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# Paying Women For Their Eggs For Use In Stem Cell Research

Pamela Foohey\*

On June 11, 2009, the Empire State Stem Cell Board (“Board”), which administers the \$600 million in New York State funds allotted to stem cell research, voted to allocate a portion of those funds to compensate women up to \$10,000 for “donating” their eggs for use in stem cell research.<sup>1</sup> The Board’s decision makes New York the first state to affirmatively allow state funds to be used to compensate women for providing their eggs for use in stem cell research beyond mere reimbursement of associated medical and other expenses,<sup>2</sup> and, similarly, distinguishes it from most

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1. Statement of the Empire State Stem Cell Board on the Compensation of Oocyte Donors, [http://stemcell.ny.gov/docs/ESSCB\\_Statement\\_on\\_Compensation\\_of\\_Oocyte\\_Donors.pdf](http://stemcell.ny.gov/docs/ESSCB_Statement_on_Compensation_of_Oocyte_Donors.pdf) (last visited Mar. 12, 2010) [hereinafter Statement of Board]; New York State Stem Cell Science, Frequently Asked Questions about NYSTEM, [http://stemcell.ny.gov/nystem\\_faq.html](http://stemcell.ny.gov/nystem_faq.html) (last visited Mar. 12, 2010). Though “donation” is not an accurate term as applied to women selling their eggs (also called oocytes) for sums greater than the associated medical and other expenses, the Board’s decision and common parlance refer to such selling as a donation.

2. California permits reimbursement for certain expenses. CAL. HEALTH & SAFETY CODE § 125355 (West 2009). Massachusetts, Connecticut, Indiana, and Maryland specifically forbid compensation. 105 MASS. CODE REGS. 960.006(a) (2009); CONN. GEN. STAT. ANN. § 19a-32d(c)(3) (West 2006 Supp.); IND. CODE ANN. § 35-46-5-3 (West 2009); MD. CODE ANN. ECON. DEV. § 10-439(b) (West 2009). Louisiana explicitly prohibits the sale of eggs. LA. REV. STAT. ANN. § 9:122 (2009). Several states ban the sale of all body parts for valuable consideration. See 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, 204-06 (2008) (listing states and noting that these statutes can be read to prohibit the sale of eggs); but see Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 127 (2001) (arguing that such statutes should not be read to cover eggs because “oocytes are, for all

international countries, which either prohibit payment of any amount to women donating their eggs for research purposes or limit compensation to reimbursement for certain expenses.<sup>3</sup> In contrast, the decision aligns New York's approach with national policy concerning supplying eggs for reproductive purposes.<sup>4</sup> Indeed, New York permits payment of up to \$10,000 to women providing their eggs for reproductive purposes, and, in the United States, women of certain backgrounds and with certain physical characteristics are offered, at least initially, as much as \$50,000 and \$100,000 for their eggs.<sup>5</sup>

As expected, the Board's decision elicited divergent reactions. Proponents focused on the potential advancements

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practical purposes, replenishable"). See also Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 48 (2007) (listing states with statutes that appear to forbid "tissue sales for research purposes").

3. England allows reimbursement for reasonable out-of-pocket expenses with up to an additional 250 pounds for lost earnings. Likewise, Canada, Australia, and Singapore prohibit compensation beyond reasonably-incurred expenses. Bercovici, *supra* note 2, at 204-06; Debora Spar, Ph.D., *The Egg Trade: Making Sense of the Market for Human Oocytes*, 13 NEW ENG. J. MED. 1289, 1291 (2007); Baum, *supra* note 2, at 129. Sweden, Israel, and South Korea forbid reimbursement or compensation in any amount. Spar, *supra*, at 1291; Erika Check, *Ethicists and Biologists Ponder the Price of Eggs*, 442 NATURE 606, 606 (2006); Baum, *supra* note 2, at 129. Citing the risks of egg production and extraction, Japan bans egg donation altogether. Check, *supra*, at 606.

4. In the United States, eggs "may be sold at a 'fair price' for use in fertility programs." Loane Skene, *Recent Developments in Stem Cell Research: Social, Ethical and Legal Issues for the Future* 22 (Univ. of Melbourne, Legal Studies Research Paper No. 385), available at <http://www.lawgenecentre.org/stemcellfuture.pdf>; see also Korobkin, *supra* note 2, at 49 (noting that, "in most states, gametes are actively bought and sold for reproductive purposes"). Most international countries disallow payment of any amount or limit compensation to reimbursement, thereby aligning their payment policies. See, e.g., HUMAN FERTILISATION & EMBRYOLOGY AUTH., SEED REPORT (2005) (Eng.), available at [www.hfea.gov.uk/docs/SEEDReport05.pdf](http://www.hfea.gov.uk/docs/SEEDReport05.pdf); Lori P. Knowles, *Canada's Regulatory Oversight of Stem Cell Research*, Stem Cell Network (2009), available at <http://www.stemcellnetwork.ca/uploads/File/whitepapers/Canada-Regulatory-Oversight-of-Stem-Cell-Research.pdf> (Can.).

5. Statement of Board, *supra* note 1 (describing New York's policy as to compensation); DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 45-46 (2006) (noting that, as of 2004, amounts paid for eggs generally ranged from \$3,000 to \$8,000 per donation cycle).

in stem cell research and the inconsistency between permitting payment in the reproductive context and disallowing payment in the research context.<sup>6</sup> Opponents voiced fears that payment might unduly induce women to donate their eggs.<sup>7</sup>

Anticipating such opposition, in its written statement, the Board opined that “reasonable reimbursement coupled with other safeguards protects against [the possibility that women may be unduly influenced],” and that “a policy prohibiting reasonable payments because they may interfere with a woman’s ability to weigh the risks and benefits of donation is unnecessarily paternalistic.”<sup>8</sup> The Board further noted that in addition to “rigorous review by an institutional oversight committee, prohibition against payment of valuable consideration, and adherence to [the American Society of Reproductive Medicine (“ASRM”)]’s guidelines,”<sup>9</sup> it intended to require “full disclosure of all physical and psychological risks associated with oocyte donation,” prescribe that “informed consent be obtained through a dynamic process focused on the donor’s comprehension of the information provided,” and mandate the “availability of psychological counseling prior to donation.”<sup>10</sup>

Despite the Board’s assurances, on October 9, 2009, Feminists Choosing Life of New York (“FCLNY”),<sup>11</sup> a self-

6. See Libby Nelson, *New York State Allows Payment for Egg Donations for Research*, N.Y. TIMES, June 26, 2009, at A20; Rob Stein, *New York to Pay for Eggs for Stem Cell Research*, WASH. POST, June 26, 2009, at A04.

7. See Nelson, *supra* note 6; Stein, *supra* note 6.

8. Statement of Board, *supra* note 1.

9. *Id.* In regards to supplying eggs for reproduction or research, ASRM guidelines provide that paying “sums of \$5,000 or more require[s] justification and sums above \$10,000 are not appropriate.” Ethics Comm., Am. Soc’y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 308 (2007), available at [http://www.asrm.org/Media/Ethics/financial\\_incentives.pdf](http://www.asrm.org/Media/Ethics/financial_incentives.pdf). As to safeguards, ASRM guidelines state that “[c]ompensation should not vary according to the planned use of the oocytes . . . , the number or quality of oocytes retrieved . . . , the outcome of prior donation cycles, or the donor’s ethnic or other personal characteristics”; that entities compensating women for supplying their eggs “should adopt effective information disclosure and counseling processes”; and that entities “should ensure equitable and fair provision of [physician] services to donors.” *Id.* at 308, 305.

10. Statement of Board, *supra* note 1.

11. Feminists Choosing Life of New York, About Us, <http://www.feministschoosinglife.org/> (last visited Mar. 12, 2010).

described “pro-life feminist” organization, filed suit in New York State court to block the use of state funds to pay women who supply their eggs for stem cell research.<sup>12</sup> FCLNY argues that the compensation program “provides significant monetary inducements to women to engage in [a] painful and risky procedure, which in part disproportionately appeals to economically vulnerable women,” while “fail[ing] to satisfactorily provide for informed consent and other safeguards to ensure adequate disclosure to women of the risks of egg harvesting.”<sup>13</sup> In advancing this argument, FCLNY identifies an important difference between compensating women who provide their eggs for reproductive purposes and compensating women who supply their eggs for research purposes: for reproductive purposes, younger women with particular backgrounds are almost exclusively sought after, while for research purposes, researchers can use eggs from a diverse set of women.<sup>14</sup> This appeal to even younger and older, less educated, and poorer women makes compensating women for providing eggs to be used in stem cell research precarious: women targeted to provide their eggs for research purposes may be more likely to agree to do so without clear thought or any real choice.

This Article analyzes the Board’s decision, first outlining the aims of stem cell research, the logistics of egg production, and why payment is necessary to obtain a sufficient number of eggs for stem cell research purposes; then summarizing the arguments regarding compensation; and finally, relying on insights from those arguments, focusing on the safeguards the

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12. Verified Petition for the Petitioner, *Feminists Choosing Life of New York v. Empire State Stem Cell Board*, No. 8594/2009 (N.Y. Sup. Ct. Oct. 9, 2009), *available at* [http://www.feministschoosinglife.org/files/FCLNY\\_vs\\_State\\_Stem\\_Cell\\_Board\\_Signed.pdf](http://www.feministschoosinglife.org/files/FCLNY_vs_State_Stem_Cell_Board_Signed.pdf).

13. *Id.* at 9. For FCLNY’s additional arguments, see *id.* at 7-10.

14. *Id.* at 9 (“The [compensation program] provides significant monetary inducements to women . . . who may not meet the ‘profile’ required to receive private payments for their eggs to be used for in vitro fertilization purposes.”); see also Sarah B. Angel, *The Value of the Human Egg: An Analysis of Risk and Reward in Stem Cell Research*, 22 *BERKELEY J. GENDER L. & JUST.* 183, 197-98 (2007) (noting that “evidence suggests that . . . women who have donated for general research purposes are not inclined to participate as donors for IVF programs . . .,” that “researchers only require that the oocytes contain healthy cytoplasm,” and that “research donors’ genetic makeup is irrelevant”).

Board set out in its written statement. In evaluating the decision, this Article concludes that the Board has not crafted sufficient safeguards to protect against the possibility that women may be unduly influenced to supply their eggs, as it sought to do. Thus, the Article ends by identifying further safeguards that the Board should adopt in order to confront the full expanse of women's potential interactions with its compensation program, both as to guarding against undue influence and exploitation, and creating a program that addresses the continuing needs of the women that New York entices with large sums of money to provide their eggs.

### I. Stem Cell Research and the Need To Pay For Eggs

Stem cell research has the potential to lead to treatments and cures for an array of diseases. With stem cells, researchers can study how cells differentiate, thereby learning the causes of various diseases, then use the differentiated cells to test medical drugs and treatments, and, hopefully, eventually use the stem cells to cure diseases.<sup>15</sup> The stem cells required for such research and future treatments can come from two sources: human embryonic stem cells ("hESCs") and human adult stem cells.<sup>16</sup> Though researchers have derived stem cells adequate for research from human adult stem cells, some researchers argue that the most useful stem cells originate from hESCs and, accordingly, that research using hESCs must continue.<sup>17</sup> HESCs, in turn, come from blastocysts harvested approximately five days following fertilization. The necessary blastocysts, in turn, are created in three ways: previously as part of in vitro fertilization ("IVF") treatment and subsequently donated to be used for research purposes; specifically for research purposes by uniting human egg and sperm; and by removing the nucleus of a human egg and replacing it with the nucleus of a human body cell, thereby creating a "clonal

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15. Russell Korobkin, *Autonomy and Informed Consent in Nontherapeutic Biomedical Research*, 54 UCLA L. REV. 605, 608 (2007).

16. *Id.* at 609.

17. Lisa C. Ikemoto, *Eggs as Capital: Human Egg Procurement in the Fertility Industry and the Stem Cell Research Enterprise*, 34 SIGNS: J. WOMEN CULTURE & SOC'Y 763, 772-73 (2009); Skene, *supra* note 4, at 3-4. *See also infra* note 19.

embryo.”<sup>18</sup>

Of these three methods, the last process holds the most promise because it yields a blastocyst with genetic material matching the provider of the body cell and, thus, may be used to create individually-tailored stem cell therapies. This process, however, requires a fresh human egg, an egg necessarily extracted from a woman.<sup>19</sup> Moreover, regardless of the method used, in the initial stages of research, to create a single stem cell line, researchers estimate that they will need over two hundred blastocysts; as technology advances, researchers most likely still will need over a dozen blastocysts.<sup>20</sup> Unless researchers use blastocysts discarded following IVF treatments and subsequently donated for use in stem cell research—of which, given the number of blastocysts needed to create one stem cell line, it is unlikely enough will be donated to fulfill the needs of researchers—these blastocysts will need to be created by using human eggs. The best and only practical source for human eggs at this time is women.<sup>21</sup> Accordingly, in order for stem cell research to proceed, thousands upon thousands of eggs must be extracted from women.

Egg production and extraction is a complicated, multi-step process that brings with it a long list of restrictions and short-term and potentially long-term health risks. In brief, following

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18. Korobkin, *supra* note 15, at 609; Emily Galpern, *Beyond Embryo Politics: Women's Health and Dignity in Stem Cell Research*, WOMEN'S HEALTH ACTIVIST, May/June 2006, available at <http://www.geneticsandsociety.org/article.php?id=1999>.

19. Ikemoto, *supra* note 17, at 773; see also Elizabeth Gerber, *Recent Development in Health Law: California Limits Egg Donor Compensation in Privately-Funded Research*, 35 J.L. MED. & ETHICS 220, 221 (2007) (noting that though stem cell lines can be created without using human eggs, “the use of eggs . . . is the only method thought to have the potential ability to create ‘stem cells that are genetically matched to patients,’ which may then be used to develop replacement organs”).

20. Ronald M. Green, *Five Ethical Questions for SCNT Stem Cell Research*, 9 MINN. J. L. SCI. & TECH. 131, 137 (2008).

21. See Lori Gruen, *Oocytes For Sale?*, 39 METAPHILOSOPHY 285, 287-90 (2007) (listing the other methods by which eggs may be procured and discussing why they are not feasible alternatives); Angel, *supra* note 14, at 195-96 (describing alternatives to donated eggs for stem cell research and concluding that “because of the dearth of alternative oocyte sources, [stem cell research] will be unable to achieve its potential if compensation bans” are implemented).

a battery of ultrasounds and blood tests, a woman providing her eggs receives a three-week series of drug injections that shut down her ovaries. After her ovaries shut down, she begins a regime of ovarian-hyper-stimulating hormones. These hormones cause between ten and twenty eggs to mature in her ovaries. Following sufficient maturation, a doctor sedates the woman with light anesthesia and extracts the mature eggs by inserting a needle through the vaginal wall, into the ovary, and suctioning out the follicular fluid that contains the eggs.<sup>22</sup> Throughout this process, the woman must follow-up with a doctor repeatedly to have her hormone levels checked through blood tests and the progress of her ovaries monitored by ultrasound. Also during this process, she may not engage in unprotected sex, smoke, drink alcohol, or take drugs, prescription or otherwise, without prior permission.<sup>23</sup> In total, the woman spends approximately fifty-six hours in a “medical setting.”<sup>24</sup>

At each step of this process, the woman supplying her eggs is subject to numerous health risks. The drugs designed to shut down ovarian function suppress a woman’s natural hormone production, which may lead to “hot flashes, difficulty with short-term memory, and insomnia.”<sup>25</sup> These drugs also may cause vaginal dryness, hypertension, formation of blood clots, intestinal bleeding, fluid accumulation in the limbs, swelling of the limbs, numbness of the limbs, fatigue, depression, mood swings, chest pain, bone pain, joint pain, muscle pain, migraines, vision problems, dizziness and blackouts, nausea, vomiting, diarrhea, anemia, and thyroid enlargement.<sup>26</sup> Moreover, the FDA has not approved Lupron, the drug most often prescribed to shut down ovaries, for such

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22. Bercovici, *supra* note 2, at 194-95.

23. Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 220-21 (2009).

24. Angel, *supra* note 14, at 203.

25. Bercovici, *supra* note 2, at 195.

26. Gerber, *supra* note 19, at 221; Galpern, *supra* note 18, at 2; *Human Cloning and Embryonic Stem Cell Research After Seoul: Examination Exploitation, Fraud, and Ethical Problems in the Research: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 109th Cong. 79 (2006) (statement of Judy Norsigian, Executive Director, Our Bodies Ourselves) [hereinafter Norsigian Statement], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_househearings&docid=f:29580.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_househearings&docid=f:29580.pdf).



use. Although Lupron's "off-label" use is allowed, and despite the fact that since 2006 the FDA has received more than 6,000 complaints regarding the drug, including twenty-five deaths related to "off-label" use, little research exists about the exact short and long-term effects of its use in connection with egg extraction.<sup>27</sup>

The drugs that hyper-stimulate the ovaries may cause even more serious side effects. In addition to the relatively minor short-term side effects of mood swings, water retention, general abdominal discomfort, and ovarian swelling and cysts, hyperstimulation of ovaries can cause ovarian hyperstimulation syndrome ("OHSS"), which can result in dehydration, nausea and vomiting, kidney problems and failure, liver problems, fluid retention in the lungs, blood clots, the formation of cysts in the ovaries, and shock.<sup>28</sup> In rare instances, OHSS becomes life-threatening and requires the removal of the affected ovary or ovaries, and "can lead to stroke and 'arterial occlusion with loss of limb or death.'"<sup>29</sup> Overall, "physicians report that even moderately severe OHSS can be a 'devastating, frightening experience for a donor.'"<sup>30</sup>

Twenty to thirty-three percent of women undergoing the egg extraction process report the less severe short-term side effects.<sup>31</sup> OHSS affects about six percent of women.<sup>32</sup> The

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27. Galpern, *supra* note 18, at 2; Diane Beeson & Abby Lippman, *Egg Harvesting for Stem Cell Research: Medical Risks and Ethical Problems*, 13 REPROD. BIOMEDICINE ONLINE 573, 575 (2006).

28. Krawiec, *supra* note 23, at 221; Bercovici, *supra* note 2, at 195; Galpern, *supra* note 18, at 2; Norsigian Statement, *supra* note 26.

29. Norsigian Statement, *supra* note 26, at 81 (referencing memorandum of Dr. Suzanne Parisian). *See also* Krawiec, *supra* note 23, at 221; Galpern, *supra* note 18, at 2; John Reichard, *Stem Cell Bill Foes Warn of Egg Donation Risks*, CQ HEALTHBEAT NEWS, Apr. 10, 2007, available at <http://public.cq.com/docs/hb/hbnews110-000002487888.html> (reporting that, at a United States Senate briefing, "Jennifer Lahl of the Center for Bioethics and Culture Network, described 34 cases of arterial thrombosis she said have resulted from assisted reproductive technologies entailing ovarian stimulation. Fifteen of the cases involved strokes, three involved heart attacks, and two cases were fatal").

30. Angel, *supra* note 14, at 203.

31. Galpern, *supra* note 18, at 2.

32. Gerber, *supra* note 19, at 221. Some experts contend that implementation of prevention strategies can reduce the risk of OSHH, such as identifying women who are especially at risk of developing OSHH. Angel, *supra* note 14, at 204-05. "[Y]oung age, ovary abnormalities, low body weight, a history of allergies, and underlying thrombophilia," as well as

more serious short-term side effects of the drugs, including those associated with OHHS, affect between 0.1 and eight percent of women supplying their eggs.<sup>33</sup> For example, 1.4 in every 1,000 women undergoing ovarian hyperstimulation experience kidney failure,<sup>34</sup> and, as of 2005, five women in the United Kingdom have died of complications related to OHSS.<sup>35</sup>

Additionally, the process used to remove the mature eggs may cause bleeding and infection. During the extraction, the bowel, bladder, and nearby blood vessels may be punctured, resulting in internal bleeding that may require major abdominal surgery.<sup>36</sup> Finally, sedation by anesthesia carries risks of its own.<sup>37</sup>

The long-term health risks of shutting-down a woman's ovaries and then hyperstimulating them to produce numerous eggs remain unknown and generally unstudied. Some small, limited studies posit a link between breast, ovarian, and uterine cancer and the drugs used to suppress ovarian function and hyper-stimulate the ovaries.<sup>38</sup> Anecdotal stories of women who have undergone the production and extraction procedure later developing colon cancer at extremely young ages similarly identify a potential link between egg donation and colon cancer.<sup>39</sup> Studies also link the drugs with future infertility.<sup>40</sup>

When faced with all these restrictions and potential side

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“irregular menstrual cycles or poly-cystic ovaries” may increase the risk of developing OSHH. *Id.*

33. Galpern, *supra* note 18, at 2.

34. Bercovici, *supra* note 2, at 195.

35. Beeson & Lippman, *supra* note 27, at 575.

36. Krawiec, *supra* note 23, at 221.

37. Angel, *supra* note 14, at 209 (“Mortality risk associated with anesthesia are low and amount to less than one per 300,000.”).

38. *Id.* at 207-09; Gerber, *supra* note 19, at 221. One study found that women who were given a certain ovarian hyperstimulation drug “had 11 times the risk of developing ovarian tumours compared with the general population.” Helen Pearson, *Health Effects of Egg Donation May Take Decades To Emerge*, 442 NATURE 607, 607 (2006).

39. See *It's Time for an Egg Donor Registry and Long-term Follow-up*, 110th Cong. (2007) (testimony of Jennifer Schneider, M.D.).

40. Angel, *supra* note 14, at 205-07; Bercovici, *supra* note 2, at 195; Gerber, *supra* note 19, at 221. For a detailed analysis of the known and potential risks of egg donation, see Institute of Medicine & National Research Council, Workshop Report, *Assessing the Medical Risks of Human Oocyte Donation for Stem Cell Research*, available at <http://www.nap.edu/openbook.php?isbn=030910355X>.

effects, it is understandable why payment may be necessary. The experiences of the several states that provide funds for stem cell research demonstrate that compensation is essential in order for researchers to obtain the eggs necessary for stem cell research to proceed. Though these states provide funding for stem cell research, they prohibit compensation beyond mere reimbursement for associated medical and other expenses to women supplying their eggs for that research.<sup>41</sup> Consequently, stem cell research largely remains at a standstill because researchers do not have enough human eggs.<sup>42</sup> For example, though the Harvard Stem Cell Institute spent \$100,000 over a period of a year and a half on advertising to recruit egg donors, during that time, it did not find a single woman willing to donate her eggs. The director of the Institute explained: "We've had hundreds of calls from women who are interested in donating, but when they find out about the time, effort, and pain involved, they simply can't take the time to go forward."<sup>43</sup>

Given that stem cell research using hESCs will continue, and that it is questionable whether enough blastocysts discarded following IVF treatments will be donated to stem cell research for such research to advance without creating additional blastocysts, this need to pay women for supplying their eggs for stem cell research to proceed creates a dilemma: the process of egg extraction is so time-consuming and painful and comes with so many risks that in order for researchers to have a sufficient number of eggs, payment seems necessary, but the process is so time-consuming and painful and comes with so many risks that the amount of payment necessary to persuade women to provide their eggs has the potential to create situations in which women are unduly induced or exploited<sup>44</sup> into supplying their eggs or agreeing to the process

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41. See *supra* note 2 and accompanying text.

42. Emily Singer, *Human Therapeutic Cloning at a Standstill: A Lack of Human Eggs Has Created a Major Roadblock in One of the Most Promising Areas of Stem-Cell Research*, TECH. REV., Oct. 9, 2007, available at <http://www.technologyreview.com/Biotech/19488/>.

43. *Id.*

44. If an inducement is undue, "the inducement . . . impairs, not just influences, judgment, so that 'the offered good leads to poor judgment which makes [a person] take unnecessary, unreasonable, and excessive risks of harm,'" or the inducement is coercive. Gruen, *supra* note 21, at 295, 297. Coercion is "an extreme form of influence by another person that completely controls a person's decision." J.P. Bentley & P.G. Thacker, *The Influence of*

without sufficient understanding of the risks involved. It is this dilemma that opponents and proponents of compensation primarily have discussed since the emergence of stem cell research and that the Board confronted when it outlined its compensation policy.

## II. Arguments Regarding Compensation

In order to evaluate the Board's safeguards, it is important to understand the arguments of opponents and proponents of compensation, which the Board attempted to balance when it crafted its decision. This section summarizes those arguments; unless otherwise indicated, this section recounts the opinions of commentators and not my own. The main arguments regarding compensating women who provide their eggs for stem cell research divide into two categories: (a) arguments about undue inducement and exploitation, and (b) arguments about commodification.

### A. *Undue Inducement and Exploitation*

First, analogizing to live organ donation, opponents of compensation argue that the underlying risks of egg production and extraction are so serious and unknown that allowing compensation would create an undue incentive to submit to a high-risk procedure without a concomitant personal benefit beyond the payment.<sup>45</sup> In the context of most medical research, donors anticipate receiving a direct medical benefit from their donation within their lifetime, either for themselves or for a loved one. Likewise, when women provide their eggs for reproductive purposes, they may receive a discount on the cost of their reproductive therapies from which they hope to receive

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*Risk and Monetary Payment on the Research Participation Decision Making Process*, 30 J. MED. ETHICS 293, 293 (2004). In contrast, and acknowledging that "[t]he concept of exploitation, its meaning, and its appropriate application" are debated heavily, as a "minimal understanding," essentially, "an individual exploits another individual if one of them has something the other needs and stands in a powerful relationship over the latter, and uses that relationship and the fact that he or she has something the subordinate needs, to take unfair advantage of the less powerful individual." Gruen, *supra* note 21, at 293.

45. Gerber, *supra* note 19, at 221.

a direct medical benefit or they may benefit in knowing that a child may be born from their provision, possibly to someone they know. In contrast, stem cell research is far from producing any analogous benefit: at this point, researchers will use eggs for research only and not for stem cell therapies.<sup>46</sup> Considering this lack of direct benefit beyond the payment, opponents fear that conflicts of interest will cause researchers to misrepresent the risks of egg extraction or neglect to obtain informed consent, or that the norms of the doctor-patient relationship, in which the patient's care is the doctor's primary concern, will be violated such that doctors discount or do not attend to the health of women supplying their eggs.<sup>47</sup>

Opponents of compensation further argue that only by prohibiting payment and other "inducements" will women truly be able to consent to the egg extraction procedure.<sup>48</sup> Opponents cite the experience of women with a research lab in South Korea. In 2004, Dr. Hwang Woo Suk became the first person to successfully clone a human embryo and extract a stem cell line from that cloned embryo. Shortly before the announcement, reporters discovered that Dr. Hwang had either paid women in violation of South Korea's ban on compensation or recruited women directly from his lab to donate the eggs he used to create the stem cell line.<sup>49</sup> Opponents contend that Dr. Hwang compelled these women to give their eggs with money and promises of continued employment.<sup>50</sup> Similarly, in the wake of the recent financial crisis, fertility clinics in the United States reported a surge in women inquiring about egg donation for reproductive purposes. In some instances, women's husbands

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46. David Magnus & Mildred K. Cho, *Issues in Oocyte Donation for Stem Cell Research*, SCIENCE, June 17, 2005.

47. See, e.g., Beeson & Lippman, *supra* note 27, at 575-77 (discussing potential conflicts of interest); Judith F. Daar, *Regulating the Fiction of Informed Consent in ART Medicine*, 1 AM. J. OF BIOETHICS 19, 19-20 (questioning "whether informed consent can ever be a practical reality in a field of medicine grounded in the trilogy of rapidly advancing technologies, emotionally charged expectations, and commercialism").

48. See Radhika Rao, *California's Stem Cell Initiative: Converting the Legal and Policy Challenges: Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1058-59 (2006).

49. *Id.* at 1059-60; see also Korobkin, *supra* note 2, at 53.

50. Rao, *supra* note 48, at 1059-60.

called the clinics themselves, “offering up their wives.”<sup>51</sup> These examples highlight concerns regarding women being pressured or exploited into supplying their eggs, and lead opponents of compensation to call for the protection of women who may agree to provide their eggs when presented with payment when they otherwise would not, especially considering that a portion of these women may be less economically advantaged than women providing their eggs for reproductive purposes and, thereby, may be enticed to the point of undue inducement by monetary incentives.<sup>52</sup>

In response, proponents of compensation assert that the substantial risks associated with, and the rigors of, egg extraction constitute the very reasons to permit payment: it is only fair that women receive compensation.<sup>53</sup> Also, if women do not receive compensation, every individual and entity involved in stem cell research but the woman providing her eggs benefits monetarily or in some other way.<sup>54</sup> According to proponents, it is precisely because a woman supplying her eggs may not see a personal benefit from stem cell research that payment is necessary.

Additionally, proponents of compensation emphasize that such non-payment may reinforce the perception that women should be willing altruistically to undergo a lengthy, painful, and risky procedure in order to advance the health and well-being of others, especially when that contribution is necessarily intertwined with reproduction. Particularly considering that the standard practice is to allow compensation to medical research subjects,<sup>55</sup> proponents worry this non-payment scheme may entrench the notion that two of women’s primary functions are reproduction and care-giving, particularly when those two align.<sup>56</sup> Simultaneously, when compared with the acceptability of paying women to provide their eggs for

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51. Melinda Beck, *Ova Time: Women Line Up To Donate Eggs – for Money*, WALL ST. J., Dec. 9, 2008, at D1.

52. Angel, *supra* note 14, at 214-15 (noting that “[o]ne written opinion in the report by President Bush’s Commission on Bioethics states that ‘financially vulnerable populations’ will be disproportionately represented among oocyte donors for research”); Rao, *supra* note 48, at 1059-60.

53. Gerber, *supra* note 19, at 221.

54. Korobkin, *supra* note 2, at 46.

55. Angel, *supra* note 14, at 200.

56. Rao, *supra* note 48, at 1061-63.

reproductive purposes, proponents also worry that a ban on compensation to women supplying their eggs for research purposes may elevate the importance of women serving as reproduction vehicles: such a ban may signal that paying women for their eggs for reproductive purposes is only fair because women, first and foremost, are innately made for reproduction and only that work deserves value.<sup>57</sup> In short, proponents contend that if payment is acceptable in the reproduction context, it should be acceptable in the research context because the procedures undergone by women providing eggs for either purpose are the same.<sup>58</sup>

As to the assertion that only the removal of monetary incentives will permit women to truly consent to supplying their eggs, proponents of compensation note that this argument extends too far. Though compensation may factor, perhaps heavily, into a woman's decision to supply her eggs or may cause a woman's husband to offer her up, the fraud in South Korea demonstrates that payment is not the only catalyst for forcing women to provide their eggs. Even when compensation is disallowed, proponents observe that women may experience intense pressure and find themselves in situations ripe for exploitation.<sup>59</sup>

Therefore, proponents stress that it is more important to provide women with adequate information about the egg extraction procedure so that they can make informed choices than to dissuade them from undergoing a risky procedure based on a theory smacking of paternalistic protection that

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57. Bercovici, *supra* note 2, at 209 ("Regulations on compensation thus must apply equally to egg donation for IVF and research, sending a message that female work is valued equally, whether it be for reproductive or research purposes."); Green, *supra* note 20, at 139 ("The view that women can be paid for eggs for reproductive but not research purposes may reflect the belief that maternally related sacrifices are somehow proper to women, whereas a commitment to science research is not.").

58. Rao, *supra* note 48, at 1065.

59. Bentley & Thacker, *supra* note 44. This study found that although monetary payment may increase willingness to participate in medical research, such payments do not "blind respondents to risk." The study notes, however, that what constitutes undue influence based on monetary incentives differs from one individual to another: "It is not the dollar amount alone that determines what is undue inducement; the impoverishment of subjects and the risk of injury from the study are also considerations." *Id.* This insight is addressed in Part III.

only when women are not distracted by money or other inducements can they make a choice about that procedure.<sup>60</sup> Permitting compensation and establishing a structure under which women can truly decide whether to supply their eggs after being presented with all the relevant information may guard against the type of exploitation experienced in South Korea: egg donation will transform from a mysterious procedure, the full logistics mostly unknown by the relevant population,<sup>61</sup> deemed something that should be agreed to through solely altruistic motivations, into a procedure openly discussed and accompanied by general practices like other medical research.<sup>62</sup> Hence, according to proponents, the key to protecting women is ensuring: (1) that they are fully informed about the risks of egg extraction, including the uncertainty of risk; (2) that potential conflicts of interests are minimized; (3) that the circumstances of each woman contemplating donation are considered to determine whether monetary or other incentives are unduly inducing her to supply her eggs; (4) that research regarding the risks is bolstered; and (5) that women are assured medical treatment during and after the egg extraction process.<sup>63</sup>

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60. See Korobkin, *supra* note 2, at 52 (“[T]he suggestion that donors are not able to make a voluntary decision when money is at issue takes on the added connotation of gender stereotype and discrimination.”).

61. See *supra* note 43 and accompanying text (demonstrating that, overall, women do not know the logistics of egg extraction). See also Reichard, *supra* note 29 (reporting on a Romanian woman who agreed to sell her eggs in order to raise money for her wedding, who then spent fourteen days in intensive care because of complications with the extraction process, but who refused to tell her doctors that she had undergone egg extraction seemingly because she viewed admitting she had sold her eggs as shameful).

62. See Rao, *supra* note 48, at 1065-66 (noting that by “denying [women] any right to receive compensation or otherwise share in the profits [of stem cell research], . . . the rubric of privacy [is invoked]. . . . The problem is that privacy . . . provides no power to control the body part . . .”).

63. See, e.g., Bentley & Thacker, *supra* note 44 (commenting on the variability of undue inducement); John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1504 (2008) (proposing “greater attention to informed consent, clinical practice, and coverage of medical care in the case of injury”); Spar, *supra* note 3, at 1290 (discussing the need for research).



B. *Commodification*

Second, opponents of compensation declare that permitting payment will lead to the commodification of women and of human life. In the context of egg donation for reproductive purposes and surrogacy, some feminists argue that “in this nonideal world of ours, treating women like anonymous fungible breeders objectifies them and recreates subordination.”<sup>64</sup> Likewise, opponents claim that compensating women for supplying their eggs for stem cell research objectifies them by “translat[ing] women’s bodies and their physiological processes into a product,” thereby turning women and their reproductive material into chattel, diminishing the value of the individual generally, and violating conceptions of personhood.<sup>65</sup> Paying a woman for her eggs also amounts to paying for a bodily intrusion, which similarly undermines personhood.<sup>66</sup> Further, opponents assert that combining payment with donation for research purposes might create a caste system: minority women, poorer women, and women without academic or athletic achievements will become the suppliers of eggs for research while white women, economically-advantaged women, and accomplished women (according to societal norms) will continue to provide eggs for reproductive purposes.<sup>67</sup>

Proponents of compensation rebut that selling eggs, especially for use in stem cell research, does not objectify women nor does it violate conceptions of individuality and personhood.<sup>68</sup> Rather, proponents declare that restricting women’s choices through prohibiting payment serves to infantilize women, constricting their autonomy, depriving them

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64. MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS* 149 (1996).

65. Angel, *supra* note 14, at 213-14.

66. *Id.* at 214; see also Lynn M. Squillace, *Too Much Of A Good Thing: Toward A Regulated Market In Human Eggs*, 1 *J. HEALTH & BIOMEDICAL L.* 135, 143 (2005) (“Egg donation has also been viewed as the ultimate form of patriarchy, where male doctors and egg brokers encourage healthy, fertile female donors to undergo invasive procedures . . . at unknown risk to the donor.”).

67. Angel, *supra* note 14, at 215.

68. See, e.g., RUSSELL KOROBKIN, *STEM CELL CENTURY* 193 (2007) (“[S]elling a cycle of eggs does not, in itself, interfere with the ability of the seller to fulfill an essential element of personhood . . .”).

of an aspect of reproductive control, denying them a source of power and liberation, enforcing paternalism, and entrenching inequality.<sup>69</sup> Proponents of compensation emphasize that women should be allowed to make their own decisions with respect to the appropriate uses of their bodies, provided that they are fully informed of the risks of those decisions.

Further, though receiving compensation for bodily intrusion might undermine personhood, proponents note that payment for providing eggs for reproductive purposes has proceeded for many years without noticeably damaging the dignity of women. Indeed, as viewed by proponents, the sale of eggs for reproductive purposes seems more troubling than the sale of eggs for research purposes: for reproduction, women with certain attributes are preferred, which implies that certain women are worth more than other women. Contrary to fears about creating a caste system, permitting compensation in both contexts may mitigate this implication: other than genetic diversity, researchers do not prefer particular attributes.<sup>70</sup> Additionally, returning to discord between permitting payment for supplying eggs in the reproductive context and disallowing payment in the research context, proponents of compensation assert that even if extracting eggs from women may lead to their commodification and the entrenchment of their subordination, payment alone will not produce this outcome: this consequence is just as likely if altruistic donation is permitted.<sup>71</sup>

Separate from arguments regarding the commodification of women, opponents of compensation argue that embryos are equivalent to persons, and, thus, selling embryos and their component parts—including eggs—disrespects human life.<sup>72</sup> In response, proponents note that this argument is made with the ultimate goal of preventing stem cell research based on views about human life and has nothing to do with a concern for women. Accordingly, proponents contend that this argument relates to the debate about the propriety of stem cell research,

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69. Angel, *supra* note 14, at 216 (“Many commentators find that the entire argument against the commodification of oocyte donation . . . devalues women as autonomous equals.”); Squillace, *supra* note 66, at 143.

70. KOROBKIN, *supra* note 68, at 194-95; Gruen, *supra* note 22, at 301-03.

71. KOROBKIN, *supra* note 68, at 195.

72. Bercovici, *supra* note 2, at 208.

not the question of compensating women who provide their eggs for such research once it is decided that the research should proceed.<sup>73</sup>

### C. *Other Concerns*

Though not raised by opponents or proponents of compensation, as New York is the only state that permits compensation for providing eggs for use in stem cell research, concerns about creating a new form of “reproductive tourism” are warranted. In the context of other reproductive technology, instances of women traveling to jurisdictions that permit compensation are well-documented.<sup>74</sup> Similarly, allowing compensation may attract women from other states and countries to New York. Taking as given that women will supply their eggs for both reproductive and research purposes, I argue that the best solution is to recognize the potential problem and enact safeguards to ensure that all women contemplating supplying their eggs, including those traveling from other jurisdictions, are able to make free and informed choices.

Indeed, taking as given payment to women providing their eggs for reproductive purposes and the acceptability of altruistic donation for both reproductive and research purposes, I find the arguments for permitting payment for research purposes persuasive: not permitting compensation may elevate the importance of women as reproductive vehicles and entrench notions about women’s natural altruism in the areas of reproduction and care-giving. In an imperfect society where women are exploited and subordinated such that compensation becomes a concern as to their continued

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73. *Id.* at 208-09; Rao, *supra* note 48, at 1065.

74. See, e.g., Beeson & Lippman, *supra* note 27, at 577 (relating the story of “impoverished, semi-literate young Romanian factory workers . . . repeatedly sell[ing] their eggs for US \$250 to make up for the absence of employment opportunities that provide a living wage”); June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings Into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509 (2006) (discussing reproductive tourism); Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQUALITY: J. THEORY & PRAC. 277 (2009) (also discussing reproductive tourism).

exploitation and the entrenchment of their subordination, the Board's solution of paying women who supply their eggs to stem cell research may be the better alternative: it is the alternative which takes into account the reality that women already are supplying their eggs in an atmosphere of incomplete information and potential coercion,<sup>75</sup> and which posits that providing women with full information and the ability to make their own decisions, including as to accepting payment, will enhance their autonomy.

Nevertheless, perhaps the more pertinent question is whether eggs should be harvested from women for any purpose at this time: the process of egg extraction is so risky and unstudied that subjecting women to it may be improper until more research is completed. Historically, untested hormones, including diethylstilbestrol and hormone replacement therapy, have been used to abuse women's reproductive functions.<sup>76</sup> Considering this and other historical subordination of women by the sciences,<sup>77</sup> a temporary prohibition against the extraction of eggs from women who do not need to undergo the procedure to have children themselves, such as for IVF, may be warranted. Only after comprehensive research is conducted and women can truly consider what undergoing egg extraction may mean for them and women's status generally should the question of the propriety of subjecting women to egg extraction be re-apprised.

### III. Bolstering the Board's Decision

Having decided to pay women who supply their eggs for stem cell research, the Board appropriately recognized the potential for the undue influence and exploitation of these women.<sup>78</sup> In recognizing this possibility, the Board outlined safeguards that begin to incorporate some of the insights

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75. See *supra* notes 49-51 and 61, and accompanying text.

76. Beeson & Lippman, *supra* note 27, at 575.

77. See, e.g., DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN 8 (1991) ("The degree to which the principle of domination is deeply embedded in our natural sciences . . . must not be underestimated. . . . Women know very well that knowledge from the natural sciences has been used in the interests of our domination and not our liberation.").

78. See *supra* note 8 and accompanying text.

advanced by both opponents and proponents of compensation as to what may lead to or evidence undue influence and exploitation. Roughly, the Board has pledged: to pay women who supply their eggs “reasonably” and an amount less than “valuable consideration”; not to vary the amount of compensation based on the outcome of the egg extraction process, the characteristics of the woman supplying her eggs, or that woman’s prior history of producing eggs; to disclose all of the risks, including psychological risks, associated with egg extraction; to obtain informed consent by following a “dynamic process” including counseling; to provide doctors’ services to the women supplying their eggs; and, finally, to implement “rigorous review by an institutional oversight committee.”<sup>79</sup>

Though the Board’s safeguards begin to address some dangers of women’s potential interactions with its compensation program, overall, the above statements read rather murky and malleable. What constitutes “valuable consideration”? How will the “dynamic process” of informed consent proceed? To what extent will doctors’ services be provided? What constitutes “rigorous review” by the institutional oversight committee? Also, all of the Board’s safeguards address concerns raised with regard to women providing their eggs for reproductive purposes.<sup>80</sup> The Board’s compensation program, however, may appeal to a diverse group of women. Will (and how will) the institutional oversight committee’s “rigorous review” address the potential differences, on average, between women who supply eggs for reproductive purposes and women who supply eggs for research purposes? Further, given the unknown long-term risks of egg production and extraction, does (and how does) the Board intend to address the potential continuing needs of the women it encourages to undergo a risky medical procedure? The Board can strengthen its decision by clarifying these and similar questions.

Perhaps most critical to ensuring the well-being of the entire universe of women who supply their eggs, the Board

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79. Statement of Board, *supra* note 1.

80. See generally Ethics Comm., Am. Soc’y for Reprod. Med., *supra* note 9 (outlining safeguards aimed at women providing their eggs for reproductive purposes). Similarly, all of the Board’s safeguards should apply equally to women supplying their eggs for reproductive purposes.

should clarify “valuable consideration” beyond paying a woman less than \$10,000 per egg extraction procedure. What constitutes valuable consideration such that the compensation creates undue inducement will vary based on the circumstances of the woman supplying her eggs.<sup>81</sup> A college or graduate student<sup>82</sup> who intends to use the money to pay student loans may conceptualize \$10,000 much differently than a woman who intends to use the money to feed her children or pay for housing. Likewise, a woman who earns around minimum wage, about \$15,000 per year,<sup>83</sup> and who anticipates few future increases in income, will view \$10,000 much differently than a college-educated woman in her twenties or early-thirties who foresees a lifetime of career advancement. In the context of surrogacy, for which women are paid on average about \$10,000 and which similarly raises concerns about class and race-based exploitation,<sup>84</sup> some surrogacy agencies and contracts prescribe that the woman contemplating acting as a surrogate must make a minimum income or be above a certain wealth line in order to become a surrogate.<sup>85</sup> The Board should implement a similar rule. This rule will distinguish those women whose financial situations create a substantial likelihood that being compensated thousands and thousands of dollars to provide their eggs will lead them to discount the risks of egg extraction so greatly that they cannot be said to have made a real choice.<sup>86</sup> Though not all women falling below the minimum income or wealth line

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81. See *supra* note 59 and accompanying text.

82. See, e.g., Angel, *supra* note 14, at 198 (discussing the characteristics of women sought to provide eggs for reproductive purposes).

83. Effective July 24, 2009, the federal minimum wage is \$7.25 per hour. Fair Labor Standards Act, 29 U.S.C. § 206(a)(1)(C) (2006).

84. CATHARINE A. MACKINNON, *SEX EQUALITY* 1193-94, 1205 (2d ed. 2007).

85. See LORI ANDREWS, *BETWEEN STRANGERS* 64-65 (1989); Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 TENN. L. REV. 135, 215 (1992). Special thanks to Professor Catharine MacKinnon for noting this parallel.

86. See Gruen, *supra* note 21, at 303 (positing that if \$5,000-\$15,000 was “routinely offered to women of color in exchange for oocytes, it is much more likely that significant problems with exploitation and undue influence would surface”). These women also may withhold important medical information, the disclosure of which would prohibit them from undergoing the egg extraction procedure. See HUMAN FERTILISATION & EMBRYOLOGY AUTH., *supra* note 4, at 13.

will discount the risks of egg extraction so severely, such a rule will serve as a proxy for the undue influence against which the Board has pledged to protect. Moreover, given that the egg extraction procedure is risky and understudied and that the women providing their eggs to stem cell research are unlikely to see a direct medical benefit—and thereby can be posited to be providing their eggs solely for the advancement of science, or, more likely, the money<sup>87</sup>—potentially precluding some women who are not being unduly influenced from supplying their eggs in exchange for preventing other women from agreeing to egg extraction without making a real choice seems a reasonable tradeoff, at least until the risks of egg extraction are better understood.<sup>88</sup>

In addition, as to informed consent and the disclosure of the risks associated with egg extraction, studies demonstrate that how egg “donation” is presented to women upon first contact impacts their ongoing perceptions of the risks of the egg extraction procedure.<sup>89</sup> Thus, it is important that when a woman initially contacts an entity affiliated with New York’s compensation program, she be given an accurate description of the egg extraction procedure and all the possible associated risks prior to a discussion of compensation. Medically-trained personnel should take the initial call so that any questions about the procedure and the risks are answered immediately. Following this call, the woman should receive a standardized written information pamphlet, which will allow her to contemplate its contents before she meets anyone in-person: first hearing about the procedure and its risks in-person may

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87. See *supra* notes 42 & 43, and accompanying text.

88. Such concerns are especially poignant given that egg production and extraction necessarily involve an invasive medical procedure that shuts down and then stimulates a woman’s reproductive functions. See *supra* notes 25-27, and accompanying text.

89. See, e.g., Carson Strong, *How Should IVF Programs Handle Initial Disclosure of Information to Prospective Ovum Donors?*, 1 AM. J. OF BIOETHICS 23, 23-24 (2001) (discussing the results of a “study evaluating the thoroughness with which infertility programs provide information about the risks of ovum donation when first contacted by prospective donors”); Gregory Stock, *Eggs For Sale: How Much is Too Much?*, 1 AM. J. OF BIOETHICS 26, 26 (2001) (noting that the same study “suggest[s] that many egg-donation agencies offer limited, perhaps ever disingenuous risk information during preliminary phone calls from prospective egg donors” and that this “might influence some of these potential donors to behave differently had they gotten more detailed risk information up front”).

pressure the woman into agreeing to the procedure.<sup>90</sup> This pamphlet should summarize, clearly and honestly, the risks of egg production and extraction, including the fact that the risks are generally unknown and unstudied, using plain language, such as stating that women can and have died from OHSS rather than vaguely noting that OHSS can be “life-threatening.” In connection with egg donation for reproductive purposes, the New York State Department of Health provides a guidebook for women contemplating egg donation entitled *Thinking of Becoming an Egg Donor*?<sup>91</sup> The Board can tailor this pamphlet for stem cell research, perhaps changing the wording so “supply” or “provide” eggs replace the inapt “donor” and “donation.”

Once a woman meets in-person about supplying her eggs, three counseling sessions should be required as part of the “dynamic process” of informed consent: one with a doctor to discuss the medical procedure and its risks; another with a psychologist to discuss the potential psychological effects of egg extraction, including the psychological effects of providing eggs to stem cell research, for which the woman will receive no direct benefit and for which the woman’s eggs may be used in unforeseeable ways;<sup>92</sup> and a third with a patient advocate to discuss the woman’s decision-making process to supply her eggs. This patient advocate should engage the woman in a conversation about why and how she decided to supply her eggs, discussing with the woman whether she appreciates all the consequences of her decision and whether she is discounting the risks of the procedure because of financial or other concerns,<sup>93</sup> thereby potentially eliciting information about the woman being unduly influenced into providing her eggs. For example, this conversation may uncover that the woman’s husband is demanding she supply her eggs and that

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90. See Strong, *supra* note 89, at 24-25 (additionally noting that an in-person meeting involves a time commitment that may make a woman more likely to agree to the procedure).

91. N.Y. STATE TASK FORCE ON LIFE & THE LAW, THINKING OF BECOMING AN EGG DONOR?, *available at* <http://www.health.state.ny.us/publications/1127.pdf>.

92. See Ikemoto, *supra* note 17, at 775.

93. See Ethics Comm., Am. Soc’y for Reprod. Med., *supra* note 9, at 307 (suggesting similar).



she would not do so but for the pressure.<sup>94</sup> To further guard against undue influence, if someone calls on a woman's behalf, perhaps inquiring about how much she can make for providing her eggs, information about that person and the nature of the inquiry should be recorded and given to the patient advocate. Together with the initial provision of the pamphlet, these three sessions will provide a woman contemplating supplying her eggs with comprehensive information and sufficient time to consider that information, guarding against the making of a rash decision based on incomplete information (potentially a proxy of undue influence) to provide her eggs when confronted with the possibility of earning thousands of dollars.

All of these interactions, from the initial phone call through the in-person meetings and the egg extraction, should occur with people and entities unaffiliated with the researchers who will use the supplied eggs: researchers who need eggs to conduct their research unintentionally might downplay the risks of egg extraction.<sup>95</sup> Likewise, to prevent situations akin to the scandal in South Korea, situations in which a woman may feel pressured (and thereby may be exploited) by a familial or employment relationship into providing her eggs, a woman who has a relationship with the researchers who will use her eggs or the doctors who will extract her eggs should be prohibited from undergoing egg extraction.<sup>96</sup> To insulate the patient advocates' interaction with women, thereby allowing women to talk freely with them, the patient advocates should be unaffiliated with the doctors and counselors attending the women.

Additionally, the Board should allocate a portion of its funds to conducting research about the demographic and

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94. See *supra* note 51 and accompanying text. In this regard, a patient advocate may uncover domestic violence, especially considering that domestic violence increases in times of financial strain and that financial strain may cause a husband to demand that his wife supply her eggs in order to relieve that strain. See, e.g., Peter C. Alexander, "Herstory" Repeats: *The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571, 579-80 (noting the link between financial difficulties and domestic violence). Accordingly, patient advocates should have adequate knowledge to direct women to domestic violence support services.

95. See Ikemoto, *supra* note 17, at 775 (discussing standards created by the California Institute for Regenerative Medicine, which impose similar requirements).

96. See Gruen, *supra* note 21, at 304 (suggesting similar safeguards).

socioeconomic composition of the women it compensates to provide their eggs. Such research will generate needed information about the backgrounds of women who supply their eggs for stem cell research. This information can be used, perhaps by the “institutional oversight committee,” to tailor the “dynamic process” of informed consent to the needs and educational level of the women interacting with it, thereby ensuring that the women contemplating supplying their eggs make fully informed decisions.<sup>97</sup>

Further, if at any time during egg production the woman wants to stop the procedure, she should be allowed to do so without repercussions: she should be paid proportionally for the part of the procedure she fulfilled, and she should be offered all the continuing medical and other care women who complete egg extraction are given. Considering the potential for long-term risks arising from egg extraction, after the extraction, the woman should be offered continuing no-cost medical care for both physical and psychological needs caused by undergoing the procedure, including suggested follow-ups to assess her ongoing condition and to gather data for research about the effects of egg production and extraction.<sup>98</sup> Individuals and entities affiliated with this care should be unassociated with the researchers who intend to use the supplied eggs and with the doctors who extracted the eggs, both groups of whom may have a stake in ensuring that women do not report severe (or any) problems with egg production and extraction.

To reduce the potential health risks of egg extraction, the number of times a woman may undergo egg extraction should be limited to at most six, and women at higher risk for developing OHSS should be prohibited from providing their eggs or should be allowed only to supply their eggs if they do not undergo ovarian hyper-stimulation.<sup>99</sup> Indeed, in light of

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97. If the Board is concerned about creating a caste system under which certain women provide eggs for stem cell research while certain other women provide eggs for reproductive purposes, the Board can use this information to ensure that those women, on average, who provide eggs for reproductive purposes are also supplying their eggs for stem cell research.

98. See Ikemoto, *supra* note 17, at 775 (discussing standards created by the California Institute for Regenerative Medicine, which stipulate that no-cost continuing medical care must be provided).

99. See ADAM BALEN, OVARIAN HYPERSTIMULATION SYNDROME (OHSS): A

the dearth of research about the short and long-term effects of ovarian hyper-stimulation, if the Board is serious about protecting the women it entices to provide their eggs, the Board should implement a rule that no eggs may be harvested from women using ovarian hyper-stimulation. Such a rule necessarily will decrease the number of eggs extracted from each woman, but also will decrease the compensation amount reasonably due to each woman and may increase the number of women willing to provide their eggs. These effects considered together, the Board may be able to purchase a similar amount of eggs for a similar amount of money while drastically decreasing the potential risk to women by mandating that women be “naturally cycled” when they provide their eggs. Overall, though some of these safeguards may seem excessively burdensome and restrictive, considering the many risks of—and dearth of research concerning—the egg extraction procedure, the lack of direct benefit beyond payment to women supplying their eggs, and that these women do not need to undergo egg extraction but to advance stem cell research, these safeguards should be viewed as appropriate and sound, at least until more is known about the risks of egg extraction.

Finally, returning to the need for research, the Board should allocate a portion of its funds to conducting studies of the short and long-term effects (both physical and psychological) of egg production and extraction.<sup>100</sup> If the Board is prepared to advertise its compensation program to tens (perhaps hundreds) of thousands of women and to extract hundreds upon hundreds of eggs from them, as will be needed for stem cell research, then the Board should be willing to spend money to determine how the procedure is affecting the women it is paying.

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SHORT REPORT FOR THE HFEA 14 (2008) (Eng.), *available at* [www.hfea.gov.uk/docs/OHSS\\_UPDATED\\_Report\\_from\\_Adam\\_Balen\\_2008.pdf](http://www.hfea.gov.uk/docs/OHSS_UPDATED_Report_from_Adam_Balen_2008.pdf) (detailing the risk factors for OHSS, suggesting to “limit[ ] the number of stimulated cycles for a given oocyte donor to approximately six,” and generally discussing the risks of OHSS). *See also supra* note 32.

100. *See Spar, supra* note 3, at 1290 (detailing what these studies should entail).

## IV. Conclusion

Taking the payment of women who provide eggs for reproductive purposes and the allowance of altruistic donation for research as given, the Board, acting on behalf of the State of New York, has decided to compensate women for providing their eggs for stem cell research. As the first state to allow payment to women in this context, it is critical that the Board adequately and effectively monitor the consequences of its program. In addition to clarifying the safeguards it has outlined in its written opinion, the Board should bolster its decision by adding requirements that take into account the possible differences between women who provide their eggs for reproductive purposes and women who provide their eggs for stem cell research, and that address the potential continuing needs of all women who provide their eggs. Particularly, adding income or wealth requirements, and allocating a portion of its funds to conducting research about the demographic and socioeconomic composition of the women it compensates, and physiological and psychological effects of the egg extraction procedure on those women, will facilitate what should be New York's primary goals as to how women interact with its payment program: to identify and reduce the percentage of women unduly induced or exploited into providing their eggs, thereby allowing women to exercise the fullest possible control over their bodies, and to ensure that those women who do freely provide their eggs are able to do so with the greatest possible knowledge of the risks of egg production and extraction.