

The Market for Egg Donation

Its Economic Inequalities & Lack of Regulation

I. INTRODUCTION

Artificial Reproductive Technology (ART)¹ was “once viewed with suspicion and skepticism,”² just as sperm donation was once viewed as an act of adultery.³ However, ART has now become a billion-dollar industry,⁴ specifically through the procedures of egg donation⁵ and in-vitro fertilization (IVF).⁶ Prior to the technological advancements in the field of artificial reproduction, infertile couples were limited in their ability to create a family to the conventional adoption arrangements. Advancements in ART, however, have made it possible for such couples to elude infertility (and the process of adoption) by introducing new methods of creating a family: for example, IVF gives couples the possibility of having biological children through the implantation of embryos fertilized outside the womb; likewise, egg donation gives couples the possibility of using “one or more eggs [which are] removed from a donor and transferred”⁷ to the infertile wife.⁸

These scientific developments embody the basic notion that procreation is, and has

¹ Assisted reproductive technologies (ART) describe a group of infertility treatment procedures that involve the extracorporeal manipulation of oocytes, embryos and sperm. Techniques include: artificial insemination, in vitro fertilization with embryo transfer (IVF-ET), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and intracytoplasmic sperm injection (ICSI). See CareAllies, *Medical Necessity Guidelines*, pg. 8 (Dec. 29, 2010, 10:00 PM), http://www.careallies.com/pdf/ex89_infertility.pdf.

² Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 298 (2009).

³ See Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1888 (2009) (donor sperm insemination was historically treated as an act of adultery on the part of the wife who had been inseminated by sperm other than that of her husband).

⁴ Suter, *supra* note 2, at 298.

⁵ The processes of ovarian hypersimulation and egg retrieval.

⁶ In vitro fertilization is an assisted reproductive technique wherein oocytes are retrieved from the ovaries and fertilized extracorporeally with subsequent embryo replacement.

⁷ Lynn M. Squillace, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMED. L. 135, 135 (2005).

⁸ The wife need not necessarily be infertile, women with genetic disorders or carriers of certain genes might also choose to use egg donation instead of their own eggs. Generally couples pick donors who resemble the wife physically and intellectually.

always been, a fundamental human drive.⁹ Perhaps “the strongest rationales for the existence of assisted reproductive technologies are the implications of procreative liberty and the social desirability of preserving the unique nature of the genetic and gestational bonds between parents and children.”¹⁰ Adoption is not only a burdensome and heavily regulated process,¹¹ but it also fails to provide the genetic or gestational bonds normally present between parents and children: for many “reproductive motivation stems in part from their perhaps narcissistic desire to pass on their genes, to use their genetic material to bring into the world a new being that shares and reflects their biological history.”¹² ART, through egg donation, allows couples to maintain the parent-child bond in a way that adoption cannot, even if the child is not genetically related to one or both of the parents.

The predominant view is that egg donation “is desirable and should be compensable”¹³ because it cures female infertility and allows women who otherwise could not bear children to do so.¹⁴ As such, a *free* market for egg donation has rapidly developed in the United States: “Egg donation is currently a \$38 million a year industry but it will continue to grow based on past usage rates, [and] current egg supply and need.”¹⁵ Egg donation has been the solution to many infertility problems. However, much controversy surrounds it due to many unresolved legal

⁹ Michelle Sargent, *Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in the United States and United Kingdom*, 4 Mich. J. Pub. Affairs 1, 2 (2007), <http://www.mjpa.umich.edu/uploads/2/9/3/2/2932559/sargent-eggdonation-final07.pdf>.

¹⁰ Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYUL REV. 107, 113 (2001).

¹¹ Naomi Chan, *Necessary Subjects: The Need for a Mandatory National Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 206 (2009).

¹² Baum, *supra* note 10, at 114.

¹³ Egg donation is an involved and time-consuming procedure. It is unpleasant, at times painful, and can have short and long-term health consequences for the donor. Donors experience medication side effects like mood swings, breast tenderness, headaches, hot flashes, vaginal dryness, fatigue, sleep problems, and body aches (Egg Donation Information Project 2006). Thus, it is easy to recognize that without a financial incentive donors would be reluctant to undergo this risky process for a stranger.

¹⁴ Ben-Asher, *supra* note 3, at 1900.

¹⁵ J. Brad Reich & Dawn Swink, *You Can't Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 ALB. L.J. SCI. & TECH. 1, 12 (2010).

issues, such as embryo status, quality control, financial costs, consumer awareness, and lack of regulations and policies monitoring the practice.

Even though the reproductive technologies market has been surrounded with controversy and debate, the market of egg donation has received little attention from the law. Many scholars argue that there is an increased need for federal regulation and look to other countries as examples,¹⁶ while others argue that current protections in the law of contracts and property are enough to protect consumers in this free market system.¹⁷ This paper analyses the market of egg donation within the United States with respect to the country's long standing constitutional right of procreative liberty, and argues that although some sort of uniform regulation is necessary to protect consumers from certain economic injustices the country's longstanding constitutional freedom will provide an impediment to such regulation. Part II of this paper introduces the market of egg donation, Part III explores the types of economic injustices and barriers the market brings forth, and Part IV describes procreative liberty and the current lack of regulations in the United States.

II. The Baby-Making Business

The baby-making market “is big business—a business in which parents pay, intermediaries profit, and surrogates, birth parents, and providers of egg and sperm ‘donate’ their products and services for prices ranging from under one hundred [sperm] to over one hundred thousand dollars [eggs].”¹⁸ Female infertility affects a great number of the population, being

¹⁶ Most scholars look at the United Kingdom where strict legislation is in place as a comparison approach. See generally Sargent, *supra* note 9.

¹⁷ See Squillace, *supra* note 7, at 146-47.

¹⁸ Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH & LEE L. REV. 203, 205 (2009).

reported that one in six couples have infertility issues.¹⁹ The advancements in ART and their greater use in curing such infertility issues have led to a booming baby-making market in which egg donation plays a central role.

In the United States, egg donation became available in the early 1980s.²⁰ “The market was originally unprofitable, limited to gift exchanges between friends and family members, and used by a limited set of infertile women.”²¹ With time however, the market became more commercial²² and today it has a broader market appeal with customers ranging from infertile or older women to gay couples.²³

“As the market for eggs grew steadily during the 1990’s, it became apparent that altruistic egg donation would not provide the market with the supply of eggs needed,”²⁴ as such there has been a rapid and significant increase in (1) the number of infertility clinics which offer such services, (2) in egg donation agencies, as well as egg brokers, and (3) lucrative financial incentives for egg donors. As the egg trade flourished, egg donation programs become more aggressive in their donor seeking practices. Egg donation transformed from a private familial matter where infertile couples brought their own donor to the clinic and where there was no financial incentive, to a less private matter where egg brokers and agencies actively seek out donors who have certain physical and intellectual qualities that match their customers’ preferences.²⁵ Egg donation agencies advertise themselves as “boutique” agencies specializing

¹⁹ *One in Six Married Couples Have Infertility Problems, Families Now Turning to Embryo Adoption* (Dec. 30, 2010, 1:29 AM), <http://www.nbcactionnews.com/dpp/news/health/one-in-six-married-couples-have-infertility-problems.-families-now-turning-to-embryo-adoption>.

²⁰ Sargent, *supra* note 9, at 2.

²¹ Krawiec, *supra* note 18, at 220.

²² See Suter, *supra* note 2, at 252 (a billion-dollar industry “which is highly privatized [and] motivated largely by profit”).

²³ Krawiec, *supra* note 18, at 220.

²⁴ Michelle Bercovici, *Biotechnology Beyond the Embryo: Science, Ethics, and Responsible Regulation of Egg Donation to Protect Women’s Rights*, 29 WOMEN’S RTS. L. REP. 193, 196 (2008).

²⁵ Suter, *supra* note 2, at 219.

in high quality service and attention, offering large databases of potential donors which cater to the couples' search for their ideal donor:²⁶ Moreover, "for a fee, the company will provide clients with access to the donor database—complete with photographs and characteristics catalogues."²⁷

The lure of the financial "reward" has created a niche for donors endowed with particular genetic characteristics and resulted "in greater price differentiation"²⁸ among donors. The compensation varies based on physical characteristics, as well as education, religion and ethnicity, athletic or artistic capabilities.²⁹ For example, a married couple advertised in campus newspapers, at schools like Harvard and Princeton, offering \$50,000 for the eggs of a student who was 5'10" or taller and who scored over 1400 on her SATs.³⁰ Advertisements, such as this one, target students, especially at Ivy League universities, and are prominently placed in student newspapers promising quick compensation and stirring controversy.

Although the financial incentive plays a great role in egg donation, it would be inaccurate to speculate that it is the sole motivating factor—a desire to help infertile couples create a family plays an important role as well.³¹ As such, there are inconsistent attitudes toward payments for egg donation. Since "[i]nfertility clinics now offer donors lucrative financial incentives to sell their eggs,"³² the arguments for regulation and altruism, rather than self-interest, are more nuanced. "For political reasons, infertility clinics assert that they compensate donors for their

²⁶ See Golden Egg Donation Inc. (Dec. 30, 2010, 1:48 AM), <http://www.goldeneggdonation.com/>.

²⁷ Baum, *supra* note 10, at 117.

²⁸ Krawiec, *supra* note 18, at 222.

²⁹ See Bercovici, *supra* note 24, at 196.

³⁰ Barbara Katz Rothman, *The Potential Cost of the Best Genes Money Can Buy*, *Chronicle of Higher Educ.*, June 11, 1999, at A52.

³¹ See Krawiec, *supra* note 18, at 214.

³² Jay A. Soled, *The Sale of Donor's Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 921 (1999).

services, rather than their eggs.”³³ Payments to donors can be coercive and exploitative, benefiting one end of the spectrum while disadvantaging the other, especially since the going rate in the US for eggs ranges from \$5,000 to \$100,000 depending upon the donor’s qualifications.³⁴ Others fear that payment for eggs and sperm will commercialize the components of human life – components that should remain intimate and personal, wholly separate from the market.³⁵ Thus, it is important to note that despite its benefits the privatization of the market for egg donation has caused several access barriers and economic inequalities for certain groups of the society.

III. Types of Economic Injustices in the Realm of ART

In any market there are economic injustices and access barriers based on issues of gender, race, class, and economic status. In the realm of ART, the most prominent barrier to accessing baby-making markets is the high cost of the procedures. “Current baby-making markets exclude lower-income individuals and couples who cannot afford IVF and embryo implantation.”³⁶ ART procedures are expensive and most health insurance plans fail to cover such treatments/procedures:³⁷

the average cost for a single-cycle IVF is roughly \$10,000-12,000 but can reach as much as \$20,000 if features such as donor gametes ... are added. And while the rate of success has grown considerably, most women need more than one cycle to accomplish pregnancy. Using an egg broker or lawyer adds more to the overall costs and couple may spend \$100,000 just to attempt to conceive.³⁸

³³ *Id.*

³⁴ Gina Kolata, *\$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES, Mar. 3, 1999, at A10; see also Classified Ad, THE STANFORD DAILY, June 8, 2006, at 19 (offering \$100,000 for “attractive, intelligent donor of East Indian decent [sic]”); *id.* At 13 (offering \$80,000 to a “special egg donor”).

³⁵ Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1061 (2006).

³⁶ Ben-Asher, *supra* note 3, at 1888.

³⁷ Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 36 (2008) (“The costs of IF are generally paid directly by the patients, as the vast majority of health insurance plans do not cover treatment for infertility”).

³⁸ Reich & Swink, *supra* note 15, at 11-12.

Thus, the baby-making market is largely inaccessible to lower-income individuals due to steep prices. Moreover, since “insurance coverage for ART is extremely limited, only half of the women with infertility seek treatment”³⁹ thus, leaving many potential “buyers” unable to enter the market. “Cost barriers to ART services disparately impact low-income couples who are primarily of color,”⁴⁰ and leaves ART “accessible largely to white, middle-to upper-class infertile couples” because it is a “private, fee-for-service” treatment.⁴¹

As a feature of free-market, unequal participation in the market of egg donation through the high cost of for services is accompanied by “providers’ discretion in deciding whom to treat.”⁴² Thus, these combined also give rise to other barriers based on minority status and marital status or sexual orientation.⁴³ Prices have gone up due to niche markets that emerge in response to consumer demand for reproductive material from donors with certain traits:⁴⁴ “Critical race theory also highlights the fact that egg donation perpetuates certain traits, namely being Caucasian and of European descent and talented in some area such as music or sports.”⁴⁵

The minority status barrier to assisted reproductive technologies exists largely, as mentioned above, due to the high cost of the procedures. However, there are other well-known factors which affect minorities, such as their socioeconomic status, lower levels of healthcare status, lower discretionary income, and a general distrust of the healthcare industry.⁴⁶ Additionally “research reveals that racial stereotyping among practitioners can cause people of color to refrain from seeking services.”⁴⁷ Barriers regarding marital status and sexual orientation

³⁹ Daar, *supra* note 37, at 36.

⁴⁰ *Id.* at 40.

⁴¹ Suter, *supra* note 2, at 283.

⁴² Daar, *supra* note 37, at 35-36.

⁴³ *Id.*

⁴⁴ Suter, *supra* note 2, at 280.

⁴⁵ Squillace, *supra* note 7, at 144.

⁴⁶ See Daar, *supra* note 37, at 38-43.

⁴⁷ *Id.* at 41.

arise because providers have discretion in choosing who to treat. But, although there are arguments on both sides of this issue, statistics are largely unavailable. The argument is that such status can influence one's access to infertility treatment because of discrimination by providers who are uncomfortable with unmarried individuals using ART.⁴⁸ There are few documented cases of such discrimination, but some research suggests otherwise: "a University of Pennsylvania study reveals that one in five treatment providers refuses treatment to unmarried women."⁴⁹ However, more information is necessary before making a compelling argument. Nevertheless, it is possible to see how some providers might refuse treatment for single women and/or gay couples.

Many scholars also point out that coercion, distorted decision making, and power imbalances also result from an unregulated infertility industry motivated by profit.⁵⁰ The leading argument is that "commodification might lead people to make decisions they would otherwise not make,"⁵¹ namely financial incentives to donors attract those who are desperate to make money. The one way lower income women can access the baby-making market is by choosing to be an egg donor in return for a fee. As such, payment to egg donors is condemned as a form of exploitation: "she might not have otherwise chosen to endure the burdensome process of taking hormones, undergoing anesthesia, and facing possible long-term health risks to retrieve the egg she would have had she not needed the money."⁵² Thus, some argue that such a result would aggravate existing inequalities by increasing the flourishing of the advantaged at the expense of the disadvantaged.⁵³ Furthermore, power imbalances also result from the socioeconomic status that

⁴⁸ See *id.* at 43-48.

⁴⁹ *Id.* at 43.

⁵⁰ Suter, *supra* note 2, at 233.

⁵¹ *Id.* at 235.

⁵² *Id.*

⁵³ *Id.*

exists between the donor and the couple paying for the process.⁵⁴ For example, factors such as unequal bargaining process and informed consent can lead to coercion and exploitation.

Moreover the “buyers” are generally in a position to exert undue influence.⁵⁵

Commodification of eggs also raises interesting legal implications of treating the body as property and about the value of life.⁵⁶ Although the baby-making markets are claiming that the payment is for the donor’s time, effort, and inconvenience,⁵⁷ the payment disparities that exist because of the particular characteristics of the donor beg to differ. A way to resolve the commodification issue is to have a uniform compensation scheme set in place, however as the following section will show regulation schemes are completely based on voluntary for participation:

the ASRM Ethics Committee has issued “compensation guidelines” of \$5,000 per donation cycle, with an exception of up to \$ 10,000 in special cases, such as an egg of very rare ancestry. Enforcement occurs through SART (the Society for Assisted Reproductive Technology), the primary member organization for assisted reproductive technology professionals in the United States, n189 whose membership accounts for eighty-five percent of U.S. fertility clinics.⁵⁸

Thus, a cap on payments to egg donors are justified to counter the argument that the “lure of large financial compensation will cause potential donors to ignore even properly disclosed health risks.”⁵⁹

Another issue pertinent to economic inequalities and unequal bargaining is that of informed consent.⁶⁰ Financial incentives can bring many lower income women to the table and the role of informed consent and full disclosure about the potential risks should play an

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Soled, *supra* note 30, at 921.

⁵⁷ *Id.* See also Baum, *supra* note 9, at 108.

⁵⁸ Krawiec, *supra* note 16, at 239-240.

⁵⁹ *Id.* at 243.

⁶⁰ See Suter, *supra* note 2, at 242.

important role. However, “existing informed consent law cannot achieve the goals of full informed consent in this context for two reasons: (1) it only requires the disclosure of a limited range of information and (2) it goes only so far in ensuring full comprehension of risks and benefits.”⁶¹ “In the fertility market there is an imperfect amount of information available to the consumer.”⁶² Egg donors should be informed about possible health risks such as ovarian hyperstimulation syndrome, bleeding, infection, and even unintentional pregnancy and the potential for secondary infertility.⁶³ Regulations regarding informed consent for such procedure regarding both donors and recipients can take away some of the unequal bargaining and coercive aspects of the baby-making market.

IV. Procreative Liberty and the Lack of Regulation

In the United States baby-making markets are “driven by consumer preferences and free of government regulation.”⁶⁴ “It is estimated that egg and sperm donations account for more than 60,000 births every year in the United States.”⁶⁵ To date the United States has been characterized by a significant lack of regulation regarding reproductive technology.⁶⁶ The nation’s general approach has been to allow the private market to regulate egg donation and to make all controls voluntary.⁶⁷ There has been extensive public debate about the use of eggs and embryos for embryonic stem cell research, but far less discussion of their use for reproductive purposes.

⁶¹ *Id.* at 244.

⁶² Brenda Reddix-Small, *Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs But Not Our Lives?*, 10 VAND. J. ENT. & TECH. L. 643, 679 (2008).

⁶³ Suter, *supra* note 2, at 242-43.

⁶⁴ *Id.* at 234. *See also* Reddix-Small, *supra* note 58, at 645.

⁶⁵ Yaniv Heled, *The Regulation of Genetic Aspects of Donated Reproductive Tissue – The Need for Federal Regulation*, 11 COLUM. SCI. & TECH. L. REV. 243, 243 (2010).

⁶⁶ Suter, *supra* note 2, at 252-53.

⁶⁷ Heled, *supra* note 65, at 248.

The unending controversies arise because non-traditional reproduction “raises profound questions about the scope of procreative liberty and family privacy.”⁶⁸ The concept of procreative liberty is that “all individuals should have the right to decide whether or not to exploit their reproductive capacity and that, absent strong justification for limiting this right, such as clearly and identifiable and tangible harms, they should have at their disposal all possible means of effectuating that choice.”⁶⁹ The reason is that “the decision whether or not to procreate is so fundamental, so personal, that its denial would be antiethical to the pursuit of life, liberty, and happiness.”⁷⁰ Procreative liberty is basically the right to be free from governmental interference and is not a “positive right to governmental assistance in the pursuit of any and all forms of reproduction.”⁷¹ Justice William O. Douglas, in *Skinner v. Oklahoma*,⁷² held that “procreation involves one of the basic civil rights of man ... fundamental to the very existence and survival of the race.”⁷³ At that time, procreation through means other than sexual intercourse was unknown – thus, his view of human conception was limited to a single scenario, however this concept has prevailed. *Skinner* declares procreation as a basic civil right, which means that the state is prohibited from interfering with a person’s ability to procreate.⁷⁴ Procreative liberty helps explain the current regulatory scheme, or lack thereof, regarding the baby-making market.

Although the market for egg donation has been around for a while and has grown into a million-dollar industry, “there is a surprisingly paucity of legislation on the matter.”⁷⁵ The

⁶⁸ John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. 1, 2 (1989).

⁶⁹ Baum, *supra* note 9, at 113-14; *see also* Robertson, *supra* note 64, at 2; *see also* Squillace, *supra* note 7, at 141.

⁷⁰ Baum, *supra* note 9, at 113-14.

⁷¹ *Id.* *See also* Daar, *supra* note 37, at 51-52.

⁷² *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁷³ *Id.* at 541.

⁷⁴ *Id.* *See also* Daar, *supra* note 37, at 51-52.

⁷⁵ Baum, *supra* note 9, at 123.

astonishing aspect about the lack of regulation of the baby-making market is that “[t]he market takes place within what is arguably the most heavily regulated economic sector in modern America—health care.”⁷⁶ Nevertheless, reproductive technologies are not closely regulated on either the state or federal level, although some states have taken a more proactive approach.⁷⁷ Generally, clinics have their own “internal regulations and policies, including donor screening criteria ... but such guidelines are variable and entirely voluntary.”⁷⁸

At the federal level, the “law imposes certain recordkeeping requirements on ART programs and laboratories performing procedures on embryos or oocytes intended for implantation via the Fertility Clinic Success Rate Certification Act (FCSRCA).”⁷⁹ However, this act only requires fertility clinics to report, on a voluntary basis, annual ART success rates and it “does not require the reporting and collection of information as to donor treatments, medical complications, or even statistics concerning the number of donors providing oocytes.”⁸⁰ “The Food and Drug Administration regulates sperm and egg donations, [only in that it] simply requires they be screened for communicable disease.”⁸¹ The National Organ Transplant Act of 1984 (NOTA) specifically prohibits the exchange of valuable consideration for any organ to be used for transplant.⁸² However, NOTA does not include human eggs under its definition of “human organ[s],” thus it does not prohibit the exchange of valuable consideration for eggs.⁸³ Most notably is the fact that “U.S. law does not require licensing or accreditation of infertility

⁷⁶ Kerry Howley, *Ova for Sale* (Dec. 30, 2010, 2:25 AM), <http://reason.com/archives/2006/10/01/ova-for-sale/3>.

⁷⁷ See Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 Am. J.L. & Med. 419, 423 (2005).

⁷⁸ Baum, *supra* note 10, at 126.

⁷⁹ Bercovici, *supra* note 24, at 199.

⁸⁰ Bercovici, *supra* note 24, at 199. See also Baum, *supra* note 10, at 124 (FCSRCA “mandates that each fertility clinic report annually its pregnancy success rates achieved annually to the Center for Disease Control and Prevention” which in turn publishes them in an annual report).

⁸¹ Sargent, *supra* note 9, at 7.

⁸² Reich & Swink, *supra* note 15, at 23-24.

⁸³ *Id.*

programs.”⁸⁴ However, most clinics do “apply for accreditation from private agencies”⁸⁵ voluntarily.

At the state level, while there is some regulation regarding donor compensation, it exists only in a few states and those restrictions vary greatly.⁸⁶ “As examples, at one end of the spectrum Louisiana specifically prohibits sale of ‘human ovum, fertilized human ovum, or human embryo’ while at the other, Virginia specifically exempts ova from its general statutory ban on the sale of ‘body part[s].’”⁸⁷ Other state statutes arguably seem to ban the sale of eggs.⁸⁸ Regarding quality control legislation, “[o]nly New Hampshire and Virginia statutorily require that gamete donors be screened, and Virginia limits screening solely to HIV.”⁸⁹ In some states, in order to “control quality of care, the state insurance coverage statutes typically require that IVF clinics conform to guideline set by the American Society for Reproductive Medicine.”⁹⁰

As already seen, the issue of informed consent plays an important role in this market and two states have taken the lead on implementing legislation specifically dealing with it: “California and New York have begun to address the issue of informed consent by implementing laws defining what an egg donor must be told before agreeing to donate, and mandating signed consent agreements.”⁹¹ Since women “seeking to donate their eggs must go through a series of physically invasive and time consuming procedures”⁹² it seems only fair that in the face of the great risks they assume full disclosure should be available. Moreover, while states generally differ as to whether egg donors may be compensated, New York went a step further and “has

⁸⁴ Ouellette et al., *supra* note 77, at 420.

⁸⁵ *Id.*

⁸⁶ Reich & Swink, *supra* note 15, at 26.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Bercovici, *supra* note 24, at 202-03 (however, several of these states “do not provide cover for IVF procedure using third-party egg or sperm”).

⁹¹ Sargent, *supra* note 9, at 7.

⁹² Bercovici, *supra* note 24, at 194.

outlawed direct payment for gametes and embryos; instead, egg donors are paid for their time and discomfort.”⁹³ States also differ regarding potential rights and liabilities of egg and sperm donors vis-à-vis the resulting child/children, however, this issue is not addressed in this paper.⁹⁴ New York and California have taken the lead for regulating the baby-making market, however, other states have been reluctant to go as far, and without some sort of uniform legislation the law will continue to greatly vary across the country.

As seen, the baby-making market is largely self-regulated and private organizations are setting the general guidelines. “The Society for Assisted Reproductive Technology (SART) is ‘the primary organization of professionals dedicated to the practice of assisted reproductive technologies in the United States.’”⁹⁵ “SART is . . . extensively involved in data collection, practice guidelines and standards, government interaction, quality assurance, and research.”⁹⁶ SART represents over 85% of the clinics practicing ART in the United States and, as of 2005, two-thirds of SART programs were privately accredited.⁹⁷

The vast amount of scholarship regarding the market of egg donation is due to the challenging questions raised about the role of the state in regulating procreation. It is undeniable that “the lack of regulation at the federal level is a direct result of U.S. emphasis on personal autonomy and the sanctity of privacy.”⁹⁸ There is a constitutional right to privacy and a basic human right to be left alone by the state in the pursuit of reproductive choices. And although artificial reproduction techniques do not “provide for all the traditional genetic and gestational relationships . . . it comes as close as possible,”⁹⁹ while one or both of the parents may not be

⁹³ Segent, *supra* note 9, at 7.

⁹⁴ Reich & Swink, *supra* note 15, at 31 *et seq.*

⁹⁵ *Id.* at 29.

⁹⁶ *Id.*

⁹⁷ *Id.* at 29-30.

⁹⁸ Ouellette, *supra* note 77, at 433.

⁹⁹ Baum, *supra* note 10, at 115.

genetically related to the parents the gestational relationship remains intact.”¹⁰⁰ The lack of regulation comes from the fact that reproduction has been and is a private and basic right of every U.S. citizen. Moreover, governmental interference in such personal matters will be seen as an intrusion on one’s rights. Justice Brennan, in *Eisenstald v. Baird*,¹⁰¹ wrote “if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁰²

V. Conclusion

The critics’ argument is that this is an industry that doesn’t want to be regulated, particularly because of high profits. However, the United States places great value and emphasis on both “individual liberty and the free market.”¹⁰³ Nonetheless, “it can be difficult for individuals to make fully informed choices in the context of healthcare.”¹⁰⁴ The “problem with the current ART marketplace is that the social costs are largely invisible,”¹⁰⁵ since there is not sufficient accurate information about its immediate or long-term effects.¹⁰⁶ As such, the argument that can still be made is that since ART is viewed as a cure for infertility, a medical issue, and since health care has historically been regulated by the state to protect the well-being of its citizens, the state can enact its own regulatory scheme. There is a significant need for improved consent laws, such as those existing in New York and California and the enactment of minimal safeguards, such as caps on compensation, in order to minimize power balances and financially coerced decision making. However, despite the fact that the free market aspect of

¹⁰⁰ *Id.*

¹⁰¹ *Eisenstald v. Baird*, 405 U.S. 438, 453 (1972).

¹⁰² *Id.* See also Daar, *supra* note 37, at 53.

¹⁰³ Ouellette, *supra* note 77, at 446.

¹⁰⁴ *Id.*

¹⁰⁵ Reddix-Smalls, *supra* note 62, at 681.

¹⁰⁶ *Id.*

egg donation creates all these issues of economic injustice as well as moral and ethical issues, and despite the fact that many advocates are calling for some sort of uniform mandatory regulation, the near future does not indicate the possibility of such uniform reform. The free market preferences are an expression of reproductive choice made free of governmental interference, which is consistent with the liberal conception of autonomy.