

## A WOMAN'S WORTH\*

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*This Article examines three traditionally “taboo trades”: (1) the sale of sex, (2) compensated egg donation, and (3) commercial surrogacy. The Article purposely invokes examples in which the compensated provision of goods or services (primarily or exclusively by women) is legal, but in which commodification is only partially achieved or is constrained in some way. I argue that incomplete commodification disadvantages female providers in these instances, by constraining their agency, earning power, or status. Moreover, anticommodification and coercion rhetoric is sometimes invoked in these settings by interest groups who, at best, have little interest in female empowerment and, at worst, have economic or political interests at odds with it.*

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## INTRODUCTION

In September 2008, “Natalie Dylan” (a pseudonym adopted by the twenty-two-year-old Women’s Studies graduate) auctioned her virginity on the Web site of the Moonlite Bunny Ranch, a brothel in Carson City, Nevada.<sup>1</sup> She reportedly received over 10,000 bids, the highest of which was \$3.8 million.<sup>2</sup> Predictably, Dylan received condemnation from many quarters (and, perhaps less predictably, praise from some).<sup>3</sup> Critics have argued that she is degrading herself and women generally, risks exporting Nevada’s poor morals to the rest of the country, and is selling something (virginity) for profit that should be cherished and freely given.<sup>4</sup>

In this Article, I explore through Dylan’s virginity auction and other examples some of the issues raised by such “taboo trades”—that is, trade in which the good or service exchanged is both legal and alienable, but in which transfer for profit (as opposed to some other motivation, such as affection or altruism) is banned or limited.<sup>5</sup> In doing so, I want to put to one side debates about whether the taboo trades considered here—the sale of sex, human eggs (or “oocytes”), and surrogacy services—should be legal. Although I believe that they should, subject to regulation, it is unnecessary for readers to accept that premise for current purposes. I specifically invoke examples of

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1. Natalie Dylan, *Why I’m Selling My Virginity*, DAILY BEAST, Jan. 23, 2009, <http://www.thedailybeast.com/blogs-and-stories/2009-01-23/why-im-selling-my-virginity/>; Moonlite Bunny Ranch, [www.bunnyranch.com](http://www.bunnyranch.com) (last visited May 2, 2010).

2. Joseph Abrams, *22-Year-Old Sells Virginity Online—And Feds Can’t Do a Thing to Stop Her*, FOXNEWS, Jan. 15, 2009, <http://www.foxnews.com/story/0,2933,480037,00.html>; Dylan, *supra* note 1. The winning bidder, who paid a \$250,000 deposit, later withdrew from the deal, allegedly because his wife objected. Cynthia R. Fagan, *‘Deflower Deal’ Guy Pulls Out*, N.Y. POST, May 31, 2009, [http://www.nypost.com/p/news/national/deflower\\_deal\\_guy\\_pulls\\_out\\_gzj1Gdyonlv99BZGWb5b5J](http://www.nypost.com/p/news/national/deflower_deal_guy_pulls_out_gzj1Gdyonlv99BZGWb5b5J). As of publication, Dylan was still featured on the Moonlite Bunny Ranch Web site. See Announcement!!!, *22-Year-Old Virgin to Sell to Highest Bidder!*, <http://www.bunnyranch.com/virgin/> (last visited May 2, 2010).

3. See, e.g., Dylan, *supra* note 1 (stating that a Fortune 500 CEO congratulated her on her “entrepreneurial gumption”).

4. See, e.g., Abrams, *supra* note 2 (discussing objections of “religious legal groups” to the sale); Dave Masters, *Bids Hit £2.6m for Girl’s Virginity*, SUN (London), Jan. 13, 2009, available at <http://www.thesun.co.uk/sol/homepage/features/article2123389.ece#ixzz0g1j3bUDP> (“Natalie has since faced a steady stream of criticism from women and allegations from men over the validity of her virginity claims.”); Bari Weiss, *Putting Herself on Sale*, WALL ST. J., Feb. 6, 2009, at W11 (arguing that “there is nothing liberating about this sale”).

5. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 18 (1996) (defining market inalienability); Kimberly D. Krawiec, Forward, *Show Me the Money: Making Markets in Forbidden Exchange*, LAW & CONTEMP. PROBS., Summer 2009, at i, i-xiv (defining a “taboo trade” or “forbidden exchange,” and distinguishing it from both illegal items and activities and legal but inalienable items and activities).

*legal* transactions that, nonetheless, remain subject to significant constraints on normal market operation, arguing that these constraints are neither obvious nor random. Instead, they are often the product of unexamined instincts that fail to withstand more careful scrutiny, and frequently embed class and gender stereotypes.

Like many taboo markets, the markets for sex, oocytes, and surrogacy present a paradox. These robust commercial industries attract large numbers of suppliers and consumers, yet continue to be regarded as socially problematic—perhaps deviant or repugnant—and in need of strict controls. Even when legal, taboo markets, and those who supply them, may be stigmatized—or, alternatively, romantically recharacterized as altruistic nonmarket transactions—and limited in ways that other markets are not.

Many taboo trades, including the sale of sex, oocytes, and surrogacy, raise important public policy issues and may be characterized by asymmetries in information and bargaining power. As I have argued elsewhere, regulation designed to address such concerns is appropriate.<sup>6</sup> However, social and legal impediments to taboo trades sometimes serve no purpose *other than* constraining normal market functioning or denying providers the status of legitimate suppliers of a valuable good or service. Although these impediments impose costs on all participants to the transaction—including consumers, who bear higher prices, reduced supply, and increased risk—this Article concentrates primarily on the costs borne by providers. In the case of the taboo trades discussed in this Article, those providers are largely or exclusively female.

I do not mean to suggest that the only taboo markets in which trade is restricted are those supplied by women. Indeed, the National Organ Transplant Act's ("NOTA")<sup>7</sup> ban on, and the recent heated debates surrounding, financial incentives for organs, which raise similar issues, are evidence to the contrary.<sup>8</sup> However, the purported

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6. See generally Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in *BABY MARKETS: MONEY, MORALS, AND THE NEW POLITICS OF CREATING FAMILIES* 41, 41–45 (Michele Bratcher Goodwin ed., 2010) [hereinafter Krawiec, *Price and Pretense*] (discussing the potential tensions among public policy goals, market forces, reproductive freedom, and parental rights raised by the baby market, including egg, sperm, and surrogacy markets); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009) [hereinafter Krawiec, *Altruism and Intermediation*] (discussing information and bargaining power asymmetries in the surrogacy market).

7. Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346 (1984) (codified at 42 U.S.C. § 274e (2006)).

8. See, e.g., Complaint for Declaratory and Injunctive Relief at 2–51, *Flynn v. Holder*, No. CV-09-07772 (C.D. Cal. Oct. 26, 2009) (challenging the constitutionality of

dangers of commodification and the need to protect a supposedly vulnerable population from the coercive effects of the marketplace have been especially prominent defenses of constraints on the markets for sex work, oocytes, and surrogacy. These defenses have also been widely embraced in much of the accepted academic wisdom on these topics, including some strands of feminist theory.<sup>9</sup>

Women have always been the primary suppliers in the markets for sex and reproduction. Indeed, in some societies, sexual and reproductive labor traditionally have been the only valuable assets held by females.<sup>10</sup> As a result, the structure, regulation, and social norms surrounding these markets necessarily impact women significantly.

By and large, objections to markets in sex, human eggs, and surrogacy services—like the objections to other taboo trades—fall into the general categories of commodification and coercion.<sup>11</sup> The “commodification” objection, in brief, relates to the purported degrading effect of market exchange on certain goods and services.<sup>12</sup>

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National Organ Transplant Act (“NOTA”) as applied to compensated bone marrow donation); Alvin E. Roth, *Repugnance as a Constraint on Markets*, J. ECON. PERSP., Summer 2007, at 37, 38 (discussing organ-matching programs as a means to reduce organ shortages without triggering the repugnance prompted by direct financial incentives).

9. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 168–75 (1993) (defending bans against contract pregnancy and baby selling on the grounds that they commodify women’s labor and children); RADIN, *supra* note 5, at 132–36 (discussing objections, including feminist objections, to prostitution); *id.* at 149–51 (discussing same with respect to commissioned adoption and paid surrogacy); MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES 92–95, 107–119 (2001) (opposing oocyte and surrogacy markets on both commodification and coercion grounds).

10. Often, however, that asset was not controlled by the woman herself, but rather by her father, husband, or other male family members. Dilek Cindoglu, *Virginity Tests and Artificial Virginity in Modern Turkish Medicine*, 20 WOMEN’S STUD. INT’L F. 253, 253 (1997) (“[T]he virginity of the bride is an asset for both her family and the groom’s family.”); Xiao Zhou, *Virginity and Premarital Sex in Contemporary China*, 15 FEMINIST STUD. 279, 279–80 (1989) (noting that women in China “are valued as sexual and reproductive tools,” thus virginity is valuable and its loss is a shame on the family); see also sources cited *infra* note 23.

11. See, e.g., ANDERSON, *supra* note 9, at xii–xiii (discussing commodification); *id.* at 186 (discussing contract pregnancy as coercive); RADIN, *supra* note 5, at 2–8 (discussing commodification and coercion as objections to a variety of exchanges); JOSEPH RAZ, THE MORALITY OF FREEDOM 346 (1986) (discussing incommensurability); SHANLEY, *supra* note 9, at 92–95, 107–19 (raising commodification and coercion objections to oocyte and surrogacy markets); Michael J. Sandel, What Money Can’t Buy: The Moral Limits of Markets, The Tanner Lectures on Human Values Delivered at Brasenose College, Oxford (May 11–12, 1998), in 21 TANNER LECTURES ON HUM. VALUES 87, 94–96, available at <http://www.tannerlectures.utah.edu/lectures/documents/sandel00.pdf> (raising commodification and coercion objections to certain market transactions).

12. The commodification objection has two variations. The first posits that the “alienation” for money of sexuality, reproductive labor, and other particularly intimate

Establishing fair and equal bargaining conditions or general equality in the underlying distribution of wealth cannot address the commodification objection. In other words, it is different from the “coercion” objection, which rests, instead, on the purported need to protect vulnerable populations against financial lures that might induce unwise risk-taking.

As will be shown, both objections are poor fits to the realities of the specific constraints on taboo transactions discussed here. Instead, what unifies reactions to the three taboo trades that are the subject of this Article is an attempt to deny the full market status of these transactions, while still ensuring market operation. In other words, these markets are tolerated, but not embraced, and this uneasy accommodation directly impacts commercial providers of sex, oocytes, and surrogacy.

Part I explores more fully the example of Natalie Dylan’s virginity auction, concluding that Dylan’s very success in profitably and openly tapping a taboo market fueled her critics’ hostility. If Dylan had charged less, promoted herself less effectively, or been less creative in marketing her value as a virgin, then her transaction would have passed into the millions of sex-for-cash transactions occurring yearly without notice.

Part II compares Oakland’s medical marijuana tax with failed Nevada SB 369, which would have imposed a tax on the legal Nevada brothel industry. Both the marijuana dispensaries and the brothel industry (and many of the sex workers employed by it) actively supported their respective taxes, meaning that each perceived some benefit from taxation that outweighed its costs. Those benefits—most likely, political influence, legal security, and social legitimacy—were granted to the marijuana dispensaries, largely without opposition or debate, but not to Nevada’s brothels.

Part III compares public, academic, and legal attitudes toward egg and sperm markets, noting the repeated insistence that egg donors are, and should be, motivated primarily by altruism and a desire to help the infertile, rather than by monetary interests. In contrast, the presumption that sperm donors are motivated primarily by profit-seeking is so strong that men professing altruistic motives may be viewed with skepticism. The culmination of these divergent

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items or activities harms the seller. The second contends that such sales degrade society—and the intimate items or activities that are the subject of sale—more generally. Both versions have been criticized at length. *See, e.g.*, MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 290–93 (1999) (challenging commodification, coercion, and related objections to prostitution specifically, and to the sale of bodily services more generally).

attitudes comes in the form of formal and informal limits on egg donor compensation through the same types of horizontal price fixing agreements long considered per se illegal in other industries.

Part IV discusses surrogacy, noting that its social and legal treatment is strikingly similar to the other taboo trades discussed in this Article, particularly egg donation. Commercial surrogacy, despite being an expensive procedure, is shrouded in the rhetoric of altruistic gift-giving, and most jurisdictions limit payments to surrogates in various ways.

I conclude that the lines separating acceptable market transactions from unacceptable taboo trades often stem from instinctive reactions of repugnance or disgust, and do not withstand more thoughtful analysis.<sup>13</sup> Moreover, they may embed social stereotypes and biases regarding gender or class.<sup>14</sup> The offense to societal sensibilities engendered by these taboo trades is moderated through either stigmatization, in the case of sex work, or through the romantic recharacterization of the transaction as one motivated primarily by altruism, rather than by profit-seeking, in the case of oocyte and surrogacy markets.

Both mechanisms, however, represent a double-edged sword. By normalizing otherwise jarring transactions, these narratives facilitate markets that otherwise could stagnate under the weight of social disapproval. At the same time, the continued denial of the market status of these taboo trades (and, particularly, of valuable female sexual and reproductive labor) has consequences for the social, legal, and market structure of these industries, and for the consumers, producers, and others, including the public-at-large, affected by them.

#### I. LIKE A VIRGIN? YEAH, WE SELL THAT HERE

Before leaving the Natalie Dylan example, it is worth considering in more detail the reactions to Dylan's virginity auction plan, and the possible motivations underlying those reactions. What drives the attention and controversy generated by the Dylan auction? What are the perceived harms associated with Dylan's actions, and in what

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13. See Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 285–88 (1997) (discussing the moral outrage associated with some taboo trades); Roth, *supra* note 8, *passim* (discussing repugnance as a constraint on markets). See generally MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004) (discussing the role of disgust and shame in society and law).

14. NUSSBAUM, *supra* note 12, at 287–88.

ways are they greater than the harms associated with similar common activities? In brief, the most likely sources of antagonism to Dylan's entrepreneurial efforts include: (1) that Dylan is trading sex for money, (2) that Dylan is selling her virginity, and (3) that Dylan's self-promotion and publicity attempts are repugnant.

It is unlikely that the sex-for-money aspect of the transaction motivates much of the reaction to Dylan's plans. Though the now-familiar commodification objection is raised in the Dylan case, it cannot logically explain the extreme attention and backlash that Dylan's actions generated.

Dylan's auction drew enormous national and international attention—and criticism—despite the thousands of legal and illegal sex-for-cash transactions that occur each day, largely without notice.<sup>15</sup> Moreover, Dylan's auction was conducted through a brothel in Nevada—the only U.S. state with a legal, thriving commercial prostitution industry.

Against this backdrop, it is unreasonable to believe that the sex-for-cash aspects of the transaction drove the enormous attention dedicated to the event. Prostitution *as an institution*, of course, remains the subject of frequent criticism and debate, particularly when it involves violence, trafficking, coercion, or underage children (none of which are present here and which, in any event, are more germane to coercion objections).<sup>16</sup> But, absent the involvement of a celebrity or politician, individual sex-for-cash transactions are ignored on a grand scale. Yet, Dylan's was not. Thus, there is something specific about the Dylan transaction, beyond the exchange of sex for money, that drew the public's attention, curiosity, and condemnation.

Dylan, of course, was selling more than sex. She was selling virginity—a “priceless and rare commodity” in the eyes of some, including, presumably, her numerous bidders.<sup>17</sup> Although the sale of

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15. Estimating prostitution activity is a difficult task. In eight General Social Survey reports between 1991 and 2006, between 15 and 18% of American men reported having paid for sex at least once (in 2006, 4% reported that they had done so in the prior year). Similar figures are reported for Australia and much of Europe, whereas much higher figures are reported in some countries, including Spain (39%) and Thailand (43–50%, depending on marital status). Because of the stigma associated with prostitution, these figures may underreport the true incidence of the activity. Ronald Weitzer, *Sex Work: Paradigms and Policies*, in *SEX FOR SALE* 1, 2 (Ronald Weitzer ed., 2d ed. 2010).

16. See MARINA DELLA GIUSTA, MARIA LAURA DI TOMMASO & STEINAR STRØM, *SEX MARKETS: A DENIED INDUSTRY* 7–9 (2008) (discussing feminist debates over prostitution); Weitzer, *supra* note 15, at 3–7 (detailing debates over legalized sex work and contrasting the “oppression paradigm” with the “empowerment paradigm”).

17. See, e.g., Abrams, *supra* note 2. Virginity has long been considered a valuable female asset; in some societies, the only asset that young women may hold. See Fabio

virginity is a less common transaction, it is no less legal in Nevada than the sale of sex more generally and is not unheard of.<sup>18</sup>

Doubtless, the virginity-for-cash aspects of the transaction are a genuine source of consternation to some of Dylan's critics, particularly those whose religious beliefs counsel that virginity should be preserved until marriage.<sup>19</sup> Again, however, Dylan's actions must be put into context. Today, very few females in Dylan's age group are virgins,<sup>20</sup> and many report a decidedly unromantic first-intercourse experience. For example, many women (particularly young women) report unprotected sex, being under the influence of alcohol, or a lack of interest in and desire for sex as part of their first sexual intercourse.<sup>21</sup>

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Mariani, *The Economic Value of Virtue 2-3* (Centre d'Economie de la Sorbonne, Working Paper No. 101, 2008), available at <ftp://mse.univ-paris1.fr/pub/mse/CES2008/V08101.pdf> (reviewing the value of virginity as a marketable asset over time and across cultures).

18. See, e.g., Mariani, *supra* note 17, at 2-4 (discussing virginity's value); Deborah Arthurs, *'I Was Attracted to Him, So I Enjoyed It': Teen Who Auctioned Off Her Virginity for £8,800 Reveals Details of Her First Time*, MAIL ONLINE, May 20, 2009, <http://www.dailymail.co.uk/femail/article-1180858/I-attracted-I-enjoyed-Teen-auctioned-virginity-8-800-reveals-details-time.html>; Sue Ryan, *For Sale: 13-Year-Old Virgin*, TELEGRAPH, Apr. 13, 2008, <http://www.telegraph.co.uk/news/worldnews/1584988/For-sale-13-year-old-virgin.html> (discussing virginity auctions as a rite-of-passage into prostitution in some poor Indian communities); Nick Squires, *Italian Model Plans to Sell Virginity for 1m Euros*, TELEGRAPH, Sept. 16, 2008, <http://www.telegraph.co.uk/news/worldnews/europe/italy/2971511/Italian-model-plans-to-sell-virginity-for-1m-euros.html>; *Student 'Sells Virginity' via Web*, BBC NEWS, Mar. 21, 2004, [http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk\\_news/england/bristol/somerset/3554121.stm](http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/england/bristol/somerset/3554121.stm).

19. Cf. Elizabeth Landau, *What Is Virginity Worth Today?*, CNN, Jan. 22, 2009, <http://www.cnn.com/2009/LIVING/01/22/virginity.value/index.html> (discussing the Dylan auction, and the anthropological, social, and religious importance of virginity preservation until marriage).

20. See Michael L. Eisenberg et al., *Who Is the 40-Year-Old Virgin and Where Did He/She Come From? Data from the National Survey of Family Growth*, 6 J. SEXUAL MED. 2154, 2158 (2009) (finding that only 8.3% of females, including self-identified lesbians, aged 25-29 report "heterosexual virginity"); Laura Duberstein Lindberg & Susheela Singh, *Sexual Behavior of Single Adult American Women*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 27, 29 tbl.2 (2008) (reporting that 82.6% of single female respondents aged 20-29 report to having had vaginal sexual intercourse with a male).

21. Rodger Doyle, *Teen Sex in America: Virginity into the Third Millennium Takes an Uptick*, SCI. AM., Jan. 2007, at 30, 30 (noting that a quarter of fifteen to sixteen year-old-females reported that their first experience with sexual intercourse was unprotected); Barbara C. Leigh, John Schafer & Mark T. Temple, *Alcohol Use and Contraception in First Sexual Experiences*, 18 J. BEHAV. MED. 81, 90-91 (1995) (reporting their own data and discussing prior research on the rate of alcohol use and first sexual intercourse); Susan L. Rosenthal et al., *Sexual Initiation: Predictors and Developmental Trends*, 28 SEXUALLY TRANSMITTED DISEASES 527, 531 (2001) ("Even [the large number of teens] who characterized their [first] intercourse as voluntary described it as not being particularly desired."). Many studies of this nature are interested in, and report, the connection between risky behavior and teens' first sexual intercourse. Dylan, at age twenty-two, is obviously in a different age group.



Given these realities, the bulk of the virginity-for-cash objections seem to rest, at best, on a highly romanticized view of most females' first experience with sexual intercourse. Moreover, even granting the (rather implausible) assumption that negative reactions from the general public and media stem from the virginity-for-cash aspects of the Dylan auction, it seems even less likely that this elevation of the importance of female virginity and sexual purity drives the many negative reactions from women themselves, including some feminists. Aside from reinforcing a concept of virginal sanctity that many women reject, to contend that the sale of virginity is more problematic than the sale of sex by a non-virgin is to contend that women should be free to commodify only that which is less valuable—that which will produce less income.

Like commodification objections, coercion is also a common refrain in debates over legalized sex markets. Yet, coercion objections are an especially ill fit in the Dylan case. Is it reasonable to assume that Dylan—an educated young woman who managed to garner an offer for a single sexual encounter that exceeds what most people (much less most sex workers) earn in an entire lifetime—is more coerced than other sex workers? Common sense suggests that the answer is “no.” Yet, Dylan received far more attention—and criticism—than the average (anonymous and largely ignored) sex worker.

Finally, it is possible that Dylan's critics feel a certain sense of repugnance toward her aggressive self-promotion and advertising of her “wares.” Threads of this concern are visible in criticism from both the Left and the Right.<sup>22</sup> At some level, these reactions are understandable. After all, Dylan is aggressively pushing societal boundaries and turning historical stereotypes on their head in a variety of potentially disturbing ways.<sup>23</sup>

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22. Compare, e.g., Weiss, *supra* note 4 (criticizing Dylan's “self-pimping” and arguing that, as a result of her actions and similar third-wave feminist attitudes, “feminism, which used to stand for a clear set of values—most basic among them, that women are not sex objects and must refuse to be treated as such—has been reduced to the mere right to make a choice”), with, e.g., Abrams, *supra* note 2 (reporting concerns of some religious legal groups that Dylan's Internet promotion and advertising may export Nevada's immorality to the rest of the country).

23. By auctioning her virginity, Dylan is capitalizing on an ancient practice in which, historically, young girls had little agency. Often they were sold as virgins into prostitution or marriage by fathers or pimps. See, e.g., WILLIAM W. SANGER, *THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES AND EFFECTS THROUGHOUT THE WORLD* 413 (1974) (stating that in rural Sumatra “interest causes the parents to be watchful of their daughters, because the selling price of a virgin is far above that of a woman who has been defiled”); *id.* at 391 (reporting that in Berber culture, “[a] virgin may be purchased, either

Moreover, at the heart of the commodification objection lies the contention that one person's taboo transaction degrades for all the intimate items and activities that are the subject of sale.<sup>24</sup> Dylan's highly public approach, with numerous television talk show appearances and mainstream and Internet media attention, brought her actions into the living room of unwilling observers, fueling fears that her actions would affect us all.

Yet objections stemming from Dylan's self-promotion, self-pimping, and aggressive marketing should also give pause: is conduct undertaken with adept self-marketing—in other words, a taboo transaction calculated to maximize the autonomy and economic gains to the supplier—really more objectionable than the same product offered less effectively? The answer to this question may be “yes,” though not consciously so, and relates to what I believe is at the heart of the distaste prompted by the Dylan virginity auction and the other taboo trades discussed in this Article.

The commodification objection, by its very nature, is more outraged by a taboo trade—here, the sale of virginity—undertaken openly, aggressively, and in a public, intentional, and highly deliberative manner (in other words, through the same mechanisms likely to increase Dylan's agency, self-control, and monetary reward) than by the same activity pursued covertly or with shame.<sup>25</sup> For that reason, commodification objections are an uncomfortable vehicle through which to package concerns about women's economic and social well-being.<sup>26</sup> If Dylan had promoted herself less effectively,

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as a wife or a concubine, for a horse”); Mary Beard & John Henderson, *With This Body I Thee Worship: Sacred Prostitution in Antiquity*, 9 GENDER & HIST. 480, 484 (1997) (discussing Herodotus's story of the “rounding up” of virgins in Babylon to be auctioned off for marriage); Ryan, *supra* note 18 (discussing virginity sales as a rite of passage into prostitution in India). Moreover, Dylan is exploiting, by muddying, a classic good girl/bad girl, virgin/whore divide—an exploitation that she openly acknowledges. See Interview by Tyra Banks with Natalie Dylan, on *The Tyra Banks Show* (CW television broadcast Nov. 3, 2008), available at <http://www.youtube.com/watch?v=do3otUSbTpA>.

24. See *supra* notes 11 and 12 and accompanying text (discussing commodification).

25. In other words, such public, intentional, highly deliberative acts impact Society's sensibilities most profoundly, particularly when the actor fails to express the shame or remorse normally exhibited by those caught in a comparable social transgression. Consider, for example, whether reactions to Dylan's plans would have been more muted had she said instead, “I'm so ashamed about this, but I need the money and feel this is necessary,” rather than proudly proclaiming her virginity sale an empowering, pro-choice act. Dylan, *supra* note 1; Interview by Tyra Banks with Natalie Dylan, *supra* note 23.

26. This tension is similar to the “double bind” recognized by Margaret Jane Radin. Radin, however, ultimately supports some forms of partial commodification. See *infra* notes 106–08 and accompanying text (discussing Radin's approach to partial commodification).

garnered less attention, or generated lower financial returns, then her auction would have been treated with the same relative indifference accorded the millions of similar trades that occur each year, largely without notice.

The taboo nature of Dylan's transaction provided her with tangible monetary benefits, of course: the rarity of such virginity auctions is what promises such fantastic returns. But the role of stigma as a barrier to market entry is well-discussed in the literature on taboo markets, reducing the opportunities for would-be virginity auctioneers and, given certain assumptions, decreasing returns to suppliers as a group.<sup>27</sup>

## II. SEE ME, FEEL ME, TOUCH ME, TAX ME

In July of 2009, Oakland, California, became the first U.S. city to levy a special tax on the proceeds from medical marijuana sales.<sup>28</sup> The tax passed with the support of the city council and by a landslide vote, with about eighty percent of voters endorsing the tax.<sup>29</sup> No formal opposition emerged to the legislation, although some believe that the tax “ ‘sends the wrong message’ ” regarding the social acceptability of drug use.<sup>30</sup> But, says Oakland city councilwoman Rebecca Kaplan, “ ‘Given that the medical cannabis dispensaries are something that was legalized in California, why not have revenue from it?’ ”<sup>31</sup>

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27. See, e.g., Mark Koyama, *Evading the 'Taint' of Usury: Complex Contracts and Segmented Capital Markets*, 1–33 (Econ. Series Working Papers, No. 412, 2008) (demonstrating that the religious ban on lending money with interest created a barrier to entry that enabled secular rulers, the Church, and a small number of merchant bankers to earn rents); Marina Della Giusta, Maria Laura Di Tommaso & Steinar Strøm, *Who Is Watching? The Market for Prostitution Services*, 22 J. POPULATION ECON. 501, 502–16 (2009) (discussing the role of stigma in the supply, demand, and price of prostitution services).

28. Oakland's Measure F became effective January 1, 2010, and amends Oakland's Business Tax (Chapter 5.04 of the Oakland Municipal Code) by adding section 5.04.480 to establish a new tax rate for “Cannabis Businesses” of \$18 for every \$1,000 of gross receipts from the businesses' activity in Oakland. Previously, cannabis businesses in Oakland were taxed at the rate for retail sales businesses of \$60 per year for the first \$50,000 of gross receipts, and \$1.20 for each \$1,000 thereafter. City Of Oakland, Ballot Measure F, available at <http://www.oaklandnet.com/documents/WebInfoJuly2009.pdf>; Oakland City Council, Res. No. 81925 C.M.S. (Apr. 21, 2009), available at <http://clerkwebsvr1.oaklandnet.com/attachments/21843.pdf>.

29. *Oakland, California Passes Landmark Marijuana Tax*, CNN, July 22, 2009, <http://www.cnn.com/2009/POLITICS/07/22/california.pot.tax/index.html>; Stu Woo, *Oakland Council Backs a Tax on Marijuana*, WALL ST. J., Apr. 30, 2009, <http://online.wsj.com/article/SB124105239168771233.html>.

30. Woo, *supra* note 29 (quoting a Southern California resident who recently founded Coalition for a Drug Free California).

31. *Oakland, California Passes Landmark Marijuana Tax*, *supra* note 29.

Other cash-strapped municipalities and states, seeking to close budget shortfalls, may try to follow Oakland's lead. On July 15, 2009, the Los Angeles City Council proposed a tax on medical marijuana;<sup>32</sup> Berkeley, San Francisco, and other California cities may consider similar taxes;<sup>33</sup> and California Assemblyman Tom Ammiano has proposed legislation to legalize and tax marijuana in California that would generate an estimated \$1.4 billion in state revenue per year.<sup>34</sup>

Compare this to the story of Nevada Senate Bill No. 369 ("SB 369"),<sup>35</sup> which would have imposed a special tax on the legal Nevada brothel industry.<sup>36</sup> Unlike the Oakland pot tax, SB 369 died in the spring of 2009 after a 3–4 vote in the state's Senate Taxation Committee, despite support from many sex workers and the brothel industry.<sup>37</sup>

Noting the state's desperate fiscal situation, Senate Taxation Committee Chairman Bob Coffin supported the tax, which he estimated would generate an additional \$2 million per year in state revenues.<sup>38</sup> Coffin argued that, although the brothel industry welcomed the tax and the idea of generating tax revenue from the brothels had been discussed for years, " 'people weren't willing to get their hands dirty.' "<sup>39</sup> " 'I don't know why people won't recognize that

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32. Julie Strack, *Oakland Voters OK a Tax on Medical Pot*, L.A. TIMES, July 22, 2009, at A4.

33. Angela Woodall, *Medical Marijuana Touted as Cure for Cities' Budget Woes*, MONTCLARION (Alameda, Cal.), July 31, 2009, at 2A ("Other California cities, including Berkeley, San Francisco, Santa Cruz, and Los Angeles, have all discussed a tax on medical marijuana or have plans to pursue a tax.")

34. John Diaz, *Oakland Finds Peace with Its Pot Clubs*, S.F. CHRON., July 19, 2009, at E2; see also Wyatt Buchanan, *State Debates Legalizing Marijuana*, S.F. GATE, Oct. 29, 2009, [http://articles.sfgate.com/2009-10-29/bay-area/17184614\\_1\\_marijuana-taxes-pot](http://articles.sfgate.com/2009-10-29/bay-area/17184614_1_marijuana-taxes-pot) (discussing the hearings on AB 390).

35. S. 369, 2009 Leg., 75th Reg. Sess. (Nev. 2009), available at <http://www.leg.state.nv.us/75th2009/Bills/SB/SB369.pdf>.

36. *Id.* The bill would have imposed an excise tax in the amount of five dollars per day on any patron using the services of a prostitute, established an office of Ombudsman for Sex Workers, and created an account in the State General Fund for expenditure to carry out the duties of Ombudsman. *Id.*

37. *Proposed Nevada Prostitution Tax Dies On 3–4 Committee Vote*, KVBC NEWS 3, Apr. 10, 2009 (on file with the North Carolina Law Review). Similar bills were proposed, but never passed, in prior years. *Nevada Brothels Want to Be Good Neighbor: Legal Businesses Seek to Pay Taxes*, MSNBC, May 10, 2005 [hereinafter *Nevada Brothels Want to Be Good Neighbor*], <http://www.msnbc.msn.com/id/7805733/>.

38. *Prostitution Tax Proposed in Nevada*, NPR, Mar. 24, 2009, <http://www.npr.org/templates/story/story.php?storyId=102314296>.

39. *Id.*

we have a legal industry,' ” said Coffin. “ ‘I’m willing to go in and do the dirty work if no one else will.’ ”<sup>40</sup>

The overwhelming support for each of these proposed taxes from the targeted taxpayers—California marijuana dispensaries and Nevada brothels—is both unusual and, at first blush, surprising. Normally, industries seek tax concessions, rather than tax liability.<sup>41</sup> Yet, Oakland’s four legal cannabis clubs led the effort to get the tax approved, though the new tax will impose on them an estimated additional yearly tax burden of between \$400,000 and over \$1 million.<sup>42</sup> Los Angeles’s medical marijuana dispensaries support a similar tax,<sup>43</sup> and the Nevada brothel industry (and many of the sex workers employed by it) have long supported taxation and testified in favor of the proposed tax during debate on the issue.<sup>44</sup>

The political and other issues surrounding the municipal medical marijuana tax are, of course, not identical to those posed by the Nevada state brothel tax. Nonetheless, the two events raise several interesting common questions. First, why would any industry actively seek to increase its tax liability? Second, why would any government facing budget shortfalls and cutbacks in important state services forgo additional tax revenue, particularly when the industry subject to the proposed tax favors it and, in fact, has lobbied for taxation?

#### A. *Courting Taxes: The Industry Story*

Why might the Nevada brothels and California marijuana dispensaries be so eager to pay additional taxes? Both are highly profitable businesses operating at the edge of legality and social acceptance, whose entire business could be eradicated through a single legislative decision. The possibility of an additional tax burden affects this calculus in at least three ways.

First, if the state derives revenue from an industry, that industry is likely to wield more political clout. Moreover, as the state’s dependence on those revenues increases, it is less likely to terminate or jeopardize them by outlawing or significantly curtailing the activity

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40. *Id.*

41. Recent attempts to control obesity rates and the associated health care costs, for example, have resulted in proposals to heavily tax some high-calorie foods and beverages. Makers of these products have been vocal opponents of such taxes. *See, e.g.,* Muhtar Kent, *Coke Didn’t Make America Fat*, WALL ST. J., Oct. 7, 2009, at A17.

42. Woo, *supra* note 29.

43. Gene Maddaus, *Hahn Wants to Tax LA Marijuana Dispensaries*, DAILYBREEZE, July 15, 2009, [www.dailybreeze.com/ci\\_12846576](http://www.dailybreeze.com/ci_12846576).

44. *See Proposed Nevada Prostitution Tax Dies on 3–4 Committee Vote*, *supra* note 37.

through onerous regulations.<sup>45</sup> These are important considerations for traditionally taboo industries, such as sex and marijuana.

Second, although few today contend that applying a general tax to disapproved activities carries symbolic weight,<sup>46</sup> the special taxation of a legal good or activity implicitly suggests its acceptance as part of mainstream culture and economic activity. Taxation, then, can sometimes purchase a measure of legitimacy.<sup>47</sup>

Although “sin taxes” are designed to discourage an activity by increasing the associated economic costs and conveying public disapproval, the special taxation of legal activities does at least recognize the taxed product or service as a major economic activity.<sup>48</sup> Indeed, this potential legitimizing effect has been a source of historical resistance to some sin taxes, including slave taxes,<sup>49</sup> and

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45. Cf. Stephanie Saul, *Government Gets Hooked on Tobacco Tax Billions*, N.Y. TIMES, Aug. 31, 2008, at WK3 (arguing that state and federal reliance on tobacco tax revenues “essentially provides a financial cushion for state governments and could be viewed as a government guarantee for the survival of the tobacco industry”); Young Kyung Do & Kidong Park, *Local Governments’ Dependence on Tobacco Tax Revenue: A Deterrent to Tobacco Control in the Republic of Korea*, 87 BULL. WORLD HEALTH ORG. 692, 692–99 (2009) (“The main results of this study show that local governments’ dependence on TCT revenue is associated with lower commitment to tobacco control in the Republic of Korea.”).

46. See, e.g., *James v. United States*, 366 U.S. 213, 213–22 (1961) (holding income from illegal activity taxable); Boris I. Bittker, *Taxing Income from Unlawful Activities*, 25 CASE W. RES. L. REV. 130, 140–47 (1975) (tracing Supreme Court case law on the inclusion in taxable income of the proceeds from illegal activities and concluding that, as a policy matter, inclusion is appropriate).

47. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 5 (1996) (arguing that the law’s denial of housework’s “status as work is costly to those who perform it”); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1571–74, 1589–99 (1996) (arguing that the failure to tax nonmarket housework delegitimizes it and also causes women to forego economic benefits, including social security, Medicare, and disability). *But see* Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1538–40 (1998) (contesting Staudt’s claims regarding the symbolic effect of taxing housework).

48. See Mark Thornton, *Prohibition: The Ultimate Tax*, in *TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION* 171, 172 (William F. Shughart II ed., Transaction Publishers 1998) (1997) (“[S]ome radical prohibitionists oppose selective excise taxation on the grounds that it represents an alliance between their government and the ‘forces of evil.’”). The legitimizing effect, if any, of special taxes on *illegal* activities (typically, excise taxes on illegal drugs) is more contestable. See, e.g., *Waters v. Farr*, 291 S.W.3d 873, 882–87 (Tenn. 2009) (discussing the history of the taxation of illegal substances at both the federal and state levels).

Related to “sin taxes” are Pigouvian taxes, designed to force actors to internalize the negative costs associated with their actions. See generally W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, 9 TAX POL’Y & ECON. 51 (1995) (discussing cigarette taxes as a sin tax and a Pigouvian tax).

49. See, e.g., 1 ANNALS OF CONG. 338 (Joseph Gales ed., 1834) [Fisher Ames of Massachusetts] (“[N]o one could suppose him favorable to slavery; he detested it from his

courts have struggled with the potential unseemliness of collecting public revenues from condemned activities.<sup>50</sup> At the very least, it is difficult to pretend that an activity is not occurring if we specifically tax and derive public revenue from it.

Third, being seen as a “good neighbor” who contributes to the local economy and provides tangible public benefits, such as funding for schools, parks, and the like, can increase public acceptance of a particular business or industry. Much corporate charitable giving, for example, is defended on exactly this basis.<sup>51</sup>

### B. *Avoiding Taxes: The Government's Story*

The other interesting side of the coin, however, is why any government would forgo a potential additional revenue source, particularly in times of economic hardship. Just as industries typically seek to minimize their tax burden, governments typically seek to maximize their tax base.

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soul; but he had some doubts whether imposing a duty on the importation would not have the appearance of countenancing the practice.”); 13 ANNALS OF CONG. 1025 (1804) [Thomas Lowndes of South Carolina] (“When a Government, by laying taxes, derives a revenue from a trade, and by that means participates in the profits and the gains of it, it is in my opinion giving an approbation of it.”); *id.* at 1029 [Roger Griswold of Connecticut] (“[B]ut if the raising of it [tax revenues from slavery] be connected with the passage of a law that recognizes a traffic in human flesh . . . I, for one, must protest against it.”); *see also*, Joel S. Newman, *Slave Tax as Sin Tax: 18th and 19th Century Perspectives*, 101 TAX NOTES 1019, 1026–28 (2003) (excerpting the above quotes and discussing the moral debates surrounding slave taxes in the antebellum United States). Proponents of slave taxes disputed the characterization of slave taxes as legitimizing. *Id.* (“In taxing it [slavery] we do not assume its rightfulness. We only assume its undeniable existence as a fact, and nothing else.” (quoting Charles Sumner of Massachusetts)).

50. *See, e.g.*, *Steinberg v. United States*, 14 F.2d 564, 566–67 (2d Cir. 1926). The case held the defendant’s illicit liquor income taxable despite noting

[t]hat the winnings of a professional gambler, the loot of a burglar, the bribes of a dishonest official, the wages of a prostitute, or the profits of any criminal commerce should not be regarded as income, but should for reasons of public policy be regarded as beneath the contempt of the law, is a proposition not without attraction.

*Id.*

51. *See, e.g.*, *Kahn v. Sullivan*, 594 A.2d 48, 51, 62 (Del. 1991) (finding that Occidental Petroleum received an economic benefit from its charitable donation to Los Angeles County Art Museum, in the form of goodwill); 18B AM. JUR. 2D *Corporations* § 1801 (2009) (observing that corporate charitable donations are generally upheld as a means of “increasing goodwill and promoting patronage”); Graham Bowley, *\$500 Million and Apology from Bank*, N.Y. TIMES, Nov. 18, 2009, at A1 (suggesting that Goldman Sachs created a large charitable fund in an attempt to quell public anger over its large bonuses and role in the financial crisis).

The public statements of Nevada's legislators, governor, and citizen opposition groups explicitly invoked an unwillingness to provide a stamp of government approval to Nevada's brothel industry as the source of opposition to the brothel tax.<sup>52</sup> This resistance is consistent with other Nevada laws and policies. Although prostitution is legal in Nevada, the state continues to keep the industry at a distance. For example, in addition to the refusal to impose a special business tax on brothels, the state also restricts their advertising and prohibits their operation in the state's two largest urban areas: Las Vegas and Reno.<sup>53</sup>

In contrast, California is one of only thirteen states to legalize medical marijuana, and marijuana distribution is still illegal under federal law.<sup>54</sup> Yet, the increasing political palatability of pot taxes—along with other factors—may signal a change in public (or, at least, Californians') perspectives on the legitimacy of this activity.<sup>55</sup>

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52. Brendan Riley, *Brothel Tax Fails to Arouse Nevada: Sin State Has Never Taxed Legal Sex Biz*, COMMERCIAL APPEAL (Memphis, Tenn.), Apr. 5, 2009, at A8 (noting that opposition to the bill is rooted in fears that taxing the industry legitimizes it); *Nevada Brothels Want to Be Good Neighbor*, *supra* note 37 (attributing the governor's opposition to his belief that the bill would "affirm[] the industry").

53. *Nevada Brothels Want to Be Good Neighbor*, *supra* note 37. Ten Nevada counties authorize prostitution through local ordinance, two have no laws on the subject, and two (those containing the cities Reno and Las Vegas) prohibit it. *Prostitution Tax Proposed in Nevada*, *supra* note 38. See NEV. REV. STAT. ANN. § 244.345(8) (LexisNexis 2005) (prohibiting the licensing of houses of prostitution in counties with a population of 400,000 or more); WASHOE COUNTY, NEV., CODE ch. 53, § 170 (2009), available at [www.co.washoe.nv.us/clerks/files/pdfs/county\\_code/Chapter053.pdf](http://www.co.washoe.nv.us/clerks/files/pdfs/county_code/Chapter053.pdf) (prohibiting prostitution under heading of "disorderly conduct"). Nonetheless, two of the three favorable Committee member votes were from Las Vegas senators. *Proposed Nevada Prostitution Tax Dies on 3-4 Committee Vote*, *supra* note 37.

54. Roger Parloff, *How Pot Became Legal: Medical Marijuana Is Giving Activists a Chance to Show How a Legitimized Pot Business Can Work. Is the End of Prohibition Upon Us?*, FORTUNE, Sept. 18, 2009, at 141. In October 2009, however, the Obama administration formally clarified that it would not spend federal enforcement or prosecutorial resources on medical marijuana providers operating "in clear and unambiguous compliance with existing state laws." Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at <http://blogs.usdoj.gov/blog/archives/192>.

55. A recent Field Poll indicates that fifty-six percent of Californians favor legalizing and taxing marijuana. Mark DiCamillo & Mervin Field, Field Research Corp., *While California Voters Prefer Spending Cuts to Tax Increases to Resolve the State Budget Deficit, Majorities Oppose Cutbacks in Ten of Twelve Spending Categories*, FIELD POLL, Apr. 30, 2009, at 2, available at <http://field.com/fieldpollonline/subscribers/RIs2306.pdf>.



*C. The Results*

The differing outcomes of the Oakland pot and Nevada brothel tax efforts are meaningful in both tangible and intangible ways. Both the dispensaries and the brothel industry (and many of the sex workers employed by it) actively supported the taxes, meaning that they perceived some benefit from taxation that outweighed its costs. As discussed, these benefits are most likely political influence, legal security, and social legitimacy. The medical marijuana dispensaries were granted these benefits—largely without debate or opposition—whereas the brothels were not. The brothel tax also would have provided more direct benefits to sex workers through the creation and funding of an Ombudsman's office providing counseling, job training, and other social services to sex workers.<sup>56</sup>

What are the countervailing public costs and benefits of Nevada's "no tax" stance? The decision clearly imposes public costs in terms of forgone revenues. Presumably, the continued denial of sex work as an important economic and social institution in Nevada is a benefit in the eyes of the bill's opponents, and this rationale was invoked in opposition to the bill.<sup>57</sup>

This tendency to stigmatize sex work, rather than acknowledge its market status, while at the same time tolerating the industry as one providing a necessary service, is neither new nor limited to Nevada. In fact, it pervades the history of society's uneasy accommodation of prostitution.<sup>58</sup>

As with the Natalie Dylan example discussed in Part I, the taboo nature of sex markets undoubtedly confers some benefit to providers—in this case, a lower tax burden than would have prevailed if the brothel tax had passed. Yet, by their support of taxation, the

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56. See S. 369, § 30, 2009 Leg., 75th Reg. Sess. (Nev. 2009), available at <http://www.leg.state.nv.us/75th2009/Bills/SB/SB369.pdf>.

57. See *supra* note 52 and accompanying text.

58. See NUSSBAUM, *supra* note 12, at 286–88. (discussing historic fears of the particularly dangerous nature of prostitution as both necessary—in order to satisfy male sexual desires that, if unmet, would seek other more harmful outlets—yet in need of strict control, lest female sexuality assume too much power and “fallen women” undermine the institution of marriage); Kathryn Hausbeck & Barbara G. Brents, *Nevada's Legal Brothels*, in *SEX FOR SALE*, *supra* note 15, at 255, 273–76 (stating that the Nevada Brothel Association “believes that keeping quiet is strategically best,” that prostitution must remain “a largely hidden exchange” in order to coexist with the local community, and discussing other industry attempts at “quiet compliance” in order to preserve the status quo).

brothel industry and its employees signaled their assessment that the benefits of taxation outweighed the burdens.<sup>59</sup>

Returning to the same commodification, coercion, and repugnance concerns raised in connection with the Dylan virginity auction, the societal willingness to tolerate certain taboo transactions, so long as they are relegated to the shadows, is highlighted even more starkly by Nevada's failed brothel tax. Commodification and coercion objections were largely absent from the tax debate, as deriving additional state revenue from an already legal activity is rarely perceived as additionally commodifying or coercive.<sup>60</sup> Instead, the primary articulated objection to the tax was the desire to avoid a public stamp of approval on sex work—in other words, a refusal to imply that sex work is a lucrative business in Nevada, similar to many others. One might suggest, then, that the sex industry pays the price for the state's desire to derive the benefits from legal prostitution while still denying full market status to sex work.

### III. SUNNY SAMARITANS OR ENTREPRENEURS?

In June 2009, in a sharp divergence from the guidelines of some scientific organizations and the laws of other states, New York became the first state to allow taxpayer-funded researchers to pay women for oocytes used in stem cell research.<sup>61</sup> The decision is controversial, both because of the underlying debate surrounding stem cell research, and because of a lingering conviction in some quarters that women should not receive payment in exchange for reproductive material.<sup>62</sup> Although there are many differences between egg donation and sperm donation (as well as between egg

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59. Cf. Giusta et al., *supra* note 27, at 514 (“[P]olicies that recognise prostitution as a job and reduce the stigma associated with it will have the effect of increasing the marginal net gain of supplying prostitution and increase the marginal willingness to pay for prostitution. This should, in a closed economy, have the effect of increasing the price of prostitution and, . . . also increase the quantity supplied.”).

60. Indeed, some provisions of the failed bill were designed to address trafficking concerns and provide social services to sex workers—actions aimed at reducing the coercion or exploitation of sex workers, rather than enhancing it. See *Proposed Nevada Prostitution Tax Dies on 3–4 Committee Vote*, *supra* note 37 (discussing anti-trafficking provisions); *supra* note 36 (discussing the proposed use of proceeds).

61. Rob Stein, *N.Y. To Pay For Eggs For Stem Cell Research*, WASH. POST, June 26, 2009, at A4.

62. *Id.* (reporting opposition to nonaltruistic oocyte donation); Petition at 2, *Feminists Choosing Life of N.Y. v. Empire State Stem Cell Bd.*, No. 8594 (N.Y. Sup. Ct. Oct. 9, 2009) (challenging the New York program); Cathleen F. Crowley, *Abortion Foes Challenge Pay for Egg Donors*, TIMES UNION (Albany, N.Y.), Oct. 15, 2009, at A3 (reporting on the lawsuit filed by the New York anti-abortion group Feminists Choosing Life against the New York State Stem Cell Board).

donation and other types of human tissue and plasma donation), this section focuses on one notable distinction between egg and sperm markets: presumed donor motivations and the resulting attempts to cap egg donor compensation.<sup>63</sup>

A. *Price Controls in the Egg Market*

In the United States, payment has long been provided for eggs and sperm used in fertility treatments. Data suggest that in 2006 alone nearly 55,000 children in the United States were born through assisted reproduction, more than 9,000 of whom were created through the use of “donated” eggs.<sup>64</sup>

Notwithstanding this active oocyte market, controversy continues to surround the issue of payments to egg donors. Despite the overwhelming evidence to the contrary, many contend that egg donors are—and should be—motivated primarily by altruism and a desire to help the infertile, rather than by the desire for monetary compensation. This insistence is evident in egg donor recruitment

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63. Due to NOTA's ban on organ donor compensation (which is defined to include bone marrow), there is no legal market in human organs or bone marrow, and severe shortages exist. Krawiec, *supra* note 5, at vii–viii (discussing NOTA's ban on compensation and resulting organ shortages and controversy); *see also* Complaint for Declaratory and Injunctive Relief at 2–51, *Flynn v. Holder*, No. CV-09-07772 (C.D. Cal. Oct. 26, 2009) (challenging NOTA's ban on compensated bone marrow donation). Plasma, in contrast, is not covered by NOTA and payment is commonplace. *See* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, LAW & CONTEMP. PROBS., Summer 2009, at 59, 85–87 (comparing and contrasting plasma donation with egg donation and discussing antitrust action). In the United States, blood is typically procured from donors who receive no monetary compensation, but who may receive other rewards, such as t-shirts, jackets, coolers, blankets, and gift cards. *See* Nicola Lacetera, Mario Macis & Robert Slonim, *Will There Be Blood? Incentives and Substitution Effects in Pro-social Behavior* 7 (Inst. for Study of Lab. (IZA), Discussion Paper No. 4567, 2009), available at <http://ftp.iza.org/dp4567.pdf>. Finally, as elaborated in this section, the sperm market is robust, and appeals to donor altruism are rare. Markets in breast milk, while more controversial, appear similarly active. *See generally* Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Human Milk and Infant Formula*, 10 NEV. L.J. 29 (2009) (discussing the market for breast milk); Sarah Waldeck, *Encouraging a Market in Human Milk*, 11 COLUM. J. GENDER & L. 361, 362 (2002) (discussing altruistic breast milk donation programs and advocating markets in breast milk to increase supply).

Thus the oocyte market, consisting of transactions that are touted as altruistic, yet in which large sums change hands, and a market that is theoretically competitive, but characterized by open industry price-fixing, is not comparable to other transactions involving human tissue or fluids.

64. CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 13, 56–59 (2008) (providing data on assisted reproductive technology (“ART”) births and ART births using donor eggs, from which the number of donor egg births is estimated).

materials, which nearly always reference altruistic motivations and the ability to help others.<sup>65</sup> It is also evident in fertility-center and donor-agency screening practices that eliminate as unacceptable potential egg donors who claim monetary compensation as the overriding motivation for egg donation.<sup>66</sup> Indeed, donor-agency staff express disgust and revulsion toward egg donors just in it “‘for the money’ ”<sup>67</sup> or “‘attempt[ing] to make a ‘career’ ” out of egg donation.<sup>68</sup>

At some level, this insistence on the altruistic motives of egg donors is driven by customer demand: donor-agency staff report a belief that fertility customers do not want egg donors who reveal monetary motivations for the desire to donate,<sup>69</sup> and sociological research has shown that donor-agency staff spend significant amounts of time coaching egg donors, but not sperm donors, on how to appropriately package their personalities and their reasons for wanting to become a donor.<sup>70</sup> That package includes a desire to help those who are infertile and downplays profit motivations.

Moreover, egg donors themselves may contribute to this discourse. Like surrogates, many egg donors report other-regarding motivations as at least a partial rationale for their decision to donate.<sup>71</sup> In addition to normalizing what is otherwise a jarring dichotomy (mothers are supposed to love their offspring, not transfer them for money), there is an obvious appeal to believing that one’s selfless behavior helps another.<sup>72</sup>

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65. See Krawiec, *supra* note 63, at 60–61 (discussing egg donor ads and recruitment materials).

66. Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 327–34 (2007) (discussing egg donor screening practices).

67. *Id.* at 327 (quoting the director of an egg agency).

68. *Id.* at 334.

69. As one egg donor-agency director stated, “[Customers] want to know that the person donating is a good person. They want to know that person wasn’t doing it for the money.” *Id.* at 327.

70. *Id.* at 329–30.

71. HELENE RAGONÉ, *SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART* 52–68 (1994) (reporting the results of surrogate interview-based research); Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, J.L. MED. & ETHICS, Spring 2007, at 300, 304–06 (reviewing surrogacy studies); L.R. Shover, S.A. Rothmann & R.L. Collins, *The Personality and Motivation of Semen Donors: A Comparison with Oocyte Donors*, 7 HUM. REPROD. 575, 575–79 (1992) (studying a sample of egg and sperm donors and finding that sperm donors are significantly more likely to report solely or primarily profit motives, whereas egg donors are more likely to report solely or primarily altruistic motives).

72. See RAGONÉ, *supra* note 71, at 85–86 (noting that surrender of a child is considered counter to maternal instinct and that a surrogate’s decision to give up her child

But the presumption that women should donate oocytes out of altruism is echoed by the media, the general public, and by many academics and ethicists.<sup>73</sup> In the face of such social pressure, the stated motivations of donors are obviously suspect.<sup>74</sup> Experience suggests that such fuzzy feelings alone are generally insufficient to induce egg donors into uncompensated donations for strangers. Instead, the experience of the stem cell industry and of countries (such as the United Kingdom, Japan, and Canada) with restrictive laws curtailing egg donor compensation illustrate the limitations of a reliance on female altruism alone, as each has experienced severe egg shortages.<sup>75</sup>

These concerns regarding compensated egg donation are reflected in the payment caps adopted in New York: the Empire State Stem Cell Board resolution requires researchers to follow the American Society for Reproductive Medicine (“ASRM”) compensation guidelines,<sup>76</sup> which state that “sums of \$5,000 or more require justification and sums above \$10,000 are not appropriate.”<sup>77</sup> As I demonstrate at length elsewhere, the ASRM-SART (Society For Assisted Reproductive Technology) oocyte-donor compensation

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“may appear incomprehensible within the context of the values associated with motherhood in American culture”).

73. See, e.g., Krawiec, *supra* note 63 at 72–76; *id.* at 84–85 (detailing various objections to compensated egg donation, at least beyond certain levels); Stein, *supra* note 61 (quoting various critics of the New York decision to compensate egg donors in connection with stem cell research).

74. Moreover, egg donors, but not sperm donors, are recruited with materials that highlight the ability to help others, rather than the ability to earn money; egg donors reporting primarily financial motivations for the decision to donate are excluded from consideration as donors; and donor-agency staff frequently coach egg donors, but not sperm donors, on the need to express altruistic motives for the donation in order to appeal to prospective purchasers, all of which skew such results. See *supra* notes 65–70 and accompanying text; see also Drabiak et al., *supra* note 71, at 305 (“[S]urrogates’ responses regarding income received from any contract may represent a kind of social response bias, in which surrogates who have been interviewed feel socially pressured to provide a socially acceptable justification for their activity.”).

75. Krawiec, *supra* note 63, at 66 n.30 (discussing reproductive tourism in the United States prompted by other countries’ restrictions on paid oocyte donation); *id.* at 72 n.66 (discussing restrictions on oocyte payments for stem cell research and resulting shortages).

76. Empire State Stem Cell Bd., Resolution of the Funding Comm. Regarding Recommended Standards for the Comp. of Women Donating Oocytes Solely for Research Purposes (June 11, 2009), [http://stemcell.ny.gov/docs/Compensation\\_of\\_Gamete\\_Donors\\_resolution\\_of\\_Funding\\_Comm.pdf](http://stemcell.ny.gov/docs/Compensation_of_Gamete_Donors_resolution_of_Funding_Comm.pdf).

77. The Ethics Comm. of the Am. Soc’y for Reprod. Med., *ASRM Ethics Committee Report: Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 308 (2007).

guidelines amount to horizontal price-fixing of the type long considered per se illegal in other industries.<sup>78</sup>

*B. The Cost of Donor Caps*

The New York payment limits are sufficiently high that they are unlikely to have any practical effect on the ability to recruit and pay egg donors for stem cell research. Nonetheless, the trend of formally limiting compensation to women for the provision of a valuable, time-consuming, and uncomfortable service that poses some health risks is disturbing for several reasons.

First, The ASRM-SART oocyte-donor compensation guidelines may depress the price of some eggs used in fertility treatments, depending on the effectiveness of those guidelines. Such price suppression would entail real costs to both consumers of fertility services, in the form of higher prices and less consumer choice, and to oocyte providers, in the form of lost compensation.<sup>79</sup>

Though egg donor compensation data is of questionable reliability,<sup>80</sup> egg donor rates in the United States appear to vary widely, with prices as low as \$1,500 and as high as \$150,000 reported, though there are allegations that offers at the high end of this spectrum are fraudulent advertisements designed to increase agencies' donor pools.<sup>81</sup> Surveys of fertility clinics and donor agencies listed with SART report less stratospheric numbers: average compensation rates per donation cycle of \$4,217 and \$5,200, respectively, although these figures may understate actual averages.<sup>82</sup>

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78. See generally Krawiec, *supra* note 63.

79. *Id.* at 81–83 (discussing the effects of a successful ASRM-SART pricing agreement and of competitive monopsonies more generally).

80. Systematic egg donor compensation data derives from two sources: (1) self-reported egg donor agency and fertility center information and (2) egg donor ads taken from college newspapers, the Internet, campus marketing materials, and the like. *See id.* at 66 & n.31. The self-reported data, though collected anonymously, unsurprisingly suggests that SART-affiliated clinics and agencies are in compliance with ASRM-SART member and affiliate self-regulatory guidelines. *See id.* at 75. This information must be approached with the same caution accorded other declarations of compliance with industry self-regulation. The second source reveals only the initial offer price, rather than the purchase price, which could be higher (if desirable egg donors negotiate upward) or lower (if, as has been alleged, many very high monetary offers are fraudulent attempts to increase an agency's donor pool). *Cf. id.* at 66–67, 88–89 (discussing both data sources and their limitations in more detail).

81. *Id.* at 66–67, 89 n.165; ADVISORY GROUP ON ASSISTED REPROD. TECHS., N.Y. STATE TASK FORCE ON LIFE & THE LAW, THINKING OF BECOMING AN EGG DONOR? 7 (2009), available at <http://www.health.state.ny.us/publications/1127.pdf>.

82. Sharon N. Covington & William E. Gibbons, *What Is Happening to the Price of Eggs?*, 87 FERTILITY & STERILITY 1001, 1002–03 (2007) (reporting averages from a

A comparison of this admittedly imperfect egg donor compensation survey data to sperm donor compensation data provides some support for theories of price suppression: egg and sperm donors receive a roughly equal average hourly compensation of between \$75 and \$93 for time spent in a medical setting.<sup>83</sup> This is despite the fact that—because egg donation requires hormone therapy, whereas sperm donation does not—egg donors face pain, discomfort, and health risks not faced by sperm donors, and these risks and side effects extend beyond the time spent in a medical setting.<sup>84</sup> Presumably egg donors would demand and—under normal market conditions—receive, additional compensation due to these factors.

Yet, sperm donor compensation has generated comparatively little controversy or discussion in the United States.<sup>85</sup> Indeed, the insistence on the altruistic motivations of egg donors is in stark contrast to the presumed motivations of sperm donors, who are recruited through materials that ask, “Why not get paid for it?” and advertise, “your sperm can earn!”<sup>86</sup> This belief that sperm donors are motivated primarily by a desire for monetary compensation is so persistent that potential donors expressing altruistic motivations are frequently viewed with suspicion and presumed to harbor an egomaniacal desire to propagate.<sup>87</sup>

Even if the apparent undercompensation of egg donors is the result of survey underreporting, as opposed to successful price suppression, one must still question what other purpose the ASRM-SART agreement serves. ASRM, SART, and SART-member clinics, doctors, and affiliated egg donor agencies spend time, effort, and

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survey of SART-affiliated clinics, and from agency Web sites that are registered with SART).

83. Krawiec, *supra* note 63, at 66–67 (demonstrating the sources for, and calculations of, these figures).

84. *Id.* at 63–65.

85. *Id.* at 70–71. A review of sperm bank Web sites suggests that payments of between \$50 and \$100 per usable sample are common. This is consistent with the \$75 figure reported by other sources as the national average. Many sperm banks increase payment levels upon the completion of stated goals and pay bonuses for a variety of acts, including the successful referral of another sperm donor, completing the six-month exit blood test, and agreeing to the release of identifying information to offspring. *Id.*

86. *Id.* at 71.

87. *Id.* at 71–72. Both stereotypes are gross oversimplifications of the motives of egg and sperm donors, the bulk of whom express a mix of altruistic and monetary motivations for their decision to donate. Shover et al., *supra* note 71, at 575–76 (discussing self-reported motivations of egg and sperm donors); *supra* notes 65–70 and accompanying text (discussing differential recruitment, selection, and other factors that likely skew such findings).

money creating (at a minimum) the appearance of cartel enforcement.<sup>88</sup> Yet, cartels are notoriously difficult to sustain. Why exert such effort, if not in the pursuit of above-market profits?

The most plausible alternative scenario is a desire to avoid industry controversy, including controversy related to egg donor compensation. Negative public attitudes toward fertility treatments threaten to prompt into action state and federal lawmakers that, to date, have been largely content to rely on industry self-regulation of the fertility market.<sup>89</sup> Yet this political-motivation narrative does not undermine the central precept of this Article and, in fact, reinforces it: the same market forces that are allowed to determine the price of other products and services, including the price of male reproductive tissue, are anathema in the context of female reproduction. The fertility industry may correctly fear that, perceiving a market run amok with the potential to commodify women and children and coerce and exploit egg donors, the natural impulse would be top-down state or federal regulation of the entire industry.

Finally, the continued insistence that egg donors are, and should be, motivated primarily by altruism and the desire to help others, rather than by the desire for monetary compensation, poses more subtle, intangible dangers. Many scholars have argued, for example, that the presumption that much valuable female labor should spring from altruistic motives threatens to reinforce gendered notions that the market activities of women are driven in large part by altruism and that women as a group are uninterested in reaping the full gains of trade from the provision of their goods and services.<sup>90</sup>

More directly, there is significant societal pressure for egg donors to profess altruistic motives, and oocyte donor agencies and consumers dislike egg donors who appear overly money-motivated. Do these attitudes affect compensation negotiations? Are prospective

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88. Krawiec, *supra* note 63, at 73–76 (detailing enforcement efforts).

89. See generally Kimberly D. Krawiec, *Why We Should Ignore the “Octomom”*, 104 NW. U. L. REV. COLLOQUY 120 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/34/LRColl2009n34Krawiec.pdf> (discussing fertility industry self-regulation and the threat posed by public controversy).

90. See, e.g., Mary Anne Case, *Pets or Meat*, 80 CHI.-KENT L. REV. 1129, 1143 (2005) (“Much of what women have market power over, such as their . . . reproductive services, they have long been expected not to commodify at all. Even when monetary compensation is allowed, it is often kept low and female providers are expected to be interested in rewards other than money.”); Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 188 (2000) (“[T]he implication that young women *should* desire to undergo a series of highly uncomfortable procedures that pose both short-term and long-term risks to their physical well-being for which they will not collect the market clearing price threatens to reinforce stereotypes of females as generous rather than self-interested.”).



oocyte donors able to drive the hardest economic bargain without signaling a disqualifying character flaw—an overriding interest in monetary compensation? In the absence of accurate oocyte pricing data it is impossible to know for sure, but the possibility cannot be ignored.

Absent a significant shift in the societal conception of motherhood, it may be the case that appeals to altruistic impulses will always play a vital role in the manner by which our society understands egg donation and even in the way that egg donors understand themselves. But the fertility and stem cell industries are big business in this and other countries, and the persistent dialogue of gift-giving and altruistic donation that surrounds egg “donation” may help to obscure both its highly commercial nature and the potential industry benefits, economic and political, of controlling the oocyte market.

### C. *The Alleged Benefits of Donor Caps*

This insistence that egg donors—unlike sperm donors—should be motivated by altruism, rather than by profit-seeking, and the resulting attempts to limit egg donor compensation, thus impose potential costs on the marketplace and those who transact in it. What are the purported benefits that justify such costs?

Although some of the resistance to oocyte markets doubtless stems from their perceived similarity to organ markets and the invasiveness of the procedure (characteristics not shared by sperm markets),<sup>91</sup> as with many other taboo markets, it is important to scrutinize our resistance to such transactions carefully. Often, these intuitions are laden with unrecognized class prejudices and anxiety about the body, especially women’s bodies, that have little relation to the stated objections to the underlying transaction.<sup>92</sup>

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91. Unlike renewable tissue, such as sperm and plasma, for which compensation has long been accepted, eggs are a technically nonrenewable but realistically unlimited tissue. Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 127 (noting that the average woman has over 400,000 pre-oocytes at puberty, yet will menstruate only about 500 times in her life, meaning that under normal conditions no woman will ever use up all her eggs, even if many are donated to others). The failure to understand this biological fact may contribute to egg donation fears. The process by which egg extraction occurs—outpatient surgery—is also different and more invasive than the process by which sperm donation occurs. This alone, however, should not—and under current law, does not—dictate whether eggs are more like organs than like sperm.

92. NUSSBAUM, *supra* note 12, at 280 (arguing that commodification and coercion objections are frequently laden with class, gender, and sometimes racial stereotypes); see Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L.

The insistence that—like virginity—female reproductive material should be provided altruistically, despite its high economic value, is typically defended by reference to the same commodification and coercion objections discussed in prior sections of this Article.<sup>93</sup> Yet these arguments have no more persuasive power in the context of egg donor compensation caps than in the contexts of virginity sales or Nevada’s brothel tax. As is true in all of the examples invoked here, anticommodification objections are a poor fit in the face of a multi-million dollar, highly commercial industry.

In this context, yet again, the commodification objection seems an especially implausible vehicle through which to raise concerns about societal degradation or the economic and social well-being of women. In an economic exchange that requires an oocyte for completion, does limiting the monetary benefit of only a single actor—the egg donor herself—significantly reduce any degrading effects of what remains a highly profitable and expensive economic transaction?

Perhaps. One challenge to countering commodification objections is that they do not lend themselves to ready measurement, and thus refutation. At a minimum, however, commodification adherents should be more skeptical of such objections, given the significant industry interests at stake.

Regarding coercion, oocyte donation presents health risks that sperm donation does not.<sup>94</sup> But this alone cannot justify attempts to restrict compensation. Indeed, in other contexts, one would anticipate the opposite: wage premia sufficient to compensate for the additional risk, pain, and discomfort.

The widely articulated coercion concern raised against compensated egg donation is particularly one that should be carefully scrutinized for class and gender bias. There are many dangerous jobs regularly performed for compensation, often by employees with lower socio-economic status and education levels than egg donors (who are often valued for their academic credentials, among other characteristics).<sup>95</sup> Those jobs are also performed primarily, if not exclusively, by men. For example, fishing, logging, aircraft pilot, and

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REV. 1108, 1111 (2005) (arguing that the Supreme Court’s nude dancing cases make little sense, unless viewed through the lens of “sexual panic driven by dread of female sexuality”).

93. See *supra* sources cited notes 9 and 77.

94. Krawiec, *supra* note 63, at 63–65 (discussing these risks).

95. Krawiec, *Altruism & Intermediation*, *supra* note 6, at 222 (discussing factors that impact oocyte pricing).

construction top the list of the most dangerous jobs,<sup>96</sup> and more than ninety-two percent of all workplace fatalities are men.<sup>97</sup> Yet, wage capping of these occupations is not suggested as an appropriate response to the jobs' inherent dangers. Nor are industry collusion or government regulation to limit worker compensation invoked as necessary mechanisms to "protect" these employees from financial coercion.

Finally, maximum wage restrictions are an odd—even backwards—response to concerns over the financial coercion of poor women. The ability of any sum to coerce action is a direct function of that person's financial need. Egg donor compensation caps, without reference to the potential donor's financial status, do nothing to address financial coercion objections. Ironically, the most likely effect of a successful ASRM-SART price cap would be to drive from the market the most highly valued egg donors, who tend to be better-educated and of a higher socioeconomic status. These donors should be in a better position to evaluate the risks of egg donation against the monetary benefits and should be less susceptible to the "coercive" effects of monetary compensation, because they are more likely to have other income opportunities from which to choose.

#### IV. GIFTING VERSUS OUTSOURCING

Because I discuss commercial surrogacy at length elsewhere, I address the issue only briefly here. However, commercial surrogacy (and its legal limitations) is strikingly similar to the other taboo trades discussed in this Article, particularly egg donation.

Although many countries strictly regulate or even ban commercial surrogacy, United States federal law does not directly address the matter, resulting in wide variation across states.<sup>98</sup> Some states, for example, adopt relatively surrogacy-friendly provisions, either through legislative or judicial action, that seek to rely on the

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96. See BUREAU OF LABOR STATISTICS, U.S. OF DEP'T LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES SUMMARY, 2008 (2009), available at <http://www.bls.gov/news.release/cfoi.htm>; Klaus Kneale, *Fishermen, Loggers Have Most Dangerous Jobs: Annual Ranking See Familiar Industries, Men Are Vast Majority of Fatalities*, FORBES, Sept. 8, 2009, available at <http://www.msnbc.msn.com/id/32725485/>.

97. BUREAU OF LABOR STATISTICS, *supra* note 96, tbl.4; Kneale, *supra* note 96.

98. See Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 214–21 (1996) (noting the "federal legislative vacuum" in the United States on the issue of surrogacy and reviewing surrogacy legislation in foreign countries that generally prohibit commercial surrogacy).

parties' intent at the time of contracting.<sup>99</sup> Other states are less embracing of commercial surrogacy. Some declare commercial surrogacy contracts void or unenforceable, and others have ruled such contracts illegal, with accompanying fines and other criminal penalties.<sup>100</sup>

Even jurisdictions in which commercial surrogacy is legal, however, may impose legal limitations that impede operation of the surrogacy market and, particularly, that restrict compensation to commercial surrogates. For example, the unenforceability of surrogacy contracts in some jurisdictions profoundly impacts market organization, empowering surrogacy intermediaries, particularly incumbent intermediaries with established market positions and reputational capital.<sup>101</sup> Moreover, many jurisdictions impose limits on surrogate compensation, often restricting payment to necessary living, medical, and other expenses.<sup>102</sup>

This inequity is not lost on critics of the surrogacy market, who have noted that commercial surrogacy profits appear unevenly distributed. The surrogate payment is dwarfed by the total price paid by the intended couple, which includes an agency fee and medical and legal expenses.<sup>103</sup>

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99. See Drabiak et al., *supra* note 71, at 300, 302 (discussing various state regimes); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109, 123–25 (discussing modern developments in state surrogacy statutes, which increasingly aim to reduce uncertainty and establish more efficient procedures for determining legal parentage).

100. Drabiak et al., *supra* note 71, at 302–03.

101. Krawiec, *Altruism and Intermediation*, *supra* note 6, at 234–35.

102. See FLA. STAT. ANN. § 742.15 (West 2009) (limiting the permissible compensation in surrogacy contracts); NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2004) (allowing surrogacy contracts, but restricting payment to living and medical expenses related to the birth); N.H. REV. STAT. ANN. §§ 168-B:16 to 168-B:25 (LexisNexis 2001) (regulating surrogacy contracts in great detail, and limiting permissible surrogacy fees and payments); UTAH CODE ANN. § 78B-15-803 (2008) (restricting surrogacy payments to reasonable amounts); VA. CODE ANN. §§ 20-156 to 20-160 (2008) (limiting compensation to reasonable medical expenses and ancillary costs); WASH. REV. CODE ANN. §§ 26.26.210 to 26.26.240 (West 2005) (permitting surrogacy contracts, but prohibiting contracts for compensation beyond medical costs, other expenses related to pregnancy, and legal fees).

103. See, e.g., Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 635 (1991) (“The couple who contracts with a paid surrogate will spend at least \$25,000: approximately \$10,000 for the surrogate mother, \$10,000 for the agency that arranges the procedure, as well as related miscellaneous costs.”); Krim, *supra* note 98, at 224 (stating that surrogacy brokers often earn “as much, if not more, than surrogates”); Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 87 (2007) (noting that the fee to surrogacy brokers is often close to or equal to that paid to the surrogate and that “the fees paid to surrogates . . . are fairly low”).

As I demonstrate at length elsewhere, large surrogacy agency fees are partially attributable to the important intermediary functions of search, matching, and quality guarantee performed by surrogate agencies.<sup>104</sup> However, legal uncertainty surrounding surrogacy contracts enhances the role of intermediaries in the market, increasing both the demand for intermediary services and their share of the total price paid for surrogacy arrangements.<sup>105</sup> Restrictions on payments to surrogates—to the extent that they are effective—would have the same impact.

As in the case of the egg market, scarce systematic data on surrogate compensation and the malleability of formal surrogate payment limits renders concrete conclusions regarding the impact of the legal and social constraints on surrogacy markets difficult. Yet the same questions must be asked: do attempts to cap surrogate compensation and the persistent dialogue of altruistic donation in the surrogacy market thwart the earning potential of surrogates as a group or foster stereotypes of women as altruistic to the point of disinterest in the monetary returns from their labor? And if so, for what benefit?

#### CONCLUSION

My thesis in this Article is a relatively narrow one: given the transactions that we accept as legally and socially valid, commodification and coercion objections seem especially implausible vehicles through which to defend the specific constraints on taboo trades identified in this Article. In particular, anticommodification objections are a poor fit in the face of extensive, profitable, and highly

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104. Krawiec, *Altruism and Intermediation*, *supra* note 6, at 234–38, 245 (detailing intermediary functions in the baby market).

105. If there is a risk of litigation over custody of the child after birth, screening out surrogates who may attempt to keep the child after delivery is an important intermediary function, and one that grows in importance as uncertainty over legal enforceability increases. Intermediating this uncertainty is a primary function of many surrogacy agencies, and one at which incumbents with significant reputational capital excel. Thus, some portion of price is necessarily diverted to this function. Unless the demand for surrogacy services is completely price insensitive (imperfect substitutes, including adoption, exist), then total surrogate compensation is reduced, and the supply of surrogacy services is constrained. See Krawiec, *Altruism and Intermediation*, *supra* note 6 at, 234–38, 45 (discussing intermediation in the surrogacy market); cf. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 23 (1989) (“Because surrogacy is so much less attractive to the father and wife when it is not enforceable, they will not be willing to pay nearly as much as they would if it were enforceable—so the surrogate is hurt.”); Sanger, *supra* note 103, 80–82 (discussing the role of commercial surrogacy intermediaries in minimizing the effects of legal uncertainty).

commercial industries built around the provision of female reproductive and sexual labor. Against this backdrop, the notion that commodification dangers are substantially tempered through stigmatization, or restrictions on the autonomy or earning capacity of the lowest-wage provider in an extensive supply chain, seems misguided.

Note that these are not mere slippery slope arguments—that because sex and reproduction have become highly commercialized, attempts to limit further market invasions of these sacred territories are fruitless. Rather, the claim is that the restrictions on taboo markets that I identify here do not—and are not intended to—protect sex, human eggs, or surrogacy services from the incursion of market forces. Instead, they are asymmetric legal and social restrictions whose primary purpose and effect is to impede market access by suppliers of these taboo goods and services, with resulting societal costs. Meanwhile, market operation continues, though often in a stunted or dysfunctional manner.

The coercion defense fares no better. Far from saving the poorest and most vulnerable from tragic choices, the restrictions on taboo markets explored here impede earnings or market entry, increase risk, or raise social stigma, making the market less attractive. Yet underlying economic and social disparities ensure that, for those with few other viable income opportunities, sex, eggs, and surrogacy services will continue to be sold.

In this regard, the theory of “a woman’s worth” proposed here harkens back to both Martha Nussbaum and Margaret Radin, each of whom articulate well the notion that, when it comes to taboo markets—and especially taboo markets involving women’s reproductive or sexual labor—we do not regulate on a clean slate. Instead, the market, social norms, and prior legal rules are likely to embed class, gender, race, and other hierarchies that reflect the pre-existing distribution of wealth and power.<sup>106</sup>

Radin reminds of the “gap between the ideals we can formulate and the progress we can realize,” advocating incomplete commodification in recognition of that fact.<sup>107</sup> When that incomplete commodification takes the form of specific measures designed to address public policy concerns (for example, disease control in the

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106. NUSSBAUM, *supra* note 12, at 297 (cautioning that “it seems a dead end to consider prostitution in isolation from the other realities of working life of which it is a part”); RADIN, *supra* note 5, at 123–30 (discussing the double bind).

107. RADIN, *supra* note 5, at 123.

case of prostitution, or the welfare of children in the case of reproductive markets) or informational or bargaining power disparities,<sup>108</sup> Radin's theory of incomplete commodification is in symmetry with my own theories of taboo trades.

Yet, I am less receptive than Radin to claims that either commodification or economic coercion concerns should inform our restrictions on the taboo trades discussed here. The dangers of reinforcing class, race, and gender bias are too high, and the supposed benefits of such restraints too amorphous, to withstand critical inquiry.

Instead, what seems to unify reactions to the taboo trades that are the subject of this Article is an attempt to normalize otherwise jarring economic transactions that offend societal sensibilities, prompting feelings of disgust, repugnance, or shame. The specific mechanisms by which this normalization occurs vary across settings—stigmatization in the case of virginity sales and other sex work, and the romantic recharacterization of a monetary transaction into an altruistic one, in the case of oocyte and surrogacy sales. Yet both mechanisms represent an attempt to relegate these taboo trades to the shadows, where they are less overt and thus less destabilizing to societal norms.

This uneasy accommodation of market forces has consequences for all who are impacted by these taboo trades. Most relevantly for this Article, suppliers may suffer direct and tangible, though difficult to assess, wage and market entry effects, as well as less direct expressive effects. Consumers should suffer corresponding costs: reduced supply, less choice, and (in the case of oocyte and surrogacy sales) higher prices.<sup>109</sup> Finally, to the extent that these taboo trades produce negative externalities or impact broader social goals (including public health, disease control, and the welfare of children), relegating them to the political and legal shadows may thwart the development of sound public policies designed to minimize such costs.

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108. See generally Krawiec, *Price & Pretense*, *supra* note 6 (discussing public policy concerns raised by baby markets).

109. As noted, given certain assumptions, the stigmatization of sex work may reduce both the supply of sex work and the price paid. See *supra* note 59 and accompanying text.

