

Assisted Reproductive Technology (ART)

ART Generally

Assisted Reproductive Technology (ART) commonly refers to treatments used to facilitate reproduction, including medications to induce ovulation, in vitro fertilization (IVF), and other methods discussed below.¹

- Heterosexual couples may turn to ART to overcome infertility in one or both partners. About 12% of women aged 15-44 in the U.S. have an impaired ability to have children.² About one-third of the time, this is due to female infertility, another third of the time to male infertility, and the other one-third of the time to a mix of factors or to unknown factors.³
- Single people,⁴ LGBTQIQ couples,⁵ women undergoing chemotherapy,⁶ and those interested in pre-implantation genetic diagnosis⁷ may also seek out ART.
- People can spend tens of thousands of dollars while trying to become pregnant.⁸ Most health insurance plans, whether public or private, do not cover infertility treatments or other ART procedures,⁹ meaning financial status can often limit access to ART. Infertility treatments are not covered by the 2010 Patient Protection and Affordable Care Act.¹⁰ It has not been announced whether 2014 benefits packages will provide coverage.¹¹
 - Fifteen states (AR, CA, CT, GA, HI, IL, MD, MA, MT, NJ, NY, OH, RI, TX, and WV) require some coverage of infertility diagnosis and treatment by insurers.¹²
 - Courts have found infertility constitutes a disability under the Americans with Disabilities Act (ADA).¹³ Insurance plans can avoid violating the ADA, however, by making coverage exclusions apply to everyone (fertile and infertile).¹⁴
 - Coverage exclusion may not violate Title VII's Pregnancy Discrimination Act, either, since men and women are equally affected by infertility.¹⁵

Sperm Donation

Sperm donation provides an option for single women, women in same-sex relationships, and couples unable to conceive because of male infertility or wishing to avoid genetic risks for inherited disease¹⁶ or contracted diseases such as HIV.¹⁷ Those wishing to use donated sperm for alternative insemination (AI) or IVF may seek out a known donor or purchase sperm from an anonymous donor from a sperm bank.¹⁸ A patient can expect to pay around \$300-\$800 per insemination for the sperm, which is not normally covered by insurance.¹⁹

- The contractual arrangement between donor and sperm bank may take various forms, setting expectations about details such as the frequency of donation and the terms of compensation.²⁰ Donors may be required to test for sexually-transmitted infection prior to donation, and semen samples may be quarantined for six months pending follow-up testing.²¹
- Sperm donors are often unprepared for the consequences of donating their genetic material.²² More and more doctors and organizations encourage counseling to address sperm donor concerns.²³
- In 2004, the FDA approved new regulations for sperm donation, recommending that sperm banks not accept anonymous donations from men who have had sex with men in the last five years to reduce the possibility of HIV and Hepatitis B transmission.²⁴ Advocates argue that the rules promote stereotypes about gay men, basing eligibility for donation on sexual orientation rather than scientifically determined risk factors.²⁵
 - In all, there have only been "a few documented cases of HIV transmission through sperm donation," which arose before the advent of current testing procedures and long before the FDA's donation criteria were developed.²⁶
- The majority of patients are lesbian couples and single women,²⁷ two groups historically discriminated against by donation clinics, donation laws, and society in general.²⁸ Today, due to advances in technology that allow doctors to use sperm that traditionally could not be

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used, male infertility rarely prevents reproduction.²⁹ Through a procedure called intracytoplasmic sperm injection (ICSI), embryologists can inject a single sperm into an oocyte (egg), eliminating the need for the sperm to be capable of accomplishing this feat without technological aid.³⁰

Ova/Oocyte or “Egg” Donation

If the would-be parent(s) cannot or choose not to provide their own eggs, they can use ova donated by a third party for IVF.³¹ The practice of egg donation remains largely unregulated.³²

- Egg donors undergo hormonal stimulation and oocyte (egg) extraction.³³ Far more invasive than sperm donation, the short-term health risks of egg donation include ovarian hyperstimulation syndrome, which can cause serious health complications.³⁴ Limited follow-up research has left the long-term health implications essentially unknown.³⁵
- Women usually receive \$5,000+ to donate their ova to assist others in procreation,³⁶ and some individuals or couples may offer up to \$100,000 for eggs from women with particular characteristics.³⁷ The American Society for Reproductive Medicine recommends that payments for egg donation not exceed \$10,000 per cycle.³⁸

Alternative Insemination (AI)

Alternative insemination, sometimes referred to as artificial insemination, involves the manual placement of semen into a woman’s body.³⁹ A syringe filled with sperm is inserted and injected into the woman’s vagina.⁴⁰ AI can be performed successfully at home or in a medical clinic.⁴¹ Some women combine AI with fertility medications to stimulate increased egg production, increasing the likelihood that one or more of the eggs will be fertilized.⁴² AI’s success rates range from 8% to 15%.⁴³

In Vitro Fertilization (IVF)

IVF is a process by which an egg is fertilized outside a woman’s body.⁴⁴ A doctor retrieves eggs from the donor (either the woman who wishes to become pregnant or a separate donor), which are then mixed with sperm in a Petri dish.⁴⁵ About two days later, the eggs are examined to determine fertilization and, if successful, one or more of the embryos are implanted in the uterus.⁴⁶

- IVF accounts for less than 5% of all infertility treatment.⁴⁷
- Due to technological improvements, surgery is rarely necessary for IVF patients.⁴⁸

Pre-implantation Genetic Diagnosis (PGD)

PGD allows the testing of embryos created by in vitro fertilization (IVF) for a variety of single-gene traits, such as sex, Down’s Syndrome, Tay-Sachs disease, Cystic Fibrosis, Sickle Cell disease, Huntington’s disease, Thalassemia, and Muscular Dystrophy.⁴⁹ Embryos can then be selectively implanted based on the presence or absence of certain characteristics.⁵⁰ Some IVF providers also recommend PGD to patients struggling with infertility problems like multiple miscarriages or several failed IVF cycles, and to patients over 35.⁵¹ This represents an extension of PGD’s original development as a method to detect inherited genetic illnesses to current efforts to improve success rates in infertility treatment.⁵²

- Most insurance companies,⁵³ and the Patient Protection and Affordable Care Act,⁵⁴ do not cover the cost of PGD. The testing adds between \$4,000 and \$7,500 to the cost of IVF,⁵⁵ which alone costs an average of \$12,000 per treatment.⁵⁶
- PGD provides a potential alternative to prenatal testing.⁵⁷ Some prefer it to screening during pregnancy and performing selective abortion if certain traits are identified.⁵⁸
- The U.S. does not currently regulate PGD,⁵⁹ although some argue for its prohibition beyond screening for a specified set of genes related to disease.⁶⁰

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- Some other countries, including Canada, Germany, and the U.K., prohibit sex selection for reasons of cultural or parental preference.⁶¹
- Some scientists believe that there might be a “gay gene.”⁶² Although some believe identifying this gene will prove that homosexuality is not an “unnatural” or chosen lifestyle, others fear that if a “gay gene” is identified, parents may use PGD to deselect embryos that carry it.⁶³
- PGD sparks controversy because couples use it to avoid passing along genes for certain identifiable conditions to their children. Some argue that PGD resembles eugenics and that de-selecting embryos for disability devalues the lives of those who live with disabilities.⁶⁴ Many object to PGD being used to choose a child of a preferred sex or to select a future child’s non-disease traits, such as cosmetic or behavioral qualities.⁶⁵ Since wealthy parents are more likely to have the option of selecting their children’s genetic characteristics, some fear that unregulated PGD will simply exacerbate current inequalities.⁶⁶

Surrogacy or Gestational Agreements

In a surrogacy agreement, a woman agrees to carry and give birth to a child for others to raise. There are two primary types of surrogacy agreements; in both circumstances, the woman who gives birth often receives compensation for the expenses of the pregnancy, ranging anywhere from \$40,000 to \$100,000 for a U.S. surrogate.⁶⁷

- In a **traditional surrogacy** arrangement, a woman agrees to be inseminated, carry the resulting pregnancy to term, and give the baby to the intended parents.⁶⁸ In this situation, the surrogate is both the genetic and gestational mother of the baby.⁶⁹
 - In a custody dispute between the intended parents and a surrogate, a New Jersey court found equal parental rights in the genetic surrogate and the biological father,⁷⁰ but no rights in the intended mother.⁷¹ Custody then hinged upon the court’s judgment of the child’s best interests, which it found lay with the biological father and intended mother based on the specific facts of the case.⁷²
- A **gestational surrogacy** arrangement uses eggs from the intended mother or a donor, fertilized by IVF and implanted into the gestational mother’s uterus.⁷³ The surrogate agrees to carry the resulting pregnancy to term and to give the baby to the intended parents.⁷⁴ In this situation, the gestational mother has no genetic relationship to the baby.⁷⁵
 - The California Supreme Court ruled that the gestational surrogate and the genetic mother both have legitimate claims to maternity, so intent became determinative of the parental rights question in the case.⁷⁶
- Ethical controversy over surrogacy arises from concerns about exploitation and commodification of motherhood or children.⁷⁷
- Many people now engage in “commercial surrogacy,” hiring surrogates from the developing world.⁷⁸ The practice is legal in India, where women earn far less than U.S. surrogates (typically \$3,000-\$6,000 versus \$25,000), but far more than India’s average daily wage.⁷⁹ Ethical concerns about such “reproductive tourism” include the wage disparity and lack of legal and health protections for the women acting as surrogates.⁸⁰
- The laws governing surrogacy agreements vary widely by state:⁸¹
 - Twelve states (AK, FL, IL, NV, NH, NJ, ND, TN, TX, UT, VA, WA) have laws that explicitly permit surrogacy arrangements.⁸² States other than Arkansas and New Hampshire place limits on the type of surrogacy allowed and on whether the surrogate can be compensated.⁸³ For example:
 - Nevada restricts access to married couples only.⁸⁴
 - Florida restricts access to heterosexuals only.⁸⁵

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- Illinois and North Dakota only allow gestational surrogacy, as do Texas and Utah, which further restrict access to heterosexuals only.⁸⁶
- New Jersey, New Mexico, Oregon, and Virginia only allow uncompensated surrogacy agreements.⁸⁷
- Arizona, Indiana, Michigan, New York, and the District of Columbia explicitly prohibit all surrogacy arrangements.⁸⁸
- Only Nebraska and Louisiana explicitly prohibit compensated surrogacy arrangements.⁸⁹
- Case law in twenty-eight other states is generally favorable to at least some types of surrogacy arrangements.⁹⁰

Access to ART for LGBTQIQ Persons

Although rapid progress is being made in this area,⁹¹ many LGBTQIQ people seeking ART still face discrimination from physicians who refuse to treat them, in addition to discriminatory regulations, statutes, and legal precedent; for example:

- In *Barros v. Riggall*, a man and his partner filed a complaint with the Orlando Human Rights Board after a Florida clinic refused to offer them fertility treatment.⁹² The men planned to impregnate a willing surrogate mother, but the clinic claimed FDA guidelines on anonymous sperm donations prevented the treatment.⁹³
- In *Benitez v. North Coast Women's Medical Group*, Guadalupe Benitez sued a fertility clinic that denied her treatment because she is a lesbian.⁹⁴ The California Supreme Court held that compliance with the state's anti-discrimination law only incidentally affected free speech and the free exercise of religion, meaning religious convictions cannot exempt a business establishment from compliance.⁹⁵
- The FDA continues to recommend that sperm banks do not accept donations from any man who has engaged in homosexual sex in the previous five years.⁹⁶

¹ The definition given here is common but broader than most official uses. For example, the Centers for Disease Control and Prevention (CDC) limit the definition of ART to only those procedures that involve the handling of both the egg and sperm and, thus, would not include sperm donation or artificial insemination. *Assisted Reproductive Technology*, CTRS. FOR DISEASE CONTROL, <http://www.cdc.gov/ART/index.htm> (last visited Feb. 14, 2011).

² *Infertility*, CTRS. FOR DISEASE CONTROL, <http://www.cdc.gov/nchs/fastats/fertile.htm> (last visited Apr. 2, 2009).

³ *Infertility*, WOMEN'SHEALTH.GOV, <http://womenshealth.gov/faq/infertility.cfm#c> (last updated July 1, 2009).

⁴ See LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD 154-76 (2008) (discussing both stereotypes and realities regarding single mothers, with statistics and true life stories).

⁵ See *id.* at 108-53 (describing true life stories of sperm bank use by lesbian women and gay fatherhood).

⁶ See AM. SOC'Y FOR REPROD. MED. (ASRM), PATIENT'S FACT SHEET: CANCER AND FERTILITY PRESERVATION 1 (2004), available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/cancer.pdf.

⁷ See ASRM, PATIENT'S FACT SHEET: GENETIC SCREENING FOR BIRTH DEFECTS 1 (2005), available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/genetic_screening.pdf.

⁸ See, e.g., Georgina M. Chambers et al., *Assisted Reproductive Technology Treatment Costs of a Live Birth: An Age-Stratified Cost-Outcome Study of Treatment in Australia*, 184 MED. J. AUSTRAL. 155, 155 (2006), available at http://www.mja.com.au/public/issues/184_04_200206/cha10890_fm.html (noting average cost of non-donor ART/IVF live-birth event is \$32,900 Australian dollars or \$28,600 US dollars).

⁹ *Health Insurance 101*, RESOLVE: THE NAT'L INFERTILITY ASS'N, http://www.resolve.org/family-building-options/insurance_coverage/health-insurance-101.html (last visited June 13, 2011).

¹⁰ *Statement: Healthcare Reform*, RESOLVE: THE NAT'L INFERTILITY ASS'N, <http://www.resolve.org/about/statement-healthcare-reform.html> (last visited June 13, 2011).

¹¹ *Id.*

¹² Michelle Andrews, *Health Law Could Affect Infertility Treatment Coverage*, HEALTH CARE ON MSNBC.COM (Jan. 16, 2011, 8:34 AM), http://www.msnbc.msn.com/id/41254553/ns/health-health_care/t/health-law-could-affect-

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fertility-treatment-coverage (noting that these states, however, vary greatly as to which services they cover and how they provide that coverage).

¹³ See, e.g., *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 763 (W.D. Mich. 2001); *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801 (N.D. Ill. 1996).

¹⁴ See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 678 (8th Cir. 1996) (finding insurance plan “not a disability-based distinction in violation of the ADA” because “the Plan’s infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for treatment of infertility problems.”).

¹⁵ See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345-46 (2d Cir. 2003) (finding “discrimination based on ‘childbearing capacity’” is a violation but “discrimination based on ‘fertility alone’” is not because “the PDA requires that pregnancy, and related conditions, be properly recognized as sex-based characteristics of women.”).

¹⁶ *Sperm Donor Bank*, CTR. FOR REPROD. & GENETIC HEALTH, <http://www.crgh.co.uk/dynamicdata/sperm-donor-bank.php> (last visited June 15, 2011).

¹⁷ ASRM Ethics Comm., *Human Immunodeficiency Virus and Infertility Treatment*, 94 FERTILITY AND STERILITY, 2010 at 11, 11, available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/hivethics.pdf.

¹⁸ CTR. FOR REPROD. & GENETIC HEALTH, *supra* note 16.

¹⁹ *How Much Does Donor Sperm Cost?*, SPERM CENTER, <http://www.spermcenter.com/content/how-much-does-donor-sperm-cost> (last updated Sept. 9, 2009).

²⁰ See Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 320 (2007).

²¹ ASRM, THIRD PARTY REPRODUCTION (SPERM, EGG, AND EMBRYO DONATION AND SURROGACY): A GUIDE FOR PATIENTS 10 (2006), available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf [hereinafter ASRM THIRD PARTY REPROD.].

²² See Rachel Lehmann-Haupt, *Mapping the God of Sperm*, NEWSWEEK, Dec. 16, 2009, available at <http://www.newsweek.com/2009/12/15/mapping-the-god-of-sperm.html> (exploring a frequent sperm donor’s qualms about early sperm bank screening processes); KDJA, *Is a \$50K Egg a Bigger Deal than a \$100 Sperm?* BABBLE (May 11, 2010, 4:40 PM), <http://blogs.babble.com/strollerderby/2010/05/11/is-an-50k-egg-a-bigger-deal-than-a-100-sperm> (discussing the range of feelings sperm and egg donors experience). But see Dr. Marcus, *Sperm Donation*, IVF-INFERTILITY (Dec. 15, 2010, 2:55 PM), <http://www.ivf-infertility.com/donation/sperm/sperm4.php> (explaining how donor counseling creates awareness of sperm donation consequences).

²³ See, e.g., *Sperm Donation*, FERTILITYFACTOR.COM, http://www.fertilityfactor.com/infertility_medical_options_sperm_donor.html (last visited June 13, 2011) (recommending “all people involved in the sperm donation process undergo psychological counseling.”). But see Kay Miller, *Needs of Sperm Donors, Offspring at Odds*, AZ REPORTER, Feb. 19, 2007, available at <http://www.azcentral.com/families/articles/0219spermdonors0220.html?wired> (noting need for more honest counseling for donors); *Donor Sperm: Treatment for Infertility*, REPROD. HEALTH SPECIALISTS, <http://www.ivfpittsburgh.com/donor-sperm.html> (last visited June 13, 2011) (noting extensive counseling for patients with no mention of donor counseling).

²⁴ FDA, GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS (HCT-PS) 14 (2007), available at <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf>.

²⁵ See, e.g., Lisa Hardaway, *Federal Government Recommendations on Gay Men Donating Sperm ‘Look Like They Were Written in 1982, not 2004,’ Lambda Legal Says*, LAMBDALEGAL.ORG (May 20, 2004), <http://www.lambdalegal.org/our-work/issues/hiv/federal-government.html>.

²⁶ Rona Marech, *FDA Sperm Donation Rule Upsets Gay Rights Groups*, S.F. CHRON., May 6, 2005, at B3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/05/06/BAGC8CKV451.DTL>.

²⁷ MUNDY, *supra* note 4, at 83; Almeling, *supra* note 20, at 325.

²⁸ JUDITH F. DAAR, CURRENT CONTROVERSIES IN REPROD. MEDICINE 7-9 (2006). See also Joanna Karpasea-Jones, *Single Women Win the Right to IVF*, SUITE101.COM (May 26, 2008), http://infertility.suite101.com/article.cfm/single_women_win_the_right_to_ivf (noting that before 1990, British clinics could deny IVF procedures to lesbians and single women. Also noting that the majority of Britains do not support a newly-enacted law allowing these groups to undergo IVF). For an example of a discriminatory opinion, see Kathleen Parker, *Deleting Dad*, REAL CLEAR POLITICS (Mar. 22, 2006), http://www.realclearpolitics.com/articles/2006/03/deleting_dad.html (calling single women “narcissistic” for giving birth to “fatherless” children who are treated as “accessories”). For an example of IVF-related issues facing lesbian couples, see AMY AGIGIAN, BABY STEPS: HOW LESBIAN ALTERNATIVE INSEMINATION IS CHANGING THE WORLD 75 (2004) (explaining that lesbian couples face those same criticisms, as well as paternity claim concerns and exclusion by insurance companies).

²⁹ MUNDY, *supra* note 4, at 77; ASRM THIRD PARTY REPROD., *supra* note 21, at 9.

³⁰ *Intracytoplasmic Sperm Injection (ICSI)*, UCSF MED. CTR., CTR. FOR REPROD. HEALTH, <http://www.ucsfivf.org/ucsf-icsi.htm> (last visited June 13, 2011).

³¹ ASRM THIRD PARTY REPROD., *supra* note 21, at 4.

³² Michelle Sargent, *Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in the United States and United Kingdom*, 4 MICH. J. PUB. AFFAIRS, 2007, at 2, available at <http://www.mjpa.umich.edu/uploads/2/9/3/2/2932559/sargent-eggdonation-final07.pdf>.

³³ DAAR, *supra* note 28, at 28.

³⁴ *Id.*

³⁵ JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 6 (2007), available at http://www.americanprogress.org/issues/2007/12/pdf/arons_art.pdf.

³⁶ DAAR, *supra* note 28, at 30; David Tuller, *Payment Offers to Egg Donors Prompt Scrutiny*, N.Y. TIMES, May 10, 2010, at D5, available at <http://query.nytimes.com/gst/fullpage.html?res=940CE4DB1238F932A25756CoA9669D8B63&ref=assistedreproductivetechnology>; Almeling, *supra* note 20, at 325-26 (noting that whereas sperm donor solicitation emphasizes monetary compensation, egg donor solicitation emphasizes altruism).

³⁷ ARONS, *supra* note 35, at 6.

³⁸ ASRM, *Financial Compensation of Oocyte Donors*, 88 FERTILITY AND STERILITY 305, 308 (2007), available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf.

³⁹ EMILY GALPERN, CTR. FOR GENETICS AND SOC'Y, ASSISTED REPRODUCTIVE TECHNOLOGIES: OVERVIEW AND PERSPECTIVE USING A REPRODUCTIVE JUSTICE FRAMEWORK 9 (2007), available at <http://geneticsandsociety.org/downloads/ART.pdf>.

⁴⁰ ASRM THIRD PARTY REPROD., *supra* note 21, at 11.

⁴¹ GALPERN, *supra* note 39, at 9.

⁴² *Id.*

⁴³ ASRM THIRD PARTY REPROD., *supra* note 21, at 12 (noting the success rates “depend on many factors”, including age and fertility complications).

⁴⁴ ASRM, *Frequently Asked Questions about Infertility*, <http://www.asrm.org/awards/index.aspx?id=3012> (last visited June 13, 2011).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *In Vitro Fertilization (IVF-ET)*, GA. REPROD. SPECIALISTS, <http://www.ivf.com/ivffaq.html> (last visited June 13, 2011).

⁴⁹ *Preimplantation Genetic Diagnosis (PGD)*, N.J. FERTILITY CTR., <http://www.ivfnj.com/services/pgd#diseases> (last visited June 16, 2011).

⁵⁰ *Id.*

⁵¹ EMORY UNIV. SCH. OF MED., DEP'T OF HUMAN GENETICS, PREIMPLANTATION GENETIC SCREENING 1 (2006) available at <http://genetics.emory.edu/pdf/factsheet41.pdf>. See also Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUS. J. HEALTH L. & POL'Y 245, 248, 252 (2008), available at <http://www.dnapolicy.org/resources/PGD&parentalpreferences.pdf>.

⁵² Baruch, *supra* note 51, at 248.

⁵³ *FAQ on PGD*, REPROD. GENETICS INST., http://www.reproductivegenetics.com/pgd_faq.html (last visited June 15, 2011).

⁵⁴ Abbie Waters, *Even After Health Care Reform, Insurance Companies Don't Have to Cover Infertility*, FERTILITY NATION, <http://www.fertilitynation.com/even-after-health-care-reform-insurance-companies-dont-have-to-cover-infertility> (last visited June 16, 2011).

⁵⁵ *Pre-Implantation Genetic Diagnosis*, REPROD. HEALTH TECH.S PROJECT, <http://www.rhpt.org/fertility/pgd/default.asp> (last visited June 15, 2011).

⁵⁶ Admin., *The Average Cost of IVF and Insurance Plans*, PREGNANCY CARE CENTER (May 25, 2011), <http://www.pregnancycare-center.org/the-average-cost-of-ivf-and-insurance-plans.html>.

⁵⁷ *About Genetic Selection*, CTR. FOR GENETICS AND SOC'Y, <http://www.geneticsandsociety.org/article.php?list=type&type=82> (last visited June 15, 2011).

⁵⁸ *Values and Religious Beliefs*, HEALTHTALKONLINE.ORG, http://www.healthtalkonline.org/pregnancy_children/Screening_for_sickle_cell_and_beta_thalassaemia/Topic/2190 (last reviewed Aug 2010).

⁵⁹ Gautam Naik, *A Baby, Please. Blond, Freckles – Hold the Colic*, WALL ST. J., Feb. 12, 2009, available at <http://online.wsj.com/article/SB123439771603075099.html>.

⁶⁰ *PGD Frequently Asked Questions*, CTR. FOR GENETICS AND SOC'Y, <http://www.geneticsandsociety.org/article.php?id=452> (last updated March 1, 2010).

⁶¹ ROSARIO M. ISAH & BARTHA M. KNOPPERS, NATIONAL REGULATORY FRAMEWORKS REGARDING HUMAN REPRODUCTIVE GENETIC TESTING (PREIMPLANTATION GENETIC DIAGNOSIS/PRENATAL DIAGNOSIS) 5, 8, 18 (July 2006), available at <http://www.dnapolicy.org/pdf/geneticTesting.pdf>.



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- ⁶²Mara Hvistendahl, *Have Scientists Found the 'Gay Gene'?*, POPULAR SCIENCE, July 15, 2010, available at <http://www.foxnews.com/scitech/2010/07/15/have-scientists-found-gay-gene>.
- ⁶³ John Robertson, BROOKINGS INST., *Reproductive Rights and Reproductive Policy in 2030*, in THE FUTURE OF THE CONSTITUTION 8 (Jan. 21, 2011), available at http://www.brookings.edu/~media/Files/rc/papers/2011/0121_reproductive_technology_robertson/0121_reproductive_technology_robertson.pdf. Cf. Edgar Dahl, *Ethical Issues in New Uses of Preimplantation Genetic Diagnosis*, 18 HUMAN REPRODUCTION 1368, 1368 (2003), available at <http://humrep.oxfordjournals.org/content/18/7/1368.full.pdf+html>. (arguing that the fear is misplaced because if parents are allowed to deselect the “gay gene,” they should also be entitled to select it).
- ⁶⁴ CTR. FOR GENETICS AND SOC'Y, *PGD Frequently Asked Questions*, *supra* note 60.
- ⁶⁵ See Brandon Keim, *Designer Babies: A Right to Choose?*, WIRED (Mar. 9, 2009, 3:08 PM), <http://www.wired.com/wiredscience/2009/03/designerdebate>.
- ⁶⁶ Marcy Darnovsky, Presentation at Gender and Justice in the Gene Age: Challenges of Emerging Technologies: Reproductive Cloning and Inheritable Genetic Modification (May 7, 2004), available at <http://www.geneticsandsociety.org/article.php?id=3129>.
- ⁶⁷ GALPERN *supra* note 39, at 11.
- ⁶⁸ ASRM THIRD PARTY REPROD., *supra* note 21, at 3.
- ⁶⁹ *Id.*
- ⁷⁰ *In re Baby M.*, 537 A.2d 1227, 1247 (N.J. 1988).
- ⁷¹ *Id.* at 1244.
- ⁷² *Id.* at 1258-59.
- ⁷³ ASRM THIRD PARTY REPROD., *supra* note 21, at 3.
- ⁷⁴ *Id.*
- ⁷⁵ *Id.*
- ⁷⁶ Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
- ⁷⁷ *E.g.*, *In re Baby M.*, 537 A.2d at 1249-51. See also Almeling, *supra* note 20; *Surrogacy Issues*, INFORMATION ON SURROGACY, <http://www.information-on-surrogacy.com/surrogacy-issues.html> (last visited June 16, 2011).
- ⁷⁸ See Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, available at <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html?pagewanted=1&r=1>.
- ⁷⁹ *Id.*; GALPERN, *supra* note 39, at 11-12.
- ⁸⁰ GALPERN, *supra* note 39, at 17; Gentleman, *supra* note 79.
- ⁸¹ See *State Surrogacy Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (last visited June 16, 2011). See also *U.S. Surrogacy Laws by State*, THE SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/surrogates.cfm?sc=23&p=99> (last visited June 16, 2011).
- ⁸² HUMAN RIGHTS CAMPAIGN, *supra* note 81.
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *Id.*
- ⁸⁷ *Id.* Virginia allows the surrogate to be compensated for expenses related to the pregnancy. *Id.*
- ⁸⁸ *Id.*
- ⁸⁹ *Id.*
- ⁹⁰ *Id.* These states are: AK, CT, CO, CA, GA, HA, ID, IA, KY, MA, MD, ME, MN, MO, MS, MT, NC, NM, OH, OK, OR, RI, SC, SD, VT, WV, WI, WY. The amount of case law varies according to state and generally does not address the legality of same-sex couples using a surrogate. THE SURROGACY EXPERIENCE, *supra* note 81.
- ⁹¹ For example, the legalization of same-sex marriage may render surrogacy available to gay and lesbian couples previously restricted by marriage-only surrogacy laws. See, *eg.*, *New Hampshire Surrogacy Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/1334.htm> (last visited June 16, 2011).
- ⁹² *Barros v. Riggall*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/barros-v-riggall.html> (last visited June 16, 2011).
- ⁹³ *Id.*
- ⁹⁴ *N. Coast Women's Care Med. Grp., Inc., v. San Diego Cty. Super. Ct.*, 189 P.3d 959 (Cal. 2008).
- ⁹⁵ *Id.* at 966.
- ⁹⁶ FDA, *supra* note 24, at 14.