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BOUTIQUE EGG DONATIONS: A NEW FORM OF RACISM AND PATRIARCHY

*Kari L. Karsjens**

INTRODUCTION

Megan is a 25-year-old female in generally good health.¹ She is a second year law student at Stanford. She is the first woman in her family who has not married and had children by age 25. She does not know if she wants children in the future, but she does know she has a long and successful legal career ahead of her. She has a clerkship position, but is desperate for money due to mounting student loans and accumulated credit card debts.

One day, she sees the following advertisement in the Stanford Daily, the official newspaper for Stanford University undergraduates and graduate students:

Wealthy and loving couple in the northeast seeks Ivy League student, aged 19-28, to donate her eggs. She should be majoring in economics, political science, or business/finance. If she is enrolled in graduate school (MBA) or law school, additional compensation will be offered. She should have scored at least 1400 on the SAT, and 158 or higher on the LSAT, or 88% or higher on the GMAT. Blonde or light brown hair, blue or light hazel eyes, and attractive physique required. Minimum compensation for the above mentioned woman is \$50,000. Please call 617-555-5550 and leave a detailed message.

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¹This is a fictional story.

Megan telephones the number and two days later is flying first class to Boston, staying at the Ritz-Carlton Hotel, and interviewing with a prominent and wealthy couple to be their selected egg donor. Three weeks later, Megan has received \$5,000 in cash along with her first round of hormone injections. One and a half months later, Megan walks out of the fertility clinic with \$45,000 cash in her pocket. Her child may be born in nine months, however, she has forever relinquished any right to know about the life she has just helped to create.

The story above sounds incredulous and the facts seem outlandish. Such stories resonate with themes from classic science-fiction movies or fiction novels.² Although the above story is fictional, the prospect of receiving large amounts of money for simply donating her eggs, enticed and nearly killed 22 year old Calla Papdemas, a struggling Stanford graduate student who agreed to donate her eggs for \$15,000.³ Calla was a healthy, unmarried, collegiate athlete with “the right combination of intelligence, good looks, and athletic prowess”⁴ and the woman who would receive the donor eggs was ecstatic about this donor.⁵ Unfortunately, two weeks after beginning her daily hormone injections, this young woman slipped in and out of a coma in the intensive care unit, having experienced a reaction to one of the hormones used in egg donation preparation.⁶ A benign tumor developed and grew at a furious rate near her pituitary gland, ultimately rupturing and causing a massive stroke in her brain.⁷ Calla’s academic and career plans were derailed, and she and her family incurred \$100,000 in uninsured medical bills.⁸

²See, Robin Cook, *SHOCK 17* (Putnam 2001). Two female friends and struggling graduate students at Harvard see an advertisement in the college newspaper seeking attractive, slim, athletic Ivy-league egg donors. *Id.* The women agree to donate their eggs for the astonishing price of \$45,000 each, with startling and shocking future implications. *Id.* The fictionalization and dramatization of the horrors of medicine gone unregulated is clear, but the underlying theory of recruiting Ivy-league, high-profile women as egg donors is nothing new.

³Joan O’C. Hamilton, *What Are the Costs*, Stanford Magazine, Nov./Dec., 2000, at <http://www.stanfordalumni.org/news/magazine/2000/novdec/articles/eggdonor.html> (last visited Oct. 29, 2001).

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸Joan O’C. Hamilton, *What Are the Costs*, Stanford Magazine, Nov./Dec., 2000, at <http://www.stanfordalumni.org/news/magazine/2000/novdec/articles/eggdonor.html>.

The reality is that many female college students are lured to donate their eggs.⁹ Despite the risks and sheer amount of money involved, there is a marked void in statutory and case law guidance for regulation of egg donation. Advertisements offering \$50,000 and simply asking for the “gift of life” carry hidden agendas and conceal the actual risks. As a matter of concern, high priced egg donation agreements bear the possibility of being “contracts void for public policy”.¹⁰ As one co-founder of an egg brokerage firm stated, “[The prospective parents] fall in love with the donor profile; it’s a little narcissistic in a positive way.”¹¹ It seems unclear how the narcissism of prospective parents is “positive” -- if anything, the emotional selfishness of the parents is disturbing because monetary and materialistic value has been placed on what is only a potential life.

In the ever changing world of reproductive medicine, technologic advances are preeminent. All obstetricians or gynecologists who have had to give the heart breaking news that a couple is unable to bear children can now bask in the glory of in vitro fertilization (IVF).¹²

⁹Sydney Leavens, *Students and Professors React to Egg Donation Ad*, YALE DAILY NEWS, Mar. 4, 1999, available at <http://www.yaledailynews.com/article.asp?AID=1043> (last visited Apr. 20, 2001).

¹⁰See generally, *In re Baby M*, 537 A.2d 1227 (N.J. 1988). This is the landmark New Jersey Supreme Court case holding that surrogate mother contracts are void for public policy reasons, despite the presence of otherwise valid contract principles. *Id.* at 1234. Specifically, the court held that “[the] contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child’s best interests shall determine custody...The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father’s right no greater than the mother’s.” *Id.* at 1246-47. Essentially, the court found that the contract at issue was more aligned with the behaviors that adoption statutes prohibit – the buying and selling of the right to a child. *Id.* at 1240-42.

¹¹Francesca Cimino, “I Donated My Eggs for Money,” in the Daily Trojan, U. of Southern California, available at <http://www.studentadvantage.lycos.com/lycos/article/0,1534,c5-i49-t0a17158,00.html> (last visited Nov. 15, 2001). The author seems to be implying that prospective parents are able to fulfill some selfish wishes and dreams by finding a donor profile that matches their ideal qualities, with the underlying belief that certain characteristics are genetically transmissible. *Id.*

¹²See generally *Kass v. Kass*, 91 N.Y.2d 554, 558 (1998). In vitro fertilization is a medical procedure where the egg and sperm are fertilized outside the body in a clinical laboratory setting and allowed to grow to a four or eight-cell developmental stage, and then the fertilized pre-embryo is implanted into the uterus of the female. *Id.* It is then hoped that the fertilized pre-embryo will continue to grow and develop as if fertilization had occurred naturally. *Id.*

Since medical technologies now permit procedures such as IVF, GIFT,¹³ and for the selectively brave – surrogacy – what legal and ethical implications arise when the quintessential elements of IVF (the egg and sperm) are bought and sold in a free market environment? Is the solicitation of blue ribbon women with certain physical and intellectual pedigrees a new form of racism? Is boutique egg donation a violation of some fundamental ethical principles? No dispositive answer exists to these questions, nevertheless, legal and regulatory guidance in this uncharted area may be warranted.¹⁴

The impetus for this article stems from the extreme complications and damaging risks of egg donation by young women, coupled with the complete lack of regulation in reproductive technologies. This article specifically seeks to explore the interrelated nature of egg donation within a feminist perspective. This topic is relatively new to the field of legal analysis, yet touches upon elementary legal concepts that beg to be explored further, such as the application and extension of contract law and property rights theories to contemporary medical developments.

The first part of this paper has provided a foundation and starting point for this article. The second part of this article provides a general overview of the genesis of the egg donation market. Since the advent of the first “test tube baby”,¹⁵ the boom in fertility clinics and assisted reproductive technology centers has been phenomenal. By detailing the history and current state of Assisted Reproductive Technology (ART), this section concludes that the timing is now ripe for major

¹³See generally Gamete Intrafallopian Transfer (GIFT) and Zygote Intrafallopian Transfer (ZIFT), WebHealthMD, at <http://webmd.lycos.com/content/article/1680.51223> (last visited Nov. 14, 2001). GIFT is the acronym for gamete intrafallopian transfer. *Id.* It is a medical procedure where a couple hours before egg retrieval the sperm is prepared and inserted into a catheter; the mature egg is placed in another catheter, and both catheters are inserted into the fallopian tube in the hope that fertilization will occur. *Id.*

¹⁴See *Davis v. Davis*, 842 S.W.2d 588 (1992); *Johnson v. Calvert*, 851 P.2d 776 (1993); and *Kass v. Kass*, 91 N.Y.2d 554 (1998); Amy Pignatella Cain, *Property Rights in Human Biological Materials: Studies in Species Reproduction and Biomedical Technology*, 17 ARIZ. J. INT'L & COMP. LAW 449 (2000). Although case law exists regarding IVF and ART, no case or statutory law exists on the actual egg harvesting or donation procedure.

¹⁵See GREGORY PENCE, CLASSIC CASES IN MEDICAL ETHICS 118 (McGraw Hill 2000) (2000) (discussing the history of Louise Brown, the first live birth baby who was a product of in vitro fertilization efforts in Great Britain).

policy decisions to be made regarding the status of commercialized egg donation.

The third part of this article recites the basic property right theories as vested in egg, sperm, and organ donations generally. This section outlines some of the categories traditionally given to human body parts, such as alienable parts (eggs and sperm), inalienable parts (organs, sexuality) and unclassified parts (surrogacy). It focuses upon the unique status given to egg and sperm donations, summarizes the various arguments for and against egg and sperm donation, and details how egg/sperm donations have been currently treated. It concludes with the notion that perhaps the same status should be afforded to both human organs and egg/sperm donations -- that is, neither should be allowed as salable goods in a free market system.

The fourth section of this article analyzes the bioethical and legal implications inherent with an egg donation private market. It criticizes the current "boutique egg donation" procedure on two substantive levels: feminism and critical race theory. By drawing upon historical examples of the evils associated with eugenics and race based traits, it is suggested that boutique egg donations are only a few steps away on the slippery slope from unethical or unjustified action. Therefore, this section seriously questions whether boutique egg donation, even as an alienable/free market product, is justified within the existing legal framework, given that racism, inequality, and exploitation coexist among hegemonic and dichotomous structures.

The last section of this article briefly discusses the need to formulate an official policy and solution in regard to boutique egg donation. It concludes that due to advances in medical technology, the uncertain state of the law in this area, and the potential for exploitation of young women, specific policy decisionmaking concerning boutique egg donation is necessary.

THE GENESIS OF THE EGG MARKET

The Egg Donation Procedure

The harvesting of donor eggs is a complicated and intricate process.¹⁶ The first step in the egg donation process is the recruitment of a donor,

¹⁶See generally Hamilton, *supra* note 3.

preferably under age 30.¹⁷ Recruitment practices range from private “egg brokers” to medical centers with affiliated fertility clinics to freestanding, independent fertility centers.¹⁸ Enticing monetary offers of “generous compensation for time and inconvenience” usually prompt the prospective donor to contact the fertility center.¹⁹

As part of the screening and recruitment process, the prospective donor is asked to complete a detailed profile and questionnaire, requesting information ranging from physical characteristics, personality traits, and estimated exposure to radiation, to photographs of the donor and her offspring, if any.²⁰ The process includes psychological screening, consultations, and evaluation, as well as completion of a detailed medical exam, history, physical, and possibly genetic testing.²¹ The egg donation agency will match the donor to a number coded recipient, and frequently, the potential parents request knowledge of the donor’s first name.²² In time, the donor is matched with the recipient and scheduled to begin the process of priming the ovaries, coordinating the donor’s and recipient’s cycles, and retrieving the eggs.²³

Some agencies include legal consultation for the recipient couple as part of the overall process to facilitate and review the contracts and financial commitments, however, the donor is only provided with a list of available attorneys and legal consultation is not a prerequisite.²⁴ The informed consent process is not standardized, and again varies depending on the type of fertility center and medical center/hospital affiliation.²⁵ Since most fertility clinics are privately run enterprises, the requisite informed consent documents vary from a general reference

¹⁷See generally Stephanie Daniel, Email posting for Rush University Online Bioethics Class, 2/10/2001. (detailing the typical egg donation procedure, as elicited from materials from an egg donation agency in California).

¹⁸*Id.*

¹⁹*Id.*

²⁰Hamilton, *supra* note 3; See e.g. Egg Donation, Inc., of Cal., *How it Works: Step-by-Step*, available at <http://www.eggdonor.com/edworks.html> (last visited Oct. 29, 2001).

²¹See e.g. Egg Donation, Inc., of Cal., *How it Works: Step-by-Step*, available at <http://www.eggdonor.com/edworks.html>.

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

to the “legal aspects of donating”²⁶ to generalized legal aspects of egg donation.²⁷ Note, however, neither of these selected FAQ’s or Contract Considerations specifically include a framework for how to define the key legal terms, such as informed consent, confidentiality, liability, or future child custody/support expectations.²⁸ One egg donation group provides a sample “Consent for Egg Donation”²⁹ and other egg donation centers include general legal information,³⁰ but it is unknown how a Court would treat this egg donation contract in terms of enforcement since to date no cases have been filed on this exact issue.

Presuming the hurdle of informed consent is overcome, and the donor chooses to move forward, the donor then picks up a dozen pinkie size vials full of powdered hormones and dilutents, along with the first cash payment.³¹ Thus begins ten days of daily injections of a high dose hormone, such as Lupron, which suppresses her own ovarian function and synchronizes her menstrual cycle with the recipient’s.³² These injections are crucial, and must be administered on a strict schedule and

²⁶See Frequently Asked Questions for Loving Donations, at <http://www.lovingdonation.com/donors/donors-faqs.html> (at 522 Hunt Club Blvd, Ste 325, Apopka, FL 32703)(last visited Oct. 29, 2001)(Stating, “In accordance with the contract you will be asked to sign, any and all children born as a result of the egg donation process will legally belong to the couple receiving the donated eggs. Egg donors legally have absolutely no responsibility to the future welfare or support of any children who may be born from their donation.”).

²⁷See Egg Donations, Inc., *Legal Aspects of Egg Donation*, at <http://www.eggdonor.com/edlegal.html> (at 8383 Wilshire Blvd, Ste 750, Beverly Hills, CA 90211)(last visited Oct. 29, 2001)(noting that key considerations your contract should cover include: 1) establish financial responsibility on part of recipient couple and declare recipient couple financially and legally responsible; 2) have legal and medical informed consent; 3) complete social disease testing; 4) consider what to do with excess embryos; 5) detail legal and psychological framework; 6) outline confidentiality concerns; and 7) stipulate for California law to govern).

²⁸*Id.*

²⁹See generally Mark A. Johnson, *TASC Legal Support Document, Consent for Egg Donation*, available at <http://www.surrogacy.com/legals> (last visited Oct. 29, 2001)(listing three sample contracts for review). Interestingly enough, the author is an attorney who apparently specializes in the representation of third party assisted reproductive technology and surrogacy arrangements in the state of Georgia, including drafting and analysis of egg donation, embryo donation, surrogacy, and cyropreservation contracts. *Id.*

³⁰See generally Egg Donation, Inc., *Legal Aspects of Egg Donation*, available at <http://www.eggdonor.com/edlegal.html> (last visited Oct. 29, 2001).

³¹See Jesse McKinley, *The Egg Woman*, N.Y. TIMES, May 17, 1998, at §14 (detailing the actual experience of Carrie Sprech, a graduate student at New York University’s film school and three-time egg donor).

³²*Id.*

regimen; dauntingly enough, an injection delayed by a few hours can ruin the entire process.³³ Later, the donor is given another hormone injection to stimulate the egg production and harvesting, which results in the production of ten or more eggs during one cycle.³⁴

The donor's eggs are extracted using a large needle inserted into the vagina while the patient is under anesthesia.³⁵ The eggs are then inseminated immediately with sperm from the recipient's husband (or possibly with donor sperm) and the resulting embryos are implanted into the recipient.³⁶ Recent statistics estimate that ART procedures result in a live birth rate of 39 percent.³⁷ However, the donor's set compensation is guaranteed as soon as egg retrieval is complete.³⁸ Some women on fertility drugs harvest an excess of 40 eggs per cycle – other women harvest 8-10.³⁹ No matter the number of eggs, however, the compensation remains the same...an envelope with numerous \$100 bills; cash payment for services, or rather – time and inconvenience rendered.

The Advent of Boutique Egg Donation

The very ethics and morality of assisted reproductive technology is at issue; for instance, the Roman Catholic Church has denounced and adamantly refused to condone the use of assisted reproductive technology.⁴⁰ Many private citizens are similarly shocked at the arbitrary monetary value given to a woman's eggs.⁴¹ After all, eggs (or ovum) are naturally occurring, biologically determined cells in a

³³McKinley, *supra* note 31.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷Hamilton, *supra* note 3.

³⁸*Id.*

³⁹*Id.*

⁴⁰GREGORY PENCE, CLASSIC CASES IN MEDICAL ETHICS 124 (McGraw Hill, 2000)(2000) (discussing the Catholic Church views on ART). Specifically, in 1978, the Vatican condemned in vitro fertilization. *Id.* One Catholic priest noted that he fears that humanity had slipped from "doctoring the patient to doctoring the races." *Id.* The Vatican Instructions of 1987 equated IVF with domination and manipulation of nature. *Id.*

⁴¹*Id.*

woman's body.⁴² Yet, some women who choose to donate their eggs are being paid amounts ranging from \$5,000 to \$50,000.⁴³

If the amount for a "typical" egg donor is not startling enough, then note the emerging trend in California and New York State where "egg brokerage firms" are in existence.⁴⁴ Now, affluent and well educated clients are demanding certain "desirable" donors and these clients are willing to utilize the services of high profile egg brokers.⁴⁵ The client "wish lists" specifically target healthy, young, Ivy League students with high SAT scores, demonstrated athletic abilities, and physical attractiveness.⁴⁶ The new price tag for these donors: \$25,000 or more for a one time egg donation.⁴⁷

Although the monetary benefit is clear, this article questions whether the risk is worth it in the long run. IVF clinics around the nation have built their claim to fame on dubious success rates:

With success rates now exceeding 70% per transfer, IVF has emerged as the most flexible and viable assisted reproductive technology available...[in addition] with success rates approaching 50% per egg donation cycle and the availability of non-anonymous donors, oocyte donation has become a frequently used method of assisted reproduction.⁴⁸

This article thus proposes the following analytical frameworks to address the conclusion that egg donation, especially high priced egg donations, are unacceptable for a variety of reasons.⁴⁹

⁴²PENCE, *supra* note 40 at 124.

⁴³Andrew W. Vorzimer, *The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract*, 21 Whittier L.Rev. 415, 418(1999).

⁴⁴Hamilton, *supra* note 3.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*See generally* Journal of Assisted Reproduction Law, *Third Party Reproduction: The Infertility Alternative*, at <http://www.surrogacy.com/legals/> (last visited Nov. 15, 2001).

⁴⁹Even the American Medical Association has published ethics commentary on the high prices of egg donation. *See* American Medical Association, *The Human Egg as "Gift of Life": Its Price is on the Rise*, (2000), available at <http://www.ama-assn.org> (last visited Nov. 20, 2001).

PROPERTY RIGHTS IN HUMAN ORGANS AND TISSUES

A brief review of contemporaneous case law helps illustrate the current status of eggs, embryos, and sperm.⁵⁰ Property rights are viewed as a bundle of rights, including the right to possess, the right to exclude, the right to use, the right to dispose, the right to enjoy the fruits or profits, and the right to destroy the property in question.⁵¹

Four main theories have been developed to assert private property rights: utilitarianism, natural rights, libertarianism, and personhood.⁵² Natural rights theorists presume that a property right in the human body exists and is created when an individual expends labor onto an object; therefore, due to physical ownership of one's body, one has ownership of their body's products.⁵³ Utilitarians simply define property as a matter of human institutions and laws; therefore, no property rights should exist in the body because there is no justifying theory.⁵⁴ Libertarians argue that property ownership is justified because it increases individual liberty by freeing individuals from natural and social constraints.⁵⁵ Finally, personhood theories allow property rights only to the extent that they contribute to a society in which personality is adequately expressed.⁵⁶

In sum, courts are very hesitant to afford anything other than traditional alienable property rights to human reproductive tissues, such as eggs and sperm.⁵⁷ However, courts have been adamant in holding that human organs and tissues, especially cadaveric organs, are inalienable – that is, human organs (live or cadaveric) cannot be bought, sold, or traded as traditional commodities.⁵⁸

⁵⁰See *Davis v. Davis*, 842 S.W.2d 588; *Johnson v. Calvert*, 851 P.2d 776; and *Kass v. Kass*, 91 N.Y.2d 554.

⁵¹See *Cain*, *supra* note 14.

⁵²*Michelle Bourianoff Bray, Personalizing Personality: Toward a Property Right in Human Bodies*, 68 TEX. L. REV. 209 (1990).

⁵³*Id.* at 212.

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Davis v. Davis*, 842 S.W.2d 588; *Johnson v. Calvert*, 851 P.2d 776; and *Kass v. Kass*, 91 N.Y.2d 554.

⁵⁸42 USCA §274e (West 1991).

Human Organs and Tissues

There is a long history of aversion to any mention of a human organ and tissue market.⁵⁹

The Sale of Organs is Clearly Illegal

One obstacle weighing against maximization of medical technology is the current public opinion regarding organ transplantation and organ procurement. An example of the lack of clarity and uniformity of organ transplant understanding is shown by urban legends detailing stories of basic organ theft and criminality.⁶⁰ The existence of communication media, such as the Internet, increases public fear and perceptions of the existence of a black market organ system.⁶¹ Fears about killing for organs are given impetus by proposals to allow criminals condemned to death to donate their organs as part of the execution process.⁶² In fact, Dr. Jack Kervorkian raised considerable

⁵⁹STUART J. YOUNGER, ET AL. ORGAN TRANSPLANTATION: MEANINGS AND REALITIES 40-41(Univ. of Wisc. 1996).

⁶⁰See Benjamin Radford, *Bitter Harvest: The Organ-Snatching Urban Legend*, 23 SKEPTICAL INQUIRER, May, 1999, at 34. This article reprints the following urban legend, a popular one circulated on email forward lists: a business traveler in New Orleans takes a break from a long day and has a drink in a hotel bar. *Id.* A prostitute approaches him, and they flirt. *Id.* They end up in his hotel room, where he soon blacks out. *Id.* He wakes up the next morning in the room's bathtub to find a note taped to the wall instructing him to call 911 from a nearby telephone. *Id.* He does, and the 911 operator instructs him to feel for a tube protruding from his lower back. Benjamin Radford, *Bitter Harvest: The Organ-Snatching Urban Legend*, 23 SKEPTICAL INQUIRER, May, 1999, at 34. He finds one, and begins to panic. *Id.* He is told to lie still, that one of his kidneys has been removed, and an ambulance is on the way. *Id.* He is later told of a vicious gang of kidney thieves who sold his kidney to the highest bidder in a clandestine organ market. *Id.* In some cases the tub is filled with ice; in others the man discovers the sewn-up incision on his own without a note or 911-telephone call. *Id.* The city may be Las Vegas or New York, but is almost always in the United States. Benjamin Radford, *Bitter Harvest: The Organ-Snatching Urban Legend*, 23 SKEPTICAL INQUIRER, May, 1999, at 34. The victim may be a business traveler, or an unsuspecting college student at a party. *Id.*

⁶¹However, as Radford's article notes, it is nearly impossible to conceal an entire organ-snatching ring. *Id.* While it is possible for such reports to be true, extraordinary claims "require extraordinary evidence; the burden of proof is on those claiming that such a trade is in fact occurring." *Id.* Kidney transplants and their procurement are not simple procedures that can be done in the kitchen. *Id.* Further, "it would be a practical impossibility in America or the West to assemble a large team of highly trained medical professionals willing to engage in such illegal and unethical behavior." Benjamin Radford, *Bitter Harvest: The Organ-Snatching Urban Legend*, 23 SKEPTICAL INQUIRER, May, 1999, at 34.

⁶²YOUNGER, *supra* note 59 (noting that there are recurring stories in the press about innocent persons killed for organs. In 1992, newspapers reported that hundreds of patients at a mental hospital near Buenos Aires were allegedly killed by greedy staff members who sold

controversy in the transplant community when he offered the kidney of an assisted quadriplegic patient who was condemned to die by means of assisted suicide, as well as his campaign to harvest needed organs from death row inmates.⁶³ While such urban legend tales are doubtful at best, there are more serious and pressing allegations regarding the existence of an illegal Chinese organ market which infiltrates into the U.S. through capitalistic ventures; casting additional doubt on the propriety of market economics in the medical technologies.⁶⁴

The sale of human body parts is a big business, and for the right price, the more sinister side of the international medical community will supply willing patients with the organs they need.⁶⁵ Rep. Burton (D-IN), chair of the International Relations Committee and Government Reform and Oversight Committee criticizes that the Chinese government is "executing prisoners and selling their organs to make money."⁶⁶ Dr. Awaya, a Japanese expert on law and sociology, recently testified that the Chinese organ trade [is] so blatant that brokers in Japan advertise on the Internet."⁶⁷

Amnesty International states that 90 percent of all transplants performed in China use organs taken from executed prisoners, generating nearly \$100 million in hard currency for the government.⁶⁸ Specifically, the percentage of transplant kidneys estimated to be derived from executed prisoners has been put as high as 90 percent.⁶⁹ Elsewhere in Asia, illegal human organ trafficking is highly

their body parts and blood. There are also rumors of children from various South American countries being kidnapped, taken to the US, and fattened up and killed for their organs.)

⁶³Michael Sintef, *Organ Donors from Death Row*, New Orleans-Times Picayne, Nov. 24, 1993, at B6, 1993 WL 7783451.

⁶⁴Prepared Statement of Amnesty International USA on the Harvesting of Organs from Executed Prisoners in the People's Republic of China Before the Committee on Foreign Relations of the United States Senate (May 4, 1995)(transcript available from: Amnesty International USA, 304 Pennsylvania Avenue SE, Washington, DC, 20003, 202/544-0200).

⁶⁵Lance Layther, *The Illegal Selling of Body Parts for Transplants is Big International Business*, THE IRISH TIMES, July 5, 1999, 1999 WL 20484752 (1999).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸Prepared Statement of Amnesty International USA on the Harvesting of Organs from Executed Prisoners in the People's Republic of China Before the Committee on Foreign Relations of the United States Senate, *supra* note 66.

⁶⁹*Id.* See also R.D. Guttman, *On the Use of Organs from Executed Prisoners*, 6 TRANSPLANTATION REVIEW 93 (1992).

profitable.⁷⁰ However, despite the information and knowledge of a black market organ business, efforts to address or eliminate this problem are futile and scarce.

Due to cries of human rights violations made by renowned Chinese political advocate, Harry Wu, the United States federal government recently investigated and indicted two Chinese-Americans for alleged human organ trafficking and conspiracy to sell organs.⁷¹ These two men were arrested for attempting to sell human organs to undercover FBI agents.⁷² The Department of Justice brought federal grand jury proceedings against two New York residents, alleging violations of 42 USCA § 274(e).⁷³

The Government attempted to prosecute pursuant to the Anatomical Gift Act prohibition on the sale of human organs.⁷⁴ Human organs are divided into dichotomous categories, regenerative and nonregenerative.⁷⁵ Surprisingly enough, the federal government does allow the sale of specifically designated regenerative human organs, such as blood, plasma, tissue, and reproductive cells such as ovum and sperm.⁷⁶ These regenerative organs may be bought and sold because these organs may be replenished naturally.⁷⁷ The statute further defines valuable consideration by noting the exclusionary provisions.⁷⁸ Accordingly, valuable consideration as applied in contract law, does *not* include reasonable payments associated with the transplantable

⁷⁰Prepared Statement of Amnesty International USA on the Harvesting of Organs from Executed Prisoners in the People's Republic of China Before the Committee on Foreign Relations of the United States Senate, *supra* note 65. In South Korea, for example, the Government announced on April 16, 1992 a comprehensive package of measures to curb what is described by Korean newspapers as a "booming" organ market, with rates of \$25,000 to \$38,000 for a kidney, of which 10 to 20 percent goes to the trafficker. *Id.*

⁷¹United States v. Wang, 98 Cr. 199, 1999 US Dist. LEXIS 2913 (S.D.N.Y. 1999).

⁷²*Id.*

⁷³42 USCA § 274e. "Prohibition of organ purchases: It shall be 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. Any person who violates ... this section shall be fined not more than \$50,000 or imprisoned not more than five years, or both." *Id.*

⁷⁴42 USCA § 274e.

⁷⁵See generally, Julie D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163 (2000).

⁷⁶*Id.*

⁷⁷*Id.* at 46.

⁷⁸See 42 USCA § 274e(c)(2) (West 1991).

organ, including lost wages incurred by the donor and the expenses of travel in connection with the donation of the organ.⁷⁹

It is arguable then that the same concerns about organ sales are valid concerns that must be factored into any discussion of boutique egg donation. Human organs, for whatever reason, are not meant to be bought and sold.⁸⁰ The existence of a black market of organs from foreign countries that exploits other citizens for the gain of the rich, exemplifies the reasoning for complete organ sale prohibitions.⁸¹ Given this existing framework for human organs – one must carefully consider how and why egg and sperm as designated regenerative organs are an exception to the rule, and whether regulation or prohibition is more appropriate.

Limited Property Rights in Cells and Tissues

Property rights may be attributed to live cells and tissues that can be removed and donated without significant harm to the donor.⁸² However, the notion of property rights in cells and tissues is viewed skeptically by the Courts.

In the landmark case, *Moore v. The Regents of the University of California*,⁸³ a former cancer patient sued for conversion when his physician removed his spleen and extracted blood samples, with the underlying intent of using the cells to create a marketable cell line for commercial laboratory use.⁸⁴ Conversion is a tort theory that protects the individual against interference with possessory and ownership interests in personal property.⁸⁵ To establish a conversion, plaintiff must first establish an actual interference with his ownership or right of

⁷⁹*Id.*

⁸⁰See generally Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1 (1994); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 U. MICH. J.L. REF. 1055 (1987) (providing an excellent overview of the body and its relationship to moral dignity, personhood, worth, and the significance of human organs as gifts); and S.H.D., *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015 (1985).

⁸¹Crespi; Cohen; Murray; S.H.D., *supra* note 80.

⁸²Laurel R. Siegel, *Comment: Re-Engineering the Laws of Organ Transplants*, 49 EMORY L.J. 917, 930 (2000).

⁸³*Moore v. The Regents of the Univ. of Cal.*, 793 P.2d 479 (1990).

⁸⁴*Id.* at 481-83.

⁸⁵*Id.* at 488.

possession, or at the very least, an expectation to retain possession of the property.⁸⁶

In this case, Moore was not able to prove that he expected to retain possession of his excised cells.⁸⁷ The Court based its decision on two findings. First, California statutes specifically require the destruction of human tissues/cells after removal for public health reasons.⁸⁸ Second, the Court found that lymphokines have the same molecular structure in every human being, the cell line that was manufactured is no more unique to Moore than “the number of vertebrae in the spine or the chemical formula of hemoglobin.”⁸⁹

The Court also considered various policy reasons to conclude that ownership claims in biological materials is problematic.⁹⁰ The Court summarily noted that “a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution.⁹¹ Third, the tort of conversion is not necessary to protect patients’ rights.”⁹² Essentially, the plaintiff could recover under a breach of fiduciary duty theory, or failure to obtain informed consent; but could not recover under a property theory.⁹³

Eggs and Sperm

Notwithstanding the analysis above, human egg and sperm cells have been designated an entirely unique status in terms of legal property rights. The current organ law does not apply to eggs.⁹⁴ The basic understanding is that individuals are free to donate their eggs or sperm

⁸⁶Moore v. The Regents of the Univ. of Cal., 793 P.2d 479 (1990).

⁸⁷*Id.*

⁸⁸*Id.* at 491.

⁸⁹*Id.* at 490.

⁹⁰*Id.* at 493.

⁹¹Moore v. The Regents of the Univ. of Cal., 793 P.2d 479 (1990).

⁹²*Id.*

⁹³Moore v. The Regents of the Univ. of Cal., 793 P.2d at 497.

⁹⁴See 42 USCA § 274e(a) “It shall be 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”. *Id.* Note that the organ law does not specifically include reproductive tissue in its prohibition of organ purchases, however, arguably, egg and sperm could be items meant to be included in phrase, “and any other human organ or any subpart thereof, specified by the Secretary of Health and Human Services by regulation”. 42 U.S.C.A. §274(c)(1).

at will because they are being compensated for their time and inconvenience.

The natural rights theory and libertarian theory probably best encompass assertions of property rights in human cells and tissues, including egg and sperm.⁹⁵ These theories, however, are highly abstract because the practical application of property rights to the disposition of egg and sperm in the assisted reproductive technology context is uncertain.⁹⁶ As will be discussed shortly, high priced egg donation is distinguishable and falls outside the parameters of existing case law involving the recognition of property rights in reproductive cells.

The Tennessee Supreme Court held that disputes involving the disposition of preembryos produced by in vitro fertilization should be resolved by looking to the preferences of the progenitors.⁹⁷ The Court then determined that if intent or preferences could not be determined, the position of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions, must be given consideration.⁹⁸ The New York Supreme Court further applied the Davis precedent, holding that the IVF informed consent document is binding and instrumental to determine the intent of the parties in the disposition of the frozen preembryos.⁹⁹

However, the reluctance of the court to rule directly on the "property" interests in eggs, sperm, and preembryos is offset by the decision of the California Supreme Court in *Johnson v. Calvert*.¹⁰⁰ The Court held that Ms. Johnson (the gestational surrogate mother) was not entitled to any custody rights of the child, born of the egg and sperm of

⁹⁵See *supra* Part III.A.2.

⁹⁶Bary Brown, *Reconciling Property Law with Advances in Reproductive Science: Courts have been reluctant to extend property rights analysis into the area of reproductive authority, leaving them unable to articulate a cogent basis for their decisions*, 6 STAN. L. & POL'Y REV. 73, 82 (1995).

⁹⁷*Davis v. Davis*, 842 S.W.2d at 597.

⁹⁸*Id.* at 603.

⁹⁹*Kass v. Kass*, 663 N.Y.2d at 581.

¹⁰⁰*Johnson v. Calvert*, 851 P.2d at 776 (addressing the difficult question of defining and identifying the natural parents when a zygote is formed of the biological mother and father, but implanted in a non-relative surrogate mother. The court held that, even though the surrogate gave birth to the child, it was still the progeny and belonged to the husband and wife are the natural parents).

Mr. and Mrs. Johnson.¹⁰¹ The Court noted that when genetic consanguinity and the woman giving birth are not merged in one woman, the natural mother is the one who intended to procreate the child.¹⁰² Implicitly, at the very least, the California Supreme Court ruled that the genetic parents had a higher “claim” to the eventual child that was produced – that Mr. and Mrs. Johnson had some sort of inherent “property right” or legal claim to that child. In fact, the Court basically enforced the parties’ intentions, based on the surrogacy contract, despite public policy prohibitions.¹⁰³

In general, courts are cognizant of public policy concerns and are hesitant to enforce an unambiguous agreement that would compel one donor to become a parent against his or her will.¹⁰⁴ Although courts recognize that some sort of unique “property” interests may exist in human reproductive cells, especially when those cells are fertilized to form a preembryo for implantation, this rationale is not enough to justify blue ribbon egg donation practices. All of the aforementioned cases involve *minimal* judicial recognition of “property interests” for parents who donated their own egg or sperm.¹⁰⁵ In the surrogacy cases discussed *infra*, the courts are very hesitant to disclaim the surrogate mother when she is the egg donor as well.¹⁰⁶ However, minimally recognized property interests that are attenuated in nature, coupled with a high risk of abuse, coercion, and unsubstantiated decisionmaking by the donors, cannot justify the inimical pricing schemes and exploitation that naturally occurs with such market commodification.

The practices of high profile egg donation, as focused on in this article, are distinguishable and should fall outside the scope of intended judicial recognition. The analogy between blood and sperm is distant; blood sustains life, but eggs (and sperm) create life, and this life generating quality means that the implications of donation may be more profound and far reaching than initially perceived.¹⁰⁷ Prohibiting

¹⁰¹ *Johnson*, 851 P.2d at 776

¹⁰² *Id.* at 782.

¹⁰³ *Id.* at 783.

¹⁰⁴ See *Litowitz v. Litowitz*, 10 P.3d 1086, 1088 (2000).

¹⁰⁵ See *Davis v. Davis*, 842 S.W.2d 588; *Johnson v. Calvert*, 851 P.2d 776; and *Kass v. Kass*, 91 N.Y.2d 554.

¹⁰⁶ *Id.*

¹⁰⁷ Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 291 (1995).

payment for gamete cells such as egg and sperm, constitutes an important symbolic statement on societal values, and affords recognition that life creating substances should be included among those things for which affixing a price tag is inappropriate.¹⁰⁸

Surrogacy

Technology allows for revolutionary and innovative means to form a biologically linked family, but does it necessarily mean that one should use assisted reproductive technology? The issue of surrogate mothers addresses this very bioethical and moral dilemma.

The issue of surrogate motherhood was first brought to the legal system with the seminal case of *Baby M*.¹⁰⁹ For a fee of \$10,000, a woman agreed to be artificially inseminated with the semen of another woman's husband, conceive a child, carry it to term, and then after birth surrender it to the natural father.¹¹⁰ The Supreme Court of New Jersey invalidated the surrogacy contract based on public policy grounds, specifically because the sole purpose of the contract was to achieve adoption, and its use of money for this purpose is illegal and criminal in violation of state adoption statutes.¹¹¹

Additional elements of the contract that rendered it unfair and violative of public policy included the following.¹¹² First, the fact that the natural father would pay nothing in the event the child died before the fourth month of pregnancy, and only \$1000 if the child were stillborn.¹¹³ Second, the contract contains no clause giving the surrogate mother the right to rescind – it is irrevocable consent to surrender the child and terminate parental rights without giving any consideration of strength of her bond with the child.¹¹⁴ Third, the contract was the sale of a child, exemplifying almost every evil that prompted the prohibition on the payment of money in connection with adoptions.¹¹⁵

¹⁰⁸Schiff *supra* note 107.

¹⁰⁹*In re Baby M*, 537 A.2d at 1227.

¹¹⁰*Id.* at 1236.

¹¹¹*Id.* at 1240.

¹¹²*Id.* at 1241.

¹¹³*Id.*

¹¹⁴*In re Baby M*, 537 A.2d at 1242-44.

¹¹⁵*Id.* at 1248.

The Court specifically noted that, “in surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability, so long as payment of money is permitted.”¹¹⁶ However, the Court also noted that “[p]utting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was ‘voluntary’, did not mean that it was good or beyond regulation and prohibition.”¹¹⁷

Although no American court has yet heard a case adjudicating the legal status of egg donors, it seems most appropriate to treat egg donation in a fashion similar to surrogacy in recognizing the limits of monetary purchasing power.

Applicability to Boutique Egg Donations

Arguably, boutique egg donations should fall into the same category of body parts that should not be bought and sold as typical commodities. Courts have already recognized that human organs should not be bought and sold; the idea of a futures organ market is untenable. Human eggs, produced by the ovaries for each female of child bearing years, are clearly more than a cell – and are more analogous to blood cells. Both blood and ova are naturally occurring and replaceable, however, blood cannot be sold, due to the fear of individuals selling unfit blood and the fear of exploitation of the oppressed. A logical extension based on the above discussions¹¹⁸ is that egg sales should be prohibited as well, particularly in light of the large financial inducement and potential for abuse by both parties.

Just as courts determined that surrogacy contracts are against public policy, courts should also find that egg donation contracts offend the traditional notions of contract law. Even though women may have a fundamental liberty interest in making medical decisions about their

¹¹⁶*In re Baby M*, 537 A.2d at 248.

¹¹⁷*Id.* at 1249, (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

¹¹⁸*See* discussion and analysis, *supra* parts III(A)(1) and III(A)(2).

bodies,¹¹⁹ that does not give them *carte blanche* to barter and trade their reproductive cells as if a common good or service without due consideration to the implications and detrimental consequences of egg donation.

One policy consideration that weighs heavily against surrogacy contracts is the fact that the gestational mother is being exploited for her body.¹²⁰ The same policy consideration should be true for the egg donor who is receiving money for her boutique quality eggs. Illinois contract law does not recognize contracts entered by one party under coercion or duress,¹²¹ or contracts procured fraudulently or by misrepresentation of material facts.¹²² These basic contractual limitations are key to egg donation contracts because immediately the underlying motivations and financial inducements are suspect. Coercion is the most difficult to prove, but duress can simply exist when a person of authority is influencing a subordinate to the extent that the subordinate feels she cannot refuse, even if the refusal is not factually grounded.¹²³

A second policy consideration that renders surrogacy contracts invalid is the understanding that a surrogate contract simply involves rights that, while recognizable, simply cannot be enforced in equity due to practicability and administrability concerns. The same is true for an egg donation contract. It is unlikely that a court will want to analyze

¹¹⁹See *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 130 (enunciating the patient autonomy, the court specifically stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body.").

¹²⁰*In re Baby M*, 537 A.2d 1227.

¹²¹See generally, *Hensler v. Busey Bank*, 596 N.E.2d 1269, 1274 (4th Dist. 1992) (holding that in order to assert a claim for undue influence there must exist a fiduciary relationship. Fiduciary relationship is defined broadly to include the degree of kinship, disparity of age, health and mental condition, and the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to and reposed faith and confidence in the dominant party).

¹²²See generally, *Cuculich v. Thomsen Consumer Elecs, Inc.*, 317 Ill. App. 3d 709, 716, 39 N.E.2d 934 (1st Dist. 2000) (noting that An Illinois Consumer Fraud and Deceptive Business Practices Act (Act), 815 Ill. Comp. Stat. 505/1 et seq. (West 1996) claim should be liberally construed to effect its purposes. The Act was intended to afford a broader range of protection than the common law. Under the Act, the plaintiff must show: (1) a deceptive act or practice; (2) an intent by the defendant that he relied on the deception; and (3) the deception occurred in the course of conduct involving trade or commerce. The intent required by the statute is only the intent that the plaintiff in the primary action rely on the information that the defendant gave him, as opposed to any intent on the defendant's part to deceive).

¹²³*Hensler v. Busey Bank*, 596 N.E.2d 1269.

the contractual defenses raised by an egg donor who accepts the initial cash payment, but who never follows through with the daily hormone injections.

Boutique egg donation also raises problems with implied or express warranties of goods rendered.¹²⁴ As applied, courts are unlikely to become involved in determining the liability of a donor when she misrepresents her “qualifications” or when she simply doesn’t produce the eggs. This potential for abuse is a very genuine possibility, and unless society is willing to open the floodgates to breach of contract cases based on parental vanity, such claims must be prevented by prohibiting the sale of eggs.

Courts should not engage in the jurisprudence of determining the quality and warranties of human reproductive cells. The extension of tort law liability is already overwhelming given the expansive nature of medical malpractice and product liability for medical devices.¹²⁵ As a matter of public policy, the practices of egg donation are underlying the prohibition of surrogacy contracts are analogous and applicable to the practices of egg donation, and thus the prohibition on the contractual validity of surrogacy should be extended to egg donation.

PERSPECTIVES AND IMPLICATIONS FOR BOUTIQUE EGG DONATIONS

Critical Race Theory

Critical Race Theorists have long questioned the validity of the existing power structure in legal society, in addition to analyzing the practical and policy implications of race and the law.¹²⁶ Critical Race Theory is a specific area of legal scholarship and jurisprudence characterized by thematic bridges between reality, power, civil rights law, social science,

¹²⁴See UCC §2-313, §2-315 (West 2000).

¹²⁵See e.g. *Wodziak v. Kash*, 663 N.E.2d 138, 145 (1st Dist. 1996)(holding that a plaintiff properly pleads medical malpractice by establishing a proper standard of care, a deviation from that standard, and an injury proximately caused by deviation; in this case, a plaintiff may prove their case even with an expert witness unfamiliar with the medical diagnosis at issue); *Haudrich v. Howmedica, Inc.*, 662 N.E.2d 1248, 1250, 1258 (1996)(holding that a manufacturer was strictly liable for a defective prosthetic device that was implanted into a part, causing serious and debilitating permanent injury, was unreasonably dangerous).

¹²⁶Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993).

contextual analysis, and structural determinism.¹²⁷ Derrick Bell first coined the concept of “whiteness as property”; however Cheryl Harris explores and expands on the foundation, relevance, and perpetuation of how being white connotes property rights and privileges.¹²⁸

Are Blue Ribbon Egg Donations A New Form of Racism?

Critical race theory is highly relevant to the issue of boutique egg donation for a variety of reasons.¹²⁹ First, the entire premise of boutique egg donation is to perpetuate certain characteristics that are deemed salient by a select few.¹³⁰ Wealthy couples, who utilize egg brokers or high profile advertisements, do not seek general traits.¹³¹ These couples are seeking a “perfect gene pool” for their commodity – notice the highly sought after donor is a woman who has blonde hair, blue eyes, received a 1400 on her SAT, attends an Ivy League school, and who preferably has some additional talents such as music, sports, or theatre.¹³²

A brief overview of egg donor “profiles” from a well known fertility clinic indicates the same result.¹³³ Out of 95 egg donor profiles, only eleven included women of color.¹³⁴ Of these eleven minority egg donors, three were Asian-American, three were African-

¹²⁷See generally, Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (specifically noting that, “whatever label is applied to the loose coalition of critical race theory...it’s scholarship is characterized by the following themes: 1) insistence on naming our own reality, 2) the belief that knowledge and ideas are powerful, 3) a readiness to question basic premises of moderate/incremental civil rights law, 4) the borrowing of insights from social science on race and racism, 5) critical examination of the myths and stories powerful groups use to justify racial subordination, 6) a more contextualized treatment of doctrine, 7) criticism of liberal legalism, and 8) an interest in structural determinism, the ways in which legal tools and thought-structures can impede law reform.”).

¹²⁸See generally, Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993).

¹²⁹See e.g. Lisa Ikemoto, *The In/Fertile, the Too Fertile, and the Disfertile*, 47 Hastings L.J. 1007 (1996). The author recounts and discusses at length the “story of black women choosing white ova presents proof that racial selection occurs.” *Id.* at 1015. The author also discusses how racial subordination, transracial egg donation, and procreative technology may fundamentally change traditional notions of the historical rule of race by birth. *Id.* at 1017.

¹³⁰*Id.*

¹³¹American Medical Association, *supra* note 49

¹³²*Id.*

¹³³Genetics and IVF Institute, *Summary of Selected Donor Characteristics*, (available from 3020 Javier Road, Fairfax, VA 22031, 703/698-7355). This information must be specifically requested by an interested donor or recipient, and will be mailed with additional information about the Institute via the United States Postal Service.

¹³⁴*Id.*

American, and four were Hispanic-American.¹³⁵ Granted, this is only a selected summary, but given the overwhelming majority of egg donors were of Caucasian, European descent, the additional donor profiles would make a marginal difference in racial diversity composition.

Given that some egg brokerage firms have a “dossier book” of prospective donors with mandatory photographs and resumes, is it any more shocking to think that since the technology exists to genetically select certain genes, that the wealthy, well educated strata of society will attempt to seize racial selection to their advantage?¹³⁶ It is a fact that the couples who are seeking ART, are not underprivileged minorities in inner cities. Rather, the typical profile of a woman utilizing ART is an upper middle class woman in her mid to late 30’s, who has at least a Bachelor’s degree, and who is more likely than not, white.¹³⁷

In short, racial characteristics matter for prospective families.¹³⁸ Linking the disparate number of minority donors and the overwhelming number and demand for white donors, critical race theorists view as suspicious the profitable practice of encouraging a racial hegemony by limited minorities access to the ART services, as well as limited the type of donors recruited to one race.¹³⁹ As related to concepts of

¹³⁵Genetics and IVF Institute *supra* note 133.

¹³⁶See http://www.fertilityoptions.com/html_pub/Z0002.htm (last visited Nov. 17, 2001). The fertility center website has very detailed donor information available online. With password permission a sample profile is nevertheless very extensive as well.

¹³⁷Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 938 (1996). Author cites that “Most couples who use IVF services are white, highly educated, and affluent.” *Id.* The author goes on to discuss how new reproductive technologies are used almost exclusively by white people and that the images connected with ART are “almost always of white people; the baby in these stories often has blonde hair and blue eyes as if to emphasize her racial purity.” *Id.* The author also notes that black children created by ART almost always include sensational stories intended to evoke revulsion at the technologies’ potential for harm; case in point, when a white woman was mistakenly inseminated with a black man’s sperm, resulting in the birth of a black child.” *Id.*

¹³⁸*Id.*

¹³⁹For more on the definition of hegemony as a structure, see Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 B.Y.U. L. REV. 515, 519 (stating that hegemony as a structure “involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense. In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture. Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.”). *Id.* For a discussion of the definition of racial

passing and assimilation, the mere fact of being “white” and the racial desirability of a “white child” carries inherent privilege, while simultaneously oppressing and delegitimizing those of non-white birth.¹⁴⁰

The issue of access to ART services thus calls into question the motivations and intentions of having medical reproductive technology services available for a limited subsection of society.¹⁴¹ Critical race theory scholarship questions the significance of race in existing legal structures. Why is there such a premium on having the “perfect child”? Why is there an obsession to have a “biological child” at all costs? What is to be said for the implications of a woman who bears a child via egg donation, but who is not actually genetically related to that child? What stories or disclosures must that woman willingly tell her child – so that her child knows the truth about its origins? What policy decisions will have to be made regarding the right of privacy and confidentiality of egg donors? More importantly, is it fair to ask the already over burdened tax payers to shoulder the costs of litigation, debate, and outcry that will be associated with “boutique egg donations”?

There exists but a scintilla of answers to these questions, but some interesting theoretical conclusions can be drawn. Critical race theory has a vested interest in analyzing the motivations and intentions of couples who utilize boutique egg donation because if race matters, then the crucial question for analysis is the message being sent when the highest paid donors are of one race.¹⁴² When one factors in other relevant considerations related to race, such as social status, prestige, power, and preference – consideration must be given to what generalizations and conclusions are expressed to women of color.

hegemony, see Leslie Espinoza and Angela P. Harris, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1620 (1997). The authors note that, “racial formation encompasses “race relations”: how racial groups jockey with one another around the globe in relations of economic production and consumption, in and between nation-states for political power, and in social systems for status and cultural hegemony. But racial formation, as a system of power, is also about how groups and individuals come to have or be “races” in the first place.” *Id.*

¹⁴⁰Roberts, *supra* note 137 at 935. The author goes on to discuss the phenomenon of “passing” as a social construct in determining whiteness as property. *Id.*

¹⁴¹Roberts, *supra* note 137 at 938.

¹⁴²Litowitz, *supra* note 139 at 519.

A related issue for consideration is whether the competing legal interests and minimal judicial recognition of a property right in cells and tissues can provide a basis of choice for contemplated genetic manipulation.¹⁴³ It is suggested that the unrestrained exercise by parents of genetic changes in an offspring constitutes a clear abuse of [if any are in fact ascribed] those possessory interests.¹⁴⁴

As detailed earlier,¹⁴⁵ there may be broad public policy reasons for denying the procreative right to alter genetic trait.¹⁴⁶ First, if only the wealthy have the resources to alter the appearance and intelligence of their offspring, is there a competing social rationale that requires equalization of that proprietary right?¹⁴⁷ Second, is the analysis on property rights overreaching – the danger is that many individuals are equating proprietary rights regarding “whether” to reproduce with exercising control over “how” to reproduce.¹⁴⁸ Third, and most importantly, is there an identifiable social policy interest that requires the preservation of that random condition, or do procreative proprietary rights extend to choices of eye, hair, and skin color, gender, intelligence and personality?¹⁴⁹

Feminist Jurisprudence

Feminist jurisprudence both supports and condemns boutique egg donation. For instance, it seems disingenuous for feminism to deny the right of women to do what they wish with their bodies, even if that means selling their reproductive cells.¹⁵⁰ Conversely, it is disheartening and troubling to think that a legal theory, committed to de-emphasizing gender inequality and subordination, supports a practice that essentially places young women in positions of extreme commodification through human tissue exploitation.

¹⁴³Brown, *supra* note 96.

¹⁴⁴*Id.*

¹⁴⁵See discussion and analysis *supra* Part III.B.

¹⁴⁶Brown, *supra* note 96.

¹⁴⁷*Id.* at 82-83.

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰See *Roe v. Wade*, 410 U.S. 113, 170 (1973). Stewart’s concurrence notes that women have fundamental liberties in matters of marriage and family life. *Id.* at 170. Based on this argument, egg donations would fall within those liberties.

Market Inalienability, Fetishism, and Feminism

Legal scholar Margaret Jane Radin has written extensively on the basic definitions of market inalienability¹⁵¹ and the Marxian ideal of the fetishism of commodities.¹⁵² Each of these can be closely correlated to feminism and held to support the overall rationale for proscribing egg donations.¹⁵³ By linking these philosophical concepts with boutique egg donation practices, the same conclusion may be reached: there are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.¹⁵⁴ In the language of the Supreme Court, some things are simply not meant to be commodities.¹⁵⁵

The traditional meanings associated with inalienability share one common core; these are things that may be given away but not sold.¹⁵⁶ Essentially, market inalienability specifies that market trading may not be used as a social mechanism of separation and an aspiration for noncommodification of certain items, including those items normally contrived as universal commodities.¹⁵⁷ Under the auspices of object fetishism, commodification simultaneously expresses and creates alienation for the individual, thereby objectifying and projecting power and action onto commodities and diminishing the inherent and intangible value of individuals.¹⁵⁸ Commodification brings about an inferior form of human life; therefore, people themselves must change and learn to live without the market.¹⁵⁹

¹⁵¹See generally, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.*

¹⁵⁵See *In re Baby M*, 537 A.2d 1227, 1249 (citing *West Coast Hotel Co. v. Parish*, 300 U.S. 379).

¹⁵⁶Radin, *supra* note 151, at 1852.

¹⁵⁷*Id.* at 1859. The author notes that universal commodification means that anything people are willing to sell, and others are willing to buy in principle can and should be the subject of free market exchange. *Id.*

¹⁵⁸*Id.* at 1871-72. The author provides a detailed discussion on the alienation of the worker, under a Marxian ideal of fetishism. *Id.* "The worker becomes an ever cheaper commodity the more commodities he creates. With the increasing value of the world of things proceeds in direct proportion the devaluation of the world of men. Labour produces not only commodities; it produces itself and the worker as a commodity – and does so in the proportion in which it produces commodities generally." *Id.* (citing Marx, Economic and Philosophic Manuscripts of 1844, in THE MARX-ENGLES READER 70).

¹⁵⁹Radin, *supra* note 151, at 1872.

As applied to boutique egg donation, the reality of commodification and alienation of human worth is eminent.¹⁶⁰ The fact that collegiate women with certain talents, gifts, and physical traits are being marketed and recruited to donate body parts that will allegedly pass on those same traits is astonishing.¹⁶¹

Informed Consent and Feminism

Returning for a moment to the informed consent process outlined above: is it a reasonable, much less prudent, expectation for young women to be making such major decisions, with all the attendant implications? Note that in the sample informed consent document,¹⁶² the language is so convoluted and ambiguous in the most key portions, that any court forced to interpret it would be governed by Section 201(2) of the Restatement of Contracts¹⁶³ which states language which is ambiguous will be construed against the drafter. Furthermore, any court that would arguably analyze the enforceability of this contract would be hard pressed to rule that specific performance is warranted, thus, egg donation contracts and boutique egg donation present inherent difficulties from the initial process.

For instance, the sample egg donation contract¹⁶⁴ outlines the risks of egg donation, including: bruising, heat/tissue damage from ultrasound, medication side-effects, pain/bleeding/fluid imbalance from ovarian over-stimulation, pain, perforation of tissues from aspiration; reactions to anesthesia; disapproval from friends and/or family, unknown medical events, and risks to the donor's potential children.¹⁶⁵ The contract then asks that the "donor accepts what medical doctors believe about the likelihood of these risks, and accepts these risks fully."¹⁶⁶ Is it even conceivable for a 19 or 20 year old college female to fully accept these inherent risks? Is contract law really protecting

¹⁶⁰ Radin, *supra* note 151, at 1872.

¹⁶¹ See Hamilton, *supra* note 3; DANIEL, *supra* note 17.

¹⁶² See *supra* note 27 (detailing the sample informed consent contract used by some egg donation clinics).

¹⁶³ RESTATEMENT (SECOND) OF CONTRACTS §201(2) (1985)(stating that in choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplied the words or from whom a writing otherwise proceeds).

¹⁶⁴ See *supra* note 27 (on the sample informed consent contract).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

the woman? Do egg donation centers really believe that they could enforce this contract in a court of law or equity?

The problem comes full circle when, considering the questionable legal status of “egg donation contracts,” this aspect of “high priced expectations” are factored into the picture.¹⁶⁷ Just how far are prospective parents willing to go to enforce their “capital investment”? After all, not only does the donor rely upon the egg brokerage firm/fertility center to pay her – the prospective parents expect a high caliber, and certain quality “embryo” (fertilized from the donor egg plus the husband or donor sperm). As of yet, no one has seriously addressed the reality of what will happen when this child, this commodity, is born average intelligence, looks, and personality. Will there suddenly be a surplus of children who were created by donor eggs, but who were not worthy enough to be raised by those high profile parents who recruited the donor egg in the first place?

More pointedly, does equity require that a woman be held down, against her will, to donate her eggs to a high paying couple, when her only informed consent consists of brief exposure of eight side effects that are unclear, uninvestigated, and technically described? What if this young woman changes her mind? Would the compensation be pro rata? Given the high costs and high expectations of these prospective parents, the answer is clearly no.

The glaring reality is that there are some legitimate restrictions that can and should be placed on a woman’s right to make decisions about her body.¹⁶⁸ Perhaps boutique egg donation, while deceptively empowering, is more indicative of oppressive medical paternalism at its finest. These potential parents are individuals who are contracting and intending for the final goods to be delivered – healthy, viable, eggs from a donor who has met all the requirements on their checklist. Of course, these parents are going to vigorously attempt to enforce their rights in court, or at the very least, engage in coercive and psychological duress to pressure the young woman to continue and donate the eggs. From a feminist perspective, this reverberates with the oppression that male dominated society imposes upon women.

¹⁶⁷Leavens, *supra* note 9.

¹⁶⁸See *Planned Parenthood v. Casey*, 505 U.S. 833, 966-70 (1992)(holding that a woman’s right to an abortion, and thus to make medical decisions about her body, may properly be limited by state statutes outlining specific requirements for informed consent).

Arguably, this is the same type of intentional disenfranchisement and oppression that feminists abhor – the societal oppression that discourages women from attending military preparatory schools,¹⁶⁹ receiving equal access and opportunity to achieve corporate success, and becoming equals to their male dominated professional counterparts.

Are Boutique Egg Donations A Form of Patriarchy?

Based on feminist analysis, the practice of boutique egg donation could be the epitome of patriarchy and paternalism.¹⁷⁰ Mostly male physicians are encouraging healthy, fertile women to undergo procedures that will help infertile women, at a cost and risk unknown to the donor. The physician, the one person who should be impartial and protect the donor's vulnerable position, is thwarting the physician-patient relationship by handing the donor cash after the procedure is finished. If nothing else, physicians are contributing to a patriarchal structure because they fail to recognize the importance of the ethical obligations of sympathy, compassion, fidelity, discernment, and love.¹⁷¹

Finally, feminists must analyze whether this woman's motives genuinely furthers the recognition of women as a unique voice in society.¹⁷² When an egg donor is enticed by the financial gain, but falls short on the "blue ribbon requirements," she may be motivated to lie. Some scholars would argue that a donor who commits fraud or false representation to donate her eggs for a high price is violating basic

¹⁶⁹See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Virginia Military Institute's same-sex enrollment policy was violative of the constitutional and fundamental right of women under the Fourteenth Amendment to have equal access to attend the University and achieve the same honor and prestige of a VMI degree).

¹⁷⁰*In re A.C.* 573 A.2d 1235, 1237 (1990) (reversing trial court that ordered an emergency cesarean section on a twenty-six year old woman dying of cancer who was 26 weeks pregnant). Although the legal case was remanded to follow substitution judgment proceedings, the case stands as a practical example of medical paternalism (decisions made by male physicians and judges regarding a woman's body). *Id.*

¹⁷¹Radin, *supra* note 151, at 1871-1872.

¹⁷²See generally, Angela Harris, *Race & Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). The author describes how gender essentialism may be silencing unique voices of women of color. *Id.* at 586. That is to say the advocacy of unitary feminist experiences may be lacking in the multiconsciousness, a necessary element of deconstructing social oppression. *Id.*

“ethics of care,”¹⁷³ yet another aspect of feminist recognition of certain immutable traits in women. Women egg donors are being coerced, influenced, or even motivated to deny that fundamental part of their femininity by commodifying and selling their reproductive cells. Thus, their nurturing and interpersonal relationship focus is further threatened and they fall to the mercy of the male dominated societal structure that legitimizes money, power, and self interest.

If nothing else, what some egg donors describe as “rude”,¹⁷⁴ that is, when egg donors experience hyperstimulation and produce 40-plus eggs and require hospitalization, but no additional compensation is offered for the eggs or trouble, could be defined as outright exploitation. Many bioethicists and medical professions share this author’s concern that, “Fertility clinics are a part of a market driven, underresearched, dangerously unregulated industry that [are] growing too quickly and that may pose long term medical and psychological risks to its participants...By encouraging women to sell their eggs, are we mechanizing motherhood, turning life itself into a commodity?”¹⁷⁵

Bioethical Considerations

Bioethics attempts to find the good in medical-legal decisions. As one Catholic bishop stated, “The fact that science now has the ability to alter this [procreative] process significantly does not mean that, morally speaking, it has the right to do so.”¹⁷⁶ Religion, feminism, and critical race theory aside – can human morality condone these practices? Boutique egg donations are steps ahead of assisted reproductive

¹⁷³TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 86-87 (1994), (citing CAROL GILLIGAN, IN A DIFFERENT VOICE 21 (1982)). The author explains the “voice of care” stresses emphatic association with others, not based on the primacy and universality of individual rights, but rather on a very strong sense of being responsible. *Id.* Women, therefore, look to and are formed by contextually given relationships such as those of the family. *Id.* Of course, the ethics of care is too confined to the private sphere of intimate relationships and may serve to reinforce an uncritical adherence to traditional social patterns of assigning caretaker roles to women. *Id.*

¹⁷⁴*See, e.g.,* Cynthia Joyce, The Price of Eggs in America, Salon 1998, at http://www.salon.com/mwt/feature/1998/03/cov_05feature.html (last visited Nov. 17, 2001).

¹⁷⁵*Id.*

¹⁷⁶*See* GREGORY PENCE, CLASSIC CASES IN MEDICAL ETHICS 124 (McGraw Hill, 2000) (2000) (quoting Catholic Bishop Kelly, quoted in G. Vecsey, *Religious Leaders Differ on Implant*, N.Y. TIMES, July 27, 1978, §A16).

technology – truly, it is now arguable that medical technologies are on the slippery slope to eugenics or racial brokering.

One suggestion from bioethics is to judge “an agent’s merit and praiseworthiness or demerit and blameworthiness are tied to a person’s motives, not just their actions.”¹⁷⁷ Directly applicable to egg donation is the intent and motivation of the donor.¹⁷⁸ Wholly altruistic motives, as elicited by some donors, would be “ethically acceptable.” However, since boutique egg donations are premised entirely on the concept of market forces, supply and demand, and commercialization, there cannot exist any “good” intentions. Capitalistic exploitation and commodification could never be considered a valid and virtuous principle to follow when individuals are being used inappropriately to bring about a desired result for a select class and race.

Another bioethical concern that must be addressed in this area of emerging reproductive technology is fairness in terms of resource allocation. Arguably, the exorbitant costs of ART, especially repeated cycles, exceed normal medical expenses.¹⁷⁹ In light of managed care and the need to provide designated “medically necessary” treatment, the ethics behind such policy decisions is intriguing at the very least.¹⁸⁰

The phenomenon of ART and boutique egg donations may be yet another example of the Rawlsian natural and social lottery.¹⁸¹ ART seems to be a device over utilized by wealthy, Anglo-American couples who desire a certain earmarked version of an ideal child, based upon genetic and biological traits.¹⁸² The inherent inequality of who has access to the technology is one issue, but perhaps it is ethically obligatory to analyze why this access is so limited.¹⁸³

In terms of a clinical approach to ART and egg donations, consider the utility of this framework, commonly known as the JSW

¹⁷⁷BEAUCHAMP & CHILDRESS, *supra* note 173, at 66. Beauchamp and Childress discuss character ethics and virtue-based theory.

¹⁷⁸BEAUCHAMP & CHILDRESS, *supra* note 173.

¹⁷⁹*Id.*

¹⁸⁰*Id.*

¹⁸¹See generally TOM BEAUCHAMP & JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 344 (1994) (expounding upon the idea of a natural and social lottery, whereby virtually all abilities and disabilities are functions of birth and social systems).

¹⁸²*Id.*

¹⁸³*Id.*

model¹⁸⁴, focusing upon the medical indications for the procedure, the patient preferences, quality of life considerations, and contextual features.

The medical indications for ART would include a very strong focus upon the purposes and goals of medicine in furthering technology and overcoming a perceived “disease” of infertility.¹⁸⁵ Of course, patient preferences are rather strong here because the woman clearly would not be seeking ART if she did not want a biological child in whatever means is medically appropriate and available to her. She has a medical diagnosis, and she wants a medical cure.¹⁸⁶ In contrast, it is questionable whether the college age ivy league female student has the proper autonomy and decision making ability, but that discussion was preempted earlier in this paper.¹⁸⁷ In terms of quality of life, it seems that a child would enhance the infertile woman’s life, but the rigors of hormone therapy, injections, and painful implantation must also be balanced against one another. The principle of proportionality might lend some support, but pragmatic realities, such as pain, inconvenience, futility, are significantly outweighed by deep seeded emotional attachments to having a biological child.

In terms of contextual features, the notion of justice and financial feasibility for continuing to support ART procedures comes into focus. The conclusions from Rawls indicate that distributive shares from such natural and social lotteries are arbitrary and without reason, therefore, instead of allowing social inequities, we should regard justice as being achieved if radical inequalities are diminished.¹⁸⁸ Contextually then, ART and specifically boutique egg donor selections, should not be condoned by the bioethics community. Rather, a different facilitative approach may be indicated wherein the social inequities caused by allowing boutique egg donations should be curtailed as violative of basic social justice norms, including the possible perpetuation of the perfect child.

¹⁸⁴Albert R. Jonsen, Mark Siegler, & William J. Winslade, CLINICAL ETHICS 6 (4th ed. 1998). The authors set out a four part framework for clinical case analysis in medical ethics.

¹⁸⁵*Id.*

¹⁸⁶*Id.*

¹⁸⁷See discussion *supra* Part IV.B.2.

¹⁸⁸*Id.*

CONCLUSION

The current treatment of female egg donation is exploitative and morally questionable from numerous perspectives. The proper solution to the issues raised mirror the policy decisions regarding human organ donations and thus should be prohibited outright. At the very least, the time is ripe for specific and targeted legislation, so that the aforementioned arguments and implications might be tempered or avoided.

The egg donation field needs to be tightly regulated and controlled by an appropriate agency or oversight committee, setting price ceilings, minimal conditions for donation, and standardizing informed consent. Traditional economic arguments, such as fear of monopolization and unfair trade practices, simply do not apply to boutique egg donations. Rather, internet advertisements, college newspaper ads, and egg brokerage firms targeted healthy college women with certain “pedigrees” are enterprises capitalizing on the human desire for a child while simultaneously exploiting young women and undervaluing their social worth as individuals.

