

INVISIBLE STRING: A COMPARISON OF STATES' ABORTION AND INFERTILITY COVERAGE LAWS SHOWS LIMITING BODILY AUTONOMY IS THE COMMON THREAD TYING SEEMINGLY OPPOSITE POLICIES TOGETHER

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I. INTRODUCTION

Unlike women¹ suffering from diseases that manifest in discomfort, physical abnormalities, or other symptoms, those suffering from infertility do not know they are infertile until they try to conceive. The Centers for Disease Control and Prevention (CDC) defines infertility as “not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.”² The Mayo Clinic estimates that between 10 and 15 percent of couples suffer from infertility.³ Put that

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² *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 10, 2023), [https://www.cdc.gov/reproductivehealth/infertility/index.htm#:~:text=What%20is%20infertility%3F,6%20months%20of%20unprotected%20sex; see also *Infertility*, WORLD HEALTH ORG. \(Apr. 3, 2023\), <https://www.who.int/news-room/fact-sheets/detail/infertility> \(stating that “\[i\]nfertility is a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse”\).](https://www.cdc.gov/reproductivehealth/infertility/index.htm#:~:text=What%20is%20infertility%3F,6%20months%20of%20unprotected%20sex;see%20also%20Infertility,WORLD%20HEALTH%20ORG.(Apr.3,2023),https://www.who.int/news-room/fact-sheets/detail/infertility)

³ See *Infertility*, MAYO CLINIC (Sept. 1, 2021), <https://www.mayoclinic.org/diseases-conditions/infertility/symptoms-causes/syc-20354317>. The Mayo Clinic in Rochester, Minnesota, defines infertility as the inability “to get pregnant despite having frequent, unprotected sex for at least a year for most couples.” *Id.*

number in context of other diseases. About 8 percent of the adult population in the United States suffers from asthma.⁴ Only 1.3 percent of the population lives with Crohn's disease.⁵ Around 11 percent of adults suffer from diabetes.⁶ Approximately 1.2 million people in the U.S. states live with Human Immunodeficiency Virus (HIV), which equates to about 0.36 percent of the population.⁷ While this Comment does not argue that treating and covering infertility is more important than doing so for life-threatening or debilitating illnesses, it is important to understand how common infertility is and how costly out-of-pocket infertility treatment is.

Texas residents Lourena and Travis tried to conceive for over eighteen months.⁸ They suffered through a miscarriage and three failed attempts at intrauterine insemination.⁹ They satisfy the CDC's definition of infertility.¹⁰ The couple consulted with a fertility specialist, who determined that Lourena's infertility diagnosis was either caused or exacerbated by her time in the military.¹¹ Lourena developed Female Sexual Arousal Disorder due to the sexual trauma she sustained while in Afghanistan.¹² Her infertility specialist concluded that in vitro fertilization (IVF) would be the best route for Lourena to take following her many failed efforts to conceive.¹³

⁴ See *Asthma Facts and Figures*, ASTHMA & ALLERGY FOUND. OF AM. (Mar. 2023), <https://www.aafa.org/asthma-facts>.

⁵ See *Prevalence of IBD*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 14, 2022), <https://www.cdc.gov/ibd/data-and-statistics/prevalence.html>.

⁶ *National Diabetes Statistics Report*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jun. 29, 2022), <https://www.cdc.gov/diabetes/data/statistics-report/index.html>.

⁷ As of April 23, 2023, the U.S. population was 334,662,925 according to the U.S. Census. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (Apr. 23, 2023, 2:53 PM), <https://www.census.gov/popclock>. The government's HIV information site estimates that 1.2 million Americans have HIV. *U.S. Statistics*, HIV.GOV (Oct. 27, 2022), <https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics#:~:text=Approximately%201.2%20million%20people%20in,who%20have%20sex%20with%20men>. Accordingly, approximately 0.36 percent of the population is living with HIV/AIDS.

⁸ Baby Quest Foundation (@babyquestgrants), INSTAGRAM, <https://www.instagram.com/p/CVNipxCLEmj> (last visited Mar. 12, 2023).

⁹ *Id.*

¹⁰ See *Infertility FAQs*, *supra* note 2, for the definition of infertility.

¹¹ Baby Quest Foundation, *supra* note 8.

¹² *Id.*

¹³ *Id.*

Despite being diagnosed with infertility, and knowing its cause, the Veterans Association (VA) denied her coverage for IVF treatment.¹⁴

Luckily, Lourena and Travis were selected as Baby Quest Foundation grant recipients and are undergoing fertility treatment that would not be possible if they had to pay completely out of pocket.¹⁵ The Baby Quest Foundation allows those suffering from infertility to share their personal stories and struggles, with the hope of being chosen as one of the foundation's grant recipients.¹⁶ To date, Baby Quest has helped almost two hundred grant recipients become parents.¹⁷ Baby Quest grant recipients include veterans like Lourena, cancer survivors, carriers for genetically linked disorders, same-sex couples, and single people of different races and sexual orientations.¹⁸ The grantees all share a common experience: they were unable to independently afford infertility treatment, and their dream of having a child likely would not have materialized without the aid of the Baby Quest Foundation. For the unlucky applicants that are not selected for grants, their dream of becoming a parent may never be realized.

The *New York Times* published the following two articles in 2021: "The Everyday Chemicals That Might Be Leading Us to Our Extinction" and "Why Women Everywhere Are Delaying Motherhood."¹⁹ Both articles focus on possible reasons for the record-low U.S. birth rate and come to a similar conclusion: there is a global risk for massive social change following a potential inverted age structure if current trends continue.²⁰ The answer to this problem is

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *About Baby Quest*, BABY QUEST FOUND., <https://babyquestfoundation.org/about> (last visited Mar. 12, 2023).

¹⁷ *Our Recipients*, BABY QUEST FOUND., <https://babyquestfoundation.org/our-recipients> (last visited Mar. 12, 2023).

¹⁸ *Id.*

¹⁹ Bijal P. Trivedi, *The Everyday Chemicals That Might Be Leading Us to Our Extinction*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/books/review/shanna-swan-count-down.html>; Sabrina Tavernise et al., *Why American Women Everywhere Are Delaying Motherhood*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/06/16/us/declining-birthrate-motherhood.html>.

²⁰ See James Gallagher, *Fertility Rate: 'Jaw-dropping' Global Crash in Children Being Born*, BBC NEWS (July 15, 2020), <https://www.bbc.com/news/health-53409521> (discussing issues that will arise if the global birth rate continues to fall, such as "[w]ho pays tax in a massively aged world? Who pays for healthcare for the elderly? Who looks after the elderly? Will people still be able to retire from work?"); see also *What's Up with Rising Infertility Rates?*, PREMIER HEALTH (Feb. 26, 2016), <https://www.premierhealth.com/your-health/articles/women-wisdom-wellness->

multifaceted, but one solution is simple: bring more babies into the world to consenting parents. Assisted reproductive technology (ART) has facilitated the births of 2.1 percent of infants born in the United States.²¹ ART refers to treatment that handles both the egg and the sperm, of which IVF is the most common.²² Utilizing ART is one way individuals combat their infertility diagnosis and become pregnant.

Part II of this Comment discusses how infertility treatment works, the current state of infertility treatment coverage, and the impact of the *Dobbs v. Jackson Women's Health Org.* decision, which overruled *Roe v. Wade* in July 2022.²³ This Comment uses the current post-*Dobbs* legal landscape to highlight hypocrisy among “pro-life” states, but does not engage in a discussion about the many reasons why the *Dobbs* decision was a mistake. Such reasons include how the decision and subsequent laws made in its wake have effectively told women, transgender men, non-binary people, and anyone capable of becoming pregnant that their lives, plans, and autonomy must come second to fetal cells (which were not created by one person alone) existing inside their bodies. Part III compares infertility-treatment-coverage laws and the abortion laws of Texas, Arkansas, and Mississippi, discussing their shortcomings. Part IV compares the infertility treatment coverage and abortion laws of Colorado and New Jersey and discusses aspects of these laws that other states should work into their infertility treatment coverage policies. Part V sets forth a recommendation for reform in states that do not cover or adequately cover infertility treatment. Part VI briefly concludes.

/what-s-up-with-rising-infertility-rates# (stating that “[b]y 2025, almost 10 million couples will encounter problems in having a baby”).

²¹ See *State-Specific Assisted Reproductive Technology Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 27, 2021), <https://www.cdc.gov/art/state-specific-surveillance/index.html>. This figure has not been updated since 2019, and with several states expanding infertility treatment coverage since then, it is possible this number has gone up significantly in the past few years.

²² *Infertility Diagnosis & Treatment*, MAYO CLINIC (Sept. 1, 2021), <https://www.mayoclinic.org/diseases-conditions/infertility/diagnosis-treatment/drc-20354322#:~:text=Some%20causes%20of%20infertility%20can,physical%2C%20psychological%20and%20time%20commitments> (explaining that IVF, which involves the stimulation and retrieval of eggs followed by fertilizing them with sperm before implanting the resulting embryos in the uterus, is the most common ART technique).

²³ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Roe v. Wade*, 410 U.S. 113 (1973).

II. MAKING SCIENCE MAKE SENSE: HOW INFERTILITY TREATMENT WORKS AND CURRENT REPRODUCTIVE LAWS

This Part will discuss existing and popular ART, followed by an explanation of the current legal landscape involving infertility and infertility treatment. This Part will then mention ART in terms of preventing life-threatening diseases.

A. *The Science Behind ART*

Like treatments for other diseases, there are remedies available to help treat infertility and maximize the patient's chances at becoming pregnant. While IVF may be the first treatment that comes to mind because of its popularity and success rate, there are numerous infertility-treatment modalities.²⁴ First, physicians can perform tests to discover the cause of infertility.²⁵ These tests include measuring hormone levels to see if the patient ovulates, determining whether the patient's fallopian tubes and uterus are adequate to sustain a pregnancy, and assessing the volume of a patient's eggs or oocytes.²⁶

Once a physician determines what may be the root cause of infertility, the course of treatment follows. A physician may first give someone with an ovulation disorder fertility drugs to help induce ovulation.²⁷ Intrauterine insemination (IUI) is another method of infertility treatment that places the sperm directly in the uterus during ovulation to help maximize the formation of a zygote.²⁸

IVF works by first stimulating the ovaries with hormones in order to produce multiple eggs.²⁹ Women typically produce one egg per

²⁴ Ashley M. Eskew & Emily S. Jungheim, *A History of Developments to Improve in Vitro Fertilization*, 114 MO. MED. 156 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6140213> (stating that the first live birth of a baby via IVF occurred in England in 1978 and that IVF has a success rate of over 50 percent when used in women under thirty-five years old).

²⁵ *Infertility Diagnosis & Treatment*, *supra* note 22.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; see Mayo Clinic Staff, *Pregnancy Week by Week*, MAYO CLINIC (June 3, 2022), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302> (explaining that a zygote is the single-cell entity that forms the moment the sperm fertilizes an egg and that zygotes contain a full set of chromosomes, which contain genetic information needed for the fetus to develop).

²⁹ See *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 10, 2021), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac->

month, but this stimulation helps to increase the number of eggs produced because, generally, not all of the eggs will fertilize successfully.³⁰ After stimulation, the eggs are retrieved and mixed with sperm to create an embryo.³¹ The embryo is then transferred directly into the uterus.³² The implantation of an embryo in the uterine lining marks a successful embryo transfer.³³ After waiting over a week, a blood test determines if the patient is pregnant; if the transfer was not successful, the patient may opt for another round of IVF.³⁴ These treatments are helpful, but how much does insurance aid with the costs associated with the treatments, and how much do patients have to pay?

B. *Legal Landscape*

Despite the popularity and success of IVF, only eighteen states have mandates requiring private insurance to cover, or offer to cover, infertility treatment.³⁵ According to the World Health Organization, infertility is a disease.³⁶ Unlike treatments for other diseases, however, infertility treatment is not covered by most insurances.

The Affordable Care Act created a federal government “Health Insurance Marketplace,” which empowers citizens to compare different insurance plans and enroll in health insurance.³⁷ States have

20384716#:~:text=IVF%20involves%20several%20steps%20%E2%80%94%20ovarian,one%20cycle%20may%20be%20needed.

³⁰ See *id.* (explaining that synthetic hormones are used to produce several eggs versus the single egg typically produced monthly “because some eggs won’t fertilize or develop normally after fertilization”).

³¹ See *id.* (stating that following egg retrieval, “[e]ggs that appear healthy and mature will be mixed with sperm to attempt to create embryos”).

³² See *id.* (stating that “the doctor places the embryo or embryos into your uterus” during the embryo transfer procedure).

³³ *Id.*

³⁴ See *id.* (stating that a pregnancy test will be done twelve days to two weeks following the egg retrieval, and that a doctor may suggest additional steps to take if the patient is interested in attempting another round of IVF).

³⁵ See *Mandated Coverage of Infertility Treatment*, KFF (May 2020), <https://www.kff.org/womens-health-policy/state-indicator/infertility-coverage/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>. Since the time the Kaiser Family Foundation published this resource, Colorado passed H.B. 20-1158 (Colorado Building Families Act) which mandates infertility coverage beginning in 2022. COLO. REV. STAT. § 10-16-104(23) (2020).

³⁶ WORLD HEALTH ORG., *supra* note 2.

³⁷ Eighteen states run their own State-based Exchanges (SBEs). See *State-Based Exchanges*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 31, 2023), <https://www.cms.gov>

the option of establishing state-based exchanges (SBEs), and all marketplace insurance plans are required to cover the same ten essential benefits.³⁸ Those essential benefits mandate the coverage of treatment for diseases other than fertility, like addiction and chronic conditions, but there is no federal mandate for infertility treatment coverage; so, it is up to individual states to implement such mandates, requiring insurance companies to comply.³⁹

The cost of infertility treatment may dissuade those wanting to become pregnant from seeking treatment. According to *Forbes*, just one IVF cycle typically costs between \$15,000 and \$20,000.⁴⁰ Another study estimated that the “average I.V.F. cycle can cost anywhere from \$12,000 to \$17,000” and, with medication, “the cost can rise to closer to \$25,000.”⁴¹

As of 2019, the national ART rate was 3,226 procedures per one million women between fifteen and forty-four years old.⁴² Of the

/CCIIO/Resources/Fact-Sheets-and-FAQs/state-marketplaces (stating that “[a]s of January 31, 2023, there are 18 SBEs” and “to establish a SBE [states] are required to convey their intent in doing so by submitting a declaration letter to the Department of Health and Human Services (HHS), Center for Medicare and Medicaid Services (CMS)”); *Marketplace*, HEALTHCARE.GOV, [https://www.healthcare.gov/glossary/marketplace/#:~:text=Shorthand%20for%20the%20%E2%80%9CHealth%20Insurance,%22\)%20for%20individuals%20and%20families](https://www.healthcare.gov/glossary/marketplace/#:~:text=Shorthand%20for%20the%20%E2%80%9CHealth%20Insurance,%22)%20for%20individuals%20and%20families) (last visited Mar. 12, 2023) (stating that the Marketplace is “a shopping and enrollment service for medical insurance created by the Affordable Care Act in 2010”).

³⁸ See *State-Based Exchanges*, *supra* note 37; *What Marketplace Health Insurance Plans Cover*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/what-marketplace-plans-cover> (last visited Mar. 12, 2023) (stating that the ten essential benefits which all plans in the Marketplace must cover include: “Ambulatory patient services . . . Emergency services[;] Hospitalization . . . Pregnancy, maternity, and newborn care . . . Mental health and substance use disorder services, including behavioral health treatment . . . Prescription drugs[;] Rehabilitative and habilitative services and devices . . . Laboratory services[;] Preventive and wellness services and chronic disease management[;] Pediatric services, including oral and vision care”).

³⁹ *Id.*

⁴⁰ Marissa Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (Mar. 7, 2023, 11:47 AM), <https://www.forbes.com/health/family/how-much-does-ivf-cost/#:~:text=Depending%20on%20your%20needs%2C%20a,retrieval%20and%20follow%20Dup%20care>.

⁴¹ Amy Klein, *I.V.F. Is Expensive. Here’s How to Bring Down the Cost.*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/article/ivf-treatment-costs-guide.html>.

⁴² See *State-Specific Assisted Reproductive Technology Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 27, 2021), <https://www.cdc.gov/art/state-specific-surveillance/index.html> (stating that “[t]he national rate of ART use was 3,226 procedures performed per 1 million women of reproductive age”).

sixteen states that reported above-average use of ART, twelve have mandates that require insurance to cover some part of infertility treatment.⁴³ This implies that when women are given the opportunity to reduce the cost of IVF, they will utilize it. The CDC explained, “[s]ome states have passed insurance mandates requiring private insurers to cover at least two ART treatment cycles. This type of mandated insurance coverage has [also] been associated with greater use of ART and may explain some of the differences in ART use [rates] among states.”⁴⁴

Abortion care and infertility treatment are seemingly opposite. While abortion allows a patient to terminate an unwanted pregnancy, infertility treatment aids in conception. On June 24, 2022, the Supreme Court of the United States released its *Dobbs* decision, changing the national legal landscape and instantly stripping women and birthing people of a federal right they once relied on and considered fundamental.⁴⁵ This decision resulted in trigger bans across thirteen states, which either outright banned, or severely limited, instances where someone could obtain an abortion.⁴⁶ The national trend of enacting ever-stricter abortion laws subsequently demands a closer look into other reproduction-related laws, like infertility-treatment-coverage mandates.

Since legislators’ rationale behind limiting abortions is to promote families and protect fetuses, one may think that the same legislators would be inclined to make infertility treatment more accessible.⁴⁷ The Texas Attorney General issued a post-*Dobbs* advisory statement, saying “[t]oday we celebrate *Roe*’s reversal, mindful that nothing can bring back the millions of lives lost since the Supreme Court . . . prohibited States from fully protecting their most vulnerable

⁴³ *Id.* (including “California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, and Virginia”).

⁴⁴ *Id.*

⁴⁵ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁴⁶ See NICOLE DUBE ET AL., OFF. OF LEGIS. RSCH., OBJECTIVE RSCH. FOR CONN.’S LEGISLATURE, STATE ABORTION LAWS ENACTED POST-DOBBS DECISION 1–2 (2022), <https://cga.ct.gov/2022/rpt/pdf/2022-R-0227.pdf>.

⁴⁷ See *Pro-Life Advocacy*, AMS. UNITED FOR LIFE, <https://aul.org/advocacy> (last visited Apr. 4, 2023) (stating that “abortion has been the clearest and deadliest threat to the human right to life. We continue to fight the scourge of abortion” and “[a]s mothers and fathers come together, with the hope of conceiving children of their own, they deserve scientifically-proven and ethically-sound fertility and reproductive health care—including embracing care, treatment, and therapies that foster fertility.”)

citizens.”⁴⁸ Based on this language, the same state that mourns millions of “lives lost” to abortion must make bringing a life into the world as accessible as possible, right? While strict abortion laws purport to protect an embryo/fetus and, therefore, appear to align with the goals of infertility treatment, an evaluation of infertility-coverage mandates in anti-abortion states demonstrate one overlapping theme: the imposition of severe threats to bodily autonomy in reproductive law and policy. States such as Texas, which has passed one of the nation’s strictest abortion laws, also tend to have either many restrictions on insurance-covered infertility treatment or no insurance coverage for infertility treatment at all.⁴⁹

States that restrict access to abortion to promote life while making IVF unobtainable because of its exorbitant cost doubly discriminate against women. States with restrictive abortion laws hinder a woman’s bodily autonomy and right to not reproduce. These states should give women more reproductive freedom by enacting infertility-coverage mandates. Doing so would allow more people to have children, aligning public policy and the state’s purported “pro-life” rhetoric.

C. Autosomal Diseases

Caitrin and Kyle from Texas tried to conceive for several years, and Caitrin eventually became pregnant following two rounds of IUI.⁵⁰ Caitrin gave birth to a daughter, named Embree, who was diagnosed with Sandhoff disease at around eleven months old.⁵¹ Sandhoff disease is a severe form of Tay-Sachs disease.⁵² These diseases are autosomal

⁴⁸ KEN PAXTON, ADVISORY ON TEXAS LAW UPON REVERSAL OF *ROE V. WADE* 1, <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf> (last visited Mar. 9, 2023).

⁴⁹ See TEX. INS. CODE ANN. § 1366.003 (2005); Texas Heartbeat Act, S.B. 8, 87th Leg. (Tex. 2021); TEX. HEALTH & SAFETY CODE ANN. §§ 171.000–171.018 (2021).; *see also Abortion in Texas*, ACLU TEX. (Aug. 29, 2022), <https://www.aclutx.org/en/your-rights/abortion-texas#:~:text=Texas%20bans%20abortions%20at%20all,that%20involve%20rape%20or%20incest> (stating “Texas bans abortions at all stages of pregnancy, unless you have a life-threatening medical emergency. The law does *not* provide exceptions for cases that involve rape or incest.”)

⁵⁰ *Caitrin & Kyle – TX*, BABY QUEST FOUND., <https://babyquestfoundation.org/project/caitrin-kyle> (last visited Apr. 4, 2023)

⁵¹ *Id.*

⁵² See *Sandhoff Disease*, CLEV. CLINIC (July 7, 2021), <https://my.clevelandclinic.org/health/articles/6086-sandhoff-disease>.

recessive disorders, which means the diseases are the result of both parents passing a mutated gene to the child.⁵³

Both Tay-Sachs and Sandhoff disease cause the nervous system to degenerate and result in the death of the child, usually by age five.⁵⁴ Caitrin and Kyle's daughter passed away from Sandhoff disease at fifteen months old.⁵⁵ Since their daughter suffered from Sandhoff, Caitrin and Kyle knew they both were carriers of the disease.

By utilizing IVF, couples like Caitrin and Kyle can have their embryos tested for Tay-Sachs pre-implantation, limiting implantations to healthy embryos.⁵⁶ Fetuses also can be tested for Tay-Sachs using either chorionic villi sampling or an amniocentesis, but not until around the tenth and sixteenth weeks of pregnancy, respectively.⁵⁷ Yet, abortion laws in sixteen states would not permit an abortion at this stage of the pregnancy if they found out that the child had Tay-Sachs.⁵⁸

Individuals who either live in a state with restricted access to abortion, or that are opposed to abortion for personal reasons, are left with two options when deciding whether to have a child together: either take a chance and conceive naturally, bearing the significant risk that their child might face lifelong pain until the child succumbs to

⁵³ The parent of a child with an autosomal recessive disorder may not suffer from the disease because they also carry a dominant gene to mask the recessive gene, but when two recessive genes are passed down to the child, the disorder manifests physically. See *Autosomal Recessive Inheritance Pattern*, MAYO CLINIC, [https://www.mayoclinic.org/autosomal-recessive-inheritance-pattern/img-20007457#:~:text=Print,dominant%20gene\)%20for%20the%20condition](https://www.mayoclinic.org/autosomal-recessive-inheritance-pattern/img-20007457#:~:text=Print,dominant%20gene)%20for%20the%20condition) (last visited Jan. 24, 2022). When two parents are carriers of an autosomal recessive disorder, like in this case, their children each have a 25 percent chance of getting the disorder, and a 50 percent chance of being a carrier, which then puts the next generation children at risk of the disease. *Id.*

⁵⁴ *Tay-Sachs Disease*, NAT'L LIBR. OF MED. (Jan. 25, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK564432/#:~:text=Tay%20Sachs%20disease%20is%20a,usually%20results%20from%20recurrent%20infections> (stating that "[e]ven with the best care, patients with infantile Tay Sachs's disease usually die by age of 4 to 5 years. Death usually results from recurrent infections").

⁵⁵ *Caitrin & Kyle – TX*, *supra* note 50.

⁵⁶ *Id.*

⁵⁷ *Tay-Sachs Disease*, *supra* note 54.

⁵⁸ See *Abortion in the United States Dashboard*, KFF (Apr. 14, 2023), <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard> (showing that as of April 14, 2023, abortion laws in Texas, Oklahoma, Louisiana, Arkansas, Missouri, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Georgia, Wisconsin, South Dakota, Florida, Arizona, and Idaho prevent abortions altogether or after fifteen weeks of pregnancy).

the genetic disease, or screen for genetic diseases pre-implantation via IVF. While some might opt to take the chance with natural pregnancy and terminate the pregnancy if the fetus does in fact have the genetic abnormality, this option is no longer viable for millions of individuals who live in states with restrictive abortion laws.

In addition to Tay-Sachs, another fatal recessive autosomal disorder is Spinal Muscular Atrophy (SMA), which is the number one genetic cause of infant mortality.⁵⁹ These are examples of just a few genetically linked disorders that can be screened prior to IVF implantation.⁶⁰ Not only are the lives of children born with these conditions difficult, but their caretakers also face challenges.⁶¹ IVF coverage for families who have or had a child with a genetically linked disease can help prevent the parents from having two-or-more children with incurable disorders. Individuals with these conditions certainly have lives worth living; parents can choose to not screen for such conditions. But if parents have already gone through the difficulty of having or losing a child with an autosomal recessive linked disorder, a lack of insurance coverage should not be the reason they hesitate to pursue an additional pregnancy.

Caitrin and Kyle's story is not unique. This Comment does not argue that individuals with genetic diseases are less worthy or unworthy of life, nor that any genetically linked disorder should be eradicated via eugenics. Instead, this Comment argues that parents who already suffered through an unimaginable loss and struggle should not have to repeat that experience.

III. OUTDATED LAW AND POLICIES

Part III of this Comment will discuss reproductive laws and policies of Texas, Arkansas, and Mississippi.

⁵⁹ *Spinal Muscular Atrophy (SMA)*, BOS. CHILD.'S HOSP., <https://www.childrenshospital.org/conditions-and-treatments/conditions/s/spinal-muscular-atrophy-sma> (last visited Feb. 17, 2023).

⁶⁰ *SMA Genetic Testing and IVF Could Save Over \$3.8M Per Patient*, THE IVF CTR. (Feb. 4, 2019), <https://theivfcenter.com/sma-genetic-testing-and-ivf>.

⁶¹ *Use of PGD to Avoid Affected Children in Couples Carrying Dominant Genetic Traits for Disease*, UNIV. REPROD. ASSOCS. (URA), <https://www.uranj.com/blog/use-of-pgd-to-avoid-affected-children-in-couples-carrying-dominant-genetic-traits-for-disease> (last visited Apr. 4, 2023) (explaining that “[p]reimplantation genetic diagnosis may be beneficial for couples undergoing IVF, increasing the chances that only healthy embryos are transferred”).

A. Texas

This section describes Texas's insurance mandate for infertility coverage and reviews Texas's abortion laws, discussing both the implications and shortfalls of the insurance policy.

1. Texas Laws and Policies

In 2005 Texas implemented a mandate requiring insurance companies to cover infertility treatment.⁶² The statute provides that “an issuer of a group health benefit plan that provides pregnancy-related benefits for individuals covered under the plan shall offer and make available . . . coverage for services and benefits . . . for outpatient expenses that arise from in vitro fertilization procedures.”⁶³ The statute further requires that benefits for IVF “be provided to the same extent as benefits provided for other pregnancy-related procedures under the plan.”⁶⁴ While the statute appears to be inclusive and provide insurance coverage for infertile individuals on its face, its limitations and caveats make it inapplicable for many seeking infertility treatment.

For example, the law requires coverage only when “the fertilization or attempted fertilization of the patient's oocytes is made . . . with the sperm of the patient's spouse.”⁶⁵ Moreover, to qualify for coverage, the patient and their spouse must “have a history of infertility of at least five continuous years' duration[,]” or infertility associated with one of several conditions, including “(A) endometriosis; (B) exposure in utero to diethylstilbestrol (DES); (C) blockage of or surgical removal of one or both fallopian tubes; or (D) oligospermia.”⁶⁶ Patients are further required to first try to become pregnant using “less costly applicable infertility treatments.”⁶⁷ In sum, Texas's infertility treatment insurance coverage mandate only assists a very limited and specific group of people: married people who can use their spouses' sperm, who have had frequent and unprotected sex for at least five

⁶² See TEX. INS. CODE ANN. § 1366.003 (2005).

⁶³ § 1366.003(a).

⁶⁴ § 1366.003(b).

⁶⁵ § 1366.005(2).

⁶⁶ § 1366.005(3).

⁶⁷ § 1366.005(4).

years,⁶⁸ and who have tried less expensive infertility treatment without success.⁶⁹

The Texas Heartbeat Act, or “SB 8,” made national media headlines in 2021 for its harsh legal stance on abortion—a stance which was unconstitutional at the time because under *Roe* and *Planned Parenthood v. Casey*, states were not permitted to ban abortion before fetal viability (approximately twenty-three weeks).⁷⁰ Texas’s “Trigger Ban,” or Human Life Protection Act of 2021, imposes criminal penalties for health care providers and others who aid or abet in an abortion at any stage of pregnancy.⁷¹ The only exception is when the life of “the pregnant female” is in danger.⁷² No exception exists for rape and incest victims.⁷³ The *Dobbs* decision made these controversial laws legal and effective.⁷⁴

Texas’s abortion laws prefer the criminalization of health care providers over the autonomy of a pregnant person. The only time a

⁶⁸ The requirement that the couple has had frequent unprotected sex for five years does not apply if the woman suffers from endometriosis, exposure in utero to diethylstilbestrol, blockage or removal of fallopian tubes, or the husband suffers from oligospermia. TEX. INS. CODE ANN. § 1366.005(3) (2005).

⁶⁹ See § 1366.005

⁷⁰ 505 U.S. 833, 833 (1992) (holding that state abortion regulations which place an undue burden on a women’s right to an abortion are invalid if the purpose or effect of the regulation is to impose a substantial obstacle on the woman seeking an abortion before fetal viability); see Roni Caryn Rabin, *Answers to Questions About the Texas Abortion Law*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/01/health/texas-abortion-law-facts.html>; Sarah McCammon, *What the Texas Abortion Ban Does — And What It Means for Other States*, NPR, (Sept. 1, 2021, 8:48 AM), <https://www.npr.org/2021/09/01/1033202132/texas-abortion-ban-what-happens-next>; see also Tyler O’Neil, *District Court Judge Blocks Landmark ‘Fetal Heartbeat’ Abortion Law*, FOX NEWS, (Oct. 6, 2021, 9:17 PM), <https://www.foxnews.com/politics/district-court-judge-blocks-texas-abortion-law>; see generally *Roe v. Wade*, 410 U.S. 113 (1973).

⁷¹ See *Abortion Laws*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/abortion-laws/trigger-laws#:~:text=go%20into%20effect,-,Texas's%20Trigger%20Law,Supreme%20Court%20overturning%20Roe%20v> (last visited Apr. 4, 2023) (explaining that “[i]n 2021, the Texas Legislature passed a bill with a trigger provision. This bill, HB 1280, contained language that would ban abortion 30 days after one of the following events occurred: [t]he issuance of a judgment by the United States Supreme Court overturning *Roe v. Wade*”); TEX. HEALTH & SAFETY CODE ANN. § 170A.002–004 (2022).

⁷² § 170A.002(b)(2).

⁷³ See § 170A.002.

⁷⁴ *Texas Summary of Current (and Most Recent) Abortion and Personhood Laws*, AM. SOC’Y FOR REPROD. MED., <https://www.asrm.org/news-and-publications/asrms-response-to-the-dobbs-v-jackson-ruling/dobbs/state-law-summaries/states/texas> (last visited Feb. 17, 2023); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

person's life is valued more than a fetus is when she is near death, or at substantial risk of impairment of a major bodily function.⁷⁵ To re-emphasize this point: the only time a pregnant person's life is more valuable than the cells existing inside her body—regardless of the age of the mother, how she became pregnant, her socioeconomic status, her hopes, her dreams, her plans, or her wishes—is when she is near death or a catastrophic bodily impairment.⁷⁶ The laws do not stop there. If Texas is unable to punish a woman with an unwanted pregnancy, then it will punish the health care provider, or anyone who aids in the abortion, with criminal and civil penalties.⁷⁷ Anyone who violates Texas's current abortion law commits a second-degree felony, and if the fetus dies, then it is a first-degree felony.⁷⁸ Additionally, violators may be subject to a civil penalty of at least \$100,000 for each violation.⁷⁹ Texas goes the extra mile, providing that “the appropriate licensing authority shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation” of the law.⁸⁰

2. Discussion

Texas's dramatic use of legislative resources to prevent someone from having an abortion, viewed in context of the relatively paltry resources it utilizes to aid an infertile person to become pregnant, strongly suggests that the state's overarching goal is to regulate and control reproductive freedom.

The Texas abortion law makes it near impossible for someone to terminate a pregnancy legally and safely unless their life is in danger, while its policies regarding infertility treatment coverage make it difficult to receive insurance coverage unless the patient is married to a male, using their husband's sperm, has been unable to conceive while having frequent unprotected sex for five years, and was unsuccessful in conceiving using less expensive infertility treatment.⁸¹ The Texas insurance policy for infertility treatment appears to

⁷⁵ See § 170A.002(b)(2) (providing an exception from liability for those abortions performed when the pregnant person's life is at risk).

⁷⁶ *Id.*

⁷⁷ §§ 170A.004–007.

⁷⁸ § 170A.004.

⁷⁹ § 170A.005.

⁸⁰ § 170A.007.

⁸¹ See TEX. INS. CODE ANN. § 1366.005(2)–(4) (2005).

promote reproductive rights, but the law imposes so many restrictions that it both severely limits the number of people that can receive coverage and forces behaviors that may negatively impact the parents' mental health in the process.⁸²

As previously discussed, the Texas insurance law's definition of infertility is too narrow and excludes a slew of medical conditions that may cause infertility.⁸³ The mandate only provides an exception to the five-year waiting period if the woman's infertility is associated with endometriosis, if they were exposed to diethylstilbestrol in utero,⁸⁴ if they have documented blockage or removal of at least one fallopian tube, or if the male partner has a low sperm count.⁸⁵ This list of reasons someone may be infertile is quite outdated and far from comprehensive.

Diethylstilbestrol (DES) is a synthetic form of estrogen that was mostly used between 1940 and 1971 to prevent complications associated with pregnancy.⁸⁶ By 1971, the Food and Drug Administration (FDA) was made aware that exposure to DES in utero was linked to vaginal cancer, so the FDA subsequently advised physicians not to prescribe DES to pregnant women.⁸⁷ At the time, it was estimated that somewhere between five-and-ten million babies were exposed to DES in utero.⁸⁸ Someone born in 1972, presumably the last year a newborn would have been exposed to DES in utero, would be fifty-one years old in 2023. While it is possible to have a healthy pregnancy at age fifty, it is unlikely.⁸⁹ If a fifty-year-old sought

⁸² Recall that the CDC defines infertility as "not being able to get pregnant (conceive) after one year (or longer) of unprotected sex." *See Infertility FAQs*, *supra* note 2; *see also* Sharon N. Covington, *The Infertility Journal: A Guide for Coping*, SHADY GROVE FERTILITY (Apr. 6, 2021), <https://www.shadygrovefertility.com/emotional-support-articles/coping-with-infertility>.

⁸³ *See* discussion, *supra* Part III.A.1.

⁸⁴ Meaning that their mothers must have taken diethylstilbestrol while pregnant and while seeking fertility treatment. *See* § 1366.005(3).

⁸⁵ *Id.*

⁸⁶ *Women Exposed to DES in the Womb Face Increased Cancer Risk*, NAT'L INST. OF HEALTH (Oct. 5, 2011), <https://www.nih.gov/news-events/news-releases/women-exposed-des-womb-face-increased-cancer-risk> (explaining how doctors began to administer DES in 1940 but stopped in 1971 after the "U.S. Drug and Food Administration notified physicians that DES should not be prescribed to pregnant women").

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Feb. 2023), <https://www.acog.org/womens-health>

IVF, she would most likely need to use donor eggs⁹⁰ and would, therefore, not be able to satisfy the rigid requirements of the Texas policy for insurance coverage.

In addition to the Texas infertility insurance policy being outdated in terms of DES use, it is socially outdated and discriminates against the LGBTQIA+ community. The American Society for Reproductive Medicine Ethics Committee issued an opinion regarding access to fertility treatment for LGBTQIA+ individuals, which concluded that “individuals and couples should have access to fertility services irrespective of marital status, sexual orientation, or gender identity.”⁹¹ A lesbian couple could not use a sperm donor if they wanted to have children under the Texas mandate because the partner trying to conceive would not be using the sperm of her spouse. She would also likely not have unprotected sex with a man. Though there is no concrete data available,⁹² there are many instances of trans and non-binary people successfully becoming pregnant and giving birth.⁹³

/faqs/having-a-baby-after-age-35-how-aging-affects-fertility-and-pregnancy (stating “[b]y 45, fertility has declined so much that getting pregnant naturally is unlikely.”); see also Vinay Gunnala et al., *One Thousand Seventy-Eight Autologous IVF Cycles in Women 45 Years and Older: the Largest Single-Center Cohort to Date*, 35 J. ASSISTED REPROD. & GENETICS 435, 438–39 (2017) (stating that live births are highly unlikely in women over forty-six).

⁹⁰ See *Fertility After Age 40—IVF in the 40s*, ADVANCED FERTILITY CTR. OF CHI., <https://advancedfertility.com/2020/09/16/fertility-after-age-40-ivf> (last visited Jan. 24, 2022) (“Most US IVF clinics have an upper age limit for allowing IVF treatment using ‘own eggs’ of somewhere between 42 and 45 years of age. Donor eggs are commonly used until about age 49—some programs will still do it after age 50[.]”).

⁹¹ Ethics Comm. Am. Soc’y for Reprod. Med., *Access to Fertility Treatment Irrespective of Marital Status, Sexual Orientation, or Gender Identity: An Ethics Committee Opinion*, 116 FERTILITY & STERILITY 326, 326 (2021).

⁹² Transgender men are often listed as females, which is the sex they were assigned at birth but not reflective of their gender, for medical records. See *Collecting Sexual Orientation and Gender Identity Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/clinicians/transforming-health/health-care-providers/collecting-sexual-orientation.html> (last visited Apr. 4, 2023) (stating that “[m]any health care providers do not routinely discuss sexual orientation or gender identity (SO/GI) with patients, and many health care facilities have not developed systems to collect structured SO/GI data from all patients”).

⁹³ See, e.g., Jessi Hempel, *My Brother’s Pregnancy and the Making of a New American Family*, TIME (Sept. 12, 2016, 7:48 AM), <https://time.com/4475634/trans-man-pregnancy-evan> (discussing Evan’s story and mentioning that of Thomas Beatie, a trans man who got pregnant and subsequently appeared on Oprah and in People Magazine); see also Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC MED. 4, 4 (2015) (noting that “news reports, documentaries, social media list-serves and video-sharing sites, guidebooks, fact sheets, and the recent

One study of transgender men who became pregnant after their female-to-male transition found that 7 percent of the men who participated in the study utilized fertility drugs to help them become pregnant.⁹⁴ Infertility treatment should be accessible to transgender men and non-binary people, as someone who has undergone testosterone therapy is still able to conceive successfully.⁹⁵

Texas's infertility treatment coverage law discriminates against unmarried women by requiring that fertilization "of the patient's oocytes is made only with the sperm of the patient's spouse."⁹⁶ The Texas Family Code defines "spouse" as someone "who has been married in accordance with the law of this state has the capacity and power of an adult, including the capacity to contract."⁹⁷ About 40 percent of births in the United States are to unmarried women,⁹⁸ and yet an unmarried couple that encountered fertility issues would not be able to receive insurance coverage for infertility treatment under current Texas law. An unmarried person with a long-term partner may discover that they are infertile following a failure to become pregnant after frequent, unprotected sex. A woman may also utilize IUI with donor sperm to have a child by herself. Repeated failures of IUI can indicate a fertility problem. Why should someone diagnosed with fertility issues be denied the ability to remedy this disease because they are not married, or because they want to raise a child on their own?

establishment of lists of health service provider[s] with experience supporting transgender individuals in pregnancy and birth, suggest numbers of transgender individuals who are seeking family planning, fertility, and pregnancy services could certainly be quite large."); Mary Clare Fischer, *Transgender Couple Fulfills Dream to Become Parents*, MICH. MED. (July 12, 2021, 9:50 AM), <https://healthblog.uofmhealth.org/health-management/transgender-couple-fulfills-dream-to-become-parents> (sharing the story of a transgender couple who successfully had a baby naturally).

⁹⁴ Alexis D. Light et al., *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 OBSTETRICS & GYNECOLOGY 1120, 1123 (2014).

⁹⁵ See Angela Leung et al., *Assisted Reproductive Technology Outcomes in Female-to-Male Transgender Patients Compared with Cisgender Patients: A New Frontier in Reproductive Medicine*, 112 FERTILITY & STERILITY 858, 863 (2019) (concluding that outcomes for transgender patients can be excellent regardless if the patient has received testosterone).

⁹⁶ TEX. INS. CODE ANN. § 1366.005(2) (2005).

⁹⁷ TEX. FAM. CODE ANN. § 1.104 (1997).

⁹⁸ *Unmarried Childbearing*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 31, 2023), <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (stating "[p]ercent of all births to unmarried women: 40.0%").

Requiring a history of infertility for five continuous years not only damages the emotional and mental health of the individual or couple trying to become pregnant, but also adversely affects “older women.”⁹⁹ Women are most fertile during their late teens and twenties.¹⁰⁰ Unlike men, who constantly produce sperm, women are born with a set number of eggs.¹⁰¹ Both the number and quality of a woman’s eggs decrease with age, and women generally only release one egg per menstrual cycle.¹⁰² Since women are born with a finite number of eggs that lose quality with time, the Mayo Clinic recommends that women over thirty-five, who have not had success becoming pregnant, seek medical advice after six months of trying.¹⁰³ The Mayo Clinic also recommends that women over forty seek medical advice right away if they wish to become pregnant.¹⁰⁴

The most common cause for IVF failure is diminished egg quality.¹⁰⁵ Unless a woman has frozen her eggs, her eggs will be

⁹⁹ “Older” refers to relative age in the context of reproduction. According to the WHO, women between the ages of fifteen and forty-nine are considered to be of reproductive age. See, e.g., *Women of Reproductive Age (15–49 years) Population (thousands)*, WORLD HEALTH ORG., [https://www.who.int/data/maternal-newborn-child-adolescent-ageing/indicator-explorer-new/mca/women-of-reproductive-age-\(15-49-years\)-population-\(thousands\)](https://www.who.int/data/maternal-newborn-child-adolescent-ageing/indicator-explorer-new/mca/women-of-reproductive-age-(15-49-years)-population-(thousands)) (last visited Jan. 24, 2022).

¹⁰⁰ *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy*, *supra* note 89.

¹⁰¹ See *Normal Ovarian Function*, ROGEL CANCER CTR., <https://www.rogelcancercenter.org/fertility-preservation/for-female-patients/normal-ovarian-function> (last visited Jan. 24, 2022) (noting that “[f]emales are not capable of making new eggs, and in fact, there is a continuous decline in the total number of eggs each month”); see also Cigdem Tanrikut, *The Lifecycle of Sperm: Sperm Development*, SHADY GROVE FERTILITY (June 11, 2021), <https://www.shadygrovefertility.com/article/fertility-facts-sperm-regeneration> (stating that “most men produce millions of new sperm every day”).

¹⁰² Mayo Clinic Staff, *Pregnancy After 35: Healthy Pregnancies, Healthy Babies*, MAYO CLINIC (July 15, 2022), <https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/pregnancy/art-20045756> (stating that “eggs decrease in quantity and quality” once women reach their mid-to-late thirties); see also Ashley Marcin, *What Is Ovulation? What to Know About Your Menstrual Cycle*, HEALTHLINE (Jan. 25, 2022), <https://www.healthline.com/health/womens-health/what-is-ovulation> (stating that usually one egg is released per cycle but that in some circumstances, multiple may be released).

¹⁰³ Mayo Clinic Staff, *supra* note 102 (recommending that “[i]f you’re older than 35 and haven’t been able to conceive for six months, consider asking your health care provider for advice”); see also *Infertility*, *supra* note 3 (stating that women over forty should consult a doctor about infertility earlier than a year of trying to conceive).

¹⁰⁴ *Id.*

¹⁰⁵ See *IVF: If at First You Don’t Succeed, Should You Try Again . . .*, USC FERTILITY, <https://uscfertility.org/ivf-first-dont-succeed-try> (last visited Jan. 24, 2022) (stating

retrieved at an early stage of IVF. Because the quality of a woman's eggs decreases every year after around age thirty, forcing women over thirty to prove that they have suffered from infertility for five years means the eggs retrieved will be of significantly worse quality than those retrieved pursuant to the Mayo Clinic's recommendation.¹⁰⁶ With increased age also comes an increased risk of Down syndrome, or trisomy 21, which is a chromosomal problem that occurs most often when women in later reproductive years try to conceive.¹⁰⁷ At age thirty, there is a 1 in 714 chance of conceiving a child with Down syndrome, by age thirty-five, that risk increases to 1 in 294 and by age forty, the risk is 1 in 86.¹⁰⁸

As Shady Grove Fertility's journal for coping with infertility points out, suffering from infertility creates "a multifaceted sense of loss," which "may include both real and symbolic things, from professional opportunities that are put on hold or turned down, to time passing by waiting for the dream-child."¹⁰⁹ Those suffering from infertility typically have higher-than-average levels of anxiety, as well as depression comparable to patients suffering from a cancer diagnosis.¹¹⁰ "It has been well documented that infertility causes stress" and "[a] diagnosis of infertility can be a tremendous burden for patients."¹¹¹ The Texas mandate's five-year wait requirement for treatment makes no exception for women with hormonal issues, which are some of the leading causes of infertility.¹¹²

that "the large majority of unsuccessful IVF cycles can be attributed to embryo quality" and "the quality of the eggs is without a doubt the most important [component in embryo quality]").

¹⁰⁶ See AM. SOC'Y FOR REPROD. MED., AGE AND FERTILITY: A GUIDE FOR PATIENTS 5 (2012), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/Age_and_Fertility.pdf.

¹⁰⁷ See *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy*, *supra* note 100 (stating "Down syndrome is the most common genetic problem that occurs with later childbearing").

¹⁰⁸ See *id.*

¹⁰⁹ Covington, *supra* note 82.

¹¹⁰ Kristin L. Rooney & Alice D. Domar, *The Relationship Between Stress and Infertility*, 20 DIALOGUES CLINICAL NEUROSCIENCE 41, 41 (2018).

¹¹¹ *Id.* at 45.

¹¹² The requirement that women attempt to become pregnant by first using less expensive methods than IVF should not be problematic because this will typically be IUI, which is less invasive than IVF. See Mary Ellen G. Pavone, *Healthy Tips IUI vs. IVF: Which Is Right for You?*, NW. MED., <https://www.nw.org/healthbeat/healthy-tips/iui-vs-ivf-which-is-right-for-you#:~:text=IUIs%20May%20Be%20Less%20Invasive,uterus%20during%20the%20f>

Polycystic ovarian syndrome (PCOS) is a hormonal issue that interferes with normal ovulation and affects about 10 percent of women between the ages of fifteen and forty-four.¹¹³ PCOS is the leading cause of infertility in women.¹¹⁴ Primary ovarian insufficiency (POI) is characterized by ovaries' failure to function as normal in women younger than forty.¹¹⁵ There is no treatment available that restores normal ovarian function, and POI can oftentimes cause infertility.¹¹⁶ PCOS and POI are just two conditions that may cause infertility that the Texas law subjects to the five-year wait requirement without any waiver. This waiting period unnecessarily delays pregnancy and unjustifiably decreases a woman's chance of a successful pregnancy. Infertility on its own is a cause of mental health issues, so forcing women to try to conceive and potentially face lost pregnancies for five years is both cruel and health harming.

B. *Arkansas*

Arkansas requires all health and accident insurance companies to include IVF as a covered expense.¹¹⁷ Pursuant to Arkansas Code Section 23-86-118, the Insurance Commissioner set and signed into law the minimum and maximum coverage guidelines in 1991.¹¹⁸ The Insurance Commissioner set the maximum coverage amount to only

erile%20window (last visited Jan. 24, 2022) (explaining that IUI is significantly less invasive than IVF). *See What Are Some Possible Causes of Female Infertility?*, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH & HUM. DEV. (Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/causes/causes-female> (explaining that failure to ovulate is the most common cause of female infertility, and that failure to ovulate can be caused by several issues such as primary ovarian insufficiency, PCOS, endocrine disorders, and other hormonal issues).

¹¹³ *Polycystic Ovary Syndrome*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/a-z-topics/polycystic-ovary-syndrome> (last visited Jan. 24, 2022).

¹¹⁴ *Infertility*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/a-z-topics/infertility> (last visited Jan. 24, 2022).

¹¹⁵ *Primary Ovarian Insufficiency*, MEDLINE PLUS, <https://medlineplus.gov/primaryovarianinsufficiency.html> (May 5, 2021).

¹¹⁶ *Id.*

¹¹⁷ ARK. CODE ANN. § 23-86-118 (2022).

¹¹⁸ ARK. INS. AGENCY, AGENCY # 054.00 RULE AND REGULATION 1 IN VITRO FERTILIZATION 1-2 (1991), <https://insurance.arkansas.gov/site/assets/files/2632/rnr01.pdf>.

\$15,000,¹¹⁹ which covers about one round of IVF.¹²⁰ In addition to and like Texas, only married people using the sperm of their husband to fertilize their oocytes are eligible for coverage.¹²¹ Arkansas also imposes a two-year waiting period on patients, unless the infertility is associated with either endometriosis, DES exposure, removal or blockage of fallopian tubes (unless resulting from voluntary sterilization), or abnormal factors affecting the sperm.¹²²

Like Texas, Arkansas has a near-total abortion ban. The State passed a “trigger law” in 2019, which became effective upon the *Dobbs* decision.¹²³ The Bill goes so far as to compare previous SCOTUS decisions like *Roe* and *Casey* to the *Dred Scott* decision, which is commonly referred to as the Supreme Court’s worst mistake in history.¹²⁴

C. Mississippi

There is no mandatory coverage for infertility treatment in Mississippi.¹²⁵ State legislators introduced a bill that would “require health insurance policies that provide pregnancy related benefits to provide coverage for medically necessary expenses of diagnosis and

¹¹⁹ *Id.* at 2 (“The benefits for in vitro fertilization shall be the same as the benefits provided under maternity benefit provisions and may be subject to the same deductibles, co-insurance and out-of-pocket limitations provided in the policy or certificate that apply to maternity benefits. Any preexisting condition limitation shall not exceed a period of twelve (12) months. The policy or certificate may include a lifetime maximum benefit of not less than Fifteen Thousand Dollars (\$15,000.00).”).

¹²⁰ See Conrad, *supra* note 40.

¹²¹ ARK. INS. AGENCY, AGENCY, *supra* note 118, at 1 (stating “[e]very applicable policy or certificate must provide benefits for in vitro fertilization procedures when: . . . [t]he patient’s oocytes are fertilized with the sperm of the patient’s spouse”).

¹²² *Id.*

¹²³ The Arkansas Human Life Protection Act, ARK. CODE ANN. §§ 5-61-301–304 (2019); see *Senate Approves Legislation Repealing the Licensure of Abortion Facilities*, ARK. SENATE (Feb. 8, 2023), <https://senate.arkansas.gov/senate-news/posts/2023/february/senate-approves-legislation-repealing-the-licensure-of-abortion-facilities>.

¹²⁴ § 5-61-302; see also Justice Stephen Breyer, Supreme Court Historical Society Annual Lecture: Guardian of the Constitution: The Counter Example of *Dred Scott* (June 1, 2009) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/sp_06-01-09.html) (stating that the *Dred Scott* decision is “a case that many believe is the Court’s worst mistake.”).

¹²⁵ *State and Territory Infertility Insurance Laws*, AM. SOC’Y FOR REPROD. MED. (last visited Apr. 4, 2023), <https://www.reproductivefacts.org/resources/state-infertility-insurance-laws/states/mississippi>.

While Mississippi has relentlessly pushed extreme abortion laws, it has made no effort to promote families and pregnancies for those who wish to become pregnant but need ART to overcome infertility. It is beyond confounding that a state would decide to hinder bodily autonomy by pushing the bounds of abortion restrictions while simultaneously providing absolutely no mandates that insurance coverage must include infertility treatment.

IV. PROGRESSIVE LAWS

This Part will examine the abortion laws and infertility coverage policies of Colorado and New Jersey and discuss aspects of these states' laws that should be implemented across the country.

A. *Colorado*

This section discusses Colorado's law and policies regarding infertility treatment insurance coverage and then examines the implications of those policies.

1. Colorado Law and Policies

Colorado signed the "Colorado Building Families Act" into law in 2020.¹³⁴ The Act aims to promote the creation of families by mandating that all individual and group health benefit plans "provide coverage for the diagnosis of and treatment for infertility and standard fertility preservation services."¹³⁵ Colorado defines infertility as the inability to conceive "as an individual or with the person's partner."¹³⁶

<https://www.google.com/maps/dir/2903+N+State+St,+Jackson,+MS+39216/A+Capital+Women's+Health+Clinic,+Starling+Drive,+Richmond,+VA/@34.8773275,-92.7601674,5z/data=!4m14!4m13!1m5!1m1!1s0x862832c2b841cd37:0x30a53f0a201d95c4!2m2!1d-90.1769535!2d32.3346177!1m5!1m1!1s0x89b16b2e1c544883:0x17916e35fa38bcd2!2m2!1d-77.5683267!2d37.60522!3e0> (last visited Apr. 17, 2023); Map of Distance from JWHO to Bristol Women's Health, GOOGLE MAPS, <https://www.google.com/maps/dir/2903+N+State+St,+Jackson,+MS+39216/Bristol+Women's+Health,+2603+Osborne+St,+Bristol,+VA+24201/@34.8773275,-92.7601674,5z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x862832c2b841cd37:0x30a53f0a201d95c4!2m2!1d-90.1769535!2d32.3346177!1m5!1m1!1s0x885a9d5445a2bb4b:0x17fae2d2a7cbc50c!2m2!1d-82.2178535!2d36.6014379!3e0> (last visited Apr. 17, 2023) .

¹³⁴ Colorado Building Families Act, H.B. 20-1158, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020); COLO. REV. STAT. §10-16-104 (23)(a) (2020).

¹³⁵ Colo. H.B. 20-1158.

¹³⁶ § 10-16-104(23)(g)(VI)(B).

Colorado also considers an individual “infertile” so long as a licensed physician diagnoses them as infertile based on their medical information.¹³⁷

Colorado law specifies that infertility insurance coverage must include three oocyte retrievals.¹³⁸ It does not limit the number of embryo transfers so long as the transfers are performed in accordance with the recommendations and guidance set forth by the American Society for Reproductive Medicine (ASRM).¹³⁹ The Colorado mandate does not require that the embryo transfers be single embryo transfers, but it states that single embryo transfers should be used when medically appropriate.¹⁴⁰ Colorado proscribes health benefit plans from imposing “[a]ny exclusions, limitations, or other restrictions on coverage of fertility medications that are different from the exclusions, limitations, or other restrictions imposed on any other prescription medications covered under the health benefit plan.”¹⁴¹ Colorado does, however, provide an exemption for religious employers if the coverage conflicts with the organization’s beliefs.¹⁴²

Colorado’s mandate also includes coverage for fertility preservation services.¹⁴³ This coverage applies to any individual “who has a medical condition or is expected to undergo medication therapy, surgery, radiation, chemotherapy, or other medical treatment that is recognized by medical professionals to cause a risk of impairment to fertility.”¹⁴⁴ Such services must be considered standard within the ASRM’s or the American Society of Clinical Oncology’s (ASCO) published guidelines for fertility preservation procedures.¹⁴⁵

In preparation for a decision like *Dobbs*, Colorado enacted statutory protection for abortion in April 2022.¹⁴⁶ Colorado is an example of a state that prioritizes building families, as best shown by naming their infertility insurance law the “Colorado Building Families Act.” Colorado protects bodily autonomy and reproductive freedom by both allowing the termination of pregnancy and aiding an infertile

¹³⁷ § 10-16-104(23)(g)(VI)(C).

¹³⁸ § 10-16-104(23)(b).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ § 10-16-104(23)(c)(I).

¹⁴² § 10-16-104(23)(e).

¹⁴³ § 10-16-104(23)(a).

¹⁴⁴ § 10-16-104(23)(g)(VIII).

¹⁴⁵ § 10-16-104(23)(g)(II)–(III), (VIII).

¹⁴⁶ *Id.* § 25-6-403(2) (2022).

individual in becoming pregnant. The state's policy is to allow citizens to both build a family and combat their infertility diagnosis, while also providing a legal and safe way to obtain abortions.

2. Discussion

Providing coverage for IVF is an essential component of promoting reproductive justice. For individuals who have undergone therapies or procedures that increase the risk of infertility, however, IVF coverage alone is not enough when their oocytes or sperm cannot create a viable embryo. The Colorado Act recognizes the importance of giving those undergoing medical treatment for other diseases and illnesses an option to preserve their ability to have children.¹⁴⁷ The Act does not specify an age minimum for fertility preservation services, which is important as pediatric patients undergoing certain treatments may lose their ability to conceive naturally before they have even considered if they want to have children later in life.¹⁴⁸ Some pediatric hospitals—like the Children's Hospital of Philadelphia, Boston Children's Hospital, the Children's Hospital of Pittsburgh, and Cincinnati Children's Hospital—have Fertility Preservation Programs in place to offer pediatric patients fertility preservation options onsite as they are treated for their primary medical issues.¹⁴⁹ Without insurance mandates like the Colorado Building Families Act, coverage may end at treating the primary medical condition.

Multiple pregnancies mean health risks not only for the fetuses, but also high-risk pregnancies for mothers. At least 60 percent of twins are born prematurely, and nearly all multiple pregnancies involving

¹⁴⁷ § 10-16-104(23).

¹⁴⁸ See *The Mayo Clinic Pediatric Fertility Preservation Program*, MAYO CLINIC (Oct. 22, 2019) <https://www.mayoclinic.org/medical-professionals/endocrinology/news/the-mayo-clinic-pediatric-fertility-preservation-program/mac-20472115> (explaining that “[t]he Pediatric Fertility Preservation Program offers both ovarian and testicular tissue cryopreservation options for individuals undergoing cancer therapy or facing other fertility-threatening conditions or treatments, to preserve reproductive potential in a timely manner regardless of pubertal status”).

¹⁴⁹ *Fertility Preservation Program*, CHILD.'S HOSP. OF PHILA., <https://www.chop.edu/services/fertility-preservation-program> (last visited Nov. 5, 2021); *Fertility Preservation Services for Pediatric Cancer Patients*, UPMC CHILD.'S HOSP. OF PITTSBURGH, <https://www.chp.edu/our-services/cancer/aya-oncology/fertility> (last visited Nov. 5, 2021); *Pediatric Fertility Preservation Program*, DANA-FARBER CANCER INST. BOS. CHILD.'S HOSP., <http://www.danafarberbostonchildrens.org/why-choose-us/expertise/fertility-preservation.aspx> (last visited Nov. 5, 2021); *Fertility Care and Preservation*, CINCINNATI CHILD.'S, <https://www.cincinnatichildrens.org/service/f/fertility-preservation> (last visited Nov. 5, 2021).

three or more fetuses result in premature births.¹⁵⁰ Babies born prematurely are at risk of having low birthweights and underdeveloped organs, and they may need to receive care from neonatal intensive care units.¹⁵¹ A woman carrying multiple fetuses is twice as likely to have high blood pressure and anemia than a woman carrying a single fetus.¹⁵²

The ASRM and Society for Assisted Reproductive Technology (SART) guidelines recommend that women thirty-five and younger utilize a single embryo transfer if their eggs or embryos are of good quality.¹⁵³ As pointed out by the Practice Committees of the ASRM and SART, “[s]tudies have shown that insurance coverage for IVF is associated with the transfer of fewer embryos and with significantly lower rates of high-order multiple birth. Financial pressures may be a coercive tipping point in favor of multiple embryo transfer.”¹⁵⁴ While it does not mandate single-embryo transfers, the Colorado Act suggests them when medically recommended.¹⁵⁵ This is the best way to handle the delicate balance between bodily autonomy and women’s health. While it may be understandable that someone would prefer to transfer multiple embryos at a time to minimize the cycles of IVF needed and increase the chance of a pregnancy, such a decision comes with health risks and should not be encouraged when there is a similar chance of becoming pregnant if just one embryo is transferred.¹⁵⁶

The Colorado Act allows for a wide array of individuals with different genders, sexual orientations, and marital statuses to benefit from its infertility treatment insurance policy. By including therapeutic donor insemination in the definition of “failure to

¹⁵⁰ *Complications of Multiple Pregnancy*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/staying-healthy-during-pregnancy/complications-of-multiple-pregnancy> (last visited Nov. 5, 2021).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Single Embryo Transfer*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/patientresources/transfer.html> (last visited Nov. 5, 2021) (stating that “guidelines on number of embryos transferred were developed by the Practice Committees of the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART)” and that “single embryo transfer should be considered for . . . women aged 35 years or younger and with eggs or embryos of good quality”).

¹⁵⁴ *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, 107 FERTILITY & STERILITY 901, 901 (2017) (footnote omitted).

¹⁵⁵ COLO. REV. STAT. § 10-16-104(23)(b) (2020).

¹⁵⁶ See *Complications of Multiple Pregnancy*, *supra* note 150.

impregnate or conceive,” it includes lesbian couples, the LGBTQIA+ community, single women without a partner, and couples where the male partner does not have adequate sperm.¹⁵⁷ The use of “partner” further allows unmarried people to receive treatment for infertility.¹⁵⁸ Instead of implementing a baseless waiting period, like Texas and Arkansas, Colorado puts trust in medical professionals in diagnosing infertility.¹⁵⁹ This allows couples to start infertility treatment right away. Colorado’s broad definition of infertility is in line with that of the CDC and the Mayo Clinic.¹⁶⁰

Colorado law mandates the coverage of three oocyte retrievals in conjunction with unlimited cycles of IVF.¹⁶¹ Unfortunately, this realistically limits coverage to three cycles of IVF with fresh embryos. The embryo transfer is usually done three-to-five days after the egg retrieval.¹⁶² Embryos may be frozen via cryopreservation, but cryopreservation is not included under the law (with the exception of fertility preservation for those undergoing unrelated medical treatments). If an individual decides to pay out of pocket for cryopreservation, then the number of cycles with those frozen embryos or eggs is unlimited, but the number of included rounds of IVF with fresh embryos remains limited to three.¹⁶³

B. *New Jersey*

New Jersey codified the right to abortion as a fundamental right with the Freedom of Reproductive Choice Act.¹⁶⁴ The Bill noted:

Governmental restrictions on reproductive choice, by their very nature, impinge on the constitutional right to reproductive autonomy, particularly when they fail to confer any benefits to patients in the form of improved health or safety. Moreover, restrictions of this nature often have a disparate impact that is predominantly felt by persons who

¹⁵⁷ § 10-16-104(23)(g)(V).

¹⁵⁸ § 10-16-104(23)(g)(VI)(B).

¹⁵⁹ § 10-16-104(23)(g)(IV).

¹⁶⁰ *Infertility FAQs*, *supra* note 2 (defining infertility as “not being able to get pregnant (conceive) after one year (or longer) of unprotected sex”); § 10-16-104(23)(g)(VI).

¹⁶¹ § 10-16-104(23)(b).

¹⁶² *IVF Cycle Details*, USC FERTILITY, <https://uscfertility.org/fertility-treatments/ivf-cycle-details> (last visited Nov. 5, 2021) (stating that “[f]resh embryo transfers are done usually 3–5 days after egg retrieval”).

¹⁶³ § 10-16-104(23)(b).

¹⁶⁴ S.B. 49, 2022 Leg., 279th Sess. (N.J. 2022).

already experience barriers to health care access, including young people, people of color, people with disabilities, people with low income, people living in rural areas, immigrants, and people who are transgender or non-binary.¹⁶⁵

About a year later in January 2023, Governor Phil Murphy signed legislation that allows “pharmacists to dispense self-administered hormonal contraceptives to patients without requiring a prescription” and therefore helps reduce barriers to contraceptives since a patient typically needs to see a physician to obtain a prescription.¹⁶⁶

New Jersey requires group health insurance policies, medical service corporations, and hospital service corporations to provide coverage for infertility treatment.¹⁶⁷ Under New Jersey law, infertility is defined as “a disease or condition that results in the abnormal function of the reproductive system, as determined pursuant to [the] American Society for Reproductive Medicine practice guidelines by a physician who is Board Certified or Board Eligible in Reproductive Endocrinology and Infertility or in Obstetrics and Gynecology.”¹⁶⁸ Like Colorado, New Jersey leaves the diagnosis of the disease up to a trained medical professional and does not impose baseless requirements that exacerbate the pain of an infertile person.¹⁶⁹ Also like Colorado, New Jersey provides an exception for religious organizations.¹⁷⁰ If an individual has not been diagnosed as “infertile” by a Board Certified or Board Eligible physician specializing in either Reproductive Endocrinology and Infertility, or an OB/GYN, they may still be entitled to infertility treatment coverage under New Jersey law, which helps those who may not be able to afford to see an infertility specialist.¹⁷¹ New Jersey mandates that coverage for in vitro fertilization, gamete intra-fallopian transfer, and zygote intra-fallopian transfer be limited to individuals forty-five or younger who have used

¹⁶⁵ *Id.*

¹⁶⁶ Press Release, Governor Murphy Signs Legislation Expanding Access to Critical Reproductive Health Care by Removing Prescription Requirement for Self-Administered Hormonal Contraceptives (Jan. 13, 2023) <https://www.nj.gov/governor/news/news/562023/approved/20230113a.shtml>.

¹⁶⁷ N.J. REV. STAT. § 17B:27-46.1x (2017); *id.* § 17:48A-7w (2017); *id.* § 17:48-6x (2017).

¹⁶⁸ § 17B:27-46.1x; § 17:48A-7w; § 17:48-6x.

¹⁶⁹ COLO. REV. STAT. § 10-16-104(23)(g)(IV) (2020).

¹⁷⁰ § 17B:27-46.1x(4b).

¹⁷¹ § 17B:27-46.1x; § 17:48A-7w; § 17:48-6x.

less expensive treatments but remain unable to become pregnant and have not yet undergone four egg retrievals.¹⁷²

Governor Murphy signed Senate Bill No. 2133 into law in 2018.¹⁷³ This law effectively mandates coverage for standard fertility treatment when medical treatment (including but not limited to surgery, radiation, and chemotherapy) may directly or indirectly cause infertility, but excludes storage fees.¹⁷⁴ The standard fertility preservation services must be offered without regard to the patient’s life expectancy, current or possible disability, medical dependency, quality of life, age, marital status, gender identity, or sexual orientation.¹⁷⁵

The New Jersey law is silent on who is responsible for storage fees for cryopreservation for those who are eligible for covered fertility preservation services. If a young or even a pediatric patient requires preservation of their eggs due to a medical condition, storage fees will add up.¹⁷⁶ This may deter them from receiving this covered treatment given they very well may be undergoing other costly treatments and medications at the same time for their primary illness.

V. RECOMMENDATION

Provided below is a chart that highlights the main takeaways from the state policies discussed in this Comment.

State	Overview	What to Keep
Texas ¹⁷⁷	Fertilization with sperm of spouse only Infertile for five years Must first use infertility treatment less costly than IVF	Use of less costly treatment first
Arkansas ¹⁷⁸	Fertilization with sperm of spouse only Infertile for two years Must first use less costly treatment Cryopreservation is included Lifetime maximum must be at least \$15,000	Cryopreservation Less costly treatment first

¹⁷²

§ 17B:27-46.1x; § 17:48A-7w; § 17:48-6x.

¹⁷³

S.B. 2133, 2018 Leg., 218th Sess. (N.J. 2018).

¹⁷⁴

Id.

¹⁷⁵

Id.

¹⁷⁶

Cost of Egg & Embryo Freezing: What You Need to Know, PAC. FERTILITY CTR. L.A. (June 29, 2022), <https://www.pfcla.com/blog/egg-freezing-costs> (noting that the cost of freezing eggs in California ranges between \$6,000 and \$10,000 and storage is an additional \$700 to \$1,000 annually).

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See discussion *supra* Part III.A.

¹⁷⁸

See discussion *supra* Part III.

Colorado ¹⁷⁹	Infertility defined as inability to conceive alone or with a partner after twelve months of trying to become pregnant for women under thirty-five and six months for women over thirty-five Trying to become pregnant means unprotected sex or donor insemination Person is deemed infertile if physician diagnoses them with infertility Fertility preservation Three oocyte retrievals Promotes single embryo transfers	Who can receive coverage Different requirements for geriatric pregnancies Fertility preservation Promoting eSET
New Jersey ¹⁸⁰	Similar infertility definitions as Colorado Four egg retrievals Cap at forty-five years old Used reasonable, less costly treatments first	Cryopreservation Less costly treatment first

As best demonstrated in Part III of this Comment, it is clear that several states with the most restrictive abortion laws, or states that have at least attempted to implement strict abortion laws, do not have adequate infertility coverage insurance policies.¹⁸¹ While abortion and infertility treatments have completely opposite outcomes—terminating a pregnancy versus facilitating pregnancy—states that allow women to do either on their own terms promote the same goals: protection of bodily autonomy. States like Texas and Arkansas, which hinder one’s ability to choose to have an abortion while also imposing difficult requirements to qualify for infertility insurance coverage, blatantly disregard bodily autonomy and instead seek to promote personal values against abortion.¹⁸² This Comment does not argue why *Dobbs* was decided incorrectly, nor does it address the life-threatening implications *Dobbs* has for millions of women across the country. Likewise, this Comment does not discuss how the decision effectively told women and all people capable of becoming pregnant that their own hopes and plans do not matter, but that, instead, they pale in comparison to a group of cells that may or may not develop into an independent human being. This Comment’s goal is to highlight that these policies are hypocritical and recommend a way in which such states can combat, or somewhat lessen, the anti-women and anti-bodily autonomy themes that permeate these policies.

Every state should mandate that insurance companies cover infertility treatment. Policies like those of Texas and Arkansas—which

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See discussion *supra* Part IV.A.

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See discussion *supra* Part IV.B.

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See discussion *supra* Part III.

182

Discussion *supra* Part III; see PAXTON, *supra* note 48.

require the patient to be married, use their partner's sperm, and suffer through unsuccessful pregnancy attempts for a prolonged period—are outdated and help only a limited subset of people.¹⁸³ First, infertility treatment insurance coverage policies should not require someone to be married or use their partner's sperm. Unmarried, lesbian, transgender, and non-binary people all may use either their partner's or a donor's sperm and still not become pregnant. Limiting insurance coverage to married individuals following five years of unsuccessful pregnancy attempts negatively impacts mental health,¹⁸⁴ neglects the fact that many people opt not to get married, and is simply not founded in science or medicine.¹⁸⁵

States and insurance companies have an interest in making sure the patient is infertile before requiring coverage, but the definition of infertility should be in line with that of the CDC, which defines the diagnosis as “not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.”¹⁸⁶ Texas and Arkansas use baseless durations in their infertility insurance coverage statutes that are not backed by science. States should require that any patient under thirty-five who fails to become pregnant following a year of regular, unprotected sex or a year of failed artificial insemination cycles be considered infertile, and that any patient thirty-five and over who fails to become pregnant following six months of regular, unprotected sex or six months of failed artificial insemination cycles be considered infertile. These definitions follow the CDC's definition of infertility. Alternatively, an infertility diagnosis by a physician in lieu of a waiting period can be used to trigger coverage.

States should mandate that insurers cover fertility preservation services for those with a primary illness that may cause infertility or where infertility may result from that treatment. Cryopreservation should be covered until age thirty-five or for ten years following the oocyte retrieval, whichever comes later. At that point, the patient may pay for cryopreservation in order to give themselves a chance to become pregnant with their own eggs. States should require that women attempt to use a less-invasive procedure, like IUI, at least twice before IVF. This could potentially save money, which is in both the

¹⁸³ TEX. INS. CODE ANN. § 1366.003 (2005); ARK. CODE ANN. § 23-86-118 (2022).

¹⁸⁴ See Covington, *supra* note 82.

¹⁸⁵ See *Infertility FAQs*, *supra* note 2

¹⁸⁶ *Id.*

states' and insurers' interests, and is also less invasive than the IVF process.¹⁸⁷

Instead of a monetary coverage limitation like the one provided by Arkansas, coverage limitations should be characterized by oocyte retrievals and cycles of embryo transfers.¹⁸⁸ Insurance companies, for example, should cover up to two oocyte retrievals for those under thirty-five at the start of infertility treatment, three oocyte retrievals for women over thirty-five at the start of infertility treatment, and three years of cryopreservation for both groups. By promoting cryopreservation versus the amount of times eggs are retrieved, it allows the youngest eggs possible to be used with each cycle if a viable embryo can be created. An optimal pregnancy rate in women under thirty-five is correlated with no more than ten eggs during oocyte retrieval, while for women over forty there was "a direct correlation between the number of eggs at retrieval and pregnancy," so the more eggs retrieved is advantageous for a geriatric pregnancy.¹⁸⁹ Another study reported that an average of about fourteen mature oocytes are retrieved per cycle of egg retrieval in women under thirty-five, while forty-year-old women had an average of about eight mature oocytes retrieved per cycle.¹⁹⁰ The proposed policy would give people younger than thirty-five an average of twenty-eight eggs, and those over thirty-five an average of twenty-four eggs, which is more than adequate for optimal pregnancy rates. Rather than repeatedly take hormones to facilitate egg maturation and undergo retrieval procedures, women can freeze mature eggs to be implanted later if they do not become pregnant following an embryo transfer.

Unless a physician decides otherwise, single embryo transfers should be used in lieu of multiple embryo transfers to minimize the

¹⁸⁷ See Pavone, *supra* note 112.

¹⁸⁸ See ARK. INS. AGENCY, *supra* note 118.

¹⁸⁹ S. Ouhilal et al., *What Is the Optimal Number of Eggs at Oocyte Retrieval?*, 100 FERTILITY & STERILITY S262, S262 (Supp. 2013), [https://www.fertstert.org/article/S0015-0282\(13\)01881-5/fulltext](https://www.fertstert.org/article/S0015-0282(13)01881-5/fulltext) (stating that "in women age less than 35 there was no improvement in pregnancy[sic] rates beyond 10 eggs" and finding that for women age 40 the highest percentage of pregnancy rates were associated with fifteen to nineteen eggs at retrieval).

¹⁹⁰ R.H. Goldman et al., *Predicting the Likelihood of Live Birth for Elective Oocyte Cryopreservation: A Counseling Tool for Physicians and Patients*, 32 HUM. REPROD. 853, 855 (2017) (showing in Table I that women under thirty-five had an average of 13.7 mature oocytes retrieved, while women forty and over had an average of 8.8 mature oocytes retrieved, and women between thirty-five and forty had an average of 10.9 mature oocytes retrieved).

risk of a multiple and, therefore, high-risk pregnancy. For women over a certain age, physicians may recommend double embryo transfer and their best judgment should be utilized.¹⁹¹ States should not limit the number of cycles of embryo transfers covered. Instead, coverage should end when there are no more embryos to transfer from the retrieved eggs. The coverage of several rounds of IVF takes the pressure off of women to transfer multiple embryos at a time and therefore decreases the chance of twins or higher-order births.

In addition to treating infertility, states should mandate that insurance cover pre-implantation genetic testing. Several recipients of the BabyQuest Foundation grant, which was discussed at the beginning of this Comment, were chosen because they needed genetic testing before embryo implantation and natural pregnancy was not an option due to a genetic disease.¹⁹² A model law for infertility treatment would read as follows:

I. All health insurance plans issued in this state shall provide coverage for the diagnosis and treatment of infertility, fertility preservation services, and fatal genetically linked disease minimization.

II. The definitions would be as follows:

(a) “Infertility” refers to

- a. A diagnosis made by a licensed physician
- b. The failure to become pregnant and/or carry a fetus to full term following a year of regular, unprotected sex and/or a year of failed artificial insemination cycles for people under thirty-five.
- c. The failure to become pregnant and/or carry a fetus to full term following six months of regular, unprotected sex and/or six months of failed artificial insemination cycles for individuals thirty-five and over.
- d. This definition is not limited by an individual’s marital status, relationship status, sexual orientation, or gender.
- e. This definition includes sperm used by a known or unknown donor.

(b) “Diagnosis and treatment of infertility” includes but is not limited to in vitro fertilization and intrauterine insemination and the

¹⁹¹ See *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, *supra* note 154 (recommending that patients between the ages of thirty-eight and forty-two should plan on having no more than 3 or 4 untested embryos transferred while also recommending that patients under thirty-seven should strongly consider single embryo transfers),

¹⁹² See *Caitrin & Kyle – TX*, *supra* note 50.

corresponding medications recommended by a licensed physician and in line with the established medical practices/guidelines as set forth by the American Society of Reproductive Medicine.

- a. This includes two oocyte retrievals for patients under thirty-five at the time of the retrieval, and three oocyte retrievals for patients thirty-five and older at the time of the retrieval. This includes three years of cryopreservation of eggs following the last round of oocyte retrieval.
- b. Single embryo transfers should be used when deemed medically appropriate by the physician and/or the ASRM.
- c. Before IVF is utilized, less invasive options like IUI should be used for at least two cycles, unless otherwise advised by a medical professional.

(c) "Fertility preservation services" refers to the procedures, medications, and services for someone with a primary medical condition who is at risk of infertility either by the condition itself, or resulting from any accompanying treatment, surgery, radiation, or chemotherapy which medical professionals deem a risk to that patient's fertility.

- a. This includes counseling by fertility preservation specialists.
- b. This includes pediatric patients
- c. Cryopreservation shall be covered until age thirty-five, or for ten years following the oocyte retrieval as part of fertility preservation services, whichever comes later, at which point the patient may pay for subsequent cryopreservation.

(d) "Genetically-linked disease minimization" refers to IVF and pre-implantation screening utilized by parents who have/had at least one full term-pregnancy or live birth that resulted in a child born with an incurable and/or fatal genetically-linked disorder. Such disorders include but are not limited to Tay-Sachs, Spinal Muscular Atrophy, and Cystic Fibrosis. This does not include chromosomal disorders that are not hereditary, such as Down syndrome.

VI. CONCLUSION

There is no dispute that infertility is a disease. Nonetheless, the majority of states do not mandate that insurers cover even widely available infertility treatments. The strict and controversial abortion laws that have been passed in states like Texas, Arkansas, and Mississippi highlight the consistent effort to limit women's bodily autonomy. The states that claim an interest in potential life as a reason

for promoting laws that make abortions near unobtainable also have outdated laws that allow only married heterosexual women to be considered for insurance coverage after sustaining years of unnecessary mental anguish due to repeatedly failed attempts at pregnancy. Every state has an interest in helping their residents treat infertility, regardless of how stringent their abortion laws are. States with strict abortion laws logically should have coverage mandates for infertility treatment since they prioritize their interest in new lives in the state. Hindering someone from having an abortion, while also hindering an infertile person from having a child due to exorbitant infertility costs, is illogical and speaks only to regulating uteruses—both what may enter and what may exit.

The language in the model act proposed by this Comment promotes bodily autonomy and is inclusive, mindful of maternal health in terms of both mental and physical health, based on science and medicine, and intended to combat the declining birth rate. While this Comment does not argue why new abortion laws like those in Texas, Arkansas and Mississippi are a denial of essential health care and a threat to women's health and safety, it does point out the sheer hypocrisy of limiting access to both abortion and affordable infertility treatment.

Reform is necessary when an individual's ability to receive treatment for a disease depends on where they live. States without infertility treatment insurance coverage mandates and those with inadequate infertility treatment coverage laws should adopt inclusive laws—like the one recommended in Part V—which promote bodily autonomy and a high chance at successful pregnancy for infertile individuals. Though many women do not know they are infertile until they try to have children, and infertility is not a life-threatening disease, treating infertility is crucial to sustain our population. The best way to combat the declining birth rate debacle is not by forcing women who are not prepared to have children into giving birth, thus risking that their children enter the already over-saturated foster care system, but is instead by aiding those who want to bring their own children into the world but do not have the means to treat the disease of infertility without insurance coverage.

