

# Markets, Morals, and Limits in the Exchange of Human Eggs

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I. INTRODUCTION . . . . .	349
II. PEACEFUL COEXISTENCE OR SEPARATE SPHERES? . . . . .	351
III. CULTURAL UNDERSTANDINGS OF GAMETE MARKETS . . . . .	353
A. <i>The Egg Market: Giving the Gift of Life</i> . . . . .	354
B. <i>The Sperm Market: Just Another Day at the Office</i> . . . . .	356
IV. SOCIAL POLICY AND THE EGG MARKET . . . . .	357
A. <i>Kamakahi v. American Society for Reproductive Medicine</i> . . . . .	358
1. Background . . . . .	358
2. The Legal Challenge . . . . .	359
B. <i>Perez v. Commissioner</i> . . . . .	360
1. No Income: Just Pain and Suffering . . . . .	361
2. Cultural Understandings and Legal Realities . . . . .	362
V. CONCLUSION: MAKING MARKETS IN HUMAN EGGS . . . . .	364

## I. INTRODUCTION

Markets have limits. It is exceedingly rare today to find a market without them. Moreover, this fact—standing alone—is uncontroversial. Even the most ardent free market advocates concede that limitations on some markets may be either inevitable, due to the nature of the item or activity in question,<sup>1</sup> or desirable, due, for example, to a need to control externalities or correct market failures.<sup>2</sup>

Whether moral considerations demand limits on the marketplace, however, is a different question and is highly contested territory. Scholars from law, philosophy, economics, sociology, and political science, among others, have all waded

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1. Some markets are inherently limited because the item or relationship in question cannot be the subject of a bargained-for exchange without changing its essential character. My offer of a thousand dollars to be my friend does not render you one, though it may buy me the accouterments of friendship. Though frequently invoked as evidence of the limitations on or corrupting force of markets, this is actually just a statement about the nature of friendship. My threats of violence will gain me no greater success in the endeavor than my offers of money.

2. See, e.g., Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUMBIA L. REV. 970, 990 (1985).

into the debate without generating agreement. As Jason Brennan and Peter Jaworski noted in their presentation for this symposium, there appears to be a limitless market for books about the ethical limits of markets.<sup>3</sup>

In this essay, I examine a component of that debate that is also addressed by other symposium contributors—the extent to which market norms are destined to crowd out nonmarket ideals and conceptions of the person.<sup>4</sup> One popular view adheres to “separate spheres” for market and nonmarket activity. Under this theory, not only is there a sharp divide between the market and nonmarket realms, but the market is particularly corrupting of nonmarket ideals and values. According to this school of thought, the mere language of the marketplace can damage our conceptions of personhood, even when no literal marketplace exists.

Others, in contrast, point to the regular coexistence of both market and nonmarket domains, arguing that the marketplace need not crowd out nonmarket ideals. In this essay, I expand on the second of these theories, using the example of human egg (or oocyte) donation in the United States as an illustration.<sup>5</sup> Although “separate spheres” adherents are quick to argue that market discourse can undermine nonmarket conceptions of personhood even when no literal market exists, few pause to consider the alternative—can gift discourse preserve nonmarket conceptions of personhood even in the presence of a market? In the egg market, not only do market and nonmarket cultural understandings coexist, but powerful cultural understandings of egg donation as an altruistic gift are essential to the literal market trading of oocytes.

I also explore the effect of these cultural understandings on the social policies—the policy decisions, legal rules, and market structure—governing egg donation, through two recent cases of first impression involving the human oocyte market. The first case, challenging the legality of an “ethical” cap on egg donor compensation of the type long considered *per se* illegal in other industries, is still in litigation. The second case, involving a failure by the IRS to collect taxes owed on egg donor compensation, in contrast to its treatment of similar income generating activities, was decided against the taxpayer this year.

I argue that the cultural account of egg donation as gift-based exchange is in increasing tension with a legal regime (properly) attuned to the realities of egg donation as a robust industry. Societal unease with the literal egg market is mediated through the cultural understanding of egg donation as at least partly a nonmarket gift exchange. This, of course, is far from the market reality of egg donation, which is a lucrative business for fertility centers and egg agencies, a substantial source of income for many young women, and one of the most

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3. Jason Brennan & Peter M. Jaworski, Comments at the Georgetown Institute for the Study of Markets and Ethics Symposium: The Ethical Limits of Markets (Nov. 21, 2014).

4. See, e.g., Kendy M. Hess, *Metaphors Matter: Ethics and the Meme of the Market*, 13 GEO. J.L. & PUB. POL'Y 321, 331-35 (2015).

5. I follow the common terminology for the provision of eggs (and, later, sperm) as “donation” by “donors,” despite the fact that both egg and sperm providers in the United States are financially compensated.

important purchases that consumers (intended parents) will ever make. Society has a certain set of concerns regarding all markets, which are expressed through the legal regime. That regime aims, among other things, to control collusive economic activity and rationally tax income generating activities.

The fact that egg market practices so inconsistent with these traditional concerns of market regulation persisted unchallenged for so long is itself striking evidence of the cultural view of egg donation as somehow different from other markets. Only time will tell whether that cultural view will survive social policies that, as highlighted by the two cases discussed in this essay, are increasingly attuned to egg donation's status as a market activity.

## II. PEACEFUL COEXISTENCE OR SEPARATE SPHERES?

In the traditional view of the proper role of markets, most human interactions are reducible to the marketplace, with a few special exceptions, such as close familial interactions, bodily integrity, and the relation of a person to her government, to name just a few.<sup>6</sup> This division of the world into a pure market domain and a pure nonmarket domain has held considerable sway with students of markets over the years and continues to do so today. Sometimes referred to as "separate spheres" theory after one of its leading proponents, Michael Walzer, this view contends not only that the market and nonmarket realms should remain separate, but that society must constantly guard against the market overstepping its bounds, lest it corrupt other areas of life.<sup>7</sup>

Margaret Jane Radin, labeling this line of thinking "domino theory," summed it up as follows:

The domino theory holds that there is a slippery slope leading from toleration of any sales of something to an exclusive market regime for that thing; and there is a further slippery slope from a market regime for some things to a market regime encompassing everything people value. The domino theory implicitly makes two claims: first, as a background normative premise, that it is important for a nonmarket regime to exist; and second, as an empirical premise, that a nonmarket regime cannot coexist with a market regime. The market drives out the nonmarket version; hence the market regime must be banned.<sup>8</sup>

This "separate spheres" view of the market as a corrupting force is both influential and persistent, as evidenced by Michael Sandel's recent best-selling book on the topic<sup>9</sup> and the contribution to this symposium by Kendy Hess.<sup>10</sup>

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6. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 30–45 (1996) (discussing the concept of "the market domain" in traditional, liberal thought and providing examples).

7. MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

8. RADIN, *supra* note 6, at 99–100.

9. MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012).

10. Kendy M. Hess, *Metaphors Matter: Ethics and the Meme of the Market*, 13 *GEO. J.L. & PUB. POL'Y* 321 (2015).

To many separate spheres market skeptics, the mere language, symbolism, and value system of the marketplace is corrupting of nonmarket conceptions of personhood, even if no literal marketplace exists.<sup>11</sup> According to this view, conceiving of human organs, babies, or sexual relations in market terms—conceiving of them as “sales” or “purchases” for a “price,” for example—as is common among some law and economics scholars, degrades our conception of organs, babies, and sex, even in the absence of literal buying and selling.<sup>12</sup> Various referred to as “market rhetoric,” “market discourse,” and “market memes,” the relevant point is that this concept describes a cultural understanding of the nature of certain relationships, items, and activities and their role in the marketplace that is, in fact, independent of any literal marketplace or buying or selling activity.

In her now famous analysis of “contested commodities,” Margaret Jane Radin criticized separate spheres thinking, arguing that it conceded too much power to the “universal commodification” worldview held by scholars such as Gary Becker and Richard Posner.<sup>13</sup> Though she attacked universal commodification as detrimental to human flourishing, she also challenged the separate spheres worldview, championing instead a middle ground in which market understandings of items, activities, and relationships could coexist with nonmarket understandings.<sup>14</sup> In other words, a thing can be both priceless and bought and sold for a price, at the same time. It could be, in other words, “incompletely commodified.”

Consistent with market critics who view the mere language and symbolism of the marketplace as corrupting, Radin attached great importance to the cultural understandings of items and activities as independent from whether market trading actually occurred. The cultural understanding of an activity might be incompletely commodified, for example, when some people accept a commodified, or market, understanding while others reject it. Though some economists may conceive of babies as commodities traded in metaphorical markets, for example, most people do not.

Alternatively, the same person may hold both market and nonmarket conceptions of the same item or activity. I may, for example, adhere to a commodified understanding of housework in some settings (my housekeeper) but not in others (the division of labor among spouses). Finally, I may hold multiple simultaneous conceptions of an item or activity, such as performing lifesaving surgery both because it earns money and because it helps others.<sup>15</sup> As will be

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11. RADIN, *supra* note 6, at 86–88; Hess, *supra* note 10, at 331.

12. See generally, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY (1991); Elisabeth M. Landes & Richard A. Posner, *The Economics of The Baby Shortage*, 7 J. LEGAL STUDIES 323 (1978).

13. RADIN, *supra* note 6, at 2–6, 103. Universal commodification treats all items and activities, including familial relations, bodily integrity, and the rights and responsibilities of citizens in a democratic state, as commodities to be bought and sold. *Id.* at 2.

14. RADIN, *supra* note 6, at 102.

15. CÉCILE FABRE, WHOSE BODY IS IT ANYWAY? (2006).

shown in Part III, human egg donation in the United States is a prime example of this type of incompletely commodified cultural understanding in which both market and nonmarket memes are simultaneously at work.

In addition to these cultural understandings of markets and their limits, there are, of course, literal markets, and these too may be completely commodified (*laissez faire* trading), incompletely commodified (some restrictions on trading), or not commodified at all (a ban on trading). Just as Radin rejected the separate spheres vision of market memes and values as destined to crowd out nonmarket cultural understandings, she similarly embraced a middle ground of literal markets. According to Radin, social policy—the policy decisions, legal rules, and actual market structure generated by our cultural understandings of markets and their proper limits—could create literal markets that were nonetheless designed to protect nonmarket values important to human flourishing and our conception of personhood.<sup>16</sup>

This assertion has been controversial. Critics, for example, have argued that Radin provides no principled method by which to distinguish acceptable social policies that promote personhood from unacceptable ones.<sup>17</sup> Still others contend that the market limits she defends as promoting personhood could just as easily pass muster under standard economic analysis or utilitarian theories.<sup>18</sup>

Part IV of this essay explores two cases of first impression in the United States to illustrate the social policy governing human egg donation. As will be shown, although market participants may successfully navigate the cultural understanding of egg donation as both a priceless gift and a market exchange for value, social policy—in this case, designed to prevent market collusion and facilitate the rational taxation of income generating activities—often finds that accommodation more difficult.

### III. CULTURAL UNDERSTANDINGS OF GAMETE MARKETS

Although market critics are quick to argue that market discourse can undermine nonmarket conceptions of personhood even when no literal market exists, few pause to consider the alternative—can gift discourse preserve nonmarket conceptions of personhood in the presence of literal market trading? At the very least, I will argue, gift discourse provides sufficient cultural acceptance of a contested commodity—in this case human eggs—to facilitate operation of the literal marketplace.

This section compares cultural understandings of the egg and sperm markets, each of which enjoys a robust commercial market in the United States. As will be shown, cultural understandings of these two literal markets are very different. Contrary to popular belief, the U.S. has never been comfortable with a

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16. RADIN, *supra* note 6, at 102–114.

17. See generally, e.g., Kenneth J. Arrow, *Invaluable Goods*, 35 J. ECON. LIT. 757 (1997).

18. *Id.*; see also Timothy J. Brenna, *Rights, Market Failure, and Rent Control: A Comment on Radin*, 17 PHIL. & PUB. AFF. 66 (1988).

complete commodification of egg donation, which sits uncomfortably in a middle ground between gift and market exchange. Egg donation's incompletely commodified status stands in stark contrast to cultural understandings of the sperm market as fully commodified (one might argue, hyper-commodified). Both examples, however, illustrate the ways in which cultural understandings about the proper limits of markets shape the conceptions, language, and interactions of market participants.

A. *The Egg Market: Giving the Gift of Life*

The United States is unusual among most jurisdictions in that it permits a legal market in human eggs. This is a source of dismay for many market critics, who contend that human eggs are traded in the United States just like any other commodity.<sup>19</sup> This is far from true, however. Instead, the United States exhibits simultaneous and often conflicting conceptions of egg donation as both a commodity subject to market forces and a selfless act of charity that is not—and should not be—fully reducible to the marketplace. In other words, egg donation is incompletely commodified, as Radin and other scholars have defined that term. This incomplete commodification is both a matter of cultural understanding and, as detailed in Part IV, a matter of social policy.

On the one hand, egg markets in the United States are big business. In 2012, the most recent year for which comprehensive data are available, donor eggs or embryos were used in 19,847 artificial reproductive technology (ART) cycles, most of them involving women over forty.<sup>20</sup> This represents a nearly forty percent increase over 2003.<sup>21</sup> Unlike many other countries, which have banned payments to egg donors, every US state but Louisiana permits payment in exchange for human egg donation.<sup>22</sup> As will be discussed in part IV, these payments are a source (sometimes, a significant source) of supplemental income for thousands of young women.

At the same time, however, the United States exhibits a distinct unease with a complete commodification of egg donation, embracing instead an apparent middle ground possessing elements of both gift and market exchange. Egg donor advertising and recruiting materials reflect this compromise, exhorting donors to “give the gift of life,” while offering handsome payment for their

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19. Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOCIETY REV. 257 (2002); Shan Li, *Asian Women Command Premium Prices For Egg Donation*, LOS ANGELES TIMES (May 4, 2012), <http://articles.latimes.com/2012/may/04/business/la-fi-egg-donation-20120504>.

20. CENTERS FOR DISEASE CONTROL, ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 44 (2012).

21. *Id.* at 51.

22. Many state laws, as well as the ethical rules of the American Society for Reproductive Medicine, prohibit payment for the eggs themselves but allow compensation based on time, inconvenience, and discomfort.

services.<sup>23</sup> Egg donors themselves appear to embrace this middle territory, citing both altruistic and profit motives for their decision to become egg donors.<sup>24</sup> As compared to sperm donors, for example, egg donors are less likely to conceive of egg donation as “employment” or a “job” and are more likely to emphasize the ability to help the infertile achieve parenthood, while still acknowledging the motivating force of money.<sup>25</sup>

Fertility-center and donor agency staff reinforce these notions through screening practices and interactions with both donors and recipients. Potential egg donors who claim monetary compensation as their overriding motivation, for example, are often eliminated as undesirable. Some staff even express disgust and revulsion toward egg donors just in it “for the money” or who “attempt to make a career” out of egg donation. Staff interactions with egg donors emphasize the satisfaction achievable by helping others realize their dreams of parenthood, while egg recipients are encouraged to send thank you notes, or even gifts.<sup>26</sup>

Not surprisingly, perhaps, these sentiments map onto perceived customer preferences. There is a widespread belief that fertility customers do not want egg donors who reveal overtly monetary motivations for the desire to donate. Accordingly, donor agency staff spend time coaching egg donors, but not sperm donors, on how to appropriately package their personalities and their reasons for wanting to become a donor. That package includes a desire to help those who

23. A recent Craigslist ad demonstrated the point well: “Earn Thousands! Egg Donors needed immediately! (Atlanta Perimeter area). The gift you make through egg donation is priceless—and your time is worth up to \$8,000!” Craigslist, post id: 4695968191 (last visited, Oct. 30, 2014). For a more detailed discussion of egg donor advertising and recruiting see, Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing In the Gamete Market*, 72 *LAW & CONTEMPORARY PROBLEMS* 59 (2009).

24. Some donors report primarily altruistic motives, some report primarily profit motives, and others report a mixture of both. Satvinder Purewal & O.B.A. van den Akker, *Systematic review of oocyte donation: investigating attitudes, motivations and experiences*, 15 *HUMAN REPRODUCTION UPDATE* 499 (2009). Many of these studies, however, rely on donor’s self-reported motivations during the psychological screening of prospective egg donors, and thus may overstate donor’s altruistic motivations. *Id.*

25. RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 125–140, (2011).

26. *Id.* at 74–83. The websites of many fertility clinics are instructive. Says one, for example:

There are many reasons why a woman may choose to donate her eggs. Altruism is usually a motivating factor, as these women sincerely want to help other women conceive a child. . . . Apart from altruism, financial gain is sometimes a motive as donors are compensated for their efforts.

*Donor Egg IVF Program*, WASHINGTON CENTER FOR REPRODUCTIVE MEDICINE, <http://www.seattleivf.com/egg-donors.html> (last visited May 5, 2015).

Another website states:

Are EFS egg donors motivated strictly by money? Absolutely not! In fact, we’ve found that candidates who are only motivated for financial reasons tend not to be as fully committed to the program, and ultimately are not acceptable donors. Though financial compensation is certainly important to most donors and their families, EFS donors truly enjoy helping others. This is an integral part of their altruistic nature and is a strong contributing factor in their decision to participate in our donor program. These young women see their involvement as a unique opportunity to give a remarkable gift to a couple seeking to experience the joy of becoming a family.

*FAQs*, ELITE FERTILITY SOLUTIONS, <http://www.elitefertility.com/faqs/> (last visited May 5, 2015).

are infertile and downplays (but doesn't eliminate) profit motivations.<sup>27</sup>

### B. *The Sperm Market: Just Another Day at the Office*

In contrast to the egg market, the sperm market has generated comparatively little controversy in the United States. This is not to suggest that Americans evince no unease with the sperm market—to the contrary, they do.<sup>28</sup> But, unlike the egg market, that unease does not stem from the fact of literal market trading. In contrast to egg donation, cultural understandings of sperm donation *emphasize* the market aspects of sperm donation while downplaying any similarities to gift giving or charity. While the gift meme is not entirely absent—sperm donation is still referred to as a donation, after all—its limited influence stands in stark contrast to the prior description of the egg market.

Unlike the egg market, where societal discomfort revolves expressly around commodification concerns, the historical discomfort with sperm markets arose from a different set of issues. Specifically, critics—most notably the church—opposed sperm donation on the grounds that it required masturbation and resulted in the birth of an illegitimate child.<sup>29</sup> Although such views are thankfully a relic of the (fairly recent) past, there remains a lingering uneasiness with sperm donation and a potential distrust of donor motivations.<sup>30</sup> That distrust seems to involve at least some fear that the same altruistic motives valued in egg donors may form a shield for sperm donors seeking to fulfill egoistic evolutionary desires to produce genetic offspring.<sup>31</sup> In contrast to the language

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27. ALMELING, *supra* note 25, at 74–83.

28. Historically, sperm donation was associated with deviant behavior, and there remains even today a lingering “yuk” factor. *See, e.g.*, Erica Haimes, *Issues of Gender in Gamete Donation*, 36 Soc. Sci. Med. 85, 87–90 (1993).

29. *See, e.g., id.* at 87 (reporting that the Archbishop of Canterbury’s Commission in 1948 urged the criminalization of sperm donation because the process requires masturbation and results in the birth of an illegitimate child); John McMillan, *The Return of the Inseminator: Euteleogenesis in Past and Contemporary Reproductive Ethics*, 38 STUD. HIST. PHILOS. BIOL. BIOMED. SCI. 393 (2007) (calling the 1948 report’s position that artificial insemination amounts to adultery as “verging on the bizarre” and discussing other religious objections to artificial insemination).

30. For example, members of the Warnock Committee (established by the British government to study and make recommendations on issues of human fertilization and embryology, and which led to the British Human Fertilization and Embryology Act of 1990) reported unspecified feelings by the committee of “yuk” and “instinctive dislike” of sperm donation, which they nonetheless recommended be approved. Haimes, *supra* note 2228, at 89–90.

31. *See, e.g.*, Haimes, *supra* note 28, at 87 (discussing the concern of the Archbishop of Canterbury’s Commission that sperm donors might invoke “altruistic idealism” to disguise what was actually “spiritual pride” in their greater virility and ability to propagate); Scoop A. Wasserstein, *Shopping For Sperm: Nobel Prizes Wanted*, HARV. CRIMSON, July 22, 2005 (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); *see also* Free Fertility Found. v. Comm’r of Internal Revenue, Docket No. 17122–07X (Filed July 7, 2010) (refusing to grant tax exempt status to a non-profit sperm bank which supplied sperm from one donor free of charge to women meeting certain criteria because “Simply put, petitioner’s activities may promote the propagation of Naylor’s seed and population growth, but they do not promote health for the benefit of the community.”).

of gift and the focus on altruism and charity that characterizes the egg market, the commodified and market-driven nature of sperm donation provides a plausible, self-interested motivation with which consumers, fertility professionals, and donors appear more at ease.

This cultural understanding of sperm donation as a market transaction is reflected in sperm donor advertisements that ask, “Why not get paid for it?” and advertise, “your sperm can earn!”<sup>32</sup> Sperm bank personnel seem to go out of their way to reinforce the notion of sperm donation as just another job. Clinic staff, for example, downplay (or avoid altogether) the fact that genetic offspring will emerge from this “job.” There are no thank you notes or gifts.<sup>33</sup>

This cultural understanding of sperm donation as a fully commodified market transaction resonates with the views expressed by sperm donors themselves. In interviews, sperm donors repeatedly refer to sperm donation as “just another job,” “the easiest job,” and “just something to make money.”<sup>34</sup> Fertility professionals express similar sentiments, contrasting sperm donors’ monetary motivations with the altruism so valued in egg donors.<sup>35</sup>

This interview (one of many) by sociologist Rene Almeling with a prominent fertility specialist and twenty-year medical director of a large fertility clinic sums up the different understandings of these two markets well:

*Physician:* I like to see some altruism of the [egg] donors. Yes, we pay them \$2,000, and that’s probably the low end of what donors are getting paid around the nation, but in [this small college town] it’s not an insignificant amount of money. When we ask them “Why do you want to be a donor?” most say, “Well I saw this [news] program on TV, or I’ve got a cousin that’s going through infertility, or I want to help people.” Most of them, it’s about some reason other than I saw an ad in the newspaper, and I want to make some money . . .

*Rene:* What is it about altruism that’s important?

*Physician:* It just tells me that they’re less likely to have regrets down the road, that they’ve really approached this as “I want to help somebody,” not “I’m doing this to make money.”

*Rene:* And then a similar question for sperm donors. What would make you think this is a great donor?

*Physician:* The sperm donors were different. . . . Sperm donors, in general, weren’t as altruistic. They honestly were guys that wanted to make money, and guys have less attachment to their sperm than women do of their eggs. Very few sperm donors actually ever have regrets about, you know, “What did I do?” So, men were a little different than the women.<sup>36</sup>

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32. Kimberly D. Krawiec, *A Woman’s Worth*, 88 N.C. L. REV. 1739, 1761 (2010).

33. ALMELING, *supra* note 25, at 131–33.

34. *Id.* at 81, 131–33.

35. *Id.*

36. ALMELING, *supra* note 25, at 81.

#### IV. SOCIAL POLICY AND THE EGG MARKET

As this account has emphasized, market and nonmarket cultural understandings not only coexist in the egg market, but powerful cultural understandings of gift exchange actually facilitate literal trading in human eggs by reframing otherwise uncomfortable activity as a more familiar and palatable transaction. Recall, however, that cultural understandings shape social policy—that is, the laws, rules, and organizational structure that govern the literal marketplace—and vice versa. Does social policy manage to finesse egg donation’s incompletely commodified status as neither fully gift nor market transaction but, instead, a little bit of both?

So far it has not. As demonstrated in Part III, societal unease with the literal egg market is mediated through cultural understandings of egg donation of at least partly a nonmarket gift exchange. This, of course, is far from the market reality of egg donation, which is a lucrative business for fertility centers and egg agencies, a substantial source of income for many young women, and one of the most important purchases that consumers (intended parents) will ever make. Society has a certain set of concerns regarding all markets, which are expressed through the legal regime. That regime aims, among other things, to control collusive economic activity and rationally tax income generating activities. As will be shown in this section, these policies are in direct tension with the cultural understanding of egg donation as a charitable gift.

##### A. *Kamakahi v. American Society for Reproductive Medicine*

###### 1. Background

The tension between the cultural understanding of egg donation as incompletely commodified and the reality of egg donation as a thriving market sector is typified by a recent class action brought by Lindsay Kamakahi and Justine Levy on behalf of themselves and other egg donors against the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART).<sup>37</sup> The suit challenges the ASRM-SART guidelines on the ethical compensation of egg donors, which limit payments to egg donors to \$5,000 (\$10,000 under special circumstances), as an illegal price-fixing agreement in violation of United States antitrust laws. These laws prohibit business practices that unreasonably restrict competition and result in higher consumer prices for products and services. In March 2013, the court denied the defendants’ motion to dismiss the case, thus paving the way for the litigation to proceed.<sup>38</sup> On February 3, 2015, the judge certified the class,

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37. *Lindsay Kamakahi v. American Soc’y for Reproductive Med.*, Consolidated Amended Class Action Compl., No. 3:11-CV-1781 U. S. Dist. Ct. (N.D. Cal. April 12, 2012).

38. *Lindsay Kamakahi v. American Society for Reproductive Medicine*, Order Denying Mot. To Dismiss, No. 3:11-CV-1781 U. S. Dist. Ct. (N.D. Cal. March 29, 2013).

removing the final hurdle to litigation.<sup>39</sup>

The challenged ASRM-SART guidelines first appeared in 2000, in the wake of increasing public attention and controversy regarding rising rates of egg-donor compensation.<sup>40</sup> As already noted, the cultural understanding of sperm donation is that of a market transaction much like any other. Social policy and market structure reflect that understanding—as with other jobs, sperm donors are paid whatever the market will bear. Their wages are not controlled through ethical guidelines or price caps of any sort.

ASRM employed these market-determined rates of sperm donor compensation to set the maximum prices to be paid to egg donors, despite the differences between the two procedures in terms of time, risk, and discomfort. Using the 2000 average hourly sperm donor rate of between \$60 and \$75 as a baseline, and multiplying that by the fifty-six hours that the average egg donor spends in a medical setting per donation cycle, ASRM concluded that, if egg donors were to be paid the same hourly rate as sperm donors, they should receive between \$3,360 and \$4,200 per egg-donation cycle. Recognizing that egg donation involves a greater time commitment, risk, and discomfort than sperm donation, however, ASRM concluded that egg donors deserve higher amounts. The report concluded that “although there is no consensus on the precise payment that oocyte donors should receive, at this time sums of \$5000 or more require justification and sums above \$10,000 go beyond what is appropriate.”<sup>41</sup> ASRM did not elaborate further on how it arrived at these amounts or why the chosen premium over sperm donor rates represented fair compensation for the increased risks and discomforts egg donors face. In 2007, ASRM issued new guidelines that restated these amounts and rationales and the amounts have not been increased since that time.<sup>42</sup>

SART represents over 90% of Assisted Reproductive Technology (ART) clinics in the United States and sets guidelines for best practices in the field of ART as a requirement of membership.<sup>43</sup> Among those requirements are the guidelines on the ethical compensation of egg donors promulgated by ASRM. Thus, more than 90% of ART clinics in the United States have entered into agreements to cap egg donor compensation at the ASRM-determined rates.

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39. Lindsay Kamakahi v. American Society for Reproductive Medicine, Order Regarding Motions To Exclude Expert Opinions And Motion For Class Certification, No. 3:11-CV-1781 U. S. Dist. Ct. (N.D. Cal. Feb. 3, 2015). The judge certified the class only on the issue of whether the price caps violate the Sherman Act, and not on the issue of damages. *Id.*

40. Informal efforts, centered in particular geographic areas, predate this.

41. Ethics Committee of the American Society for Reproductive Medicine, Financial Incentives in Recruitment of Oocyte Donors, 82 FERTILITY & STERILITY 240 (2004).

42. Ethics Committee of the American Society for Reproductive Medicine, ‘Financial Compensation of Oocyte Donors,’ 88 FERTILITY & STERILITY 305 (2007).

43. *What is SART*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, [http://sart.org/What\\_is\\_SART/](http://sart.org/What_is_SART/) (last visited May 5, 2015).

## 2. The Legal Challenge

The fact that this open and well-publicized price fixing persisted unchallenged for more than a decade is itself striking evidence of the extent to which egg donation is *not* viewed as the trade of a simple commodity. An agreement among competitors to control prices, such as the agreement among SART-member fertility clinics to follow the ASRM price caps, is referred to in antitrust law as a “naked price fixing agreement.” Such agreements are traditionally presumed illegal for a simple reason—it has long been accepted that such restraints on competition are injurious to the public, with few or no offsetting benefits.<sup>44</sup> The traditional rule is that such naked agreements are “per se” illegal—that is, they are conclusively presumed illegal without inquiry into whether competition is actually reduced or consumers are actually harmed. This is true whether the agreement is one to keep output prices high or, like the egg donor pricing guidelines, to keep input prices low. If egg donation was really viewed like trade in any other commodity, the compensation guidelines might well have been challenged long before now.

The reality, as *Kamakahi* demonstrates, is that even in the United States, where egg donation is commonly assumed to be subject to the same free market forces that apply to any other transaction, the cultural understanding of human egg donation is one of incomplete commodification—a transaction that is neither fully market nor fully gift, but somewhere in between the two.

I engage this litigation in more depth elsewhere, finding the ASRM-SART case lacking.<sup>45</sup> Here, however, I merely invoke *Kamakahi* for two purposes. First, as a further illustration of egg donation’s incompletely commodified status, and second, as an illustration of the tensions that can arise when we attempt to cleanly map such incompletely commodified cultural understandings onto the social policy and market structure of the literal marketplace.

### B. *Perez v. Commissioner*

Though egg donation may straddle the gift-market divide in the minds of market participants, the tax code allows for no such middle ground. Consequently, it is somewhat astonishing—though perhaps it should not be, given the prior discussion of the cultural account of egg donation—that until this year there was no definitive statement on the taxability of egg donor compensation, despite the nearly 6000 children born from donor eggs in the United States each

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44. Per se agreements are “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are ‘illegal per se.’” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978). Naked price-fixing is one of the few fact patterns easily characterized as a per se violation of the Sherman Act because “naked price fixing rarely or never has anything to be said in its support.” HERBERT HOVENKAMP, 3 *FEDERAL ANTITRUST POLICY* 256 (3d ed. 2005).

45. Kimberly D. Krawiec, *Egg-Donor Price Fixing and Kamakahi v. American Society for Reproductive Medicine*, 16 *VIRTUAL MENTOR: AMERICAN MEDICAL ASSOCIATION JOURNAL OF ETHICS* 57 (2014).

year.<sup>46</sup> Should egg donors be taxed on the proceeds received from egg donation? If not, then what do the payments represent? If donors are to be taxed, then what type of income is it: income from the sale of assets (the eggs) or income from the provision of a service? Yet, *Perez v. Commissioner*, decided in January of 2015, is the first case to address the taxability of the proceeds from egg donation.<sup>47</sup>

### 1. No Income: Just Pain and Suffering

On two separate occasions in 2009, Nichelle G. Perez agreed to provide oocytes to an anonymous couple through The Donor Source, a California-based egg donor agency.<sup>48</sup> Perez received \$10,000 on each occasion and was issued a 1099 in the amount of \$20,000. Perez did not include this \$20,000 on her federal income tax return in 2009, instead listing only the roughly \$43,000 she earned that year at her full-time job. Perez claims that, because the payments from the Donor Source represent compensation for “pain and suffering,” they are not includable in taxable income. The IRS disagreed, seeking back taxes and penalties.

According to the trial transcript, Perez has been an egg donor through The Donor Source a total of five times, once in 2007, twice in 2008, and twice in 2009. Interestingly, in 2008 Perez received a notice from the IRS that she would be taxed on her income earned as an egg donor but, following advice from other egg donors found on the Internet, contested the notice with the IRS, who then dropped the matter:

Q: What happened? What did you do?

A: I pretty much took the advice that I found online from other donors, what they had done, what they had said, *stating that the income was from pain and suffering, and sent the page of the contract that stated that.* And their case was dismissed and I received a similar letter, and that was the end of it for 2008. (emphasis added)

Far from being an isolated incident, Perez’s account matches that of other egg donors. For example, one eight-time egg donor gives advice at [weareeggdonors.com](http://weareeggdonors.com) about how to appeal taxes owed on egg donation income.<sup>49</sup> “Elizabeth” advises egg donors to:

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46. For the number of births from donated eggs see, *Clinic Summary Report for 2012*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, [https://www.sartcorsonline.com/rptCSR\\_PublicMultYear.aspx?ClinicPKID=0](https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0) (last visited May 5, 2015).

47. *Perez v. Comm’r of Internal Revenue*, No. 9103-12 (T.C. Jan. 22, 2015). Even now, questions remain regarding whether proceeds earned from egg donation are a sale of assets or income earned from the provision of a service. The Perez court declined to address the issue, as both parties stipulated that the proceeds were in exchange for the provision of a service. *Id.*

48. *Id.* All facts regarding the case and background events are taken from the trial transcript and related filings.

49. Raquel, *How a High-demand 8x Egg Donor Appealed her Taxes and Won—Part 2*, WE ARE EGG DONORS (Aug. 7, 2103), <http://weareeggdonors.com/2013/08/07/part-two/>.

Be proactive with the IRS! If you have 1099 income that you think should be excluded from tax take the steps to draft a comprehensive appeal for reconsideration. . . .

Make sure that your contract clearly outlines the facts that you are being compensated for physical injury, in consideration of future medical complications, and emotional suffering in addition to any economic losses endured.

Elizabeth even provides a sample letter to the IRS for use by other egg donors. After detailing the “pain and suffering” endured in order to provide eggs for the benefit of a commissioning couple, the letter concludes:

In the United States of America it is illegal to pay for or sell genetic material thus donors are not paid for eggs; we are compensated for various damages including but not limited to physical injury. This is quite different from being employed or contracted for work. Egg donation is not a job or the sale of goods. From the irs.gov site it is stated that: in 1996, IRC § 104 (a)(2) was amended to exclude gross income [sic] “the amount of any damages . . . received whether by suit or agreement and whether as lump sums or as periodic payments in account of physical injuries or physical sickness.” This indeed is a case of compensation on account of both of those variables.

Comments on the site from other egg donors suggest that others are following this technique. Pending cases make clear both that other egg donors followed this procedure with success and that the IRS is now initiating proceedings to collect back taxes and penalties from some egg donors.<sup>50</sup>

## 2. Cultural Understandings and Legal Realities

In a ruling that surprised few in the tax community, the court held that egg donor compensation is taxable income and rejected the “pain and suffering” claim, distinguishing the type of voluntary, contractual exchange entered into by egg donors from the involuntary tort damages to which § 104(a)(2) was intended to apply.<sup>51</sup> To rule otherwise would mean, for example, that professional athletes, such as boxers, are not taxable on their earnings, because they suffer injuries in the course of performing their contractual obligations.

Yet “pain and suffering” is precisely the grounds on which the IRS allowed Perez and other egg donors to avoid taxes for several years. One can only speculate about why the IRS so readily accepted such a weak argument. Perhaps the answer is merely ignorance about the mechanics of egg donation. Perhaps

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50. Personal communication with Kirby Mitchell (May 8, 2014).

51. Perez, *supra* note 47. For the views of various tax experts on the case see, Kim Krawiec, *Taxing Eggs: A Mini-Symposium*, THE FACULTY LOUNGE (Feb. 23 2014), <http://www.thefacultylounge.org/2014/02/taxing-eggs-a-mini-symposium.html>. For treatments of the taxation question that pre-date Perez, see Lisa Milot, *What are We-Laborers, Factories, or Spare Parts-The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053 (2010); Bridget J. Crawford, *Our Bodies, Our (Tax) Selves*, 31 VA. TAX REV. 695 (2011).

IRS agents have been conditioned by the language and sentiments surrounding egg “donation,” into concluding that egg donors derive no real benefit in exchange for their “gift.” Or, perhaps it was simply a matter of administrative convenience—the cost of collection efforts may have exceeded what the IRS assumed would be relatively small revenues from a few isolated, one-time transactions. As the *Perez* case and Elizabeth’s discussion above illustrate, however, donation is not an isolated one-time transaction for many egg donors and, instead, might well qualify as a trade or business (with resulting tax implications) for frequent donors such as Perez and Elizabeth.<sup>52</sup>

Particularly relevant, given the discussion in Part III of this essay of the cultural understanding of egg donation as not “work,” in contrast to sperm donation, are these closing lines from the decision:

We see no limit on the mischief that ruling in Perez’s favor might cause: A professional boxer could argue that some part of the payments he received for his latest fight is excludable because they are payments for his bruises, cuts, and nosebleeds. A hockey player could argue that a portion of his million-dollar salary is allocable to the chipped teeth he invariably suffers during his career. And the same would go for the brain injuries suffered by football players and the less-noticed bodily damage daily endured by working men and women on farms and ranches, in mines, or on fishing boats. We don’t doubt that some portion of the compensation paid all these people reflects the risk that they will feel pain and suffering, but it’s a risk of pain and suffering that they agree to before they begin their work. And that makes it taxable compensation and not excludable damages.

Egg donation might be a pseudo-charitable gift, lurking somewhere in the middle ground between gift and market in the eyes of market participants. But in the eyes of the court, it is just another (risky) job.

Will *Perez* alter the cultural account of egg donation as a priceless gift? My own intuition is that it will not. The tax classification of any activity may diverge substantially from our shared mental categorization of that transaction—it is possible to have a cultural understanding of egg donation as incompletely commodified while taxing the proceeds from donation like any other income. Moreover, at least some egg donors presumably already considered proceeds earned from egg donation taxable as income. Surely many egg donors, upon receiving 1099s, simply complied and included egg donation proceeds in their taxable income without appealing to the IRS.<sup>53</sup> Nonetheless, there is undoubtedly some tension between the cultural account of egg donation as

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52. Lisa Milot, *Taxing Eggs*: Lisa Milot, THE FACULTY LOUNGE (Feb. 26, 2014), <http://www.thefacultylounge.org/2014/02/taxing-eggs-lisa-milot.html>.

53. At least some agencies fail to issue 1099s, however, with no indication that the IRS has ever sought to enforce filings. ALMELING, *supra* note 25, at 77.

incompletely commodified and the tax account of egg donation as ordinary income.

#### V. CONCLUSION: MAKING MARKETS IN HUMAN EGGS

Students of markets from all disciplines are increasingly turning their attention to the cultural and psychological factors that affect market structure. In traditionally taboo markets, of which reproduction surely is one, those factors include cultural understandings of the moral limits of markets and our collective level of comfort with fully commodifying and subjecting traditionally sacred items and activities to the marketplace.

Facilitating a market in gametes is no easy task. Donors must relinquish something with not only a market value, but a personal value as well—their reproductive capacity. Successful donors will have genetic offspring (perhaps many of them) whom they will never meet and about whom they will know nothing. For their part, consumers of gametes—*parents*—are purchasing a priceless asset—the genetic makeup of their future child.

Reproductive markets, moreover, are further complicated by deeply ingrained and rarely consciously-acknowledged conceptions of appropriate gender roles in the marketplace and in parenthood. Egg donation generates additional queasiness because the process presents some health risks and involves a violation of bodily integrity sufficiently similar to the violations associated with taboo trades such as organ donation and paid medical research.

Cultural understandings of the marketplace and the motives and values of participants within it thus interact with other cultural norms and beliefs—gender stereotypes, conceptions of parenthood, and qualms regarding violations of the body—to shape, reframe, and normalize otherwise uncomfortable aspects of egg and sperm markets. In doing so, those understandings not only help market participants make cultural sense of the market (by likening it to already familiar transactions) but also facilitate and enable literal trading in gametes.

The cultural understanding of egg donation reconceptualizes socially uncomfortable behavior (the sale of motherhood, the violation of the body for pay) as a more palatable and familiar transaction—a loving gift that enables those yearning for a child to achieve their dreams. The fact that few women are willing to make the gift in the absence of substantial compensation is of little relevance—market participants understand egg donation as both a gift whose true value could never be fully compensated and an act deserving of remuneration.

While it is easy to dismiss these cultural understandings as romantic, silly, or delusional, this severely underestimates their importance, not just to society, but to the market itself. By reframing traditionally unacceptable behavior as a more palatable and familiar transaction, society is able to accept a market that is otherwise socially problematic or even repulsive.<sup>54</sup> Market architects ignore

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54. Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 J. ECON. PERSPECTIVES 37 (2007).

these cultural understandings—and, in particular, societal conceptions of the ethical limits of markets—at their peril. In a world unwilling to embrace the sale of female reproductive capacity for merely a price, the “priceless gift” of egg donation allows a market to flourish that otherwise might stagnate under the weight of social disapproval.

At the same time, this cultural account is undoubtedly in tension with legal norms (properly) attuned to the realities of egg donation as a robust industry. This essay has provided two such examples. The first, an “ethical” cap on egg donor compensation of the type long considered *per se* illegal in other industries, is still in litigation. The second, a failure by the IRS to collect taxes owed on egg donor compensation, in contrast to its treatment of similar income generating activities, was only decided this year. The fact that egg market practices so inconsistent with typical market regulation persisted unchallenged for so long is itself striking evidence of the perceived specialness of the egg market. Only time will tell whether the cultural account of egg donation survives what appears to be an increasing social policy emphasis on egg donation as a marketplace.

