare.uky.edu/publications/AI/women/frozenEggs.htm> (last visited Jan. 23, 2010) (indicating “Cryo Eggs International, one of two commercial egg banks worldwide, about 70 percent of the frozen eggs survive the thawing process.”). The American Society for Reproductive Medicine still terms the process “investigational” and cautions against its use. Black, *supra* note 60.

<sup>63</sup> The first U.S. baby conceived using frozen donor eggs was born in 2006. University of Kentucky Healthcare, *supra* note 62.

<sup>64</sup> Only about 120 babies worldwide are believed born from eggs frozen prior to fertilization. *Id.*

<sup>65</sup> See ABCNews.Go.com, *Can Frozen Eggs Help Extend Fertility?*, Mar. 22, 2009, <http://abcnews.go.com/print?id=127949> (last visited Dec. 11, 2009) (“For so long, we had been told you can do it all [have a career and children] and then all of a sudden we’re getting news that the biological clock actually has its limitations and it has to do with the eggs . . . In a best-case scenario, freezing a woman’s eggs would allow her to have children when she wants to, not when her chances of conceiving are best” allowing a woman to “hit the snooze button” to get the best of both worlds.); see also ExtendFertility.com, *Female Egg Banking Services*, <http://www.extendfertility.com/female-egg-banking.htm> (last visited Dec. 11, 2009) (encouraging young women to *bank* their eggs by freezing them); see also MUNDY, *supra* note 16, at 39 (reporting doctors are seeing “women astonished to find out that getting pregnant was going to be even harder than making partner in their law firm had been.”).

<sup>66</sup> Kerry Howley, *Ova for Sale: The Art of the Deal in the Gray Market for Human Eggs*, REASON, Oct. 2006, available at <http://reason.com/archives/2006/10/01/ova-for-sale/print>.

<sup>67</sup> The year 1999 was the year the egg donor ad was placed in the classified advertisement sections of the Harvard and Princeton campus newspapers. See *supra* text accompanying note 3.

<sup>68</sup> Keith Griffin, *Fuel Efficient Used Cars from \$4000 to \$6000*, ABOUT.COM, <http://usedcars.about.com/od/usedcarhistories/tp/Fuel-Efficient---4000-6000.htm> (last visited Jan. 23, 2010).

run for President of the United States,<sup>69</sup> the Euro was created,<sup>70</sup> a relatively unknown U.S. cyclist won his first Tour de France,<sup>71</sup> and Pokémon games<sup>72</sup> tied Furbies<sup>73</sup> for the “hottest Christmas toys.”<sup>74</sup> Popular television shows included *Who Wants to be a Millionaire*<sup>75</sup> and *Friends*,<sup>76</sup> while *The Sopranos* debuted on Home Box Office.<sup>77</sup> The late 90’s also became known as the “Electronics Age” as the number of games and gadgets, including computers and peripherals, increased dramatically.<sup>78</sup> As sales of personal computers went up, Internet access and use also increased.<sup>79</sup> A new term, “blog” was introduced<sup>80</sup>, but most

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<sup>69</sup> Inthe90s.com, Timeline of the 90s, 1999, <http://www.inthe90s.com/generated/time1999.shtml> (last visited Jan. 23, 2010).

<sup>70</sup> *Id.*

<sup>71</sup> See SportsIllustrated.CNN.com, Strong Enough: American Lance Armstrong Wins Tour de France, *available at* [http://sportsillustrated.cnn.com/cycling/1999/tour\\_de\\_france/](http://sportsillustrated.cnn.com/cycling/1999/tour_de_france/).

<sup>72</sup> Pokémon were “pocket monsters” that appeared as various animated Japanese creatures containing various fighting skills for “doing battle” on behalf of their masters. CARM.org, Pokémon: What Is It?, <http://www.carm.org/more-stuff/features/pokemon-what-it> (last visited Jan. 23, 2010).

<sup>73</sup> A “Furby” was a small, furry, electronic robot that rolled its eyes and ears as it speaks “Furbish”, but can also speak English. WhatIS.com, Furby, [http://whatis.techtarget.com/definition/0,,sid9\\_gci212170,00.html](http://whatis.techtarget.com/definition/0,,sid9_gci212170,00.html) (last visited Jan. 23, 2010).

<sup>74</sup> See Toy Retailers Association, Top 10 Toys & Games for Christmas 1999, <http://www.toyretailersassociation.co.uk/toysxmas/10xmas99.php?year=1999> (last visited Jan. 23, 2010).

<sup>75</sup> See Sean Daley, ‘Million’ Dollar Question, NYPOST, June 1, 2009, *available at* [http://www.nypost.com/p/entertainment/tv/million\\_dollar\\_question\\_aqc7M4C5oBKjcvaxOh8CLK](http://www.nypost.com/p/entertainment/tv/million_dollar_question_aqc7M4C5oBKjcvaxOh8CLK) (originally hosted by Regis Philbin on ABC, this game-show/reality-show offered a maximum prize of \$1,000,000 for correctly answering trivia questions); ClassicTVHits.com, T.V. Ratings: 1999-2000, <http://www.classictvhits.com/tvratings/1999.htm> (last visited Jan. 23, 2010).

<sup>76</sup> See ClassicTVHits.com, T.V. Ratings: 1999-2000, <http://www.classictvhits.com/tvratings/1999.htm> (last visited Jan. 23, 2010).

<sup>77</sup> See IMDB.com, “The Sopranos” TV Series 1999-2007, <http://www.imdb.com/title/tt0141842/> (last visited Jan. 11, 2010).

<sup>78</sup> See Claudia H. Deutsch, *The Digital Brain Drain: So Many Computers, So Little Interest in Hard Science*, N.Y. TIMES, Sept. 2, 1999, at C1, *available at* <http://www.nytimes.com/1999/09/02/business/the-digital-brain-drain-so-many-computers-so-little-interest-in-hard-science.html?pagewanted=1> (reporting 32 million electronic toys—including computer games were sold in 1998, an increase of four million from 1997).

<sup>79</sup> See Innovations-Report.com, UN Study Shows Environmental Consequences from Ongoing Boom in Personal Computers Sales, Aug. 2, 2004, [http://www.innovations-report.com/html/reports/environment\\_sciences/report-26612.html](http://www.innovations-report.com/html/reports/environment_sciences/report-26612.html) (last visited Jan. 23, 2010) (“Sales of personal computers have exploded.”). The number of Internet users jumped from 66 million in 1998 to 83 million in 1999 alone. Media Awareness Network, *supra* note 4.

individuals used the Internet for sending and receiving e-mail<sup>81</sup> and obtaining general news.<sup>82</sup> However, businesses and individuals were increasingly turning to the Internet to buy and sell goods, and that movement would significantly impact ART.<sup>83</sup>

It is quite possible that no single technological discovery had a more profound impact on all aspects of modern life than the Internet. For better or for worse, it transformed the way we communicate, how, when, and where we work, and how we utilize our free time. As of June 2009, within the United States alone, 227,636,000 people were using the Internet for various reasons.<sup>84</sup> It may seem like a staggering statistic, but anywhere in the world, at any given time, an estimated 1,668,870,408 people are online.<sup>85</sup> The Internet has had a profound impact on the business of baby-making in several ways, but two Cyberprocreation developments are most important for purposes of this article. First, the Internet changed the way many prospective recipients locate and select egg donors. Second, the Internet is changing how and where people choose ART procedures, a movement called “Reproductive Tourism.”

In the not-too-distant past, would-be egg recipients relied on female relatives or friends for donor eggs.<sup>86</sup> Unlike sperm purchasers who could readily turn to sperm banks for stored product, egg seekers who did not have friend or family options were forced to advertise and they did so, at least primarily, through local publications.<sup>87</sup> That constraint no longer exists as

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<sup>80</sup> See Declan McCullagh & Anne Broache, *Blogs Turn 10—Who’s the Father?* CNET NEWS, Mar. 20, 2007, [http://news.cnet.com/Blogs-turn-10-whos-the-father/2100-1025\\_3-6168681.html](http://news.cnet.com/Blogs-turn-10-whos-the-father/2100-1025_3-6168681.html) (reporting the word “blog” first appeared in print in 1999).

<sup>81</sup> See Media Awareness Network, *supra* note 4.

<sup>82</sup> *Id.*

<sup>83</sup> See David J. Reibstein, *Who is Buying on the Internet, 1999?*, THE WHARTON SCHOOL OF BUSINESS, 2, 16 (1999) available at <http://knowledge.wharton.upenn.edu/papers/755.pdf>.

<sup>84</sup> See InternetWorldStats.com, Internet World Stats: Usage and Population Statistics, <http://www.internetworldstats.com/am/us.htm> (citing Nielsen Online) (last visited Jan. 23, 2010). This is an 84% increase since 2000. *Id.*

<sup>85</sup> InternetWorldStats.com, Internet Usage Statistics: The Internet Big Picture—World Internet Users and Population Stats, <http://www.internetworldstats.com/stats.htm> (last visited Jan. 23, 2010). The number of users already outpaces predictions of 1.5 billion people with Internet access by 2011. See Fred Aun, *Brazil, Russia, India and China to Lead Internet Growth Through 2011*, CLICKZ.COM, June 26, 2007, <http://www.clickz.com/3626274> (last visited Jan. 23, 2010).

<sup>86</sup> See SPAR, *supra* note 21, at 42.

<sup>87</sup> See Rothman, *supra* note 3.

the Internet allows them to reach a potential audience limited only by online accessibility.<sup>88</sup> Furthermore, they no longer just look for egg donors, the Internet allows them to attempt to “customize.” Thousands of websites now allow prospective recipients to sort through donor profiles, providing a vast array of physical and personal characteristics,<sup>89</sup> from the comfort of their living rooms.<sup>90</sup> As examples, a prospective recipient might look for an attractive appearance,<sup>91</sup> signs of a high I.Q.,<sup>92</sup> or particular

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<sup>88</sup> See Jim Hopkins, *Egg-Donor Business Booms on Campuses*, USA TODAY, Mar. 15, 2006, available at [http://www.usatoday.com/money/industries/health/2006-03-15-egg-donors-usat\\_x.htm](http://www.usatoday.com/money/industries/health/2006-03-15-egg-donors-usat_x.htm) (“Eggs have been traded almost since the fertility industry started 30 years ago. But now, new technologies tied to the Internet have turned the business into a global bazaar of egg merchants . . .”). The Internet also makes it easier for potential donors to make their product or services available. See EggDonor4U.com, Secure Egg Donor Application Now Available Online, [http://www.eggdonor4u.com/newsletter.htm#secure\\_application](http://www.eggdonor4u.com/newsletter.htm#secure_application) (last visited Jan. 23, 2010) (discussing how prospective donors can submit their application via the Internet); see also Martha Irvine, Increase in Egg Donors Raises Concerns, REDORBIT.COM, Feb. 18, 2007, [http://www.redorbit.com/news/health/845341/increase\\_in\\_egg\\_donors\\_raises\\_concerns/index.html](http://www.redorbit.com/news/health/845341/increase_in_egg_donors_raises_concerns/index.html) (last visited Nov. 3, 2009) (“In 1996, women in federally monitored programs donated eggs just over 3,800 times. That number has risen steadily, to more than 10,000 in 2004, the most recent year for which the Centers for Disease Control has compiled data.”).

<sup>89</sup> See MUNDY, *supra* note 16, at 100 (using websites such as “Tiny Treasures” and “Loving Donations,” “[P]rospective parents can sort donors based on ethnicity, personality, College Board scores, the shade of their skin and the kink of their hair.”); see also Growing Generations Egg Donor Program, Egg Donor Database, <http://www.growinggenerations.com/egg-donor-program/intended-parents/egg-donor-database?GGID=b0ae84c2cddd04c86443d4611f04bf03> (last visited Dec. 10, 2009) (allowing intended parents to select donors based on personal genetic desires and providing a paid service wherein donor bios, photo galleries, and videos are viewable, where you can watch a donor’s videotaped response to questions such as “what are your future career aspirations?”, see her baby pictures, learn her favorite colors, and even find one who closely resembles your own facial features).

<sup>90</sup> See Creating New Generations, Steps in Choosing an Egg Donor, <http://www.creatingnewgenerations.com/webfront/search-egg-donors> (last visited Jan. 23, 2010).

<sup>91</sup> See Claudia Dreifus, *An Economist Examines the Business of Fertility*, N.Y. TIMES, Feb. 28, 2006, available at <http://www.nytimes.com/2006/02/28/health/28conv.html>.

<sup>92</sup> See, e.g., Growing Generations, An Example Egg Donor Profile, [http://www.growinggenerations.com/growinggen/ff/egg\\_donor/profile/sample/profile\\_sample.php](http://www.growinggenerations.com/growinggen/ff/egg_donor/profile/sample/profile_sample.php) (last visited Jan. 23, 2010) (showing an example donor profile with factors *inter alia* I.Q. numbers, G.P.A. and S.A.T. scores); see also Polly Morrice, *The Genius Factory: Test-Tube Superbabies*, N.Y. TIMES, July 3, 2005, available at <http://www.nytimes.com/2005/07/03/books/review/03MORRICE.html>.

ethnic backgrounds.<sup>93</sup> It is entirely possible that recipients are now selecting donors so that their progeny have a certain height, hair color, eye color, or athletic or academic aptitude, as opposed to the traditional requirement that they simply had eggs for reproduction.<sup>94</sup> There is also a related issue: many egg donors and recipients find each other online, but that pre-supposes an awareness of the existence of the “other party.” While it is impossible to quantify, there is no doubt that some people get the initial idea to be an egg donor, or use the services of one, from the Internet.<sup>95</sup> It is also true that the Internet is creating new markets for donor eggs,<sup>96</sup> and innovative ways of building interest and demand.<sup>97</sup>

#### A. Reproductive Tourism

Eighty percent of adult web users in the United States use the Internet to seek health information<sup>98</sup> and reproductive health

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<sup>93</sup> See *Creating New Generations*, *supra* note 90.

<sup>94</sup> See, e.g., Joan O’C. Hamilton, *What are the Costs?*, STAN. MAGAZINE, Nov.-Dec. 2000, available at <http://www.stanfordalumni.org/news/magazine/2000/novdec/articles/eggdonor.html>:

[F]uturistic scenarios of parents-in-waiting “constructing” a child already have arrived. Scouring a website where they can select donors, hopeful couples can quickly get caught up in comparison shopping, where physical features are the stock in trade. “Couples who would have been looking for someone with a lovely character before [the Internet] now say, ‘Well, we like No. 98, but haven’t you got someone with a bluer eye?’”

<sup>95</sup> See Posting of StarDust to SGClub, [http://www.sgclub.com/singapore/eggs\\_4000\\_china\\_188402.html](http://www.sgclub.com/singapore/eggs_4000_china_188402.html) (July 31, 2009, 09:20AM).

<sup>96</sup> As an example, there is a gay men’s baby boom presently developing, and fed by the Internet. See Stephen H. Miller, *Gay Men’s Baby Boom*, INDEP. GAY FORUM, <http://www.indegayforum.org/news/show/26805.html> (last visited Dec. 12, 2009).

<sup>97</sup> The decade of the 90’s saw, a new web site launched on the Internet offering a new twist for infertile couples: auctioning the eggs of models. See Rons Angels, [www.RonsAngels.com/index2.html](http://www.RonsAngels.com/index2.html) (last visited Nov. 3, 2009) (billing itself as “the only web site that provides you with the unique opportunity to bid on eggs from beautiful, healthy and intelligent women.”). Donors are chosen at the “discretion” of the website’s owner, a former Playboy filmmaker. *Id.*

<sup>98</sup> See Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71, 85 (2008) (citing Harris Interactive, Number of “Cyberchondriacs”- Adults Who Have Ever Gone Online for Health Information-Increases to an Estimated 136 Million Nationwide, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=686](http://www.harrisinteractive.com/harris_poll/index.asp?PID=686) (last visited Jan. 23, 2010). Searching health information ranks behind only email use and consumer goods and services searches online. Cortez, *supra*, at 8.

questions are one of the most common areas of online interest.<sup>99</sup> While authors discuss the concept of Reproductive Tourism (“RT”) differently, here it means “citizens of one country using reproductive technologies in another.”<sup>100</sup> Commentators address restrictions that drive RT users across borders such as situations where treatment is unavailable<sup>101</sup> or procedures are locally illegal.<sup>102</sup> However, users pursue RT for a variety of other reasons<sup>103</sup> including lack of local medical expertise, lengthy waiting lists,<sup>104</sup> cost considerations,<sup>105</sup> and convenience.<sup>106</sup> RT is a

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<sup>99</sup> See Wolfgang Himmel et al., *Information Needs and Visitors’ Experience of an Internet Expert Forum on Infertility*, 7 J. MED. INTERNET RESEARCH 20 (2005), <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1550645> (last visited Jan. 11, 2010).

<sup>100</sup> See Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 19 HUMAN REPROD. 2689, 2690 (2004) (noting that the practice of citizens leaving their home country for another in hopes of receiving treatment that has been banned in their home country, typically for safety or moral reasons). The basis of this definition likely comes from Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J.L. & MED. 329, 333 (1991) (defining “procreative tourism” as people traveling to exercise “personal reproductive choices in less restrictive states.”).

<sup>101</sup> Sometimes procedures are “unavailable” because medical personnel simply refuse to perform them. See Andrea D. Gurmankin et al., *Screening Practices and Beliefs of Reproductive Technology Programs*, 83 FERTILITY AND STERILITY 61, 65 (2005) (reporting that one in five treatment providers refuse treatment to unmarried women); see also Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 150 (2000) (“The most common and the most significant barrier that gays and lesbians face when trying to access reproductive technologies is physician discrimination and refusal to provide treatment.”). In addition to direct discrimination, refusal to provide treatment, same-sex couples face hostile statutes that prohibit insurance payments for in-vitro procedures unless for instance, the treatment is rendered upon their lawful spouse. See Fertility Lifelines, State Mandated Insurance for Fertility Treatment, <http://www.fertilitylifelines.com/payingfortreatment/state-mandatedinsurancelist.jsp> (last visited Jan. 23, 2010).

<sup>102</sup> Although both nations are members of the EU, German citizens have gone to the Netherlands for ART procedures that Germany would not condone. See Pennings, *supra* note 100, at 2691.

<sup>103</sup> See Elizabeth Ferrari Morris, *Reproductive Tourism and the Role of the European Union*, 8 CHI. J. INT’L L. 701, 703 (2008). For a comprehensive discussion, see Cortez, *supra* note 98, at 71.

<sup>104</sup> See *A Growing Number of Brits Cross the Atlantic for Donor Egg IVF Treatment at Shady Grove Fertility Center*, PR NEWSWIRE, June 16, 2009, <http://news.prnewswire.com/ViewContent.aspx?ACCT=109&STORY=/www/story/06-16-2009/0005044891&EDATE> (“In the UK, where egg donors are neither paid nor guaranteed anonymity, donor eggs are scarce, wait times can be as long as three years and choice of donor is limited.”). Some clinics exist precisely because countries have more demand than supply. See, e.g., Shady Grove

prevalent<sup>107</sup> and, based upon growth patterns, will soon be an enormous ART/Internet consideration because “[t]he Internet facilitates nearly all facets of medical tourism.”<sup>108</sup>

It is almost impossible to fathom the RT explosion but, while data is limited, India provides some perspective. In 2003 India’s Finance Minister announced his country’s goal to become a “global health destination.”<sup>109</sup> An estimated 150,000 medical tourists visited India in 2005 and that number increased to 450,000 by 2008.<sup>110</sup> Perhaps more telling is that India’s RT segment of medical tourism was approximately \$450 million per year in 2006, but projected to grow to six billion dollars by 2008.<sup>111</sup> A significant portion of this growth is attributable to the Internet and, specifically, to user-friendly websites<sup>112</sup> and

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Fertility, <http://www.shadygrovefertility.com/international> (last visited Dec. 28, 2009).

<sup>105</sup> Fertility treatments in foreign countries are generally cheaper to their residents, “partly because of nationalized health plans. In the Czech Republic, for instance, citizens up to the age of 39 can get up to three IVF treatments for [approximately] \$750 each. Visiting Americans must pay for the service,” but the same treatment would cost up to \$8,158 each in the United States. See Heather Won Tesoriero, *Infertile Couples Head Overseas for Treatments*, WALL ST. J., Feb. 19, 2008, at D1, available at <http://online.wsj.com/article/SB120338119629575619.html>.

<sup>106</sup> Foreign clinics use online promotions to target frazzled, infertile couples with an attractive combination: fertility treatments and vacation. For instance, offering “vacation style” IVF procedures in the Czech Republic. See, e.g., My IVF Alternative, <http://www.myivfalternative.com/> (last visited Dec. 28, 2009); see also Go Sculptura, [http://www.ivfmexicoexperts.com/conversion/mexico\\_conv\\_fertility.htm?OVRAW=IVF%20Vacation&OVKEY=ivf%20abroad&OVMT C=advanced&OVADID=44419002522&OVKWID=220392856522](http://www.ivfmexicoexperts.com/conversion/mexico_conv_fertility.htm?OVRAW=IVF%20Vacation&OVKEY=ivf%20abroad&OVMT C=advanced&OVADID=44419002522&OVKWID=220392856522) (last visited Dec. 28, 2009) (offering a “pleasurable” IVF vacation experience in Mexico).

<sup>107</sup> See Morris, *supra* note 103, at 712 (“Reproductive tourism has become an unmistakable part of the European landscape.”).

<sup>108</sup> See Cortez, *supra* note 98, at 85.

<sup>109</sup> Rupa Chinai & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, 85 BULL. OF THE WORLD HEALTH ORG. 161 (2007), available at [www.who.int/bulletin/volumes/85/3/07-010307/en/index.html](http://www.who.int/bulletin/volumes/85/3/07-010307/en/index.html).

<sup>110</sup> *Id.*; see Anupama Chandrasekaran, *Dentists Vie for Slice of the Medical Tourism Pie*, LIVEMINT, Aug. 18, 2009, at 7, available at <http://www.livemint.com/2009/08/17235726/Dentists-vie-for-slice-of-the.html>.

<sup>111</sup> Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 24 (2008–2009); see Linda F. Powers, *Leveraging Medical Tourism*, THE SCIENTIST, Mar. 2006, at 79, available at <http://www.the-scientist.com/2006/3/1/79/1> (projecting a six-fold increase in medical tourism to India within “the next five to seven years.”); see also Sudha Ramachandran, *India’s New Outsourcing Business – Wombs*, ASIA TIMES ONLINE, June 16, 2006, [http://www.atimes.com/atimes/South\\_Asia/HF16Df03.html](http://www.atimes.com/atimes/South_Asia/HF16Df03.html) (last visited Dec. 28, 2009).

<sup>112</sup> Cortez, *supra* note 98, at 85–86 (Virtually every hospital that caters to

effective, although not necessarily reliable,<sup>113</sup> online advertising.<sup>114</sup> The United States, while not attempting to grow RT as India, still has a \$3 billion per year fertility industry.<sup>115</sup>

#### IV. REGULATION?

*“The most remarkable thing about the egg trade is that it exists. The market takes place within what is arguably the most heavily regulated economic sector in modern America – health care . . . .”*<sup>116</sup>

The following subsections discuss the egg donor and supplier regulation, or lack thereof, at the international, federal, state, and voluntary association levels. Where possible, we address two primary issues. The first is restriction on egg donorship, either through outright prohibition or regulated compensation. The second is quality control, specifically through donor screening and/or egg storage requirements.

##### A. International

Several countries prohibit or otherwise regulate donorship of, or compensation for, oocyte materials.<sup>117</sup> Austria, China, Germany, Italy, Japan, Norway, Switzerland, and Turkey do not allow egg donorship for purposes of ART.<sup>118</sup> South Korea<sup>119</sup> and

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foreign patients has an English web site. And these web sites are increasingly functional. Many allow patients to schedule treatments, book hotels and airfare, and even contact their surgeons. Patients can also find medical tourism brokers on the Internet that will liaise with foreign hospitals and make travel arrangements.”)

<sup>113</sup> See Smerdon, *supra* note 111, at 30 (“Many Indian ART practitioners and fertility tourism agencies have created websites that ‘are designed to function as marketing tools for medical tourism, to attract patients from around the world to India and more importantly, to the clinic. It is difficult to distinguish actual information from marketing strategies, as the two often appear to be indistinguishable.”) (citations omitted).

<sup>114</sup> Smerdon, *supra* note 111, at 24 (“Between 2004 and 2006, the number of websites advertising ART more than quadrupled with marketing heavily geared to foreigners.”). Prospective users can even comparison shop online utilizing estimated costs and user reviews. See, e.g., All Medical Tourism, <http://www.allmedicaltourism.com/usa/fertility/ivf-in-vitro-fertilization> (last visited Jan. 13, 2010) (allowing users to compare IVF options in up to 5 countries traveling from the USA).

<sup>115</sup> See MUNDY, *supra* note 16, at 4, 349 (“\$3 billion is the commonly accepted figure for the U.S. fertility industry.”).

<sup>116</sup> Howley, *supra* note 66.

<sup>117</sup> See BIOETHICS ADVISORY COMM., DONATION OF HUMAN EGGS FOR RESEARCH, A CONSULTATION PAPER 10, 19–20 (2007), available at <http://www.bioethics-singapore.org/uploadfile/52533%20PMEgg%20Donation%20Consultation%20Paper.pdf>.

<sup>118</sup> *Id.*

Canada<sup>120</sup> ban the sale of human eggs. Australia and Israel prohibit payment beyond actual expenses,<sup>121</sup> as does France.<sup>122</sup> However, donors in Singapore,<sup>123</sup> Belgium, Denmark, Hong Kong, Hungary, India, Spain, Taiwan, the United Kingdom, and the United States may receive compensation above actual expenses.<sup>124</sup>

While there is some compensation regulation, there is very little international quality control regulation. As examples, the European Union regulates cell quality only,<sup>125</sup> while India has no laws regulating ART.<sup>126</sup>

### B. Federal

The Uniform Anatomical Gift Act<sup>127</sup> (“UAGA”) and the National Organ Transplant Act of 1984<sup>128</sup> (“NOTA”) clarify the federal position on organ donation.<sup>129</sup> The UAGA governs gifting cadaveric human organs.<sup>130</sup> All states and the District of Columbia adopted some form of the UAGA.<sup>131</sup> However the act

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<sup>119</sup> James Brooke, *Korean Leaves Cloning Center in Ethics Furor*, N.Y. TIMES, Nov. 25, 2005, at A1, available at <http://www.nytimes.com/2005/11/25/international/asia/25clone.html>.

<sup>120</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2 § 5 (2004) (Can.).

<sup>121</sup> BIOETHICS ADVISORY COMM., *supra* note 117, at 19–20; Baum, *supra* note 49, at 129.

<sup>122</sup> BIOETHICS ADVISORY COMM., *supra* note 117, at 19–20.

<sup>123</sup> See Deborah Spar, *The Egg Trade – Making Sense of the Market for Human Oocytes*, 356 NEW ENG. J. MED. 1289, 1291 (2007).

<sup>124</sup> BIOETHICS ADVISORY COMM., *supra* note 117, at 19–20.

<sup>125</sup> See Council Directive 2004/23, 2004 O.J. (L. 102) 48 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:102:0048:0058:EN:PDF>.

<sup>126</sup> KARI POINTS, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 3 (The Kenan Inst. for Ethics at Duke Univ.), available at <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>.

<sup>127</sup> UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 17 (2003).

<sup>128</sup> The National Organ Transplant Act, 42 U.S.C. §§ 273-274(f) (2006).

<sup>129</sup> Lynn M. Squillace, Note, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMED. L. 135, 145 n.72 (2005) (“The UAGA was enacted in 1968 to establish a consistent and coordinated system for organ donation in the United States. The NOTA . . . established the current United States’ system for organ donation and allocation which is run by the United Network of Organ Sharing, a non-profit organization that contracts with the Department of Health and Human Services to regulate traffic in transplant organs.”) (quoting Baum, *supra* note 49, at n.69).

<sup>130</sup> See UNIF. ANATOMICAL GIFT ACT §§ 4 cmt., 10 cmt.

<sup>131</sup> Margaret R. Sobota, Note, *The Price of Life: \$50,000 for an Egg, Why Not \$1,500 for a Kidney? An Argument to Establish a Market for Organ Procurement Similar to the Current Market for Human Egg Procurement*, 82 WASH. U. L.Q.

was originally silent on whether or not donors could receive compensation for the organ(s). The NOTA was enacted in 1984 and specifically prohibits the exchange of valuable consideration for any organ to be used for transplant.<sup>132</sup> However, the NOTA does not include human eggs under its definition of “human organ[s],”<sup>133</sup> thus it does not prohibit the exchange of valuable consideration for eggs. The federal government could regulate aspects of egg donorship, but chooses not to do so.<sup>134</sup> The federal position on regulating quality control is similar.

It is possible that no federal laws address egg donor screening or egg storage. However, we contend that the statutory language and commentary demonstrate that there is some mandatory screening, though minimal.<sup>135</sup> The federal government oversees assisted reproduction and genetic testing through three agencies: the Food and Drug Administration (“FDA”), the Centers for Medicare and Medicaid Services (“CMS”),<sup>136</sup> and the Center for Disease Control (“CDC”).<sup>137</sup> As previously discussed, it appears that the FDA classifies human eggs as “other reproductive tissue.”<sup>138</sup> If that is true, then there are no more than two regulations applying to egg buying, selling, or storage. The first

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1225, 1232 (2004).

<sup>132</sup> 42 U.S.C. § 274(e)(a) (2006) (“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”).

<sup>133</sup> § 274(e)(c) (“[T]he human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof . . .”).

<sup>134</sup> See Brenda Reddix-Small, *Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs but Not Our Livers?*, 10 VAND. J. ENT. & TECH. L. 643, 645–46 (2008) (“With practically every aspect of human-to-human tissue transfer in the United States regulated, the lack of regulatory control over human egg donation in particular . . . speaks volumes about the acceptance of a free market approach to ART.”).

<sup>135</sup> See, e.g., 21 C.F.R. § 1270.21 (2009) (stating that donor and mother specimens will be screened for HIV-1, HIV-2, hepatitis B, and hepatitis C).

<sup>136</sup> See, e.g., § 1271.55 (listing the records that the FDA requires after donor eligibility determination is complete, and stating that testing for a communicable disease is to be compatible with CMS requirements); § 1271.80 (stating that laboratory testing is to comply with CMS requirements).

<sup>137</sup> See President’s Council on Bioethics: U.S. Public Policy and the Biotechnologies that Touch the Beginnings of Human Life: Some Policy Options, [http://www.bioethics.gov/background/some\\_policy\\_options.html](http://www.bioethics.gov/background/some_policy_options.html) (last visited Dec. 15, 2009) (“The Centers for Disease Control is . . . charged by statute with the task of gathering and publishing data on Assisted Reproductive Technologies.”).

<sup>138</sup> 21 C.F.R. § 1271.3(d) (2009).

merely requires that all establishments engaged in the collection, processing, storage and distribution of human gametes or embryos have their donors screened and tested for H.I.V., Hepatitis B & C, Chlamydia trachomatis and Neisseria gonorrhoea.<sup>139</sup> The second states only that human tissue must be stored at an “appropriate temperature.”<sup>140</sup> While these regulations are nominal and vague such deficiencies might be explained by accidental over-sight, but the federal government had an opportunity to clearly establish quality control standards and chose not to do so.

The Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA)<sup>141</sup> authorized the Secretary of Health and Human Services to issue regulations to establish certification standards and procedures for embryo laboratories.<sup>142</sup> The Act defined an “[e]mbryo laboratory” as “[a] facility in which human oocytes and sperm, or embryos, are subject to ART laboratory procedures.”<sup>143</sup> It then defined “[o]ocyte” as “[t]he female reproductive cell, also called an egg.”<sup>144</sup> However the Act and the Secretary did nothing to establish standards or procedures for quality control practices; instead they only require that fertility clinics report annual ART success rates.<sup>145</sup> In sum, there is no federal legislation addressing egg donor compensation and, if there is any quality control regulation it is minimal<sup>146</sup> and this minimal level is clearly intentional.

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<sup>139</sup> § 1271.85(a), (c).

<sup>140</sup> § 1271.260(b).

<sup>141</sup> Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (1992) (codified as amended at 42 U.S.C. §§ 263a-1-a-7 (2006)).

<sup>142</sup> Implementation of the Fertility Clinic Success Rate and Certification Act of 1992; Proposed Model Program for the Certification of Embryo Laboratories, 63 Fed. Reg. 60178, 60178 (Nov. 6, 1998).

<sup>143</sup> *Id.* at 60181.

<sup>144</sup> *Id.*

<sup>145</sup> See 42 U.S.C. § 263a-1(a) (2009); § 263a-2(c); § 263a-5; Reddix-Small, *supra* note 134, at 658 (suggesting that the act is “governmental regulation at its weakest,” a contention that is hard to dispute. To give perspective, in addition to its failure to establish quality control procedures, the act was not even funded until four years after enactment).

<sup>146</sup> Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children’s Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 28 (2003) (stating that there are no federal laws governing gamete donors).

*C. State*

While there is some regulation regarding donor compensation, it exists only in a few states and those restrictions vary greatly. As examples, at one end of the spectrum Louisiana specifically prohibits sale of “human ovum, fertilized human ovum, or human embryo”<sup>147</sup> while at the other, Virginia specifically exempts ova from its general statutory ban on the sale of “body part[s]”.<sup>148</sup> In the middle several state statutes appear to ban the sale of eggs, although they do not specifically state so.<sup>149</sup> There is even less quality control legislation.<sup>150</sup> Only New Hampshire<sup>151</sup> and

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<sup>147</sup> LA. REV. STAT. ANN. § 9:122 (2008). *But see* A Woman’s Center for Reproductive Medicine, Donor Egg IVF Louisiana, <http://www.ivflouisiana.com/donor-egg.html> (last visited Dec. 5, 2009) (explaining that Louisiana does not prohibit compensation to a donor for harvesting the eggs).

<sup>148</sup> VA. CODE ANN. § 32.1-291.16 (2009).

<sup>149</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-280a(b) (West 2003) (“No person shall knowingly acquire, receive or otherwise transfer for valuable consideration any human organ for use in human transplantation.”); FLA. STAT. ANN. § 873.01(1) (West 2000) (“No person shall knowingly offer to purchase or sell, or purchase, sell, or otherwise transfer, any human organ or tissue for valuable consideration.”); 720 ILL. COMP. STAT. ANN. 5/12-20(b) (West 2002) (“[A]ny person who knowingly buys or sells, or offers to buy or sell, a human body or any party of a human body, is guilty of a Class A misdemeanor for the first conviction and a Class 4 felony for subsequent convictions.”); IND. CODE ANN. § 35-46-5-1(d) (LexisNexis 2004) (“A person who intentionally acquires, receives, sells, or transfers in exchange for an item of value: a human organ for use in human organ transplantation . . . commits unlawful transfer of human tissue . . . .”); NEV. REV. STAT. ANN. § 201.460(1) (LexisNexis 2006) (“A person shall not knowingly sell, acquire, receive or otherwise transfer for valuable consideration any human organ for use in human transplantation.”); N.Y. PUB. HEALTH LAW § 4307 (McKinney Supp. 2009) (“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer for valuable consideration any human organ for use in human transplantation.”); OHIO REV. CODE ANN. § 2108.18(A) (LexisNexis 2007) (“[N]o person shall, for valuable consideration, knowingly purchase or sell a part for transplantation or therapy if removal of a part from an individual is intended to occur after the individual’s death.”); TENN. CODE ANN. § 68-30-401(a) (2006) (“It is unlawful for any person to acquire, receive or otherwise transfer any human organ for valuable consideration and for use in human transplantation if the transfer affects commerce.”); TEX. PENAL CODE ANN. § 48.02(b) (Vernon 2003) (“A person commits an offense if he or she knowingly or intentionally offers to buy, offers to sell, acquires, receives, sells, or otherwise transfers any human organ for valuable consideration.”); WIS. STAT. ANN. § 146.345(2) (West 2006) (“No person may knowingly and for valuable consideration acquire, receive or otherwise transfer any human organ for use in human organ transplantation.”); CAL. PENAL CODE § 367f(a) (West 1999) (“[I]t shall be unlawful for any person to knowingly acquire, receive, sell, promote the transfer of, or otherwise transfer any human organ, for purposes of transplantation, for valuable consideration.”).

<sup>150</sup> *See* Alicia Ouellette et al., *Lessons From Across the Pond: Assisted*

Virginia<sup>152</sup> statutorily require that gamete donors be screened, and Virginia limits screening solely to HIV.<sup>153</sup>

Some states also attempt to regulate parental rights and responsibilities by statute.<sup>154</sup> The National Conference of Commissioners on Uniform State Laws influences the formulation of state laws regarding parentage and paternity rights. “The most important uniform act addressing . . . nonmarital child[ren is] the Uniform Parentage Act [(“UPA”)] approved in 1973.”<sup>155</sup> Nineteen states adopted the UPA, with many others enacting significant portions of it.<sup>156</sup> The UPA states that when a married woman is impregnated by a donor’s sperm “under the supervision of a licensed physician and with the consent of her husband[,]” the husband is legally declared the natural father of the child.<sup>157</sup> As a matter of law, the sperm donor then has no paternal rights or responsibilities, even though he is the biological father of the child.<sup>158</sup> However the Act was silent as to egg donors.

The Uniform Parentage Act of 2000 (as amended in 2002, “UPA 2002”) followed the UPA. UPA 2002 directly addressed assisted reproduction cases.<sup>159</sup> As with the original, UPA 2002 holds that “[a] donor is not a parent of a child conceived by means of assisted reproduction” and, in Comment, specifically includes egg donors under the definition of “donor.”<sup>160</sup> This seems to

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*Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 433 (2005) (“This body of legislation and court cases demonstrate that regulations on ART lack consistency and are rarely well developed in any particular state.”).

<sup>151</sup> See N.H. REV. STAT. ANN. § 168-B:14 (West 2009).

<sup>152</sup> See VA. CODE ANN. § 32.1-45.3 (LEXIS through 2009 Sess.).

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., C.G.S.A. (Connecticut General Statutes Annotated) § 46b-172; N.H. Rev. Stat. 461-A:2.

<sup>155</sup> See UNIF. PARENTAGE ACT Prefatory Note (amended 2002), 9B U.L.A. 5 (West Supp. 2009).

<sup>156</sup> See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1120 n.237 (1998) (explaining that “states . . . model[ing] . . . legislation [after] the UPA [include] Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Washington, Wisconsin, and Wyoming.”).

<sup>157</sup> UNIF. PARENTAGE ACT 1973, 9B U.L.A. § 5 (2001).

<sup>158</sup> *Id.*

<sup>159</sup> UNIF. PARENTAGE ACT 2000, 9B U.L.A. § 701-707 (amended 2002 & West Supp. 2009). See also *id.* (“Child of Assisted Reproduction”); *id.* §801-809 (“Gestational Agreement”).

<sup>160</sup> *Id.* § 702 (“Parental Status of Donor”). “A donor is not a parent of a child conceived by means of assisted reproduction.” *Id.* Comment in the 2009

succinctly regulate potential egg donor parental rights and responsibilities. However, only nine states enacted UPA 2002, and none of them without change.<sup>161</sup> To date there is no case law interpreting UPA 2002 definition and comments.

#### *D. Voluntary Associations*

There is little voluntary association regulation of donor compensation and, where it might exist, it is limited to issues of egg donation for medical research, as opposed to procreation usage. Human Embryonic Stem Cell Research (“HESCR”) extracts stem cells from human embryos. The embryos may come from any of three sources: cloned human embryos created for research, research embryos created through IVF, or embryos donated for research.<sup>162</sup> The National Academy of Sciences (“NAS”) issued guidelines prohibiting payment or other “inducements,” beyond expense reimbursement, to egg donors for HESCR.<sup>163</sup> While NAS suggests ways to urge or mandate compliance with its standards,<sup>164</sup> those guidelines are hortatory. It is impossible to determine how many, if any, entities have adopted any or all of these principles. However, there is more compelling and comprehensive voluntary quality control regulation—or perhaps not.

The American Society for Reproductive Medicine (“ASRM”) is “a voluntary, non-profit organization devoted to advancing

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supplement on §702 further states

[i]f a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.

*Id.*

<sup>161</sup> Those states are Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. See Uniform Law Commission, *CSG Approves Two Uniform Acts as “Suggested State Legislation,”* available at <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=213> (last visited Dec. 2, 2009). The first draft of a “Model Assisted Reproductive Technology Act” has also been published. See Sara Cotton et al., *Creating Life? Examining the Legal, Ethical and Medical Issues of Assisted Reproductive Technologies*, 9 J. GENDER RACE & JUST. 55 (2005). Note: to our knowledge it has not yet been reduced to final form or adopted by any state.

<sup>162</sup> See NAT’L RESEARCH COUNCIL & INST. OF MED., GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH 2, 17 (2005), available at <http://www.nap.edu/catalog/11278.html>.

<sup>163</sup> *Id.* at 82–89.

<sup>164</sup> *Id.* at 14.

knowledge and expertise in reproductive medicine, including infertility, menopause, contraception, and sexuality.”<sup>165</sup> It is “the leading market force in the field of reproductive medicine.”<sup>166</sup> The Society for Assisted Reproductive Technology (SART) is “the primary organization of professionals dedicated to the practice of assisted reproductive technologies (ART) in the United States.”<sup>167</sup> “SART is . . . extensively involved in data collection, practice guidelines and standards, government interaction, quality assurance, and research.”<sup>168</sup> SART is also comprehensively involved with a wide variety of entities which have significant ART interests and concerns.<sup>169</sup> ASRM and SART, along with the College of American Pathologists (“COP”) created the Reproductive Laboratory Accreditation Program (“RLAP”).<sup>170</sup> SART represents over 85% of the clinics practicing ART in the United States<sup>171</sup> and, as of 2005, two-thirds of SART programs were RLAP accredited.<sup>172</sup>

It is difficult to ascertain whether or not the RLAP accreditation process and standards are truly adequate to safeguard the egg donation and storage processes. While SART’s relationships with key stakeholders in ART could lend credibility to RLAP standards, at least one author is concerned that where federal oversight could occur, it may be suspect precisely because of SART’s close working relationship with a federal agency.<sup>173</sup> Additionally, RLAP standards do not discuss egg donation and storage specifically; they leave particular procedures to the

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<sup>165</sup> See *Welcome to the American Society for Reproductive Medicine*, American Society for Reproductive Medicine, available at <http://www.asrm.org/> (last visited Jan. 23, 2010).

<sup>166</sup> See Reddix-Small, *supra* note 134, at 673.

<sup>167</sup> See Society for Assisted Reproductive Technology, *What is SART?*, available at <http://www.sart.org/WhatIsSART.html> (last visited Jan. 23, 2010).

<sup>168</sup> See Reddix-Small, *supra* note 134, at 675.

<sup>169</sup> See David Adamson, *Regulation of Assisted Reproduction Technologies in the United States*, 39 FAM. L.Q. 727, 735 (2005) (“[B]oth SART and ASRM have continued to cooperate with and lead initiatives with other organizations and institutions that are stakeholders in ART. These include the CDC, FDA, NIH, FTC, and members of Congress as well as professional organizations such as the American Medical Association (AMA), American College of Obstetricians and Gynecologists (ACOG), the American Bar Association (ABA) and consumer organizations, RESOLVE, the National Fertility Organization, and the American Fertility Association (AFA).”).

<sup>170</sup> *Id.* 732–33.

<sup>171</sup> *What is SART?*, *supra* note 167.

<sup>172</sup> See Adamson, *supra* note 169, at 732–33.

<sup>173</sup> See Reddix-Small, *supra* note 134, at 674. The author is also concerned that laboratories failing accreditation can still operate. *Id.* at 675.

individual facilities.<sup>174</sup> This is problematic as individual fertility clinics' voluntary screening procedures vary tremendously<sup>175</sup> and may not be followed at all.<sup>176</sup>

#### V. EGG DONOR RIGHTS AND OBLIGATIONS

Clearly egg donors are a vital part of many ART procedures, but do they have any rights over eggs donated and what are their rights and responsibilities, if any, toward resulting children? This section begins to address those questions.

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<sup>174</sup> Instead of identifying particular processes or procedures, the standards speak in general terms. See COLL. OF AM. PATHOLOGISTS, STANDARDS FOR REPRODUCTIVE LAB. ACCREDITATION 2009 EDITION 4 (2009), [http://www.cap.org/apps/docs/laboratory\\_accreditation/standards/standards\\_repro.pdf](http://www.cap.org/apps/docs/laboratory_accreditation/standards/standards_repro.pdf) (last visited Dec. 13, 2009) ("There must be a manual(s) in the laboratory describing all procedures in sufficient detail to assure reproductibility and competence in the handling of gametes.").

<sup>175</sup> See Alvaré, *supra* note 146, at 27.

<sup>176</sup> See CTR. FOR GENETICS & SOC'Y, *Introduction to RESPONSIBLE FEDERAL OVERSIGHT OF THE NEW HUMAN BIOTECHNOLOGIES: OPPORTUNITIES FOR THE NEW ADMINISTRATION* (2009), <http://geneticsandsociety.org/downloads/CGSOabama.pdf>.

*A. Do Donors Have Enforceable Rights Over Eggs Post-  
Donation?*<sup>177</sup>

There are no published decisions to date where an egg donor wanted to exercise rights over eggs post-harvest, but pre-fertilization. However, there are analogous cases that help us understand what would likely happen in such a situation.

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<sup>177</sup> This sub-section assumes that human eggs can legally be bought and sold. However, this is far from settled on an economic theory, ethical, or moral basis. See, e.g., Baum, *supra* note 49, at 162–63 (“The rationales for the prohibition of the commodification of organs are either internally irrational or are not applicable to oocyte donation due to its unique technical and social aspects. Additionally, oocyte-specific arguments misconstrue the potential applications of such technology and fail to conform with broader social treatments of noncoital reproduction and freedom to contract.”); Gregory Pence, *De-Regulating and De-Criminalizing Innovations in Human Reproduction*, 39 CUMB. L. REV. 1, 7 (2009) (“Public intellectuals . . . claim that such innovation wrongly commodifies life. I believe that the opposite is true: money fueled stupendous breakthroughs in assisted reproduction and such market forces will continue to be good for babies and for the infertile couples who want them.”); Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1058 (2006) (“Allowing human eggs to be bought and sold . . . treats the sacred components of human life as a form of property, engendering an attitude of disrespect for actual persons.”); Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 487, 511 (2006) (“In a sense, these transactional procreative arrangements reduce the missing sex to the products of their reproductive abilities: sperm, ova, gestation, labor, and birth, and the ultimate product of the transaction, the child, to a commodity.”); see also Matthew H. Baughman, *In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy*, 10 COLUM. J. GENDER & L. 263, 279–80 (2001) (differentiating contracting to sell and purchase renewable reproductive services from the concept of selling and purchasing a child); Jayanti, *supra* note 47, at 426 (exploring implications of viewing donor eggs as commodities on potential product liability tort actions). Much of the discussion on this topic focuses on whether or not reproductive materials are, or should be, “property.” See, e.g., Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 181–82 (2000) (“Whoever has the power to donate (or refuse to donate) the organ can be said to possess a property right, albeit it of a limited kind.”); Rao, *supra*, at 1066 (“Constructing the body as a form of property . . . would imply not only freedom from physical invasion, but also freedom to instrumentalize the body by technologically manipulating it or otherwise putting it to productive use.”); Andrew Wancata, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 J.L. & HEALTH 199, 223 (2004) (“Legal scholars and property theorists, as well as judges, have found it very difficult to speak of human body parts without resorting to masking them in property terminology.”); see generally Elizabeth E. Appel Blue, *Redefining Stewardship over Body Parts*, 21 J.L. & HEALTH 75, 85–95 (2008) (contrasting benefits and shortcomings of viewing body parts as property); R. Alta Charo, *Skin and Bones: Post-Mortem Markets in Human Tissue*, 26 NOVA L. REV. 421 424–30 (2002) (examining historical treatments of the market value of corpses and human tissue).

The California Supreme Court held in *Moore v. Regents of the University of California*<sup>178</sup> that a medical patient did not retain a property right to materials removed from his body.<sup>179</sup> Moore was treated for a form of leukemia at the UCLA medical center.<sup>180</sup> As part of his treatment his spleen and amounts of blood, skin, bone marrow aspirate, and sperm were removed.<sup>181</sup> He gave written consent to at least one of these procedures.<sup>182</sup> His attending physician established a cell line from Moore's materials and the Regents of the University of California patented it.<sup>183</sup> The physician and the Regents then entered into an agreement with Genetics Institute whereby they provided exclusive access and research in exchange for 75,000 shares of common stock and a minimum of \$330,000 over three years.<sup>184</sup> While a full analysis is beyond the scope of this article, Moore brought suit under multiple claims of action including conversion.<sup>185</sup> The Court did not hold that Moore had a property right to his bodily materials; instead it held that his conversion claim failed because he did nothing to maintain a proprietary interest in those materials after they were removed.<sup>186</sup> While *Moore* did not deal with gamete material, the logic could certainly apply to claims by egg donors. If they do nothing to perfect or maintain a proprietary interest post-harvest, they likely have no property rights over "their" eggs. On the other hand, if they take action affecting such an interest, they may have enforceable rights.<sup>187</sup>

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<sup>178</sup> 793 P.2d 479 (Cal. 1990).

<sup>179</sup> *Id.* at 493 ("Moore's novel claim to own the biological materials at issue in this case is problematic, at best."). See also *Greenberg v. Miami Children's Hosp. Research Inst.*, 264 F. Supp. 2d 1064,1074 (S.D. Fla. 2003) (ruling that donating biological tissue or genetic matter for research negates any property interest rights in said material).

<sup>180</sup> *Moore*, 793 P.2d at 480.

<sup>181</sup> *Id.* at 481.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 481–82.

<sup>184</sup> *Id.* at 497.

<sup>185</sup> *Id.* at 482.

<sup>186</sup> *Id.* at 488–89.

<sup>187</sup> As an analogy, see *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993), which held that bequeathed frozen sperm cells were property pursuant to the California Probate Code. However, in the case of a donor contract as opposed to a bequest, the agreement may not be enforceable. See *Squillace*, *supra* note 129, at 142 (discussing the *Moore* holding and arguing "[t]he implication, by analogy, may be that if egg donors do not enjoy a property right in their removed eggs the courts may not recognize an action for breach of contract in a dispute over the terms of any pre-donation contracts between the donor and recipient."). But see *York v. Jones*, 717 F. Supp. 421, 426 n.5 (E.D.

It is also held that a donor loses rights over eggs as soon as they are fertilized, even when the original agreement between donor and recipient conferred some rights. In *Litowitz v. Litowitz*,<sup>188</sup> a married couple entered into an agreement with an egg donor.<sup>189</sup> Pursuant to that contract, the donor had to grant written permission before the eggs were transferred to any other party.<sup>190</sup> The donor provided five eggs.<sup>191</sup> They were fertilized, resulting in five pre-embryos.<sup>192</sup> Three were used in attempted conception and two remained frozen.<sup>193</sup> The Litowitzs were divorcing and the wife wanted to use the remaining pre-embryos for further conception attempts, while the husband wanted to donate them to another “adoptive” couple.<sup>194</sup> The court held that while the original contract gave the donor rights over egg transfer to another couple “the eggs no longer existed as they were identified in the egg donor contract because they were later fertilized by Respondent’s sperm and their character was then changed to preembryos.”<sup>195</sup> The most common use for donor eggs is fertilization and attempted procreation.<sup>196</sup> If an egg donor loses contractual control rights over her eggs when they are fertilized, most donors must lose their rights.<sup>197</sup> But, perhaps,

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Va. 1989) (where control over the disposition of a pre-zygote was at issue, the court reasoned “[i]t is understood that the gametes and concepti are the property of the donors.” (quoting The Ethical Comm. of the Am. Fertility Soc’y, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 89s (1986)); *In re Marriage of Dahl & Angle*, 194 P.3d 834, 839, 842 (Or. Ct. App. 2008) (finding that the contractual right to dispose of frozen embryos was personal property). See also *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (rejecting a pure property analysis and holding that preembryos are an “interim category”: neither “persons’ [n]or ‘property.’”).

<sup>188</sup> 48 P.3d 261 (Wash. 2002).

<sup>189</sup> *Id.* at 263.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 262.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 264.

<sup>195</sup> *Id.* at 269.

<sup>196</sup> BIOETHICS ADVISORY COMM., *supra* note 117, at 4–5 (explaining that while donated eggs are used most often for treating infertility, human eggs can also certainly be used for non-fertilized purposes. “The eggs can be studied without being fertilised, for example, studies into methods of egg maturation and preservation . . .”).

<sup>197</sup> This result might be different if the original donation agreement specifically gave the donor rights over pre-embryos, embryos, a fetus, and/or any resulting child or children. However, it is unlikely that most donees would want a donor to have such rights. This could be true even if donor and donee were romantically involved. See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 676 (Cal.

they might retain some rights to any children conceived from their eggs?

*B. Do Egg Donors Have Enforceable Parental Rights?*

This sub-section, unlike many of the issues in the ART world, has a more comprehensive perspective on case law, although, “more” is certainly a relative term. In discussing the potential rights of egg donors, a review of primary surrogacy cases helps clarify different courts’ perspectives on the parental rights of parties other than the “traditional parents.”<sup>198</sup>

There are two types of surrogates: “traditional” and “gestational”. In a traditional surrogacy the surrogate’s egg(s) are fertilized by donor semen using IVF and re-implanted in the surrogate’s body.<sup>199</sup> In a traditional surrogacy the surrogate is both the biological mother (as the egg donor) and the birth mother.<sup>200</sup> In a gestational surrogacy, the surrogate carries an embryo using an egg donated by a third party.<sup>201</sup> Here, the surrogate is the birth mother, but not the biological mother as she is not the egg donor.<sup>202</sup> Understandably surrogacy arrangements can create very strong ties between the surrogate and the resulting child,<sup>203</sup> so disputes can arise over custody, especially when the biological mother is not also the birth mother. However, it is very difficult for a biological mother to establish custody or visitation when she is not also the birth mother.<sup>204</sup>

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2005) (explaining the circumstances surrounding a lesbian couple who wanted to conceive. One partner had the other sign a “Consent Form for Ovum Donor (Known)” stating, in part, that the donor “waive[d] any right and relinquish[ed] any claim to the donated eggs or any pregnancy or offspring that might result from them.”).

<sup>198</sup> For purposes of this discussion only “traditional parents” mean a married husband and wife who conceive a child using coitus.

<sup>199</sup> Heather Weller, *Traditional Versus Gestational Surrogacy*, *Childbirth Solutions Inc.*, (2001), <http://www.childbirthsolutions.com/articles/preconception/surrogacy/index.php>.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See Terman *supra* note 48, at 169.

<sup>204</sup> See Wancata *supra* note 177, at 225 (“While the conviction of some donors may hold that visitation or even custody rights over the offspring conceived from their gametes cannot be denied them should they legally pursue vindication of such rights, in general, courts have met the enforceability of agreements or contracts like these with little welcome.”); see also Terman, *supra* note 48, at 175 (“In fact, courts have held that egg providers have

The most famous surrogate custody case, and certainly the first to garner strong public attention, was *In the Matter of Baby M*.<sup>205</sup> *Baby M* was a traditional surrogacy case. Mary Beth Whitehead was artificially inseminated with William Stern's sperm and became the surrogate mother of the child.<sup>206</sup> Whitehead gave birth to a daughter, whom she named "Sara Elizabeth Whitehead."<sup>207</sup> Within 24 hours of transferring custody to the Sterns, Whitehead asked for the baby back and threatened suicide.<sup>208</sup> She then refused to return the baby to the Sterns and left New Jersey, taking the infant with her.<sup>209</sup> The New Jersey Superior Court awarded custody of *Baby M* to the Sterns under a "best interest of the child" analysis.<sup>210</sup>

On appeal, the Supreme Court of New Jersey invalidated surrogacy contracts as against "public policy,"<sup>211</sup> but in dicta affirmed the trial court's "best interest" analysis.<sup>212</sup> The Court then remanded the case to family court.<sup>213</sup> The lower court awarded William Stern custody and Mary Beth Whitehead visitation rights.<sup>214</sup> *Baby M* is the most famous surrogacy case, but it is only one of two on record that awarded a surrogate parental rights.<sup>215</sup> Other cases have not done the same.<sup>216</sup>

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standing to assert parentage . . .").

<sup>205</sup> 537 A.2d 1227 (N.J.1998).

<sup>206</sup> *Id.* at 1236.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1236–37.

<sup>209</sup> *Id.* at 1237.

<sup>210</sup> *Id.* at 1238.

<sup>211</sup> *Id.* at 1240.

<sup>212</sup> *Id.* at 1238.

<sup>213</sup> *Id.* at 1264.

<sup>214</sup> *See id.* at 1238.

<sup>215</sup> While one author termed *Baby M* an "aberration," the other case awarding parental rights to the surrogate is even more unusual. Compare Pence, *supra* note 177, at 7, with *Flynn v. Bimber*, 70 Pa. D. & C. 4th 261 (Pa.Com.Pl. 2005), *vacated*, *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006). The outcome of this case is unique as it is the only case of record where the gestational surrogate received primary custody. The decision is the culmination of four uncommon events. First, the surrogate mother was judicially declared the legal mother. *Flynn*, 70 Pa. D. & C. 4th at 283. Second, she had also established parental rights via *in loco parentis*. *Id.* Third, Pennsylvania case law allows a person with *in loco parentis* status to pursue custody. *Id.* at 289. Fourth, any person reading this case would be absolutely clear that the court could not, and would not, award the biological father custody of the triplets. "He often referred to one child or another as 'that one', 'this one', 'one of them', and, at one point, 'the biggest.'" *Id.* at 274. "Plaintiff has consciously chosen not to play an active role in the care and decision-making for his children." *Id.* at 298. "Plaintiff, his paramour, and her family seem more concerned with

*Johnson v. Calvert*<sup>217</sup> is a case that is not directly on point, but a footnote in it is, and that note may become increasingly important. *Johnson* arose out of a dispute regarding a gestational surrogacy contract. Shortly before birth, the surrogate threatened to keep the child unless she was paid monies she contended due under the agreement.<sup>218</sup> Both sides filed suit seeking declaration as the lawful parent(s) of the unborn child.<sup>219</sup> The court had to choose between the biological parents and the birth mother. The court held, in this situation, “she who intended to procreate the child—this is, she who intended to bring about the birth of the child that she intended to raise as her own—is the natural mother.”<sup>220</sup> The end result was that the biological mother got custody, not the surrogate. But the footnote of interest states “in a true ‘egg donation’ situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.”<sup>221</sup> This note is significant because, while it was not mandatory authority, a New York appellate court cited *Johnson* in *McDonald v. McDonald*<sup>222</sup> and held that the non-biological mother, in that true egg donation case, was the lawful mother.<sup>223</sup> The end result, should other courts continue to follow the lead of *Johnson* and *McDonald*, is that egg donors likely will have no common law rights of custody or visitation over children conceived from their eggs.<sup>224</sup> This is even more likely the case

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their relative wealth and upscale community than the welfare of the children.” *Id.* at 295. “Based on all of the testimony presented, defendant is the better caretaker by far . . .” *Id.* at 291.

<sup>216</sup> See Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 670 (2003) (arguing that the genetic mother should be favored over the birth or intended mother when it is in the child’s best interests).

<sup>217</sup> 851 P.2d 776 (Cal. 1993).

<sup>218</sup> *Id.* at 778.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 782

<sup>221</sup> *Id.* at 782, n.10.

<sup>222</sup> 196 A.D.2d 7, 10–11 (N.Y. App. Div. 1994).

<sup>223</sup> *Id.* at 12.

<sup>224</sup> This is far from settled. See, e.g., *Rice v. Flynn*, 2005 Ohio App. LEXIS 4205, 25 (“When a child is delivered by a gestational surrogate who has been impregnated through the process of in vitro fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child.”); *J.F. v. D.B.*, 879 N.E.2d 740, 742 (Ohio 2007) (holding that a gestational surrogacy contract did not violate Ohio

when the surrogate intentionally signed away parental rights in the surrogacy agreement,<sup>225</sup> although it is unclear if surrogacy contracts are enforceable.<sup>226</sup>

*C. Do Egg Donors Have Parental Responsibilities?*

There are no recorded child support cases involving egg donors and resulting progeny, so we must go forward via analogy to a recent sperm donor case. That case clearly illustrates the uncertainty donors of reproductive materials face regarding their potential parental support obligations. This issue is, and will be, significant as the combination of advancing medical technologies and the increased number of potential donors available online likely result in more children born from donated reproductive materials. But, as these children were not conceived via traditional coitus between spouses married to each other, we need to understand who may be liable for their support.

Historically most biological parents had support obligations to their children;<sup>227</sup> however, sperm and egg donors are biological parents who likely do not want such responsibilities. There are three common classifications of sperm donors: “known”<sup>228</sup>,

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public policy but noted “a gestational surrogate, whose pregnancy does not involve her own egg, may have a different legal position from a traditional surrogate.”).

<sup>225</sup> See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 675 (defendant entered into a written contract to relinquish any claim to offspring stemming from her donated ovum).

<sup>226</sup> See Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 445 (2004) (“A survey conducted in December 2000 revealed that approximately eleven states expressly permitted gestational agreements by statute or case law. Six states statutorily declared such agreements void. Approximately eight states enacted statutes to ban gestational agreements that pay compensation to the gestational woman . . . [t]he survey further revealed that courts in two states refuse to recognize gestational agreements.”).

<sup>227</sup> See Barry Pearson, *International History of Child Support in the USA*, available at [http://www.childsupportanalysis.co.uk/information\\_and\\_explanation/world/history\\_usa.htm](http://www.childsupportanalysis.co.uk/information_and_explanation/world/history_usa.htm) (last visited Dec. 20, 2009).

<sup>228</sup> A “known” sperm donor’s identity is known to the prospective mother. Courts tend to order child support more often from known donors, regardless of any intent of the adult parties. See, e.g., *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. 1 Dist., Feb. 22, 2005) (support ordered for child conceived after woman self-inseminated following oral sex); see *S.F. v. State ex rel T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996) (support ordered for child conceived when father was passed out drunk); see also *Faske v. Bonanno*, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) (disallowing misrepresentation of contraceptive protection as a defense).

“unknown”<sup>229</sup> and “identified.”<sup>230</sup> Egg donors may or may not be anonymous<sup>231</sup>, but when an egg donor’s identity is known to the donee, she must be viewed as equivalent to a “known” sperm donor.<sup>232</sup> Historically, many sperm donors did not want to be known because they did not want parental rights or obligations.<sup>233</sup> Today, however, many egg and sperm donors are not donating anonymously, but instead are attempting to contract away parental rights and responsibilities.<sup>234</sup> How valid

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<sup>229</sup> An “unknown” or “anonymous” sperm donor is one whose identity or other personal contact information is undisclosed to either the prospective mother or the child. See, e.g., Elaine Gordon, *Open Donation: An Intriguing Option*, (2001), available at [http://www.eggdonor.com/?section=resources&page=open\\_donation](http://www.eggdonor.com/?section=resources&page=open_donation) (last visited Nov. 1, 2009).

<sup>230</sup> An “identified” sperm donor donates understanding that any resulting child is given the donor’s personal contact information and personal identification (name, address, city of birth, date of birth, etc) once the child reaches the age of 18. Judy Muller, *Sperm Donor Child to Meet Her Father: California Teen May Become First to Meet her Sperm-Donor Father*, ABC NEWS, Dec. 13, 2008, <http://abcnews.go.com/WNT/Health/story?id=129948&page=1> (last visited Dec. 9, 2009).

<sup>231</sup> See Terman, *supra* note 48, at 172 (asserting egg donors are usually known to the donee). This may be because the donor and donee must be in contact, or relatively close proximity, as “egg transfer procedures are more successful when eggs are implanted into the recipient within days of extraction rather than frozen and stored for later use . . .” *Id.* at 174–75. There is also a growing discussion about the importance of making egg donors known to resulting children. See Gordon, *supra* note 229. But see Schneider & Kramer, *supra* note 15, at 5 (asserting that most egg donors in the United States are anonymous). However, these same authors reveal that donors would be open to contact from resulting offspring. *Id.* at 5. In fact, not one of the 155 respondents would refuse contact if it was requested. *Id.* See also Howley, *supra* note 66, at 3 (“The parents wanted an anonymous donation . . . although I had indicated to the agency that I [the donor] was open to a more intimate relationship with the recipients.”) If donors did have such contact they could become “known”. On a related note, see *Egg Donation for Recipients*, [www.familyfertilitycenter.com/EggDonation.html](http://www.familyfertilitycenter.com/EggDonation.html) (last visited Dec. 4, 2009) (“We carefully maintain anonymity to the degree requested by our intended parents.”). That provision sounds as if the Center would release the donor’s identity to the donee making the donor “known.”

<sup>232</sup> Although this could actually mean that known egg donors have less protection from child support obligations than known sperm donors in some situations. The 1973 UPA gave sperm donors protection from child support obligations, but not egg donors. Arguably the 2002 UPA extends protection to egg donors, but there is no judicial decision holding that to date. See *supra* text accompanying notes 153–56.

<sup>233</sup> See Marsha Garrison, *Law Making For Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 904 (2000).

<sup>234</sup> See *Ferguson v. McKiernan*, 60 Pa. D. & C. 4th 353, 353 (Pa. C.P. 2002), *aff’d*, 855 A.2d 121 (Pa. Super. 2004), *rev’d*, 940 A.2d 1236 (Pa. 2007).

are these contracts?<sup>235</sup> *Ferguson v. McKiernan*<sup>236</sup> demonstrates the uncertainty.

Plaintiff Ivonne Ferguson and Defendant Joel McKiernan met as co-workers and began a physical relationship, even though Ferguson was married to another man at the time.<sup>237</sup> McKiernan never used condoms during intercourse because Ferguson claimed to be using the Norplant device for birth control.<sup>238</sup> In fact, unknown to defendant, plaintiff had had a tubal ligation, thus rendering her sterile.<sup>239</sup> Although their mutual affection began to wane, plaintiff suggested to the defendant that she wanted to conceive a child using his sperm.<sup>240</sup> The defendant immediately declined to conceive a child through sexual intercourse. Subsequently, the plaintiff consulted with several doctors and discovered that, although she could not reverse her tubal ligation, she was a candidate for IVF.<sup>241</sup> Plaintiff then requested that defendant donate his sperm for the purposes of artificial insemination, thus removing him as a “natural father” and using him as a “sperm donor.” The parties orally contracted that the defendant volunteered to anonymously donate his sperm to the IVF procedure, and for his release from any rights to the children or any obligation to pay child support.<sup>242</sup> In other words, the defendant would be treated as an “unknown” donor, even though his identity was actually known to the recipient.

Twin boys were conceived through IVF.<sup>243</sup> Both before and after the twins’ birth, the plaintiff never told anyone of the defendant’s identity; in fact, she went to great lengths to conceal it.<sup>244</sup> She even named her ex-husband as the “father” on the twins’ birth certificate.<sup>245</sup> The defendant saw the children several

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<sup>235</sup> One author flatly contends that “contractual provisions absolving egg providers of parental responsibilities are unenforceable.” See Terman, *supra* note 48, at 172.

<sup>236</sup> *Ferguson*, 60 Pa. D. & C. 4th at 363.

<sup>237</sup> *Id.* at 354–55.

<sup>238</sup> *Id.* at 356.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 357.

<sup>242</sup> *Id.* at 356.

<sup>243</sup> *Id.* at 357.

<sup>244</sup> *Id.* at 361–62. For example, “[n]umerous papers, charts, and forms were completed without the defendant’s knowledge or presence,” plaintiff lied to hospital personnel and to her physicians claiming that her ex-husband wanted the baby, and plaintiff actually brought in a different male to the insemination process and represented him as her husband. *Id.* at 357.

<sup>245</sup> *Id.* at 354, 358.

times, but never held himself out as their biological father, provided gifts, made financial payments for the children's support, or assumed any parental identity.<sup>246</sup> The plaintiff later experienced financial difficulty and, after randomly discovering the defendant's telephone number, filed an action against him for child support.<sup>247</sup> The defendant was ordered to pay about \$1,400 per month in child support.<sup>248</sup> The defendant appealed, arguing not only that the parties' contract released him from financial liability, but also that it specified that he was to be treated as an anonymous sperm donor.<sup>249</sup>

The parties intended, and contracted pre-conception, to release the known donor from all parental obligations. The trial court found that oral contract valid<sup>250</sup> agreeing that "[t]he fact that [the donor] was not totally anonymous in the end does not change the contractual nature of his relationship with the plaintiff."<sup>251</sup> However, it held the contract to be unenforceable under Pennsylvania's long-standing precedent that "[n]o other party, albeit a parent, can bargain away a child's support rights."<sup>252</sup> In other words, at least in Pennsylvania, a child had a common law right to child support from both biological parents and those parents could not contract away such rights.<sup>253</sup> A panel of the Superior Court affirmed<sup>254</sup>, but the Supreme Court reversed and found the original agreement enforceable<sup>255</sup>.

The Pennsylvania high court spoke but there are, at least, three reasons to wonder if this is really settled, even within that state. First, we are not aware of any domestic jurisdiction that does not recognize the "best interest" standard for matters of custody and support.<sup>256</sup> It is quite possible that other

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<sup>246</sup> *Id.* at 358.

<sup>247</sup> *Id.*

<sup>248</sup> *Ferguson v. McKiernan*, 940 A.2d 1236, 1241 (Pa. 2007).

<sup>249</sup> *Ferguson*, 60 Pa. D. & C. 4th 353, 356 (Pa. C.P. 2002).

<sup>250</sup> *Id.* at 358–63.

<sup>251</sup> *Id.* at 364.

<sup>252</sup> *Id.* The court noted the "despicable" actions of the plaintiff for all of her misrepresentations but remarked, "it is the interest of the children we hold most dear." *Id.*

<sup>253</sup> *Id.* The court's rationale would also seem to require both biological parents to contribute other support, such as post-secondary educational subsidization. See *J.F. v. D.B.*, 941 A.2d 718, 721 (Pa. Super. Ct. 2008) ("It is well settled that a parent has an absolute duty to support his children . . .").

<sup>254</sup> *Ferguson v. McKiernan*, 855 A.2d 121, 124 (Pa. Super. Ct. 2004).

<sup>255</sup> *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (Pa. 2007).

<sup>256</sup> See *Browne-Barbour*, *supra* note 226, at 441 ("Presently in the United States, whether by statute or case law, the fundamental concern of courts in

jurisdictions could simply hold that contractually releasing a parent from financial responsibilities is not in the best interest of the child.<sup>257</sup> Second, while the holding does not specifically say so, it appears to implicitly weigh the equal protection rights of the donor father against the best interest of the child.<sup>258</sup> It is

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custody and adoption cases is to determine what is in the best interest of the child.”). In fact Justice Eakin, writing in dissent in *Ferguson*, went immediately to the “best interests” issue:

[Parents] have no power . . . to bargain away the rights of their children . . . . They cannot in that process set a standard that will leave their children short. Their bargain may be imminently fair, give all that the children might require and be enforceable because it is fair. When it gives less than required or less than can be given to provide for the best interest of the children, it falls under the jurisdiction of the court’s wide and necessary powers to provide for that best interest.

See 940 A.2d at 1250 (Eakin, J., dissenting) (quoting *Knorr v. Knorr*, 588 A.2d 503, 504–05 (1991)).

<sup>257</sup> See M. Scott Serfozo, *Sperm Donor Child Support Obligations: How Courts and Legislatures Should Properly Weigh the Interests of Donor, Donee, and Child*, 77 U. CIN. L. REV. 715, 734 (2008) (“The factor always cited by the courts, typically to invalidate preconception support agreements, was the best interests of the child.”); see also Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 23 (2003) (“Generally, however, contracts affecting children are not enforceable in the way that most other contracts are enforceable, primarily because the State has an interest in safeguarding the best interests of children that trumps the parties’ intentions.”). *But see* Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 550–51 (1994) (arguing that there is a significant difference between potential parental obligations when a child is created through coital procreation and artificial insemination by donor (AID)).

AID . . . provides considerable opportunity before conception for individuals and couples to exercise a high degree of choice and control over the procreative process and to negotiate the roles they wish to assume in that process . . . . This distinction—namely, the centrality of intentionality in AID—demands that the parties’ intentions be taken far more seriously than they are in the present, largely biological based legal model.

See also Robert Kraimer, *Preconception Fertilization Agreements: Valid or Void*, 35 U. LOUISVILLE J. FAM. L. 595, 600 (1997) (“Courts have held that parties may not contract away child support obligations[,] . . . [but] [p]reconception fertilization agreements are distinguishable because the parties enter these agreements before the child’s conception.”); Serfozo, *supra* note 257, at 734 (“[C]ourts should not consider the best interests of the child when it is conclusively proven that the donee agreed to relieve the donor of financial liability prior to conception.”).

<sup>258</sup> *Ferguson*, 940 A.2d at 1246 (“These opposed extremes produce two distinct views that we believe to be self-evident. In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires. In the institutional sperm donation case, however, there appears to be a growing consensus that clinical,

impossible to say that other jurisdictions would take the same approach or, if they did, reach the same result.<sup>259</sup> Finally, and certainly most telling in Pennsylvania, the trial court relied on *Kesler v. Weniger*.<sup>260</sup> *Kesler* held that “[T]he right to support is a right of the child, not the mother or father.”<sup>261</sup> The Supreme Court also cited *Kesler*, but did not specifically over-rule it.<sup>262</sup> That likely means the issue will be heard again in Pennsylvania. Because of these uncertainties this decision is scary for an egg or sperm donor, both within and outside of Pennsylvania, and provides little true guidance as to whether or not they may avoid child support responsibilities via contract.<sup>263</sup> In the absence of such clarification a donor must assume they may be responsible for support under a “best interests” standard.

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institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.”) (citation omitted).

<sup>259</sup> If the issuing Court was divided on the appropriate rationale there is little doubt that other courts could adopt the same base logic as Justice Eakin:

I respectfully dissent from the majority’s conclusion [that] appellee can bargain away her children’s right to support from their father merely because he fathered the children through a clinical sperm donation. The majority concludes this is possible because the parties intended “to preserve all of the trappings of a conventional sperm donation . . . [and] negotiated an agreement outside the context of a romantic relationship . . . .” To this, I say, “So what?” The only difference between this case and any other is the means by which these two parents conceived the twin boys who now look for support. Referring to Joel McKiernan as “Sperm Donor” does not change his status—he is their father.

*Id.* at 1249 (Eakin, J., dissenting) (citation omitted); *see also* Kraimer, *supra* note 257, at 602–05 (discussing child support obligations under Equal Protection analysis); Serfozo, *supra* note 257, at 737 (“The prerogative of a donor and donee to choose one method of reproduction over another should not alter those parties’ respective rights.”).

<sup>260</sup> *Ferguson*, 60 Pa. D. & C.4th at 363–64.

<sup>261</sup> *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super Ct. 2000).

<sup>262</sup> *See Ferguson v. McKiernan*, 940 A.2d 1236, at 1241–42, 1246–47 (Pa. 2007).

<sup>263</sup> If a contract to limit support between a mother and a sperm donor could be invalidated because it denied a resulting child support rights as the lower courts held, the same logic could invalidate contracts between egg donors and donees. By extension, it could also invalidate contract provisions between egg donors and egg suppliers that seek to extinguish parental responsibilities. *See, e.g.*, Egg Donor Contract, ¶ 13, <http://www.ivf-indiana.com/egg-donor-packet/egg-donor-contract.pdf> (last visited Dec. 7, 2009).

VI. THE BUSINESS OF EGGS: WARRANTY, STRICT PRODUCT  
LIABILITY, AND NEGLIGENCE

*A. Warranty*

Article 2 of the Uniform Commercial Code (“U.C.C.”) governs the sale of goods.<sup>264</sup> While there is a great deal of discussion of whether or not human reproductive materials *should be* goods<sup>265</sup> we contend, for purposes of this article, that human eggs *are* goods. The U.C.C. defines “[g]oods” as “all things . . . which are movable at the time of identification to the contract for sale . . . .”<sup>266</sup> Eggs can be transported from place to place, and body to body; there is no question they are movable. While the regulation of “sale” varies significantly, eggs are sold in at least some areas of the United States and abroad.<sup>267</sup> Eggs are goods and the sale of eggs can be governed by the U.C.C..

1. Express

Pursuant to Article 2 of the U.C.C. any oral or written promise relating to the good at issue can create an express warranty.<sup>268</sup> Accordingly, statements assuring that an egg donor has been screened for, and is free from, certain diseases or medical conditions can constitute express warranties. In fact so many fertility clinics attempt to distinguish themselves by promoting such standards in their web advertising that online egg marketing is replete with express warranties focusing on donor screening.<sup>269</sup>

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<sup>264</sup> U.C.C. § 2-102 (2003), *available at* <http://www.law.cornell.edu/ucc/2/article2.htm> (last visited Dec. 03, 2009).

<sup>265</sup> *See supra* note 173.

<sup>266</sup> U.C.C. § 2-105(1).

<sup>267</sup> *See supra* text accompanying notes 122–23, 145.

<sup>268</sup> U.C.C. § 2-313(2)(a) (2004) (“Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.”).

<sup>269</sup> *See Cortez, supra* note 98, at 86 (“[H]ealth care providers use the Internet to signal their quality.”). As examples, *see* Egg Donation Screening Process at Elite Fertility, [http://www.elitefertility.com/egg-donation-center.html#egg\\_donor\\_health](http://www.elitefertility.com/egg-donation-center.html#egg_donor_health) (last visited Nov. 2, 2009); RMFC Fertility, <http://www.rmfcfertility.com/egg-donor-program> (last visited Nov. 2, 2009); Monterey Bay IVF Program, <http://www.montereybayivf.com/fgc-egg-donation.htm> (last visited Nov. 2, 2009). Unfortunately, it may be that these promises are regularly broken. One study, though dated, revealed that many physicians failed to adequately screen donors for diseases and many screenings were limited to

Some egg suppliers also specifically warrant attributes or qualifications of donors through donor profiles<sup>270</sup>, although they may actually warrant more than they expect. While they may believe that they only warrant that a donor has certain characteristics, they may actually warrant characteristics of any resulting child. As previously discussed, an express warranty is created by an oral or written promise, but can also be created when a sample or model becomes “part of the basis of the bargain.”<sup>271</sup> If a photograph or biography of a donor constitutes a model,<sup>272</sup> the purchaser may expect that any resulting child would have the model’s characteristics.<sup>273</sup> Most reasonable

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merely questioning donors about common familial diseases. See Martin Curie-Cohen et al., *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 586 (1979). It is possible that physicians have engaged in more rigorous screening in intervening years, but there are few safeguards to actually ensure such practices. See Kerry Cork, Comment, *Test-Tube Parents: Collaborative Reproduction in Minnesota*, 22 WM. MITCHELL L. REV. 1535, 1537 (1996).

<sup>270</sup> Many clinics tout their screening procedures, but most profiles and databases are proprietary and cannot be accessed by the general public. For a sample profile form see Elite Fertility Solutions, <http://www.elitefertility.com/egg-donor-profile.pdf> (last visited Nov. 2, 2009). For a sense of how many donors may be available, see The Egg Donor Center, [http://www.theeggdonor.com/egg\\_donors.php](http://www.theeggdonor.com/egg_donors.php) (last visited Nov. 2, 2009) (The Egg Donor Center Database “has 6260 prescreened egg donors, 641 interviewed and approved egg donors, and 18 currently unavailable egg donors on file.”). For a “menu board” of donor photos see Egg Donations, Inc., <http://www.eggdonor.com/?page=donordb> (last visited Nov. 2, 2009).

<sup>271</sup> See U.C.C. § 2-313(2) (2003) (noting that a seller who makes an affirmation of fact or promise relating to the goods or who supplies a description, sample or model of the goods that becomes part of the basis of the bargain makes an express warranty that the goods will conform to that affirmation of fact, promise, description, sample or model).

<sup>272</sup> To our knowledge, no court has decided this issue. It is impossible to accurately predict how a court would likely rule as the U.C.C. provides no guidance for determining what constitutes a model.

<sup>273</sup> There is little doubt that reproductive materials sellers want precisely that perception. See, e.g., Ron’s Angels, <http://www.ronsangels.com> (last visited Nov. 2, 2009) (at any given time this website, auctioning sperm and eggs, has photographs of scantily dressed, attractive, and, according to the accompanying biographies, almost perfect donors). On a related note, sales of athletes’ sperm jumped 150% in one month after the athletes were shown as “Donors of the Month” at California Cryobank. See ESPN Video, E:60-SPERM U (Aug. 26, 2008), available at <http://espn.go.com/video/clip?id=3554822&categoryid=null> (last visited Nov. 2, 2009). See also California Cryobank, <http://www.cryobank.com/Donor-Search/Look-A-Likes/> (last visited Nov. 2, 2009) (noting where customers can shop for donors who look like famous people). Donees are certainly interested; a spokesperson said site traffic increased 50 percent in the first week the look-a-like sections was added. See Mary Elizabeth Williams, *Sperm Donation for Us Weekly Fans*,

people recognize that a child's characteristics may differ greatly from those of a genetic parent, but it is not well settled that reliance on an express warranty must be reasonable.<sup>274</sup> Egg

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<http://www.salon.com/mwt/broadsheet/feature/>

2009/07/30/celebrity\_sperm/index.html (last visited Nov. 2, 2009).

<sup>274</sup> For a comprehensive analysis see James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, at n.31 (1998):

In many states there are cases taking irreconcilable positions regarding whether reliance by the buyer is required for express warranty liability. While some cases from each of the following jurisdictions require reliance, there are others in most of these jurisdictions that grant recovery without explicitly mentioning reliance. See, for example, in Maryland: *Worm v. American Cyanamid Co.*, Civ. A. No. HAR 90-1424, 1992 WL 368062 at 5 (D. Md. Nov. 30, 1992) ("The court would have to find that such representations induced the Worms to purchase Scepter . . . [B]ecause the literature upon which the [p]laintiffs rely did not exist in 1987 and [p]laintiffs therefore could not have relied on it . . . it did not become part of the basis of the bargain."); Illinois: *Stamm v. Wilder Travel Trailers*, 358 N.E.2d 382, 385 (Ill. App. Ct. 1976) ("[C]ases under the present day Commercial Code . . . require a reliance by the buyer upon the promise, affirmation or description."); cf. *Adolphson v. Gardner-Denver Co.*, 553 N.E.2d 793, 798 (Ill. Ct. App. 1990) ("The trial court was not obligated to accept the plaintiff's argument that the sales brochure created an express warranty . . . given the fact that Adolphson testified that he did not rely on the sales brochure . . ."); but see *Weng v. Allison*, 678 N.E.2d 1254, 1256 (Ill. App. 1997) (citation omitted) ("[T]he trial court's ruling that the statements of the seller could not have been part of the basis of the bargain simply because no reasonable persons could have relied upon those statements was erroneous. The trial court misconstrued the role of reliance in determining whether an affirmation of fact or description is part of the basis of the bargain. Affirmations of fact made during the bargain are presumed to be part of the basis of the bargain unless clear, affirmative proof otherwise is shown . . . It is not necessary, therefore, for the buyer to show reasonable reliance upon the seller's affirmations . . ."); New York: *Scaringe v. Holstein*, 477 N.Y.S.2d 903, 904 (N.Y. App. Div. 1984) (citation omitted) ("A necessary element in the creation of an express warranty is the buyer's reliance upon the seller's affirmations or promises."); *Pilch, Inc. v. L & L Started Pullets, Inc.*, No. 84 Civ. 6513 (CSH), 1987 WL 9430, at \*4 (S.D.N.Y. Apr. 9, 1987) (citation omitted) ("[I]n order to succeed on an express warranty theory under [2-313], it is necessary for the purchaser to plead and prove that the written promotional literature in question was furnished to buyer prior to the purchase, and relied upon him [*sic*] in making the purchase."); *Shapiro Budrow & Assocs., Inc. v. Microdata Corp.*, No. 84 Civ. 3589 (CBM), 1986 WL 2756, at \*7 (S.D.N.Y. Feb. 24, 1986) (quoting *Eddington v. Dick*, 386 N.Y.S.2d 180, 181 (City Court, Geneva County, 1976)) ("In order to make out a cause of action for breach of express warranty, the buyer must demonstrate by a preponderance of the evidence, 1) an affirmation of fact or promise by the seller; 2) the natural tendency of the said affirmation or promise was to induce the buyer to purchase goods; 3)[t]hat the buyer purchased goods in reliance thereon . . ."); cf. *Tecnoclima, S.p.A. v. PJC Group of New York, Inc.*, No. 89 Civ. 4437 (CSH), 1993 WL 404109, at \*7

(S.D.N.Y. Oct. 1, 1993) (“[T]he finder of fact could determine that Circle relied on the specifications in assessing the marketability of the boiler/burner combination. Such a finding would support a claim for breach of express warranty.”); *but see* CBS Inc. v. Ziff-Davis Publ’g Co., 553 N.E.2d 997, 1001 (N.Y. 1990) (citation omitted) (“[T]his view of ‘reliance’ – i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties – reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right [to damages] for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled.”); *Rogath v. Siebenmann*, 129 F.3d 261, 264 (2d Cir. 1997) (quoting *Galli v. Metz*, 973 F.2d 145, 151 (2d Cir. 1992) (emphasis in original) (“Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach . . . unless the buyer expressly preserves his rights under the warranties . . . On the other hand, if the seller is not the source of the buyer’s knowledge, e.g., if it is merely ‘common knowledge’ that the facts warranted are false . . . the buyer may prevail in his claim for breach of warranty”); *Massachusetts: Sprague v. Upjohn Co.*, Civ. A. No. 91-40035-NMG, 1995 WL 376934, at \*3 (D. Mass. May 10, 1994) (citation omitted) (“In an express warranty claim, plaintiff must show reliance on such warranty.”); *Stuto v. Corning Glass Works*, Civ. A. No. 88-1150-WF, 1990 WL 105615, at \*5 (D. Mass. July 23, 1990) (“[T]his court believes that some minimum of reliance is a required element of a breach of express warranty claim . . . .”); *cf.* *Roth v. Bay-Stel’s Hair Stylists, Inc.*, 470 N.E.2d 137, 138 (Mass. App. 1984) (noting that “the hairdresser testified that he had read the information printed on the box, and, relying on it, he recommended its use to Judith Roth”); *Hannon v. Original Gunite Aquatech Pools, Inc.*, 434 N.E.2d 611, 617 (Mass. 1982) (noting that “the trial judge found that Hannon relied on Aquatech’s brochure”); *Jacquot v. Wm. Filene’s Sons Co.*, 149 N.E.2d 635, 637 (Mass. 1958) (noting that “Mrs. Jacquot . . . relied upon these express warranties”); *but see Wechsler v. Long Island Rehabilitation Ctr. of Nassau, Inc.*, No. Civ. A. 93-6946-13, 1996 WL 590679, at \*22 (Mass. Super. Ct. Sept. 4, 1996) (“The trustee is not required to establish that in connection with a specific account receivable it purchased, Towers relied on the factual truth of each of the representations and warranties; what must be shown is that Towers relied on the fact of the warranties, that is, the promise itself that the representations and warranties were true . . . .”); *Kentucky: Overstreet v. Norden Lab., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) (citation omitted) (“A warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product.”); *Nebraska: Vlasin v. Shuey*, No. A-91-324, 1993 WL 61875, at \*1 (Neb. Ct. App. Mar. 9, 1994) (“Nebraska case law has long held that the assertion of a fact or promise by a seller concerning goods, which is relied upon by the buyer and which tends to induce the buyer to purchase the goods, is an express warranty.”); *Hillcrest Country Club v. N.D. Judds Co.*, 461 N.W.2d 55, 61 (Neb. 1990) (citation omitted) (“This court has held that ‘since an express warranty must have been ‘made part of the basis of the bargain,’ it is essential that

suppliers that fail to meet promised standards of donor screening would certainly be liable for breaching expressed warranties. Suppliers who make a promise of resulting characteristics through a model, and fail to deliver those characteristics, may also be liable for such breach.

## 2. Merchantability

“Unless excluded or modified, a warranty that the goods shall be merchantable is [automatically] implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”<sup>275</sup> “Merchantable” means the goods “are fit for the ordinary purposes for which [they] are used.”<sup>276</sup> The U.C.C. defines a merchant as:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an

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the plaintiffs prove reliance upon the warranty.”); *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 366 N.W.2d 424, 428 (Neb. 1985) (citation omitted) (“Since an express warranty must have been “made part of the basis of the bargain,’ it is essential that the plaintiffs prove reliance upon the warranty.”); *Indiana: Royal Bus. Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34, 44 n.7 (7th Cir. 1980) (citation omitted) (“The requirement that a statement be part of the basis of the bargain in order to constitute an express warranty ‘is essentially a reliance requirement . . . .’”); *Kansas: Ray Martin Painting, Inc. v. Ameron, Inc.*, 638 F. Supp. 768, 772 (D. Kan. 1986) (citation omitted) (“Whether the statements about the coating ability of the Amerlock created an express warranty depends on whether they were ‘part of the basis of the bargain’ which, under Kansas law, requires some type of reliance on the part of the buyer.”); *Mississippi: Global Truck & Equip. Co., Inc. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 652 (N.D. Miss. 1986) (“Given the express language used in U.C.C. section 2-313 and the majority of the cases holding that the buyer must both be knowledgeable of and rely on the affirmation of fact before an express warranty is created, the court concludes that the plaintiff failed to prove by a preponderance of the evidence that the statements contained in the Palmer brochure were relied upon by Randall prior to or contemporaneously with the making of the contract between Global and Palmer. Therefore, recovery under the theory of breach of express warranty is also precluded.”); *Washington: Casper v. E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 909 (E.D. Wash. 1992) (citation omitted) (“If, in fact, Mr. Warr assured Brad Casper that Velpar could be applied safely during November or December of 1990, and Mr. Casper relied upon that affirmation of fact in deciding to have PureGro treat his fields, an express warranty was created.”).

*Id.*

<sup>275</sup> U.C.C. § 2-314(1) (1966).

<sup>276</sup> *Id.* at § 2-314(2)(c).

agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.<sup>277</sup>

Most egg suppliers are merchants for purposes of the U.C.C. pursuant to the “deals in” definition, and quite probably under “knowledge and skill” as well. Most egg donors probably are not merchants under “knowledge and skill”<sup>278</sup>, but might be under the “deals in” standard.<sup>279</sup>

Egg donors and suppliers have little to fear when it comes to the issue of breach of warranty of merchantability because that warranty only requires that eggs be “reasonably fit” for their ordinary use (attempted conception). This warranty does not promise a resulting child, much less one with specific characteristics; it simply promises that the egg(s) provided is reasonably fit for the purpose of attempted procreation. Absent extreme circumstances<sup>280</sup> it is unlikely that many donors or suppliers would breach this warranty.<sup>281</sup>

### 3. Fitness for Purpose

An implied warranty of fitness for a particular purpose can

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<sup>277</sup> U.C.C. § 2-104(1) (2003).

<sup>278</sup> See Jayanti, *supra* note 47, at 433 (“[T]he egg [donor] is usually less knowledgeable than the ‘consumer’, the recipient parents.”).

<sup>279</sup> It is impossible to tell how often most egg donors actually donate. One study showed that the mean number of egg cycles per donor was 2.9. See Schneider, Kramer & Schultz, *supra* note 15, at 3. The American Society of Reproductive Medicine recommends no more than six donations. However, at least one donor has donated at least twelve times. See Michele Norris, *Donation and the Free Market* (National Public Radio July 28, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4775655>. One author flatly contends that “egg donors are not often ‘engaged in the business’ of selling or otherwise distributing [eggs]” and cannot be merchants under the U.C.C.. See Jayanti, *supra* note 47, at 432. However, the question of whether a party is a merchant for purposes of the U.C.C. is a question of law. See, e.g., *County of Milwaukee v. Northrop Data Sys., Inc.*, 602 F.2d 767 (7th Cir. 1979). As such determination must be made on a case by case basis, we cannot say that all egg donors are merchants and subject to the U.C.C.. Certainly some are and it is likely that most, if not all, egg suppliers are merchants for purposes of the U.C.C. as well.

<sup>280</sup> Obvious examples are providing sterile eggs or eggs damaged during collection, storage, or transportation such that they cannot be used to conceive.

<sup>281</sup> While rare, egg donors and suppliers are protected by statute in some jurisdictions from this cause of action and the one discussed next. As an example, South Carolina has a statute that states “[t]he implied warranties of merchantability and fitness are not applicable to a contract for the sale, procurement, processing, distribution, or use of human tissues . . .” S.C. CODE ANN. § 44-43-10 (2008). As previously discussed, the FDA classifies human eggs as human tissue. See 21 C.F.R. § 1271.3(d) (2009).

exist “[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods . . . .”<sup>282</sup> Responsible egg donors and suppliers have little to fear from this warranty because, at present, eggs satisfy only the general purpose of attempted procreation, not any specific purpose of creating specific characteristics in a resulting child. ART has not advanced to the point where it can control specific aspects of reproduction.<sup>283</sup> However, it is advancing rapidly and, if the time comes when it can control those types of characteristics, then donors and suppliers will have to be aware that asking prospective recipients to designate a donor’s personal characteristics can create a warranty of fitness for a particular purpose. A prospective recipient could view such questions as a “checklist” for the desired characteristics of the resulting child. They could view the questions as akin to a menu and they would expect to get what they ordered. Egg suppliers currently ask recipients for these types of designations but, for now, they remain attempts to discern preferences, not actionable promises.<sup>284</sup>

### *B. Strict Product Liability*

The rationale for the tort of strict product liability is simple; products can cause harm or injury to users and manufacturers, sellers, and distributors should absorb the cost of these injuries

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<sup>282</sup> U.C.C. § 2-315.

<sup>283</sup> As examples, it cannot yet control characteristics such as height, eye color, intelligence, or athleticism.

<sup>284</sup> This is a different conclusion than reached under possible breach of express warranties, *see supra* text accompanying notes 267–73, because it is a different cause of action. The seller creates an express warranty, but a warranty of fitness for a particular purpose is actually created by the buyer when he or she causes a seller to know that the buyer is relying on the seller’s expertise in making a purchase decision. *See supra* text accompanying note 274. Admittedly it is an assumption, but we assume that an egg donor or supplier (seller) who is aware that a would-be donee (buyer) is relying on their expertise would inform the would-be donee that there is no guarantee that a child will have the characteristics of the donor. We also understand that a donor or supplier may know of a donee’s particular purpose (donee said that she wants eggs from a 5’-4”, 115 lb., brown-haired, blue-eyed world class cyclist because donee wants a child that will grow up to be a 5’4”, 115 lb., brown-haired, blue-eyed world class cyclist) but might not inform the donee that a child conceived using eggs from this donor may not have these characteristics. In that case there is a breach of warranty of fitness for a particular purpose.

rather than end-users.<sup>285</sup> Strict product liability has specific elements that an injured party must satisfy to recover. While these elements have been discussed collectively and separately, all discussions encompass the following:

1. There must be a product<sup>286</sup> that causes an injury. The product must be sold in the same condition, or substantially the same condition, as when it reaches the consumer or user.<sup>287</sup>

2. The product must contain a defect and the defective condition must make the product “unreasonably dangerous.”<sup>288</sup> “Unreasonably dangerous” is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”<sup>289</sup> There are three potential types of defects: manufacturing, design, and warning.<sup>290</sup>

3. Finally, the plaintiff must prove actual injury caused by the product. An injury is actual harm or loss to the party’s person, land, or chattel.<sup>291</sup>

There is no question that donated reproductive tissue can cause damage to a recipient, resulting fetus, or resulting child,<sup>292</sup>

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<sup>285</sup> See Seldon J. Childers, Note, *Don’t Stop the Music: No Strict Products Liability for Embedded Software*, 19 U. FLA. J.L. & PUB. POL’Y 125, 134 (2008)

The rationales for imposing strict liability for commercial products take two forms. The first is a set of moral arguments, based on fairness, positing that manufacturers are ethically responsible to innocent consumers who have been harmed because the consumers had a reasonable expectation that the manufacturer would supply a safe product. The second group of rationales is based on economic arguments or efficiency. For example, it is argued that manufacturers are best able to insure against losses and to spread the cost of such insurance among all the consumers who purchase their products, and that strict liability creates socially desirable economic incentives for manufacturers to produce safer products. (citation omitted)

*Id.*

<sup>286</sup> Courts define “product” very broadly. See 1 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶7.03(1) (2nd ed. 1990).

<sup>287</sup> See RESTATEMENT (SECOND) OF TORTS § 402(A)(1)(b) (1965).

<sup>288</sup> See *id.* § 402(A)(1) (“One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . .”).

<sup>289</sup> See *id.* § 402(A), cmt. i.

<sup>290</sup> See William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 650 (1991).

<sup>291</sup> See 1 Louis R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* ¶ 8.01(4) (2009).

<sup>292</sup> See, e.g., Laurene Mascola & Mary E. Guinan, *Screening to Reduce Transmission of Sexually Transmitted Diseases in Semen Used for Artificial*

but this does not automatically mean that strict product liability is a viable cause of action in such situations. In order to assess potential liability under this doctrine, we must determine if the requisite elements can be satisfied. *Paretta v. Medical Offices for Human Reproduction*<sup>293</sup> provides a partial template for this analysis<sup>294</sup>. In *Paretta*, parents brought suit alleging the defendant liable for using eggs from a donor who was a cystic fibrosis carrier where the resulting child had the disease.<sup>295</sup>

The claim was not based on strict product liability, so we must begin by addressing a question *Paretta* did not: are eggs a product? A product is defined as “something produced by human or mechanical effort or by a natural process.”<sup>296</sup> It is also defined as a “commodit[y] . . . for sale.”<sup>297</sup> Human eggs are created by a natural process in the female body and are frequently sold to donees. Eggs are therefore a product and the first requirement is satisfied.

The second element is that the egg had a defect that made it unreasonably dangerous. In *Paretta* the causes of action were based on the premise that the egg was defective because a) the donor carried cystic fibrosis, and b) the resulting child suffered from the same disease.<sup>298</sup> A product is defective when it is dangerous beyond the expectations of an ordinary user.<sup>299</sup> If an ordinary user would not expect the donor egg(s) to carry a strong predisposition toward a specific disease, cystic fibrosis, then the egg is defective. In *Paretta* the defects could be both manufacturing and warning.

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*Insemination*, 314 NEW ENG. J. MED. 1354, 1354 (1986) (“Sexually transmitted organisms have been transmitted during artificial insemination by donor, and such transmission can cause . . . disease in the recipient woman and may harm the fetus or newborn.”).

<sup>293</sup> 195 Misc. 2d 568 (N.Y. Sup. Ct. 2003) (parents brought suit for medical malpractice where the defendants failed to properly screen the egg and inform the plaintiffs that the egg tested positive for cystic fibrosis, which their resulting child had been diagnosed with).

<sup>294</sup> *Id.* at 569–71, 760 N.Y.S.2d 639, 641–42 (N.Y. Sup. Ct. 2003). (*Paretta* only provides a partial template because while factually on point, strict product liability was not a cause of action.)

<sup>295</sup> *Id.* at 570–71, 760 N.Y.S.2d at 641–42.

<sup>296</sup> Dictionary.com, Product, <http://dictionary.reference.com/browse/product> (last visited Nov. 2, 2009).

<sup>297</sup> WordNet Search, Product, <http://wordnetweb.princeton.edu/perl/webwn?s=product&o2=&o0=1&o7=&o5=&o1=1&o6=&o4=&o3=&h=> (last visited Nov. 2, 2009).

<sup>298</sup> *Paretta*, 195 Misc. 2d at 570–71, 760 N.Y.S.2d at 641–42.

<sup>299</sup> See RESTATEMENT (SECOND) OF TORTS § 402(A), cmt. i.

Finally, there must be an actual injury or loss to person or property caused by the defective sperm. At a minimum, a child who is born with cystic fibrosis has experienced, and will experience, several legally recognized and compensable injuries: she has been damaged in her enjoyment of life, suffered and will suffer physical and mental pain, endured past medical expenses, and is very likely to incur future medical expenses.<sup>300</sup> The end result of this analysis is that a human egg can be a product that has a defect resulting in injury and triggering strict product liability. As a result, egg donors and suppliers have significant reason to fear this cause of action.<sup>301</sup>

At least one author would likely disagree with this conclusion and presents a number of possible defenses.<sup>302</sup> The first is that a manufacturer is not liable under strict product liability for failure to warn if the danger is “open and obvious” or “readily ascertainable.”<sup>303</sup> She argues that, “the risks of reproduction are commonplace and commonsense; birth defects and complications during pregnancy and labor are universally understood to be inherent in human reproduction.”<sup>304</sup> She is undoubtedly correct that the general possibility of some defect is possible in reproduction. However, that broad contention does not create an absolute defense when the claim is that a defective egg resulted in a child born with a defect because that donor posed a specific, not general, danger that was not open to, obvious to, or readily ascertained by the donee.<sup>305</sup>

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<sup>300</sup> *Paretta*, 195 Misc. 2d 568, 570, 574, 577 (N.Y. Sup. Ct. 2003); 760 N.Y.S.2d 639, 642, 644–45, 647 (N.Y. Sup. Ct. 2003).

<sup>301</sup> As an analogy see *Donovan v. Idant Labs.*, where the victims alleged strict product liability when a child conceived using donor semen had Martin-Bell Syndrome and the donor was the carrier. 625 F. Supp. 2d 256, 262–63. (D. Pa. 2009). The holding of this case could have been significant as “the relevant New York statute does not and no case law has extended the statute to also exempt human tissues.” *Id.* at 273. “Thus, under New York law, the sale of sperm is considered a product and is subject to strict liability.” *Id.* As previously discussed, eggs are also a form of human tissue and would be subject to the same cause of action. See 21 C.F.R. §1271.3(d). Unfortunately for our research purposes the claim was ultimately dismissed because the court viewed it as improperly plead. *Donovan*, 625 F. Supp. 2d at 268.

<sup>302</sup> See Jayanti, *supra* note 47, at 432–34.

<sup>303</sup> *Id.* at 432 (quoting 63 AM. JUR. 2D *Prod. Liab.* § 92 (2007)).

<sup>304</sup> *Id.*

<sup>305</sup> See James P. End, Comment, *The Open and Obvious Danger Doctrine: Where Does it Belong in Our Comparative Negligence Regime?*, 84 MARQ. L. REV. 445, 464–65 (2000):

Manufacturers are not strictly liable for injuries caused by open and

The second proposed defense is that “a manufacturer is not liable if the consumer is better informed, or a ‘sophisticated user’ . . . .”<sup>306</sup> She argues that “the egg ‘seller’ is usually less knowledgeable than the ‘consumer’, the recipient parents.”<sup>307</sup> This may or may not be true for an egg donor; it is likely untrue for egg suppliers.<sup>308</sup>

She argues, third, that the Learned Intermediary Doctrine applies.<sup>309</sup> Her rationale is that certain intermediaries in the donation process are learned and the knowledge they acquire from the donor, even if never shared with the donee, shields the manufacturer from liability for failure to warn of subsequently discovered genetic disease.<sup>310</sup> The flaw in this contention is that there is nothing to guarantee that these intermediaries actually have this knowledge. It is also possible, largely due to the Internet, that courts will accept this defense less frequently, especially in cases involving medical treatment and technology issues.<sup>311</sup>

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obvious defects, and accordingly, manufacturers have no duty to warn of open and obvious dangers inherent in a product. However, when defects are hidden or latent, a manufacturer must adequately warn consumers of such dangers. A warning is adequate only if it heightens a consumer’s awareness of the defect to a degree “that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger.” Therefore, if a jury determines a defect is not obvious to an average consumer, the question arises as to whether there is an adequate warning that makes a hidden defect known to the average consumer. Without such a warning, a product will likely be defective and unreasonably dangerous. (citations omitted).

<sup>306</sup> Jayanti, *supra* note 47, at 432.

<sup>307</sup> *Id.* at 433.

<sup>308</sup> See 2006 ART REPORT, *supra* note 16, at 13 (noting that in 2006, there were 483 fertility clinics that performed 138,198 ART cycles resulting in 41,343 live births (deliveries of one or more living infants) and 54,656 total infants). This is an average, per clinic, of 316 cycles run resulting in 125 infants born. It is unreasonable to argue clinics engaging in that number of procedures would be less knowledgeable than prospective users.

<sup>309</sup> Jayanti, *supra* note 47, at 434.

<sup>310</sup> *Id.*

<sup>311</sup> See Sarah L. Olson, *Net’s Impact on Strict Product Liability*, LAW.COM LEGAL TECHNOLOGY, Oct. 7, 2008, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202425060704>:

As product manufacturers engage with consumers in designing and marketing their products, some of the traditional defenses to strict product liability suits may be diminished. A case in point is the learned intermediary rule, which bars failure-to-warn claims against prescription pharmaceutical and medical device manufacturers because of the role of the physician in providing warnings to their patients. (citation omitted) For decades, this doctrine has been justified by the manufacturer’s lack of

Her final contention is that “the danger must be an unreasonable one for liability to attach to a manufacturer or seller for not warning a consumer.”<sup>312</sup> Her rationale is that

[e]gg donors are normal members of the population at large with no distinguishing characteristics other than their choice to donate, so the risk of their carrying a genetic disease is no higher than any other individual and thus the risks of conception through egg donation are no more unreasonable than those posed by traditional human reproduction.<sup>313</sup>

She buttresses this contention with “[j]ust as strict liability in tort holds manufacturers liable for any dangerous, injury-causing defect, regardless of care taken, strict liability, if applied to egg donation, would mandate that egg donors foresee the unforeseeable.”<sup>314</sup> Unfortunately for this position, that is exactly what the strict product liability doctrine does. It imposes liability, regardless of care taken, when the requisite elements are satisfied.<sup>315</sup>

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direct communication with patients, the patient’s reliance on his or her physician’s judgment, the physician’s independent role in selecting appropriate medications and making appropriate warnings, and a concern that direct warnings would interfere with the doctor/patient relationship. (citation omitted).

Recently, however, the Supreme Court of Appeals of West Virginia rejected the learned intermediary doctrine, labeling it outdated. (citation omitted). Citing both the availability of information over the Internet and manufacturer direct-to-consumer advertising, the court found that the learned intermediary defense could no longer be justified. (citation omitted). In rebuffing what has been a highly successful defense, the court pointed to “significant changes in the drug industry . . . specifically . . . the initiation and intense proliferation of direct-to-consumer advertising, along with its effect on the physician/patient relationship, and the development of the Internet as a common method of dispensing and obtaining prescription drug information.” (citation omitted) The court cited a study showing “that 43% of the 40.6 million adults who regularly use the Internet search for health-related topics,” to demonstrate that traditional justifications for the learned intermediary rule purportedly no longer apply. (citation omitted). Other traditional defenses, including unforeseeable misuse, also could be challenged based on the availability on the Internet of consumer-generated information about how products are being used. (citation omitted).

*Id.*

<sup>312</sup> Jayanti, *supra* note 47, at 434.

<sup>313</sup> *Id.* at 434–35.

<sup>314</sup> *Id.* at 435.

<sup>315</sup> There are jurisdictions that have enacted “blood shield” statutes that exempt biological products from strict products liability. See George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?*,

*C. Negligence*

There are suits alleging that holding facilities were negligent in storing or disseminating human reproductive materials.<sup>316</sup> Those cases addressed sperm, pre-embryos, and embryos.<sup>317</sup> None have involved human eggs but given the dramatic increase in the number of egg suppliers<sup>318</sup> and overall ART use,<sup>319</sup> there will be such cases soon. We look at the likely outcome of such claims in light of what has been decided.

The suits involved two different contentions. In the first, a claimant wanted reproductive materials stored and distributed to a specified recipient, but the holding facility failed to meet one or both of those obligations.<sup>320</sup> For purposes of this article, we term these “lost materials” cases because, even if the material was used for conception, it did not reach the intended recipient. In the second, a child was born with a birth defect attributable to material that should have been removed through adequate screening or testing. We term these “defective materials” cases.<sup>321</sup>

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109 YALE L.J. 1087, 1099 (2000). However, “blood products” are actually blood components such as “red Blood cells, Blood platelets, Blood plasma and other human Blood clotting agents.” See Bloodbook.com, Common Blood Products, <http://www.bloodbook.com/products.html> (last visited Nov. 2, 2009). Human eggs are not blood products and claims of strict product liability are not barred by blood shield statutes.

<sup>316</sup> See, e.g., *Stanton v. Univ. of Tex. Health Scis. Ctr.*, 997 S.W.2d 628, 628 (Tex. App. 1998); *Paretta v. Med. Offices for Human Reprod.*, 760 N.Y.S.2d 639, 641 (N.Y. Sup. Ct. 2003).

<sup>317</sup> See, e.g., *Stanton*, 997 S.W.2d at 628; *Paretta*, 760 N.Y.S.2d at 641–42.

<sup>318</sup> Fox5news.com, *More Women Donating Eggs*, July 31, 2008, <http://www.fox5vegas.com/news/17045493/detail.html>.

<sup>319</sup> 2006 ART REPORT, *supra* note 16, at 61.

<sup>320</sup> See, e.g., *Stanton*, 997 S.W.2d at 628–29; *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68–69 (Utah 1998); see also Dorinda Elliot & Friso Endt, *Twins - with Two Fathers: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38 (noting that after a baby was born from in vitro fertilization, a DNA test was run and the mother actually carried another man's baby); Barbara Kantrowitz et al., *Not the Right Father*, NEWSWEEK, Mar. 19, 1990, at 50 (noting that after a child who was conceived through in vitro fertilization was born, the mother immediately knew that the child was not of her or her late husband's genetic makeup because she was of a different race); Michael Lasalandra, *Woman, Ex and Hospital Settle over Sperm Mixup*, BOSTON HERALD, Aug. 27, 1998, at 12 (stating that a woman and her ex-husband settled out of court with a Florida hospital after learning they impregnated her with the wrong sperm).

<sup>321</sup> We prefer to term the groups “Lost Egg” and “Defective Egg” situations,

## 1. Lost Materials

Although there is a relative dearth of published case law on this topic, the situation is not uncommon.<sup>322</sup> In 1985, Fred Skolnick contracted with a sperm bank to store his sperm because he had a form of cancer that would eventually render him unable to reproduce.<sup>323</sup> His wife, Julia, was then inseminated with what the couple thought was Fred's sperm.<sup>324</sup> The resulting child was bi-racial, even though both Fred and Julia were Caucasian.<sup>325</sup> In Utah, an IVF clinic fertilized a woman's eggs with the wrong man's sperm; she ultimately bore a stranger's children.<sup>326</sup> A clinic mistakenly implanted one woman's embryos in another's uterus,<sup>327</sup> then that situation occurred again,<sup>328</sup> and again.<sup>329</sup> In fact, it might happen with highly concerning regularity.<sup>330</sup> We contend that lost materials cases will become more common as more people increasingly utilize forms of ART: but are claimants likely to recover under a negligence theory? We must review the traditional elements of that cause of action: duty, breach, proximate causation, and

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but that is potentially misleading because, as we will discuss, there are not yet any reported Lost Egg cases and the material for the Defective Egg cause of action is only factually on point.

<sup>322</sup> “[I]t is more likely that the lack of precedent is attributable to quiet, out-of-court settlements designed to prevent anxious consumers from discovering the risks involved in the [transaction and] procedure.” See Anita M. Hodgson, Note, *The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures*, 26 IND. L. REV. 357, 358 (1993).

<sup>323</sup> See Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES, Mar. 9, 1990, available at <http://www.nytimes.com/1990/03/09/nyregion/mother-accuses-sperm-bank-of-a-mixup.html?pagewanted=1>

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> See *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998).

<sup>327</sup> See *Creed v. United Hosp.*, 600 N.Y.S.2d 151, 151–52 (N.Y. App. Div. 1993).

<sup>328</sup> *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29 (N.Y. App. Div. 2001); see also *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259–60 (Ariz. Ct. App. 2005) (The central claim of the case was negligent destruction or loss of pre-implantation embryos, the claimants were very concerned that the missing embryos may have been mistakenly implanted in another woman.).

<sup>329</sup> *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 786 (Cal. Ct. App. 2003).

<sup>330</sup> A representative of the United Kingdom IVF clinics estimates that one in one-thousand IVF embryos are implanted into the wrong woman. See Lois Rogers, *Women Given Wrong Embryos at IVF Clinics*, SUNDAY TIMES (London), Nov. 12, 2000, § Home news. For a comprehensive history of ART “mix-up” cases and events, see Leslie Bender, “*To Err is Human*” *ART Mix-ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443, 446–53 (2006).

harm to determine potential liability.

It is easy to imagine that the victims in lost materials situations will sue both any medical professionals involved and any storage entity (such as a fertility clinic), however, there is one initial, and critical, difference. While medical professionals' duties are well established,<sup>331</sup> the legal duty of storage entities is, uncertain.<sup>332</sup> This uncertainty is the direct result of a lack of uniform laws governing the egg industry. As previously discussed there is, at most, one federal regulation addressing egg donor screening,<sup>333</sup> one addressing egg storage,<sup>334</sup> and very few states have any quality control legislation.<sup>335</sup> Statutes create legal duties, but there are few statutes and, when they do exist, they are not uniform.<sup>336</sup> Without a clearly defined duty, it is very difficult to prove a resulting breach.

Unlike duty and breach, proximate cause in lost materials cases is easily established.<sup>337</sup> When materials did not reach the intended recipient, and additional materials are not available from that donor, the contention is that but for defendant's failure to provide the appropriate materials to the appropriate recipient, conception from that particular materials donor would have been possible.<sup>338</sup> In the case where materials were provided to the wrong recipient, and conception resulted, the contention is that but for the defendant's failure to provide the materials to the intended recipient, the resulting child would not exist.<sup>339</sup>

Harm is highly problematic in lost materials cases because a court has to determine whether a) a party has suffered actual

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<sup>331</sup> For example, in New York a physician has a duty to use reasonable care and exercise the degree of skill and knowledge that is ordinarily possessed by physicians in the community. See *Pepe v. United States*, 599 F. Supp. 798, 802 (E.D.N.Y. 1984); see also *Pike v. Honsinger*, 49 N.E. 760, 762 (N.Y. 1898); *Zellar v. Tompkins Cmty. Hosp. Inc.*, 508 N.Y.S.2d 84, 86 (N.Y. App. Div. 1986).

<sup>332</sup> *But see Jayanti, supra* note 47, at 441 (arguing that a duty could be recognized under a "risk imports relation" theory). There are no cases of record finding such a duty.

<sup>333</sup> See, e.g., *supra* text accompanying note 137.

<sup>334</sup> See, e.g., *supra* text accompanying note 138.

<sup>335</sup> See, e.g., *supra* text accompanying notes 147–50.

<sup>336</sup> See, e.g., *supra* text accompanying notes 144–50.

<sup>337</sup> See *Frisina v. Women and Infants Hosp. of R.I.*, No. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at \*9 (R.I. Super. Ct. 2002) (quoting *Hawkins v. Scituate Oil Co.*, 723 A.2d 771, 773 (R.I. 1999)).

<sup>338</sup> See, e.g., *Doe v. Irvine Sci. Sales Co.*, 7 F. Supp. 2d 737, 741 (E.D. Va. 1998).

<sup>339</sup> See *Sullivan, supra* note 323.

damage, and, if so, b) how to calculate such damage.<sup>340</sup> As discussed under causation, lost materials damages could arise in two different scenarios. The first is where the opportunity to procreate using a specific donor is simply gone because materials have been lost and the donor is unable to produce more.<sup>341</sup> The second scenario is where a recipient received and utilized materials from someone other than the anticipated donor, resulting in the birth of a healthy baby.<sup>342</sup>

There are no decisions on liability when eggs are lost and the donor cannot produce more, but there are two potentially analogous embryo cases. In the first, stored embryos were contaminated and unusable.<sup>343</sup> In the second, stored embryos were lost or destroyed by the storing hospital.<sup>344</sup> Recovery was denied in the first case because the court held that the donors were unable to establish a requisite physical injury.<sup>345</sup> In the second case the court allowed recovery based on emotional distress.<sup>346</sup> While this is, admittedly, a very small sample of cases, it appears that the majority of jurisdictions would follow the rationale of the first case because most jurisdictions do not allow recovery absent physical injury.<sup>347</sup> Assuming that courts continue this rationale, it is unlikely that defendants will be held liable when stored eggs are lost.

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<sup>340</sup> See *Frisina v. Women and Infants Hosp. of R.I.*, No. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at \*5, \*10 (R.I. Super. Ct. 2002).

<sup>341</sup> See Sullivan, *supra* note 323.

<sup>342</sup> See, e.g., *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998).

<sup>343</sup> See *Doe*, 7 F. Supp. 2d at 739.

<sup>344</sup> See, e.g., *Frisina*, 2002 WL 1288784, at \*1-2.

<sup>345</sup> *Doe*, 7 F. Supp. 2d at 741.

<sup>346</sup> *Frisina*, 2002 WL 1288784, at \*10.

<sup>347</sup> See Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury*, 9 J. MED. & L. 55, 65 (2005). However, a claimant may recover for loss of property in such claims and physical injury would not be required. See *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1273 (Ariz. Ct. App. 2005) (“While a party cannot bring a claim for negligent infliction of emotional distress based merely on the negligent destruction of property, a party can recover damages for emotional distress arising from the tortious loss of property if the emotional distress is unrelated to the pecuniary loss.”) (citing *Reed v. Mitchell*, 903 P.2d 621, 626-27 (Ariz. Ct. App. 1995); *Frisina*, 2002 WL 1288784, at \*10 (“[T]he Court finds . . . that recovery for damages for emotional distress based on the “loss of irreplaceable property,” the loss of their pre-embryos, is permissible . . . .”) (citing *Hawkins v. Scituate Oil Co.*, 723 A.2d 771, 773 (R.I. 1999).

At least one author has been highly critical of the basis for damages in the second lost materials scenario, where materials from someone other than the designated donor were used in conception and birth of a healthy child.<sup>348</sup> And, while the suit did not assert a negligence cause of action, at least one court held that a couple whose healthy child was conceived using lost materials was not entitled to recovery.<sup>349</sup> This decision is not surprising when the lost materials claim is juxtaposed with the “wrongful birth” cause of action.

Wrongful birth actions are brought by the “parents of [an] impaired child for the emotional and financial damages that they . . . suffer[] as a result of the birth” of that child.<sup>350</sup> At least one author contends that wrongful birth cases have had some judicial support and acceptance.<sup>351</sup> If true, this could increase the likelihood that damages are awarded in lost materials cases because, at base, both wrongful birth and this type of lost materials case seek damages resulting from birth of a child.

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<sup>348</sup> See generally Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships after Reproductive Technological Mistakes*, 5 DEPAUL J. HEALTH CARE L. 15, 55–56 (2002) (noting that the mere existence of children is a blessing and those few cases that fall under this category are actually known).

<sup>349</sup> Chris Snow, Case Note, *Harnicher v. University of Utah Medical Center: Fertility Treatment and the Duty of Care*, 2 J.L. & FAM. STUD. 63, 69 (2000) (addressing the tort of “negligent infliction of emotional harm” and denying recovery as plaintiffs failed to show that the circumstances created a situation in which a reasonable person would be unable to adequately cope and could not show sufficient harm because the babies were healthy). *But see* Chambliss v. Health Scis. Found., 626 S.E.2d 791, 791–95 (N.C. Ct. App. 2006) (awarding compensatory and punitive damages to a woman who was inseminated with lost materials, although the cause of action and the jury finding regarding bodily injury are unclear in the appellate opinion).

<sup>350</sup> See Timothy J. Dawe, Note, *Wrongful Life: Time for a “Day in Court”*, 51 OHIO ST. L.J. 473, 476 (1990).

<sup>351</sup> See Megan D. McIntyre, *The Potential for Products Liability Actions When Artificial Insemination by an Anonymous Donor Produces Children with Genetic Defects*, 98 DICK. L. REV. 519, 539–40 (1993).

The child’s mother would have a better chance of recovering if she brings a products liability claim in her own right, seeking damages based on a wrongful birth theory. The wrongful birth claim enjoys far greater judicial acceptance than wrongful life because it does not define the wrong as the child being given life, but rather as the denial of the mother’s right to choose to abort or to never even initiate the pregnancy. Thus, if the mother can show that she would not have carried the child to term or that she would not have consented to the insemination if she had known the truth about the sperm donor’s medical history, many courts may award her compensation for wrongful birth.

*Id.*

However there are two significant differences in the claims that make it unlikely that such damages would be awarded in lost materials cases. First, in a wrongful birth claim the child is impaired,<sup>352</sup> in a lost materials case the child is not.<sup>353</sup> Second, the assertion that wrongful birth is judicially acceptable is true, but far from universal.<sup>354</sup> Some state courts refuse to recognize wrongful birth causes of action absent statutory creation.<sup>355</sup> Some state legislatures have passed laws refusing to recognize wrongful birth causes of action.<sup>356</sup> Only Maine statutorily recognizes wrongful birth, and then only for a limited cause of action.<sup>357</sup> Even where wrongful birth exists, there is still a highly pragmatic consideration when it comes to assessing damage because “[j]uries would have an extremely difficult time trying to calculate how much the life of a disabled child is worth.”<sup>358</sup> If it is difficult for a jury to calculate damages to parents based on the birth of a disabled child, it is even more difficult to calculate damages to parents for the birth of a healthy child. Finally, this type of claim seeks damages for birth and subsequent child rearing expenses and those damages are seldom awarded.<sup>359</sup> The end result is that it is unlikely that claimants will be successful in lost materials cases because, regardless of which scenario the claim falls under, they are highly unlikely to satisfy the requisite elements.<sup>360</sup>

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<sup>352</sup> Wrongful Birth damages are predicated on the existence of a congenital defect. *See* Hall v. Dartmouth Hitchcock Med. Ctr., 899 A.2d 240, 245 (N.H. 2006).

<sup>353</sup> *See* Doe v. Irvine Sci. Sales Co., 7 F. Supp. 2d 737, 741 (E.D. Va. 1998).

<sup>354</sup> As of 2005, more than half of all United States jurisdictions recognized Wrongful Birth. *See* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 160 (2005).

<sup>355</sup> *See, e.g.*, Etkind v. Suarez, 519 S.E.2d 210, 212 (Ga. 1999).

<sup>356</sup> *See, e.g.*, MINN. STAT. ANN. § 145.424(2) (2005).

<sup>357</sup> *See* ME. REV. STAT. ANN. tit. 24, § 2931(3) (2000).

<sup>358</sup> Monique Ann-Marie Croon, Note, Taylor v. Kurapati: *The Court of Appeals of Michigan's Decision of Refusing to Recognize the Tort of Wrongful Birth*, 5 DEPAUL J. HEALTH CARE L. 317, 339 (2002).

<sup>359</sup> Many courts refuse to award these types of damages because they are too speculative. *See generally* 62A AM. JUR. 2D *Prenatal Injuries, Etc.* § 109 (2009). *See also* Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1376 (Ohio 1989) (“Another rationale is that the cost of child-rearing would be too speculative to measure with any certainty.”). *But see infra* text accompanying note 338 (where, in *Paretta*, such expenses could be recovered under a traditional negligence cause of action, as opposed to a wrongful birth claim).

<sup>360</sup> There is a third possible scenario under this subsection and it combines the two lost materials scenarios discussed. Material could be lost and delivered to an incorrect recipient, who then uses it to conceive a child who is impaired.

## 2. Defective Materials

Defective materials can cause children born with defects. The questions addressed in this section are whether the parents, and/or the child, can recover damages for such defects. We previously turned to *Paretta v. Medical Offices for Human Reproduction*<sup>361</sup> for guidance; that case is beneficial here as well.

In *Paretta*, plaintiffs alleged that the egg supplier either failed to screen an egg donor to determine if she was a carrier for cystic fibrosis or did screen and failed to inform the donee.<sup>362</sup> The child was born with the disease.<sup>363</sup> The Paretts brought action under a variety of negligence based claims.<sup>364</sup> They also brought suit on behalf of the child, Theresa.<sup>365</sup> The court held that “[it is] abundantly clear that the Paretts can pursue recovery for the pecuniary expense they have borne and continue to bear for the care and treatment of their sick infant.”<sup>366</sup> It was equally clear that “the Paretts cannot recover on Theresa’s behalf.”<sup>367</sup> While *Paretta* provides some guidance, it really leaves more specific versions of the questions this subsection began with. First, plaintiffs may be entitled to damages in defective materials cases, but are they really likely to meet the requisite elements of negligence? Second, is it truly well settled that a child cannot recover in a defective materials case?

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We could not find any record of this occurring, and we have no sense of how common this scenario might be, but we have to assume it could happen. If it did occur, it would suffer the same fate as the other lost materials scenarios and for many of the same reasons. First, any legal duty is uncertain. Second, that uncertainty makes proving breach difficult or impossible. Third, proximate causation may be extremely difficult to establish because birth defects may be caused by many sources. Finally, it is extremely difficult for juries to value the harm created by the birth of an impaired child.

<sup>361</sup> 195 Misc. 2d 568 (N.Y. Sup. Ct. 2003).

<sup>362</sup> *Id.* at 570–71.

<sup>363</sup> *Id.* at 570.

<sup>364</sup> *Id.* at 570–72.

<sup>365</sup> *Id.* at 571.

<sup>366</sup> *Id.* at 577. *See also* Weintraub v. Brown, 98 A.D.2d 339, 342 n.2 (2d Dep’t 1983) (citing Becker v. Schwartz, 46 N.Y.2d 401 (1978)) (noting that parents can recover “the costs for the extraordinary care and treatment of their intended but abnormal child.”).

<sup>367</sup> *Paretta*, 195 Misc. 2d 568, 575 (N.Y. Sup. Ct. 2003). “Theresa, however, like any other baby, does not have a protected right to be born free of genetic defects.” *Id.* at 576.

## (a) Traditional Negligence

The elements of duty and breach raise the same concerns previously discussed,<sup>368</sup> because specific legal duties are largely uncertain, resulting breach is difficult to prove. Proximate causation is highly problematic. A claimant must prove, by a preponderance of the evidence, that there is a direct causal link between the materials provided and the resulting condition.<sup>369</sup> Such a link is extremely difficult to establish because “[t]he majority of genetic and nongenetic birth defects occur as the result of spontaneous mutations such that causation cannot be attributed to either biological parent.”<sup>370</sup> If the claimant can establish causation, damages for harm should be much more readily available than in a lost materials case. At a minimum, as noted in *Paretta*, the claimants should be entitled to damages for care and treatment of the child.<sup>371</sup> Additionally, depending on the conduct of the defendant, those compensatory damages could provide the basis for punitive damages.<sup>372</sup> However, much like lost materials cases, claimants asserting this cause of action are not likely to be successful due to their inability to satisfy the elements. Consequently, it does not appear that egg donors or suppliers currently have much to fear from this claim.<sup>373</sup>

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<sup>368</sup> *But see* Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 638–39 (2003) (“[C]ourts may well conclude that fertility doctors and clinics have a duty of care running to the class of intended offspring.”). The author does not propose what that duty is or should be and none of the cases he cites in support of this contention involve lost materials.

<sup>369</sup> *See* McIntyre, *supra* note 351, at 537.

<sup>370</sup> *Id.*

<sup>371</sup> 195 Misc 2d at 577 (discussing *Becker v. Schwartz*, 46 N.Y.2d 401 (1978)).

<sup>372</sup> *Id.* at 577–78. However, punitive damage recovery may not be possible in some jurisdictions, especially if egg suppliers are treated as some sperm banks have been. *See* Kenneth Ofgang, *Sperm Bank Protected as “Health Care Provider,” Court Rules*, METRO. NEWS ENTER., Sept. 3, 2002, available at <http://www.metnews.com/articles/john090302.htm> (“A sperm bank is a ‘health care provider,’ entitled to special statutory protection from punitive damage claims.”).

<sup>373</sup> It is also possible that the holding facility could assert a “state of the art” defense, admitting it had a duty to act reasonably and did so, but alleging that medical technology existing at the time of the donation and transfer was not sufficient to reveal any pre-existing defect in the reproductive material. *See* McIntyre, *supra* note 351, at 544 (“The state-of-the-art defense is properly invoked only if there was *no technologically feasible way* of discovering the defect in the [material]. In these particular cases, the state-of-the-art defense acts as an absolute bar to negligence.”). The viability of this defense then depends on the type of defect and the technology available at the time of

## (b) Wrongful Life Claims

Wrongful life is a more specific claim under the general umbrella of negligence. It “is made by or on behalf of an ‘impaired’ child who asserts that he would have been spared his impaired existence, either through his parents’ decision not to conceive or through a timely abortion, were it not for the negligent acts or omissions of the defendant.”<sup>374</sup>

Wrongful life has the same elements previously discussed under negligence; duty breach, proximate causation and harm. The first three elements continue to suffer the same deficiencies. The legal duties are uncertain,<sup>375</sup> making breach difficult to prove,<sup>376</sup> and proximate causation remains difficult to establish. Only three states currently recognize a cause of action for wrongful life<sup>377</sup> and several have refused to do so, either by statute<sup>378</sup> or common law.<sup>379</sup> This lack of acceptance is, at least partially, a product of courts’ inability to address the legal issue of harm, separate from a moral or societal issue:

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donation and transfer.

<sup>374</sup> Dawe, *supra* note 323, at 475.

<sup>375</sup> *But cf.* Huddleston v. Infertility Ctr. of Am., Inc., 700 A.2d 453, 460 (Pa. Super. Ct. 1997) (holding that a surrogacy business had a “special relationship” with the parties and, therefore, owed a duty to protect the resulting child from foreseeable risks).

<sup>376</sup> *But see* Dawe *supra* note 323, at 477 (asserting that “[w]ith few exceptions, modern courts have had little trouble accepting the elements of duty and breach in wrongful life suits.”). However the author cites only one case, Albala v. City of New York, 429 N.E.2d 786 (N.Y. 1981) in support of this contention. *Id.*

<sup>377</sup> *See* Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982); Procanik *ex rel.* Procanik v. Cillo, 478 A.2d 755, 765 (N.J. 1984), *rev’d*, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 497 (Wash. 1983).

<sup>378</sup> *See, e.g.*, IDAHO CODE ANN. § 5-334(1) (West 2009); IND. CODE ANN. § 34-12-1-1 (West 2009); MICH. COMP. LAWS ANN. § 600.2971(2) (West 2009), following Eisbrenner v. Stanley, 308 N.W.2d 209, 212–13 (Mich. Ct. App. 1981), *abrogated by* Taylor v. Kurapati, 600 N.W.2d 670 (Mich. 1999); MINN. STAT. ANN. § 145.424(1) (West 2009); MO. ANN. STAT. § 188.130(1) (West 2009); N.D. CENT. CODE ANN. § 32-03-43 (West 2009); 42 PA. CONS. STAT. ANN. § 8305(b) (West 2009), following Ellis v. Sherman, 515 A.2d 1327, 1329 (Pa. 1986); S.D. CODIFIED LAWS § 21-55-1 (West 2009).

<sup>379</sup> *See* Ronen Perry, *It’s a Wonderful Life*, 93 CORNELL L. REV. 329, 336-37 (2008) (listing more than 20 states where courts rejected such claims); *see also* Doolan v. IVF Am. (MA), Inc., No. 99-3476, 2000 Mass. Super. LEXIS 581, at \*8–12 (Mass. Super. Ct. 2000) (rejecting a tort claim brought on behalf of a child born with cystic fibrosis against a fertility clinic for negligence in genetic screening of IVF embryos before implantation because it amounted to a claim for Wrongful Life not recognized in Massachusetts).

In wrongful life claims . . . the child usually asserts as “general” damages the pain and suffering he will endure during his lifetime as a result of the defect, but presumably less the benefits he will derive from his existence, if any. This “net burden” is then measured not against the value of a “normal” life, but against the nullity of nonexistence.<sup>380</sup>

The response has been that:

Courts have consistently refused to recognize claims for wrongful life because of the deep-seated ethical dilemma involved.<sup>381</sup> Few courts have been willing to say that children, no matter how severely impaired, would have been better off had they never been born. “One of the most deeply held beliefs in our society is that life—whether experienced with or without major physical handicap—is more precious than non-life.”<sup>382</sup>

So courts have held “that life itself cannot constitute injury.”<sup>383</sup> As a result, the harm element cannot be satisfied when there is a birth, even the birth of an impaired child. In the unlikely event that a wrongful life cause of action is recognized, a claimant will find it very difficult to establish any of the first three elements, and the fourth may be judicially impossible.

#### VII. CYBERPROCREATION EVOLUTION: PREDICTIONS AND RECOMMENDATIONS

ART technologies, generally, and issues for egg donors, specifically, are developing at an astounding pace. The continuing evolution will be fascinating to observe, but it will also pose a variety of critical issues and questions. Some will be political, others economical, and many are moral. Discussion on multiple levels is vital. For now, we make the following legal predictions and recommendations.

1. *Prediction:* Potential ART users will increasingly use the Internet to gather information and to find potential egg donors, suppliers, and donees.

*Recommendation:* The continuation of this ongoing

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<sup>380</sup> Dawe, *supra* note 323, at 479–80.

<sup>381</sup> See, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 411 (1978) (“Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.”).

<sup>382</sup> McIntyre, *supra* note 351, at 539 (quoting *Berman v. Allan*, 404 A.2d 8, 12 (N.J. 1979)).

<sup>383</sup> Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 328 (2004).

trend is likely inevitable but, in light of the current lack of regulation for gathering, screening, and storing human eggs we cannot recommend it.

2. *Prediction:* More women will choose to donate eggs for compensation.<sup>384</sup>

*Recommendation:* Ongoing medical technology advancements, coupled with increased egg use in ART procedures, will result in more children born from donor eggs. There will certainly be demand for donor eggs, but prospective donors must consider the possibility that they may be liable for child support responsibilities under a “best interests” analysis before supplying eggs because egg donors will be held responsible in some jurisdictions.

3. *Prediction:* A group, or groups, will call for an absolute ban on egg donation or compensation for egg donors worldwide.

*Recommendation:* It seems unlikely that such a ban would ever be adopted globally due to political volatility<sup>385</sup> and economic necessity.<sup>386</sup> Such a ban would really create fewer good and service providers, likely with even less regulation.<sup>387</sup> We do not recommend this ban.

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<sup>384</sup> This seems even more likely if other states follow New York’s recent decision to allow compensation to egg donors for research purposes as there will be more compensation options. See Peter Aldhous, *New York Approves Controversial Egg Donor Payments*, NEW SCIENTIST, June 22, 2009, available at <http://www.newscientist.com/article/dn17348-new-york-approves-controversial-egg-donor-payments.html>.

<sup>385</sup> See, e.g., Morris, *supra* note 103, at 704–05 (discussing Italy’s extreme shift from one of the least ART regulated countries to one that now prohibits egg donorship for ART). “This problem will only be inflamed as countries continue to change their laws, which are becoming increasingly divergent from one another.” *Id.* at 708.

<sup>386</sup> Market demands may sway countries to defy international agreements in pursuit of RT dollars. See *id.* at 707–08. Additionally, clinics are sourcing eggs from poorer countries. See *Buying Babies, Bit By Bit*, THE ECONOMIST, Jan. 3, 2007, available at <http://www.uslaw.com/bulletin/buying-babies-bit-by-bit.php?p=118>. As an example see The Rainbury Clinic, <http://www.genderselection.uk.com/home.html> (last visited Dec. 26, 2009).

<sup>387</sup> “As medical tourism becomes more lucrative, countries may compete by offering treatments that other countries do not offer. Poor countries may be tempted to offer treatments that are illegal or highly experimental elsewhere.” Cortez, *supra* note 98, at 104.

4. *Prediction:* There will be a call for the United States to ban compensation for egg donors.

*Recommendation:* We cannot recommend, again this would likely create fewer providers with less regulation. However, we do recommend that the United States use its interstate commerce power to regulate collection, storage, and screening of human eggs.<sup>388</sup> Will this make the U.S. less attractive for some entities to do business in? Yes and that, in turn, might actually create a more attractive, and safe, ART environment domestically.<sup>389</sup> If other countries followed this lead, it might create a more secure ART world. We cannot put the genie back in the bottle, but we can act to make it more likely that the true wishes of egg donors and donees are fulfilled in the Cyberprocreation era.

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<sup>388</sup> *But see* Debora Spar, *Reproductive Tourism and the Regulatory Map*, 352 *NEW ENG. J. MED.* 531, 533 (2005) (“Americans, with their distrust of bureaucratic authority, would never condone the extension of federal power into the intimate affairs of reproduction.”); *see also* Ouellette, *supra* note 150, at 432–33 (arguing that federal regulation of ART is problematic). These perspectives may or may not be prescient, but the sale of some body parts is already federally regulated. *See* 42 U.S.C. § 274e(a) (2006) (“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”).

<sup>389</sup> *But see* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 *VILL. L. REV.* 169, 203 (2004) (“Once the state becomes involved in regulating human reproduction, the attractiveness of politically favored doctrines becomes a real danger.”).