Altruism and Intermediation in the Market for Babies

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Abstract

Central to every legal system is the principle that certain items are off-limits to commercial exchange. In theory, babies are one such sacred object. This supposed ban on baby selling has been lamented by those who view commercial markets as the most efficient means of allocating resources, and defended by those who contend that commercial markets in parental rights commodify human beings, compromise individual dignity, or jeopardize fundamental values. However, the supposed and much-discussed baby selling ban does not, and is not intended to, eliminate commercial transactions in children. Instead, it is an asymmetric legal restriction that limits the ability of baby market suppliers to share in the full profits generated by their reproductive labor, insisting instead that they derive a large portion of their compensation from the utility associated with altruistic donation. Meanwhile, a wide range of baby market intermediaries profit handsomely in the baby market, without similar restrictions on their market activities. Baby selling "bans" thus have more in common with the rent seeking by powerful marketplace actors seen in other commercial markets than with normative statements about the sanctity of human life. The author concludes with a call for the removal of the last vestiges of the ban against baby selling and other laws that diminish the capacity of baby market suppliers to access the marketplace.

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I. Introduction

Few proposals generate the moral outrage engendered by a suggestion that babies—or, more accurately but less vividly, parental rights—should be traded on the open market. More than anything else, baby selling flies in the face of our deeply held convictions that some items are too priceless to ever be bought and sold.[1] Throughout the world, in fact, baby selling is formally prohibited.[2] And throughout the world babies are bought and sold each day.

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1. *See* Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Off: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 286–87 (1997) (arguing that people find certain monetary trade-offs, such as baby selling, morally offensive); Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 856–57 (2000) (discussing moral outrage associated with various "taboo trade-offs," including surrogate motherhood contracts and payments for adoption rights).

2. As a historical matter, this is a relatively recent development. Many societies, including the United States, traditionally have embraced the concept of selling children, primarily for labor. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 415–16 (1992) (discussing paid adoptions among the Romans as well as the Anglo-Saxon practice until the seventh century

In the United States alone in 2001, roughly 41,000 children were born through assisted reproduction, 6,000 of whom were created through the use of "donated" eggs and 600 of whom were carried by surrogates.[3] In 2003, Americans adopted 21,616 children through international adoptions[4] and gave birth to thousands of babies using commercially purchased sperm.[5] Each of these children was purchased, usually, at great cost. As will be demonstrated in this Article, the baby market is big business—a business in which parents pay, intermediaries profit, and surrogates, birth parents, and providers of egg and sperm "donate" their products and services for prices ranging from under one hundred to over one hundred thousand dollars.

Until recently, the most visible and contested debates regarding baby markets primarily addressed the normative desirability of an open-market baby exchange, largely assuming that formal bans against baby selling relegated the baby trade to the black and gray markets. Indeed, the supposed ban on baby selling has been forcefully lamented by those who view commercial markets as the most efficient means of allocating resources, and just as vigorously defended by those who contend that commercial markets in parental rights commodify human beings, compromise individual dignity, or jeopardize fundamental values.[6] Yet both camps generally assume that such a ban exists.

A.D. of selling children under the age of seven in cases of necessity); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 169–89 (1985) (discussing the sale and indenture of children for labor in the United States); J. Mark Ramseyer, *The Market for Children: Evidence From Early Modern Japan*, 11 J.L. ECON. & ORG. 127 (1995) (discussing the sale, adoption for money, pledge, and indenture of children in Japan).

3. DEBORA L. SPAR, THE BABY BUSINESS, at ix (2006).

4. *Id.* at x.

5. The traditional secrecy and lack of reporting requirements regarding births from sperm donation result in highly variable estimates. For example, although a 1988 Congressional Report puts the number at 30,000 births per year, other estimates are as low as 4,000–5,000 births per year. *Compare* U.S. Congress, Office of Technology Assessment, *Artificial Insemination Practice in the United States: Summary of a 1987 Survey—Background Paper* 3 (1988) (reporting "[t]he survey estimates that 172,000 women underwent artificial insemination in 1986–87, at an average cost of $953, resulting in 35,000 births from artificial insemination by donor (AID)"), *with* Cryogenic Laboratories Incorporated, *Children by Donor Insemination*, http://www.cryolab.com/Default.aspx?section=postconceptionservices&page=donorOffspring (last visited Feb. 4, 2009) ("We estimate that now about 4,000 to 5,000 children a year are born in the US as the result of anonymous donor insemination.") (on file with the Washington and Lee Law Review). For the reasons discussed *infra* notes 61–63 and accompanying text, it is doubtful that these reported differences are attributable solely to reduced demand over time.

6. *Compare, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 168–75 (1993) (defending bans against contract pregnancy and baby selling on the grounds that they commodify women's labor and children), *and* MARGARET JANE RADIN, CONTESTED COMMODITIES 136–39 (1996) (defending the ban against baby selling and arguing that "[c]onceiving of any child in market rhetoric wrongs personhood"), *with* Elisabeth M. Landes &

This assumption fundamentally misunderstands the true nature of the baby market and its distribution networks. Recent analyses persuasively document the legal, but highly imperfect, baby market, rendering (in some circles, at least) assertions regarding the existence of legal baby markets so widely accepted as to be almost mundane.[7] This Article takes those analyses a step further, analyzing the complicated and interconnected roles of politics, altruism, and intermediation in the baby market.

By and large, baby market debates have been stymied by the mistaken assumption that prohibitions against commercial sale by original suppliers of babies and their constituent parts can be equated with an absence of commercial markets.[8] In fact, however, commercial markets characterize all aspects of the distribution of parental rights, with one exception: Legal restrictions purport to limit the ability of surrogates, birth parents, and egg donors ("Baby Market Suppliers") to reap the full monetary benefits of their production.[9] One of the defining characteristics of the baby market is thus the legal regime's formal exclusion of Baby Market Suppliers from the full profits of exchange. As a result, although Baby Market Suppliers charge for their services, they are expected to derive a substantial portion of their compensation

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Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL. STUD. 323, 324 (1978) (stating that "because public policy is opposed to the sale of babies, such sales as do occur constitute a 'black market,'" and proposing a limited market in parental rights). A decade later, Posner argued that, "wholly apart from the black market in babies for adoption, the market *is* used, though in stunted form, to allocate babies for adoption." Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987).

7. *See generally* SPAR, *supra* note 3 (discussing the baby business); Martha M. Ertman, *What's Wrong With a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003) (discussing legal markets in parental rights); Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007) (discussing the surrogacy market).

8. For similar arguments in the context of organ markets, see generally, MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 10–12 (2006) and Julia D. Mahoney, *The Market For Human Tissue*, 86 VA. L. REV. 163, 165 (2000). For influential discussions of the relationship between organ selling restrictions and the organ shortage, see generally, RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 221–82 (1997); Lloyd R. Cohen, *Increasing The Supply Of Transplant Organs: The Virtues Of A Futures Market*, 58 GEO. WASH. L. REV. 1, 11–15 (1989); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 71 (1989).

9. Interestingly, the most commercial of the baby market sectors—the sperm market—is comparatively free of such anti-competitive restrictions, a dichotomy that has been explained by sexism, the greater health risks faced by suppliers in other baby market sectors, historical forces, and economic expediency. *See generally* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW. & CONTEMP. PROBS. (*forthcoming* 2009) (finding open price-fixing in the egg market but not the sperm market, and exploring possible reasons for this difference) (on file with the Washington and Lee Law Review).

from the utility associated with altruistic donation. Meanwhile, their monetary compensation frequently is characterized as a gift, donation, or reimbursement and may be well below market value. Not surprisingly then, supply in most sectors of the baby market falls far short of demand.

At the same time, a wide array of fertility specialists, agents, brokers, facilitators, and other middlemen ("Baby Market Intermediaries") legally profit handsomely from the baby market, without similar legal restrictions on their profit-making activities. As public choice theory would predict, these Baby Market Intermediaries are more economically and politically powerful than Baby Market Suppliers, whose market access is legally restricted. Not coincidentally, Baby Market Intermediaries also have agitated actively for legal and industry restrictions that undermine the ability of Baby Market Suppliers to collect the market-clearing price for their services, thus reducing competition and capping the price of their required inputs.

As documented in this Article, there is substantial malleability to these one-sided baby selling restrictions, which makes it difficult to determine the extent to which Baby Market Suppliers are precluded from collecting the market-clearing price for their services. This malleability, however, does not necessarily render such restrictions harmless. Many scholars have discussed the normative impact of legal rules, noting their ability to act as symbolic speech and alter conduct, even in the absence of formal enforcement mechanisms.[10] Legal limitations on Baby Market Suppliers may similarly reinforce gendered notions that the market activities of women are driven in large part by altruism, and that women as a class are uninterested in reaping the full gains of trade from the provision of their goods and services.[11] Moreover, even if open to circumvention, these legal restrictions—and the negative norms that they promote—may reduce the economic bargaining power of Baby Market Suppliers. By classifying profit-seeking as an improper or, at best, secondary motivation in the baby market context, baby selling restrictions may reduce the ability of Baby Market Suppliers to favorably negotiate the financial terms of their arrangements, as open displays of materialism are deemed socially unacceptable.

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10. *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 971–72 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

11. *See* Mary Anne Case, *Pets Or Meat*, 80 CHI.-KENT L. REV. 1129, 1143 (2005) ("Much of what women have market power over, such as their . . . reproductive services, they have long been expected not to commodify at all. Even when monetary compensation is allowed, it is often kept low and female providers are expected to be interested in rewards other than money.").

Moreover, to the extent they effectively restrict Baby Market Supplier activity, legal restrictions on the baby trade exacerbate scarcity, increase prices, and raise distributional concerns stemming from the distorted division of profits between Baby Market Intermediary and Baby Market Supplier. Prior researchers have noted the relatively small share of the gains of trade retained by Baby Market Suppliers, concluding that Baby Market Intermediaries exploit either consumers or suppliers, or both, in the baby market.[12] As detailed in this Article, these large intermediary fees are attributable to two factors.

First, Baby Market Intermediaries perform many salutary functions for both suppliers and consumers in the baby market, reducing costs and uncertainty on both sides of the transaction and improving the baby market in the process. The fact that neither producers nor consumers tend to be repeat players in the baby market, combined with the information asymmetry, high transaction costs, and emotionally-charged nature of most baby market transactions suggests that, even in a fully functional free market for babies, Baby Market Intermediaries likely would reap a substantial portion of the gains from trade in the baby market.

Second, however, the institutional framework (that is, the set of governing laws, public institutions, and informal norms) associated with any market can act to either reduce or increase the transaction costs of exchange. Within that framework, intermediaries will seek to minimize transaction costs between parties to exchange, extracting profits for themselves in the process.

In the baby market, the institutional framework uniformly increases—rather than reduces—transaction costs, leaving both producers and consumers in the baby market vulnerable in the process, and enhancing the role of Baby Market Intermediaries and their potential for market gains. As will be shown, Baby Market Intermediaries have been some of the most vocal opponents of attempts to reduce this imbalance, invoking the rhetoric of altruism, coercion, and commodification to justify restrictions on Baby Market Suppliers. As elaborated in this Article, none of these is a persuasive justification for the asymmetric trading restrictions that characterize the baby market.

Moreover, in an open market, intermediaries must compete with decentralized exchange, in which buyers and sellers forgo intermediary services and seek each other out, directly negotiating price. More than twenty-five years ago, Professors Landes and Posner famously accused adoption agencies of anticompetitive behavior, noting the asymmetric legal restrictions on profit flows in the baby market that limit amounts paid to Baby Market Suppliers, yet

12. *See infra* notes 212–13 and 228 and accompanying text (discussing these objections in the context of surrogacy and adoption markets).

allow adoption agencies a free hand in setting the prices charged to adoptive parents.[13] Landes and Posner, however, concluded that the targets of such anti-competitive activity were independent adoption agencies and brokers, with whom state-run agencies did not want to compete.[14] No doubt there is some truth to this contention, as Baby Market Intermediaries have actively sought to limit the activities of their independent competitors.[15] These asymmetric pricing restrictions make more sense, however, not as an attempt to avoid competition from other Baby Market Intermediaries, but as an attempt to fix the price of inputs and avoid competition with decentralized exchange in which baby market consumers and producers directly seek each other out and negotiate prices in the absence of a Baby Market Intermediary.

To clarify, the recognition that the allocation of parental rights operates like other commercial markets in many significant respects does not imply that there are not important differences between the baby market and more traditional commercial markets.[16] Needless to say, trafficking in human lives raises many public policy issues simply not implicated by the markets for cars, bonds, or janitorial services. Yet the failure to acknowledge the many ways in which the baby market operates like other commercial markets imposes severe costs on the market, its participants, the children and future children traded in the market, and society at large. Those costs include the forgone opportunities to develop legal policies designed to improve the functioning of the market and to further particular public policies unlikely to be advanced solely through the goal of profit-maximization.[17] Perhaps the greatest cost imposed by the

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13. *See* Landes & Posner, *supra* note 6, at 324 (criticizing adoption regulation as leading to scarcity and inefficiency, and proposing financial incentives for women contemplating abortion to pursue adoption instead).

14. *See id.* at 331 (noting "vigorous efforts by adoption agencies to restrict independent adoptions").

15. *See infra* notes 231–32 and accompanying text (discussing such rent seeking).

16. Indeed, the baby trade possesses a few somewhat unusual *market* characteristics, including demand inelasticity and a lack of suitable substitutes. Kimberly D. Krawiec, *Price & Pretense in the Baby Market*, *in* BABY MARKETS: MONEY, MORALS, AND THE NEOPOLITICS OF CHOICE 6–8 (Michele Goodwin ed.) (forthcoming 2008) (on file with the Washington and Lee Law Review).

17. Regarding market functioning, microeconomic theorists have identified a variety of conditions to the competitive functioning of markets, and regulatory regimes governing other commercial markets frequently seek to promote those conditions. For example, the legal regime may seek to reduce transaction costs, information asymmetries, externalities, monopolies, and barriers to the provision of public goods. *See, e.g.*, ROBERT S. PINDYCK & DANIEL L. RUBINFIELD, MICROECONOMICS 557–670 (6th ed. 2005) (describing various market failures and the potential mitigating role of government); Jack Knight & James Johnson, *The Priority of Democracy: A Pragmatist Approach to Political-Economic Institutions and the Burden of Justification*, AM. POL. SCI. REV. (forthcoming 2009) (manuscript at 9–13, on file with the

traditional romanticization of the baby market and its distribution networks, however, is the extent to which it masks attempts by politically and economically powerful market participants to cloak private wealth transfers as public-interested regulation in the form of "baby selling" restrictions and other laws dictating the allocation of parental rights.

Part II of this Article examines each sector of the baby market—including assisted reproductive technologies, egg and sperm donation, surrogacy, and adoption—demonstrating both the baby market's similarities to and differences from other types of commercial markets. Part III analyzes baby selling bans as rent seeking. Part III.A carefully parses the role of Baby Market Intermediaries, including price setting, market clearing, the provision of market liquidity, coordinating buyers and sellers, and performing monitoring and guarantee functions. Part III.A concludes that even in a fully functioning baby market, Baby Market Intermediaries likely would reap a large portion of the gains from trade, thus contributing to large intermediary fees in the baby market.

Part III.B, however, demonstrates a more nefarious explanation for large Baby Market Intermediary fees: Baby selling restrictions are one-sided, threatening market access only by Baby Market Suppliers, and not by Baby Market Intermediaries. For example, price fixing in the egg market, legal uncertainty regarding the enforceability of surrogacy contracts and the permissibility of surrogacy compensation, and the prohibition against baby selling in the adoption market all threaten to limit full market access by Baby Market Suppliers. Part III.C argues that these restrictions serve two related functions: controlling market entry and capping the price of Baby Market Intermediary inputs.

Part IV concludes with a call for the removal of the last vestiges of baby selling restrictions, which today serve little purpose beyond excluding Baby Market Suppliers from the full profits of baby market trading. Baby selling "bans" thus have more in common with the rent seeking by powerful marketplace actors seen in other commercial markets than with normative statements about the sanctity of life. Part IV also encourages the recognition of the baby trade for what it is—a market, with similarities to, and differences from, other markets. As with other markets, the legal regime may seek to improve competitive conditions, and should be suspicious of attempts to use the state's power to extract private benefits under the guise of public-interest

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Washington and Lee Law Review). Regarding public policy, disparate access to the baby market implicates troubling issues of class, race, and global inequity. Krawiec, *supra* note 16, at 10–13. In addition, technological and other baby market innovations create a potential tension among public policy goals, market forces, reproductive freedom, and parental rights. *See id.* (discussing these tensions in more detail).

regulation. Trafficking in human lives, of course, poses public policy issues not implicated by the markets in other items. But maintaining the pretense that legal baby markets don't exist does nothing to address those issues.

II. Defining the Market

Part II examines each sector of the baby market—including assisted reproductive technologies (hereinafter ARTs), egg and sperm donation, surrogacy, and adoption—demonstrating both the baby market's similarities to and differences from other types of commercial markets. Although the product supplied in each sector of the baby market differs—ranging from the hope of a future child in the ART sector to a fully-formed, already existing child in the adoption sector—an effective analysis of the baby trade necessitates a unified, holistic approach to the market. This is not to imply that a one-size-fits-all legal regime is suitable for the varied sectors of the baby market. To the contrary, each market sector poses vastly different legal and public policy issues.

But because each industry sector can act as an imperfect substitute for the others, legal rules and market imperfections that limit supply in one sector will channel consumers into another. In other words, prospective parents determined to have a child may be forced into the next best substitute, say adoption, when their first reproductive choice, say ART, has been fully exhausted without success or becomes otherwise unavailable. As a result, regulations and market failures that limit the egg trade will force prospective parents into the adoption market, and vice versa.[18] Moreover, a holistic approach to the baby market that encompasses each of its various sectors facilitates analysis of an important commonality across those sectors—the extent to which societal pretense regarding the existence of for-profit market exchange may obscure anti-competitive behavior by economically and politically powerful baby market participants.

A. "I Manufacture Embryos"[19]—The Business of Assisted Reproduction

In the United States in 2004, fertility treatment constituted a $3 billion industry, serving one million customer-patients seeking a variety of services

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18. *Cf.* Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5, 9–10 (1995) (arguing that regulatory policy and social norms incentivize women with fertility problems to seek ART rather than to pursue adoption).

19. SPAR, *supra* note 3, at 46 (quoting Dr. Merle Berger, founder of Boston IVF, the largest fertility center in the United States).

ranging from medical advice and fertility testing to sophisticated ART treatments.[20] Today, assisted reproduction has become so ubiquitous that it is easy to forget the controversy and criticism surrounding the practice in its early years—a firestorm ignited by the birth of Louise Brown, the world's first "test tube baby," on July 25, 1978.[21] To many, in vitro fertilization (IVF) represented both a sinful interference of science with the natural act of procreation and a frightening incursion of commercial forces into sacred territory.[22] Critics, including the Catholic Church, ethicists, scientists, and high-profile feminists, denounced the practice as degrading, dehumanizing, and immoral.[23]

Such controversy notwithstanding, the fertility industry has enjoyed immense growth. In 1986, for example, there were only one hundred fertility clinics in the United States with revenues of roughly $41 million.[24] By 2002, those numbers had grown to 428 clinics with revenues of nearly $3 billion.[25] These figures don't include profits to other intermediary participants in the

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20. *Id.*; *see also* DEP'T OF HEALTH AND HUMAN SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATE FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 29–30 (2005) (reporting that, of the 61.6 million women of reproductive age in the U.S. in 2002, 12% (or 7.3 million women) had ever used fertility services and about 1.9% (or 1.2 million women) had received fertility treatment to become pregnant during the prior twelve months).

21. *See* Richard M. Restak, *Can There Be New Forms of Life Before Birth?*, N.Y. TIMES, July 16, 1978, at E8 (discussing moral and religious implications of in vitro fertilization); Walter Sullivan, *Woman Gives Birth to Baby Conceived Outside the Body*, N.Y. TIMES, July 26, 1978, at A1 (reporting on the birth of Louise Brown).

22. *See* Restak, *supra* note 21, at E8 (discussing moral and religious implications of in vitro fertilization). In vitro fertilization is a procedure in which sperm and eggs are combined outside of the womb in a laboratory dish. *See* AM. SOC'Y OF REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 1, 3 (2007), *available at* http://www.asrm.org/Patients/Patientbooklets/ART.pdf (describing the in vitro fertilization process). If fertilization occurs, the embryos are transferred to the uterus. *Id.* IVF thus bypasses the fallopian tubes and originally was designed to treat couples that were otherwise fertile, but in which the woman's fallopian tubes were damaged or missing. *Id.* Today, however, IVF is combined with other ARTs to treat infertility from a variety of causes. *Id.*

23. *See* SPAR, *supra* note 3, at 26 (describing various groups' condemnation following the announcement of the first successful assisted reproduction procedure). Not all feminists opposed IVF. Many prominent feminists, such as Shulamith Firestone, applauded IVF as a mechanism for liberating women. SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 179–88 (1970) (praising IVF and other technological innovations in fertility and childbirth as freeing women from pregnancy).

24. SPAR, *supra* note 3, at 32.

25. *Id.* at 32–33.

embryo industry, such as lawyers, consultants, equipment manufacturers and suppliers, and counselors of various sorts.[26]

Infertile couples, of course, typically do not view themselves as purchasing a baby or, perhaps, even entering into a market transaction (despite charges averaging $12,400 per in vitro cycle in 2003, and total fees of as much as $100,000 before some couples conceive or give up).[27] Consumer behavior in acquiring fertility services tends to reflect this, differing from consumer behavior in other types of transactions. Fertility customers, for example, do not engage in extensive price comparison or bargaining over fees; change fertility centers only reluctantly, even when faced with a lack of success through a given provider; and tend to blame themselves, rather than the provider, when they are unsuccessful in achieving pregnancy.[28]

For their part, fertility centers do little to alter the perception that their relationship with infertile couples is a non-commercial one, highlighting instead their willingness and ability to help infertile couples realize their dreams of conception. As stated by doctors at Boston IVF, "our greatest honor is knowing that at least one of our patients fulfills their dream of becoming a parent every day of every year."[29] Similarly, the Center for Reproductive Medicine and Infertility in New York assures couples that, "[t]he desire to have a baby is one of life's most important and exciting decisions. . . . [W]e help make that dream a reality for thousands of couples every year."[30] Although marketing rhetoric of this sort is hardly unique, particularly in the health care field, it does highlight a common trend evident across all sectors of the baby market—a pretense that profit-seeking and market forces are, at best, secondary considerations in matters so sacred as reproduction and parenthood.

Doubtless, a desire to help infertile couples is a motivating factor for many doctors, reproductive center directors, counselors, and others involved in the fertility industry. But profits are undeniably a—if not *the*—motivating factor in the industry as well. Although many fertility centers are affiliated with non-profit hospitals or academic institutions, the fertility center itself is often a

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26. *Id.* at 33.

27. *Id.* at 32–33.

28. *See id.* at 49, 244 n.42 ("[T]he people who purchase fertility services don't see themselves as participating in a commercial relationship. They switch providers only reluctantly; they don't argue about price; and they generally don't blame the doctors when treatment fails."). Female customers, in particular, frequently blame themselves for a failure to conceive. *Id.*

29. http://www.locateadoc.com/doctors/infertility/wellesley-ma.html (last visited Sept. 8, 2008) (on file with the Washington and Lee Law Review).

30. Center for Reproductive Medicine and Infertility, http://www.ivf.org (last visited Sept. 8, 2008) (on file with the Washington and Lee Law Review).

professionally managed, for-profit, private corporation.[31] Those fertility centers not affiliated with academic institutions are even more openly profit-centered and, like suppliers in any competitive industry, they engage in elaborate marketing efforts to attract customers. These efforts include hiring high-priced marketing consultants; advertising on billboards, the radio, newspapers, and magazines; and assiduously courting physician referrals by "wining and dining" doctors and hosting dinners and parties at medical meetings.[32] Many clinics even offer "shared risk" or money-back guarantee programs and aggressive financing plans that, as advertised by the nation's largest network of fertility specialists, "make your fertility care less expensive than a second car."[33]

For ART critics concerned with intrusions by science and commerce into the realm of procreation, the "specialty trade" in embryos prompts even greater alarm than did the advent of IVF. For example, originally developed as a means to screen embryos for a variety of devastating genetic childhood diseases, preimplantation genetic diagnosis (PGD) weds two nascent fields—assisted reproduction and genetic testing—by removing and genetically testing one cell of a three-day-old, eight-cell embryo.[34] Only those embryos possessing the desired genetic variant—such as the absence of a chromosomal mutation associated with a particular hereditary disease—are implanted. There are over a thousand genetic tests currently available (and more constantly being developed), nearly all of which could be used to test embryos, and fertility clinics around the country now offer PGD as an add-on to their fertility treatment services.[35]

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31. *See* SPAR, *supra* note 3, at 49 (describing the commercial nature of fertility center operations).

32. *See id.* (describing the methods by which fertility centers attempt to attract customers).

33. Advanced Reproductive Care, Affordable Options, Affordable Packages, http://www.arcfertility.com/family_building/index.html (last visited Sept. 8, 2008) (on file with the Washington and Lee Law Review); *see also* American RadioWorks, *The Fertility Industry: Get a Baby or Your Money Back*, http://americanradioworks.publicradio.org/features/fertility_race/part3/section3.shtml (last visited Feb. 4, 2009) (discussing the controversy surrounding such programs) (on file with the Washington and Lee Law Review); Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 J.L. & CONTEMP. PROBS. (forthcoming 2009) (discussing debt-financing plans, shared-risk plans, and money-back guarantees in the parenthood market) (on file with the Washington and Lee Law Review).

34. *See* GENETICS & PUB. POLICY CTR., PREIMPLANTATION GENETIC DIAGNOSIS: A DISCUSSION OF CHALLENGES, CONCERNS, AND PRELIMINARY POLICY OPTIONS RELATED TO THE GENETIC TESTING OF HUMAN EMBRYOS 3 (2004), *available at* http://www.dnapolicy.org/images/reportpdfs/PGDDiscussionChallengesConcerns.pdf (describing the process of preimplantation genetic diagnosis).

35. *Id.*

Roughly one thousand children in the United States have been born through the use of PGD, but increasing numbers of customers seeking PGD do not carry genetic diseases—many are not even infertile.[36] Instead, they are purchasing a custom-made baby that meets their genetic specifications, such as a particular gender.[37] Decried by many ethicists, some specialists eschew PGD for non-medical reasons. The views of Harvard political philosopher Michael Sandel are representative of these critics. Sandel argues that "sex selection is one step down the road to designer children, in which parents would choose not only the sex of their child, but also conceivably the height, hair color, eye color, and ultimately, perhaps, IQ, athletic prowess and muscular ability."[38] Other clinics, by contrast, actively advertise PGD gender selection services, defending the practice as a matter of reproductive freedom.[39] Jeffrey Steinberg, director of the Fertility Institute, which provides fertility services in Los Angeles and Las Vegas, reports that seventy percent of customers hire him specifically for the purpose of gender selection, paying as much as $18,000 for a comprehensive service that includes counseling, PGD, and IVF.[40]

Finally, some clinics sell ready-made embryos, produced from the best eggs and sperm money can buy and then frozen until purchased.[41] Unlike the excess embryos that often result after a successful fertility treatment, these embryos are specifically created for purchase. Fertility centers essentially create such embryos on speculation, allowing infertile couples to choose from a menu of donor genetic traits that include ethnic and educational background and appearance, such as hair and eye coloring.[42]

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36. *Id.* at 100.

37. *See* Rob Stein, *A Boy for You, a Girl for Me*, WASH. POST, Dec. 14, 2004, at A1 (describing the broadening use of ART for such purposes as gender selection). Given the traditional use in some countries of sex screening and abortion to discard female fetuses, PGD for gender selection has been banned in many countries, including Australia, Britain, Canada, France, Germany, India, Japan, and Switzerland. *Id.* In the United States, however, where gender selection techniques are unrestricted, parents request girls as often as boys. *Id.* A less controversial, but less reliable, method of gender selection relies on sperm sorting. Currently in trials at several clinics in the United States, the procedure costs between $2,800 and $4,000 per attempt and claims a 75% accuracy rate in selecting boys and a 90% accuracy rate in selecting girls. *Id.*

38. *Id.*

39. *See id.* (quoting Jeffrey Steinberg as stating that "[t]hese are grown-up people expressing their reproductive choices. We cherish that in the United States").

40. SPAR, *supra* note 3, at 99.

41. *See* Gina Kolata, *Clinics Selling Embryos Made for 'Adoption'*, N.Y. TIMES, Nov. 23, 1997, at A1 (describing the availability of ready-made frozen embryos for purchase by prospective parents).

42. *See id.* at A1, A34 (contrasting custom made embryos with the excess embryos produced during the IVF process, some of which historically have been offered for "adoption"

Although Jennalee Ryan of the Abraham Center of Life recently caused an uproar by advertising "the world's first human embryo bank" online, contrary to the assumptions surrounding this debate, Ms. Ryan is not the first to offer such embryos for sale, but rather is the first third-party broker to advertise such services.[43] But fertility centers across the country have quietly offered this service for nearly a decade to their customers for whom fertility treatments have failed.[44] The centers have never advertised these services, however, and, consistent with this traditional secrecy, Ms. Ryan will not reveal the identities of the fertility centers that are her suppliers.[45]

B. Who's Your Daddy?—The Sperm Business

One of the oldest and most concentrated sectors of the baby business, the sperm trade is also one of its most commercial and profitable. Although the first reports of artificial insemination using donor sperm were published in 1945, the practice has been in use for over a century.[46] As with most other segments of the baby market, the sperm sector was not viewed as a profit center in its infancy.[47] Instead, sperm banking initially developed as a step in the artificial insemination process and relied almost exclusively on banking by men unable to inseminate their wives through natural means.[48] When sperm banking by the husband was not possible, infertile couples sometimes turned to close friends and family members to provide sperm.[49]

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to other infertile couples).

43. *See, e.g.*, Debra J. Saunders, *Embryos Made to Order*, S.F. CHRON., Aug. 8, 2006, at B7 (describing Ryan's business); Julie Wheldon, *Ethical Row Over World's First 'Made to Order' Embryos*, DAILY MAIL, Aug. 4, 2006, *available at* http://www.dailymail.co.uk/health/article-399142/Ethical-row-worlds-order-embryos.html (same). A copy of the advertisement is available at http://www.theabrahamcenter oflife.com/index2.html (last visited Oct. 15, 2008) (on file with the Washington and Lee Law Review).

44. Kolata, *supra* note 41, at A1.

45. *See* Saunders, *supra* note 43, at B7 (questioning whether Ryan can really provide the embryos she claims, because she is unwilling to reveal the names of the fertility centers from which the embryos are procured).

46. *See* THE NEW ENCYCLOPEDIA BRITANNICA 605 (15th ed. 1995) ("The practical use of artificial insemination in animals was developed during the early 20th century in Russia and spread to other countries in the 1930s."). Artificial insemination is employed in cases of male infertility due to seminal abnormalities, including low sperm count, testicular failure, and ejaculatory failure. AM. SOC'Y OF REPROD. MED., *supra* note 22, at 4.

47. SPAR, *supra* note 3, at 35–36.

48. *Id.*

49. *Id.*

Eventually, however, fertility centers realized that a more impersonal, commercial system could increase both supply and quality. They began soliciting anonymous donors and offering a small fee for their sperm, choosing young men who offered specific physical and genetic characteristics such as a particular height, ethnicity, or hair color.[50] In doing so, they also opened up the sperm market to other sources of demand: single women; lesbian couples; and heterosexual couples in which the man, while fertile, was older or carried genetic diseases.[51]

Many people trace the birth of the sperm business to the Repository for Germinal Choice, started in the late 1970s by a retired optometrist, Robert Graham, as a means of reducing genetic pollution.[52] Graham's plan was to launch a sperm bank in southern California that would accept sperm contributions only from Nobel Prize winners.[53] The sperm would be given without charge for insemination only to similarly accomplished women—Mensa members.[54]

The bank was plagued by problems from the start. First, the only Nobel Prize winner to publicly admit his donation to the bank, William Shockley, was an infamous racist.[55] The bank immediately became the focus of derision and scandal in the media.[56] Moreover, the few Nobelists who agreed to donate to the bank were too old to have useful sperm.[57] Although the bank eventually was forced to lower its standards and accept sperm from famous athletes, business moguls, men with advanced degrees, and even some "men you wouldn't wish on your ex-girlfriend,"[58] the Repository for Germinal Choice closed its doors in the late 1990s without ever producing a single Nobel offspring.[59]

Today, the sperm business consists almost entirely of free-standing banking centers unconnected to any specific fertility clinic, and offers services

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50. *Id.* at 37.

51. *Id.*

52. *See generally* DAVID PLOTZ, THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK (2005).

53. *Id.* at 4.

54. *Id.*

55. *See id.* at 6 (describing Shockley's public admission and the ensuing international uproar over the perceived racist implications of the project).

56. *Id.*

57. *See id.* at 98, 101 (noting that sperm from older men such as Shockley is more likely to produce children with health problems, such as Down's Syndrome).

58. *Id.* at 236.

59. *Id.* at 101.

that include banking for men who want to freeze their sperm for later use, direct-order services to couples and single women in need of sperm, and commercial provision to fertility clinics.[60] Although medical advances that address male infertility have caused a reduction in the demand for donor sperm among heterosexual couples over the past decade,[61] demand from single women and lesbian couples has increased, resulting in significant industry growth.[62] Moreover, a drop in supply in many other countries due to regulatory changes has increased the export market in the United States.[63]

Sperm donors are actively solicited through the internet, newspaper ads, and college campus flyers, and receive $75 on average for each specimen.[64] Each specimen yields three to six vials of sperm, which sell for an average of $250 to $400 each.[65] Shipping costs an extra $100, and the sperm of donors with advanced degrees or who agree to reveal their identity to offspring command a premium.[66]

Since the advent of AIDS awareness in the late 1980s, donor sperm is required by federal law to be washed, frozen, and quarantined for at least six months while the donor is tested for HIV, hepatitis, and other sexually-transmitted diseases.[67] Although not required by law, most banks also test donors for the most common genetically-transmitted diseases, such as Tay-Sachs and cystic fibrosis, and collect extensive (but unverified) family medical

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60. *See* Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at 46 (describing the mail-order sperm procedures at a variety of sperm banks across the country); Jennifer Glaser, *Modern Love: Mortality Can Be a Powerful Aphrodisiac*, N.Y. TIMES, Aug. 13, 2006, at ST7 (discussing sperm banking by cancer patients, who will lose the ability to produce sperm through chemotherapy, and professional athletes, who are prone to groin injuries).

61. *See* AM. SOC'Y OF REPROD. MED., *supra* note 22, at 9 (describing intracytoplasmic sperm injection, a treatment for male infertility that has become widespread in the past decade and does not require the use of donor sperm).

62. *See* Tamara Audi, *Giving Life: Donor Dads Reach Out to Kids*, DETROIT FREE PRESS, May 21, 2006, at A1 ("But in recent years, industry officials say demand for sperm has risen significantly among . . . single women and lesbian couples."); Egan, *supra* note 60, at 47 (providing a variety of statistics on the growth of donor sperm demand among single women).

63. *See* Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006, at A1 (discussing the drop in sperm donations in countries, such as the United Kingdom, that recently have required registration of donors). American customers also import sperm from other countries, especially Denmark, the world's leading sperm exporter, which specializes in blond-haired, blue-eyed donors. *See* Lizette Alvarez, *Spreading Scandinavian Genes, Without Viking Boats*, N.Y. TIMES, Sept. 30, 2004, at A4 (describing the growth of the Danish sperm banking industry).

64. SPAR, *supra* note 3, at 39.

65. *Id.*

66. Egan, *supra* note 60, at 48.

67. *Id.*

histories.[68] The costs of these storage and testing requirements are substantial, resulting in significant economies of scale.[69] As a result, the sperm business has tended to be dominated by a small number of large, highly efficient producers.[70]

Other than FDA attempts to control the spread of infectious disease through donor sperm, regulation of the sperm market is left largely to self-policing by individual banks, a fact increasingly met with sharp criticism.[71] Although, compared to the egg market, the sperm market has operated for many years in the United States relatively free of controversy, calls for regulatory intervention are now increasing, driven by demand for more openness by single women and lesbian couples,[72] advances in genetic testing, eugenics concerns,[73] and recent sperm industry scandals.[74]

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68. *See* Tamara Audi, *Sperm Donor Passes on Rare Disease to Children*, DETROIT FREE PRESS, May 20, 2006, at A3 (describing the voluntary measures sperm banks take to screen sperm for genetically-transmitted diseases).

69. SPAR, *supra* note 3, at 37–38.

70. *Id.* at 38.

71. *See, e.g.*, Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES, June 6, 2006, at F5 (describing sperm banking as a "largely unregulated business" and questioning whether additional regulation is necessary to protect the health of children conceived with donor sperm).

72. Historically, sperm donation in the United States has been completely anonymous. But that tradition is being challenged by the offspring of sperm donors (the first generation of whom are now reaching young adulthood and are demanding to know more about their genetic fathers) and by sperm bank customers (especially lesbians and single women). *See* Harmon, *supra* note 63, at A1 (noting that whereas married heterosexual couples frequently refuse to disclose to children their genetic roots, single women and lesbian couples, faced with questions about "where daddy is," want to pass on to their children a more complete genetic history); Audi, *supra* note 62, at A1.

73. Much of the sperm business is internet-based, with search engines that allow users to choose specific characteristics from a menu list and return a set of donors with the chosen qualifications. Tamara Audi, *Sperm Buyers Customize Orders*, DETROIT FREE PRESS, May 22, 2006, at A1. Although interested purchasers can buy donor sperm from a variety of ethnic backgrounds, most purchasers seek a donor who is white, tall, and has a college degree. *Id.*

74. The issue recently gained sustained national attention when five children with an extremely rare genetic blood disorder were all referred to the same University of Michigan blood specialist. Audi, *supra* note 68, at A3. Dr. Laurence Boxer traced all five children to the same sperm donor at Michigan's largest sperm bank, who (the bank later disclosed) had fathered six other children through the bank. *Id.* Although testing for all known recessive genetic traits is considered prohibitively costly, many critics call for more thorough and uniform genetic testing of donors. *Id.*; Grady, *supra* note 71, at F5.

C. Wanted: Ivy League Eggs

Newer, pricier, and more differentiated than the market for sperm, the egg market is also more controversial. Whereas the sperm market in the United States today rarely triggers more than the occasional "ick" factor, the egg market generates sometimes fierce ethical debates.[75] Like many other aspects of the baby business, the egg market was originally unprofitable, limited to gift exchanges between friends and family members, and used by a limited set of infertile women who suffered from ovarian failure.[76] Today, however, the egg business enjoys a much broader market appeal, with such disparate sources as older women, women who carry genetic diseases, gay couples, and embryonic stem cell researchers contributing to demand.[77]

In the market's early years, the term "egg donation" was a literal one. Women unable to produce their own eggs sometimes would seek the help of a close friend or family member who bore genetic characteristics (such as race, ethnicity, or hair or eye color) and other attributes (such as education levels) similar to their own.[78] But so long as egg donation remained limited to altruistic transfers from known contributors, the market was fated to be undersupplied for a variety of reasons.

First, egg donation is a complicated process with some health risks. All egg donors must undergo a comprehensive medical screening, plus a three-week course of hormone injections to induce ovulation, during which period the donor cannot have unprotected sex, smoke, use illegal drugs or drink alcohol, and can take prescription and over-the-counter drugs only with permission.[79] During this time, frequent doctor visits are required, at which the

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75. Historically, however, some critics (particularly the church) have associated sperm donation with deviant behavior because the process requires masturbation and results in the birth of an illegitimate child. *See, e.g.*, Erica Haimes, *Issues of Gender in Gamete Donation*, 36 SOC. SCI. MED. 85, 87 (1993) (discussing opposition to sperm donation in some countries, including the United Kingdom).

76. *See* SPAR, *supra* note 3, at 42 ("At first, most . . . [egg donors] came from the intended recipients' friends or family . . . the donation was just that—a donation."). As discussed in note 22, *supra*, IVF, standing alone, fertilizes eggs outside of the uterus and then implants the resulting embryos, bypassing the fallopian tubes. Accordingly, it does not redress other causes of infertility, such as a failure to produce eggs. The egg market arose to address this need. AM. SOC'Y OF REPROD. MED., *supra* note 22, at 3.

77. *See* Jim Hopkins, *Egg Donor Business Booms on Campuses*, USA TODAY, Mar. 16, 2006, at A1 (discussing the sources of demand for donor eggs).

78. *See* SPAR, *supra* note 3, at 42–43 ("[T]he recipients generally wanted eggs that looked like them—eggs, in other words, that bore particular genetic characteristics: the intended mother's hair or eyes, for example, or her desired level of education achievement.").

79. *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, ADVISORY GROUP ON ASSISTED REPROD. TECH., THINKING OF BECOMING AN EGG DONOR? 14–18 (rev. 2007), *available at*

donor's hormone levels are checked through blood tests and her ovaries are examined through ultrasound to determine the extent of egg production.[80]

The long-term risks of infertility treatments are unknown.[81] Although the short-term side effects of ovarian stimulation are normally limited to mood swings, water retention, and ovarian swelling, fertility medications can cause ovarian hyperstimulation syndrome (OHSS), which in its severe form can cause serious medical problems, including kidney failure, fluid build-up in the lungs, and shock.[82] Rarely, the condition can be life-threatening and necessitate removal of the ovaries.[83]

When the eggs are ready for retrieval, they are surgically removed through a process that may cause bleeding and infection.[84] During this process, the bowel, bladder, or nearby blood vessels may be punctured. Although this is a rare occurrence, if severe internal bleeding results, major abdominal surgery may be required.[85]

These more serious risks are quite rare, and egg donation is normally little more than a time-consuming and physically uncomfortable inconvenience. It is easy to understand, however, why few women would undergo the process for a stranger without the inducement of financial compensation.

The second factor limiting egg supply relates to the fairly stringent qualifications required of egg donors. Donors must be in a certain age range, typically twenty-one to thirty-five.[86] In addition, as previously noted, even in the early stages of the egg market, recipients desired egg donors with particular genetic characteristics to increase the chances that their offspring would bear a resemblance to the intended mother.[87]

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http://www.health.state.ny.us/community/reproductive_health/infertility/docs/1127.pdf (describing the egg donation process from the donor standpoint). As with all IVF cycles, ovarian stimulation is performed to induce the production of multiple eggs during a single ovulation cycle. *Id.*

80. *Id.*

81. Although some studies show a link between hormone therapy and ovarian cancer, other studies find no correlation. *Id.* at 16.

82. *See id.* at 15 (describing the potential short-term side effects of ovarian stimulation, such as OHSS).

83. *Id.*

84. *See id.* at 17 (describing the egg retrieval process and associated risks).

85. *Id.*

86. The lower number is designed to ensure legal capacity to enter into the transaction. The upper limit maximizes the probabilities of successful fertilization and the live birth of a child with no birth defects, which decrease with the age of the egg donor. NEW YORK STATE TASK FORCE, *supra* note 79, at 5.

87. *See supra* note 78 and accompanying text (discussing desires in the early egg market for donors with genetic traits in common with the intended mothers).

As the market has become more commercial, however, this demand for particular genetic characteristics has increased, resulting in greater price differentiation. Although the base-line rate for eggs in 1999 was $2,500 to $5,000, depending on geographic region, donors with traits that are particularly rare or desired commanded significantly higher prices.[88] For example, East Asian and Jewish eggs command a price premium, because they are rarer, as do the eggs of Ivy League college students, women with high SAT scores, women with athletic ability, and women with extraordinary physical attractiveness.[89]

This increasing commercialization in the egg market, as well as the price differentiation and aggressive advertising that accompanies it, is a source of discomfort among critics of the egg industry. The luxury egg market has generated particular controversy. In 1999, to the horror of the mainstream fertility industry, a fashion photographer launched a scheme to auction off the eggs of models on the internet for prices as high as $150,000.[90] The site is still up and running and claims sales of $39.2 million through 2004.[91] "Donor" programs also have generated controversy—and profits—at Ivy League schools across the country through their aggressive advertising in student newspapers and on-campus flyers offering sums as high as $50,000 for egg donors.[92] These

88. American Society for Reproductive Medicine (ASRM) Ethics Committee, *Financial Incentives in Recruitment of Oocyte Donors*, 74 FERTILITY & STERILITY 216, 216 (2000).

89. *See* American RadioWorks, *The Decision to Donate*, Part 10, § 2, *In Short Supply*, http://americanradioworks.publicradio.org/features/fertility_race/part10/section2.shtml (last visited Feb. 4, 2009) (discussing price premiums for Jewish and Asian eggs) (on file with the Washington and Lee Law Review); *infra* notes 90–91 and accompanying text (discussing the price premiums for these features).

90. *See* Ron's Angels, http://www.ronsangels.com (follow the [ron's angels] hyperlink; then follow the model eggs auction hyperlink) (last visited Sept. 8, 2008) (listing the eggs from models for auction) (on file with the Washington and Lee Law Review). The site also auctions off the sperm of male models, with minimum bids starting at $15,000. *Id.* (follow the [ron's angels] hyperlink; then follow the model sperm auction hyperlink) (last visited Sept. 8, 2008) (on file with the Washington and Lee Law Review); *see also* Carey Goldberg, *On Web, Models Auction Their Eggs to Bidders for Beautiful Children*, N.Y. TIMES, Oct. 23, 1999, at A11 (claiming that the site auctioned eggs for as much as $150,000).

91. Ron's Angels, http://www.ronsangels.com (last visited Sept.8, 2008) (on file with the Washington and Lee Law Review). E-bay prohibits the auctioning of sperm, eggs, or organs on its site, although it permits hair to be auctioned. Goldberg, *supra* note 90, at A11.

92. *See, e.g.*, Ken Schwartz, *Ivy Eggs*, BUS. TODAY, Aug. 5, 2006, at 1, *available at* http://www.businesstoday.org/index.php?itemid=120 (discussing ads for egg and sperm donors in campus newspapers at Princeton and other Ivy League schools); Annie M. Lowrey, *Will You Be My Baby's Mama?*, HARVARD CRIMSON, Apr. 29, 2004, http://www.thecrimson.com/article.aspx?ref=502192 (discussing ads for egg donation in the *Harvard Crimson* and other Ivy League college newspapers) (on file with the Washington and Lee Law Review); Bioethics.net, http://bioethics.net/blog/images/donor.jpg (last visited Sept. 8, 2008) (displaying a photograph of a flyer posted on the campus of the University of Pennsylvania offering $15,000–$25,000 for a fun, attractive donor meeting certain height and ethnicity requirements) (on file with the

fees are sometimes linked to specific qualifications, such as membership on a varsity athletic team, or a GPA or SAT score in a certain percentile.[93]

D. Surrogacy: Gift of Life or Ultimate Outsourcing?

Perhaps the oldest sector of the baby market, surrogacy has a long history. Since biblical times, couples have used surrogates to provide children when the intended mother is unable to conceive or give birth.[94] Historically, surrogates were induced into service through neither money nor altruism, but through coercion.[95] Most were servants—for example, the maid of the intended mother or a concubine of the father.[96] In this era, conception took place the old-fashioned way—through sexual intercourse—in contrast to today's more technologically advanced methods.[97]

For most Americans, surrogacy first entered their consciousness with the birth and subsequent litigation surrounding "Baby M," who was born on March 27, 1986, the product of a traditional surrogacy arrangement between William and Elizabeth Stern, the intended parents, and Mary Beth Whitehead, the surrogate.[98] Within days of giving birth, Whitehead determined to keep "Sarah," the name she had entered on the birth certificate, and refused to relinquish her to the Sterns.[99] Whitehead threatened suicide if she were forced to give up the child and eventually fled to Florida with her husband, Richard Whitehead, in order to evade a court order of temporary custody of the baby to the Sterns.[100] Although the trial court ordered specific performance of the contract and awarded custody of "Melissa" (as the Sterns had named her) to the Sterns, the New Jersey Supreme Court reversed the decision, holding that,

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Washington and Lee Law Review).

93. *See, e.g.*, Schwartz, *supra* note 92, at 1 (discussing examples of fees linked to qualifications); Lowrey, *supra* note 92 (same).

94. *See, e.g.*, *Genesis* 16 (documenting Hagar's surrogacy on behalf of Sarah); *Genesis* 30 (documenting Bilha's surrogacy on behalf of Rachel).

95. *See* SPAR, *supra* note 3, at 72–73 (discussing methods associated with ancient surrogacy arrangements).

96. *Id.* at 73.

97. *Id.*

98. *See In re* Baby M, 537 A.2d 1227, 1240 (N.J. 1988) (holding the surrogacy contract between Whitehead and the Sterns unenforceable). In a traditional surrogacy arrangement, the surrogate is artificially inseminated with the intended father's (or a donor's) sperm. In other words, the surrogate is both the birth mother and the *genetic* mother.

99. *Id.* at 1237.

100. *Id.*; Sanger, *supra* note 7, at 68–69.

under New Jersey law, "the payment of money to a 'surrogate' mother [is] illegal, perhaps criminal, and potentially degrading to women."[101]

Today, surrogacy raises even more difficult legal issues due to technological innovations that permit gestational surrogacy, a process by which IVF is employed to implant the surrogate with an embryo created by an egg, donated by the intended mother or an egg donor, and sperm, from the intended father or a sperm donor.[102] In the case of gestational surrogacy, therefore, the surrogate has no genetic relation to the child, an important distinction in determining parentage under many state laws.[103] In the United States, ninety-five percent of all commercial surrogacy arrangements are for gestational surrogacy.[104]

From the beginning, some of the most heated and interesting debates regarding commercial surrogacy arrangements involved the enforceability of such contracts.[105] Although many countries have outlawed or sharply limited

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101. *In re* Baby M, 537 A.2d at 1237. The court awarded custody to the Sterns, however, reasoning that, although the surrogacy contract was void, awarding custody to the Sterns served the best interests of the child. *Id.* at 1234; Sanger, *supra* note 7, at 69.

102. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 902–22 (2000) (noting that gestational surrogacy arrangements can result in as many as five different individuals contributing to the creation of a child—the intended mother, the intended father, the surrogate, the egg donor, and the sperm donor—and discussing some of the resulting legal issues); Krista Sirola, *Are You My Mother: Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 134–35 (2006) (same).

103. *See* Sirola, *supra* note 102, at 135–37 (discussing various tests used by states to determine parentage of children resulting from surrogacy arrangements, including the "genetic provider" standard favoring genetic parents over gestational surrogates).

104. Sanger, *supra* note 7, at 79.

105. *Compare, e.g.*, Lori Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995) (arguing for enforcement, subject to certain restrictions), Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) (urging enforcement), Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 30 (1989) (arguing for the specific enforcement of surrogacy contracts against the birth mother), *and* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (urging enforcement), *with* ANDERSON, *supra* note 6, at 178 (arguing that commercial surrogacy exploits and demeans women and that the surrogate industry refers to surrogates in inanimate terms, such as "hatcheries," in order to suppress their maternal instincts), RADIN, *supra* note 6, at 145–47 (comparing commercial surrogacy to baby selling and arguing against enforcement, but proposing a rule that would require the birth mother to determine within a reasonable time after delivery whether or not to keep the child), Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2377 (1995) (opposing specific enforcement of surrogacy contracts), *and* John A. Robertson, *Prior Agreements for Disposition of Frozen*

paid surrogacy arrangements, United States federal law is silent on the issue of commercial surrogacy, leaving a hodge-podge of widely varying state laws governing the issue.[106] Some states, either through statute or court decisions, take approaches relatively friendly to commercial surrogacy arrangements, for example, by analyzing the parties' intent at the time of the contract.[107] Other states declare surrogacy contracts void or unenforceable, while still others attempt to prohibit commercial surrogacy altogether, by declaring such contracts illegal and assigning fines and other penalties for violations.[108]

Freed by the advent of gestational surrogacy from the traditional constraints on the race or ethnicity of the surrogate, surrogacy is increasingly being outsourced overseas. Driving the push, in part, are concerns over the legal enforceability of commercial surrogacy contracts in the United States, as well as other considerations, including lower costs and the ability to supervise and control the behavior of the surrogate.[109]

Since commercial surrogacy was legalized in India in 2002, for example, clinics have spread to nearly every major city, resulting in an industry estimated at $500 million.[110] Indian surrogates typically earn less than their American counterparts (between six and ten thousand dollars, on average, plus room,

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Embryos, 51 OHIO ST. L.J. 407, 421 (1990) (arguing that surrogates should be free to disavow their contracts, as their views on relinquishing the child are likely to change after birth).

106. *See* Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 224 (1996) (reviewing surrogacy legislation in foreign countries and noting that most nations prohibit commercial surrogacy).

107. *See* Katherine Drabiak, et al., *Ethics, Law, and Commercial Surrogacy: A Call For Uniformity*, 35 J.L. MED. & ETHICS 300, 302–03 (2007) (discussing various state regimes); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. (forthcoming 2009) (discussing modern developments in state surrogacy statutes, which increasingly aim to reduce uncertainty and establish more efficient procedures for determining legal parentage) (on file with the Washington and Lee Law review); Sirola, *supra* note 102, at 135–37 (outlining three prominent approaches).

108. Drabiak, *supra* note 107, at 302.

109. Marketplace, *"Wombs for Rent" Grows in India*, (American Public Media radio broadcast, Dec. 27, 2007), *available at* http://marketplace.publicradio.org/display/web/2007/12/27/surrogate_mothers (reporting growth of the commercial surrogacy industry in India). In India, for example, where commercial surrogacy is a growing industry, surrogates typically live together at the clinic or in a supervised home. *Id.* The clinic, therefore, can monitor their health, diet, and other behavior. *Id.*; *see also* CBS News, *Outsourced: Wombs for Rent in India* (CBS television broadcast Dec. 31, 2007), *available at* http://www.cbsnews.com/stories/2007/12/31/health/printable3658750.shtml (reporting the same).

110. MSNBC, *Surrogate Mother Business Booming in India* (MSNBC television broadcast Feb. 20, 2008), *available at* http://www.msnbc.msn.com/id/23252624/print/1/displaymode/1098.

board, and some educational or vocational training.)[111] With some thirty-five percent of Indians surviving on less than one dollar per day, however, and a lack of similarly well-paying jobs for the uneducated (particularly women), there is no shortage of women willing to perform the task.[112]

E. Useful Labor, Priceless Treasure—The Adoption Market

The adoption market represents the far end of the spectrum in the baby trade, as it is the only sector in which the purchase is explicitly for a fully-formed, already-existing child, rather than a future child. Contrary to popular belief, the primary driver of the adoption market has always been economics. In ancient Greece and Rome, families frequently paid to adopt a child from families that had an excess, primarily to provide an heir or to preserve the family name.[113] In Europe in the middle ages, where blood-lines were more important, the ancient institution of adoption gave way to a more informal practice of "taking in" the excess children of family and neighbors who could not afford to care for them.[114] Although some of these children were treated as family members, more often they were used as indentured domestic help or laborers until the age of eighteen or twenty-one, at which age the common law decreed their independence.[115]

In the United States, adoption followed a similar pattern as in Europe, relying primarily on informal indenture arrangements among family and neighbors and more formalized apprenticeship practices.[116] By the mid-nineteenth century in the United States, due largely to the efforts of the New York Children's Aid Society and its director, Charles Loring Brace, the traditional indenture arrangement had begun to give way to arrangements more analogous to modern-day foster care.[117]

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111. Marketplace, *supra* note 109.

112. *Id.*; CBS News, *supra* note 109; MSNBC, *supra* note 110.

113. POSNER, *supra* note 2, at 415–16; SPAR, *supra* note 3, at 162–63.

114. SPAR, *supra* note 3, at 163.

115. *Id.*

116. *Id.*

117. *See* ZELIZER, *supra* note 2, at 172 (discussing indenture-based adoption arrangements in the United States). Under this model, quickly replicated by similar organizations throughout the country, legal guardianship did not change hands, but instead was retained by the birth parents or the Society. *Id.* Children were no longer under a contractual labor obligation, but they were expected to—and did—labor. *Id.* The Society's advertising circulars were quite explicit about the anticipated arrangement, emphasizing the "handy and active" nature of the boys, who could quickly learn "any common trade or labor," such as farming or manufacturing. *Id.* (quoting HENRY W. THURSTON, THE DEPENDENT CHILD 101 (1930)). Similarly, "girls could

During this period, as in prior periods when children were valued primarily for labor, there was no market for infants. The inability of an infant to contribute to household income, combined with the economic and social pressures on single or widowed mothers, meant that infants were liabilities who were more likely to be abandoned, die, or reside until adulthood in an orphanage than be adopted by another family.[118] As a result, even reputable child-placement agencies charged large fees for accepting babies.[119] Poor women who could not afford the fees frequently abandoned their babies in public places or foundling asylums, where infant mortality rates reached eighty-five to ninety percent.[120] Those who could spare the money left illegitimate infants with placement agencies or baby farmers, who ran a profitable enterprise by charging fees to take in babies, ostensibly until a home could be found for them.[121]

Around the second half of the nineteenth century, the social conception of children in the United States began to change radically in ways that permanently impacted the adoption industry, as well as numerous other aspects of children's lives.[122] By the turn of the twentieth century, demand was high to adopt previously undesirable illegitimate children, not as laborers, but as family members.[123]

The new demand for children created new profit opportunities for Baby Market Intermediaries. Child placement services and baby farmers, for example, now managed to make money on both ends of the trade. While continuing to extract a fee from single mothers who desired to secretly rid

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be used for the common kinds of housework." *Id.* at 172–73 (quoting HENRY W. THURSTON, THE DEPENDENT CHILD 101 (1930)).

118. *Id.* at 173.

119. During an 1897 interrogation by the New York State Board of Charities, for example, Reverend W. Jarvis Maybee of the Children's Home Society, a national child placement organization, admitted to charging fifty dollars to take in babies, and doubling the fee if the child was illegitimate. *Id.* at 175. As stated by Reverend Maybee, "we charge more for little babies as it is hard to get homes for them while they are young; we have to keep them." *Id.*

120. *Id.* at 173–74.

121. *See id.* at 174 (discussing the practice of baby farming). Given the lack of demand for infants, however, such homes were rarely found. *Id.*

122. *See id.* at 175–95 (discussing the changing role of children, from useful laborers to economically useless—but sentimentally priceless—objects, and the accompanying changes in the adoption market). This change was manifested throughout society, not simply in adoption practices. For example, child labor laws and changing norms altered expectations of children's contribution to the economic family unit, the practice of insuring children's lives became increasingly suspect, and children were expected to spend more of their time on study and play, and less on labor. *Id.*

123. *See id.* at 193–95 (discussing the advent of sentiment-driven adoption).

themselves of an unwanted child, baby brokers found that childless couples would pay to adopt an infant.[124]

Even legitimate maternity homes and lying-in hospitals profited from the early twentieth century baby market. As noted by a speaker at the 1913 National Conference of Charities and Correction discussing the impact of the new demand for babies on hospitals and maternity homes: "'[T]here are enough childless marriages to create a demand for promising babies, and therefore a market.'"[125] Similarly, the Juvenile Protective Association reported in 1917 a "regular commercialized business" in babies.[126]

The wide availability of the birth control pill beginning in 1960 and the 1973 *Roe v. Wade*[127] decision, legalizing abortion across the country, spelled the beginning of the end for what, in hindsight, proved to be the golden years of the domestic adoption market.[128] Between 1970 and 1975 the number of unrelated adoptions in the United States fell by almost half, from 89,000 a year to 50,000.[129] By 1975, many officially licensed agencies had stopped accepting applications for white infants with no illness or disability, and waiting times at agencies that did accept such applications were as much as five years.[130]

Frustrated, primarily white, infertile couples sought other solutions, including procuring children from sources that, sadly, did not suffer from undersupply. Those solutions included acquiring children from developing nations,[131] lobbying for reforms to the foster care system that would ease the ability of the state to more readily terminate birth parents' rights, and pushing

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124. *Id.* at 195.

125. *Id.* at 196 (quoting W. Almont Gates, Secretary of State Board of Charities and Corrections, *Caring for Dependent Children in California*, Address Before the 40th Annual National Conference of Charities and Corrections (July 5–12, 1913), *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS 309 (1913)).

126. *Id.* at 197.

127. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (concluding that "the right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interests in regulation").

128. *See* SPAR, *supra* note 3, at 173 (discussing the impact of these developments on the adoption market).

129. *Id.*

130. *Id.* These changes not only reduced the number of out of wedlock births, but meant that women who chose to have children out of wedlock were more likely to keep their children. Prior to 1973, 19.3% of children born to never-married white women were put up for adoption, versus 1.7% from 1989 to 1995. Anjani Chandra et al., *Adoption Seeking and Relinquishment for Adoption in the United States*, *in* CDC ADVANCE DATA 306, May 11, 1999, at 1, 9.

131. *See infra* note 141 and accompanying text (discussing the international adoption debate).

agencies to place minority and biracial children with white families—practices that remain both common and controversial today.[132]

Cross border adoptions were not unheard of, even at a time when domestic adoptions were relatively easy.[133] But the import market in babies began in earnest in the 1990s when the break-up of the former Soviet bloc opened up new supplies of adoptable children.[134] By 1991, hordes of brokers, agencies, and other adoption intermediaries were doing business in Romanian children, placing 2,594 with American families and pushing the cost of adopting a Romanian child from a low of $2,000 in 1990 to more than $11,000 just a year later.[135] Shortly thereafter, China, in 1991, and Russia, in 1992, opened their borders to foreign adoption.[136] By 1996, Americans were adopting more than 2,400 Russian and 3,300 Chinese infants yearly.[137]

At the same time, the number of intermediaries and agencies offering international adoption grew substantially, from the handful of charitable groups in existence prior to the 1990s international adoption boom, to hundreds of agencies, many of them for-profit businesses that specialized in a particular country, such as China, Guatemala, Russia, or Peru.[138] In 2003, more than 42,000 children were adopted through international adoptions, almost half in the United States.[139]

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132. *Compare* DOROTHY ROBERTS, KILLING THE BLACK BODY 250–64 (1997) (linking the willingness to terminate the parental rights of black parents with white parents' desires to adopt black children), *and* Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 940 (1998) (proposing a strict nonaccommodation policy that "challenges white same-race preferences, in adoption and elsewhere"), *with* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1248 (1991) (urging the abandonment of racial matching policies as contrary to the best interests of black children).

133. After World War II, for example, Americans adopted some of the children left orphaned by the war, including children from Germany and Greece, and 1,500 orphaned victims of the Hiroshima and Nagasaki bombings. Later, American families adopted children orphaned by civil wars in Greece (1946–1949), Korea (1950–1953), and Vietnam (1954–1975). Christine Ward Gailey, *Race, Class and Gender in Intercountry Adoption in the USA*, *in* INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS AND PERSPECTIVES 298–303 (Peter Selman ed., 2000).

134. *Id.* at 302 (discussing the effect of the Soviet break-up on the international adoption market).

135. SPAR, *supra* note 3, at 175.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*; *see also* U.S. Dep't of State, *Immigrant Visas Issued to Orphans Coming to the U.S.*, http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Sept. 15, 2008) (reporting the number of U.S. visas granted to internationally adopted children) (on file with the Washington and Lee Law Review).

Although international adoption now accounts for roughly fifteen percent of all unrelated adoptions in the United States,[140] the international adoption market remains controversial. Many critics argue that such adoptions exploit poor women and children in developing nations. Its defenders, however, maintain that international adoptions save children who would otherwise lead lives of poverty and degradation.[141]

In contrast to the international market, the domestic adoption market is starkly divided into two segments: The private market and the state-run (foster care) market.[142] This state-run domestic market—comprised nearly entirely of older, minority, and special needs children—is one of the few sectors of the domestic baby trade not lacking in supply: In 2004, 118,000 foster children were available for adoption, more than double the 52,000 children actually adopted from the system that year.[143] Of these "waiting children," nearly sixty percent were non-white, and over sixty percent were six years of age or older.[144]

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140. CHILD WELFARE INFORMATION GATEWAY, HOW MANY CHILDREN WERE ADOPTED IN 2000 AND 2001? 1 (2004).

141. Advocates of international adoption argue that such adoptions provide loving homes to children who would otherwise lead lives of poverty under inhumane conditions. *See, e.g.*, ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 143–63 (1993) (discussing the many benefits of international adoption and warning against over-regulation). Skeptics, in contrast, argue that international adoptions are imperialistic, displace domestic adoptions because of the higher profits in international adoption, and lead to human rights abuses such as trafficking and kidnapping. *See, e.g.*, D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 374 (2005) (arguing that, due to the large profits in the international adoption market, some children are placed overseas when there are willing adoptive parents in their home country); Kay Johnson, *Politics Of International and Domestic Adoption in China*, 36 LAW & SOC'Y REV. 379, 394 (2002) (documenting the domestic demand for adoptable Chinese girls, in contrast to the common assumption that they are unwanted in their home country, and urging a refocus on domestic adoption); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 105 (1998) (arguing that international adoptions create a "troubling dilemma" because "the access of affluent white Western women to children of color for adoption is often dependent upon the continued desperate circumstances of women in third-world nations").

142. *See* Evan B. Donaldson Adoption Institute, *International Adoption Facts*, http://www.adoptioninstitute.org/research/adoptionfacts.php (last visited Sept. 15, 2008) (outlining the division between private and state-run adoption channels) (on file with the Washington and Lee Law Review).

143. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT PRELIMINARY FY 2004 ESTIMATE AS OF JUNE 2006 5, 7 (2006), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report11.pdf. This is roughly 23% of the 517,000 children in the foster care system in 2004. *Id.* at 1.

144. *Id.* at 5–6. "Waiting children" refers to children under the age of sixteen "who have a goal of adoption and/or whose parental rights have been terminated." *Id.* at 5. The mean age of a waiting child in 2004 was 8.8 years, whereas the median was 8.7 years. *Id.* at 6. Researchers estimate that after eight or nine years of age, the probability that a child will remain in foster

Moreover, it is estimated that thirty to forty percent of waiting children have physical health problems, and a high percentage suffer from mental health problems.[145]

This state-run side of the domestic adoption market contrasts sharply with the private market for U.S.-born infants, an estimated one-half to two-thirds of whom are placed directly by birth parents with adoptive parents through the assistance of an intermediary, such as an attorney, doctor, clergy, or other facilitator.[146] The remainder are placed through private, for-profit or non-profit adoption agencies that are licensed by the state.[147]

These private adoptions are decidedly more commercial than their public counterparts and are characterized by one overriding feature: It is a seller's market. The insufficient domestic supply of healthy white infants places the birth parents of such children in a radically different position than the birth parents of children placed through state agencies. Today, for example, many agency adoptions and virtually all independent adoptions directly involve birth parents in selecting adoptive parents, a stark change from the days when unwed mothers were forced by circumstance and social and institutional pressures to give up their children shortly after birth to strangers whose identities were kept secret.[148]

III. Baby Selling Bans as Rent Seeking

The point of the forgoing discussion in Part II is not to argue that either the baby trade or Baby Market Intermediaries are inherently bad. Instead, the aim is to demonstrate that the baby market resembles other common markets in

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care indefinitely exceeds the probability that she will be adopted. Evan B. Donaldson Adoption Institute, *Foster Care Facts*, http://www.adoptioninstitute.org/research/fostercare.php (last visited Sept. 15, 2008) (on file with the Washington and Lee Law Review).

145. *Id.*

146. Evan B. Donaldson Adoption Institute, *Private Domestic Adoption*, http://www.adoptioninstitute.org/research/domesticadoption.php (last visited Sept. 15, 2008) (on file with the Washington and Lee Law Review). Estimates vary because states are not required to report private domestic adoptions. *Id.*

147. *Id.*

148. *See generally* ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006) (discussing young women coerced by family and hospital personnel to give up their children for adoption). When the birth parents and adoptive parents have direct contact during the selection process, the adoption is referred to as "open." Evan B. Donaldson Adoption Institute, *supra* note 146. The degree of openness varies significantly, however, ranging from a single meeting prior to adoption finalization to ongoing contact throughout the child's life. *Id.*

many important ways, including industry segmentation, price differentiation, the presence of powerful market intermediaries, and substantial industry profits. Given these similarities to other commercial markets, baby market participants should be expected to behave in at least some respects like participants in other commercial markets. Importantly, we should expect the market's most economically and politically powerful participants to attempt to harness the state's power to extract private benefits under the guise of public-interested regulation.

More than twenty-five years ago, Professors Landes and Posner famously accused adoption agencies of anticompetitive behavior, noting the asymmetric legal restrictions on profit flows in the baby market that limit amounts paid to Baby Market Suppliers, while allowing adoption agencies a free hand in setting the prices charged to adoptive parents.[149] Landes and Posner, however, concluded that the targets of such anti-competitive activity were independent adoption agencies and brokers, with whom state-run agencies did not want to compete.[150] No doubt there is some truth to this contention, as Baby Market Intermediaries actively have sought to limit the activities of their independent competitors.[151] Yet, asymmetric pricing restrictions of this sort make more sense, not as an attempt to avoid competition from other Baby Market Intermediaries, but as an attempt to fix the price of inputs and avoid competition with decentralized exchange in which baby market consumers and producers directly seek each other out and negotiate prices in the absence of a Baby Market Intermediary.[152]

The notion that the government's power to regulate may be used to provide private benefits by restricting market entry, policing cartels, and legitimizing price-fixing tactics is a phenomenon well documented in other industries.[153] In fact, Stigler argues that every industry with sufficient political

149. Landes & Posner, *supra* note 6, at 328 ("While agencies are generally not limited in fees they may charge prospective adoptive parents, they are constrained to other inefficient restrictions . . . . The most significant restriction is the regulation of the price at which the agencies may transact with the natural parents.").

150. *See id.* at 333–34 (noting that adoption agencies "agitate for stringent regulation of the independent market" so as to avoid competition).

151. *See infra* notes 231–32 and accompanying text.

152. *See infra* notes 234–35 and accompanying text (discussing intermediary competition with decentralized exchange).

153. *See* Jonathan R. Macey, *Commercial Banking and Democracy: The Illusive Quest for Deregulation*, 23 YALE J. ON REG. 1, 16–17 (2006) (arguing that both regulation and deregulation are sometimes the result of rent seeking by private actors, justified through the rhetoric of public-interest governance); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230–33 (1986) (describing how special interest groups successfully lobby the government

power to harness the state's coercive machinery will seek to use that authority to: (1) control market entry by new competitors and (2) police cartels and price fixing agreements.[154]

Baby-selling restrictions arguably serve both of these goals. As discussed in Part II of this Article and elaborated in this Part, a wide array of Baby Market Intermediaries legally profit handsomely from the baby market. As public choice theory would predict, these Baby Market Intermediaries are more economically and politically powerful than those suppliers of babies and baby-making components whose market access is legally restricted. Not coincidentally, Baby Market Intermediaries also have agitated actively for legal and industry restrictions that impede the ability of Baby Market Suppliers—quite literally, the "mom and pop" producers of this industry—to reap the full monetary benefits of their services, thus reducing competition and capping the price of their required inputs. Not surprisingly, then, supply in many sectors of the baby market frequently falls far short of demand.

Subsection A discusses intermediation in the baby market, demonstrating that Baby Market Intermediaries perform many salutary functions that increase the gains of trade to all baby market participants. Thus, even in a fully functional baby market, Baby Market Intermediaries likely would reap substantial profits.

Value added, alone, however, does not fully explain the central role of intermediaries in the baby market, or their large gains. Instead, rent seeking and other anti-competitive behavior play a role. Subsection B demonstrates the extent to which baby selling restrictions are one-sided, threatening market access only by Baby Market Suppliers and not by Baby Market Intermediaries. For example, price fixing in the egg market, legal uncertainty regarding the enforceability of commercial surrogacy contracts and the permissibility of surrogacy compensation, and the prohibition against baby selling in the adoption market all threaten to limit full market access by Baby Market Suppliers. Subsection C argues that these restrictions serve two related functions: controlling market entry and capping the price of Baby Market Intermediary inputs.

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for self-serving regulations); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4–6 (1971) (discussing benefits derived by industry from state regulation).

154. Stigler, *supra* note 153, at 5–6. Stigler also contends that industries with sufficient political power will seek state assistance in encouraging the production of complements and discouraging the production of substitutes. *Id.* at 6. As previously noted, the baby market is characterized by a lack of acceptable substitutes. *See supra* note 16 (noting the absence of substitutes in the baby market).

A. Intermediation in the Baby Market

An intermediary has been defined as "an economic agent that purchases from suppliers for resale to buyers or that helps buyers and sellers meet and transact."[155] Intermediation is an important—and profitable—function in developed economies, accounting for over twenty-five percent of the U.S. gross domestic product.[156] Although the types of market imperfections associated with any given transaction ultimately will determine the types of intermediation services performed, intermediaries are generally thought to perform four general categories of services: (1) price setting and market clearing functions; (2) providing market liquidity; (3) coordinating buyers and sellers; and (4) performing monitoring and quality guarantee functions.[157]

In the case of baby markets, a wide array of Baby Market Intermediaries performs these functions. Consider price setting, for example. Price setting can be a costly activity, with economies of scale and scope.[158] Suppliers must discern, gather, and analyze demand information and keep abreast of competitors' prices.[159] Buyers must do the same with regard to supply information.[160] In the baby market, such functions frequently are performed by surrogacy agencies, adoption agencies, adoption facilitators, fertility specialists offering packages that include services and products (such as an egg or embryo), and numerous others.[161]

Coordinating buyers and sellers is another important role performed by Baby Market Intermediaries. Intermediaries can help coordinate buyers and sellers by performing matching and searching functions.[162] When buyers and sellers must seek each other out directly, each entails search costs—the costs of searching for trading partners, investigating them, and, sometimes, traveling to

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155. Daniel F. Spulber, *Market Microstructure and Intermediaries*, 10 J. ECON. PERSP. 135, 135 (1996) (discussing the role of intermediaries in reducing transaction costs).

156. *Id.* at 137.

157. *Id.* at 136. To provide market liquidity, intermediaries may hold inventories of goods and stand ready to buy or sell at any time in order to smooth out dips and spikes in supply or demand. *Id.* at 142–43. Given the nature of the product, this seems an unlikely source for substantial intermediary activity in the baby market, other than the sperm and egg sectors.

158. *Id.* at 141.

159. *Id.*

160. *Id.*

161. *See supra* Part II (discussing the various sectors of the baby market and the role of intermediaries in each); *infra* Part III.B (discussing the asymmetric institutional framework that enhances the role of intermediaries in the egg, surrogacy, and adoption markets).

162. Spulber, *supra* note 155, at 145.

their location.[163] Intermediaries can reduce these costs by centralizing the search function.[164] Furthermore, when buyers and sellers are matched in a decentralized fashion, there may be a high degree of randomness involved.[165] Customers have differing levels of willingness and ability to pay, and sellers have different opportunity costs.[166] Intermediaries can reduce the risk that a trade will fail by better matching prospective consumers with prospective sellers.[167]

The baby market entails high search and matching costs, which various Baby Market Intermediaries seek to reduce. For example, prospective parents wishing to procure a child in the baby market face costs in identifying a prospective egg donor, surrogate, or birth parent.[168] Prospective parents must determine who these women are, how they can be reached, and whether they have the desired characteristics. Baby Market Suppliers face similar search costs in finding a willing purchaser.[169] As in other markets, matching in the Baby Market is also risky when decentralized, as prospective parents have varying degrees of willingness to pay and Baby Market Suppliers may have very different opportunity costs. Needless to say, in a decentralized market, prospective parents have an incentive to understate their willingness to pay, while Baby Market Suppliers have an incentive to overstate their opportunity costs.[170] Baby Market Intermediaries can, and do, work to close that gap, increasing the possibility of successful exchange.

Perhaps the most important role played by Baby Market Intermediaries, however, involves the traditional intermediary functions of guarantee and monitoring. In markets where buyers and sellers have asymmetric information, intermediaries can capture gains from trade by reducing those asymmetries through, for example, certifying the quality of goods, monitoring the efforts of

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163. *Id.* at 145–47.

164. *Id.* at 146–47.

165. *Id.* at 146.

166. *Id.*

167. *See id.* at 145–47 (explaining the role of intermediaries in coordinating buyers and sellers).

168. *See* Mhairi Galbraith et al., *Commercial Agencies and Surrogate Motherhood: A Transaction Cost Approach*, 13 HEALTH CARE ANALYSIS 11, 16 (2005) (discussing the role of surrogacy brokers in reducing searching and matching costs in that market); *see also* POSNER, *supra* note 6, at 61 ("A couple may try to go the independent adoption route, but this route is haphazard and disorganized, and information about babies available for adoption through it is hard to come by.").

169. *C.f.* Galbraith et al., *supra* note 168, at 17 (discussing the search costs of intended parents and surrogates).

170. *C.f. id.* at 16 (discussing the matching role of intermediaries in the surrogacy market).

trading parties, and guaranteeing performance with warranties and contract terms.[171]

In the baby market, these functions are extraordinarily important. Most baby market participants are not repeat players, and severe information disparities exist between most producers and consumers in the baby market. For example, egg or embryo purchasers are unable to observe all of the characteristics and behaviors of the donor that may be relevant to the well-being of the eventual child. Similarly, once the intended parents have contracted for a surrogate's services, they have an interest in her behavior, which will affect the child's health.[172] For example, they want her to refrain from smoking, alcohol, and drugs, and want her to eat and rest properly.[173] Yet the intended parents are at an informational disadvantage vis-à-vis the surrogate on this front, as they generally are unable to observe her behavior at all points after contracting.[174] Finally, adoptive parents may have less than perfect information about a child that they plan to adopt—what were her birth parents' backgrounds, what were the conditions of pregnancy and infancy, does she have any currently unobservable health issues or special needs?

All of this is information that prospective parents would like to have but may be able to attain only at great cost, if at all. And Baby Market Suppliers naturally have incentives to be less than fully forthcoming about some of these issues. By putting their reputational capital at stake and engaging in screening procedures, Baby Market Intermediaries reduce these risks.

Moreover, some sectors of the baby market may be prone to hold-up problems, as the relative commitment of the parties to the transaction are likely to change after contracting.[175] For example, in the case of surrogacy, intended parents may become very committed to completion of the transaction after conception, shifting power to the surrogate to demand more money than bargained for in order to relinquish the child.[176] Alternatively, the status of the intended parents' relationship may change, causing one or both to seek to avoid the contract, and leaving the surrogate with an unwanted child that is not her genetic offspring.[177]

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171. *See* Spulber, *supra* note 155, at 147–49 (discussing the importance of guaranteeing and monitoring functions performed by market intermediaries).

172. Galbraith et al., *supra* note 168, at 14.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* Scott, *supra* note 107, at 17–18 (discussing this problem). Needless to say, this latter scenario represents not just a contracting problem, but a public policy problem as well. *Id.*

In addition, the baby market may be prone to problems of adverse selection. Women who are addicted and in need of money may be especially likely to contract their reproductive resources away for monetary gain, or women prone to miscarriage may be drawn to the surrogacy market, where they can earn money during the pregnancy, without having to carry the child to term.[178] On the other side, many fear that wealthy couples with only a minimal commitment to parenting may be drawn to the ease of a baby market that does not require the burden of nine months of pregnancy followed by childbirth.[179] Many Baby Market Suppliers would find such a contracting partner unacceptable and will expend costly effort attempting to screen out such parties.

Finally, the baby market is plagued with uncertainty—uncertainty that Baby Market Intermediaries are able to profitably reduce. For example, the international adoption market is swamped by a morass of red tape and regulation on both sides of the transaction—a morass unnavigable without the assistance of translators, lawyers, "facilitators," agencies, and a host of other intermediaries.[180] Similarly, uncertainty and risk surround all surrogacy arrangements. What if the surrogate miscarries? What if multiple children are conceived? And, most important, what if she threatens to retain the child after birth? Surrogate agencies and brokers reduce this uncertainty through contract drafting, and through careful psychological and other screening of surrogates and intended parents.[181]

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178. *See* Galbraith et al., *supra* note 168, at 14–15 (discussing problems of adverse selection generally and with respect to potential surrogates specifically). The most common example of a market subject to adverse selection problems is the insurance market, in which unhealthy people may be particularly attracted to health insurance coverage. *Id.*

179. *See id.* at 17–18 (discussing problems of adverse selection with respect to potential commissioning couples); Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337, 337–39 (2003) (documenting the widely articulated view that the requirement of maternal infertility in many state surrogacy statutes is justified by the fact that surrogacy should not be available to women who want to avoid pregnancy, but ultimately suggesting a different justification related to the likelihood of parental investment in non-genetic offspring).

180. SPAR, *supra* note 3, at 181–83. The legal regime governing these transactions is both extraordinarily complex and burdensome, while at the same time remaining vague. *Id.* Under the terms of the Hague Convention (which entered into force in the United States on April 1, 2008), both the sending and the receiving country must establish a central authority governing adoptions, implement procedures for the protection of adoptive children, track and review prospective parents, and ensure that the relevant parties are not engaged in baby selling. *Id.* In the United States prospective parents must undergo a home study just as in a domestic adoption, an FBI check, receive immigration clearances, and comply with any regulations imposed by the child's home country. *Id.* These home country regulations generally include, at a minimum, the provision of police reports and medical records that have been notarized and translated. *Id.*

181. *See infra* notes 215–20 and accompanying text (discussing the role of intermediaries

In sum, Baby Market Intermediaries perform an important role in reducing transaction costs in the baby market and likely would continue to do so even in a fully functioning, legalized baby market. These value adding functions, in part, explain the large intermediary fees in the baby market. The high information asymmetries between consumers and producers in the baby market, the fact that neither are likely to be repeat players, and the emotionally-charged nature of the transaction all conspire to ensure that intermediaries will remain important baby market participants that increase the gains of trade to all parties and extract profits for themselves in the process.

As elaborated in the following subsection B, however, these value-adding functions only partially explain the central role of intermediaries in the baby market and the resulting large profit opportunities. Instead, an asymmetric institutional framework—that is, a set of laws, legal and extra-legal institutions, and informal norms governing conduct—stymies full market access by Baby Market Suppliers, without similar restrictions on the activities of Baby Market Intermediaries. Moreover, in contrast to the institutional framework governing most markets, the institutional framework governing the baby market uniformly operates to increase, rather than reduce, transaction costs, increasing the dependency of both Baby Market Suppliers and consumers, and enhancing the role of Baby Market Intermediaries. This dichotomy contributes to the lopsided division of profits between Baby Market intermediaries and Baby Market Suppliers that many observers have criticized.

B. The Institutional Framework

As noted, profit flows in the baby market are governed by one-sided legal restrictions that purport to limit compensation to Baby Market Suppliers while allowing Baby Market Intermediaries a free hand in setting prices charged to prospective parents. The most obvious incarnation of the legal restrictions on a free and competitive baby market is the legal rule prohibiting baby selling, typically defined as a prohibition against the relinquishment of parental rights in exchange for compensation. Yet, as demonstrated in Part II of this Article and elaborated here, numerous other forces impede market access by Baby Market Suppliers. For example, informal geographic-based and formal national price-fixing agreements in the egg market, legal uncertainty regarding the enforceability of surrogacy contracts and restraints on surrogate compensation,

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in the surrogacy market).

and adoption regulation and licensing all impede the ability of egg donors, surrogates, and birth parents to collect the full value for their services.

1. The Egg Industry

Formal and informal agreements to depress the price of eggs pervade the fertility industry. As I discuss at length elsewhere, these attempts by the fertility industry to control egg prices amount to the same type of horizontal price fixing agreement long deemed *per se* illegal by the Supreme Court.[182]

Yet these agreements to depress egg prices thus far have failed to elicit regulatory notice, public criticism, or legal consequence. Although several factors may contribute to this lapse, the persistent dialogue of altruism and donation that shrouds the egg business and distracts from the commercial nature of the industry is surely a contributing factor. Such rhetoric may operate to obscure the fertility industry's incentives to depress the price of eggs, a necessary input into many fertility treatments.[183]

Price-fixing attempts in the egg market take two basic forms: informal geographic-based and national.[184] In 1998, for example, Dr. Paul Bergh of the St. Barnabas Medical Center decided—in violation of an apparent "community understanding" among fertility clinics in the New York Metropolitan area to pay no more than $2,500 for donated eggs—to double the center's egg donor fees, from $2,500 to $5,000.[185] The move generated an enormous amount of media coverage and at least two essays in medical journals.[186] During the ensuing debate, many fertility professionals openly discussed the need to control egg prices, lamenting that any increase in egg prices would have to be passed on to consumers.[187]

Attempts at national price capping occur largely through professional standard-setting organizations. For example, the ASRM Ethics Committee has issued "compensation guidelines" of $5,000 per donation cycle, with an

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182. *See generally* Krawiec, *supra* note 9.

183. AM. SOC'Y OF REPROD. MED., *supra* note 22, at 12 (reporting that donor eggs are employed in roughly 10% of all ART cycles in the United States).

184. Several state legislatures have also forbidden payments to egg donors for eggs to be used in stem cell research. Krawiec, *supra* note 9. None of these restrictions apply to eggs used for fertility treatment. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* (discussing this episode); American RadioWorks, The Fertility Race, *The Decision to Donate*, Part 10 § 3, "Assessing the Risks" (Mar. 24, 1999), *available at* http://americanradioworks.publicradio.org/features/fertility_race/ part10/section3.shtml (same).

exception of up to $10,000 in special cases, such as an egg of very rare ancestry.[188] Enforcement occurs through SART (the Society for Assisted Reproductive Technology), the primary member organization for assisted reproductive technology professionals in the United States,[189] whose membership accounts for eighty-five percent of U.S. fertility clinics.[190] SART requires both its members and all egg donation agencies doing business with a SART-affiliated fertility clinic to comply with the ASRM compensation guidelines.[191] Surveys of SART member clinics and affiliated agencies suggest broad compliance.[192]

Moreover, individual fertility industry members engage in informal enforcement efforts. For example, Dr. Brian Berger, medical director of the Donor Egg and Gestational Carrier program at the Boston IVF fertility treatment center reports that Boston IVF keeps records of egg donor agencies that exceed the ASRM compensation guidelines and refuses to do business with them.[193]

Such openly anti-competitive behavior is largely impossible in other industries. Yet it has persisted in the egg industry for at least a decade, amidst the traditional romanticization of the baby market and the persistent dialogue of altruistic donation that pervades it.

An examination of recent egg industry controversy highlights the point. Although controversy over the egg market stems from several sources,[194] one of the most common—as in other sectors of the baby market—is an objection to

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188. ASRM Ethics Committee, *supra* note 88, at 219 ("[A]t this time sums of $5,000 or more require justification and sums above $10,000 go beyond what is appropriate.").

189. Society for Assisted Reproductive Technology, http://sart.org/index.html (last visited September 29, 2008) (on file with the Washington and Lee Law Review).

190. Jennifer Durgin, *More is not Merrier in Fertility Clinics*, DARTMOUTH MED., Summer 2007, at 3, 3, *available at* http://dartmed.dartmouth.edu/summer07/pdf/disc_fertility.pdf.

191. Krawiec, *supra* note 9.

192. *Id.*

193. *See* Carlene Hempel, *Golden Eggs*, BOSTON GLOBE MAG., June 25, 2006, at 18, *available at* www.boston.com/news/globe/magazine/articles/2006/06/25/golden_eggs.

194. For example, critics contend that the aggressive advertising and pricing for donors with particular traits (such as attractiveness or athleticism) implies that these traits are genetically determined, when, in fact, the full extent of the genetic determination of such traits is unknown. Moreover, some critics worry that parents with expectations that a child will grow up to possess certain characteristics may be disappointed if the child does not live up to those expectations. *See* Joseph Berger, *Our Towns; Yale Gene Pool Seen as Route to Better Baby*, N.Y. TIMES, Jan. 10, 1999, at 19 (quoting David Callahan of the Hastings Center, a bioethics research institute, as saying, "[t]he risk with these boutique babies is that parents will be unhappy with the actual child"); Goldberg, *supra* note 90, at A11 (observing that parents who have chosen donors with model-like features may be disappointed if their child is unattractive).

the commodification and commercialization of children, motherhood, or human organs.[195] As demonstrated in Part II above, however, objections to the egg market (or any other baby market sector) cannot persuasively rest on concerns over commodification and commercialization, as the market was commodified and commercialized long ago. In the absence of similar attempts to control the prices charged by providers of fertility goods and services to customers, anti-commodification objections boil down to assertions that the ultimate supplier of the good—the egg donor—should be the only party not fully profiting from the transaction.[196] Egg market critics generally do not dispute that the customer—the infertile couple—will pay large sums to the fertility clinic for the bundle of goods and services (including the egg) that will result in the creation of an embryo for implantation.[197] Arguments against commodification, then, are simply claims that the supplier/egg donor should be excluded from the full profits generated by ARTs that employ donated eggs, while fertility clinics enjoy the surplus created by the ability to procure their inputs at below-market prices.[198]

Moreover, despite the overwhelming evidence to the contrary, the egg market is characterized by an insistence that the primary motivation of egg

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195. *See supra* note 6 and accompanying text (discussing these objections). Currently, no federal law directly governs egg or sperm donation. The National Organ Transplantation Act (NOTA) "makes it unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." 42 U.S.C. § 274e (2000). The term "organ" in the statute, however, has not been extended to include sperm, ova, or embryos. *Id.* Louisiana specifically prohibits paid egg donation, whereas Virginia specifically permits it. THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 151 (2004).

Unlike sperm and blood for which compensation has long been accepted, eggs are a technically nonrenewable but realistically unlimited bodily tissue. *See* Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 B.Y.U. L. REV. 107, 127 (noting that the average woman has over 400,000 pre-oocytes at puberty, yet will menstruate only about 500 times in her life, meaning that under normal conditions no woman will ever use up all her eggs, even if many are donated to others). Payment for egg donation thus conceivably threatens to violate rules against payment for such organs. Egg donors, therefore, are claimed to be compensated for their time and inconvenience—not for their eggs. PRESIDENT'S COUNCIL, *supra*, at 151–52. As stated by the Ethics Committee Report of the American Society for Reproductive Medicine (ASRM) regarding financial incentives for egg donation, compensation arrangements should suggest that payment is for the donor's time and inconvenience alone, is not payment for the eggs themselves, and should not be so large as to be an "undue inducement" into the procedure. ASRM Ethics Committee, *supra* note 88, at 216.

196. *C.f.* Mahoney, *supra* note 8, at 187–88 (raising a similar objection to restrictions on payments for human tissue, including oocytes).

197. *Id.* at 187.

198. *Id.* at 189.

donors—even those being paid—is, and should be, altruism. For example, the statements and screening procedures of fertility clinics indicate that the primary motivation of egg donors should be a desire to help infertile couples and that donors whose primary motivation is financial will be disqualified.[199] Even those ads offering donor compensation well above the average nearly always include an appeal to altruistic impulses, frequently exhorting young women to "give the gift of life,"[200] or requesting the help of a "sunny Samaritan."[201] Given such norms regarding the appropriate motivations of those who offer their eggs for use by others, it is perhaps not surprising that many egg donors report in surveys that helping infertile couples achieve parenthood was one of the primary concerns motivating their decision.[202] Donors often are more forthcoming in informal interviews, however, explicitly discussing the motivating force of money in the decision to become an egg donor.[203]

The important role played by the insistence on altruistic motivations among egg donors is highlighted by the statements of Pamela Madsen, executive director of RESOLVE, an advocacy and support group for infertile couples.[204] As stated by Ms. Madsen, infertile couples "want to feel good about

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199. For example, the website of Elite Fertility Solutions states that:

> If financial gain is your main motivating factor, then you may not be eligible for the program. EFS does not compensate the donor for her eggs. However, we do compensate you for your time, commitment and effort. We are interested in candidates whose primarily motivation is to help a couple achieve their dream of having a child. Egg donor compensation is $5000.00.

Elite Fertility Solutions, http://www.elitefertility.com/egg-donor-faq.html (last visited Feb. 16, 2009) (on file with the Washington and Lee Law Review). The websites of other egg donation programs contain similar statements. *See, e.g.*, Conceive Abilities, http://www.conceiveabilities.com/donor_pg_4a.htm (last visited Feb. 4, 2009) ("[W]e strongly advise any potential egg donor not to apply if compensation is the only motivation.") (on file with the Washington and Lee Law Review); Fertility Alternatives, Inc., http://fertilityalternatives.com/eggdonors.html (last visited Feb. 4, 2009) ("Candidates understand there is compensation for their time and efforts as a donor, however it is not their primary motivation. It is very important that you choose to be a donor for altruistic reasons in addition to the financial compensation.") (on file with the Washington and Lee Law Review); *see also* Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 322–24 (2007) (presenting field research on the insistence by egg agency staff and customers that donors report primarily altruistic motivations).

200. Schwartz, *supra* note 92, at 1.

201. Berger, *supra* note 194, at 19.

202. *See* Krawiec, *supra* note 9 (reviewing studies of egg donor motives).

203. *See* Hempel, *supra* note 193, at 18 (quoting egg donors for whom money was a central factor in the decision to donate, including one donor who stated that, "I wouldn't do it to help out a woman I never met without being paid"); *see also* Almeling, *supra* note 199 (documenting the extent to which egg donors are coached by egg agency staff to list altruistic motives).

204. *See generally* RESOLVE: The National Infertility Association, http://www.

how they got their eggs," and want the ability to tell their child "a wonderful birth story" about "a lovely woman who knew I needed her eggs," rather than a story about purchasing eggs by bidding the highest amount.[205] There is a serious problem, however, with the insistence that less affluent women provide this "lovely story" at below-market prices.

As stated by one commentator, "the implication that young women *should* desire to undergo a series of highly uncomfortable procedures that pose both short term and long term risks to their physical well-being for which they will not collect the market clearing price threatens to reinforce stereotypes of females as generous rather than self-interested."[206] The true limits to women's altruistic nature are starkly revealed by the experience of countries, such as the United Kingdom, Japan, and Canada, that have banned paid egg donation. The egg supply in such countries is severely depressed, creating a lucrative export market and "reproductive tourism" trade in the United States.[207]

This insistence on the altruistic nature of egg donation is in sharp contrast to the presumed motivations of sperm donors, who are exhorted through on-campus marketing campaigns that query, "why not get paid for it?"[208] In fact, the presumption against altruistic sperm donation is so strong that men claiming such motives—as opposed to pure financial need—prompt skepticism and are suspected of hiding an egomaniacal desire to propagate the world with their sperm.[209]

Finally, caps on payments to egg donors are often justified by a worry that the lure of large financial compensation will cause potential donors to ignore even properly disclosed health risks. Although other commentators have

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resolve.org/ (last visited Sept. 30, 2008).

205. Gina Kolata, *Price of Donor Eggs Soars, Setting Off a Debate on Ethics*, N.Y. TIMES, Feb. 25, 1998, at A16.

206. Mahoney, *supra* note 8, at 188.

207. Overseas demand now accounts for 30% of all U.S. egg donations. *See* Hopkins, *supra* note 77, at A1 (discussing the impact in the United States of Canada's 2004 ban on paid egg donation); *see also* Kolata, *supra* note 205, at A16 (discussing couples in Japan who pay a premium to egg donors of Japanese descent in the United States because the ban on paid egg donation in that country has severely reduced the supply); *see also* American RadioWorks, *supra* note 33 (discussing the egg shortage created by the United Kingdom's ban on paid donations, and the resulting imports from the United States).

208. PLOTZ, *supra* note 52, at 155.

209. *See* Scoop A. Wasserstein, *Shopping For Sperm: Nobel Prizes Wanted*, HARVARD CRIMSON, July 22, 2005, http://www.thecrimson.com/article.aspx?ref=508301) (quoting David Plotz, author of *The Genius Factory*, as stating that the key attraction of sperm donation to most young men is "making money for something you do anyway," and that although some men claim altruistic motives, many of them are really egomaniacs) (on file with the Washington and Lee Law Review).

attacked the assertion that the promise of financial compensation negates the ability of young women to evaluate properly disclosed health risks,[210] it is unnecessary to revisit that debate here in order to conclude that attempts to cap egg donor payments are not motivated primarily by a concern for the health of egg donors. If that were the case, then the fertility industry would push for a ban on payments to egg donors, rather than a cap. A ban on payment, of course, would severely reduce the supply of donated eggs, a necessary component of many of the fertility treatments offered by fertility centers.

Moreover, the ability of any sum to induce or coerce behavior by any person is a direct function of that person's financial need. Accordingly, egg donor compensation caps, without reference to the potential donor's financial needs do nothing to address the financial coercion objection.

2. The Surrogacy Market

In the surrogacy market, the most obvious impediments to market access by Baby Market Suppliers are the uncertain legal enforceability of surrogacy contracts in many jurisdictions and the prohibition in some jurisdictions against paying surrogates amounts beyond necessary living and medical expenses.[211] Many commentators have noted the fact that surrogates earn a relatively small share of the total price paid by intended parents, often less than the agency fee and typically much less than the total price paid, which includes medical and legal expenses and the agency placement fee.[212]

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210. *See* Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 51–55 (2007) (critiquing coercion as an objection to payments to egg donors in connection with stem cell research).

211. *See* FLA. STAT. §§ 63.212–213, 742.15–.16 (2007) (limiting the permissible compensation in surrogacy contracts); NEV. REV. STAT. ANN. § 126.045 (2007) (allowing surrogacy contracts, but restricting payment to living and medical expenses related to the birth); N.H. REV. STAT. ANN. §§ 168-B:1 to :32 (2007) (regulating surrogacy contracts in great detail, and limiting permissible surrogacy fees and payments); UTAH CODE ANN. §§ 78-45g-801 to -809 (2007) (restricting surrogacy payments to reasonable amounts); VA. CODE ANN. §§ 20-156 to -165 (2007) (limiting compensation to reasonable medical expenses and ancillary costs); WASH. REV. CODE §§ 26.26.011 to .903 (2007) (permitting surrogacy contracts, but prohibiting contacts for compensation beyond medical costs, other expenses related to pregnancy, and legal fees); *see also supra* notes 106–08 and accompanying text (discussing the enforceability of surrogacy contracts under various state regimes).

212. *See, e.g.*, Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 635 (1991) ("The couple who contracts with a paid surrogate will spend at least $25,000: approximately $10,000 for the surrogate mother, $10,000 for the agency that arranges the procedure, as well as related miscellaneous costs."); Krim, *supra* note 106, at 224 (stating that surrogacy brokers often earn "as much, if not more, than surrogates"); Sanger, *supra* note 7, at 87 (noting that the fee to surrogacy brokers is often close to or equal to that paid to the

As noted in Subsection A above, large surrogacy broker fees are partially attributable to the important search, matching, quality guarantee, and other intermediary functions played by surrogacy brokers. As elaborated in Subsection C, however, legal rules limiting direct surrogate access to the marketplace increase the power imbalance between surrogate and intermediary, contributing to this skewed division of profits. Ironically, many of the remedies to this imbalance proposed by researchers include further limiting the surrogacy market.[213] Such changes, however, would only serve to reinforce the tenuous market position of surrogates and further enhance intermediary power and profits.

Legal uncertainty surrounding surrogacy contracts enhances the role of intermediaries in the market, increasing their share of the surplus from any gains of trade in the surrogacy market. Restrictions on payments to surrogates—to the extent that they are effective—obviously would have the same impact. Critics of the current power structure between intermediaries and surrogates thus should support full enforceability of surrogacy contracts and the removal of restrictions designed to limit surrogate compensation rather than agitating for further restrictions on the surrogacy market.[214]

A return to the *Baby M* case and its surrounding facts helps to illustrate these points. After *Baby M*,[215] some state legislatures and courts moved to limit commercial surrogacy, and surrogacy brokers followed suit, congregating in friendly jurisdictions, such as California, and even advertising on their web sites the congeniality of the jurisdiction to commercial surrogacy arrangements.[216] But even in surrogacy-friendly states like California, there is a risk of litigation over custody of the child after birth. As a result, screening out surrogates who may attempt to keep the child after delivery is an important intermediary function, and one that grows in importance as uncertainty over legal enforceability increases.

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surrogate and that "the fees paid to surrogates are fairly low").

213. *See, e.g.*, Brinig, *supra* note 105, at 2379, 2396–97 (noting that most family law professors "[v]iew the agencies who promote surrogacy with great suspicion" and arguing that surrogate brokers and lawyers often earn more than the surrogate and should not be allowed to extract that profit); Drabiak et al., *supra* note 107, at 301 (arguing that commercial surrogacy agencies exploit intended parents and surrogates).

214. *See* Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 23 (1989) ("Because surrogacy is so much less attractive to the father and wife when it is not enforceable, they will not be willing to pay nearly as much as they would if it were enforceable—so the surrogate is hurt.").

215. *In re* Matter of Baby M, 537 A.2d 1227 (N.J. 1988).

216. Sanger, *supra* note 7, at 80–81. *But see* Scott, *supra* note 107 (noting the modern trend toward promoting certainty of parentage in surrogacy transactions).

Importantly, this is a role that intermediaries appear to have performed quite well over the course of the history of commercial surrogacy markets. For example, "Baby M" notwithstanding, out of the hundreds of traditional surrogacy arrangements brokered in the United States since Noel Keane (the attorney who brokered the Stern-Whitehead deal) initiated what is considered to be the first over thirty years ago, only a handful have been litigated.[217] Indeed, despite what appeared to be a rather shoddy intermediation in the Stern-Whitehead contract, Keane's business—like that of many intermediaries—depended on a record of, and reputation for, dependability.[218] Prior to Whitehead, only three surrogate mothers hired by Keane had failed to turn over the child after birth.[219] Other surrogacy intermediaries appear to have enjoyed similar success rates.[220]

As in the case of the egg market, formal attempts to cap surrogate compensation and the persistent dialogue of altruistic donation in the surrogacy market may further complicate the ability of surrogates to fully reap the value of their services. Surrendering a child that one has carried to term and given birth to is a profound disjuncture from our traditional societal notions of motherhood.[221] Society insists that such a woman must be either crazy or venal.[222] Prohibitions against, and limitations on, commercial surrogacy arrangements reinforce these norms.

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217. *See id.* at 94 (classifying contested surrogacy arrangements as extremely rare).

218. *See id.* at 72 ("[T]he problem that gave rise to *Baby M*—the mother's refusal to comply—arose not because intermediaries were *involved* but because they performed the job badly.").

219. *Id.* at 89–90.

220. *See, e.g.*, Tim Appleton, *Emotional Aspects of Surrogacy: A Case for Effective Counseling and Support*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 203 (Rachel Cook et al. eds., 2005) (noting that problems with surrendering the child after birth are rare); Gena Dodd, *Surrogacy and the Law in Britain: Users' Perspectives*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 113–20 (Rachel Cook et al. eds., 2005) (arguing that, although surrender problems are extremely rare in commercial surrogacy arrangements, the media, critics, and policymakers often focus on the small percentage of unsuccessful cases). Such problems may be even rarer in a world in which gestational surrogacy is the norm. Because the gestational surrogate is not genetically related to the child, she may be less likely to consider the child hers. *Cf.* Robert Edelman, *Psychological Assessment in Surrogate Motherhood Cases*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 144–45 (Rachel Cook et al. eds., 2005) (discussing psychological assessment in surrogacy arrangements and concluding that traditional surrogacy, while medically more simple, is emotionally more difficult, because of the surrogate's genetic link to the child).

221. *See* HELENE RAGONE, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 85–86 (1994) (noting that surrender of a child is considered counter to maternal instinct).

222. *See id.* at 85 (noting that a surrogate's decision to give up her child "may appear incomprehensible within the context of the values associated with motherhood in American culture").

As a result, the motivations of commercial surrogates are repackaged as altruistic and their compensation is defined as derived in large part from the enhanced utility that results from helping a childless couple. For example, surrogacy agency websites exhort women to "give the gift of surrogacy,"[223] and surrogates themselves reiterate this motivation. Despite the fact that nearly all surrogacy arrangements among strangers involve compensation, most surrogates report being motivated primarily by a desire to help infertile couples and only secondarily by monetary desires.[224] These asserted rationales are in contrast, however, to the financial need evidenced by most surrogates' demographic backgrounds, leading some researchers to conclude that "surrogates' responses regarding income received from any contract may represent a kind of social response bias, in which surrogates who have been interviewed feel socially pressured to provide a socially acceptable justification for their activity."[225]

This altruistic rhetoric is not harmless and, indeed, may reduce the economic bargaining power of surrogates. By classifying money motivations as improper or, at best, secondary, in the surrogate context, surrogates may have a reduced ability to negotiate the financial terms of their arrangement, as open displays of monetary concerns are deemed socially unacceptable.[226]

3. The Adoption Market

In the adoption market, the primary legal restriction on the baby trade is the ban against baby selling. Although both international law and the laws of all fifty states prohibit "baby selling"—the relinquishment of parental rights in exchange for payment—few states specifically cap or otherwise restrict permissible payments for medical, living, and other expenses of birth parents,

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223. *See, e.g.*, The Gift of Surrogacy, www.thegiftofsurrogacy.com; International Assisted Reproduction Center, www.fertilityhelp.com/CM/Surrogates/Why-Use-Agency.asp (last visited Feb. 4, 2009) ("Women thinking about making this gift to infertile parents should consider the benefits of a surrogate agency.") (on file with the Washington and Lee Law Review); Parenting Partners, www.parentingpartners.net/testimonials.htm (last visited Feb. 4, 2009) (presenting a testimonial that notes "[t]here is no gift greater than the gift of life") (on file with the Washington and Lee Law Review).

224. *See* RAGONE, *supra* note 221, at 60 (reporting the results of surrogate interview-based research); Drabiak et al., *supra* note 107, at 304–06 (reviewing some surrogacy studies).

225. Drabiak et al., *supra* note 107, at 305. Studies reveal, for example, that many surrogate mothers receive financial assistance and are in the lower-middle socio-economic class. *Id.* at 304.

226. *Id.* at 304–05.

allowing some latitude to those eager to evade such restrictions.[227] Therefore, birth parents are paid cash for the relinquishment of their child and, in some cases, the amount paid might approximate the parents' opportunity costs, equaling what would be earned in a free market. At the same time, because such payments must be justified as reasonable living or other expenses, the restriction could very well deter very large payments and act as a de facto price-fixing agreement that prevents particularly desirable birth parents from collecting the full value for their services.

Compensation to Baby Market Intermediaries, in contrast, is not similarly restricted and, as in the case of the surrogacy market, the relatively small share of the profits garnered by birth parents has prompted calls for controls on intermediary activity in the adoption market. This is particularly true in the international adoption market, where the disparity between total fees paid by adoptive parents and the amounts rendered to birth parents may be vast.[228]

Similarly, as discussed in Part II.E above, the majority of international adoptions in the United States are carried out through licensed agencies, which, in most states, have few limits on the fees and expenses charged to prospective parents. Although nearly all states ban finders' fees to intermediaries, most permit reasonable payments to intermediaries for services rendered in connection with the child's placement.[229] Although the level of control and

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227. Landes & Posner, *supra* note 6, at 328; Posner, *supra* note 6, at 60–61.

228. *See, e.g.*, Ertman, *supra* note 7, at 9 n.23 (finding that first-world agencies make "donations" of thousands of dollars to third-world orphanages, but not to birth parents); *id.* at 12 (criticizing the current system, under which the birth mother, despite "doing the most work in the transaction," receives less compensation than the intermediary). The number of complaints regarding unethical intermediary behavior in the international adoption market has also been on the rise. *See, e.g.*, David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 2 (2007) (arguing that unethical adoption practices are a serious and recurrent problem). Incidences of child-trafficking, kidnapping, fraud, and coercion of birth parents have been documented, fueling calls for increased regulation and international cooperation. D. Marianne Blair, *Safeguarding The Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 352 (2005) (arguing that while the increase in intercountry adoptions may allow more children to find good homes, it also increases the risks of unethical practices, magnifying the need for increased international and domestic regulation). Needless to say, nothing in this Article regarding the many useful functions of Baby Market Intermediaries is intended to defend such behavior. Moreover, it should be noted that the central thesis of this Article—a call to remove legal barriers to market access by Baby Market Suppliers—would reduce the power of Baby Market Intermediaries, potentially checking such conduct.

229. *See* Evan B. Donaldson Adoption Institute, *supra* note 146 (noting that reasonable fees are allowed for court-approved services). The domestic charges typically include an application fee, a home study fee, and a program fee. SPAR, *supra* note 3, at 182. Overseas charges include a required "donation" to the child's orphanage, and fees to the agency's facilitator, drivers, and interpreters, and these charges vary by agency and home country. *Id.*

oversight over intermediary fees can vary significantly across jurisdictions, few states impose specific limits on these fees, providing latitude to those eager to evade the ban on finders' fees.[230]

Baby Market Intermediaries in the adoption sector, such as state-licensed adoption agencies, long have sought to protect their market positions through active agitation for prohibitions against baby selling, with exceptions for their own activities.[231] Those efforts have met with mixed success in restricting the business of private agencies and brokers that enjoy the political support of lawmakers, whose constituents value the larger supply and shorter waiting times associated with private adoption.[232] These anti-competitive efforts, however, have been quite successful in deterring independent market entry by birth parents, nearly all of whom are funneled into the baby trade through a Baby Market Intermediary, rather than as direct suppliers.

To illustrate, given the ban on baby selling and the need to package all payments as a reimbursement of living expenses, birth parents could not legally auction off their infant over the internet to the highest bidder. This limitation may very well be irrelevant to many birth parents, who in any event would be unlikely to receive amounts significantly greater than living expenses, particularly in the absence of the quality guarantee and other services provided by an intermediary. One can imagine, however, that birth parents with particularly desirable characteristics would prefer such an auction system to the current system under which all payments must credibly masquerade as a reimbursement. I am not suggesting, of course, that as a public policy matter we would *desire*, or should *allow*, such a system for allocating parental rights. As discussed in Part IV of this Article, any removal of the restrictions on payments to Baby Market Suppliers requires careful oversight to protect the welfare of the children in question. Nonetheless, this stylized hypothetical serves to illustrate the impact of baby selling bans, even allowing for the possibility that such bans leave flexibility for some circumvention. The bans ensure that birth parents receive no more in a system of decentralized exchange than if they were to operate through an intermediary, thus removing the burden on Baby Market Intermediaries to compete with decentralized exchange.

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230. Landes & Posner, *supra* note 6, at 328; Posner, *supra* note 6, at 60–61.

231. *See* SPAR, *supra* note 3, at 166–71 (discussing the evolution of the adoption industry and its efforts to curtail baby-selling); ZELIZER, *supra* note 2, at 169–207; Landes & Posner, *supra* note 6, at 346–47 (explaining that the "supply of babies to agencies and agency revenues from adoption would be greater if the private market were regulated out of existence" and noting vigorous efforts by state-licensed adoption agencies to restrict independent adoption).

232. ZELIZER, *supra* note 2, at 200.

C. Controlling Market Entry and Price-Fixing

As discussed in this Part, the baby selling restrictions, adoption regulation, and legal uncertainty regarding the enforceability and payment terms of surrogacy contracts elaborated in the preceding subsection B restrict direct market access by Baby Market Suppliers.[233] Such rules thus deter independent market entry, preserving the division of profits among established baby providers and enhancing the role of Baby Market Intermediaries (particularly incumbent intermediaries, who have already established market position and reputational capital).

In an open market, intermediaries must compete with decentralized exchange in which buyers and sellers forgo intermediary services and seek each other out, directly negotiating price.[234] Sometimes, the two forms of exchange actively operate side by side (consider the used car market, for example) and other times they do not.[235] As discussed in Part III.B.3 above, baby market restrictions in the adoption market limit direct market access by Baby Market Suppliers, reducing Baby Market Intermediaries' competition from decentralized exchange.

Similarly, as demonstrated in Part III.B.2 above, legal uncertainty regarding the enforceability of surrogacy contracts in many jurisdictions channels some parents into less risky sectors of the baby market, causes those that remain in the surrogacy sector to charge a risk premium for the surrogate's risk of non-performance, and enhances the role of intermediaries whose reputations and profits depend on the repeated delivery of surrogates who will perform under the terms of the contract. The effect of each of these outcomes is to stymie the direct provision of gestational surrogacy services and deter independent market entry, decreasing the need for Baby Market Intermediaries to compete with decentralized exchange.

The institutional framework discussed in the preceding Part B that restricts compensation to Baby Market Suppliers while permitting Baby Market Intermediaries free reign in setting charges to prospective parents thus makes independent entry into the baby market less attractive for many Baby Market Suppliers. Less obviously, the insistence that Baby Market Suppliers are, and

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233. In the egg market, the primary restriction on Baby Market Supplier access—price fixing agreements—operates primarily as an input price cap and not as a barrier to entry. Instead, the bundling of goods and services that fertility centers provide is likely to channel most prospective parents—and, therefore, most egg donors—through fertility centers and the egg donor agencies with whom they do business, rather than through decentralized exchange.

234. Spulber, *supra* note 155, at 146.

235. *Id.*

should be, motivated primarily by altruism rather than by profit may facilitate explicit and implicit price-fixing by Baby Market Intermediaries seeking to cap the price of their inputs. This produces two related results: (1) inefficiently low supply and high consumer prices, and (2) distributional concerns stemming from the distorted division of profits between Baby Market Intermediary and Baby Market Supplier.

When babies, eggs, or the use of a womb are characterized as donative or altruistic transfers from a Baby Market Supplier, rather than as inputs into the final product (a child) offered for sale by Baby Market Intermediaries, it is easy to overlook the fact that such intermediaries have an economic interest in artificially depressing the price of that input. Of course, capping input prices reduces the available supply for both Baby Market Intermediaries and consumers.[236] As in the traditional oligopsony model, however, Baby Market Intermediaries accept reduced access to inputs in exchange for a lower purchase price.[237] In other words, assuming that the marginal cost of any unit of a good is the price paid on all prior units, an oligopsonist will fail to purchase some units whose value to the oligopsonist exceeds their costs, in order to cap the purchase price of prior units.[238] As a consequence, oligopsony power (like oligopoly power) produces inefficient supply levels.[239] The end result, as seen in all sectors of the baby market, is product scarcity. More difficult to observe—but inherent in the oligopsony model—is the distorted division of profits between producer (Baby Market Supplier) and middleman (Baby Market Intermediary) produced by baby selling restrictions.

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236. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY AND THE LAW OF COMPETITION AND ITS PRACTICE 15 (2005). For a detailed discussion of monopsony markets, see generally ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY, ANTITRUST LAW, AND ECONOMICS (1993).

237. The phrase "monopsony," meaning a single buyer, was first coined by Joan Robinson. JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 215 (1933). Given that single-buyer models are unrealistic as applied to modern markets, economists instead employ models of oligopsony or "competitive monopsony," in which buyer market power persists despite competition among buyers. V. Bhaskar et al., *Oligopsony and Monopsonistic Competition in Labor Markets*, 16(2) J. ECON. PERSP. 155, 156 (2002). The phrase "oligopsony" refers to the market power of buyers and not their number, which need not be small. *Id.*

238. *See* William Boal & Michael Ransom, *Monopsony in American Labor Markets*, *in* EH.NET ENCYCLOPEDIA (Robert Whaples ed.), *available at* http://eh.net/encyclopedia/article/boal.monopsony (last visited Oct. 13, 2008) ("[T]he monopsonist avoids purchasing the last few units of a good whose value to the monopsonist is greater than their marginal cost, in order to hold down the price paid for prior units.") (on file with the Washington and Lee Law Review).

239. *See* HOVENKAMP, *supra* note 236, at 14 (stating that output will fall below the competitive level when the buyer is a monopsonist); Boal & Ransom, *supra* note 238 (explaining the concept of labor monopsony).

Lawmakers and judges frequently exhibit confusion regarding the economic effects of monopsony markets, as reflected in the occasional judgment that monopsony is not a concern of anti-trust law, which seeks a goal of low consumer prices.[240] Such an analysis, however, incorrectly assumes that the savings from low input prices in a monopsony market will be passed on to consumers. Instead, a monopsonist who sells into a competitive market will charge consumers the same price as a non-monopsonist, but will supply a lower amount of the good.[241] In contrast, a monopsonist buyer who also enjoys monopoly (or cartel) power over consumers will sell to consumers at a higher price than a non-monopsonist.[242] Monopsony markets, therefore, never benefit consumers, and create a deadweight efficiency loss, as do monopoly markets, because some market actors engage in a second-choice transaction that produces less social value than their first choice.[243]

This intuition has been employed in a growing body of work in labor economics, which posits that—in contrast to competitive employment models that assume a mass exodus of employees if the employer cuts wages—employers may enjoy significant market power over their workers in some cases.[244] That market power may derive from a variety of sources, including employer differentiation, moving costs, job search costs, an inability of rival

240. *See, e.g.*, Balmoral Cinema v. Allied Artists Pictures Corp., 885 F.2d 313, 317 (6th Cir. 1989) (finding that the agreement could result in lower prices, and therefore, "serve rather than undermine consumer value"); Kartell v. Blue Shield, 749 F.2d 922, 930–31 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985) (finding that the issue at hand involved low prices, not high prices, and therefore failed to implicate the Sherman Act).

241. *See* HOVENKAMP, *supra* note 236, at 14 (noting that a monopsonist matches market prices but reduces output).

242. *See id.* at 14–15 (explaining that a monopsonist can also be a monopolist when selling into a cartelized market). As noted in Part III.B, legal restrictions and uncertainties impose a variety of barriers to entering the baby market, creating market power among industry incumbents.

243. *See id.* at 19–20 (explaining the deadweight loss of monopsony). A difficulty with antitrust analyses of monopsony markets, however, is distinguishing low input purchase prices stemming from monopsony, versus those stemming from reduced transaction costs or the elimination of upstream market power. *Id.* at 16.

244. *See generally* DAVID E. CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995); ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOUR MARKETS (2003). For an introduction to the debate surrounding some of this research, compare David E. Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397 (2000), with David Neumark & William Wascher, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Comment*, 90 AM. ECON. REV. 1362 (2000).

employers to absorb additional employees quickly, and—most relevant for the baby market—employer collusion.[245]

Although empirical research documents numerous examples of collusion attempts (both successful and unsuccessful),[246] cartels are, in fact, difficult to organize and even more difficult to maintain. Incentive problems encourage cheating among cartel members and the possibility of super-normal profits encourages new market entrants, who compete with and destabilize the existing cartel.[247] Consequently, successful cartels must have a credible enforcement mechanism to punish defectors and a mechanism for preventing new market entrants, who would eat up any cartel profits.[248] Legal rules can—and in the case of baby markets do—decrease the private costs of cartel formation and enforcement and of policing market entry.[249]

As previously discussed, baby selling restrictions and professional standard-setting organizations perform this input capping function of the buyers' cartel in the egg donation, adoption, and surrogacy sectors of the baby market. Yet the anti-competitive nature of this institutional framework rarely elicits comment or controversy, perhaps because the persistent dialogue of altruism and donation distracts observers from the highly commercial nature of the baby industry.

Ironically, this institutional framework and the anticompetitive behavior that it enables are frequently defended as a means of preventing the commodification and commercialization of human beings, women's labor, or motherhood.[250] As demonstrated, however, the costs of these rules are borne

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245. V. Bhaskar et al., *supra* note 237, at 160.

246. *See, e.g.*, Margaret C. Levenstein & Valerie Y. Suslow, *Studies of Cartel Stability: A Comparison of Methodological Approaches*, *in* HOW CARTELS ENDURE AND HOW THEY FAIL 9–50 (Peter Z. Grossman ed., 2004) (citing examples of collusion attempts).

247. *See* WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 294 (6th ed. 1994) (proposing that the key to the preservation of a monopoly is preventing market entry); Peter Z. Grossman, *Introduction: What Do We Mean By Cartel Success?*, *in* HOW CARTELS ENDURE AND HOW THEY FAIL 1–4 (Peter Z. Grossman ed., 2004) (recognizing that for cartels to succeed, individual members must resist the temptation to "cheat" and maximize their own profits); Stigler, *supra* note 153, at 5 (demonstrating the need to prevent new entrants into the market).

248. *See* Grossman, *supra* note 247, at 2 (concluding that cartels must be able to prevent and punish defectors); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 46 (1964) (arguing that the enforcement of agreements is essential to the success of a conspiracy).

249. Stigler, *supra* note 248, at 46; Mark Tilton, *The Difference Government Policy Makes: The Case of Japan*, *in* HOW CARTELS ENDURE AND HOW THEY FAIL 174–95 (Peter Z. Grossman ed., 2004).

250. *See, e.g.*, ANDERSON, *supra* note 6, at 168–75 (arguing that the state would "best preserve women's autonomy" by outlawing surrogacy contracts); RADIN, *supra* note 6, at 136–39 (arguing against "baby-selling" and the commodification of humans and personal attributes);

primarily by Baby Market Suppliers, who are disproportionately female and frequently from the lower end of the economic spectrum. The benefits, meanwhile, are disproportionately enjoyed by Baby Market Intermediaries. Similar arguments have been made regarding the perverse effects of the ban against unconscionable contracts,[251] protective women's labor laws,[252] and laws and rhetoric opposing the "commodification" of women's, particularly poor women's, labor.[253]

IV. Conclusion

Commentators and policy makers have spent much time romanticizing or ignoring the baby market, and fretting over an impending commercialization or commodification that, in fact, took place long ago. As demonstrated in this Article, the supposed—and much discussed—ban against baby selling is merely a one way ratchet that does not (and is not designed to) prevent commercial transactions in children. Instead, limitations on the baby trade primarily insist that the ultimate supplier of the good—the egg donor, surrogate, or birth parent—should be excluded from fully enjoying the profits generated by reproductive labor and, instead, should derive a large portion of her compensation from the utility associated with altruistic donation. Baby Market Intermediaries, in contrast, are expected to be fully compensated for

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MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES 92–95 (2001) (opposing baby markets on a variety of grounds, including the danger that it would lead to certain physical attributes being worth more than others); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97 (1983) (arguing that "if we attend to values, there are things that cannot be bought and sold" including human beings and procreative rights).

251. *See generally* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975).

252. *See* JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 269–70 (2001) (characterizing protective women's labor laws as a "double-edged sword"); David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1962 (2003) (reviewing Novkov's research on women's protective labor laws and arguing that such laws harm women).

253. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 115–44 (2000) (concluding that women suffer because their housework is not turned into entitlements); Naomi R. Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER, RACE, & JUSTICE 1, 2 (2001) (arguing that the commodification of women's work within the home could provide economic advantages for poor women); Case, *supra* note 11, at 1143–44 (criticizing the expectation that women will not commodify much of what they have market power over, including their reproductive abilities); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 5 (1996) (arguing that by denying housework its status as "work," the legal system hurts women who perform it).

their services from the fees charged to intended parents, and are not subject to similar calls of gift giving and philanthropy.

As documented in this Article, and as one should expect in any market with high demand, there is substantial manipulation of the restrictions on baby selling, rendering it difficult to measure the full extent to which Baby Market Suppliers are precluded from collecting the market clearing price for their services. The observed circumvention of limits on compensation to Baby Market Suppliers, however, does not render such rules harmless. To the extent that they successfully limit Baby Market Supplier access, such rules lead to inefficiently low supply, high consumer prices, and distributional disparities stemming from the distorted division of profits between Baby Market Suppliers and Baby Market Intermediaries. Even when the rules are circumvented, however, they threaten to reinforce gendered notions of women as altruistic marketplace actors, uninterested in the full monetary gains of trade.

Moreover, such rules may more subtly reduce the economic bargaining power of Baby Market Suppliers. By classifying open materialism by Baby Market Suppliers as improper, this framework of laws, institutions, and informal norms may deter the ability of Baby Market Suppliers to fully negotiate the financial terms of their arrangements in the baby market, as open displays of monetary motivation are deemed socially unacceptable.

Accordingly, this Article calls for the removal of existing "bans" against baby selling and other laws that diminish the capacity of Baby Market Suppliers to fully access the marketplace. Contrary to the common assumption that baby selling bans perform an important normative function by delineating those items that society views as irreducible to monetary valuation,[254] this Article makes clear that society appears to have no problem attaching price tags to children. Moreover, even in the unlikely event that current restrictions on the baby trade provide some residual benefit in the form of symbolic law, this Article demonstrates that the costs of maintaining such symbolism are far too high.

Needless to say, a fully functioning baby market openly motivated by profit-making introduces the possibility of perverse incentives that the legal

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254. *See, e.g.*, WALZER, *supra* note 250, at 97–103 (observing that there are many things that cannot or should not be priced and society thus forbids commercial exchange in these areas); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 789 (1994) (arguing that economic valuation of certain things "is inconsistent with and may even undermine their appropriate kind (not level) of valuation"); Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets*, THE TANNER LECTURES ON HUMAN VALUES, delivered at Brasenose College, Oxford (May 11 & 12, 1998), *available at* http://www.tannerlectures.utah.edu/lectures/documents/sandel00.pdf (criticizing increasing levels of commodification and arguing that there are moral limits to markets).

regime would need to guard against. Although a challenge, these issues are not insurmountable and, indeed, have been recognized by every scholar to propose a freer baby exchange. Interestingly, many of these perverse incentives and their corresponding dangers are already present in the currently existing commercial baby trade. Yet the failure to recognize the market as such impedes the regulatory ability to address such problems today.

Although Baby Market Suppliers, intended parents, and the public all have a stake in and are affected by the baby market, the best interests of children placed through the baby market are paramount. However, granting fair marketplace access to Baby Market Suppliers is not inherently inconsistent with the best interests of children.

Finally, critics may contend that the proper response to the issues identified in this Article would be a real baby selling ban in which all commercial sectors of the baby market are shut down. But baby market critics should not delude themselves about either the probability or the costs of a real baby selling ban. First, a true baby market ban would entail high costs. As demonstrated by the experience of those countries that have eliminated commercial exchange in some sectors of the baby trade, were the United States successfully to prohibit commercial transactions in children, supply in the baby market would be even further reduced.

Second, banning the baby market is politically infeasible in the United States. Consumer demand is simply too strong and too deeply felt, and unlikely to be sated through substitutes. In addition, baby market consumers and intermediaries are too economically and politically powerful and have too much at stake in the baby market to permit its abandonment.

Perhaps, in the absence of a sufficient number of healthy, white infants, prospective parents would be forced into the only sector of the baby trade that, sadly, does not suffer from a shortage of supply—the state-run foster care system, through which a disproportionate number of older, minority, and special needs children are available. Such substitutions arguably have positive effects, such as providing homes to children who otherwise would remain in state care, or altering American norms about what constitutes a desirable child. However, cross-racial adoptions are controversial for a variety of reasons, and many child advocates worry about promoting through scarcity the adoption of special needs children by parents who are ill-equipped to handle the challenges.

This Article instead encourages recognition of the baby trade for what it is—a market, with similarities to and differences from, other markets. As with other markets, the legal regime may seek to improve competitive conditions, and should be suspicious of attempts to use the state's power to extract private benefits under the guise of public-interest regulation. Trafficking in human

lives, however, poses public policy issues not implicated by the markets in other items. Pretending that legal baby markets do not exist accomplishes none of these objectives.