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No Payment, No Procreative Liberty: The Case Against Restrictions and Prohibitions on Payment for Gametes

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I
INTRODUCTION

The widespread use of Assisted Reproductive Technology ("ART") is not a new phenomenon in the twenty-first century. Although ART is most commonly used to treat infertility,[1] it is increasingly used both to prevent the transmission of sex-linked genetic disorders to offspring[2] and to allow same-sex couples to have genetic offspring.[3] ART treatments and procedures use donor eggs, donor sperm, or embryos that have been previously frozen.[4]

Infertility is defined as the inability to achieve pregnancy after one year of unprotected intercourse.[5] Infertility affects approximately ten percent of women in the United States ages 15-44 (6.1 million),[6] and it affects approximately seven percent of all men in their reproductive age.[7] It should be noted that infertility is also a natural consequence of aging, and it is becoming ever more common among generations marked by the habit of postponing child rearing to pursue other life goals, like a career and education.[8]

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[1] *See* MEDLINE PLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001191.htm (last visited Oct. 25, 2020).
[2] John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 Case W. Res. 1, 4 (1989).
[3] *See Gamete Donation: Current Practices, Public Opinion, and Unanswered Questions*, ASRM: FERTILITY AND STERILITY, https://www.fertstert.org/article/S0015-0282(17)30305-9/fulltext (last visited Oct. 28, 2020) (explaining that as of 2017, thirty-three percent of donor sperm users were same-sex or transgender couples); *see also* LESBIAN AND GAY FAMILY BUILDING USING ASSISTED REPRODUCTIVE TECHNOLOGIES, https://www.resolvenewengland.org/2014/07/lesbian-and-gay-family-building-using-assisted-reproductive-technologies-art/ (last visited Oct. 25, 2020) (about the various options available for same-sex couples to genetically reproduce).
[4] *See* MEDLINE PLUS, https://medlineplus.gov/assistedreproductivetechnology.html (last visited Oct. 25, 2020).
[5] MEDLINE PLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001191.htm (last visited Oct. 25, 2020).
[6] INFERTILITY, https://www.womenshealth.gov/a-z-topics/infertility#:~:text=Women%20who%20can%20get%20pregnant,Control%20and%20Prevention%20(CDC) (last visited Oct. 25, 2020).
[7] Francesco Lotti & Mario Maggi, *Ultrasound of the Male Genital Tract*, HUMAN REPRODUCTION UPDATE, (July 19, 2014) https://flore.unifi.it/retrieve/handle/2158/956381/187679/HRU%20review%20Lotti%20and%20Maggi.pdf (last visited Oct. 25, 2020). This study provides a detailed analysis of male infertility research and diagnostic techniques and results.
[8] Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 612-13 (2003) ("infertility represents a natural consequence of aging, and demographers have noted a trend of deferred childbearing").

This paper will discuss the topic of payment for gametes used in ART. Although some countries have nationwide restrictions and outright prohibitions on payments for donated eggs and sperm,[9] such restrictions and prohibitions would be unconstitutional in the United States. This is because regulations restricting compensation generally reduce the availability of gametes, as people become less incentivized to donate.[10] This, in turn, dampens the ability of people to utilize ART procedures to procreate.[11] The recognized right to procreate, also known as "procreative liberty,"[12] extends to the use of ART, and placing restrictions or prohibitions on gamete compensation is an infringement on procreative liberty because they will effectively diminish any meaningful opportunity to utilize ART for procreative purposes.[13] Thus, any such regulations restricting compensation would be found unconstitutional in the United States.

Section II of this paper will encompass an overview of the procedures by which eggs and sperm are donated and other information about commonly used ART procedures. Section III will discuss the current state of regulation regarding compensation for gametes in the United States at the federal and state levels, as well as other sources of guidance in the industry. Section IV will include an overview of laws and regulations in other countries, and the impact of these countries' prohibitions and caps on compensation will be explained here, as well.

As ART continues to become a more prevalent means of procreating, it is critical that there continue to be a meaningful ability to utilize ART. As will be demonstrated by looking at the effect that restricting or banning compensation has had in foreign countries, a dearth of the bread

[9] *See infra* Section IV.
[10] *See infra* Section IV.B.
[11] *See infra* Section V.
[12] *See generally* Robertson, *supra* note 2. Procreative liberty, as used here, is described as negative right against state interference with private decisions—more specifically, the decision to bear children.
[13] ART is also used to provide eggs, sperm, and embryos for research purposes. While an argument can be made that there should not be any restrictions or prohibitions on payments for gametes used for research to ensure a ready supply of gametes to aid in the advancement of ART, the discussion of the constitutionality of the use of ART for research is beyond the scope of this paper.

and butter of ART—eggs and sperm—significantly hampers the use of ART.[14] Thus, Section V will encompass the argument that restrictions on payments for gametes is unconstitutional in the United States.

II
EGG AND SPERM DONATION FACTS AND FIGURES

Egg and sperm donors in the United States are generally compensated for their contributions and/or time and effort.[15] The amount of compensation for sperm donors is usually a fraction of that which is provided to egg donors.[16] The reasons for this stark difference in payment lie in the time, effort, expense, and risks of each donation. To better understand the arguments against restrictions and prohibitions on gamete compensation, one must first understand the egg and sperm donation processes.

A. PROCEDURES AND PAYMENT FOR EGG DONATIONS

The egg donation procedure is complex, but it can be broken down into four steps.[17] The first step is an initial consultation and screening.[18] This step includes a preliminary medical[19] and

[14] *See infra* Section IV.B.
[15] *See infra* Section III.B. As will be discussed, some states disallow payment for gametes themselves but allow compensation for the donor's time, travel costs, and other expenses, while others have no laws regulating compensation.
[16] *Compare Egg Donor Compensation*, EGG DONOR AMERICA, https://www.eggdonoramerica.com/become-egg-donor/egg-donor-compensation (last visited Oct. 25, 2020) [hereinafter EggDonorAmerica.com] (the egg donor fee typically ranges from $5000 to $10,000); *and Egg Donor Compensation*, CENTER FOR HUMAN REPRODUCTION (last updated Feb. 25, 2020), https://www.centerforhumanreprod.com/egg-donation/egg-donor-compensation/ (last visited Oct. 25, 2020) [hereinafter CenterforHumanReproduction.com] (some IVF centers compensate based on the number of eggs produced, up to $14,000, and high-demand donors are allowed to charge additional fees of $1000-$2000); *with Why Donate?*, THE SPERM BANK OF CALIFORNIA, https://donors.thespermbankofca.org/ (last visited Oct. 25, 2020) [hereinafter TheSpermBankofCalifornia.com] (sperm donors earn up to $125 for each sperm sample and can earn between $400 and $600 a month).
[17] *See The Ovum Donation Process*, EGG DONATION PROCESS FOR RECIPIENTS, https://www.ucsfhealth.org/education/egg-donation-process-for-recipients (last visited Oct. 25, 2020).
[18] *See id.*; *How Does Egg Donation Work?*, EGG DONATION, INC., https://eggdonor.com/donors/egg-donation-process/ (last visited Oct. 25, 2020).
[19] The medical evaluation includes blood tests for hormone levels, a transvaginal ultrasound, and possibly a psychological screening. *The Egg Donation Process*, EGG DONATION INC., https://eggdonor.com/donors/egg-donation-process/egg-donation-screening/ (last visited Oct. 26, 2020).

physical evaluation.[20] As far as what is mandated by the government regarding testing, the FDA requires testing for infectious diseases and screening for certain risk factors associated with the transmission of communicable diseases.[21] The second step is a more in-depth medical screening.[22] This process includes genetic tests and blood draws.[23]

The third step, synchronization and stimulation,[24] is arguably the most important and stringent of the steps. Here, the donor will begin a medication regimen, which will stimulate the donor's ovaries to produce the eggs, and it typically starts with birth control pills to synchronize the donor's monthly cycles with the intended mother's or surrogate's.[25] The donor will then administer daily injections of hormones for two to three weeks, which will stimulate the development of follicles in the ovaries.[26] These follicles contain the eggs.[27] The injections will initiate maturation, which readies the egg for the final step: retrieval.[28]

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[20] *See id*.; *Egg Donation Process*, EGG DONATION INC., https://eggdonor.com/donors/egg-donation-process/egg-donation-screening/ (last visited Oct. 26, 2020).
[21] *See What You Should Know*, U.S. FOOD & DRUG ADMINISTRATION (Nov. 5, 2010), https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/what-you-should-know-reproductive-tissue-donation (last visited Oct. 26, 2020).
[22] *Egg Donation Process*, EGG DONATION INC., https://eggdonor.com/donors/egg-donation-process/egg-donation-screening/ (last visited Oct. 26, 2020).
[23] *See id*. The blood draw will determine if the donor has any sexually transmitted diseases, HIV, hepatitis, and drug/nicotine testing. *Id*.
[24] *See id*.
[25] *See id*. Although beyond the scope of this paper, there are interesting arguments regarding the legality and ethics of payment for surrogate services. For an overview of the current state of surrogacy laws and for arguments surrounding those laws, *see generally* Austin Caster, Note, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477 (2011); Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL J.L. & PUB. POL'Y 685 (2018).
[26] *See id*. These injections include Lupron, which shuts down the donor's ovulation and may cause various side effects. *Id*. The donor will also administer hormone injections, such as Follistim, Gonal-F, or Menopur. *Id*. There is a final injection, which may either be HGC or Lupron, which will initiate the final stage of maturation and stimulate ovulation. *Id*. These injections may cause side effects that are normally mild and similar to those associated with premenstrual syndrome (PMS). *Id*.
[27] *See id*.
[28] *See id*.

The egg retrieval process lasts between twenty and thirty minutes and requires one to two hours of postoperative recovery.[29] During the operation, the donor is sedated and given pain medications, and the doctor will locate the follicles.[30] Once located, the doctor will insert a long needle into the vagina wall and into the follicles to retrieve the eggs.[31] Usually, multiple eggs will be retrieved in one go.[32]

As demonstrated by the above four steps, the egg donation process requires the donor's time, commitment to following all required regimens, and assumption of the risk of side effects. Due to the rigorous and sometimes unpleasant nature of the egg donation process, an egg donor is usually paid a large sum of money.[33] In the United States, payment ranges from $5000 to $14,000 depending on the clinic and donor.[34] Although there may exist some female donors who are motivated to donate for altruistic purposes,[35] women are most often motivated by monetary compensation.[36]

B. PROCEDURES AND PAYMENT FOR SPERM DONATIONS

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[29] *See id.*

[30] *See In Vitro Fertilization: Egg Retrieval*, MAYO CLINIC, http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/details/what-you-can-expect/rec-20206943 (last visited Oct. 26, 2020).

[31] *See id.* If the eggs cannot be retrieved through the vagina wall because the follicles are not accessible, then an incision will be made in the abdomen to retrieve the eggs. *See id.*

[32] *See id.*

[33] *See* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 66 (2009). Prices for egg donor compensation in the United States have been reported to range from $1500 to $150,000, but surveys of fertility clinics have found that the average compensation rates per donation cycle are $4217, and the Society for Assisted Reproductive Technology ("SART") has reported an average compensation rate of $5200. *See id.* Krawiec warns that these are self-reported numbers, so they must be approached with caution. *See id.* She notes, however, that these figures are the "most reliable pricing data available," and further bolstering the data's reliability is the threat of SART de-listing a clinic or agency that fails to comply with ASRM guidelines regarding compensation. *See id.* That is, the threat of being de-listed from SART's national clinic registry incentivizes SART-member clinics to report pricing data. *See id.*

[34] *See* EggDonorAmerica.com, *supra* note 15; CenterforHumanReproduction.com, *supra* note 15. Egg donors who have successfully donated in the past can usually charge higher fees. *See id.*

[35] *See* M. Elliott Neal, Note, *Protecting Women: Preserving Autonomy in the Commodification of Motherhood*, 17 WM. & MARY J. OF WOMEN & L. 611, 614 (2011) (citing Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 61-63 (2009)).

[36] *See id.* (citing Vanessa L. Pi, Note, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 382 (2009)).

The sperm donation process is much less complex, invasive, and time-consuming than the egg donation process. As mentioned above, the FDA requires basic medical screening of donors.[37] The American Society for Reproductive Medicine ("ASRM") recommends additional screenings such as age, a physical exam, semen testing, genetic testing, family medical history, psychological evaluation, and personal and sexual history.[38] The actual donation is usually done at the sperm bank, and there the donor will provide a semen sample in a sterile cup in the privacy of the bathroom or another private room.[39]

Most sperm banks pay for each ejaculate that meets the minimum sperm count.[40] Donors typically earn between $35 and $125 per donation and can earn up to $1500 a month for their sperm.[41] Similar to egg donors, most sperm donors are motivated by the promise of payment rather than altruism.[42]

The need for gamete donors will continue to increase as the use of ART in the United States becomes more popular every year. ART use has nearly doubled in the past decade.[43] Approximately 1.9% of all infants born in the United States are conceived through ART.[44] The CDC reported that over 306,197 ART cycles were performed at 456 reporting clinics in the United States in 2018, resulting in 81,478 live born infants.[45] This number will only go up in the future, as the potential demand for ART outweighs its current use.[46] Thus, society has an interest in

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[37] *See* U.S. FOOD & DRUG ADMINISTRATION, *supra* note 21.
[38] *See Sperm Donation*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/sperm-donation/about/pac-20395032 (last visited Oct. 26, 2020).
[39] *See id.*
[40] *See* TheSpermBankofCalifornia.com, *supra* note 15.
[41] *9 Ways to Make Money by Selling Your Body to Science*, BUSINESS INSIDER, https://www.businessinsider.com/ways-to-make-money-from-medical-research-and-donations-2013-12 (last visited Oct. 26, 2020).
[42] *See* EggDonorAmerica.com, *supra* note 15.
[43] *See Art Success Rates*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last updated Sept. 2, 2020), https://www.cdc.gov/art/artdata/index.html (last visited Oct. 26, 2020).
[44] *See id.*
[45] *See id.*
[46] *See id.*

ensuring a steady supply of eggs and sperm in the future, and this will generally require the availability of people who are willing and able to donate.

C. COMMON ART PROCEDURES

Two of the most prominent ART techniques are artificial insemination (AI) and in vitro fertilization (IVF).[47] AI is the process by which sperm is deposited into the fallopian tube of a woman who is ovulating.[48] This is done to maximize the chances that an egg becomes fertilized, and AI is often used to overcome the male fertility issue, which is sometimes low sperm count or impaired mobility of the sperm.[49] IVF is the process by which eggs are fertilized with sperm in the laboratory and then implanted into the uterus.[50] This process is used to overcome female fertility issues. Importantly, both techniques allow one or both of the parents to maintain a genetic tie to the resulting child.[51] This genetic tie is often the driving force behind the increasingly widespread use of ART.

III
CURRENT STATE OF COMPENSATION REGULATIONS IN THE UNITED STATES

The United States, relative to other countries, has a pronounced lack of regulation regarding the use of reproductive technology[52] and, more specifically, regarding payment for gametes. Most infertility research is not funded by the federal government, so the players in the fertility industry—physicians, researchers, and clinics—have the freedom to formulate their own policies[53] with

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[47] *See Assisted Reproductive Technology*, EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT (Jan. 31, 2017), https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/treatments/art (last visited Dec. 17, 2020).
[48] *See id.*
[49] *See id.*
[50] *See id.*
[51] *See id.*
[52] *What Policies Govern Egg Donation?*, INFERTILITY TREATMENT: AN OVERVIEW, https://web.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/eggpol.htm (last visited Oct. 26, 2020).
[53] *See id.*

respect to all aspects of ART. Whether a lack of government regulation regarding all aspects of ART is desirable is a complicated debate and requires much more information beyond what this paper can provide.

Instead, what will be discussed is whether widespread regulation specifically about compensation for gamete donors is desirable and, more importantly, constitutional. To begin to frame the answer to this important question, this section will describe the current regulations and guidance—or lack thereof—promulgated by the federal government, state governments, and other non-governmental entities.

A. THE FEDERAL (NON)REGULATORY LANDSCAPE: A BLANK CANVASS

The regulatory history of the United States regarding reproductive services encapsulates a respect for the autonomy of the doctor-patient relationship.[54] It is because of this principle, in combination with both Congress's instruction in the Fertility Clinic Success Rate Act of 1992 ("FCSRCA") to leave to the discretion of the medical doctors the proper standards, and Congress's declaration that ART is beyond the reach of the FDA and other federal agencies,[55] that the federal regulatory landscape is bare. Furthermore, authors and scholars have opined that the lack of

[54] *See* Danielle A. Vera, Note, *R-Egg-Ulation: A Call for Greater Regulation of the Big Business of Human Egg Harvesting*, 23 MICH. J. GENDER & L. 391, 406 (2016) (citing Philip M. Rosoff & Doriane Lambelet Coleman, *The Case for Legal Regulation of Physicians' Off-Label Prescribing*, 86 NOTRE DAME L. REV. 649, 659 (2011) ("This society has a strong tradition of deference to physicians' autonomy and judgement in the context of the physician-patient relationship.").

[55] 42 U.S.C.A. § 263a-2(i)(1)(2000) (Westlaw through Pub. L. No. 114-219) ("In developing the certification program, the Secretary [of the Department of Health and Human Services] may not establish any regulation, standard, or requirement which has the effect of exercising supervision or control over the practice of medicine in an assisted reproductive technology program."). The FTC also has a role in investigating deceptive claims made by healthcare providers, including ART providers. *See* Vera, *supra* note 54 at 408. The FTC has entered into multiple cease-and-desist orders after proving that there had been "unfair or deceptive practices" regarding certain providers' use of aggressive advertising practices to consumers. *See id.* This does not make a large impact on the industry's marketing practices, however, because the FTC has been able to penalize only a small fraction of the ART industry players. *See id.*

federal regulation may result from lawmakers' restricted ability due to the absence of federal funding, and lack of desire caused by complex constitutional issues, to closely regulate ART.[56]

As briefly mentioned, this restricted legislative ability may be a result of legal precedent regarding the fundamental right of procreation.[57] In fact, this very reason for the lack of federal regulation was mentioned in a report from the President's Council on Bioethics, Reproduction, and Responsibility in 2004.[58] As this report suggests, there is a complex relationship between abortion and ART due to the tiny, yet crucially important element that they share: the embryo.

The ongoing debate centers around the status of the embryo—that is, whether it should be granted personhood.[59] Granting personhood to embryos would have major implications for both abortion and ART, and more specifically IVF, because of the use and potential storage of embryos.[60] Thus, the destiny of *Roe v. Wade*, the seminal case that enshrined the pregnant woman's liberty to have an abortion free from excessive governmental interference, [61] will control

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[56] *See* Vera, *supra* note 54 at 406-07. ("A limitation on federal funding for procreative exercise leaves IVF clinics separated not only from the Congressional purse but, notably, from the federal oversight that attaches to such Congressional funding. As a result, federal regulations designed to protect women . . . have not been meaningfully applied to ART").

[57] *See* Vera, *supra* note 54 at 406-07.

[58] *See* The President's Council on Bioethics, Reproduction & Responsibility: The Regulation of New Biotechnologies 8 (Mar. 2004) (available at http://www.bioethics.gov/reports/reproductionandresponsibility/ pcbe final reproduction and responsibility.pdf) ("The 2004 report . . . listed as a probable reason for the lack of regulation regarding ART is that proposed efforts to regulate or monitor assisted reproduction are viewed by many people through the prism of Roe v. Wade . . . . Defenders of reproductive freedom want no infringement of the right to make personal reproductive decisions . . . . This situation creates a powerful disincentive for any regulation of the uses of reproductive technologies.").

[59] *See* Lauren B. Paulk, Article, *Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U.J. GENDER SOC. POL'Y & L. 781, 782 (2014).

[60] *See id* at 783. It is a common and widespread practice to fertilize multiple eggs at a time during IVF in order to increase the chances of a viable pregnancy. *See id.* Because the egg process retrieval is complex and potentially dangerous, rather than repeat the process, people choose to freeze the remaining embryos for future use. *Id.* Paulk explains that were these embryos granted personhood status, the frozen embryos could be considered people with constitutional rights, and therefore the "[d]isposal or destruction of these embryos would be tantamount to murder, potentially for both the parents and the medical personnel assisting in the IVF process." *Id.*

[61] *See generally Roe v. Wade*, 410 U.S. 113 (1973).

the ability of women to have an abortion as well as the ability of women and couples to conceive using ART.[62]

But, as *Roe v. Wade* continues to check the federal government's capacity to impinge on the right of women to make important choices about their bodies and futures, it has also disincentivized federal regulators from peripherally involving themselves in the closely connected world of ART. And as federal regulation of the ART industry is lacking overall, there is virtually no regulation with respect to compensation for gametes. Because federal law and guidance has left the states wanting, some states have attempted to fill in the gaps, and this will be the subject of the next subsection.

B. THE STATE REGULATORY LANDSCAPE: A COLORFUL CANVASS

Donor compensation is regulated in some, but not all states. There are no recognized trends among the states toward any particular type of regulatory scheme in general and with respect to compensation.[63] The states that have enacted regulations regarding the use of ART have mixed approaches.[64] Some states have passed blanket prohibitions on payments for donations involving eggs or embryos, without considering the consequences.[65] Other states, like New York, prohibit direct payment for gametes themselves, but allow for payment for the donor's time and

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[62] *See* Margaret Marsh & Wanda Ronner, *Why New Anti-Abortion Laws May Make It Harder to Conceive*, THE WASHINGTON POST (Aug. 15, 2019, 6:00AM), https://www.washingtonpost.com/outlook/2019/08/15/why-new-anti-abortion-laws-may-make-it-harder-conceive/ (last visited Dec. 15, 2020), for a discussion about the potential impact that changing abortion laws may have on the ability to conceive via ART.

[63] *See* Neal, *supra* note 35, at 619; *see also* Kitty L. Cone, *Eggs for Sale: The Scrambled State of Legislation in the Human Egg Market*, 35 UALR L. REV. 189, 189 (2012) (comparing legislation among the states).

[64] *See* THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 26 (March 2004), ch. 2, *available at* http://www.bioethics.gov/reports/ (providing a summary of state laws regarding ART).

[65] *See e.g.*, GA. Code Ann. §16-12-160 (2008) ("It shall be unlawful . . . to buy or sell, to offer to buy or sell, or to assist another in buying or selling or offering to buy or sell a human body or any part of a human body or buy or sell a human fetus or any part thereof."); LA. Stat. Ann. §9:122 (2017) ("The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited."); OKLA. Stat. Ann. tit. 10, §556 (2000) (classifying as human trafficking in children the human embryo that is at any time offered for sale or sold).

inconvenience associated with the donation,[66] yet other states allow for "reasonable" compensation without defining "reasonable."[67] Many states have not passed regulations concerning payment for gamete donations.[68] Finally, some state legislatures outlaw compensation for gametes based on the purpose of the donation. That is, they recognize a distinction between gametes donated for reproductive purposes and gametes donated for medical research, and most ban compensation for research purposes.[69]

Besides a few states' attempts at regulating certain aspects of gamete compensation, such regulations are few and far between. In any event, it is not clear how effective the laws of any one state are because those wishing to circumscribe the laws of a regulated state may simply travel to another state where there are no such regulations. Since the states as a whole are largely incapable of regulating the industry, the burden of oversight has been taken on by professional organizations, discussed next.

C. THE SELF-REGULATED ART INDUSTRY STANDARDS: AN IGNORED CANVASS

As the federal and state governments have mostly left the ART regulatory canvass blank, ART industry standards typically come from elsewhere. Professional medical societies, like the

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[66] *See* NY Fam. Ct. Act. §581-502 (McKinney 2021) ("Compensation may be paid to a donor . . . based on medical risks, physical discomfort, inconvenience and the responsibilities they are undertaking in connection with their participation in the assisted reproduction. Under no circumstances may compensation be paid to purchase gametes or embryos . . . .").

[67] *See e.g.,* Fla. Stat. Ann. § 742.14 (West 2016) ("Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted."); VA. Code Ann. § 20-156 (West 2017) (defining "compensation" for donors as "payment of any valuable consideration for services in excess of reasonable medical and ancillary costs).

[68] As of 2012, these states include Alabama, Alaska, Arizona, Connecticut, Delaware, D.C., Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* Cone, *supra* note 63 at 217-26 (listing findings of Fifty State Survey in Appendix A).

[69] *See* Vera, *supra* note 54, at 410; *see e.g.,* Mass. Gen. Laws Ann. Ch. 111L, § 8 (2005) ("No person shall knowingly and for valuable consideration purchase, sell, transfer or otherwise obtain human embryos, gametes or cadaveric tissue for research purposes. Nothing in this section shall prohibit a person from banking or donating their gametes for personal future use, or from donating their gametes to another person or from donating their gametes to research.")

American Society of Reproductive Medicine ("ASRM") and Society for Assisted Reproductive Technologies ("SART"), play a role in shaping the industry practices.[70] ASRM is a multidisciplinary organization that strives to advance the science and practice of reproductive medicine.[71] ASRM promulgates practice guidelines and ethics statements regarding ART, and it requires its members to abide by such guidelines in order to maintain membership status.[72]

The other related and major player in ART standard-setting is SART. SART is affiliated with ASRM, and it is an organization of professionals that establish and maintain standards for ART.[73] Many ART clinics in the United States are members of SART[74] and, similar to ASRM, in order to maintain membership status, SART requires that the clinics adhere to SART's standards and guidelines.[75]

Although many clinics and agencies are associated with ASRM and SART, the problem with the guidelines and standards promulgated by these organizations is that non-compliance results in nothing more than a de-listing on the organization's member-page.[76] Thus, compliance with the

[70] *See* Vera, *supra* note 54, at 411-12. In addition to disseminating guidance with respect to ART industry standards and practice, the CDC commissioned SART to collect data by implementing reporting requirements. *See id*. These reporting requirements are mandatory and require member clinics and agencies to report fertility success rates and other information under the Fertility Clinic Success Rate and Certification Act of 1992. *See id*. In 1997 the CDC, with the help of SART, was able to publish the first annual Assisted Reproductive Technology Success Rates Report, which provided statistics from 1995. *See Archived ART Reports and Spreadsheets*, CENTER FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/art/reports/archive.html (last visited Oct. 28, 2020).

[71] *See History of ASRM*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, https://www.asrm.org/about-us/history-of-asrm/ (last visited Oct. 27, 2020) (discussing the history of ASRM, including its founding, activities and achievements, journals, publications, and member groups).

[72] *See id*; *see also* Vera, *supra* note 54, at 411-12 (highlighting the fact that SART and ASRM promote standards of practice of ART to benefit patients and members of society at large, but those who do not receive these benefits are the suppliers—that is, those individuals that supply eggs and sperm for use in the ART industry).

[73] *See What is SART?*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, https://www.sart.org/patients/what-is-sart/ (last visited Oct. 27, 2020).

[74] *See id*. ("The organization represents the majority of ART clinics in the country. . . . In 2018, eighty-six percent of IVF clinics in the United States were members of SART.").

[75] *See id*. SART also reports birth outcome data from its member clinics, including likelihood and success with different treatment options, and its professionals interact with members of Congress regarding pending litigation that may have an impact on ART.

[76] *See* Krawiec, *supra* note 33, and accompanying text.

guidelines is noncompulsory, and the guidelines are often disregarded.[77] In 2000, ASRM did, in fact, promulgate compensation guidelines,[78] but as the result of a lawsuit filed against ASRM alleging a violation of anti-trust laws, ASRM was required to amend its guidelines to remove its recommended compensation amounts.[79] Therefore, even if either organization currently had guidelines regarding compensation for donors, there is no guarantee that they would be allowed under anti-trust law or meaningfully followed.

Although these professional organizations have developed respectable and principled guidelines, because the guidelines do not have binding effect on the practice of ART, particularly with regard to compensation, their impact on ART industry practices remains unclear.

IV
COMPENSATION REGULATION IN OTHER COUNTRIES

This Section will explore the much more comprehensive laws of other countries that regulate the use of ART and, more specifically, compensation for gametes. The motivating factors behind the regulation of gamete compensation in these countries include ethical concerns about the

[77] *See* Vera, *supra* note 54, at 412 (citing Michael Hiltzik, *Should We Pay Women to Donate Their Eggs for Research? No, and Here's Why*, L.A. TIMES (July 22, 2016), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-egg-donors-20160722-snap-story.html.). Vera points out that SART even admits that its guidelines are not suitable for total reliance because medical science and ethics are constantly changing. *See id*. at 413, 413 n. 176.

[78] *See* Ethics Committee of the Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 308 (2007). These guidelines stated that an oocyte donor should not be paid more than $5000 and that payment of more than $10,000 is "beyond what is appropriate." *Id*.

[79] *See* Kimberly D. Krawiec, *Egg-Donor Price Fixing and Kamakahi v. American Society for Reproductive Medicine*, AMA JOURNAL OF ETHICS, 57 (Jan. 2014), https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-05/pfor1-1401.pdf (last visited Oct. 27, 2020). The lawsuit was brought in 2011 by an egg donor on behalf of herself and other egg donors. *See id*. The suit alleged that the donor compensation guidelines were an illegal price-fixing agreement in violation of antitrust law, and that they presented a risk of anticompetitive effects—that is, product scarcity, which will drive up the price of eggs. *See id* at 58. ASRM argued that the price caps had the opposite effect—that they were, in fact, procompetitive—because "enhancing the safety and social acceptability of the egg donation process may encourage women to donate eggs and help promote the view among those affected by infertility that the use of donated oocytes is a safe and responsible treatment, thus improving the market." *Id* at 59. Ultimately, ASRM was required to amend its guidelines to remove the paragraphs that contained the compensation guidelines. *See generally Kamakahi v. Am. Soc'y for Reprod. Med. & Soc'y for Assisted Reprod. Tech.*, No: 3:11-CV-1781 JCS, 2016 U.S. District. LEXIS 186798 (N.D. Cal. Aug. 26, 2016).

exploitation of donors, particularly egg donors, and the commodification of gametes.[80] In 2004, the European Union ("EU") issued a directive to the members of the EU regarding human tissues and cells.[81] The Directive instructed Member States that they are to ensure that compensation will be limited to reasonable expenses incurred by the donor and that tissues and cells must be procured on a non-profit basis.[82]

The United Kingdom, as well as other European countries have since implemented regulations in compliance with the Directive.[83] Countries outside of the EU have also implemented regulations restricting compensation for gametes, including Canada.[84] This Section will discuss the laws of the United Kingdom and Canada, respectively,[85] and it will then explore the impact of these laws on the countries' gamete markets.[86] Understanding the impacts of compensation restrictions in foreign countries is important for understanding the impact that widespread prohibitions and restrictions on compensation for gametes might have in the United States.[87]

A. THE LAWS OF FOREIGN COUNTRIES

The laws that will be discussed here are those enacted under the United Kingdom's Human Fertilization and Embryology Act ("the HFE Act")[88] and Canada's Assisted Human Reproduction

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[80] *See* Lisa Hird Chung, Note, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT'L L. 263, 271 (2006). These ethical considerations will be addressed in Section V, *infra*.

[81] Council Directive 2004/23, art. 4, On Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells, 2004 O.J. (L102) 52 (EU) [hereinafter Directive of the European Parliament and of the Council].

[82] "Member States shall endeavor to ensure voluntary and unpaid donations of tissues and cells. Donors may receive compensation, which is strictly limited to making good the expenses and inconveniences related to the donation. In that case, Member States define the conditions under which compensation may be granted." *Id.* at art. 12; *see also* Chung, *supra* note 80.

[83] *See* Chung, *supra* note 80.

[84] *See* Chung, *supra* note 80, at 272.

[85] *See infra* Section IV.A.

[86] *See infra* Section IV.B.

[87] *See infra* Section V.

[88] *See* Human Fertilisation and Embryology Act, 1990, c. 1, 2A, 3, 4, 5-10, 41 (Eng.) [hereinafter HFE Act].

Act ("the AHR Act").[89] Both sets of laws include restrictions on payment for gametes.[90] These laws, however, are less restrictive than the laws of some other countries, which ban all aspects of compensation for gametes.[91]

The United Kingdom's HFE Act was enacted by the U.K. Parliament in part to gain control over the use and development of human embryos and to prohibit certain practices regarding embryos and gametes.[92] The HFE Act also created the Human Fertilisation and Embryology Authority ("HFEA"), the regulatory body charged with carrying out the HFE Act's provisions.[93]

The HFEA regulates clinics that offer ART-related procedures or store eggs, sperm, or embryos by inspecting all such clinics in the U.K.[94] and granting licenses that are subject to revocation.[95] The HFEA's Code of Practice, published in October of 2018, provides that centers may compensate sperm donors up to £35 per clinic visit[96] and egg donors up to £750 per cycle of

[89] *See* Assisted Human Reproduction Act, 2004, S.C., ch. 2, 5 (Can.) [hereinafter AHR Act].
[90] *See* HFE Act, *supra* note 88, at c. 12, 41; ARH Act, *supra* note 89.
[91] *See* Rebecca Lennon Baskin, Note, *Re-Evaluating Egg Donation: Why the United States Should Eliminate the Competitive Marketplace for Donated Eggs and Create Federal Regulations that Promote Informed Consent*, 19 GEO. J. GENDER & L. 571, 586-87 (2018) (describing the laws of various European countries). Examples of countries that ban compensation for gamete donation altogether include Spain, *see Regulations Governing Egg and Sperm Donation in Spain*, INVITRA, https://www.invitra.com/en/regulations-governing-egg-and-sperm-donation-in-spain/ (last visited Oct. 28, 2020), and Denmark, *see Egg Donation*, COPENHAGEN FERTILITY CENTER, https://www.copenhagenfertilitycenter.com/uk/behandlingen/gdonation.htm (last visited Oct. 28, 2020).
[92] *See* HFE Act, *supra* note 88, at c. 37. The HFE Act defines an embryo as either "a live human embryo where fertilization is complete," *id.* at § 1(1)(a), or "an egg in the process of fertilization." *Id.* at § 1(1)(b).
[93] *See* HFE Act, *supra* note 88, at c. 5-10; *see also* Chung, *supra* note 80, at 271-72
[94] *See* HFE Act, *supra* note 88, at c. 8; *see also* Chung, *supra* note 80, at 271-72 n. 51.
[95] *See* HFE Act, *supra* note 88, at c. 11. *See also* Donna M. Gitter, *Am I My Brother's Keeper? The Use of Preimplantation Genetic Diagnosis to Create a Donor of Transplantable Stem Cells for an Older Sibling Suffering from a Genetic Disorder*, 13 GEO. MASON. L. REV. 975, 980 (2006) (describing the duties of the HFEA).
[96] *See Donating Your Sperm*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, https://www.hfea.gov.uk/donation/donors/donating-your-sperm/ (last visited Oct. 28, 2020) [hereinafter HFEA Sperm Donation].

donation to cover the donor's costs.[97] No direct payments for gametes are allowed,[98] and the permitted cost-covering payments are substantially lower than that received by both egg and sperm donors in the United States.

In Canada, the AHR Act makes it illegal to purchase human gametes from donors.[99] Like in the U.K., payments are permitted for the reasonable reimbursement of the donor's expenses.[100] The penalties for violating the provisions of the AHR Act are severe. They include a fine of up to $500,000, a prison sentence of up to ten years, or both.[101]

B. THE IMPACT OF COMPENSATION REGULATION IN FOREIGN COUNTRIES

This subsection will explore the effects that the gamete compensation laws have had in various countries.[102] These effects include diminished incentives to donate gametes,[103] a corresponding reduction in the national supply of gametes,[104] and the rise of "procreative tourism"[105] due to inadequate local gamete supplies in regulated countries. All such consequences negatively impact

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[97] *See Donating Your Eggs*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, https://www.hfea.gov.uk/donation/donors/donating-your-eggs/ (last visited Oct. 28, 2020) [hereinafter HFEA Egg Donation]. In addition, the HFEA provides that "[c]enters must not accept an individual as a donor who is known (or reasonably suspected) by that center to have received or to be about to receive money or other benefits not in line with HFEA Directions." *See Payments for Donors*, CODE OF PRACTICE, Guidance note 13, https://www.hfea.gov.uk/media/2565/hfea-draft-code-of-practice-9th-edition-consultation-version.pdf (last visited Oct. 28, 2020).

[98] *See* HFEA Sperm Donation, *supra* note 96; HFEA Egg Donation, *supra* note 97.

[99] *See* HRA Act, *supra* note 89, at ch. 5(3).

[100] *See* HRA Act, *supra* note 89; *see also* Chung, *supra* note 80, at 272 n. 54 ("Receipted expenditures include medical costs and other physical care expenses, including medication, gas and maternity clothes, but exclude time away from work and family, or medical risk or inconvenience.").

[101] *See* HRA Act, *supra* note 89, at ch. 61; *see also* Françoise Baylis, *Enforcing the Assisted Human Reproduction Act* (May 2012), DALHOUSIE UNIVERSITY, https://www.dal.ca/academics/programs/undergraduate/canadian.html (last visited Oct. 28, 2020).

[102] It should be noted that these effects may also be due in part to the enactment of donor anonymity laws, which prohibit the anonymity of donor gametes.

[103] *See* Neal, *supra* note 35, at 614 ("Most anonymous [sperm] donors are motivated primarily by the promise of compensation."); *id.* at 616 ("Women undergoing the ovum donation procedure for purposes other than to create a child of their own are often motivated by monetary compensation. Many donors also state that they are motivated by the thought of helping infertile women conceive a child, but there is significant evidence that his is largely untrue.").

[104] Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 B.Y.U.L. REV. 107, 159-60 (2001) ("The empirical evidence is clear: supply does not meet demand when donor compensation is regulated.").

[105] *See* Chung, *supra* note 80, at 272 (citing B.M. Knoppers & S. Lebris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J.L. & MED. 329, 329-61 (1991)).

the meaningful opportunity to utilize ART in these countries.[106] One can conclude that similar restrictions on payment for gametes in the United States, the constitutionality of which will be discussed in the next section,[107] will result in the same consequences.

Of the most alarming consequences of regulations and prohibitions on gamete compensation is the corresponding shortages of gametes.[108] This has a particularly acute effect on the supply of eggs.[109] Women who donate eggs require financial incentives likely due to the negative aspects and risks of the egg donation procedures.[110] There is also evidence that male donors require financial incentives to donate[111] because, despite the less complex sperm donation procedure,[112] male donors still incur costs for the time, effort, and inconvenience associated with sperm donation.[113] Evidence shows that the restrictions placed on gamete compensation in the U.K. and Canada, as well as other nations, have led to shortages in the supply of both eggs and sperm,[114] so

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[106] *See generally* Baum, *supra* note 104 (discussing the impact of gamete compensation regulations on infertile couples' ability to access donors of their choice, or even donors at all, thus restricting their ability to achieve their reproductive goals through the use of ART).

[107] *See infra* Section V.

[108] *See* Chung, *supra* note 80, at 269-70 n. 42. Chung explains that "the relationship between gamete shortages and capped compensation is based on circumstantial evidence rather than a proven direct correlation," and that "there may be other factors, such as local social norms and religious beliefs, to explain a low number of gamete donors where payment is regulated." *Id.* (citing Baum, *supra* note 104, at 158-60). Despite the circumstantial nature of the correlation, like Chung and Baum, who proceeded "based on the logic and evidence that gamete supply is affected by financial incentives," *id.*, I will proceed on the same logic; *see also* Gina Kolata, *Price of Donor Eggs Soars, Setting Off a Debate on Ethics*, N.Y. TIMES, Feb. 25, 1998, at A1 (discussing the effects of a severely reduced egg supply in Japan due to the Japanese ban on paid egg donation); *American RadioWorks: The Fertility Race (Part 8), No Money for Eggs* (American Public Media radio broadcast), *available at* http://americanradioworks.publicradio.org/features/fertility_race/part8/ [hereinafter American Public Media] (discussing the necessity of imports of eggs to the United Kingdom from the United States due to the egg shortage created by the U.K. ban on paid egg donations).

[109] *See* Krawiec, *supra* note 30, at 62. Countries like the United Kingdom, Japan, and China, that have banned compensation for egg donation have subsequently encountered a lack of donors and severe oocyte shortages. *See id.* Krawiec describes this as "the true limit to women's altruistic nature." *Id.*; *see also* Kolata, *supra* note 108; American Public Media, *supra* note 108.

[110] *See supra* Section II.A.; Chung, *supra* note 80, at 269.

[111] *See* EggDonorAmerica.com, *supra* note 12.

[112] *See supra* Section II.B.

[113] *See* Chung, *supra* note 80, at 268-69.

[114] *See* Baum, *supra* note 104, at 159 n. 133 ("[C]omparisons between the United States, with its unregulated compensation, and England and Israel, with their regulated compensation, yield powerful evidence on the supply side effects of donor compensation schemes. It is also clear that within the United States compensation scheme affects supply. . . . Clearly, compensation has a direct effect on supply, but the magnitude of that effect remains

it can be inferred that less people are choosing to donate, or more people are choosing to donate less often, at least in part due to the reduced financial incentive.

"Procreative tourism," a growing phenomenon, is defined as "traveling by candidate service recipients from one institution, jurisdiction, or country where treatment is not available to another institution, jurisdiction, or country where they can obtain the kind of medically assisted reproduction they desire."[115] Another related event is the necessary importation of gametes into a country.[116] Due to the above-described shortages in supply of gametes, potential parents in the U.K., Canada, and other countries may face wait times of up to five years to access the particular gametes they desire, let alone any gametes at all.[117] These significant wait times and limited gamete selections have led to a drastic increase in procreative tourism and gamete importation in regulated countries.

Fertility clinics and gamete donors in countries with less restrictions benefit from the increased procreative tourism and gamete importation because international clients are seeking out

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unclear."); *see also* Jeff Roberts, *Allowing Compensation for Gamete Donors Will Restore Access to Fertility Care in Canada* (Apr. 1, 2019), VANCOUVER SUN, https://vancouversun.com/opinion/op-ed/dr-jeff-roberts-allowing-compensation-for-gamete-donors-will-restore-access-to-fertility-care-in-canada (last visited Oct. 28, 2020) (explaining that Canada's ban on compensation to gamete donors has contributed to the shortage of individuals willing to donate sperm and eggs, and arguing for the legality of compensation for donors in order to restore Canada's fertility market).

[115] *See* G. Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 337 (2002) (citing B.M. Knoppers & S. LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 329-61 (1991)); Chung, *supra* note 80, at 290. For the purposes of this paper, procreative tourism, in addition to encompassing the physical traveling aspect, also includes the purchase of gametes online from an outside institution, jurisdiction, or country.

[116] *See* Roberts, *supra* note 114 (explaining that gamete shortages has led to the importation of gametes from other countries).

[117] *See, e.g.*, Susan Manfield, *The Gift of Life*, ABERDEEN PRESS & J. (Aberdeen, Scotland), Oct. 5, 1999, at 13 (noting that the "desperate shortage of donors" has led to long waiting lists for oocytes); Kathleen Morgan, *Babies for Sale*, DAILY RECORD (Glasgow), Aug. 17, 1999, at 8 (noting the two-year waiting list for oocytes at a clinic in Aberdeen); Jane Draper, *IVF Donor Sperm Shortage Revealed*, BBC NEWS, Sept. 13, 2006, http://news.bbc.co.uk/2/hi/health/5341982.stm (revealing that seventy-eight of the eight-five United Kingdom clinics included in a survey reported over a six month waiting period for clients).

these foreign donors at unprecedented rates.[118] Despite this benefit to some unregulated countries, the overall effect of procreative tourism and gamete importation is undesirable.

First, the international purchase of gametes between countries allows people to circumvent the more restrictive laws of their nation, thus frustrating the purpose of those laws.[119] Second, international buyers of gametes must bear the costs of travel or importation of gametes,[120] and those couples whose reproductive time-frames are shorter than their countries' average wait period, who cannot afford such exorbitant costs, are essentially excluded from the ART market.

Finally, the importation of donor gametes from unregulated countries where donors are paid in order to supplement regulated countries' inadequate gamete supply creates a double standard in those countries.[121] That is, countries with compensation restrictions have seen the number of treatments utilizing gametes donated from unpaid nationals shrink, while also seeing the number of treatments utilizing imported gametes from countries where donors are paid exponentially more rise.[122] Double standards such as this may have the effect of illegitimating the reasons for passing gamete compensation laws in the first place.

These impacts are important to keep in mind when thinking about the constitutionality of payment restrictions and prohibitions in the United States. All of the impacts discussed have a direct bearing on the ability to freely utilize ART. This resulting inability to use ART is the crucial

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[118] *See* Chung, *supra* note 80, at 290-91. Another related benefit is the stimulation of providers' economies because the "tourism" creates more business for clinics, and thus, creates more jobs and income.
[119] *See* Chung, *supra* note 80, at 291. Chung notes that politicians have not been able to take action to prevent the circumvention of laws, and few states have enacted measures to punish such border crossers. *See id.*
[120] *See* Chung, *supra* note 80, at 291. Moreover, Chung notes that only thirty-four percent of ART procedures are successful, so the stakes are higher for those who spent the money to travel internationally. *See id.* According to Chung, "[i]f ART is a gamble anywhere, it becomes an even greater risk when attempted globally." *Id.*
[121] *See* Roberts, *supra* note 114.
[122] *See* Roberts, *supra* note 114 (noting that in 2017, sixty-five percent of egg donation treatments in Canada utilized eggs from anonymous U.S. donors, so many fertility clinics in Canada may be unwittingly participating in treatments that utilize the eggs of paid donors, despite the illegality of this practice).

element supporting the argument of this paper, which is that such restrictions and prohibitions are unconstitutional in the United States.[123] This assertion will be developed in the next section.

V
THE UNCONSTITUTIONALITY OF RESTRICTIONS AND PROHIBITIONS ON PAYMENT FOR GAMETES

In order to explain the premise that restrictions and total bans on payment for gametes is unconstitutional in the United States, this section will consist of three subsections. The first will make the argument that the right to procreate is a constitutional right[124]—that is, there exists for each individual the constitutional guarantee of "procreative liberty."[125] The second subsection will argue that procreative liberty extends to the use of ART.[126] Finally, the last subsection will explain that given the two above propositions, and given that restrictions on payments lead to gamete shortages,[127] placing restrictions on gamete compensation is an infringement on our constitutional right to procreate because such restrictions will effectively diminish any meaningful opportunity to utilize ART.[128]

A. THE RIGHT TO PROCREATE

Although the Supreme Court has never expressly recognized the right to procreate, one would have a difficult time arguing that procreative liberty has not been conceded by the Court in numerous opinions. From the plentiful case history dealing with privacy and liberty, one can infer that the Court has read the Constitution to protect the right to procreate.[129] The Court has

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[123] *See infra* Section V.
[124] *See infra* Section V.A.
[125] John A. Robertson coined the term "procreative liberty." *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 457 (1983).
[126] *See infra* Section V.B.
[127] *See supra* Section IV.B.
[128] *See infra* Section V.C.
[129] *See* Robertson, *supra* note 125, at 414. Robertson explains that even though many commentators have inferred that the Supreme Court's broad statements in privacy cases support a right to obtain and raise children, a closer look reveals that no Supreme Court case addresses reproduction itself. *Id.* at 415. That is, in these cases, the Court works off the assumption that the children already exist, and that the parents have a right to raise them. *Id.* Robertson

recognized the right of individuals, married or single,[130] to be free from government interference when it comes to making reproductive choices.[131] The recognized rights of privacy and liberty in the contexts of marriage, procreation, contraception, and child rearing make up the sturdy backbone of the right to procreate.

Like other fundamental rights, the honored right to procreate protects the individual and couples from unwarranted interference from the government.[132] This protection is strong, but it is not absolute. Also like other fundamental rights, insofar as the government has a compelling justification, it may interfere with the right to procreate to a certain extent.[133] The substantive due process doctrine provides that states may not interfere with a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest.[134] In other words, if the

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concludes that despite this fact, "the principles and doctrines espoused in two kinds of cases necessarily protect some measure of autonomy in bringing children into the world." *Id.* Robertson goes on to explain that the first type of case involves contraception or abortion, and in these cases, the Court recognizes the right *not* to procreate. *Id.* at 415-16. Robertson explains that the right to *not* have children implies the right *to* have children, as well. *Id.* The other type of case where the Court has impliedly recognized a right to procreate is that where the Court must determine who has the right to raise a child and the scope of such right. *Id.* Robertson concludes that "[t]he right to rear cannot . . . be easily divorced from the acts and decisions leading to the existence of the person to be reared." *Id.* at 417.; *see also* Chung, *supra* note 80, at 286 n. 136.

[130] There is a strong argument that individuals, rather than just couples, have the right to procreate, as well. Robertson argues that because the right of single parents to bear and raise children that they have already conceived is firmly established, recognizing the right of a single person to conceive in the first place is only a marginal shift. *See* Robertson, *supra* note 125, at 418. Moreover, he contends that no evidence exists tending to show that the marriage environment is essential to raising a child. *Id.* Additionally, Robertson points out that "[p]rocreation may be as central to a single person's identity and life-plan as it is for a married person." *Id.* That is, the decision to bear and beget a child is, for a single person, no less a private and fundamental life decision than it is for a married couple.

[131] *See generally Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that "central to the liberty protected by the Fourteenth Amendment" is the intimate choices involved in procreation); *Carey v. Population Services International*, 431 U.S. 678 (1977) (recognizing that the right to privacy entails the decision whether or not to bear or beget a child); *Einstadt v. Baird*, 405 U.S. 438 (1972) (acknowledging the right to be free from governmental intrusion into the fundamental and private decision of whether to bear or beget a child); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (characterizing procreation as one of the "basic civil rights" of man).

[132] *See Einstadt*, 405 U.S. at 453 (explaining that there exists "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") (emphasis removed).

[133] *See Washington v. Glucksburg*, 521 U.S. 702, 720 (1997). The Court in *Glucksburg* held that the Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests," which includes the right "to have children." Therefore, any attempt by the government to interfere with the right to have children is subject to strict scrutiny. *See id.*

[134] *Id.*

government does, indeed, have a compelling state interest, and the government's infringement is narrowly tailored to serve that compelling interest, then it may regulate the right to procreate in a limited manner.

The way that the strict scrutiny test applies to government interference with the right to procreate using ART will be discussed below.[135] More specifically, potential justifications will be introduced and analyzed, and this paper will conclude with the contention that no justification can be characterized as compelling enough to warrant restrictions or prohibitions on payment for gametes.[136]

B. THE RIGHT TO USE ART TO PROCREATE

All people have the right to procreate,[137] including those who do not have the ability to procreate coitally.[138] Both procreative liberty and the desire to maintain biological ties to children justify the existence of ART.[139] There is a clear connection between the right to procreate and the use of ART because ART allows people who are otherwise incapable[140] to have offspring.[141] As

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[135] *See infra* Section V.C.

[136] *See infra* Section V.C.

[137] It should be noted that the right to procreate is generally thought of as a negative right, meaning that it is the right to be free from government interference. *See* Baum, *supra* note 104, at 113-114. This is in contrast to a positive right, which entails the right to receive assistance from the government regarding the pursuit of reproduction. *See id.*

[138] Robertson explains that "infertility should no more disqualify [coitally infertile couples] from reproductive experiences than physical disability should disqualify persons from walking with mechanical assistance." *See* Robertson, *supra* note 2, at 33-34.

[139] *See* Baum, *supra* note 104, at 115. The clearest case in which it is difficult to deny the right to procreate by utilizing ART is that of the infertile couple seeking to utilize ART to increase the chances of pregnancy. *See id.* This is because both partners will maintain a genetic bond with the child. *See supra* Section II.C. Kenneth Baum contends, however, that in even those cases where an individual is unable or unwilling to produce his or her own gametes due to the possibility of transmitting genetic disorders to his or her offspring, the right to utilize ART is still justified. *See* Baum, *supra* note 104, at 115. Although one parent may not be genetically related to the child, one parent's genetic connection to the child is the next best thing. *See id.*

[140] This incapacity arises from infertility, the chance of passing on genetic disorders, and/or being involved in a same-sex relationship.

[141] Baum argues that adoption does not satisfy the right to procreate because it does not provide for the genetic ties that normally exist between parents and their offspring. *See* Baum, *supra* note 104, at 114. He explains that "[m]any individuals' 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." *Id.*

such, the ability to use ART is essential for those who need technological assistance to exercise their fundamental right to form a family.

Although few, some courts across the country are beginning to recognize that the right to procreate extends to the use of ART. For instance, the Seventh Circuit affirmed a district court's opinion in *Lifchez v. Hartigan* that the right of "privacy and reproductive freedom as established in *Roe v. Wade*" is broad enough to encompass a right to use ART.[142] Additionally, in another district court case, the court stated that "[t]o suggest that procreative rights do not encompass the use of medical technology ignores the fact that the right not to procreate through the use of contraception and the right to terminate a pregnancy necessarily require access to medical technology and assistance."[143] As the use of ART continues to rapidly grow, and as it is abundantly clear that a right to procreate exists,[144] it is likely that more courts will move in the direction of cementing the idea that the right to procreate encompasses the use of ART.

C. NO PAYMENT, NO ART, NO (PROCREATIVE) LIBERTY

Individuals have a constitutionally protected right to procreate. Any infringement on the right of individuals and couples to procreate coitally is subject to strict scrutiny.[145] Individuals have a constitutionally protected right to procreate with the use of ART.[146] It therefore follows that any infringement on the right to procreate using ART should be subject to the rigorous scrutiny that applies to government interference with the right to procreate coitally.[147]

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[142] 735 F. Supp. 1361 (N.D. Ill. 1990), aff'd without opinion, 914 F.2d. 260 (7th Cir. 1990). This case dealt specifically with the use of IVF. *See id.*

[143] *T.M.H. v. D.M.T.*, 79 So. 3d. 787 (Fla. District. Ct. App. 2011). This was a case of first impression in Florida, and the issue was whether two women in a same-sex relationship share parental rights to a child born out of that relationship with the use of IVF. *See id.*

[144] *See supra* Section V.A.

[145] *See supra* Section V.A.

[146] *See supra* Section V.B.

[147] *See* Robertson, *supra* note 2, at 9 n. 10. Although there are many ways that the government can regulate ART in a potentially invasive manner, the following will discuss the regulation of compensation for gametes only.

Restricting or prohibiting payments for gametes constitutes an infringement on the right to procreate using ART. By looking at the impacts that regulating payment for gametes has had on countries like the United Kingdom and Canada,[148] and comparing that to the currently unregulated market in the United states where supply of gametes meets demand,[149] one can conclude that the consequences of regulating compensation for gametes in the United States will be similar to those felt in regulated countries.[150]

Regulating compensation, though intended to alleviate the current wealth distinction that gives the wealthy more expansive options in selecting a donor and generally utilizing ART, will have the actual effect of creating gamete scarcity for all.[151] Scarcity of gametes in the United States will likely have the same effect that scarcity has had for individuals and couples in other countries hoping to utilize ART—that is, it will require costly travel to other countries without scarcity problems in order to avoid wait times.[152] Therefore, this dramatically reduced supply of gametes will effectively preclude many individuals from accessing ART at all.[153]

Financial incentives to donate are necessary to maintain an adequate supply of gametes.[154] Thus, it is clear that an unrestricted market that ensures payment to gamete donors is the only way to protect the right to procreate using ART because an increased supply of gametes creates a greater ability to access and utilize ART for all individuals and couples.

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[148] *See supra* Section IV.B.
[149] *See* Baum, *supra* note 104, at 139.
[150] Kenneth Baum suggests that the United States' current supply surplus will likely change if donor compensation was banned. *See* Baum, *supra* note 104, at 150. Although his argument focuses on the market for oocytes, the same logic applies to the market for sperm.
[151] *See* Baum, *supra* note 104, at 150.
[152] *See supra* Section IV.B.
[153] Baum contends that the current market-based donor compensation allows for more expansive options for those who are wealthy, but this wealth distinction is the lesser evil because the scarcity that results from compensation regulation will guarantee that some people do not have access to ART at all. *See* Baum, *supra* note 104, at 150.
[154] *See supra* Section II.A-B.

Because the link between restrictions on compensation for gametes and reduced supply leading to limited access to ART is fairly apparent, such an infringement by the government on procreative liberty must be rigorously scrutinized. John Robertson explains that "[o]nly serious harm to the interests of others, not avoidable by less restrictive means, should justify interference with" the right to make reproductive decisions.[155] As will be discussed, none of the justifications that are often advanced can be considered compelling under strict scrutiny.

Allowing compensation for gametes is often subjected to the criticism that such a practice is morally objectionable. The violation of moral values, alone, is not a harm to society that can outweigh the right to reproduce.[156] A common argument that falls under the moral violation umbrella is that allowing ART to flourish may psychologically harm offspring.[157] This argument centers on the potential confusion stemming from the mismatch between the biological and social relation that a child of ART has with his or her parents, and there are also concerns that these children will have low self-esteem from discovering that he or she was "bought."[158]

These harms are merely speculative and unfounded, as research suggests that there is no cognitive impairment in ART-conceived children, nor are there difficulties with socioemotional development among these children as compared to naturally conceived children.[159] Thus, this argument does not constitute a compelling justification for restricting payment for gametes.

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[155] *See* Robertson, *supra* note 2, at 10-11.
[156] *See* Robertson, *supra* note 2, at 11; Chung, *supra* note 80, at 287.
[157] *See* Baum, *supra* note 104, at 156-57.
[158] *See* Baum, *supra* note 104, at 156-57.
[159] *See generally* Susan E. Golombok, *Reproductive Technology and Its Impact on Child Psychosocial and Emotional Development*, ENCYCLOPEDIA ON EARLY CHILD DEVELOPMENT (Nov. 2007), http://www.child-encyclopedia.com/sites/default/files/textes-experts/en/887/reproductive-technology-and-its-impact-on-child-psychosocial-and-emotional-development.pdf (last visited Dec. 17, 2020). Dr. Susan E. Golombok summarizes the research on the cognitive, social, and emotional development of children in assisted reproduction families that utilized various ART procedures, like IVF and donor insemination. *Id.* After evaluating the studies conducted in multiple countries, Dr. Golombok concluded that there were no significant differences in the cognitive, social, and emotional development, of children of ART and that "assisted-reproduction children appear to be functioning well." *Id.* It should be noted, however that the majority of parents do not tell their children about the nature of their conception, and currently, it is not possible to establish the impact on children's psychological development when

Another facet of the moral violation umbrella is the argument against the commodification of the human body. This argument is most well known in the context of organ donation.[160] The essence of the argument is that commodifying the human body by selling organs is an affront to the human existence because human body parts should not be treated as goods on a market.[161] Kenneth Baum correctly points out that this argument does not take into account the reality that the commodification of individual attributes, like intelligence, athleticism, the values placed on various body parts in personal injury cases, and people's volunteering of their bodies for scientific research, is ubiquitous.[162] He finds that the drawing of the line at organs, and particularly gametes, is entirely arbitrary.[163] Whether or not one views such line-drawing as arbitrary, it is difficult to imagine that an argument rooted solely in morality could overcome strict scrutiny.

A related argument is that human organs are prohibited from being sold under the federal National Organ Transplant Act ("NOTA" or "the Act"),[164] and NOTA thus controls the sale of gametes. NOTA, however, arguably does not apply to gametes because the term "human organ," as used in the Act, is narrowly defined,[165] and Congress did not intend for that definition to extend to replenishable tissues, such as blood or sperm.[166] There is a major difference between the

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their parents do or do not disclose that the children were conceived through ART. *Id.*; Anna Barbuscia, Mikko Myrskylä, & Alice Goisis, *The Psychological Health of Children Born After Medically Assisted Reproduction*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jan. 14, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6351582/ (last visited Dec. 17, 2020) (finding that studies suggest that the use of ART does not increase the risk that assisted-reproduction children will have psychological problems at the onset of adolescence).

[160] *See* Anya Adair & Stephen J. Wigmore, *Paid Organ Donation: The Case Against*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Apr. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291132/ (last visited Dec. 17, 2020) (explaining the reasons why countries, like the United Kingdom, have outlawed the commodification of organs).

[161] *See id.*; Baum, *supra* note 104, at 134.

[162] *See* Baum, *supra* note 104, at 135-36.

[163] *See* Baum, *supra* note 104, at 136.

[164] 2 U.S.C. 273-74 (2000).

[165] *See* 2 U.S.C. 274(c)(1), defining "human organ" as "the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ . . . specified by the Secretary of Health and Human Services by regulation."

[166] *See* H.R. REP. NO. 98-1127, at 16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3989, 3992 (explicitly stating that "[t]he term 'human organ' is not intended to include replenishable tissues such as blood or sperm.")

commodification of non-replenishable organs (like kidneys) and the commodification of gametes because eggs and sperm are plentiful and replenishable.[167] The harm caused by commodifying gametes is therefore not of a serious, compelling nature. Because the concerns about the commodification of transplant organs do not extend to the commodification of gametes, any reservation about a market for gametes is a mere moral misgiving that, like the speculative psychological harm to offspring, does not outweigh the right to utilize ART to procreate.

Perhaps the strongest proffered justification for restricting or prohibiting compensation for gametes is the argument that compensation can lead to the exploitation of donors. This argument is especially potent in the context of egg donors. In the context of egg donation there is a greater chance of this occurring because of the large sums of money typically paid for donated eggs.[168] But both women and men who are financially desperate may be induced to donate without fully thinking through the burdens and risks to their health.[169]

Although this justification certainly demonstrates tangible harm, it still does not pass as a compelling interest justifying restrictions or prohibitions on compensation for gametes. This is because other, less intrusive means of preventing such exploitation exist. These include placing limits on the number of donation cycles in which a donor can participate,[170] eliminating or

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[167] Although eggs are not replenishable, the sheer number of eggs the typical woman possesses arguably makes the donation of eggs different and less problematic than the donation of organs of a limited number, such as kidneys. Women have about 300,000 eggs at the time of puberty, only 300-400 of which are ovulated throughout a woman's reproductive lifetime. *See Female Reproductive System*, CLEVELAND CLINIC (Jan 19, 2019), https://my.clevelandclinic.org/health/articles/9118-female-reproductive-system#:~:text=During%20fetal%20life%2C%20there%20are,during%20a%20woman's%20reproductive%20lifetime. (last visited Dec. 17, 2020).

[168] *See supra* Section II.A. As was noted earlier, the process of egg donation is complex and invasive. Because of these features, the process is inherently riskier than that of sperm donation. It also takes much more time to complete. Women are paid large sums of money for the risks they take, as well as their time and inconvenience. These sums of money, rather than an altruistic motive, have likely induced women to donate eggs without fully considering the risks they will be taking.

[169] Because regulations regarding ART and gamete donations is for the most part unregulated, donors may also unwittingly end up with parental rights and obligations depending on the circumstances of the donation and the state in which they donate. This, however, is beyond the scope of this paper.

[170] *See* Robertson, *supra* note 2, at 31.

significantly reducing coercive advertising,[171] and most importantly, ensuring that there exists a robust informed consent process whereby potential donors are thoroughly educated about the risks and implications of donating their gametes.[172] These less restrictive alternatives are not likely to drastically reduce the supply of gametes in the way that payment restrictions will. Thus, the exploitation of gamete donors will not carry the day under the rigors of strict scrutiny review.

VI
CONCLUSION

Eggs and sperm are the key ingredients for the operation and effective utilization of ART by individuals and couples wishing to exercise their right to reproduce. Donors, though sometimes motivated by altruism, are more often motivated by financial incentives to donate. Any law that diminishes the motivations to donate will ultimately reduce the supply of gametes, as has been proven in various countries with strict payment restrictions. Regulations causing a lack of gametes are a direct infringement on the right to procreate for those who wish to utilize ART. Intangible and speculative harms, as well as harms that can be addressed by less intrusive means, cannot be permitted to curtail the fundamental right to procreate guaranteed to all Americans.

[171] A common example of coercive advertising is the placing of ads guaranteeing exorbitant amounts of money in specific areas, like college campuses, where those likely viewing the ads are young, debt-laden adults that are prone to being unduly persuaded into donating. Placing restrictions on these types of ads will likely not have a significant impact on the supply of gametes.

[172] This can be done by regulation that will likely not drastically reduce the supply of gametes.