

COERCION, COMMERCIALIZATION, AND COMMODIFICATION: THE ETHICS OF COMPENSATION FOR EGG DONORS IN STEM CELL RESEARCH

By Radhika Rao[†]

TABLE OF CONTENTS

I. INTRODUCTION	1055
II. TRADITIONAL JUSTIFICATIONS FOR PROHIBITING PAYMENT TO EGG DONORS.....	1058
A. WHY PROHIBIT PAYMENT FOR HUMAN EMBRYOS? PERSONHOOD VS. PROPERTY.....	1058
B. WHY PROHIBIT PAYMENT FOR HUMAN EGGS? COERCION AND COMMODIFICATION.....	1058
III. JUSTIFICATIONS FOR A MARKET FOR HUMAN EGGS IN IVF BUT NOT IN HESCR.....	1060
A. INSTRUMENTALIZATION.....	1060
B. COMMERCIALIZATION.....	1061
C. RESEARCH VS. THERAPY.....	1063
D. PROPERTY VS. PRIVACY	1065

I. INTRODUCTION

Human embryonic stem cell research (hESCR) involves the extraction of stem cells from human embryos, which are destroyed in the process. The embryos may be obtained in one of three ways: (1) they may be cloned human embryos specifically created for research; (2) they may be research embryos created through in vitro fertilization (IVF); or (3) they may be “spare” embryos left over from infertility treatments that are donated for research.¹ All of these methods entail the use of human eggs at some stage in the process; they may also involve the use of human sperm

© 2006 Radhika Rao

[†] Professor of Law, University of California, Hastings College of the Law.

1. See NATIONAL RESEARCH COUNCIL & INSTITUTE OF MEDICINE, GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH (2005) [hereinafter NAS GUIDELINES].

or human cells. How do we protect the individuals who donate these eggs, sperm, cells, or embryos? How do we ensure their consent to the process? Are donors entitled to maintain a certain degree of control over the bodily material they donate, and over the resulting products? Are donors at least entitled to share in the profits generated from such research?

In this Article, I discuss current U.S. guidelines for compensation of egg donors in hESCR. By prohibiting payment, the guidelines attempt to prevent coercion of egg donors and the commodification and commercialization of their bodies. In so doing, the guidelines implicitly invoke the rubric of privacy and reject propertization of the human body. Yet the guidelines fail to limit payment of egg donors in IVF. Moreover, they permit commercialization and commodification of the human body by everyone else engaged in hESCR, except for those who provide eggs and other body parts. Thus, the scientists who conduct hESCR and the companies and universities that fund their research are all free to profit. These inconsistencies and contradictions ultimately undermine the objectives of the U.S. guidelines.

The National Academy of Sciences (NAS) has issued guidelines for hESCR that require “informed consent” and prohibit payment or other “inducements” made to attract donors, beyond reimbursement for their expenses.² The California Institute for Regenerative Medicine (CIRM) has recommended that essentially the same restrictions apply to all hESCR funded by the state under Proposition 71.³ Regulations that proscribe payment to egg donors appear to be quite common and uncontroversial. For example, South Korea has enacted similar laws banning payment to oocyte donors,⁴ as have the United Kingdom, Canada, Australia, France, Germany, Israel, and other countries.⁵

2. *See id.* at 82-89.

3. *See* SCIENTIFIC & MED. ACCOUNTABILITY STANDARDS WORKING GROUP, CIRM, PROPOSED CIRM MES REGULATIONS: ACCEPTABLE RESEARCH MATERIALS § 100007(e)(1)-(3) (proposed Feb. 10, 2006); *see also* INDEPENDENT CITIZENS OVERSIGHT COMMITTEE (ICOC), AGENDA ITEM #16: CONSIDERATION OF ADDITIONAL INTERIM CIRM MEDICAL AND ETHICAL STANDARD REGULATION FOR HUMAN STEM CELL RESEARCH, ICOC MEETING AGENDA (Apr. 16, 2006), *available at* http://www.cirm.ca.gov/meetings/pdf/2006/04/040606_item_16.pdf (considering new § 100085: Use of Fetal Tissue).

4. South Korea banned the sale of human eggs in January 2004. *See* James Brooke, *Korean Leaves Cloning Center in Ethics Furor*, N.Y. TIMES, Nov. 25, 2005, at A1.

5. The United Kingdom permits oocyte donors to be paid no more than £15 plus reasonable expenses. *See* Press Release, Human Fertilisation Embryology Authority, HFEA Confirms UK Position on Payment for Egg Donors (Feb. 25, 2004) (on file with author), *available at* <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-866577E4/>

By contrast, the United States lacks uniform legislation regulating the market for human eggs.⁶ No federal law limits compensation for egg donors, and only a handful of state statutes address the issue directly. Louisiana is the only state that explicitly prohibits the sale of human oocytes while Virginia is the only state that explicitly authorizes the sale of human oocytes.⁷ Several states have enacted statutes that broadly ban the sale of all body parts for valuable consideration without expressly mentioning oocytes, although these laws usually contain exceptions for renewable resources such as blood products and human hair.⁸

While the NAS and CIRM guidelines prohibit payment to egg donors, they appear to be of limited effect. The CIRM guidelines apply only to hESCR that is funded by the state of California under Proposition 71,⁹ while the NAS guidelines are purely hortatory. The NAS recommends that the stakeholders in hESCR—funding sources, research institutions, and scientific journals—take action on their own to ensure compliance with the guidelines by imposing appropriate sanctions for violations.¹⁰ The NAS suggests, for example, that funding agencies assess compliance with the guidelines when reviewing grant applications and that scientific journals require evidence of compliance before publishing the results of any

hfea/hs.xsl/1034.html; HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, CODE OF PRACTICE 41 (6th ed. 2003), available at http://www.phgu.org.uk/newsletter?newsletter_year=2004&newsletter_month=apr. Canada also forbids the sale of human eggs. See The Assisted Reproduction Act (Bill C-6), House of Commons, 37th Parl., 3d Sess. (2004) (Can.), available at http://www.parl.gc.ca/37/3/parlbus/chambus/house/bills/government/C-6/C-6_3/C-6TOCE.html. For a helpful overview of countries that prohibit oocyte sales, see Alice J. Carlson, Trade in Human Reproductive Biota: Our Quest for Babies, Table 3: International Legal Framework (Dec. 11, 2003) (unpublished M.A. thesis, American University), available at <http://www.american.edu/TED/reproductive-trade.htm>. See also Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 128-29 (2001) (noting guidelines in place for compensating egg donors in England, Israel, and Australia). In March 2004, the European Parliament adopted Directive 2004/23/EC prohibiting the sale of human eggs, while Italy has banned egg donation altogether. See Robin Marantz Henig, *On High-Tech Reproduction, Italy Will Practice Abstinence*, N.Y. TIMES, Mar. 2, 2004, at F5.

6. See Baum, *supra* note 5, at 123-28.

7. *Id.* at 126.

8. *Id.*

9. CIRM, INTERIM CIRM GRANTS ADMINISTRATION POLICY FOR ACADEMIC AND NON-PROFIT INSTITUTIONS, VERSION 14C, available at <http://www.cirm.ca.gov/policies/pdf/InterimGAP.pdf> (last visited Aug. 21, 2006). The CIRM regulations have the force and effect of law once an agency agrees to them as a condition for receiving funding. See *id.*; CAL. HEALTH & SAFETY CODE § 125290.40(j) (2006).

10. NAS GUIDELINES, *supra* note 1, at 14.

research.¹¹ As a practical matter, such funding and publication restrictions may achieve virtually the same results as a legal limitation upon hESCR.

Why do these guidelines prohibit payment to egg donors or to those who donate sperm, cells, or embryos? Is it for symbolic reasons—to prevent commodification of the components of human life—or for substantive reasons?

II. TRADITIONAL JUSTIFICATIONS FOR PROHIBITING PAYMENT TO EGG DONORS

A. Why Prohibit Payment for Human Embryos? Personhood vs. Property

The easiest case to make is for prohibiting payment for human embryos. Allowing human embryos to be bought and sold arguably treats them as a form of property. For those who view the embryo as a person, this is as offensive as slavery. Of course, for those who view the embryo as a person, stem cell research itself is the equivalent of murder.

Yet, even for those who do not view an embryo as a full-fledged person, the purchase and sale of embryos could be seen as disrespectful of potential persons. Such attitudes could lead to disrespect for actual persons, just as desecration of dead bodies might breed disrespect for living human beings. Thus, the NAS Report states that one reason to prohibit payment for embryos “might lie in the view that the treatment of the developing human embryo as an entity deserving of respect may be undermined by the introduction of a commercial motive into the solicitation or donation of fetal or embryonic tissue for research purposes.”¹²

B. Why Prohibit Payment for Human Eggs? Coercion and Commodification

Allowing human eggs to be bought and sold could be criticized for the very same reason, namely that it treats the sacred components of human life as a form of property, engendering an attitude of disrespect for actual persons. Moreover, egg donation is a risky and painful procedure that requires hormone treatment in order to stimulate the ovaries to release multiple eggs, and involves the extraction of these eggs in a surgical procedure.¹³ Thus, prohibitions upon payment may be intended to protect the

11. *Id.*

12. *Id.* at 84.

13. An egg donor must first undergo daily hormone injections for a period of seven to ten days in order to stimulate production of an abnormally large quantity of oocytes. Side effects from these injections may include bloating, abdominal pain, mood swings,

individuals who donate their eggs from possible medical complications, and not just the symbolic value of that which is donated.

Prohibitions upon payment or other “inducements” may be necessary to ensure true consent, protecting donors from being pressured by the possibility of obtaining money or other benefits to agree to something that they would not otherwise choose. An example from South Korea illustrates the kinds of pressure that may be brought to bear upon vulnerable parties in order to obtain eggs and other bodily material. South Korean researcher Dr. Hwang Woo Suk became famous around the world as the first person to successfully clone a human embryo and extract stem cells from the embryo.¹⁴ However, he later became the subject of international controversy when it was revealed that the so-called “donors” of eggs allegedly used to create embryonic stem cell lines were either paid (around \$1400 each) or were junior researchers (and even graduate students) in his laboratory.¹⁵ Critics contend that “in the strict hierarchy of a scientific laboratory in a Confucian society like South Korea, junior members often feel great pressure to please their superiors.”¹⁶ Dr. Hwang disclaimed any knowledge of the egg donation,¹⁷ but others allege that he pressured his employees to donate eggs, and that he even drove the car that brought one

and nausea. After the eggs are fully developed, the donor receives an injection of another hormone that prepares the eggs for removal, and the eggs are then removed by means of a long needle that is inserted through the vagina in a minor surgical procedure that requires anesthesia. Risks involved in this process include side-effects from the anesthesia, hemorrhaging, damage to the bowel, bladder, or blood vessels, infection, and ironically even loss of fertility. One of the most serious risks of egg donation is ovarian hyperstimulation syndrome (OHSS), which develops in a very small percentage of egg donors. OHSS is an adverse response to ovulation induction therapy that can cause fluid accumulation in the abdomen and chest, breathing trouble, thrombosis, and kidney failure. In severe cases, OHSS may result in hospitalization and death. There are concerns that the hormone treatments necessary for egg donation may cause ovarian cancer, but there are no conclusive links between the two in humans. See AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS (2003), available at <http://www.asrm.org/Patients/patientbooklets/ART.pdf>; Robert Steinbrook, *Egg Donation and Human Embryonic Stem-Cell Research*, 354 NEW ENG. J. MED. 324, 324-26 (2006); Baum, *supra* note 5, at 118.

14. Suk’s claim has recently been called into question by allegations that he falsified data. Nicholas Wade & Choe Sang-Hun, *Researcher Faked Evidence of Human Cloning, Koreans Report*, N.Y. TIMES, Jan. 10, 2006, at A1.

15. Constance Holden, *Korean Cloner Admits Lying About Oocyte Donations*, 310 SCI. 1402, 1402-03. At least one of the researchers who donated her eggs was Dr. Hwang’s Ph.D. student. *Id.*

16. Brooke, *supra* note 4, at A1.

17. Anthony Faiola & Joohee Cho, *S. Korean Stem Cell Expert Apologizes for Ethical Breach*, WASH. POST, Nov. 25, 2005, at A24.

donor to the egg retrieval procedure!¹⁸ A blanket prohibition upon payment or other inducements could be intended to shield individuals like the junior researchers in Dr. Hwang's lab from such subtle or not-so-subtle forms of pressure.

The problem with this argument is that it proves too much. If Dr. Hwang actually compelled those who worked in his lab to supply him with eggs for research, clearly their "choice" cannot be said to be voluntary. And if other South Korean women were not adequately informed of the risks involved in egg donation and were paid an unconscionably low price, their treatment might constitute exploitation. Payment to egg donors may be as "coercive" or "exploitative" in the context of IVF as it is in the context of hESCR, yet the purchase and sale of human eggs for IVF is permitted.¹⁹ Indeed, even advertising and market pricing of eggs based upon the donor's appearance and other personal characteristics is allowed. The going rate for eggs in the U.S. ranges from \$5,000 to \$100,000, depending upon the donor's "qualifications."²⁰ If compensation can "coerce" women to supply their eggs for hESCR, why does it not "coerce" women to supply their eggs for IVF? And if payment is degrading because it relegates human eggs to the status of objects that can be bought and sold, why does this argument not apply in the IVF context as well? Why allow a market for human eggs in IVP but not in hESCR?

III. JUSTIFICATIONS FOR A MARKET FOR HUMAN EGGS IN IVF BUT NOT IN HESCR

A. Instrumentalization

Perhaps the reason for prohibiting payment to oocyte donors in hESCR but not IVF lies in their very different objectives. Eggs that are purchased for the purpose of IVF will be used to create embryos in the hope that they will ultimately lead to the birth of a child, whereas eggs that are purchased

18. Anita Srikameswaran, *Pitt Panel Castigates Stem Cell Researcher*, PITT. POST-GAZETTE, Feb. 11, 2006, at A1.

19. Although there are no laws limiting payment to egg donors in the context of IVF, the Ethics Committee of the American Society for Reproductive Medicine has recommended that payments above \$5,000 to egg donors require justification, and payments that exceed \$10,000 should be prohibited. Ethics Committee of the American Society for Reproductive Medicine, *Financial Incentives in Recruitment of Oocyte Donors*, 74 FERTILITY & STERILITY 2, 219 (2000).

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

for the purpose of hESCR will be used to create embryos that will ultimately be destroyed in the process of harvesting stem cells. Thus, hESCR may be viewed as treating human eggs (and other bodily materials) in an instrumental way, as a means to other objectives rather than as ends in themselves. Such instrumentalization is a key attribute of property.

But if instrumentalization is the objection, then the problem is not the purchase and sale of human eggs but the *way* in which they will be used. This is an objection to stem cell research itself, which demands the destruction of human embryos in order to extract stem cells.

B. Commercialization

Perhaps the objection is not to instrumentalization alone, but rather to the combination of instrumentalization with commercialization, which is another attribute of property. We may fear that payment for eggs and sperm will commercialize the components of human life—components that should remain intimate and personal, wholly separate from the market. Although IVF also involves the commercialization of eggs and sperm, it fosters the creation of families. In the context of hESCR, however, markets in the raw materials of human life would be for the purpose of creating a commercial product, which might ultimately be patented and produce profits. This may be seen as sliding too far towards treating human beings as objects to be fragmented, manipulated, transformed, and ultimately sold as commodities. Fragmentation, alienation, instrumentalization, and commercialization are the hallmarks of property.²¹

The problem with this objection is that there is no question that everyone else involved in the production of human embryonic stem cells *is* entitled to compensation. The researchers who invest intellectual capital and the companies and universities that invest financial capital will surely share in any profits resulting from human embryonic stem cell research, so why not those who provide the human capital in the form of their own bodies? If the concern is commercialization, why should everyone but the donor possess property rights and profit from hESCR? Such a lopsided rule appears reminiscent of *Moore v. Regents of the University of California*, where altruism was expected of the patient, while profits were anticipated by researchers, the university, and the companies.²² In *Moore*, the California Supreme Court held that Mr. Moore's spleen cells were not his property, although the cell line created from his spleen cells was the patented property of the researchers who created it and the university and

21. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000).

22. See *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120 (1990).

company that supported their research.²³ Therefore, if we insist upon altruism from the women who donate eggs for the purpose of stem cell research, shouldn't we likewise limit the profits reaped by the researchers engaged in hESCR and the universities and companies that support their research? Indeed, who would be willing to donate their eggs for free for hESCR, given the knowledge that they could sell the very same eggs for large sums of money for the purpose of fertility treatments, and that everyone else engaged in such research is permitted to profit from their act of altruism?

These justifications appear to be completely incoherent, underscoring the absence of any underlying principle. We deny hESCR donors the right to receive any compensation or even share in the proceeds of such research, while simultaneously allowing IVF egg donors to be paid large sums and permitting everyone else involved in hESCR to profit. Even the reasons offered by the NAS to justify the prohibition on payment to egg donors in the context of hESCR are contradictory. On the one hand, payment to egg donors is criticized as "coercive" because the market value may be "too high," enticing women to consent to a painful and risky procedure with the prospect of financial gain. Thus, the NAS Guidelines state that "[a] major ethical concern is that payments should not be so high as to create an undue influence or offer inducement that could compromise a prospective donor's evaluation of the risks or the voluntariness of her choices."²⁴ At the same time, payment to egg donors is condemned as a form of "exploitation" because the market value may be "too low," providing a level of compensation that is inadequate to attract anyone to undergo such a procedure except for those who are desperate to make money.²⁵ Thus the NAS Guidelines also provide that "[o]ther concerns are that payments should not be so low as to recruit disproportionately high numbers of economically disadvantaged persons and that they should compensate participants fairly for their contribution to research."²⁶

Such inconsistent attitudes toward payment appear to embody an assumption that egg donations should result from "pure" altruism, rather than self-interest. To the extent that such assumptions are invoked when women are providing material that is intertwined with reproduction, they may stem from deep-seated stereotypes regarding the natural role of women as altruistic and the natural sphere of woman as the family, which should be kept separate from the market. Of course, the NAS Guidelines

23. *Id.* at 141-42.

24. NAS GUIDELINES, *supra* note 1, at 86.

25. *See id.* at 82.

26. *Id.*

provide the appearance of equality by prohibiting payment to men who donate sperm as well as women who donate eggs.²⁷ However, there is a vast difference between the donation of sperm and the donation of eggs in terms of the invasiveness of the egg retrieval procedure²⁸ and the serious risks that it entails.²⁹ This difference is reflected in the huge disparity in price between sperm, which possesses a market value between \$50 to \$100, and eggs, which may sell for as much as \$100,000.³⁰ Thus, a rule that treats sperm and egg donors the same by denying payment to both exhibits a superficial symmetry that is deeply flawed in substance.

C. Research vs. Therapy

The NAS Guidelines offer another possible justification for a prohibition on payments: “The guidelines . . . are intended to enhance the integrity of privately funded hES cell research both in the public’s perception and in actuality by encouraging responsible practices in the conduct of that research.”³¹ Moreover, the commentary accompanying Recommendation 16—that payment to oocyte donors should not be allowed—provides: “This recommendation is based, in part, on the recognition that payments to oocyte donors raise concerns that might undermine public confidence in the responsible management of hES cell research.”³² Indeed, the commentary accompanying Recommendation 16 makes it clear that this prohibition upon payment is limited to hESCR and should not be extended (as logic and principle would seem to require) to the field of infertility treatments: “The recommendation should not be interpreted as a commentary

27. *Id.* at 10.

28. While both men and women contribute genetic material to create pre-embryos, women’s contribution involves far more ‘sweat equity.’ Men’s donation may be achieved relatively easily and without high-tech intervention. For women, the process is far more arduous. Ellen Waldman, *The Parent Trap: Uncovering the Myth of “Coerced Parenthood”* In *Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1052-53 (2004).

29. Indeed, the South Korean National Bioethics Committee said that fifteen of the seventy-nine women who donated their eggs to one of the hospitals collecting oocytes for Hwang’s research developed ovarian hyperstimulation syndrome, and two were hospitalized. Sei Chong, *Scientific Misconduct: Investigations Document Still More Problems for Stem Cell Researchers*, 311 SCI. 754, 754-55 (2006).

30. See, e.g., THE STANFORD DAILY, *supra* note 20, at 19 (offering \$100,000 for “attractive, intelligent donor of East Indian decent [sic]”); *id.* at 13 (offering \$80,000 to a “special egg donor” who meets the following criteria: “Caucasian,” with a “height approximately 5’9” or taller,” and an “S.A.T. score around 1275,” who is “athletic” and has “no genetic medical issues”); see also Kolata, *supra* note 20, at A10 (offering \$50,000 to tall egg donor with S.A.T. score above 1400).

31. NAS GUIDELINES, *supra* note 1, at 1.

32. *Id.* at 87.

on commercial IVF practices, but as a narrow policy position specifically with respect to hES cell research.”³³

These statements suggest that the distinction between hESCR and IVF may lie in the difference between research and therapy, a line that finds support in federal law.³⁴ Federal law limits “research” upon human subjects, but it does not circumscribe the “practice” of medicine.³⁵ Thus, research involving human embryonic stem cells is subject to a variety of regulations that do not apply to IVF and other forms of medical therapy that are designed to enhance the well-being of a particular patient and that have a reasonable chance of success.

The federal regulations limiting research on human subjects, however, apply only to research that is conducted by the federal government itself or by research institutions that receive federal funds. But President George W. Bush flatly banned the use of federal funds for human embryonic stem cell research on any cell lines created after August 9, 2001.³⁶ Thus, the federal law regulating research on human subjects does not apply to most hESCR, which is supported by other sources. Moreover, nothing in the law of research on human subjects prohibits compensation, and research subjects in other contexts typically do receive compensation.³⁷

A deeper flaw in this research versus therapy argument is that it blindly follows the letter of the law while flouting the spirit of the human subject’s protection. History reveals that human beings may be exposed to

33. *Id.*

34. *See* Protection of Human Subjects, 45 C.F.R. § 46 (2000).

35. According to the Belmont Report, “the term ‘practice’ refers to interventions that are designed solely to enhance the well-being of an individual patient or client and that have a reasonable expectation of success. The purpose of medical or behavioral practice is to provide diagnosis, preventive treatment or therapy to particular individuals.” By contrast, “research” is defined as “an activity designed to test an hypothesis, permit conclusions to be drawn, and thereby to develop or contribute to generalizable knowledge (expressed, for example, in theories, principles and statements of relationships).” NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES & GUIDELINES FOR RESEARCH INVOLVING HUMAN SUBJECTS Part A (1979).

36. Press Release, President George W. Bush, President Discusses Stem Cell Research (Aug. 9, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html>.

37. *See* FOOD & DRUG ADMINISTRATION, *Payment to Research Subjects*, in INFORMATION SHEETS: GUIDANCE FOR INSTITUTIONAL REVIEW BOARDS AND CLINICAL INVESTIGATORS (1998), *available at* <http://www.fda.gov/oc/ohrt/irbs/toc4.html#payment>; *see also* OFFICE FOR HUMAN RESEARCH PROTECTIONS, *Incentives for Participation*, in INSTITUTIONAL REVIEW BOARD GUIDEBOOK ch. 3, sect. G (1993), *available at* http://www.hhs.gov/ohrp/irb/irb_chapter3.htm#e7.

risk and subjected to harm without their knowledge or consent, all in the name of medicine. Federal law limiting research on human subjects protects individual autonomy and prevents individuals from being harmed needlessly or excessively for the benefit of others or society at large. These protections may not be necessary when physicians are engaged in the practice of medicine, which is intended to benefit the patient. Accordingly, IVF is not governed by the law limiting research on human subjects because it involves patients who are receiving treatment for infertility. Yet those who donate eggs to infertile couples are not receiving medical treatment. To the contrary, they are consenting to a regimen of drugs and a surgical procedure that pose great risks to them without any corresponding benefit, for the sole purpose of helping others. If compensation undermines the quality of consent and unduly influences the donor to undergo a risky and painful procedure in the context of hESCR, the same is true for IVF. From the standpoint of the egg donor, the dangers posed by payment would seem to be the same regardless of the destination of the eggs or the use for which they are designed.

Indeed, egg donation for the purpose of hESCR may be regarded as morally superior to egg donation for the purpose of IVF when the risks are weighed against the benefits. Egg donors in IVF undergo a risky and painful procedure in order to satisfy the purely private interests of infertile couples who seek biological children. Egg donors for hESCR, on the other hand, accept these risks in order to advance the public welfare of society by helping to find cures for devastating diseases. Thus, a moral calculus that would exalt egg donation for the purpose of IVF over hESCR is completely upside down. For all these reasons, the prohibition of payment appears to be intended more for political reasons than for substantive ones, to insulate human embryonic stem cell research from the taint of filthy lucre in the eyes of the public, rather than to actually prevent coercion of egg donors or commodification of human life.

D. Property vs. Privacy

In *Property, Privacy, and the Human Body*, I compared property and privacy constructions of the human body and argued that distinctions drawn between “self-ownership and sale of the body to others,” are “alien to property law . . . [but are] entirely consistent with the right of privacy.”³⁸ By allowing women only the choice whether or not to donate their eggs while denying them any right to receive compensation or otherwise share in the profits that might result from hESCR, the NAS and

38. Rao, *supra* note 21, at 364, 438.

CIRM regulations invoke the rubric of privacy rather than property. The problem is that privacy protects only the right to consent or refuse consent, but provides no power to control the body part or its use once it has been alienated from the individual. Privacy conceives of the body as a passive entity to be protected from physical interference and alteration, but not mined, manipulated, or exploited for profit. Constructing the body as a form of property, on the other hand, would imply not only freedom from physical invasion, but also freedom to instrumentalize the body by technologically manipulating it or otherwise putting it to productive use. Thus, privacy rights provide meager protection for egg donors in a context in which the body has already been alienated from the person, and is fragmented, instrumentalized, commercialized, and treated as a species of property for everyone else.