

**OOCYTE DONOR COMPENSATION FOR
EMBRYONIC STEM CELL RESEARCH: AN
ANALYSIS OF NEW YORK’S “PAYMENT FOR
EGGS PROGRAM”**

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I. INTRODUCTION

Although gamete donation is often criticized because of the legal and ethical implications associated with the uses of donated gametes, donors provide recipients with a valuable resource. Whether a donor is granting an infertile couple the chance to start a family, or providing researchers with the materials to develop treatments for debilitating diseases, gamete donors provide individuals and society with an array of benefits.

The motivations for human gamete donation vary from individual to individual. For males the process of donating sperm is a relatively quick process involving minimal risk.¹ In contrast, the process for obtaining female gametes, known as oocytes, is much more involved and encompasses a plethora of potential risks and side effects. It is common in both male and female gamete donation for the donor to receive compensation for his or her time and effort in the donation process.² While the level of compensation offered for sperm typically does not exceed \$100, the level of compensation for female gametes can be quite high, ranging from a few thousand dollars to tens of thousands of dollars.³

Once donated, gametes may be used for reproductive purposes. The donation of gametes for assisted reproductive therapies helps thousands of individuals who cannot successfully become parents without donations.⁴ When an individual or a couple is unable to reproduce naturally, they have often relied on donated

¹ For an explanation of the typical sperm donation process see Christina M. Eastman, Comment, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 376–77 (2010).

² See *id.*; Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 84 (2009); Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 283 (2009).

³ Eastman, *supra* note 1, at 372, 376; Krawiec, *supra* note 2, at 66–67.

⁴ Krawiec, *supra* note 2, at 59. (“Data suggest[s] that in 2006 alone nearly 55,000 children in the United States were born through assisted reproduction . . .”).

gametes in order to become pregnant.⁵

In addition to the use of donated gametes for reproductive purposes, gametes are valuable for research purposes.⁶ Oocytes are used to create embryos that contain the stem cells necessary to provide researchers with the materials needed to conduct research that may potentially lead to the development of treatments and cures for diseases.⁷ On June 11, 2009 the Empire State Stem Cell Board (ESSCB), the entity responsible for overseeing stem cell research in New York State, passed a resolution to permit funding of stem cell lines derived using oocytes that have been donated solely for research purposes.⁸ Upon passing the resolution, New York State became the first state to authorize the disbursement of public funds to oocyte donors who donate oocytes specifically to be used for research purposes.⁹ Traditionally, oocytes used in embryonic stem cell research are procured by donations from couples that have undergone in vitro fertilization (IVF) for reproductive purposes, and have excess embryos remaining from the procedure.¹⁰ It is also possible to obtain embryonic stem cells from gametes that have been donated solely for research purposes through in vitro fertilization or a process known as somatic cell nuclear transfer (SCNT).¹¹ These gametes are used to create embryos from which stem cells are harvested.¹²

⁵ Urska Velikonja, Note, *The Costs of Multiple Gestation Pregnancies in Assisted Reproduction*, 32 HARV. J.L. & GENDER 463, 464 (2009); Krawiec, *supra* note 2, at 59 (noting there are “new sources of demand that include older, single, and gay and lesbian parents” which in 2006 resulted in close to 55,000 children born through assisted reproduction in the United States alone).

⁶ See Leslie E. Wolf, *Advancing Research on Stored Biological Materials: Reconciling Law, Ethics, and Practice*, 11 MINN. J.L. SCI. & TECH. 99, 99–104 (2010); Velikonja, *supra* note 5, at 464–65.

⁷ See Stephen R. Latham, *The Once and Future Debate on Human Embryonic Stem Cell Research*, 9 YALE J. HEALTH POL’Y, L. & ETHICS 483, 484 (2009).

⁸ Resolution, New York State Stem Cell Science ESSC Board, *Resolution of the Funding Committee Regarding Recommended Standards for the Compensation of Women Donating Oocytes Solely for Research Purposes* (June 11, 2009) [hereinafter ESSCB Resolution], http://stemcell.ny.gov/docs/Compensation_of_Gamete_Donors_resolution_of_Funding_Comm.pdf.

⁹ *Id.*; Libby Nelson, *New York State Allows Payment for Egg Donations for Research*, N.Y. TIMES, June 26, 2009, at A20.

¹⁰ Gregory Dolin, *A Defense of Embryonic Stem Cell Research*, 84 IND. L.J. 1203, 1239–41 (2009).

¹¹ RICHARD MOLLARD, INT’L SOC’Y FOR STEM CELL RESEARCH, SOMATIC CELL NUCLEAR TRANSFER (SCNT) OR THERAPEUTIC CLONING, http://www.isscr.org/public/therapeutic_cloning.pdf (last visited Jan. 7, 2011).

¹² NAT’L BIOETHICS ADVISORY COMM’N, ETHICAL ISSUES IN HUMAN STEM CELL

Embryonic stem cell research is inherently controversial because it involves the manipulation and destruction of human embryos.¹³ The allocation of public funds to compensate women for donating oocytes solely for research purposes deepens the controversy because of the risks associated with the invasive procedures that are necessary to harvest the oocytes. Soon after ESSCB passed the controversial resolution, a group of New York taxpayers filed a lawsuit seeking to enjoin ESSCB from funding what they refer to as the “payment for eggs program.”¹⁴ This group advanced several arguments to claim that the payment for eggs program is contrary to New York law.¹⁵

The purpose of this paper is to compare the implications of compensating women for oocyte donations intended for assisted reproduction to donations intended for research endeavors. This comparison will demonstrate that women should be compensated for donating oocytes regardless of the oocyte’s ultimate use. Additionally, it will show that donations for research purposes are ethical because these donations have fewer unintended consequences than donation for reproductive purposes. Throughout this paper, the term “reproductive donation” will refer to donations in which the intended use of the oocyte is for assisted reproductive therapies; the term “research donation” will refer to donations in which the intended use of the oocyte is for embryonic stem cell research.

The first part will provide an overview of the oocyte donation process and the different uses of oocytes once they are donated. The second part will describe the risks associated with the process. The third part will detail New York State’s decision to use public funds to compensate women who donate oocytes for research purposes as well as the legal action seeking to enjoin such compensation. The final part will describe why New York’s

RESEARCH: EXECUTIVE SUMMARY 5–6 (Sept. 1999), *available at* <http://bioethics.georgetown.edu/nbac/execsumm.pdf>.

¹³ See Andrew McCoy, *Biotechnology and Embryonic Stem Cells: A Comparative Analysis of the Laws and Policies of the United States and Other Nations*, 8 LOY. L. & TECH. ANN. 63, 66 (2009) (noting “[human embryonic stem cell] research is perhaps the most ethically charged debate of the past decade, simply due to the fact that said research requires the destruction of human embryos.”).

¹⁴ Verified Petition at 1–3, *Feminists Choosing Life of New York, Inc. v. Empire State Stem Cell Board*, No. 8594/2009 (N.Y. Sup. Ct. Oct. 9, 2009) [hereinafter FCLNY Petition], *available at* www.feministschoosinglife.org/files/FCLNY_vs_State_Stem_Cell_Board_Signed.pdf.

¹⁵ *Id.* at 1–3, 7–11.

decision is legally and ethically permissible.

II. THE OOCYTE DONATION PROCESS AND THE USES OF OOCYTES

In the United States, donated oocytes may be obtained from four main sources. First, oocytes can be harvested from one individual for the reproductive benefit of another.¹⁶ The oocyte recipient in this case is usually a friend or family member who cannot reproduce without the donation.¹⁷ Fertility clinic donor recruitment programs are the second source of oocytes.¹⁸ The fertility clinic business model is one in which clinics solicit donors in order for the clinic to provide consumers with a steady supply of oocytes.¹⁹ The third source, which is an alternative to the fertility clinic business model, is one in which oocytes are procured through egg donor agencies.²⁰ These agencies are distinguishable from fertility clinics because they actively recruit women to make donations without offering fertility services.²¹ Finally, donors may be solicited directly by consumers with or without the assistance of brokers, agents or other intermediaries.²² Direct solicitation is done through a variety of print and electronic sources.

Regardless of the source of a particular oocyte, all donors are required to undergo the same procedure to harvest the gametes.²³ Because most embryos used in research are excess embryos that were initially created for fertility treatments, the same gamete donation process is used whether the donor is donating for research or for reproduction.²⁴ The donation process is time

¹⁶ Krawiec, *supra* note 2, at 63–64.

¹⁷ *Id.* at 63.

¹⁸ *Id.* at 63–64.

¹⁹ See Sharon N. Covington & William E. Gibbons, *What is Happening to the Price of Eggs?*, 87 FERTILITY & STERILITY 1001, 1002 (2007).

²⁰ Krawiec, *supra* note 2, at 64.

²¹ Carlene Hempel, *Golden Eggs*, BOS. GLOBE, June 25, 2006, http://www.boston.com/news/globe/magazine/articles/2006/06/25/golden_eggs/.

²² See Krawiec, *supra* note 2, at 64.

²³ See Dolin, *supra* note 10, at 1212–13 (“[T]he same IVF process is used to create embryos that are initially intended for pregnancy and to create those initially intended for research.”).

²⁴ See Zach W. Hall, *Stem Cell Research in California: The Intersection of Science, Politics, Culture, and Law*, 10 MINN. J. L. SCI. & TECH. 1, 5 (2009) (“Most of the human embryonic stem cell lines now available were derived from excess embryos made for in vitro fertilization (‘IVF’) and donated by couples for research and therapeutic purposes.”); Dolin, *supra* note 10, at 1212 (“[M]ost stem cells are derived from the embryos created in vitro . . .”). There are currently four methods of obtaining human embryonic stem cells: 1) extracting

consuming and requires donors to undergo screening tests, medical examinations, hormone therapies, and surgery. Donors assume substantial time commitments and health risks when donating. This section will detail the donation process and discuss the various uses of donated oocytes.

A. Oocyte Donation Process

Unlike sperm donors, oocyte donors are faced with a daunting procedure. The process begins with donor solicitation. Those who respond to solicitations become donor candidates and must go through an intense screening process.²⁵ If a donor candidate is deemed appropriate she must then begin hormone therapies and medical examinations.²⁶ Upon completion of hormone therapies, donors undergo surgery to extract oocytes.²⁷ On average, these therapies and procedures require a 56-hour commitment.²⁸ Throughout the process, donors are provided with monetary compensation for their time and effort.²⁹

Solicitation occurs through various media sources such as radio advertisements, newspaper advertisements, and Internet postings.³⁰ Although each fertility clinic, egg agency, broker, or

surplus embryos that have been created by in vitro fertilization for reproductive purposes and are subsequently donated for research; 2) extraction from embryos creates solely for in vitro fertilization research; 3) production through somatic cell nuclear transfer or therapeutic cloning, in which embryos are created asexually by introducing the nucleus of an adult cell into an enucleated human cell; and 4) through parthenogenesis. Caroline P. Torrisi, *Embryonic vs. Adult: The History and Future of the Stem Cell Debate*, 3 J. HEALTH & BIOMEDICAL L. 143, 146–47 (2007).

²⁵ Krawiec, *supra* note 2, at 64–65 (“The screening includes general physical and gynecological exams, a psychological evaluation, blood and urine tests, and medical and family histories.”); Rene Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, 72 LAW & CONTEMP. PROBS. 37, 47–52 (2009). See also Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1906 (2009).

²⁶ See Sanja Zgonjanin, *What Does it Take to be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN’S L.J. 251, 251 n.1 (2005) (describing the process women must undergo for oocyte and egg donation); Elizabeth Gerber, *California Limits Egg Donor Compensation in Privately-Funded Research*, 35 J.L. MED. & ETHICS 220, 221 (2007).

²⁷ Zgonjanin, *supra* note 26, at 251 n.1 (“The egg retrieval, which lasts 15-30 minutes, takes place about 34-36 hours after the injection and upon administration of an intravenous anesthetic.”).

²⁸ Krawiec, *supra* note 2, at 67.

²⁹ See *id.* at 66 (explaining how egg donor compensation varies in the United States).

³⁰ Almeling, *supra* note 25, at 47.

individual consumer relies on different recruitment practices, most entities target women who are under age 30.³¹ Donors typically range in age between 21 and 35.³² Recruitment materials often depict oocyte donation as an altruistic means of helping others.³³ Monetary offers, however, may be included in solicitations to entice potential donors to respond. Solicitations are frequently designed to target women with specific attributes. For example, ads seeking donors are commonly placed in college newspapers at Ivy League schools.³⁴ Part IV will discuss the methods used to specifically target women with certain characteristics in more detail.

After responding to a solicitation, donor candidates must undergo an extensive application and screening process that typically involves questionnaires and medical examinations.³⁵ Donors may be required to answer questions or undergo examinations regarding physical characteristics, personality traits, and genetics.³⁶ Health related physical and psychological screenings are also typical.³⁷ Screening is designed to achieve two goals: the process is aimed at determining whether the donor candidate is physically and psychologically fit to be a donor; additionally, the process is designed to assess how desirable a donor will be to those seeking oocytes.³⁸ Clinics use the screening process to determine the donor candidate's motivation for donating. Those who are motivated solely by money and those with undesirable traits may be weeded out.³⁹ Undesirable traits may be health related factors such as genetic or infectious disease susceptibility, prescription drug use, or substance abuse.⁴⁰ Undesirable traits may also be based on physiological characteristics such as height, weight, or ethnic background.⁴¹

³¹ See Krawiec, *supra* note 2, at 64 (“Donors typically must be between the ages of twenty-one and thirty-five.”).

³² *Id.*; Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 221 (2009) [hereinafter *Altruism and Intermediation*].

³³ See Krawiec, *supra* note 2, at 64 (“[E]gg donors, but not sperm donors, are recruited with materials that highlight the ability to help others, rather than the ability to earn money . . .”).

³⁴ *Altruism and Intermediation*, *supra* note 32, at 222.

³⁵ See Krawiec, *supra* note 2, at 64.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *id.* at 64–65.

³⁹ See *id.* See also Almeling, *supra* note 25, at 47.

⁴⁰ Krawiec, *supra* note 2, at 64–65.

⁴¹ See Steven R. Lindheim & Mark V. Sauer, *Expectations of Recipient*

Overall, only a small percentage of donor candidates are selected to proceed with the oocyte harvesting process.⁴² Oocyte harvesting begins once the donor is chosen by a particular recipient.⁴³

Qualified donors must undergo medical treatments to harvest oocytes. Treatments begin with initial hormone therapies that are designed to manipulate the normal functioning of the donor's ovaries.⁴⁴ These hormones are most often administered in the form of pills, but injections are sometimes used.⁴⁵ The first round of hormone therapies, intended to suppress ovarian functioning and prepare the donor's body for more fertility drugs, may last for several weeks.⁴⁶

After the initial hormone therapy is complete, additional hormone injections are required to stimulate egg production.⁴⁷ Throughout the hormone therapies, donors undergo ultrasounds and blood tests and must abstain from unprotected sex and the use of drugs, cigarettes and alcohol.⁴⁸ Additionally, donors must obtain the physician's permission before taking any additional medications.⁴⁹ These hormones stimulate oocyte production; ten or more oocytes are usually produced during one cycle of therapy.⁵⁰

Once the oocytes are ready to be retrieved they are then

Couples Awaiting an Anonymous Oocyte Donor Match, 15 J. ASSISTED REPROD. & GENETICS 444, 446 (1998); Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 326 (2007).

⁴² The low acceptance rate is similar for male gamete donation, which is used as a marketing tool by sperm banks such as Fairfax Cryobank. This facility's 2009 brochure boasts that "fewer than 3% [of potential donors] . . . are accepted." Gregory Katz & Stuart O. Schweitzer, *Implications of Genetic Testing for Health Policy*, 10 YALE J. HEALTH POL'Y L. & ETHICS 90, 119 (2010).

⁴³ See Krawiec, *supra* note 2, at 65.

⁴⁴ *Id.*

⁴⁵ Melissa R. O'Rourke, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 S.D. L. REV. 343, 351–52 (1992).

⁴⁶ NEW YORK STATE DEPARTMENT OF HEALTH, THINKING OF BECOMING AND EGG DONOR? 14–15 (2009), <http://www.health.state.ny.us/publications/1127.pdf>; Michelle Goodwin, *Assisted Reproductive Technology and the Double Blind: The illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 28 (2005).

⁴⁷ Goodwin, *supra* note 46, at 28; *Altruism and Intermediation*, *supra* note 32, at 220–21.

⁴⁸ *Altruism and Intermediation*, *supra* note 32, at 220.

⁴⁹ *Id.*

⁵⁰ John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 991 (2001).

extracted through an outpatient surgical procedure.⁵¹ First the donor is given a local anesthetic or placed under intravenous sedation.⁵² The physician then inserts a large needle into the vagina and extracts the oocytes. The surgery typically takes up to an hour.⁵³

Throughout the process, donors may collect payments, usually in the form of cash, as compensation for their time.⁵⁴ Alternatively, a single payment may be made upon extraction of the oocytes.⁵⁵ Whether the compensation is given incrementally or in a lump sum differs from clinic to clinic.⁵⁶ The total compensation offered differs and may be as low as a few thousand dollars to tens of thousands of dollars.⁵⁷ Women with certain attributes such as tall women, women with high IQs, or blonde haired women can demand more compensation than others. The methods used to determine donor compensation will be discussed in Part IV.

B. Post Donation Uses of Oocytes

Once extracted, oocytes can be used to either induce pregnancy or for research. Regardless of its ultimate use, the oocyte is used to create an embryo. An embryo can be created through fertilization or a process known as somatic cell nuclear transfer (SCNT). Leftover materials are most often destroyed.⁵⁸

In order to use an oocyte for reproduction it must be fertilized.⁵⁹ Fertilization occurs when the oocyte is joined with

⁵¹ Meena Lal, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 520–21 (1997).

⁵² *Id.*

⁵³ *IVF Egg Retrieval (Oocyte Retrieval)*, IVF1.COM, <http://www.ivf1.com/egg-retrieval/> (last visited Jan. 8, 2011).

⁵⁴ See, e.g., Eastman, *supra* note 1, at 377 (“[A]n egg donor can receive anywhere from \$5,000 to \$150,000 per donation cycle.”); Almeling, *supra* note 25, at 44–45.

⁵⁵ See, e.g., Gina Kolata, *\$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES, Mar. 3, 1999, <http://www.nytimes.com/1999/03/03/us/50000-offered-to-tall-smart-egg-donor.html> (“In return for providing eggs, she would receive \$50,000.”).

⁵⁶ See, e.g., Almeling, *supra* note 25, at 44–45.

⁵⁷ Krawiec, *supra* note 2, at 66.

⁵⁸ Robertson, *supra* note 50, at 991 (“If the couple does not use them or donate them to researchers or other infertile couples, they may eventually be removed from storage and discarded.”).

⁵⁹ See Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 171 n.4 (2004).

sperm under appropriate lab conditions; this process is known as in vitro fertilization.⁶⁰ The average success rate, measured by the ratio of oocytes that are successfully fertilized, is between 40 and 70%.⁶¹ To be placed in context, if 10 oocytes are harvested from a donor in a donation cycle, four to seven of these oocytes are successfully fertilized and have the potential of becoming a human life. Many of these embryos will eventually be transferred into the gestational carrier's uterus in hopes that a viable pregnancy will be induced. Before a transfer occurs, however, embryos must incubate under laboratory conditions until they are between four and eight cells.⁶²

During this incubation period, pre-implantation genetic screening is frequently conducted to determine which embryos will be transferred.⁶³ Through pre-implantation screening it is possible to determine the specific attributes of an embryo such as its gender and susceptibility to certain conditions.⁶⁴ Part IV discusses pre-implantation genetic screening in detail. Based on the results of pre-implantation screening the recipients of the fertilized embryo may be given the choice of which embryos to transfer. Generally, up to four embryos are transferred.⁶⁵ Since fewer than one third of IVF treatments result in live birth, most embryos that are not transferred are frozen after reaching the two to eight cell stage; these embryos are stored for further rounds of transfer.⁶⁶ With the exception of Louisiana, all states allow unused embryos to be discarded or donated for research purposes.⁶⁷

Donated embryos and embryos developed through IVF solely for research purposes may be used for embryonic stem cell

⁶⁰ *In Vitro Fertilization: IVF*, AMERICAN PREGNANCY ASSOCIATION, <http://Americanpregnancy.org/infertility/ivf.html> (last updated May 2007).

⁶¹ Dolin, *supra* note 10, at 1213.

⁶² Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 528 (1994).

⁶³ See Katz & Schweitzer, *supra* note 42, at 112.

⁶⁴ *Id.* at 112–13, 119–20; Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y L. & ETHICS 283, 328–29 (2008).

⁶⁵ Dolin, *supra* note 10, at 1214.

⁶⁶ *Id.*

⁶⁷ Dena S. Davis, *The Puzzle of IVF*, 6 HOUS. J. HEALTH L. & POL'Y 275, 278–279. Louisiana prohibits any person from destroying a fertilized human ovum, unless that ovum fails to develop after thirty-six hours. LA. REV. STAT. ANN. § 9:129 (2011).

research.⁶⁸ In order to harvest stem cells from embryos, the embryo must reach the blastocyst stage of development.⁶⁹ This stage in development is reached after an embryo has incubated under laboratory conditions for five days.⁷⁰ A blastocyst contains two layers of cells, the trophoblast layer and the inner cell mass.⁷¹ In uninterrupted fetal development, the trophoblast layer eventually becomes the placenta and inner mass cells develop into the fetus.⁷² At the blastocyst stage of development, inner mass cells are undifferentiated and have the potential to develop into any type of cell that is found in the human body.⁷³ It is this characteristic of the inner mass that makes embryonic stem cell research so promising. Because these cells are totipotent – capable of becoming any type of cell found in the human body – they may be used in medical applications to replace cells that have been damaged by diseases.⁷⁴

To harvest embryonic stem cells, researchers isolate the inner mass layer, allow it to develop for up to seven days, and separate the mass into individual cells.⁷⁵ Once separated, the individual cells are placed in a culture and grown as clones.⁷⁶ After the inner cell mass is separated from the trophoblast layer, the embryo is incapable of developing into a fetus.⁷⁷ This aspect of embryonic stem cell research makes this form of research controversial.⁷⁸

⁶⁸ NAT'L BIOETHICS ADVISORY COMM'N, *supra* note 12, at 1–2.

⁶⁹ James A. Thomson, et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282 SCI. 1145, 1145 (1998).

⁷⁰ *Id.* at 1145 Fig. 1.

⁷¹ Dolin, *supra* note 10 at 1209.

⁷² *Id.*; Torrisi, *supra* note 24, at 145 & n.19.

⁷³ Dolin, *supra* note 10, at 1209; Hall, *supra* note 24, at 3.

⁷⁴ For a discussion of the potential uses of stem cells see THE NAT'L INST. OF HEALTH, *Frequently Asked Questions, STEM CELL INFORMATION*, <http://stemcells.nih.gov/info/faqs.asp> (last modified Aug. 2, 2010) (“Stem cell lines grown in the lab provide scientists with the opportunity to ‘engineer’ them for use in transplantation or treatment of diseases. For example, before scientists can use any type of tissue, organ, or cell for transplantation, they must overcome attempts by a patient’s immune system to reject the transplant. In the future, scientists may be able to modify human stem cell lines in the laboratory by using gene therapy or other techniques to overcome this immune rejection. Scientists might also be able to replace damaged genes or add new genes to stem cells in order to give them characteristics that can ultimately treat diseases.”).

⁷⁵ Dolin, *supra* note 10, at 1215–16.

⁷⁶ Hall, *supra* note 24, at 5; Dolin, *supra* note 10, at 1209, 1215–16.

⁷⁷ Dolin, *supra* note 10, at 1209, 1215.

⁷⁸ Sina A. Muscati, “*Some More Human Than Others*”: *Assessing the Scope of*

It is also important to note that blastocysts can also be created through SCNT.⁷⁹ SCNT involves the removal of the genetic material from an oocyte and replacement with genetic information from a second cell.⁸⁰ The resulting cell is a genetic duplicate of the second cell.⁸¹ Once the genetic information is placed in the oocyte, chemicals or electric shocks can be used to induce cellular divisions.⁸² These cellular divisions result in the development of an embryo that is a clone of the second organism.⁸³ Once the embryo has developed for several days, its stem cells can be harvested.⁸⁴ SCNT allows researchers to create stem cells that are customized to an individual patient and less susceptible to being rejected by that patient's immune system.⁸⁵

The creation of customized stem cells through SCNT for therapeutic purposes is known as therapeutic cloning.⁸⁶ SCNT is also the first step in the procedure that is used to clone organisms; this was the process used to clone Dolly the sheep.⁸⁷ Clones are reproduced when a SCNT created embryo is transferred into a gestational carrier and carried to term.⁸⁸ When SCNT is used in this fashion, it is referred to as reproductive cloning.⁸⁹ Theoretically, reproductive cloning could be used to create human clones. SCNT related research is controversial because opponents fear that SCNT-based stem cell research will lead to reproductive cloning of humans.⁹⁰

Patentability Related to Human Embryonic Stem Cell Research, 44 JURIMETRICS J. 201, 204 (2004).

⁷⁹ See Richard Mollard, *Nuclear Transfer -- Stem Cells or Somatic Cell Nuclear Transfer (SCNT)*, INTERNATIONAL SOCIETY FOR STEM CELL RESEARCH, <http://www.isscr.org/public/therapeutic.htm> (last updated Feb. 2, 2005).

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² James A. Marcum, *Cloning Facts and Fictions*, THE CENTER FOR CHRISTIAN ETHICS 24 (2005), <http://www.baylor.edu/content/services/document.php/109234.pdf>.

⁸³ *Id.* at 83–84.

⁸⁴ See Mollard, *supra* note 79.

⁸⁵ See *id.* (“These embryonic stem cells, containing the patient’s DNA, now match the patient’s immunological profile and will not be rejected by the patient’s immune system. These embryonic stem cells can now be used to generate cells and tissues for the patient.”)

⁸⁶ *Id.*

⁸⁷ Jamie Love, *The Cloning of Dolly*, SCIENCE EXPLAINED (Nov. 27, 1997–2009), <http://www.synapses.co.uk/science/clone.html>.

⁸⁸ *Id.*

⁸⁹ THE NAT’L INST. OF HEALTH, *Glossary*, STEM CELL INFORMATION, <http://stemcells.nih.gov/info/glossary.asp> (last modified Aug. 20, 2010).

⁹⁰ Letter from Lori B. Andrews, Visiting Professor, Princeton University et

III. RISKS OF OOCYTE DONATION

Oocyte donation encompasses a variety of risks. Women who undergo the process are faced with the potential of physical and psychological harm. Offering compensation to donors makes the donation more complex because it may coerce women to engage in risky behavior. This section discusses the risks inherent to oocyte donation, specifically addressing those risks directly posed to donors as well as risks posed to third parties. A discussion of the increased risks that result from offering donor compensation is also included.

A. *Direct Risks to Donors*

Oocyte donors assume substantial physical and psychological risks. Physical risks range from mild PMS-like symptoms to severe, even life threatening conditions.⁹¹ Psychologically, donors may be susceptible to feelings of regret.⁹²

The initial round of hormones may result in mild to moderate side effects such as hot flashes, fatigue, mood swings, general body aches, breast tenderness, vaginal dryness, and headaches.⁹³ The next round of hormone therapy, hormone injections, may include additional, more severe side effects such as enlarged ovaries, bloating, and severe abdominal pain caused by hyperstimulation of the ovaries.⁹⁴ It is estimated that one third of all donors experience some level of hyperstimulation.⁹⁵ Three to five percent of donors experience severe hyperstimulation, which causes the ovaries to swell and fluids to build up in the abdominal cavity.⁹⁶ Although most cases of hyperstimulation are treatable, some cases result in severe complications such as kidney failure, fluid buildup in the lungs, and shock.⁹⁷ In rare instances these complications may lead to death or require

al., to Members of the Senate (Mar. 19, 2002), *available at* <http://www.geneticsandsociety.org/article.php?id=1958>.

⁹¹ See Dolin, *supra* note 10, at 1213; Krawiec, *supra* note 2, at 65.

⁹² See Krawiec, *supra* note 2, at 86–87.

⁹³ *The Medical Procedure of Egg Donation*, EGG DONOR INFO. PROJECT, <http://www.stanford.edu/class/siw198q/websites/eggdonor/procedures.html> (last updated June 5, 2002).

⁹⁴ *Id.* See also Krawiec, *supra* note 2, at 65.

⁹⁵ Dolin, *supra* note 10, at 1213.

⁹⁶ Martha Frase-Blunt, *Ova-Compensating? Women Who Donate Eggs to Infertile Couples Earn a Reward – But Pay a Price*, WASH. POST, Dec. 4, 2001, at F051. See also Dolin, *supra* note 10, at 1213.

⁹⁷ *Altruism and Intermediation*, *supra* note 32, at 221.

removal of the ovaries.⁹⁸ One severe case of hyperstimulation was publicized after a 22-year-old graduate student suffered a massive stroke after beginning hormone injections.⁹⁹

The extraction process also poses risks to donors. As with all surgery, there are risks associated with anesthetics.¹⁰⁰ Additionally, lacerations may occur due to the use of surgical tools when extracting the oocytes.¹⁰¹ These tools may puncture the bladder, bowel or blood vessels, which may cause internal bleeding.¹⁰² If a puncture is severe, the patient may need to undergo abdominal surgery to correct the problem. Additionally, post-operation discomfort and the potential of infection are risks associated with the removal procedure.¹⁰³

Donors face substantial risks even after oocyte extraction. Although it is relatively common for women to donate oocytes, the long-term risks associated with the required hormones are uncertain.¹⁰⁴ Studies suggest that excessive hormones may heighten the chances of developing cancer.¹⁰⁵ Some fertility clinics include this risk in their consent forms.¹⁰⁶

There are also psychological risks associated with oocyte donation. Although there may be a psychological impact on donors regardless of whether they make a research donation or reproductive donation, it is easier to illustrate the psychological impact that results from reproductive donation. The purpose of reproductive donations is to bring about the birth of a child. The resulting child is the biological child of the donor because the donor's genes pass through the oocyte to the offspring. The donor may feel that she has given up a child because of the genetic relationship she shares with the offspring.¹⁰⁷ The American

⁹⁸ *Id.*

⁹⁹ See Joan O'C. Hamilton, *What Are the Costs*, STAN. MAG., Nov./Dec., 2000, available at <http://www.stanfordalumni.org/news/magazine/2000/novdec/articles/eggdonor.html>.

¹⁰⁰ Frase-Blunt, *supra* note 96.

¹⁰¹ *Id.*

¹⁰² Krawiec, *supra* note 2, at 65; *Altruism and Intermediation*, *supra* note 32, at 221.

¹⁰³ H. Mertes & G. Pennings, *Oocyte Donation for Stem Cell Research*, 22 HUMAN REPROD. 629, 630 (2007); *Altruism and Intermediation*, *supra* note 32, at 221.

¹⁰⁴ Krawiec, *supra* note 2, at 65; Mertes & Pennings, *supra* note 103, at 630.

¹⁰⁵ Meretes & Pennings, *supra* note 103, at 630.

¹⁰⁶ Sonia M. Suter, *Giving in to Baby Markets: Regulations Without Prohibition*, 16 MICH. J. GENDER & L. 217, 239–40 (2009).

¹⁰⁷ See Frase-Blunt, *supra* note 96. Cf. Michelle Oberman, *Thirteen Ways of Looking at Buck v. Bell: Thoughts Occasioned by Paul Lombardo's Three*

Infertility Association recognizes this risk when rhetorically asking “[a]re we . . . leading [donors] to make a decision that later in life they may regret . . . in the end, she has given up her genetic child forever.”¹⁰⁸ For research donations, there is a risk that donors may feel similar regret. In that situation, the regret is due to the loss of potential life that results when the woman’s oocytes are used for research.¹⁰⁹

Additionally, oocyte donation has far reaching risks that extend beyond those posed solely to the donor. Reproductive donations have potentially negative implications for the oocyte recipient and the resulting offspring. To develop an understanding of the broad implications of oocyte donation it is important to recognize these risks, as they result directly from gamete donation.

As previously noted, when a reproductive donation is made, it is the intent that offspring will be produced using the oocytes. There are several risks inherent in the methods used to produce these offspring. It is not uncommon for fertility treatments to result in multiple births, which is potentially dangerous to the gestational carrier.¹¹⁰ While a naturally conceived child has a one in ninety chance of being a twin, a child that is conceived using assisted reproductive technologies is thirty times more likely to be a twin.¹¹¹ Multiple births often result from assisted reproduction because multiple embryos are transferred to the gestational carrier’s uterus.¹¹²

Generations, No Imbeciles, 59 J. LEGAL EDUC. 357, 384–85 (2010) (stating that the psychological consequences of egg donation are still somewhat unclear).

¹⁰⁸ Frase-Blunt, *supra* note 96.

¹⁰⁹ See Sheryl de Lacey, *Decisions for the Fate of Frozen Embryos: Fresh Insights into Patients’ Thinking and Their Rationales for Donating or Discarding Embryos*, 22 HUM. REPROD. 1751, 1756 (2007) (describing the regret some women suffer over the loss of potential life from unused embryos).

¹¹⁰ Velikonja, *supra* note 5, at 466.

¹¹¹ *Id.* at 468.

¹¹² The United States’ fertility industry is unique in its lack of oversight and regulation. In many other countries there are limits on the number of embryos that may be transferred to a woman’s uterus during the IVF process. Due to factors such as patient demand, procreative freedom, and the mechanics of the fertility industry, the United States has higher embryo transfer rates than other countries. Fertility specialists are under pressure to transfer multiple embryos for several reasons. First, fertility clinics are central to the assisted reproductive technology industry. In order to stay competitive in this industry, each clinic has the incentive to ensure that its success rate is high. In this case, success is measured by the number of fertility treatments that result in the live births. One way to increase the likelihood of producing a live birth is by transferring many embryos into the gestational carrier’s uterus. As a result, it

Additionally, evidence suggests that the resulting offspring are more likely to suffer from birth defects.¹¹³ Reproductive donations place the resulting offspring at risk of suffering from defects such as cleft lip, heart conditions, and gastrointestinal conditions at higher rate than offspring conceived naturally.¹¹⁴

B. Risk of Offering Compensation and Existing Guidelines to Mitigate that Risk

Compensation of oocyte donators carries its own set of risks. Because offering remuneration for gametes is a source of contention for many people due to its legal and ethical ramifications, it has been banned in many other countries.¹¹⁵ Concerns regarding compensation include the possibility of undue inducement and exploitation of women.¹¹⁶ Although the area is largely unregulated, guidelines have been developed that are designed to ensure that compensation practices are done in an ethical manner.¹¹⁷

Opponents of offering compensation to oocyte donors raise the concern that monetary incentives will unduly influence women to donate.¹¹⁸ Throughout the oocyte donation industry there is a clear consensus that altruism should be the primary motivation behind a woman's decision to donate her oocytes.¹¹⁹ Donor

is common for multiple embryos to induce pregnancy simultaneously and multiple babies to be carried to term. Another reason that fertility specialists are under pressure to transfer multiple embryos is due to the high cost of fertility treatments. Individuals undergoing fertility treatments must often pay for the services out of their own pockets. The cost of a single IVF cycle may exceed \$15,000. Because the cost is so high, IVF patients pressure their doctors to transfer several embryos at once in hopes that at least one embryo will successfully induce pregnancy. *Id.* at 470, 487–89.

¹¹³ *Id.* at 466.

¹¹⁴ *Id.*

¹¹⁵ See Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1056–58 (2006) (listing several countries banning payment for oocyte donation).

¹¹⁶ Mertes & Pennings, *supra* note 103, at 633.

¹¹⁷ AM. SOC'Y FOR REPROD. MED. & PRACTICE COMM. OF THE SOC'Y FOR ASSISTED REPRODUCTIVE TECH., *2008 Guidelines for Gamete and Embryo Donation: A Practice Committee Report*, 90 FERTILITY & STERILITY S30 (2008), available at http://www.asrm.org/Practice_Guidelines/Guidelines.../2008_Guidelines_for_gamete.pdf.

¹¹⁸ Mertes & Pennings, *supra* note 103, at 632.

¹¹⁹ Krawiec, *supra* note 2, at 61–62. Although it is beyond the scope of this paper, it is worth noting the contrast that exists in the oocyte and sperm markets. While recruiters emphasize altruism as the motivator for oocyte

solicitation materials often use rhetoric to describe the donation process as providing donors with the opportunity to “give the gift of life” as a means to inspire potential donors to donate based on philanthropic motives.¹²⁰ This altruism, however, may be undermined when women are offered monetary incentives to donate.

It does not take a stretch of the imagination to understand that money might play an important role in a woman’s decision to donate. While it may be permissible to allow money to play some role in a donor’s decision, it is impermissible to allow money to become the driving factor behind that decision.¹²¹ Undue inducement occurs when the presence of risk is outweighed by the presence of payments that are designed to convince individuals to accept the risk against their better judgment.¹²² High payments may become coercive to women who are financially strained, and exploitation becomes a possibility if vulnerable women are specifically targeted and made offers that they cannot refuse.¹²³ Although this paper focuses on New York’s law, it is important to note that California prohibits compensation to women who donate their eggs for research purposes.¹²⁴

donors, sperm donation solicitations sell the process as an easy way for men to make money. *Id.* at 61–62, 71. Sperm donation ads use rhetoric such as “[w]hy not get paid for it?” and “[y]our sperm can earn!” to target cash strapped men. *Id.* at 61–62, 71.

¹²⁰ *Id.* at 61–62, 67.

¹²¹ See Frase-Blunt, *supra* note 96.

¹²² Mertes & Pennings, *supra* note 103, at 632.

¹²³ See Robert Steinbrook, *Egg Donation and Human Embryonic Stem-Cell Research*, 354 NEW ENG. J. MED. 324, 324, 326 (2006) (“According to the Centers for Disease Control and Prevention, donor eggs were used in 13,183 (11.4 percent) of the 115,392 procedures involving assisted reproductive technology that were started in the United States in 2002. Women are routinely paid \$4,000 to \$5,000 per cycle and in some cases considerably more.”); G. Pennings et al., *ESHRE Task Force on Ethics & Law 12: Oocyte Donation for Non-Reproductive Purposes*, 22 HUMAN REPROD., 1210, 1212–13 (2007), available at <http://humrep.oxfordjournals.org/content/22/5/1210.full.pdf+html> (arguing that poor and illiterate women should be excluded as donors for non-reproductive purposes to prevent undue inducement).

¹²⁴ Act of Sept. 26, 2006, ch. 483, § 125350, 2006 Cal. Adv. Legis. Serv. 1, 7 (LexisNexis) (codified at CAL. HEALTH & SAFETY CODE § 125350 (Deering 2010)). This law was enacted in 2006 as the first no-compensation legislation in the United States to prohibit compensation to egg donors in the private sector. Elizabeth Gerber, *California Limits Egg Donor Compensation in Privately-Funded Research*, 35 J.L. MED. & ETHICS 220, 220 (2007). The law does not affect compensation practices for women who donate for reproductive purposes. *Id.* The intent of the law is to protect donors from coercion. See *id.* at 220–21.

Given the fact that research donations do not result in live births, offering compensation for these donations may exacerbate any potential coercive effect. Frequently, women are hesitant to donate oocytes because they are turned off by the possibility of creating a genetic child that will most likely remain a stranger.¹²⁵ Research donors do not have this concern because a new life is not created.¹²⁶ Therefore, women may be more inclined to undergo the risky donation procedure to make research donations when compensation is offered because the long-term risk of creating their genetic child is absent.

It is important to note existing guidelines are designed to ensure that oocyte donor compensation is ethical.¹²⁷ These guidelines attempt to minimize the risks associated with donor compensation by setting compensation limits and ensuring that informed consent is obtained from donors.¹²⁸ For example, the American Society of Reproductive Medicine (ASRM) guidelines on donor compensation set limits on compensation and require certain services be offered to donors.¹²⁹ While guidelines exist, compliance with these requirements is voluntary unless a state has statutorily adopted the guidelines.¹³⁰ Therefore, in jurisdictions that have not codified the guidelines, it is left to individuals to decide whether to follow ASRM's recommendations. Furthermore, ASRM has no way of punishing noncompliant individuals.¹³¹ As of 2009, the Associated Press

¹²⁵ See Ethics Comm. of the Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 306–07 (2007) [hereinafter *Financial Compensation of Oocyte Donors*], available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf (noting that oocyte donors may experience psychological distress due to the knowledge of a genetically related child and may later develop desires to “establish contact with genetically related children”).

¹²⁶ Mertes & Pennings, *supra* note 103, at 629.

¹²⁷ See *ASRM Guidelines*, *supra* note 117, at S42–S43. While other guidelines also exist, this paper will only focus on the American Society of Reproductive Medicine's guidelines because of the role that these documents play in the New York's payment for eggs program. See EMPIRE STATE STEM CELL BD., STATEMENT OF THE EMPIRE STATE STEM CELL BOARD. ON THE COMPENSATION OF OOCYTE DONORS (2009) [hereinafter *ESSCB Statement*], available at http://stemcell.ny.gov/docs/ESSCB_Statement_on_Compensation_of_Oocyte_Donors.pdf.

¹²⁸ *ASRM Guidelines*, *supra* note 117, at S36–S37, S40.

¹²⁹ See *id.* at S36–S37, S40, S42–S43 (stating services include psychological evaluation).

¹³⁰ Velikonja, *supra* note 5, at 486.

¹³¹ *Id.*

reported that less than 20% of fertility clinics follow the ASRM's guidelines.¹³² In March 2010, the Hastings Center reported that many egg donation agencies violate ASRM guidelines by offering donors sums exceeding \$10,000, which is prohibited in the ASRM guidelines.¹³³

IV. FEMINISTS CHOOSING LIFE FOR NEW YORK V. EMPIRE STATE STEM CELL BOARD

With a basic understanding of the oocyte donation process, the uses of donated oocytes, and the risks associated with donation, it is appropriate to turn attention to the controversy that surrounds compensation for research donations. A recent decision of New York's Empire State Stem Cell Board (ESSCB) to allow public funds to be used to compensate research donations, and the resulting legal action to enjoin this decision from taking effect, highlight the legal and ethical issues raised by this topic.¹³⁴

New York State became the first state to authorize the use of public funds to compensate women for research donations after the State's stem cell research oversight entity adopted a resolution specifically authorizing such compensation.¹³⁵ The oversight entity, the Empire State Stem Cell Board (ESSCB), passed the resolution in accordance with its authority to allocate funds from the State's Empire State Stem Cell Trust Fund.¹³⁶

¹³² Stephanie Nano, *Few Fertility Clinics Follow Embryo Guidelines*, S.F. CHRONICLE, Feb. 21, 2009, http://articles.sfgate.com/2009-02-21/news/17189772_1_two-embryos-fertility-clinics-success-rates.

¹³³ *Majority of Egg Donation Agencies Violate ASRM Guidelines*, THE MEDICAL NEWS (Mar. 25, 2010, 4:54), <http://www.news-medical.net/news/20100325/Majority-of-egg-donation-agencies-violate-ASRM-guidelines.aspx> (referencing data from The Hastings Center).

¹³⁴ ESSCB Resolution, *supra* note 8; Press Release, Feminists Choosing Life of N.Y., *Lawsuit Seeks to End NYS Comp. for Women's Eggs*, (Oct. 14, 2009), available at <http://www.feministschoosinglife.org/press.php> (reporting that FCLNY argues, in its lawsuit, that payment to donors serves to entice vulnerable women of lower socioeconomic status to undergo a donation procedure involving substantial risks to their health).

¹³⁵ ESSCB Resolution, *supra* note 8; Pamela Foohey, *Paying Woman for Their Eggs for Use in Stem Cell Research*, 30 PACE L. REV. 900, 900—01 (2010); see also *Pro-Life Feminists Challenge New York's Payments for Human Egg Donations*, CATHOLIC NEWS AGENCY (Oct. 15, 2009, 6:18 AM), http://www.catholicnewsagency.com/news/prolife_feminists_challenge_new_yorks_payments_for_human_egg_donations/ ("On June 11, 2009 the Empire State Stem Cell Board . . . passed a resolution authorizing up to \$10,000 to be used to compensate young women who donate their eggs for research.").

¹³⁶ N.Y. PUB. HEALTH LAW § 265-a (1) (McKinney 2010); ESSCB Statement,

Soon after ESSCB adopted this measure, the Feminists Choosing Life for New York issued a suit against ESSCB seeking to enjoin the board from implementing the program.¹³⁷ To date, the ESSCB has yet to compensate women for oocyte donations, and the legal action is still pending.¹³⁸ This part will discuss the ESSCB action, provide an overview of the ESSCB's authority to take such an action, describe the legal action taken to enjoin the board from using the Empire State Stem Cell Trust Fund to compensate oocyte donors, and conclude with an explanation of the current status of ESSCB's "payment for eggs program."

A. *The ESSCB Resolution*

On June 11, 2009 ESSCB passed a resolution to permit funding of stem cell lines derived using oocytes that have been donated solely for research purposes.¹³⁹ The resolution

supra note 127.

¹³⁷ FCLNY Petition, *supra* note 14, at 3.

¹³⁸ *How Can I Donate Eggs (Oocytes) for Stem Cell Research in New York State*, NYSTEM, http://stemcell.ny.gov/oocyte_donation.html (last visited Jan. 8, 2011) ("[T]he NYSTEM program has not yet funded studies that plan to retrieve oocytes for use in stem cell research."); see Press Release, Feminists Choosing Life of N.Y. to Appeal Lower Court Ruling in Egg Donor Comp. Suit (Sept. 22, 2010), available at http://www.feministschoosinglife.org/press.php#lawsuit_appeal (reporting that the FCLNY filed a notice of appeal from the Court of Claims decision to the Appellate Division, Third Department).

¹³⁹ ESSCB Resolution, *supra* note 8. The text of the resolution reads:

Contractors may conduct research involving the use of stem cell lines, or deriving new stem cell lines, in which women donating oocytes solely for research purposes have been, or are being, reimbursed for out-of-pocket expenses, including payments for travel, housing, medical care, child care and similar expenses incurred as a result of the donation of the oocytes for research purposes and compensated for the time, inconvenience and burden associated with the donation in a manner consistent with the New York standards applicable to women who donate oocytes for reproductive purposes and in an amount not to exceed the payments permitted by the guidelines of the American Society of Reproductive Medicine. Payments made to oocyte donors in accordance with the provisions of this section are an allowable expense under this contract.

If reimbursement for oocyte donation is provided, there must be a detailed and rigorous review by the ESCRO Committee, and the IRB, if required, to ensure that reimbursement of direct expenses and/or other compensation do not constitute an undue inducement. At no time should financial consideration of any kind be given for the number or quality of the oocytes themselves that are provided for research.

authorizes the disbursement of state funds to oocyte donors. This allows funding research endeavors where oocyte donors are compensated for the “expenses, time, burden and discomfort” of the donation process.¹⁴⁰ The compensation offered must comply with ASRM guidelines for reproductive donations. Furthermore, the resolution only applies to donations of oocytes made “specifically and solely to stem cell research.”¹⁴¹ According to a statement issued by ESSCB on the compensation of oocyte donors, the decision to allow compensation of research donors was made after much debate.¹⁴² During deliberations, the board considered factors such as the promising scientific potential of stem cell research and current national and international ethical standards in reaching the funding decision.¹⁴³ Additionally, “mechanisms to safeguard the rights and welfare of oocyte donors” were considered.¹⁴⁴ ESSCB eventually concluded that it is ethically appropriate to compensate women who donate oocytes for research purposes according to the ASRM’s guidelines for compensating women who make reproductive donations.¹⁴⁵

ESSB’s statement about the resolution begins by stating that freshly harvested oocytes are vital to the advancement of stem cell research endeavors.¹⁴⁶ The statement notes that stem cell research will ultimately result in a variety of medical applications.¹⁴⁷ Based on experiences in other jurisdictions, which have proven that potential donors are reluctant to donate without compensation, the statement suggests that compensation is necessary to obtain a sufficient supply of oocytes.¹⁴⁸

The resolution is silent regarding the logistics of how the program is to be implemented.¹⁴⁹ It does, however, outline some

Id.

¹⁴⁰ ESSCB Statement, *supra* note 127.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* (“Sources of recently-harvested oocytes are necessary for certain stem cell research pursuing medical advances to alleviate pain and suffering by people afflicted with debilitating and life-threatening diseases.”).

¹⁴⁸ *See id.* (“Experiences from other jurisdictions indicate that lack of reasonable compensation to women who donate their oocytes to stem cell research has created a significant impediment to such donation, limiting the progress of stem cell research.”).

¹⁴⁹ *See* ESSCB Resolution, *supra* note 8.

requirements for compensation to be made available. Specifically, the resolution authorized funds to be used strictly for research donations; it does not allow funds to be allocated to purchasing excess embryos that are left over from in vitro fertilization.¹⁵⁰ The Board saw no reason to distinguish between research donations and reproductive donations. As previously noted, ESSCB's resolution requires compensation standards to align with the same State standards that are used to compensate women who donate oocytes to assist in reproduction.¹⁵¹ The resolution relies on the American Society for Reproductive Medicine's (ASRM) standards as guidance for compensation for reproductive purposes.¹⁵² These guidelines prohibit compensation that is contingent on the quality or quantity of oocytes obtained from the donor.¹⁵³ The resolution specifically authorizes compensation for out-of-pocket expenses including, but not limited to "costs associated with travel, housing, child care, and medical care, incurred as a result of the donation process; and . . . the time, burden and inconvenience associated with oocyte donation . . . not . . . exceed[ing] the range permitted by [the] ASRM,"¹⁵⁴ which is currently up to \$10,000.¹⁵⁵

Additionally, the level of compensation must not be coercive, and informed consent must be obtained from the donor.¹⁵⁶ The Board's position statement contemplates that safeguards to protect women from making donation decisions based solely on the basis or monetary incentive can balance the risks of reasonable compensation. Risks such as undue influence are counteracted by the oversight of institutional review boards at institutions where the stem cell research is conducted as well as reliance on ASRM's guidance.¹⁵⁷ The position statement specifically mentions minimizing exploitation concerns by "requiring full disclosure of . . . [the] physical and psychological risks associated with" the donation process.¹⁵⁸ Additionally, the resolution requires psychological counseling to be available to

¹⁵⁰ ESSCB Statement, *supra* note 127.

¹⁵¹ ESSCB Resolution, *supra* note 8.

¹⁵² *Id.*

¹⁵³ *Financial Compensation of Oocyte Donors*, *supra* note 125, at 305.

¹⁵⁴ ESSCB Statement, *supra* note 127.

¹⁵⁵ *See Financial Compensation of Oocyte Donors*, *supra* note 125, at 305.

¹⁵⁶ ESSCB Statement, *supra* note 127.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

donors prior to donation.¹⁵⁹

B. Legal Authority for Disbursements of State Funds to Egg Donors

The resolution specifically authorizes State funds to be used for compensation purposes. Under existing State law, stem cell research is funded through the Empire State Stem Cell Trust Fund.¹⁶⁰ ESSCB is the governing body that is authorized to determine how these funds are distributed.¹⁶¹ This section will provide a history of the legislation that led to the development of the Trust Fund and ESSCB as well as a description of how ESSCB is designed.

The New York State Budget for the 2007-2008 fiscal year contained provisions that established the Stem Cell and Regenerative Medicine Support Program in the Department of Health.¹⁶² This was achieved through the implementation of Title 5-A of Article 2 of the Public Health Law.¹⁶³ Although lawmakers allocated \$600 million to be spent on stem cell research initiatives through the Empire State Stem Cell Trust Fund, the legislation did not specify how the money would be spent.¹⁶⁴ Rather than allocating the funds directly, the legislation created the Empire State Stem Cell Board (ESSCB), which is responsible for this duty.¹⁶⁵ ESSCB is authorized to adopt bylaws to direct how grants are awarded.¹⁶⁶ ESSCB is comprised of a funding committee and an ethics committee that work together and are authorized to provide grants to research and development activities in stem cell related fields.¹⁶⁷ ESSCB is prohibited from granting funds to be used for the purpose of human reproductive cloning research.¹⁶⁸

ESSCB's ethics committee and the funding committee each

¹⁵⁹ *Id.*

¹⁶⁰ N.Y. PUB. HEALTH LAW § 265-a (1) (McKinney 2010).

¹⁶¹ *Id.*

¹⁶² Sponsor's Memorandum, N.Y. State Assemb. A. 4308-C (N.Y. 2007).

¹⁶³ PUB. HEALTH § 265-a (1).

¹⁶⁴ N.Y. STATE FIN. LAW § 99-p (1), (3) (McKinney 2010) (establishing the "empire state stem cell trust fund" and providing that "[m]onies of the fund when allocated, shall be available . . . for funding stem cell research"); FCLNY Petition, *supra* note 14, at 1-2.

¹⁶⁵ PUB. HEALTH § 265-a (1).

¹⁶⁶ *Id.* § 265-a (3).

¹⁶⁷ *Id.* § 265-a (1).

¹⁶⁸ *Id.* § 265-a (2).

consist of 13 members who are appointed by various State leaders.¹⁶⁹ The ethics committee makes general recommendations regarding the scientific, medical, and ethical standards that should be observed in making funding decisions.¹⁷⁰ One of the ethics committee's specific duties is to make recommendations about "safe and ethical procedures for[] obtaining materials and cells for research."¹⁷¹ The funding committee is responsible for determining how to distribute funds based on the advice of the ethics committee.¹⁷² NYSTEM's bylaws establish procedures that each committee must adhere to when making funding related decisions. One provision requires independent scientific review panels to review funding applications.¹⁷³ The panels must be composed of biomedical research experts who do not live or work in New York State.¹⁷⁴ The bylaws also codify a code of ethics that board members must adhere to, which is designed to prevent conflicts of interest between board activities and board members' outside activities.¹⁷⁵

C. Legal Action against the ESSCB Decision

On October 9, 2009, the Feminists Choosing Life of New York (FCLNY) filed suit on behalf of New York taxpayers against ESSCB to enjoin ESSCB's compensation program, which the organization refers to as the "payment for eggs program."¹⁷⁶ This organization's mission is to promote pro-life, pro-woman philosophies based on "the belief that all people . . . have a right to live without violence from conception to natural death."¹⁷⁷ The petitioners advanced several arguments to claim that the payment for eggs program is contrary to New York Law. First, they argued that the program authorizes funds to be used to

¹⁶⁹ *Id.* §§ 265-b(1), 265-c(1).

¹⁷⁰ *Id.* § 265-c(2)(a).

¹⁷¹ *Id.* § 265-c(2)(b).

¹⁷² See *Frequently Asked Questions About NYSTEM*, NYSTEM, http://stemcell.ny.gov/nystem_faq.html (last visited Jan 8, 2011).

¹⁷³ NYSTEM, BYLAWS OF THE EMPIRE STATE STEM CELL BD. § VI.1.a.1 (2007), available at http://stemcell.ny.gov/about_esscp_bylaws.html[hereinafter NYSTEM BYLAWS].

¹⁷⁴ *Id.* at § VII.1.

¹⁷⁵ See *id.* at § VIII.1 (requiring compliance with N.Y. PUB. OFF. LAW §§ 74(2), 78 (McKinney 2010)).

¹⁷⁶ FCLNY Petition, *supra* note 14, at 2–6, 10–11.

¹⁷⁷ *Mission Statement*, FEMINISTS CHOOSING LIFE OF N.Y., <http://feministchoosinglife.org> (last visited Jan. 8, 2011).

support research involving human reproductive cloning.¹⁷⁸ Second, they argued that the program is an unauthorized use of taxpayer funds because it allows a private entity to determine how tax dollars are spent.¹⁷⁹ Third, the petition argued that the program does not sufficiently ensure informed consent and other necessary safeguards to protect donors and that the compensation provides significant monetary incentive to engage in the risky program.¹⁸⁰

In support of the human reproductive cloning argument, the petition points out that Public Health Law § 265-a (2), which established the Empire State Stem Cell Board, expressly prohibits grants from being provided to any source that will directly or indirectly use the funds for research involving human reproductive cloning.¹⁸¹ According to the petitioners, the payment for eggs program disregards this prohibition and allows taxpayer funds to be used for human reproductive cloning purposes because it does not contain any “standards, guidelines or safeguards to ensure that the funding of research on stem cells line derived from using compensated-for eggs will not be ‘directly or indirectly utilized for research involving human reproductive cloning.’”¹⁸² In support of this argument, the petition cites the use of SCNT as a method of deriving stem cells for research purposes.¹⁸³ As previously mentioned, SCNT is the first step in the reproductive cloning process. According to the petition, “the resulting human clone produced using SCNT for research purposes is no different from a clone produced for any other purpose – including ‘human reproductive purposes.’”¹⁸⁴ “The only difference is one of subjective intent for the clone’s end purpose.”¹⁸⁵

Next, the petitioners’ claim that the resolution allows tax dollars to be used to pay women to donate eggs and that the ESSCB is not authorized to spend or administer state monies or adopt resolutions.¹⁸⁶ Specifically, the petition states that:

New York State is the first U.S. State to use taxpayer money to

¹⁷⁸ FCLNY Petition, *supra* note 14, at 3, 6.

¹⁷⁹ *Id.* at 2–3.

¹⁸⁰ *Id.* at 2, 9–10.

¹⁸¹ *Id.* at 2.

¹⁸² *Id.* at 6.

¹⁸³ *Id.* at 6–7.

¹⁸⁴ *Id.* at 7.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 6, 8.

pay women who donate their [oocytes] . . . for stem cell research and has no precedent to guide it in terms of the liability it is assuming for any future medical costs and other injuries suffered by women donors.¹⁸⁷

The petition continues by claiming that the use of taxpayer funds for the payment for eggs program is unauthorized because it allows ESSCB to grant these funds, and ESSCB is a “private organization that is not affiliated with, or accountable to, New York State.”¹⁸⁸ The petition, therefore, argues that the funding mechanism created through Public Health Law § 265-a (1) is unconstitutional and contrary to New York State Law because it authorizes ESSCB to operate and expend state money without legal authority.¹⁸⁹

Alternatively, the petition claims that the payment for eggs program does not ensure “informed consent and other necessary safeguards to protect women” from the “health risks involved in the egg extraction [process].”¹⁹⁰ Specifically, it cites risks such as “ovarian hyper-stimulation, clotting disorders, kidney damage, ovarian twisting, pulmonary embolism, damage to future reproductive ability, and stroke.”¹⁹¹ It is alleged that the long-term risks of egg donation are unknown, and, therefore, New York State taxpayers are exposed to “future open-ended liability for injuries suffered by women who participate in the . . . Program.”¹⁹² Additionally, the payment provisions included in the program serve as inducement for women to participate.¹⁹³

D. Analysis of the Feminists Choosing Life Petition

The arguments presented by the Feminists Choosing Life of New York’s petition are merely attempts to prevent embryonic stem cell research under the guise of legitimate concerns about cloning, the use of tax revenues, and protecting women from exploitation. The concerns raised in these arguments are either overstated or easily rectifiable.

The argument that the payment for eggs program authorizes

¹⁸⁷ *Id.* at 2.

¹⁸⁸ *Id.* at 2–3.

¹⁸⁹ *Id.* at 4, 8.

¹⁹⁰ *Id.* at 9.

¹⁹¹ *Id.*

¹⁹² *Id.* at 9–10.

¹⁹³ *Id.* at 9.

funds to be used to support research involving human reproductive cloning is inaccurate. New York State law prohibits cloning related research, and ESSCB's method of oversight ensures that no prohibited stem cell research is conducted with the use of state funds.¹⁹⁴ The FCLNY claim that the ESSCB's donation program allows funding for reproductive cloning merely because the resolution fails to explicitly include procedural safeguards to prevent such funding.¹⁹⁵ This claim fails to take ESSCB's general oversight procedures into account. The ESSCB's bylaws specifically implement safeguards to prevent the funding of reproductive cloning research.¹⁹⁶ ESSCB's funding committee is specifically charged with ensuring that "[n]o grants shall be made available directly or indirectly for use in research involving human reproductive cloning."¹⁹⁷ The oocyte donation resolution that ESSCB adopted does not need to explicitly prohibit human reproductive cloning research because this prohibition is a premise of ESSCB's oversight scheme. Furthermore, the resolution is a relatively short statement that is silent about many aspects of the program.¹⁹⁸ It is not necessary for the resolution to detail all aspects of the program because its implementation must be done pursuant to ESSCB's bylaws.

Furthermore, FCLNY's petition mistakenly groups all SCNT research in the same category. SCNT research encompasses both therapeutic cloning and reproductive cloning; both of these distinctly different research procedures rely on SCNT as the initial procedure for producing cloned blastocysts.¹⁹⁹ After this initial procedure, therapeutic cloning and reproductive cloning have little, if anything in common. SCNT created blastocysts used for therapeutic cloning research are used for harvesting stem cells, while SCNT created blastocysts used for reproductive cloning are transferred to the uterus and allowed to develop into a living organism.²⁰⁰ Simply because the two procedures rely on the same initial step does not mean that the benefits of

¹⁹⁴ N.Y. PUB. HEALTH LAW § 265-a (2) (McKinney 2010).

¹⁹⁵ FCLNY Petition, *supra* note 14, at 7.

¹⁹⁶ NYSTEM BYLAWS, *supra* note 173, at § VI.1.a.8.i.

¹⁹⁷ *Id.*

¹⁹⁸ See ESSCB Resolution, *supra* note 8.

¹⁹⁹ See *Glossary of Stem Cell-Related Terms*, INT'L SOC'Y FOR STEM CELL RESEARCH, <http://www.isscr.org/public/glossary.htm> (last visited Jan. 8, 2011) (explaining that both reproductive and therapeutic cloning use SCNT).

²⁰⁰ *Id.*

therapeutic cloning should be sacrificed. While purchasing a gun may be the first step in committing a crime, gun sales are not made illegal as a means of crime prevention.²⁰¹

FCLNY's argument that the program is an unauthorized use of taxpayer funds has an equally weak foundation. ESSCB is a statutorily created entity whose membership is composed of appointed individuals.²⁰² Entities designed in this fashion are commonly used to determine which projects will receive government funding. The New York State Energy Research and Development Authority (NYSERDA), the New York State Foundation for Science, Technology and Innovation (NYSTAR), the New York State Higher Education Services Corporation (HESC), and Industrial Development Agencies (IDAs) are all statutorily created entities that are used to allocate state resources to research endeavors and projects.²⁰³ NYSTAR is authorized to grant state funds to various high tech research endeavors and projects.²⁰⁴ NYSERDA is authorized to use state funds to fund research endeavors and projects aimed at "help[ing] New York meet its energy goals."²⁰⁵ HESC and IDAs are similarly authorized to distribute state funds to education related endeavors and economic development activities, respectively.²⁰⁶ It is common for a state to create entities such as these to determine how public funds are best invested. ESSCB is one such example. Validating the FCLNY's argument that such entities are unauthorized to distribute public funds would require a fundamental shift in the way public funds are distributed.

The petition's final argument that the program does not sufficiently ensure informed consent and other necessary safeguards to protect donors, and that the compensation provides significant monetary incentive to engage in the risky program

²⁰¹ See N.Y. PENAL LAW § 400.00 (2) (McKinney 2010) (describing the different types of licenses that can be acquired to legally possess a firearm in New York).

²⁰² N.Y. PUB. HEALTH LAW §§ 265-a (1), 265-b (1), 235-c (1) (McKinney 2010).

²⁰³ N.Y. PUB. AUTH. LAW §§ 1850, 1850-a (McKinney 2010) (establishing NYSERDA); N.Y. EXEC. LAW §§ 209 (4), 209-p (1)-(2) (McKinney 2010) (establishing NYSTAR); N.Y. EDUC. LAW §§ 652 (1), 653 (1)-(2) (McKinney 2010) (establishing HESC); N.Y. GEN. MUN. LAW §§ 850, 858 (McKinney 2010) (providing for the establishment of local IDAs).

²⁰⁴ *About NYSTAR*, NYSTAR, www.nystar.state.ny.us/about.htm (last visited Jan. 8, 2011).

²⁰⁵ *About NYSERDA*, NYSERDA, www.nyserda.org/About/default.asp (last visited Jan. 8, 2011).

²⁰⁶ EDUC. § 652 (1)-(2); GEN. MUN. §§ 852, 858.

are also invalid because these concerns are addressed by the resolution. The resolution specifically relies on ASRM's guidance to ensure that compensation levels do not rise to the level of being coercive.²⁰⁷ Currently, ASRM states that payments in excess of \$5,000 for donations require justification, and compensation above \$10,000 is inappropriate.²⁰⁸ Furthermore, these guidelines also require strict informed consent procedures.²⁰⁹ The ASRM guidance documents stress the critical role that institutional review boards play in assuring that informed consent is secured from oocyte donors.²¹⁰ These guidelines require clinicians to provide prospective donors with information about the purpose, nature, risks, and benefits of the procedure.²¹¹

V. DISCUSSION

ESSCB's resolution conflicts with similar regulations in other jurisdictions that prohibit compensation for research donations. Despite this divergence, the practice of offering such compensation is more responsible from an ethical viewpoint than compensation for reproductive donation. While the immediate risks to oocyte donors are the same regardless of donative purpose, reproductive donation has many unintended consequences that are absent from research donation. Research donations pose fewer risks and offer greater benefits to society than reproductive donations. Additionally, the current paradigm used for most oocyte donations relies on discriminatory practices to determine who may donate and who may not. Allowing compensation for research donations through the same methods employed by ESSCB's resolution levels the playing field for all potential oocyte donors. This part will explain the unintended consequences of reproductive donations with a particular focus on its eugenic and discriminatory effects.

²⁰⁷ ESSCB Resolution, *supra* note 8.

²⁰⁸ *Financial Compensation of Oocyte Donors*, *supra* note 125, at 305.

²⁰⁹ Ethics Comm. of the Am. Soc'y for Reprod. Med., *Informed Consent and the Use of Gametes and Embryos for Research*, 82 FERTILITY & STERILITY S251, S251-52 (2004), available at www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/informedconsent.pdf.

²¹⁰ *Id.* at S251.

²¹¹ *Id.* at S251-52.

A. *The Unintended Eugenic Impact of Reproductive Donation*

The negative impact associated with the unintended consequences of reproductive donations is not limited to directly affecting donors; reproductive donations negatively affect the consumers of the fertility industry, taxpayers, and society as a whole. One troubling impact of research donations is the eugenic effect that is occurring as a result of the United States' booming fertility industry. Contrary to reproductive donations, eugenics is not a concern with research donations.

The fertility industry has boomed over the past two decades; it is now valued at more than \$3 billion.²¹² The industry that has emerged reflects the notions of laissez-faire oversight and capitalism that are prevalent in the United State's history and traditions. Unlike other nations, which have implemented strict rules to monitor the fertility industry, the United States has been reluctant to enact similar oversight.²¹³ The commercialized fertility market that exists today is designed to profit from infertile individuals as well as individuals who seek services for family planning purposes.²¹⁴

The reproductive donations that form the foundation of the fertility industry raise several eugenic issues. Oocyte recipients look for certain characteristics in a donor in order to maximize the possibility that their offspring will have some of the same features.²¹⁵ Recipients frequently look for donors with similar genetic characteristics to increase the likelihood that the resulting child will resemble the gestational mother.²¹⁶ This form of selectivity has a slight eugenic impact because donors with specific traits are chosen so that their genes will proliferate.²¹⁷

²¹² Suter, *supra* note 106, at 217–18; see Shannon Brownlee, *Designer Babies*, WASH. MONTHLY, March 1, 2002, at 25, available at <http://www.washingtonmonthly.com/features/2001/0203.brownlee.html> (stating that there were only 30 fertility clinics in the U.S. in 1985, and there were more than 300 a decade later).

²¹³ Velikonja, *supra* note 5, at 481–82, 493.

²¹⁴ See *id.* at 488–89 (“High prices combined with an absence of health insurance coverage put financial pressure on the infertile consumers to conceive as quickly as possible and with multiple children at once.”).

²¹⁵ See Oberman, *supra* note 6, at 382–83.

²¹⁶ *Altruism and Intermediation*, *supra* note 32, at 221; see also Oberman, *supra* note 6, at 382–83 (discussing the desire of recipients to produce a child who will resemble the non-biological parent).

²¹⁷ See Oberman, *supra* note 6, at 382–85 (stating that some couples seeking oocyte donors advertise for “particularly gifted female students,” hoping these genes will produce similarly gifted offspring).

While it is understandable that infertile women may desire to find a donor with traits similar to their own, such as the same race, ethnicity, hair color, and eye color, the availability of fertility services is not limited to infertile individuals.²¹⁸ The slippery slope of eugenics is demonstrated by the availability and ever-increasing use of fertility services by individuals who are capable of reproducing naturally.²¹⁹

The method used to assist in family planning, known as pre-implantation genetic screening, involves picking and choosing embryos to transfer into a carrier's uterus based on the characteristics that the embryo will eventually manifest.²²⁰ Pre-implantation genetic screening allows couples to choose which embryos to transfer into the recipient's uterus and which to discard.²²¹ These decisions are made after the screening process reveals specific characteristics of the embryo. While couples can utilize screening to ensure that the resulting offspring will not have certain genetic diseases, they can use the same screening process to ensure that only embryos with other specific traits are transferred.²²² For example, they can choose to transfer only embryos of a certain gender.²²³ If, for example, the couple only wants male embryos transferred the female embryos will be discarded. As technology advances, it will be possible to determine more specific characteristics of embryos.²²⁴ To the extent that intelligence is genetic, couples will be able to ensure that only embryos with the potential for high intelligence are

²¹⁸ See *id.* at 382, 386 (discussing other genetic services such as screening for fetal abnormalities in pregnant women over 35).

²¹⁹ See *Altruism and Intermediation*, *supra* note 32, at 214–15; see also Katz, *supra* note 63, at 112–13 (explaining that increased genetic data collection could create stratified genetic profiles in the population).

²²⁰ See *Altruism and Intermediation*, *supra* note 32, at 214–15; see also Katz, *supra* note 63, at 112–13 (explaining how genetic screening can prevent an embryo with a genetic defect from being implanted); see also Oberman, *supra* note 6, at 386 (explaining how prenatal screening can detect the presence of a genetic abnormality).

²²¹ *Altruism and Intermediation*, *supra* note 32, at 214–15.

²²² See *id.* (explaining that some fertility centers allow couples to choose embryos based on genetic traits such as hair color, eye color, and ethnicity).

²²³ *Id.* at 215.

²²⁴ See Elyse Whitney Grant, Note, *Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach*, 61 HASTINGS L.J. 997, 1005 (2010) (“Although the technology does not yet allow selection for a broad array of nontherapeutic traits, with the advance of DNA microarray . . . the ability to select such traits remains only a matter of time.”).

transferred.²²⁵ Although fertile women may use their own gametes for pre-implantation genetic screening, donated oocytes commonly undergo pre-implantation genetic screening to allow recipients to choose the characteristics of their offspring.²²⁶ These “designer babies” demonstrate the eugenic impact of reproductive donation.²²⁷

The compensation method used in reproductive donations exacerbates the eugenic effects of assisted reproduction because women with certain traits are commonly coerced to donate as a result of substantial monetary offers.²²⁸ Women with particular characteristics have been offered sums over \$100k to donate their oocytes.²²⁹ In 1999, the average rate for oocyte donors was between \$2500 and \$5000.²³⁰ Today the national average for oocyte donations is \$4200.²³¹ Donors with traits that are considered rare or desirable, however, are able to demand a premium for their oocytes. For example, donors with certain ethnic backgrounds such as those of Jewish descent, donors with Ivy League educations or high SAT scores, donors with exceptional athletic ability, or donors with physical attractiveness are typically offered a premium for their oocytes.²³² The market for these “golden eggs” is largely unregulated and open to any party willing to buy or sell them at

²²⁵ See Jeffrey R. Botkin, *Ethical Issues and Practical Problems in Preimplantation Genetic Diagnosis*, 26 J.L. MED. & ETHICS 17, 22 (1998), available at <http://www.hum.utah.edu/~bbenham/2510%20Spring%2009/Botkin-PGD%20issues.pdf> (inferring that once scientists can refine PGD to identify specific traits, couples can select the embryos containing the traits of their choice, including intelligence).

²²⁶ See Grant, *supra* note 224, at 1003–04; *Donor Egg IVF Program: Frequently Asked Questions*, GENETICS & IVF INST., http://givf.com/donoregg/faq_sdonoregg.cfm (last visited Jan. 8, 2011).

²²⁷ See Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUS. J. HEALTH L. & POL'Y 245, 246, 258–59 (2008) (“The chosen embryos are not simply those that will survive early childhood without suffering and death, but rather the ones that will have genetic attributes the parents strongly desire.”).

²²⁸ See Oberman, *supra* note 6, at 383 (inferring that couples in search of oocyte donors will pay more money to donors with more desirable genetic traits, hoping their offspring will possess these desirable traits).

²²⁹ See, e.g., *Altruism and Intermediation*, *supra* note 32, at 222 (“[A] fashion photographer launched a scheme to auction off the eggs of models on the internet for prices as high as \$150,000.”).

²³⁰ *Id.*

²³¹ Almeling, *supra* note 25, at 37; see also Krawiec, *supra* note 2, at 66 (reporting that egg donor compensation can vary from \$4217 to \$5200 on average).

²³² *Altruism and Intermediation*, *supra* note 32, at 222.

any chosen price.²³³

The free market system that is used for reproductive donations is inherently coercive in a manner that New York's research donation program is not. Under the free market system that governs reproductive donation, oocyte buyers are free to offer donors as much or as little compensation as they desire.²³⁴ When reproduction is the intended purpose of oocyte donation, women with golden eggs may be offered compensation that is hard to refuse. Ads offering students sums of \$100k or more for oocytes are frequently published in college newspapers at Ivy League schools.²³⁵ Given the expense of attending college incurred as a result of tuition and living expenses, it is not difficult to see why a student may be pressured to respond to such an advertisement.

Contrary to the unregulated system that allows extremely high payments to reproductive donors, ESSCB's donation program controls the level of compensation offered to donors. The program uses the ASRM's standards as guidance, which sets standards to ensure that oocyte donation is done in an ethically responsible manner.²³⁶ The ASRM also recommends donation programs to implement counseling and information disclosure procedures for potential donors.²³⁷ Furthermore, ASRM guidelines suggest that donors who experience complications as a result of donation receive coverage for the medical costs associated with those complications.²³⁸

²³³ See Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 108–09, 123, 126, 139 (2001) (stating that the U.S. currently has an unregulated, “market-driven system of oocyte donation”).

²³⁴ See *Altruism and Intermediation*, *supra* note 32, at 234–35, 238–39 (explaining how one role of intermediaries is to help match buyers and sellers according to their “levels of willingness and ability to pay”).

²³⁵ See Krawiec, *supra* note 2, at 66 (stating that sums as high as \$150,000 have been reported); *Altruism and Intermediation*, *supra* note 32, at 222 (noting donor recruitment through Ivy League school newspapers with offers up to \$50,000); *Financial Compensation of Oocyte Donors*, *supra* note 125, at 306 (“[S]ums [exceeding] \$50,000 . . . have been offered in print and Internet advertisements placed by couples or entrepreneurs seeking oocytes from women with specific physical, cultural, or other characteristics and intellectual or other abilities.”).

²³⁶ See *ASRM Guidelines*, *supra* note 117, at S36–37; *Financial Compensation of Oocyte Donors*, *supra* note 125, 306–09.

²³⁷ *ASRM Guidelines*, *supra* note 117, at 42.

²³⁸ *Id.* at 40.

B. The Unintended Discriminatory Impact of Reproductive Donation

In addition to the eugenic impact of reproductive donations, the current oocyte donation paradigm used in the United States is discriminatory against women who do not fit specific, often superficial, criteria. Under the current donation scheme, many women who have viable oocytes are unable to donate due to factors that are based solely on the potential marketability of individual characteristics.²³⁹

The recruitment method used at OvaCorp, a prominent egg donation entity,²⁴⁰ highlights the fact that women are frequently shut out from the donation system based on factors that are unrelated to their gametes. In discussing OvaCorp's recruitment criteria, a donor manager used a donor application to explain the factors that would contribute to that applicant being chosen over other potential donors.²⁴¹ The manager noted that a particular applicant was desirable due to her attractive appearance, age, education, and skin tone; even though she was Hispanic, her hue was Caucasian enough to pass as white.²⁴² This discussion of the applicant's physical attributes shows the discriminatory factors that are used to choose oocyte donors. Overall, only a small percentage of donor candidates are determined to be worthy of making a donation.²⁴³

Unlike the discriminatory practices used to solicit reproductive donations, research donations are solely concerned with obtaining stem cells rather than the extraneous attributes of donors. ESSCB's resolution allows more women to participate in donation regardless of their characteristics.

²³⁹ Krawiec, *supra* note 32, at 215, 222–23 (noting that infertile couples often demand and are willing to pay more for eggs with select preferable donor traits including education, athletic ability, ethnic background, and hair and eye color). From this it can be construed that this selection process constructively excludes and discourages women with less marketable traits from donating.

²⁴⁰ See Almeling, *supra* note 25, at 47 (“OvaCorp is one of the oldest and largest commercial egg agencies in the country . . .”); Rene Almeling, *Why do you Want to be a Donor?: Gender and the Production of Altruism in Egg and Sperm Donation*, 25 *NEW GENETICS AND SOC'Y* 143, 147–48 (2006) (“OvaCorp was one of the first [egg donation agencies] in the country to expand its assisted reproduction services to include egg donation.”).

²⁴¹ Almeling, *supra* note 25, at 48–49.

²⁴² *Id.*

²⁴³ *Id.* at 52 (noting two agencies that have an eighty percent rejection rate).

VI. RECOMMENDATIONS

Oocyte donation is clearly a valuable process. Whether a donor is providing an infertile couple the chance to start a family, or providing the materials to develop treatments for debilitating diseases, she is conferring benefits to those to who rely on her gift. Through proper oversight, the risks posed to donors can be minimized so that the demand for oocytes can be properly met.

Despite the significant problems that are traceable to reproductive donation that are not inherent to the research donation process, jurisdictions have tightly regulated research donations, while allowing reproductive donation to prosper unchecked. Some locations, such as the state of California have chosen a bright line approach to the question of donor compensation, allowing compensation for reproductive donations but not donations that are intended to solely be used for research.²⁴⁴ Some jurisdictions have banned all forms of payment to oocyte donors.²⁴⁵ These prohibitions have created a shortage of available oocytes in these jurisdictions, demonstrating the importance of allowing donors to be fairly compensated regardless of the intended use of the oocyte.²⁴⁶ Without enacting drastic prohibitions and restrictions, jurisdictions can enact proper oversight measures to ensure that the risks of all oocyte donations are minimized, regardless of the oocyte's intended use.

Jurisdictions can take steps to ensure that women are properly informed of the risks inherent to the donation process. California has led the way in ensuring proper notification from the initial stages of donation. In October 2009, California became the first state to require oocyte solicitations to include a notice disclosing some of the potential risks associated with egg donation.²⁴⁷

²⁴⁴ See *supra* note 124 and accompanying text.

²⁴⁵ Krawiec, *supra* note 2, at 62.

²⁴⁶ *Id.* at 59–62.

²⁴⁷ CAL. HEALTH & SAFETY CODE § 125325 (Deering 2010). California requires a prescribed notice to be printed on advertisements for oocyte donation which must state:

Egg donation involves a screening process. Not all potential egg donors are selected. Not all selected egg donors receive the monetary amounts or compensation advertised. As with any medical procedure, there may be risks associated with human egg donation. Before an egg donor agrees to begin the egg donation process, and signs a legally binding contract, she is required to receive specific information on the known risks of egg donation. Consultation with your doctor prior to entering into a donor contract is advised.

Id. However, this regulation only applies to reproductive donations because

Additional measures can be taken to ensure that donors are informed of the risks throughout the entire donation process. Although physicians are generally required to obtain informed consent from an individual before rendering services, physicians could be specifically required to discuss risks such as hyperstimulation with donors.

Steps can also be taken to mitigate the eugenic impact of reproductive donations. To reduce the eugenic impact of reproductive donations, legislatures can adopt guidelines such as those adopted by ASRM to place a limit on the amount of compensation that can be offered to women. Placing these restrictions would undermine the market for golden eggs because the recruitment process would be unable to offer women with desirable traits more money for their eggs. As a result, fewer women with these traits would respond to solicitations, and it would become harder for oocyte recipients to choose donor eggs based on superficial motives.

Additionally, implementing such a cap would reduce the potential for women to be unduly induced to donate. The cap would ensure that women are only compensated for the expenses incurred as a result of donation. Therefore, donation would be viewed as an altruistic means of advancing research or helping an infertile person become pregnant rather than an opportunity to make money.

Through ensuring that women are informed of the risks of oocyte donation, and by placing limits on donor compensation in general, the risks of oocyte donation can be mitigated. Until proper guidelines are codified into law, women should be compensated for their time and reasonable expenses so that both embryonic stem cell research and assisted reproduction can continue.

as previously noted, payment for research donations is prohibited under California Law. See Marcy Darnovsky, *California Warning Labels: "Donating" Eggs may be Hazardous to your Health*, BIOPOLITICAL TIMES (Oct. 13, 2009), <http://www.biopoliticaltimes.org/article.php?id=4946> (noting that California's legislation, requiring egg-donor advertisements to warn women of the risks of donating their eggs is the first of its kind in the nation); THE ADVISORY BD. CO., *Egg Donor Ads Often Offer Compensation Exceeding Industry Guidelines, Study Says*, MED. NEWS TODAY (May 13, 2010), <http://www.medicalnewstoday.com/articles/188573.php> ("In 2009, California adopted a new law requiring egg donor advertisements to include specific health risk warnings. The state already banned the sale of eggs for research purposes.").