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Taxation, Pregnancy, and Privacy

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TAXATION, PREGNANCY, AND PRIVACY

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ABSTRACT

This Article frames a discussion of surrogacy within the context of existing income tax laws. A surrogate receives money for carrying and bearing a child. This payment is income by any definition, even if the surrogacy contract recites that it is a "reimbursement." Cases and rulings on the income tax consequences of the sale of blood and human breast milk, as well as analogies to situations in which people are paid to wear advertising on their bodies, support the conclusion that a surrogate recognizes taxable income, although the Internal Revenue Service has never stated so. For tax purposes, the reproductive labor of surrogacy is "work." This Article considers, and then rebuts, privacy-based objections to a surrogacy tax. Disclosure of income from surrogacy is a reasonable consequence of the freedom to engage in that activity. The federal government should take steps to increase tax compliance.

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INTRODUCTION

Donating blood to friends, family members, or even strangers has social and moral caché. The press heralds the donations as acts of kindness, generosity and even heroism.[1] But selling or renting one's body parts or products is another matter entirely. Associating human organs or bodily fluids with economic value smacks of the illicit or illegal.[2] Yet the sale or donation of body parts occurs with enough frequency that, on multiple occasions, courts and the Internal Revenue Service (IRS) have addressed the tax consequences of these transfers.[3] Concepts like "income" and "deductions" translate awkwardly to the human body, but the government has applied them to cases involving sales of blood and human breast milk.[4]

This Article applies basic tax principles to paid pregnancy, more commonly known as surrogate motherhood. In the traditional form of surrogacy, a woman contractually agrees to be artificially inseminated with sperm of the other party (or a third party donor).[5] The woman also agrees to carry the child to term and relinquish her rights to the child in favor of the contracting party (and his wife, typically).[6] In gestational surrogacy, a surrogate is implanted with an embryo created from the egg of one of the parties (or a donor) and the sperm of the other party (or a donor).[7] The parties who contract with a traditional or gestational surrogate typically are called the "intended parents."[8] Surrogacy contracts often characterize payments to the surrogate as reimbursements for living and medical expenses to minimize the likelihood that the contract would violate policies against

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1. Margaret Schmidt, *Police Officer Marc DiNardo's Organs to be Donated*, JERSEY J., July 20, 2009, *available at* http://www.nj.com/hudson/index.ssf/2009/07/police_officer_marc_dinardos_o.html (quoting a colleague memorializing a thirty-seven-year-old Jersey City, New Jersey police officer shot while on duty: "Marc was not a selfish man; he was a moral man, a man who gave of himself to those who could not care for themselves. Marc gave his life so others could live by donating organs. He is a true hero.").

2. *See, e.g.*, Elaine Catz, *Exhibition of Exploitation*, PITT. POST-GAZETTE, June 24, 2007, at H-1, *available at* http://www.post-gazette.com/pg/07175/796418-109.stm (questioning sources of cadavers displayed in "Bodies . . . the Exhibition," in light of the fact that "the Chinese deputy health minister publicly acknowledged that his country has a thriving illegal organ trade. He also said that most organs transplanted in China are taken from executed prisoners"); Laurie Goering, *Gruesome Harvest in India*, CHI. TRIB., Feb. 21, 2008, at 1 (describing India's illegal organ harvesting rings).

3. *See infra* Part I.A.1 and accompanying text (discussing the income tax consequences of the sale of body parts).

4. *See infra* Part I.A.1 and accompanying text (discussing the income tax consequences of the sale of body parts).

5. *In re* Roberto d.B., 923 A.2d 115, 117 (Md. 2007).

6. Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 22 (2005).

7. *Id.*

8. *Id.*

baby-selling.[9] Nevertheless, the surrogate's receipts are and should be taxable income.[10]

Part I provides an overview of the income tax treatment of two types of transactions: (A) selling blood and regenerable body parts and (B) renting the human body as advertising space. This Part considers whether such income should be treated as capital or ordinary and what deductions might be available under existing tax rules. Part II analyzes surrogacy contracts and the demographics of the parties. Part III explains why payments received by a surrogate are taxable income. This Part argues that surrogates do not uniformly comply with income tax-reporting requirements and that the federal government should enforce existing laws. Part IV evaluates and rebuts privacy-based objections to taxing surrogacy. This Part also argues that there is no privacy-based justification for failing to enforce a surrogacy tax any more than a tax on the sale of blood. Part V links questions about taxation and surrogacy to disruptions of traditional family structures and roles for women. The Article concludes with reflections on the law's role in supporting a commercial trade in human bodies.

I. INCOME TAX AND BODIES

A. Blood and Regenerable Body Parts

Giving away one's body (or body parts) is not unusual in the United States. At least eight million living people give blood each year.[11] Typically blood donors are not compensated for their donations,[12] although some blood donors seek more than the psychic

9. *See* Doe v. Att'y Gen., 487 N.W.2d 484, 489 (Mich. Ct. App. 1992) (holding that entering into a surrogacy contract for "compensation," defined as a payment of money or anything having monetary value, except the payment of medical and other expenses incurred during the pregnancy, is unlawful and prohibited).

10. *See infra* Part III.A (discussing the income tax treatment of payments received by a surrogate).

11. American Red Cross, 50 Quick Facts, http://www.givelife2.org/sponsor/quickfacts.asp#top%20idtop (last visited Sept. 28, 2009) (citing eight million blood donors in the United States in 2001). As a point of reference, in 2007, there were 10,587 kidneys donated from deceased donors. Living Donors Online!, Why Living Kidney Donation?, http://www.livingdonorsonline.org/kidney/kidney2.htm (last visited Sept. 28, 2009) (stating further that approximately 76,000 people were waiting for kidney transplants).

12. *See* Posting of Melissa Lafsky to Freakonomics Blog, *How Much for that Pint of Blood?*, http://freakonomics.blogs.nytimes.com/2007/06/04/how-much-for-that-pint-of-blood/?pagemode=print (June 4, 2007, 11:10 EST) (stating that the Food and Drug Administration guidelines, which regulate gifts to blood donors, "prohibit[] any gifts to blood donors in excess of twenty-five dollars in cumulative value"). While this strains the income tax definition of a gift (Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) ("[I]f the payment proceeds primarily from . . . 'the incentive of anticipated benefit' . . . it is not a gift . . . . A gift in the statutory sense . . . proceeds from a 'detached and disinterested generosity' . . . .")) it appears to be an administrative response to a common practice.

benefit of helping a person in need. They want a financial benefit,[13] too, often in the form of an income tax deduction. The IRS has not been sympathetic to these claims, reasoning either that blood donations either are *not* donations of *property* susceptible to a charitable transfer (and therefore the value of the blood is not deductible)[14] or that donating blood is a *service* (and therefore the value of the service is not deductible).[15] So potential blood donors who seek financial gain are better off selling their blood, although this option may be available only to people with rare blood types,[16] and these people will owe income tax on their receipts.[17] Proceeds from the sale of blood are clearly "income" under the tax laws.[18]

1. Tax Characterization of Income

Basic tax concepts like gain and loss do not translate easily to the sale of human body parts or products. For tax purposes, the gain

13. Employees of the Commonwealth of Massachusetts are permitted a paid leave of absence of up to eight hours per year for donating blood. MASS. GEN. LAWS ANN. ch. 149, § 33D (West 2009) ("Any employee of the commonwealth, of any county, and of any city or town which accepts the provisions of this section, shall be allowed a leave of absence without loss of pay of not more than eight hours in each calendar year for the purpose of donating platelets, plasma white cells or whole blood to any cancer research center.").

14. Lary v. United States, 787 F.2d 1538, 1540 (11th Cir. 1986) (stating that taxpayers are not entitled to a tax deduction when donated blood is categorized as a product); Green v. Comm'r, 74 T.C. 1229, 1234 (1980) (finding that the sale of plasma was the sale of a tangible product); I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975) [hereinafter I.R.S. Gen. Couns. Mem.] ("Milk is property . . . . Under Code § 170(e), the tax result in the subject case would be the same, recognizing that the donation of mother's milk is a contribution of property and not services . . . . Therefore, under Code § 170(e) the taxpayer is not allowed any deduction for her donation of mother's milk.").

15. The value of services rendered to or on behalf of a charity is not deductible. Treas. Reg. § 1.170A-1(g) (2009). Thus, when an attorney performs pro bono services for a non-profit organization, she may not deduct the value of her time. *See id.*; *see also* Rev. Rul. 162, 1953-1 C.B. 127 (finding that blood donation is a non-deductible service rendered on behalf of a charity); I.R.S. Gen. Couns. Mem., *supra* note 14 (citing I.R.S. Gen. Couns. Mem. 23,310 (July 6, 1942)) (denying a deduction for blood donation, reversing the prior position taken by the IRS); Dorothy A. Brown, *Contested Commodities: Lessons From Tax Policy, in* 21ST CENTURY LAW (Michele Goodwin ed., forthcoming 2010) (manuscript at 4-8) (discussing the tax treatment of sales and donations of blood). In other contexts, courts have held that blood is not property. Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 794-96 (N.Y. 1954) (holding that blood is not property for purposes of a commercial warranty).

16. *See* United States v. Garber, 607 F.2d 92, 94 (5th Cir. 1979) ("Because Garber's blood is so rare . . . she was approached by other laboratories which lured her away from Dade Reagents by offering an increasingly attractive price for her plasma.").

17. *See infra* Part I.A.1 (discussing the tax treatment of sales of regenerable body parts).

18. *Lary*, 787 F.2d at 1540-41 (noting that "profit from the sale of blood does constitute income within the meaning of I.R.C. § 61"); *see* I.R.C. § 61(a) (2009) (stating that gross income includes "all income from whatever source derived"); *see also* Comm'r v. Glenshaw Glass, 348 U.S. 426, 431 (1955) (describing income as an "undeniable accession[] to wealth, clearly realized, and over which the taxpayers have complete dominion").

or loss on the sale or other disposition of property is the excess of the amount realized over adjusted basis.[19] Amount realized is the sum of money plus the fair market value of other property received.[20] Adjusted basis is the amount that a taxpayer has invested in the property.[21] So, when a taxpayer buys a piece of real property for $500, her cost basis is $500.[22] When she makes a capital improvement of $100, her adjusted basis becomes $600.[23] If the property is worth $800 at the time of the sale, and the taxpayer sells the improved property for this price, her gain is $200. Similarly, if the property is worth $300 at the time of the sale, and the taxpayer sells the improved (but less valuable) property for this price, her loss is $300. To apply the same rules to the disposition of body parts, one must determine the taxpayer's basis in the property and the amount for which she sells it. In the case of human hair, for example, a taxpayer may sell her long tresses to a commercial wigmaker for $200.[24] What is a taxpayer's basis in her own hair?[25] Is it $200? Zero?[26] Some amount in between? The law is not clear.

After determining the gain or loss on the sale of any property, one then characterizes it as "ordinary" or "capital" for income tax purposes.[27] A sale of a capital asset results in capital gain or loss.[28] A sale of an ordinary asset results in ordinary gain or loss.[29] According to the income tax definition, all assets are capital, unless specifically excluded from the definition of capital assets.[30] Specifically excluded is any "copyright, a literary, musical, or artistic composition, a letter

19. I.R.C. § 1001(a) (2009).

20. *Id.* § 1001(b).

21. *Id.* §§ 1011(a), 1012, 1016.

22. *See id.* § 1012 (stating that a taxpayer's unadjusted basis is the cost of the property).

23. *See id.* § 1016(a)(1) (stating that capital expenditures are upward adjustments to the taxpayer's basis).

24. *Sell Yourself for Cash*, MSNBC, April 12, 2004, http://www.msnbc.msn.com/id/3949869 ("[I]f you want to sell your hair to a merchant, you'll get [five] to [ten] dollars an ounce."). Recently an eleven-year-old girl offered twelve inches of her red hair for sale on an internet auction site; the minimum bid was $200. Online Hair Affair, Multi-Tone Auburn Red Virgin Hair, http://www.onlinehairaffair.com/Multitoned-Auburn-Red-Virgin-Hair,name,100204,auction_id,auction_details (last visited Sept. 28, 2009).

25. *See* Treas. Reg. § 20.2031-1(b) (2009) ("[F]air market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.").

26. Dorothy Brown argues that a taxpayer takes a zero basis in her own blood because the taxpayer has not paid anything for that blood. Brown, *supra* note 15 (manuscript at 11-12).

27. 2009 U.S. MASTER TAX GUIDE ¶ 1735 (2008).

28. I.R.C. § 1222 (2009).

29. *Id.* § 64.

30. *Id.* § 1221(a).

or memorandum, or similar property, held by . . . a taxpayer whose personal efforts created such property, . . . [or] a taxpayer for whom [a letter, memorandum, or similar property] was prepared or produced," or a person whose tax basis in the property is determined by reference to either of the foregoing.[31] Thus an artist's painting is an ordinary asset in his own hands, but a capital asset in the hands of the art aficionado who purchases from a gallery (or even the artist himself) and holds it for investment purposes.[32]

So what about the taxpayer who sells her own hair? Is hair something that the taxpayer has created, like a painting, through her own effort, or is the hair more like the art aficionado's investment? The amount of tax imposed on the gain from the sale of a taxpayer's hair will depend on whether the hair is a capital asset or an ordinary asset for tax purposes.[33]

Income tax concepts apply awkwardly to the human body. At least one court has opined that human blood is no different, in a tax sense, from "hen's eggs, bee's honey, cow's milk, or sheep's wool for processing and distribution."[34] In *Green v. Commissioner*, the United States Tax Court held that when a taxpayer makes routine and repeated sales of her blood plasma, she is like a business selling its inventory.[35] Inventory is an ordinary asset, so its sale results in ordinary gain or loss.[36] The IRS has taken a similar approach to human breast milk: "Milk is a commodity, whether from a human being or a cow."[37] Then the sale of breast milk, too, results in ordinary income, not capital gains (or losses).[38] Presumably the same is true of sperm, although there do not appear to be any specific statutes, cases, administrative rulings or guidance indicating as much.[39]

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31. *Id.* § 1221(a)(3)(A)-(C).

32. *See id.*

33. *See* IRS.gov, Tax Topics — Topic 409 Capital Gains and Losses, http://www.irs.gov/taxtopics/tc409.html (last visited Oct. 13, 2009) ("[I]f you have a net capital gain, that gain may be taxed at a lower tax rate than the ordinary income tax rates.").

34. Green v. Comm'r, 74 T.C. 1229, 1234 (1980).

35. *Id.* at 1235; *see also* Int'l Trading Co. v. Comm'r, 275 F.2d 578, 584 (7th Cir. 1960) (pointing out that the determination of whether a taxpayer has been carrying on a trade or business is fact-specific, with factors such as profit motive and business-like policies carrying weight); Doggett v. Burnet, 65 F.2d 191, 194 (D.C. Cir. 1933) (holding that, in deciding whether the taxpayer has carried on a trade or business, the court should look at "whether or not the person engaged in a legitimate enterprise" and "show[ed] a willingness to invest time and capital on the future outcome of the enterprise"); Gentile v. Comm'r, 65 T.C. 1, 4, 6 (1975) (noting that gambling has elements of carrying on a trade or business).

36. I.R.C. §§ 64, 65 (2009).

37. I.R.S. Gen. Couns. Mem., *supra* note 14.

38. *Id.*

39. The IRS does not seem to have addressed the direct question of whether receipts from sperm donations are taxable income, but by analogy to the blood cases, they almost certainly are. *See* I.R.C. § 61 (2009) ("[G]ross income means all income from whatever source derived . . . ."); *U.S. Income Portfolios: Real Estate*, Tax & Accounting Center

If replenishable bodily fluids, like blood plasma and breast milk, are ordinary assets for income tax purposes, do all transactions involving cash for body parts result in ordinary income? Some body parts, like kidneys, lungs or parts of livers, should not be treated as commodities because they are not replenishable.[40] A living person can sell or donate only one kidney or one lung and continue to live.[41] By any definition, these human organs are not assets held primarily for sale to customers in the ordinary course of business,[42] suggesting that they are capital in nature.[43] Yet the taxpayer has not made any investment in a tax sense in these organs, or at least the taxpayer has made no investment in her organs that is different than an investment in life generally (such as paying for food, water, shelter).[44] Because the tax law is so ill-equipped to address commercial dealings involving the human body, one gropes for apt (if inelegant or even offensive) analogies.

2. Deductions from Income

A taxpayer who sells enough blood plasma or breast milk with enough frequency will be treated, for income tax purposes, as being

(BNA) No. 561-2nd, at III(C)(3) (2009) [hereinafter *U.S. Income Portfolios: Real Estate*] (discussing whether certain human body parts are capital assets). An eligible man may sell his sperm for between twenty-five dollars and one hundred dollars per deposit. Machelle M. Seibel & Ann Kiessling, *Compensating Egg Donors: Equal Pay for Equal Time?*, *in* FAMILY BUILDING THROUGH EGG AND SPERM DONATION 26 (Machelle M. Seibel & Susan L. Crockin eds. 1996); LISA JEAN MOORE, SPERM COUNTS: OVERCOME BY MAN'S MOST PRECIOUS FLUID 104 (2007).

40. Brown, *supra* note 15 (manuscript at 12) ("Unlike Margaret Green who was in the business of selling her blood, a one-time sale of a kidney that goes to the highest bidder would generally not be considered as property held primarily for sale to customers in the ordinary course of a trade or business."). In a different context, several authors make a distinction between the commodification of a "replenishable" bodily fluid or part (such as blood, sperm or hair) and a non-replenishable part (such as a kidney). *See, e.g.*, Kenneth Baum, *Golden Eggs: Towards a Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 128 (2001) (discussing the ban on the sale of organs and nonreplenishable tissues and arguing that the sale of replenishable parts should not be banned); Mark F. Grady, *Politicization of Commodities: The Case of Cadaveric Organs*, 20 J. CORP. L. 51, 60 (1994) (pointing out that commentators fear that sale of nonreplenishable organs affronts human dignity).

41. OrganDonor.gov, Types of Donation, http://www.organdonor.gov/donation/typesofdonation.htm (last visited Oct. 6, 2009).

42. *See* Mauldin v. Comm'r, 195 F.2d 714, 716 (10th Cir. 1952) ("There is no fixed formula or rule of thumb for determining whether property sold by the taxpayer was held by him primarily for sale to customers in the ordinary course of his trade or business. Each case must, in the last analysis, rest upon its own facts. There are a number of helpful factors, however, to point the way, among which are the purposes for which the property was acquired, whether for sale or investment; and continuity and frequency of sales as opposed to isolated transactions.").

43. I.R.C. § 1221 (2009) (stating that capital assets do not "include property held by a taxpayer primarily for sale to customers in the ordinary course of business").

44. *See id.* § 262 (disallowing deductions for various personal expenses).

in the business of selling these fluids.[45] Generally speaking, under I.R.C. § 162, a deduction is allowed for all "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business."[46] In *Green*, the blood plasma case, the United States Tax Court permitted the taxpayer to deduct the cost of specialty foods and vitamins and for transportation to and from the lab where she gave blood.[47] Presumably, similar deductions would be permitted for a breast milk seller. By extension, a taxpayer who derives the majority of her income from frequent sales of her own hair is likely to be in the business of selling hair, for income tax purposes, and entitled to deductions for her "ordinary and necessary" business expenses.[48] This might mean that the cost of shampoo, conditioners, special hair treatments, professional blow-drying, and the like would be deductible.

The *Green* case does not necessarily suggest, however, that courts will permit broad deductions for taxpayers engaged in the business of selling their own bodily products.[49] After allowing the taxpayer's claimed deductions for specialty food and travel to the lab, the *Green* court denied two further claimed deductions.[50] First, the court rejected a business deduction for the cost of the taxpayer's health insurance.[51] The court said: "Although petitioner attempts to justify the deduction by comparing her body to some insured manufacturing machinery, the instant set of facts prevents such a comparison; her body is not a replaceable, or easily repairable, machine maintained solely for the production of blood plasma."[52] Furthermore, maintaining health insurance, according to the court, was "primarily a personal concern, not merely a business concern."[53]

Next the court rejected a claimed depletion deduction for the loss of mineral content in the taxpayer's body as a result of her plasma donations.[54] Under I.R.C. § 611, a taxpayer is allowed to deduct a certain percentage of either his original investment or his sales revenue from mines, oil, gas wells, similar natural deposits, and timber.[55] The *Green* court reasoned that the clear legislative history permitted the depletion allowance for natural, geological or soil-based deposits,

45. Green v. Comm'r, 74 T.C. 1229, 1235 (1980); *Mauldin*, 195 F.2d at 716.
46. I.R.C. § 162 (2009).
47. *Green*, 74 T.C. at 1236-38.
48. I.R.C. § 162 (2009).
49. *See Green*, 74 T.C. at 1235 (holding that a determination of allowable deductions is fact-specific and must be substantiated).
50. *Id.* at 1235, 1238.
51. *Id.* at 1235.
52. *Id.* at 1235-36.
53. *Id.* at 1236.
54. *Id.* at 1238.
55. I.R.C. § 611 (2009).

but not for the minerals of the human body.[56] Thus, it is extremely unlikely that the IRS or the courts would take an expansive approach to deductions for, say, depreciation of "property used in the trade or business" under I.R.C. § 167.[57] For tax purposes, one can be in the business of selling one's body, but one's body is no ordinary business.

Charitable deductions for the donation of body parts almost certainly are disallowed; the IRS has already made this clear with respect to blood donations.[58] Talk show host Jimmy Kimmel famously offered to buy the kidney stone of actor William Shatner of *Star Trek* fame.[59] If Mr. Shatner had sold the kidney stone to Mr. Kimmel, Shatner would have had to recognize income.[60] So when Mr. Shatner sold the kidney stone to a business in return for the business's promise to donate the purchase price to Habitat for Humanity, a well-known charity,[61] then under the I.R.C., Mr. Shatner is deemed for income tax purposes to receive $25,000.[62] As the constructive transferor of the $25,000, he might also be eligible for a charitable contribution deduction under I.R.C. § 170(c).[63] But had Mr. Shatner transferred the kidney stone directly to Habitat for Humanity, he would not be permitted to take a deduction, either because the IRS would deem him to be providing a "service" to the charity, or on the grounds that the kidney stone was not "property" susceptible to a charitable transfer.[64]

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56. *Green*, 74 T.C. at 1238 ("Congress enacted sections 611 to 614 and their predecessors to promote exploration and development of geological mineral resources.").

57. I.R.C. § 167 (2009).

58. See *supra* notes 14-18 and accompanying text (discussing the tax treatment of blood donations as charitable contributions).

59. *Jimmy Kimmel Live: William Shatner Interview* (ABC television broadcast Nov. 14, 2005), *available at* http://vrrrm.com/tv/Kimmel/05/ShatnerKimmel51114.php. Kimmel proclaimed the kidney stone "the ultimate 'Star Trek' collectible." *Id.*

60. I.R.C. § 61 (2009) ("[G]ross income means all income from whatever source derived . . . .").

61. Press Release, Send2Press Newswire, William Shatner Passes Kidney Stone Off to GoldenPalace.com for $25,000 (Jan. 18, 2006) (http://www.send2press.com/newswire/2006-01-0118-001.shtml) [hereinafter Shatner Press Release].

62. I.R.C. §§ 63, 64, 170(c) (2009). For the reasons that Mr. Shatner is treated as the income tax "owner" of the $25,000, see Lucas v. Earl, 281 U.S. 111, 115 (1930) (stating famously that "no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew"); Comm'r v. Giannini, 129 F.2d 638, 640-41 (1942) (finding that the taxpayer with control of the funds realizes taxable income, even if he assigns it to someone else).

63. I.R.C. § 170(c) (2009). His actual deduction would be limited to applicable limits on "excess" charitable contributions. *Id.* § 170(d).

64. *See supra* note 15 and accompanying text (discussing the tax treatment of charitable contributions); *see also* INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, PUBL'N NO. 526, CHARITABLE CONTRIBUTIONS tbl.1 (2008) (listing the value of time or services and the value of donated blood as nondeductible); *U.S. Income Portfolios: Real Estate*, *supra* note 39, at III.C(7) ("It would seem that current law generally supports capital gain treatment for the sale or transfer of human body parts. The service aspect of the transfer would have no meaning without the body part.").

B. Body Rentals

Newspapers are full of strange accounts of commercial transactions involving the human body. Consider three situations in which members of the public agreed to wear temporary tattoos or stickers on their bodies in return for compensation. The first well-publicized contemporary case arose in 2005, when student Andrew Fisher auctioned his forehead space on eBay.[65] The highest bidder, a snoring pill company, paid Mr. Fisher $37,375 to wear its advertisement emblazoned on his face.[66] Several people also agreed to shave their heads and display temporary tattoos advertising Air New Zealand in return for airline tickets worth $1200.[67] One online beauty products purveyor, FeelUnique.com, paid people to affix temporary stickers to their eyelids.[68] The company then paid the sticker-bearers for winking at others.[69] In each of these three cases — the forehead billboard, the shaved heads and the decorated eyelids — the recipient recognizes taxable income that he or she must report.[70] It makes no difference whether the taxpayers' actions constitute the rental of a body part (the forehead or the shaved skull) or the performance of a service (winking stickered eyes).[71] In each case, the taxpayer receives income on a one-time basis.[72] Because of the temporary nature of the advertising and the singular payment, none of these taxpayers likely could claim successfully that they were in the "business" of advertising.[73]

Consider whether a person who agrees to a permanent body tattoo in return for payment is differently situated. Kari Smith of Bountiful, Utah received $10,000 from Golden Palace Online Casino to permanently tattoo the company's name on her forehead.[74] Ms. Smith's case is different from the others because the advertising she

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65. *CBS Evening News: Latest Advertising Fad of Placing Ads on People's Bodies* (CBS television broadcast May 13, 2005). Similarly, Amber Rainey auctioned advertising space on her pregnant torso for $4000. *Id.*

66. *Id.*

67. Andrew Adam Newman, *The Body as Billboard: Your Ad Here*, N.Y. TIMES, Feb. 18, 2009, at B3; *see also* Steve Creedy, *Shorthaul*, AUSTRALIAN, Sept. 12, 2008, at 36 (discussing Air New Zealand's ad campaign); Robert Kahn, *Turning (and Shaving) Heads*, NEWSDAY, Feb. 20, 2009, at A13 (same).

68. Newman, *supra* note 67.

69. *Id.*

70. I.R.C. §§ 61 (2009) (noting that gross income includes "[c]ompensation for services").

71. *Id.*

72. *See supra* notes 65-69 and accompanying text.

73. *See* Mauldin v. Comm'r, 195 F.2d 714, 716 (10th Cir. 1952) (noting that relevant to characterization are purposes for which property acquired and "continuity and frequency of sales").

74. Newman, *supra* note 67. Note that GoldenPalace.com is the same company that bought William Shatner's kidney stone. *See* Shatner Press Release, *supra* note 61.

wears is permanent, but similar in that she received a one-time payment. Arguably she is in a better (although far from certain) position to argue that she is engaged in the day-to-day business of advertising. If that is true, then one would expect that she would be eligible for deductions under IRC § 162 for the costs of carrying on her business of advertising.[75] Recall that in the case of the frequent plasma donor, the court allowed a deduction for the cost of specialty foods, vitamins, and transportation to and from the medical lab.[76] So might the wearer of a permanent forehead tattoo be able to deduct the cost of food? After all, one cannot continue to operate the body as a billboard unless the body receives nourishment. Might she be able to deduct the cost of her transportation to a busy public place? One cannot advertise what is on one's forehead by staying at home. It is unlikely, however, that the IRS would allow any business deductions for these expenses of a permanent tattoo wearer, probably because they are personal in nature.[77] One must eat anyway; one must travel for work, school, and commerce anyway, regardless of what is on one's forehead. Just as the court in *Green* rejected the body-as-machine argument for purposes of the business deduction,[78] it also likely would reject deductions claimed for a body-as-billboard business.

II. SELLING OR RENTING REPRODUCTION

A. Overview of Surrogacy

Against the backdrop of cases involving the sale of one's bodily fluids and the rental of bodies for advertising space, consider an arrangement between a woman (typically called the surrogate) and another party or parties (typically called the intended parent or parents).[79] The surrogate agrees to carry a fertilized embryo, give birth to a child and relinquish all legal claims to the child in favor of the intended parents.[80] The surrogate typically receives reimbursement for her medical expenses and may or may not receive an additional fee.[81]

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75. *See* I.R.C. § 162 (2009) ("There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business . . . .").

76. Green v. Comm'r, 74 T.C. 1229, 1230, 1237-38 (1980).

77. *See* I.R.C. § 262 (2009) ("[N]o deduction shall be allowed for personal, living, or family expenses.").

78. *Green*, 74 T.C. at 1235-36.

79. Ciccarelli & Beckman, *supra* note 6, at 22.

80. *Id.*

81. Surrogacy Contracts: The Essentials of a Good Surrogacy Agreement, http://www.allaboutsurrogacy.com/contracts.htm (last visited Oct. 6, 2009) (listing the various expenses and fees that a surrogate might request).

The surrogate may be a relative, friend, or stranger with respect to the intended parent or parents.[82]

Early surrogacy arrangements typically involved a hired third-party surrogate who agreed to have her own egg fertilized in vitro with the sperm of the intended father.[83] The surrogate, sometimes called a "genetic" or "traditional" surrogate, carried and gave birth to her own child.[84] The surrogate then relinquished her parental rights in favor of the child's genetic father; she permitted the child to be adopted by the genetic father's wife.[85]

Traditional surrogacy drew national attention in the dramatic case of *In re Baby M.*[86] In 1985, Mary Beth Whitehead agreed to be artificially inseminated with the sperm of Richard Stern.[87] The parties agreed in writing that at the conclusion of a successful pregnancy, Mrs. Whitehead would terminate her parental rights and deliver the child to Mr. Stern and his wife, Elizabeth.[88] Mr. Stern was to pay Mrs. Whitehead $10,000.[89] After the baby was born, Mrs. Whitehead changed her mind.[90] She initially relinquished the child but pled to have the child with her for one week.[91] Mrs. Whitehead then refused to return the child to the Sterns and fled from New Jersey to Florida with the baby.[92]

After a long trial, the lower court upheld the validity of the surrogacy contract, awarded custody of the child to Mr. Stern, and permitted Mrs. Stern to adopt the child.[93] On appeal, the New Jersey Supreme Court invalidated the surrogacy contract.[94] The Court reasoned that the contract violated state prohibitions on paid adoptions, standard procedures for termination of parental rights, and the fundamental right to revoke a private placement adoption.[95] The Court further noted:

> Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion

82. R.J. Edelmann, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 124 (2004).

83. *In re* Baby M, 525 A.2d 1128, 1137 (N.J. Super. Ct. Ch. Div. 1987), *rev'd in part*, 537 A.2d 1227 (N.J. 1988).

84. Ciccarelli & Beckman, *supra* note 6, at 22.

85. *In re Baby M*, 525 A.2d at 1137.

86. Ciccarelli & Beckman, *supra* note 6, at 21.

87. *In re Baby M*, 525 A.2d at 1143.

88. *Id.*

89. *Id.*

90. *Id.* at 1144.

91. *Id.*

92. *Id.* at 1145.

93. *Id.* at 1175.

94. *In re* Baby M, 537 A.2d 1227, 1240 (N.J. 1988).

95. *Id.*

> that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.
>
> This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.[96]

The court awarded custody to Mr. Stern and remanded the case for a determination of Mrs. Whitehead's visitation rights,[97] which the lower court granted.[98] In its decision, the New Jersey Supreme Court carefully noted the bounds of its decision: *In re Baby M* had no application to a case where the surrogate is unpaid and retains the ability to change her mind after the birth of the child.[99] The New Jersey Supreme Court called on the state legislature "to focus on the overall implications of the new reproductive biotechnology — *in vitro* fertilization, preservation of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology — especially for infertile couples — while minimizing the risk of abuse."[100] In reality, individuals and their doctors responded faster than state legislators could, using new reproductive biology to avoid, or at least obscure, some of the concerns of the *In re Baby M* court.[101]

In the post-*In re Baby M* era, genetic or traditional surrogacy is less common.[102] Negative publicity in that case, combined with advances in reproductive technology, make gestational surrogacy the most common form of surrogacy.[103] Gestational surrogacy involves

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96. *Id.* at 1248.

97. *Id.* at 1263.

98. *In re* Baby M, 542 A.2d 52, 53 (N.J. Super. Ct. Ch. Div. 1988) (granting Stern custody but finding that the baby's interests would be served by "unsupervised, uninterrupted, liberal visitation" with Whitehead).

99. *In re Baby M*, 537 A.2d at 1264.

100. *Id.*

101. *See, e.g.*, Elizabeth S. Scott, *Surrogacy and the Politics of Commodification* 14 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper, Paper No. 08153, 2008), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1045&context=columbia_pllt (noting that improvements in IVF and gestational surrogacy have "largely replaced traditional surrogacy" and these "new arrangements have proved to be . . . more palatable to lawmakers and the public").

102. *Id.* at 16 (noting that "gestational surrogacy contracts have become standard").

103. *See id.* at 14 (noting that "the new arrangements have proved to be . . . more palatable to law makers and the public"). From 1988 to 1994, "the practice of gestational surrogacy increased in the United States at a rather remarkable rate, from less than five per cent [sic] of all surrogate arrangements to approximately [fifty] per cent [sic] as of 1992." Heléna Ragoné, *The Gift of Life: Surrogate Motherhood, Gamete Donation and*

an egg donor, a carrier and at least one intended parent.[104] The intended parent(s) might be the source of either, both, or neither of the egg and sperm.[105] Gestational surrogacy might be used when a single man or a male couple wishes to have a child,[106] or where a woman wishes to have a child but she has no viable eggs and/or is unable to carry a child.[107] Usually the egg donor and surrogate are strangers to each other and to the intended parent(s),[108] and thus the surrogate has no genetic relationship to the child.[109]

B. Surrogate Census

There are no records of the number of surrogate births in the United States each year.[110] Neither the states nor the federal government keeps records of how many surrogates there are, or who acts as a surrogate.[111] The best data comes from reports by member fertility clinics to the Society for Assisted Reproductive Technology (SART).[112] However, even SART's data are not particularly accurate, because many fertility clinics do not report to SART.[113] Furthermore, not all surrogates use fertility clinics.[114] For example, some may choose to work with their own doctors.[115] Informed estimates place the number of surrogate births in the United States at anywhere from 400 to

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Constructions of Altruism, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 209, 211 (Rachel Cook et al. eds., 2003) [hereinafter Ragoné, *The Gift of Life*].

104. AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 13 (2006), http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf.

105. *Id.* (defining gestational surrogacy as when "the surrogate carries a pregnancy created by transferring an embryo created with sperm and egg of intended parents" but also noting that "donor sperm can be used as well").

106. *Id.*

107. *Id.*

108. Edelmann, *supra* note 82, at 129.

109. Ciccarelli & Beckman, *supra* note 6, at 22.

110. The Fertility Clinic Success Rate and Certification Act of 1992 requires clinics to report statistics on *in vitro* fertilizations and resulting births, but does not require specific reporting on surrogates. 42 U.S.C. § 263a-1(a) (2006). For an overview of the model proposed by the Department of Health and Human Services for certification of certain laboratory procedures in order to facilitate public awareness of infertility services and to monitor the quality of those services, see Implementation of the Fertility Clinic Success Rate Certification Act of 1992, 63 Fed. Reg. 60,178 (1998).

111. *See* § 263a-1 (requiring that assisted reproductive technology programs report pregnancy success rates, with no mention of reporting of details about surrogates or intended parents).

112. Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 45, 47.

113. *Id.*

114. *Id.* (noting that statistics vary because "[p]rivate agreements made outside an agency aren't counted").

115. *Id.*

1000 per year.[116] Based on information reported to the government by fertility clinics, in 2005 there were 134,260 in vitro fertilizations and related procedures, resulting in the births of 52,041 children.[117] Less than one percent of all of these technologies involved the use of a gestational carrier.[118]

Surrogacy, like abortion, is a controversial topic in the United States.[119] Yet for all of the controversy surrogacy has engendered,[120] there are few empirical studies of surrogates or those who turn to them.[121] Five separate studies found that most surrogate mothers are married Caucasians between the ages of twenty and forty who have children already.[122] They tend to be Christian and come from working-class backgrounds.[123] Women of color are underrepresented in the surrogate population and the intended parent population, relative to their percentage of the general population.[124] Thus, the prediction that surrogates will be young, single racial minorities[125] seems to be incorrect.

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116. *Id.* (giving the "high end" of estimates by "industry experts" as 1000 births to surrogates in 2007); Sara Rimer, *No, the Stork Didn't Bring You, But Mom and Dad Had Help*, N.Y. TIMES, July 12, 2009, at A1 (noting that advocacy groups estimate that the number of births from reproductive technology is "much higher" than the American Society for Reproductive Medicine's estimate of 400 to 600 per year).

117. Victoria Clay Wright et al., *Assisted Reproductive Technology Surveillance — United States, 2005*, MORBIDITY AND MORTALITY WEEKLY REPORT, June 2008, at 1, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5705a1.htm.

118. *Id.* at 3.

119. Ciccarelli & Beckman, *supra* note 6, at 23; *see also* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 1-2 (1984) (discussing abortion).

120. *See* Scott, *supra* note 101, at 3 (asking of *In re Baby M*, "why did the case generate such powerful emotional, ideological and politic responses that, institutionalized through legislation, continue to define the law in many states?").

121. *See* Ciccarelli & Beckman, *supra* note 6, at 23 (highlighting the lack of knowledge about surrogates and the intended parents who rely on them). Ciccarelli and Beckman suggest several reasons for this absence: (1) lack of research funding because the issue is controversial; (2) conflict with the prevailing political party's policies; (3) surrogate births comprise a relatively low percentage of all births; (4) fear on the part of the intended parents or the gestational carrier of social stigma; (5) professional and ethical constraints on lawyers, psychologists and others who work with surrogates. *Id.* at 23-24. Table 1: Studies on Psychological Aspects of Surrogacy cites the only empirical studies of surrogates and intended parents published between January 1983 and December 2003. *Id.* at tbl.

122. *Id.* at 30-31.

123. *Id.* at 31.

124. *Id.*; *see* Jan Hoffman, *Egg Donations Meet a Need and Raise Ethical Questions*, N.Y. TIMES, Jan. 8, 1996, at 1 (noting the lack of Asian and Jewish egg donors).

125. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 237 (1989); Ruth Macklin, *Is There Anything Wrong With Surrogate Motherhood: An Ethical Analysis*, 16 L. MED. & HEALTH CARE 57, 60-63 (1988). The fact that women of color in the United States are not being exploited more than other women does not mean that exploitation does not occur. Richard F. Storrow, *The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception*, 12 TEX. WESLEYAN L. REV. 189, 203 (2005). Certainly, the woman most likely to engage in surrogacy will be someone who would derive a marginal benefit from the income. *Id.* Furthermore, women in other nations are being

Surrogacy agencies themselves act as gatekeepers to the surrogate population.[126] One agency, the Center for Surrogate Parenting, Inc., posts online guidance for prospective surrogates, stating that they must be (1) a permanent United States resident (in other words, a citizen or green-card holder); (2) a non-smoker; (3) twenty-one to forty-two years old (unless the applicant has been a surrogate before, in which case the surrogate can be older); (4) not a recipient of any public assistance (such as food stamps, public housing and the like); and (5) a mother of a child being raised by the applicant.[127] Other agencies have online pre-screening guidelines similar to those of the Center for Surrogate Parenting, Inc.[128] Thus, these are typical agency policies that shape the surrogate demographic.

If there are few studies of surrogate mother demographics, there are even fewer studies of intended parents.[129] Intended parents skew wealthy, with one study finding their average household income to be over $100,000.[130] Given how expensive surrogacy is, this information is not surprising.[131] Indeed, the unavailability of reproductive technology to middle- and lower-income people is a concern for those who consider access to reproductive health services to be a basic

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asked to have their bodies used as a source of eggs or gestation. *Id.* It is not uncommon, for example, for infertile couples to go to a surrogate in India who charges less than a surrogate in Europe or America. Silvia Spring, *The Trade in Fertility*, NEWSWEEK, Apr. 12, 2006, http://www.newsweek.com/id/46542. Intended parents from the United States may go to foreign countries seeking a surrogate who will charge less than a United States-based surrogate, so the potential hazard of colonization remains. *See* Storrow, *supra* ("[I]nfertility, wealth, and religious dogma . . . can engender a system wherein the infertile act as colonists laying claim to the resources of disenfranchised groups.").

126. *See* Ciccarelli & Beckman, *supra* note 6, at 31 ("[I]t is likely that surrogate demographics are due, at least in part, to the screening which is utilized by surrogacy agencies in selecting candidates to be surrogates.").

127. Center For Surrogate Parenting, Inc., Surrogate Mother Application Request, http://www.creatingfamilies.com/SM/SM_app_request.aspx (last visited Sept. 29, 2009).

128. *See, e.g.*, Circle Surrogacy, Surrogate Questionnaire, http://www.circlesurrogacy.com/questionnaire/fillsurvey.php?sid=3 (last visited Sept. 29, 2009) (including questions about prior medical history and drug use); Growing Generations, Surrogate Application, http://www.growinggenerations.com/ (hover mouse over "Surrogacy Program" hyperlink; follow "Become a Surrogate" hyperlink) (last visited Sept. 29, 2009) (including questions about prior sexual history); An Eggceptional Match LLC, Qualifications of a Gestational Carrier, http://www.donatedeggs.com/surrogacy/gc-qualificatons.html (last visited Sept. 29, 2009) (delineating qualifications to be a surrogate).

129. Ciccarelli & Beckman, *supra* note 6, at 24 (noting that there are only twenty-seven studies that "directly studied characteristics and interaction patterns" of surrogate mothers and intended parents).

130. HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 91 (1994).

131. Surrogates receive somewhere between $20,000 and $25,000 for carrying and delivering a child. Ali & Kelley, *supra* note 112, at 45. The intended parents' total expenses can run up to $120,000, including medical, legal and other fees. *Id.* at 47.

right.[132] Curiously overlooked in discussions, studies, and inquiries, however, is a more basic economic question: how do surrogates treat the payments they receive for carrying a child?[133] Do they declare and pay income taxes on it? If not, why not? The next Part explores the answers to these questions.

III. SURROGACY TAX

A. Payments Received by a Surrogate are Taxable Income

Paid surrogates — women who carry a child to term for another — recognize taxable income.[134] Whether that is income from a service, income from dealings in property, or "rental" income does not change the fundamental tax result.[135] Some surrogacy contracts peg the amounts a surrogate receives to stated reimbursements for housing, food, or clothing.[136] This is to minimize the likelihood that the contract will be voided, in states that otherwise permit surrogacy, on the grounds that the contract violates a prohibition on baby-selling.[137] Under I.R.C. § 61, gross income includes "all income from whatever source derived . . . ."[138] Income may be realized "in any form, whether in money, property or services. Income may be realized . . . in the form of services, meals, accommodations, stock, or other property, as

132. *See* Macklin, *supra* note 125, at 60 (analogizing that if women have the right to reproductive freedoms, such as the "right to abortion or to control the number and spacing of . . . children," perhaps they also have the right to serve as a surrogate).

133. Anthony C. Infanti, *Dismembering Families* 13 (Univ. Pittsburgh Legal Studies Research Working Paper Series, Paper No. 11, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374492#.

134. For a prescient discussion of the income tax consequences of surrogacy, see James Edward Maule, *Federal Tax Consequences of Surrogate Motherhood*, 60 TAXES: THE TAX MAGAZINE 656, 657 (1982). Professor Maule explains, "Unquestionably, the fee paid to the surrogate mother by the childless couple is gross income to the surrogate mother." *Id.* at 657.

135. *But see id.* at 657 ("Whether that fee constitutes compensation or rental income is arguable.").

136. *See, e.g.*, Sample Gestational Surrogate Surrogacy Agreement, http://www.allaboutsurrogacy.com/sample_contracts/GScontract1.htm (last visited Sept. 29, 2009) (explaining that examples of expenses to be paid to a surrogate "include, but are not limited to, housing, automobile, related insurances for housing and automobile, real estate taxes, and maternity clothing").

137. Under Ohio law, for example, gestational surrogacy contracts are enforceable, but the court did not address whether traditional surrogacy contracts are. J.F. v. D.B., 116 Ohio St. 3d 363, 2007-Ohio-6750, 879 N.E.2d 740, at ¶ 6. In the adoption context, Ohio prohibits the payment of expenses for anything other than physician expenses, hospital expenses, attorney fees, adoption agency fees, fees for the minor's medical care, guardian ad litem fees, foster care expenses, court expenses, and a birth mother's living expenses up to $3000. OHIO REV. CODE ANN. § 3107.055(c) (West Supp. 2009).

138. I.R.C. § 61 (2009).

well as in cash."[139] The surrogate receives payment for carrying and bearing a child.[140] It is true that many surrogates report altruistic motives.[141] The desire to help another couple have a child is undoubtedly heart-felt.[142] And many intended parents develop feelings of true affection for the surrogate.[143] The truth remains, however, that but for the surrogate's agreement to carry the child, the intended parents would not pay the surrogate.[144] That is income by any definition.[145]

A woman's decision to have a child, whether or not that child is genetically related to her, is a deeply personal — and, for some people, a religious — choice.[146] From moral and ethical standpoints, there may be a world of difference between a surrogate and someone who agrees to wear an advertising tattoo.[147] But from a purely economic perspective, there is no difference. Both taxpayers put their bodies to an agreed-upon use and receive compensation for "work" (whether advertising or gestating).[148] The gestational surrogate has no more claim to an exclusion from income than does the woman with the forehead tattoo.[149] It is possible that, depending on the facts of a particular

139. Treas. Reg. § 1.61-1(a) (2009).

140. Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 2 (1988).

141. *See* Scott, *supra* note 101, at 2 ("[N]ews stories about surrogacy arrangements in the past decade have tended to be upbeat human interest tales describing warm relationships between surrogates and the couples for whom they bear children . . . .").

142. *See, e.g.*, M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 J. MED. ETHICS 171, 171 (2009) (explaining surrogate mothers' altruistic motives for bearing children); Olga van den Akker, *Genetic and Gestational Surrogate Mothers' Experience of Surrogacy*, 21 J. REPROD. & INFANT PSYCHOL. 145, 146, 150 (2003) (reporting that the majority of British surrogates surveyed said that they did it for altruistic reasons, that most reported they enjoyed pregnancy and childbirth, and that many surrogates said surrogacy fulfilled or added something to their lives).

143. van den Akker, *supra* note 142, at 146 (describing that many surrogates testified to the "deep and meaningful friendships" they had developed with the intended parents).

144. *See* Atwell, *supra* note 140, at 45 (advancing the argument that the intended parents pay for the surrogate's services rather than the baby).

145. *See supra* Part I.B (describing commercial transactions involving the human body and their tax consequences).

146. *See, e.g.*, United States Conference of Catholic Bishops, CATECHISM OF THE CATHOLIC CHURCH 532 (Libreria Editrice Vaticana, 2nd ed. 2000) (1997) ("The conjugal community is established upon the consent of the spouses. Marriage and the family are ordered to the good of the spouse and to the procreation and education of children. The love of the spouses and the begetting of children create among members of the same family personal relationships and primordial responsibilities."); *see also* DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 30 (1968) ("Mishnah: A man may not desist from the duty of procreation unless he already has children.").

147. *See supra* Part I.B (discussing commercial transactions involving the human body).

148. *See supra* notes 65-75, 140 and accompanying text (pointing out that both taxpayers who rent their bodies as advertising space and those who act as surrogates receive payment for their services).

149. *See supra* notes 74-78 and accompanying text (refuting the suggestion that deductions are available for body advertisement expenses).

case, the IRS might be willing to permit certain offsetting deductions to the surrogate that it otherwise disallows to the wearer of the forehead tattoo.

What kind of deductions might a surrogate be eligible to take? If a surrogate engages in enough gestation (or, rather, in gestation *often enough*), it is possible that she could be deemed to be engaging in the "trade or business" of gestation, such that she would be able to deduct her gestation-related expenses under I.R.C. § 162 (business deductions) or I.R.C. § 195 (for "start-up" expenses).[150] If the surrogate is not in the "business" of gestation, it is possible that she could be deemed to be engaged in the "hobby" of gestation — that is, an activity not engaged in for profit — thereby entitling her to limited income tax deductions.[151]

B. Surrogacy Tax Enforcement

From a tax perspective, the difficult question to answer is not how much taxable income surrogates recognize, but whether they report that income. If they do not, why not? If they do not, what does (or should) the federal government do about the non-compliance?

It is not possible to determine with certainty whether surrogates report their income.[152] The IRS does not ask on Form 1040, U.S. Individual Income Tax Return, whether the taxpayer has received any income from surrogacy.[153] The form, however, does ask

150. For an engaged and thorough discussion of possible deductions available to a surrogate, see Sarah B. Lawsky, Baby Tax 8-10 (unpublished manuscript, on file with author).

151. I.R.C. § 183(b) (2009) (providing for deductions for activities not engaged in for profit). The phrase "activity not engaged in for profit" means any activity other than one for which business deductions are allowed under I.R.C. § 162 and other than expenses associated with the production or collection of income under I.R.C. § 212. *Id.* § 183(c); *see also U.S. Income Portfolios: Income Deductions, Credits, and Computations of Tax*, Tax & Accounting Center, (BNA) No. 541-1st, at I(A) (describing the "operation of the § 183 'hobby loss' rule"); 34 AM. JUR. 2D *Federal Taxation* ¶ 17480 (2009) (listing factors to consider in determining whether an activity is engaged in for profit). A more unusual deduction would be for "qualified creative expenses" under I.R.C. § 263A(h). A person who is in the business of being a writer, photographer or artist need not comply with the capitalization rules for inventory. I.R.C. § 263A(h) (2009). Is creating a human life analogous for tax purposes creating an artwork? If an artist has a zero basis in her art, does she have a zero basis in her blood? A child she gestates? Even asking these questions is certain to offend someone.

152. Income Tax Issues in Surrogacy, http://www.information-on-surrogacy.com/tax-issues.html (last visited Oct. 7, 2009) (stating that many surrogates have contacted the IRS to ask if they should pay income tax on their surrogacy compensation, but that the IRS has given no uniform answer).

153. *See* Internal Revenue Service, Dep't of the Treasury, Form 1040 (2008) (lacking any mention of surrogacy).

the taxpayer to report any wages, salaries, tips,[154] business income,[155] and "other" income.[156] The IRS could compile data on the number of taxpayers who report payments received from a particular payor (a named surrogacy agency) or a group of payors (all known surrogacy agencies). The IRS has never done so, however, and it is quite unlikely that it ever will because of budgetary constraints.[157] Because no tax data are available, the researcher must look to other sources. In the case of surrogacy, however, there is no accurate count of the number of surrogate births each year,[158] let alone the tax positions taken by surrogates. Academic studies of surrogates have focused on their demographic or psychological characteristics, not their income tax reporting practices.[159] One must turn instead to the surrogates themselves. They already have turned to the internet.[160]

Postings by experienced or potential surrogates to publicly-accessible internet discussion boards tend to indicate three different conclusions: (1) not all surrogates understand that their receipts are taxable income;[161] (2) those surrogates who do understand that their receipts are taxable income reject that characterization;[162] and

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154. *Id.* at l. 7.

155. *Id.* at l. 12.

156. *Id.* at l. 21.

157. *See, e.g.*, Jacki Calmes, *Obama Will Propose Cuts of $17 Billion From Budget*, N.Y. TIMES, May 7, 2009, at A22 ("The savings for the budget year starting Oct. 1 represent the sum of Mr. Obama's promised 'line by line' scrubbing of the federal budget."); David Cay Johnson, *I.R.S. to Close Walk-In Centers as Agency Faces Tighter Budget*, N.Y. TIMES, Apr. 10, 2005, at 20 (reporting that in 2004, the agency hired no tax collectors and does not hire revenue agents at rate to keep pace with retirements); Stephen Ohlemacher, *IG: IRS Does Poor Job Regulating Tax Preparers*, ASSOCIATED PRESS FIN. WIRE, July 20, 2009 (describing the inability of the IRS to track, monitor, or control tax preparers' activities).

158. *See supra* note 110-116 and accompanying text (explaining the variations in the numbers of surrogate births reported).

159. *See, e.g.*, Ciccarelli & Beckman, *supra* note 6, at 22 (describing literature on surrogacy and noting that it includes "moral, legal, and psychological implications" as well as "social aspects").

160. For a more in-depth discussion on this topic, see Bridget J. Crawford, *Taxing Surrogacy, in* CHALLENGING GENDER INEQUALITY IN FISCAL POLICY MAKING: COMPARATIVE RESEARCH ON TAXATION (Åsa Gunnerson et al. eds., forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422180.

161. One surrogate asked a financial advisor, "I served as a surrogate carrier in 2004 and gave birth earlier this year. . . . Do I have to report my compensation?" She also said, "I do feel I shouldn't have to pay taxes for being compensated for helping a couple to have a baby. What about all the needles, sticks, stretch marks and pain/suffering I went through?" Do Surrogate Moms Have to Pay Income Tax?, Question from "Alcia," to George Saenz, http://www.bankrate.com/brm/itax/tax_adviser/20050524a1.asp) (May 24, 2005) [hereinafter Question from Alcia].

162. "I believe that most of the places that do [send to surrogates the income tax Form] 1099 think of us as 'independent contractors' of which we are NOT!" Posting of SusanFrmLA to SMO Message Boards, http://www.surromomsonline.com/support/showthread.php?p=1604396) (Dec. 29, 2008, 03:38 EST) [hereinafter Posting of SusanFrmLA].

(3) not all surrogacy agencies issue the appropriate tax forms that would prompt the surrogates to comply with their income tax reporting obligations.[163] Ordinarily, a business issues to a service provider or contractor who is not an employee a Form 1099-MISC.[164] Thus a surrogacy agency in the business of matching, supporting, and paying surrogates should issue a Form 1099 to any surrogate it pays in a given taxable year.[165] Because many agencies do not,[166] however, women who otherwise would report their income may not be aware that they are required to do so. Furthermore, it does not seem that the IRS has ever audited a taxpayer who failed to report income from surrogacy (or at least there are no cases or rulings to suggest so). Indeed the IRS has not made any public statement that payment received by a surrogate is income, although there is every indication that it is. When a surrogacy agency does not issue a Form 1099, it is reasonable to hypothesize that compliance levels will be low.

I have suggested elsewhere that the IRS should remedy this situation by issuing guidance regarding the taxability of surrogacy payments and the obligation of surrogacy agencies to issue Forms 1099-MISC to surrogates.[167] This is a straightforward solution to a compliance problem; it requires little expenditure of resources by the government, the surrogacy agencies, or the surrogates themselves. If the government makes a clear statement, the agencies will adjust their practices and taxpayers will know to report their income.

Consider the possibility of an alternative compliance system, one located primarily in the other party (or parties) to the surrogacy arrangement — namely, the intended parent or parents. Such a system might have one or more forms. In one iteration, the surrogate would provide her social security number to the intended parents. The intended parents would then issue a payment statement to the surrogate. A Form 1099-MISC would not be appropriate in such a case, because the intended parents are not in the business of surrogacy,[168] but the IRS could choose to adapt the form for this purpose

163. *Id.* (reporting that six out of eighteen agencies mentioned by surrogates do issue Form 1099s; twelve out of eighteen do not).

164. Form 1099-MISC is a payor's statement for amounts paid for services performed for a trade or business by people not treated as its employees or rent or royalty payments. Internal Revenue Service, Dep't of the Treasury, Instructions for Form 1099-MISC 1 (2008) [hereinafter Instructions for Form 1099-MISC] (explaining how to properly report miscellaneous income that qualifies for this form); *see also* Internal Revenue Service, Dep't of the Treasury, Form 1099-MISC (2008) [hereinafter Form 1099-MISC].

165. Crawford, *supra* note 160.

166. *See* Posting of SusanFrmLA, *supra* note 162 (reporting surrogacy agencies that do not issue Form 1099-MISC).

167. Crawford, *supra* note 160.

168. *See supra* note 164 and accompanying text (explaining when to report trade or business payments).

or create a new form. Alternatively, the surrogate could prepare for the intended parents a form similar to Form W-4, the Employee's Withholding Allowance Certificate.[169] The intended parents then would be responsible for withholding the income taxes on the payment to the surrogate. From an administrative perspective, these proposals are not especially complex or difficult to implement. The next Part considers whether there may be valid theoretical or legal objections to enforcing a surrogacy tax.

IV. TAXATION, PREGNANCY, AND PRIVACY

A. What Privacy Is

"Privacy" has different meanings, depending on the context.[170] One way of understanding privacy is as a right to keep information from others, either because one has no obligation to disclose or because one can prevent another from disclosing it to third parties.[171] For example, a person has no legal obligation to make public his blood type.[172] A patient can prevent a doctor from disclosing to the patient's spouse whether the doctor prescribes anti-depressants for him.[173] This informational understanding of privacy undergirds several important health-related regulations in the United States and abroad.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)[174] and related legislation include several restrictions on the use and disclosure in the United States of "protected health information," such as a patient's name, address, image, medical record or "[a]ny other unique identifying number, characteristic, or code."[175] HIPAA's privacy rule[176] requires health care providers to obtain authorization from patients before releasing any protected health

169. Internal Revenue Service, Dep't of the Treasury, Form W-4 (2008).

170. On the complex meanings of privacy, see, for example, Response, Ann Bartow, *A Feeling of Unease About Privacy Law*, 154 U. PA. L. REV. PENNUMBRA 52, 53 (2006), http://www.pennumbra.com/responses/11-2006/Bartow.pdf.

171. *See* BLACK'S LAW DICTIONARY 1002 (8th ed. 2004) (defining privacy law as "[t]he area of legal studies dealing with a person's right to be left alone and with restricting public access to personal information such as tax returns and medical records").

172. *See* 45 C.F.R. §§ 164.502(a), 164.512(f)(2) (2008) (disallowing disclosure of protected health information except as permitted, and allowing blood type to be disclosed to law enforcement only when the law enforcement official's request meets certain criteria).

173. *See id.* § 164.508(a) (prohibiting disclosure without authorization).

174. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 26, 29 & 42 U.S.C.).

175. 45 C.F.R. § 164.514 (2008).

176. *Id.* § 164.508(a).

information (although there are exceptions for "health oversight" and other narrowly-drawn scenarios).[177]

Another information-based privacy law is the European Union's Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.[178] That Directive contains specific rules for the treatment of "any information relating to an identified or identifiable natural person."[179] Each member nation of the E.U. must adopt laws that limit the "collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction"[180] of such information. For any of these actions (or processes) to occur, the data subject must have "unambiguously" consented and the processing must be "necessary" for compliance with the law, compliance with contractual terms, or to achieve a legitimate state interest.[181] The E.U. Directive and HIPAA both articulate privacy as an individual's right to expect that her personal information will not be used without her consent.[182]

Privacy can be understood not only as a right to keep information to oneself or to prevent others from disclosing it, but also as a broader right to be left alone, free from interference by others.[183] Thoughts, feelings, and religious affiliation are traditionally private matters — those into which the state may not interfere.[184] As Caitlin Borgmann

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177. *See, e.g.*, Barbara J. Evans, *Congress' New Infrastructural Model of Medical Privacy*, 84 NOTRE DAME L. REV. 585, 597 n.73 (2009) (discussing the health-oversight exception to HIPAA's privacy rule); Michael D. Greenberg & M. Susan Ridgely, *Patient Identifiers and the National Health Information Network: Debunking a False Front in the Privacy Wars*, 4 J. HEALTH & BIOMED. L. 31, 31 n.2 (2008) (noting that one Congressional purpose of HIPAA was creating "standards for privacy and security of health information").

178. Council Directive 95/46, The Protection of Individuals With Regard to the Processing of Personal Date and Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC).

179. *Id.* art. 2(a).

180. *Id.* arts. 2(b), 5.

181. *Id.* art. 7. For a discussion of the differences between the approaches of the United States and the European Union to data protection, see Horace E. Anderson, Jr., *The Privacy Gambit: Toward a Game Theoretic Approach to International Data Protection*, 9 VAND. J. ENT. & TECH. L. 1, 16 (2006) (discussing how the two "have traditionally held starkly different positions on data privacy, including the appropriateness of government regulation of the collection and use of personal information by the private sector").

182. Council Directive 95/46/EC, *supra* note 178, at art. 7; 45 C.F.R. § 164.502(a) (2002).

183. *See* Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 487 (2009) ("[F]reedom from unreasonable government intrusion into the home, of course, lies at the core of the Fourth Amendment's guarantee of privacy.").

184. *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) ("[T]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . . ."); Samuel D. Warren & Louis D. Brandeis, 4 HARV. L. REV. 193, 205 (1890) ("[T]he protection afforded to thoughts, sentiments, and emotions, expressed

explains, the United States Supreme Court recognized a married couple's privacy right in the decision to use contraceptives in *Griswold v. Connecticut* in 1965.[185] The Court held that a "zone of privacy [is] created by several fundamental constitutional guarantees" which protect such decisions in the marital context.[186] In 1972, in *Eisenstadt v. Baird*, the Supreme Court extended that right of privacy to "the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[187] More than thirty years later, the Supreme Court struck down a Texas sodomy law in *Lawrence v. Texas*,[188] overruling its 1986 decision in *Bowers v. Hardwick*.[189] The *Lawrence* Court reasoned that a state prohibition on sodomy violates the Due Process Clause of the United States Constitution:

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[190]

In other words, the conduct in question in *Lawrence* was so personal and private that the Constitution prohibits state interference.[191] The Court held that the state law "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[192] In the context of these three Supreme Court cases, privacy means something different than what it means under HIPAA or the E.U. Directive.[193] In these cases, privacy is a freedom from

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through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.").

185. Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 293 (2010); *see also* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

186. *Griswold*, 381 U.S. at 485.

187. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

188. 539 U.S. 558, 578 (2003).

189. 478 U.S. 186, 196 (1986) (holding that the existing sodomy laws in twenty-five states were valid).

190. *Lawrence*, 539 U.S. at 578.

191. *Id.*

192. *Id.*

193. *See supra* notes 173-83 and accompanying text (discussing HIPAA's and the E.U. Council Directive's interpretations of privacy).

state interference or involvement in personal conduct.[194] The government cannot constitutionally regulate decisions and acts that are sufficiently "personal and private."[195]

B. Privacy Objections to Taxing Surrogacy

With this understanding of privacy's dual meanings, consider two possible lines of privacy-based objections to enforcing a surrogacy tax. First, do surrogates have a privacy interest in the information that they received payments for carrying a child for another? Second, is there is a legitimate state interest in requiring surrogates to report their income? Rephrased, does an income tax reporting requirement infringe upon either a surrogate's right to confidentiality or her constitutional right to privacy, as envisioned by *Griswold*,[196] *Eisenstadt*[197] and *Lawrence*?[198]

1. Right to Keep Tax Information to Oneself

To evaluate whether a surrogate might have a privacy right in the fact of her receipt of taxable income, consider a market-based analogy. Assume that a company that is in the business of painting houses hires additional laborers to meet the summer demand for house painting services. The company hires Person A to work for twelve weeks as an independent contractor and pays him more than $600. Guidance from the IRS and the courts make it clear that the house painting company must issue to Person A Form 1099-MISC, a statement of amounts paid to an independent contractor.[199] Person A in turn must report that income to the IRS.[200] Neither the company

194. *See Lawrence*, 539 U.S. at 578 (stating that the government cannot interfere with an individual's sexual conduct inside the home); *Eisenstadt*, 405 U.S. at 453 (finding that individuals, single or married, are free from government interference when deciding whether to purchase contraceptives); *Griswold*, 381 U.S. at 485 (holding that the government cannot interfere with a married couple's decision to purchase contraceptives).

195. *Lawrence*, 539 U.S. at 578.

196. 381 U.S. 479 (1965).

197. 405 U.S. 438 (1972).

198. 539 U.S. 558 (2003).

199. *See* I.R.C. § 6401(a) (2009) (requiring those engaged in a trade or business to issue a form for all payments of $600 or more); *see also* Vaughn v. Comm'r, 63 T.C.M. (CCH) 3094, 3095 (noting the requirement "to issue a Form 1099-MISC to a nonemployee payee . . . regarding remuneration for services in excess of $600"); Instructions for Form 1099-MISC, *supra* note 164 (stating that the form must be filed for "other income payments" over $600).

200. *See* I.R.C. § 6012(a)(1)(A) (2009) (requiring income tax returns to be filed by "every individual having for the taxable year gross income which equals or exceeds the exemption amount . . .").

nor Person A has a colorable privacy claim that is superior to the income tax reporting requirement.[201]

The Privacy Act of 1974 prohibits the IRS, as an agency of the federal government,[202] from disclosing its records except in limited circumstances.[203] An agency of the federal government, the IRS must keep strict account of all disclosures it makes.[204] Furthermore, the

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201. *See infra* notes 215-24 and accompanying text (discussing various unsuccessful privacy challenges to the requirement to file taxes).

202. For purposes of the Administrative Procedure Act, a federal "agency" is an "authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1) (2006).

203. Specifically:

> (b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> (2) required under section 552 of this title;
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
>
> (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;
>
> (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
>
> (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
>
> (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;
>
> (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;
>
> (11) pursuant to the order of a court of competent jurisdiction; or
>
> (12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

5 U.S.C. § 552a(b) (2006).

204. *Id.* § 552a(c).

Internal Revenue Code itself prohibits agency disclosure of certain information.[205] Tax returns are confidential; government employees are prohibited from disclosing "any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise . . . ," subject to narrow exceptions.[206]

In spite of these legal protections, taxpayers' confidence in the confidentiality of their tax data suffers with each additional report of a breach to IRS security.[207] In 1995, for example, a former IRS employee was indicted for illegally obtaining information on a candidate for national political office.[208] In 1997, someone at the IRS allegedly leaked the tax records of Paula Jones, the plaintiff in a sexual harassment lawsuit against then-President Bill Clinton.[209] As recently as January 2009, Congress's Government Accountability Office (GAO) reported that the IRS's "information security control weaknesses continue to jeopardize the confidentiality, integrity, and availability of financial and sensitive taxpayer information."[210] Specifically, the GAO faulted the IRS for failing to maintain strong passwords on electronic files, restrict access to files and encrypt data.[211] The GAO further stated that, "Until these weaknesses are corrected, the agency remains particularly vulnerable to insider threats and IRS is at increased risk of unauthorized access to and disclosure, modification, or destruction of financial and taxpayer information, as well as inadvertent or deliberate disruption of system operations and services."[212]

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205. I.R.C. § 6103(a) (2009).

206. *Id.* For a thorough analysis of administrative law and its application to the IRS, see MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 1.03 (rev. 2d ed. 2002) (discussing the sections of the Administrative Procedure Act that apply to the IRS).

207. *IRS Waives Red Flag on Request for Consumer Information*, 7 CONSUMER FIN. SERVICES L. REP. (2004) ("The Internal Revenue Service shot an arrow through the heart of public confidence in the government's role in protecting consumer financial privacy.").

208. Judy Rakowsky, *Ex-IRS Worker Indicted Allegedly "Browsed" Data for Candidate's Records*, BOSTON GLOBE, June 3, 1995, at 13.

209. *See* Carl Limbacher, *IRS Official to Judicial Watch: Clinton Enemies Were Audited*, NEWSMAX.COM, Apr. 23, 2002, http://archive.newsmax.com/archives/articles/2002/4/22/200136.shtml ("The [Paula] Jones case, which would eventually lead to [President Bill] Clinton's impeachment, was of particular interest to the IRS, which apparently leaked her confidential tax returns to the late New York Daily News reporter Lars Erik Nelson.").

210. U.S. GEN. ACCOUNTING OFFICE, INFORMATION SECURITY: CONTINUED EFFORTS NEEDED TO ADDRESS SIGNIFICANT WEAKNESSES AT IRS 2 (2009), *available at* http://www.gao.gov/new.items/d09136.pdf [hereinafter GAO REPORT]. The GAO issued a similar report in 2008. See U.S. GEN. ACCOUNTING OFFICE, INFORMATION SECURITY: IRS NEEDS TO ADDRESS PERVASIVE WEAKNESSES 2-3 (2008) (discussing the weaknesses in security controls at the IRS).

211. GAO REPORT, *supra* note 210, at 2.

212. *Id.* at 3.

It seems, therefore, that no amount of legal protection can guarantee the privacy of tax information.

Even though there are real privacy risks to taxpayers' confidential information, the government has consistently rejected the claim that tax compliance — reporting one's income to the government in accordance with the IRS rules and regulations — violates a citizen's constitutional rights.[213] The IRS labels as "frivolous" the claim that the tax law, including mandatory self-reporting, "invades a taxpayer's right to privacy under the Fourth Amendment."[214] The United States Supreme Court also has rejected this claim,[215] and yet taxpayers continue to raise it.[216] *Klunder v. United States* is typical in this regard.[217] For two separate years, the taxpayer in *Klunder* filed incomplete income tax returns.[218] He filled in his name, address, signature and the amount of tax he believed he owed, but he left the rest of the form blank.[219] After the IRS assessed and Mr. Klunder paid penalties for filing frivolous returns, Mr. Klunder sought a refund.[220] He argued that he had a privacy right in information about his income and that imposing a penalty on him for failing to disclose that information violated his Fourth Amendment right to privacy.[221] The United States District Court for the Western District of Washington granted summary judgment to the government, soundly rejecting the taxpayer's constitutional claim:

> Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities. Without such disclosure, and the concomitant power of the Government to compel disclosure, our national tax burden would not be fairly and equitably distributed.[222]

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213. *See, e.g.*, United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (holding that it does not violate the Fifth Amendment to mandate filing taxes).

214. I.R.S. Notice 2007-30, 2007-1 C.B. 883, 885.

215. Couch v. United States, 409 U.S. 322, 335-36 (1973).

216. *See, e.g.*, Pryor v. United States, No. 88-z-183, 1990 WL 61972, at *2 (D. Colo. Mar. 14, 1990) ("[P]laintiffs' [sic] have no legitimate expectation of privacy in their returns"); Wainwright v. United States, No. 83-2466, 1984 WL 261, at *1 (W.D.La. Apr. 3, 1984) (rejecting a Fourth Amendment claim as "frivolous").

217. Klunder v. United States, No. C99-542R, 2000 WL 555963, at *1 (W.D. Wash. Feb. 25, 2000).

218. *Id.*

219. *Id.*

220. *Id.*

221. The taxpayer's complaint alleged that "'a mere request for information by a governmental agency, without probable cause, is insufficient to require production of that information.'" *Id.*

222. *Id.* at *2-3.

Courts routinely reject claims to Fourth Amendment privacy in one's tax data,[223] or even a Fifth Amendment privilege against self-incrimination.[224]

With this background, it is clear that neither the house painting company nor Person A in the earlier example can avoid tax disclosure on constitutional grounds. If Person A (the house painter and an independent contractor) must disclose his financial dealings to the IRS, it is highly unlikely that a surrogate would be treated any differently. Just as the house painting company pays Person A, a surrogacy agency pays a surrogate.[225] The agency is in the business of brokering surrogacy agreements and relationships.[226] Thus the agency has an obligation to issue Form 1099-MISC to any surrogate it pays more than $600.[227] Anecdotal information suggests that not all surrogacy agencies meet this obligation, however.[228] In the case of a privately arranged surrogacy, without the assistance of an agency, intended parents may pay the surrogate directly.[229] In that case, the intended parents would not issue Form 1099-MISC to the surrogate, as the intended parents are not engaged in the trade or business of surrogacy.[230]

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223. *See supra* note 216 and accompanying text (noting that taxpayers continue to raise claims asserting that tax compliance violates their constitutional right to privacy).

224. Couch v. United States, 409 U.S. 322, 336 (1973) (holding that the Fifth Amendment claim failed where "there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the accused"); Ricket v. Comm'r, 773 F.2d 1214, 1215-16 (11th Cir. 1985) (holding that the Fifth Amendment claim was "frivolous"); Edwards v. Comm'r, 680 F.2d 1268, 1270-71 (9th Cir. 1982) (same).

225. *See, e.g.*, Find a Surrogate Mother: Surrogacy Agency Program, Surrogate Mother Compensation Schedule, http://www.thesurrogacysource.com/sg_compensation.htm (last visited Oct. 6, 2009) (outlining a compensation scheme for surrogate mothers).

226. *See* National Surrogacy Clinic, The Surrogacy SOURCE: For Intended Parents, http://www.thesurrogacysource.com/ip_about.htm (last visited Oct. 6, 2009) (describing the maintenance of the relationship between the agency and the surrogate and the relationship between the intended parents and the surrogate).

227. *See* I.R.C. § 6041(a) (2009) (requiring those engaged in a trade or business to issue a return for all payments of $600 or more).

228. Posting of SusanFrmLA, *supra* note 162. This same commenter added that "MOST of the large agencies have been in business for some time and know the industry DO NOT 1099. They are in business and what their clients/surrogates do is not their business." Posting of proudmomnsurro to SMO Message Boards, http://www.surromomsonline.com/support/showthread.php?p=1592863 (Dec. 28, 2008, 23:17 EST) (quoting SusanFrmLA). Of the eighteen agencies mentioned in this discussion thread, six reportedly issue Form-1099 and twelve do not. Posting of SusanFrmLA, *supra* note 162.

229. *See* Surrogate Motherhood: Private vs. Agency-Facilitated Arrangements, http://surrogate-motherhood.org/content/surrogate-motherhood-private-vs-agency-facilitated-arrangements (last visited Oct. 8, 2009) (discussing the pros and cons of private surrogacy versus agency-facilitated surrogacy).

230. *See* Internal Revenue Service, Dep't of the Treasury, Instructions for Form 1099-MISC 1 (2009) ("Report on Form 1099-MISC only when payments are made in the course

Notwithstanding the current law, might there be something about surrogacy that makes it different enough from house painting that it is more susceptible to a constitutional claim to privacy? If one's primary intellectual commitment is to treating reproductive labor identically to other types of labor, then surrogacy should be treated no differently from house painting. Neither the surrogate nor the house painter, each of whom engages in paid work, has a constitutional right to keep from the IRS any information about the taxpayer's earnings.[231] Like house painting, surrogacy–and indeed all employment–involves a choice about the use to which one will put one's own body.[232] But to take this position is to ignore the social and cultural reality that, in the estimation of many reasonable people, surrogacy is not just another form of employment.[233] Rather, it is an arrangement with deep moral implications.[234] Participating in a surrogacy arrangement, whether as an egg donor, intended parent, gestational carrier, or representative of a surrogacy agency, may invite scrutiny from one's friends, family, or community.[235]

2. The Right to Choose to be a Surrogate

Consider, then, whether the obligation to disclose income from surrogacy violates privacy in the second sense: the freedom to make choices about private and personal conduct free from state interference or involvement. The decision to enter into a surrogacy arrangement is a choice about the uses to which one will put one's own reproductive capacity as well as the reproductive capacity of at least one other

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of your trade or business. Personal payments are not reportable. You are engaged in a trade or business if you operate for gain or profit.").

231. *See supra* notes 214-24 and accompanying text (arguing that the government has never accepted a constitutional right to privacy when it comes to tax).

232. Martha C. Nussbaum, *"Whether From Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 693-94 (1998) ("All of us with the exception of the independently wealthy and the un-employed take money for the use of our body.").

233. *See, e.g.*, Ragoné, *The Gift of Life*, *supra* note 103, at 213 (discussing women who testified compensation was not their only motivation for becoming a surrogate).

234. Lisa Sowle Cahill, *The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 152-53 (Larry Gostin ed., 1990) (analyzing the "moral ramifications of surrogate motherhood" by focusing on the "moral status of decisions . . . to conceive a child one does not intend to raise, or to induce another to do so; and . . . to enter into a reproductive relationship with an individual who one has no significant and enduring interpersonal relationship . . .").

235. *See, e.g.*, Ragoné, *The Gift of Life*, *supra* note 103, at 213 (quoting one surrogate whose family was actively opposed to her acting as a surrogate); Thomas C. Shevory, *Rethinking Public and Private Life via the Surrogacy Contract*, 8 POL. & LIFE SCI. 173, 182 (1990) (indicating that the Catholic Church and many conservatives are opposed to assisted reproductive technologies).

person.[236] It is a decision about how to "bear or beget a child," a decision "so fundamentally affecting a person" that the government may not intrude on it, as the *Eisenstadt* court established.[237] So does a tax requirement to report income from surrogacy rise to the level of a constitutional violation? It almost certainly does not.[238]

In analogous contexts, the income tax law requires disclosure of extremely private facts, without legally offending taxpayers' privacy rights. For example, details about an abortion must be reported to the IRS in order to claim a medical deduction for associated expenses.[239] Any claimed medical deduction must be supported by evidence.[240] This requirement, the United States Tax Court has ruled, in no way infringes on a taxpayer's privacy.[241] Deductions are a matter of "'legislative grace,'"[242] and so, too, are exemptions from tax reporting requirements.[243] Thus it is unlikely that a surrogate could raise a successful claim that a legal requirement to report income violates her right to privacy.

Critics of the surrogacy tax may argue that, putting privacy concerns aside, surrogacy is so unique that the government should play no role in it.[244] The New Jersey Supreme Court in *In re Baby M*

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236. *See* Cahill, *supra* note 234, at 152-63 (discussing the issues that may emerge from entering into a reproductive relationship with another individual who is not a spouse and who does not intend to raise the child).

237. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

238. *See* discussion *infra* notes 244-246 and accompanying text (discussing the role of privacy in taxation of income from surrogacy).

239. *See* Treas. Reg. § 1.213-1(h) (2009) ("Claims for deductions must be substantiated, when requested by the district director, by a statement or itemized invoice from the individual or entity to which payment for medical expenses was made showing the nature of the service rendered, and to or for whom rendered; the nature of any other item of expense and for whom incurred and for what specific purpose, the amount paid therefor and the date of the payment thereof; and by such other information as the district director may deem necessary."). *See* INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, PUBL'N 502, MEDICAL AND DENTAL EXPENSES 5 (2008) (including abortion costs on the list of expenditures that count toward medical expense deduction).

240. Gasparutti v. Comm'r, 76 T.C.M. (CCH) 726, 728 (1998).

241. *Id.* (denying deduction where taxpayer "did not wish to provide any documents regarding his medical condition because it is an invasion of his privacy").

242. *See, e.g.*, Langer v. Comm'r, T.C. Memo 2008-255, 2008 WL 4876819 at *2 (U.S. Tax Ct.) ("'[A] taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.'" (quoting New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934))).

243. *See, e.g.*, I.R.C. § 2503(a),(b) (2009) (stating that annual gifts under the exclusion amount are not taxable for gift tax purposes).

244. *See* Gregory Pence, *De-Regulating and De-Criminalizing Innovations in Human Reproduction*, 39 COLUM. L. REV. 1, 1-2 (2008-2009) (arguing that deciding to have a child "may be a quintessential aspect of personal liberties" and noting that "[p]rior decisions by the Supreme Court about contraception, informed consent, and abortion, among many other decisions, imply a respect for an area where governments should not interfere with individuals' decisions concerning the creation of families").

mused, "In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest."[245] Taken to its logical conclusion, this position would require an income tax exemption not only for the surrogate, but also for the surrogacy agencies that profit from the arrangements.[246] The exemption theoretically could extend to all people and businesses engaged in a myriad of commercial activities involving truly unique and personal decisions: for example, making, selling, and purchasing contraceptives or medicines for certain health conditions. Such an exemption, however, would be administratively and fiscally unwise.

C. Whether Privacy Matters

Anita Allen has argued that "accountability for virtually all personal and intimate behavior is the rule rather than the exception in the United States. Accountability for private life is as common as dirt."[247] In other words, there exists little "privacy," in the sense of a cultural or even moral "right," to keep information to oneself.[248] Even though a citizen has no generalized legal obligation to disclose her health-related information,[249] in Allen's analysis, this citizen nevertheless may have a moral duty to share that information with her husband or life partner.[250] Being accountable for health information (as in yielding privacy through disclosure) allows a physician to better care for the patient.[251] Such disclosure better equips a spouse or

245. *In re* Baby M, 537 A.2d 1227, 1264 (N.J. 1988).

246. In a non-tax context, Naomi Cahn and Jennifer Collins argue for increased oversight of assisted reproductive technologies, including limits on embryo transfers. Naomi R. Cahn & Jennifer M. Collins, *Eight is Enough*, 103 NW. U. L. REV. COLLOQUY 501, 513 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/22. Kimberly Krawiec cautions that such limits "would produce fewer benefits and higher costs than Cahn and Collins assume. Moreover, the fertility industry is to be subjected to greater oversight, such oversight should stem from a balancing of what is to be gained and lost in the process . . . ." Kimberly D. Krawiec, *Why We Should Ignore the "Octomom,"* 104 NW. U. L. REV. COLLOQUY 120, 121 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/34.

247. ANITA L. ALLEN, WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY 3 (2003).

248. *Id.* ("Accountability for private life means that the broad areas of individual and group life regularly labeled as private are not walled off.").

249. *Id.* at 120 ("Individuals have exclusive access to many forms of information about their own physical and mental states. They may elect to keep this kind of information to themselves.").

250. *Id.* at 122 ("It is important to share health information with family and friends to reap the rewards of reciprocal love, trust, and interdependency.").

251. *Id.* at 119 ("The ability of patients to trust their doctors with the truth depends on their expectations of physician competence and confidentiality. Patient openness is

partner to recognize signs of illness or perhaps even to determine the appropriateness of certain interventions.[252] Allen's theories, as applied to the surrogacy context, suggest that surrogacy tax itself is not an intrusion on privacy. Any "harm" the surrogacy tax does is to the narrative of altruism that surrogates and intended parents embrace.[253]

1. Women and Privacy

Women have a mixed experience with privacy. Privacy, in the sense of being left alone, is the condition under which domestic violence flourishes, free from state intervention.[254] Privacy, however, also is the theoretical ground on which women assert the right to control their own bodies.[255] Instead of drawing broad conclusions about privacy, then, Allen calls for a "context-specific" analysis of accountability for private life.[256] She reasons that "certain goals, including moral dignity and autonomy, inclusive workplaces, public safety, effective leadership, happy families, and a pluralistic society, will point us away from certain specific accountability practices and toward others."[257] Thus, accountability for our so-called "private" lives comes in many forms: "(1) reporting, (2) explaining, and (3) justifying acts and omissions [as well as] (4) submit[ting] to sanctions and (5) maintain[ing] reliable patterns of behavior."[258] Although taxation does not factor explicitly into Allen's analysis, it is an accountability of the form that Allen identifies. Surrogacy tax is a requirement to report to the government the money that changes hands in an otherwise "private" transaction.[259]

How is this type of tax reporting justifiable? A system that requires a taxpayer to report income from surrogacy marks the economic value of reproductive work.[260] A surrogate's paying taxes on this work means that it will inure to her future financial benefit, inso-

especially critical in the delivery of mental health services. In addition to physician-patient confidentiality facilitating health-relevant disclosures, it also promotes individual interests in autonomy.").

252. *Id.* at 121-22.

253. *See infra* notes 270-78 and accompanying text (discussing altruism).

254. ALLEN, *supra* note 247, at 42.

255. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926-27 (1992) (noting the "principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of the government").

256. ALLEN, *supra* note 247, at 42.

257. *Id.* at 44.

258. *Id.* at 15.

259. *See* Crawford, *supra* note 160 (discussing the controversy around and difficulties with reporting surrogacy in tax documents).

260. *See id.* (framing surrogacy as "activities . . . of work . . . for which [the surrogate] deserves to be compensated").

far as social security benefits, among others, are based on the length of time the individual has engaged in paid, market-based labor.[261] Taxation also makes reproductive work more like traditional market-based work: work that is subject to a myriad of local, state, and federal regulations.[262] Taxation, therefore, can be understood as an accountability practice that "protects, dignifies, and advantages," in Allen's lexicon.[263] Taxation holds surrogates accountable for their choice, thereby "presupposing intelligence, rationality, and competence for dialogic social performances of reckoning,"[264] conferring a high degree of dignity on the person who performs the work.

A business income payor, such as a surrogacy agency, makes itself accountable for standard business practices by issuing Form 1099-MISC.[265] An agency that complies with its administrative obligations under the tax law likely employs experts and specialists who can monitor compliance with other local, state and federal regulations, too.

The fact that surrogates are women, and that only women will pay a surrogacy tax, does not offend equality under Allen's framework. She makes room for treating men and women differently as long as that difference is linked to women's actual capabilities.[266] Allen states, "Equality of accountability will also require that when men and women engage in the same activities, women are neither more nor less accountable than male counterparts."[267] Differential treatment between men and women is not per se inappropriate when it is based on biology.[268] Thus, a surrogacy tax is not an inappropriate form of accountability for private life.

2. Bursting the Bubble of Altruism

Requiring surrogates to account to the government via the tax system weakens the narrative that surrogates are wholly altruistic actors. If that narrative weakens too much, social and perhaps even

261. *See id.* at 7.

262. *See, e.g.*, 1 DISABILITY DISCRIMINATION WORKPLACE § 11:6 (2009) (pointing out that employers must comply with various anti-discrimination laws).

263. ALLEN, *supra* note 247, at 195.

264. *Id.* at 196.

265. Form 1099-MISC, *supra* note 164 (requiring individuals and companies to report payments for non-employee services of more than $600).

266. ALLEN, *supra* note at 247, at 41 ("Equality of accountability cannot mean, though, that without regard to actual capacities and roles, individual men and women should be accountable in precisely the same ways to precisely the same people.").

267. *Id.*

268. *Id.* ("The criminal or civil accountability that might be appropriate for a nursing mother who knowingly consumes dangerous drugs that will be delivered to her infant through breast milk is not appropriate for the father of the infant who consumes those same drugs.").

legal tolerance of surrogacy may, too.[269] Surrogates report that their motives often are not financial, or at least not financial in the first instance.[270] As one surrogate explained, "The money wasn't enough to be pregnant for nine months."[271] Another said, "I'm not doing it for the money. Take the money. That wouldn't stop me. It wouldn't stop the majority."[272] A third asked, "What's $10,000 bucks? You can't even buy a car . . . Money wasn't important. I possibly would have done it just for expenses, especially for the people I did it for. My father would have given me the money not to do it."[273] De-emphasizing the financial aspects of surrogacy contributes to the construction of surrogacy as the "'gift of life,'"[274] a supreme self-sacrifice.[275] Framing surrogacy — whether traditional or gestational — in this way contributes to a positive view of surrogates, like blood or organ donors.[276] Indeed, one factor in Mary Beth Whitehead's success in the *In re Baby M* case may have been her lawyers' portrayal, and the Supreme Court of New Jersey's acceptance, of her as a woman whose desire to be a surrogate "resulted from her sympathy with family members and others who could have no children (she stated that she wanted to give another couple the 'gift of life'); she also wanted the $10,000 to help her family."[277] From this perspective, Mrs. Whitehead's altruism was primary; her financial motives were secondary.[278]

Constructing surrogacy as a gift reinforces the dichotomy between the family/private sphere and the commercial/public sphere.[279] Bringing a child into the world typically is associated with love, affection, and the family.[280] Purchasing services or a product is associ

269. SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 182 (2003) ("[N]ew reproductive technologies are more likely to be permitted and tolerated when they are associated with acts of reproduction rather than with acts of consumption. That is, although we live in a consumer-oriented culture . . . as a society we remain averse to equating kinship formations with commercial transactions.").

270. *See* Ragoné, *The Gift of Life*, *supra* note 103, at 212.

271. *Id.* at 213.

272. *Id.*

273. *Id.*

274. *Id.* at 210.

275. *See id.* at 214-15 (referring to surrogacy as "the ultimate gift of love" and framing surrogacy as a relationship of indebtedness to the woman's sacrifice).

276. *See supra* note 1 and accompanying text (discussing the positive view of organ and blood donors).

277. *In re* Baby M, 537 A.2d 1227, 1236 (N.J. 1988).

278. *See* MARKENS, *supra* note 269, at 120-21 (contrasting *In re Baby M* with *Johnson v. Calvert*, where the surrogate was portrayed in the press as a welfare abuser who demanded more money from intended parents in return for relinquishing the child).

279. "[T]he rejection of paid or commercial surrogacy may . . . result from a cultural resistance to conflating the symbolic value of the family with the world of work to which it has long been held in opposition." Ragoné, *The Gift of Life*, *supra* note 103, at 215.

280. D. Langdridge et al., *Understanding the Reasons for Parenthood*, 23 J. REPROD. &

ated with greed, need, consumption, and the market economy.[281] To focus on the money that changes hands in the surrogacy context is to suggest that the family and the marketplace are not as distinct as one may think.[282]

The ideology of altruism historically has obscured the underlying reality of women's work.[283] Scholars have exposed, for example, the ways that working women who employ in-home child-care providers, as well as care-providers themselves, become invested in a narrative of the giving, loving nanny.[284] Care providers may focus their love for their own absent children to the children in their immediate care,[285] allowing the employer-mother to feel less guilty about her own physical absence from them.[286] But as Taunya Lovell Banks has explained, even the names used to describe care providers — "babysitters" and "nannies" — can obscure the power dynamics of the employer-employee relationship.[287] In other words, to describe

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INFANT PSYCHOL. 121, 131 (2005) (noting "a number of reasons . . . in predicting intentions to have a child" including "giv[ing] love and mak[ing] a family").

281. Katherine Franke invites reconsideration of this dichotomy: "To portray mothering as purely altruistic, other-regarding, and socially valuable, and [market consumption] as purely selfish and socially inconsequential, is to ignore the complex interrelations between production, reproduction, and consumption, as well as the social forces that govern the 'choices' and priorities we set in our own lives." Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 190-91 (2001).

282. *See* Rhonda Shaw, *Rethinking Reproductive Gifts as Body Projects*, 42 SOC. 11, 16 (2008) (finding that non-commercial surrogacy is emphasized as altruistic because money is not exchanged).

283. *See* Deborah Stone, *For Love nor Money: The Commodification of Care*, *in* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 271, 278 (Martha M. Ertman & Joan C. Williams eds., 2005) (suggesting that the desire of some care workers to be seen as loving providers makes them vulnerable to exploitation); *see also* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1133 (1994) (recounting the idealized view of a wife's labor in the home in the nineteenth century); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 23 (1997) (explaining that in the nineteenth century, "[t]he market was understood as cold, competitive, male, and aggressively self-interested, while the family was understood as a haven for altruism, affection, higher moral calling, and refuge from the market world").

284. Arlie Russell Hochschild, *Love and Gold*, *in* GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 15, 26 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) (describing how wealthy employers of child-care providers focus on mutual love between child and care-provider and stating: "[T]hat's all there is to it. The nanny's love is a thing in itself. It is unique, private — fetishized"); Cameron L. Macdonald, *Manufacturing Motherhood: The Shadow Work of Nannies and Au Pairs*, 21 QUALITATIVE SOC. 25, 37 (1998) (noting that mother's "need to feel good about her child care arrangement can lead [her] to maximize the nanny-child bond" and emphasize how much her children "'love' the nanny").

285. Hochschild, *supra* note 284, at 25-26.

286. *See* Macdonald, *supra* note 284, at 40-41 (describing the guilt absent mothers may feel, and their belief that their children need attention from some source).

287. Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work*

the relationship is to characterize it in a certain way. This is true with surrogacy.

Taxing surrogacy is a kind of accountability that threatens to disrupt a narrative not dissimilar to the nanny narrative. A surrogate tells herself and others (and very genuinely may believe) that she is acting as a surrogate in order "to give."[288] The intended parents want and need to accept this as true, so that they can disengage from the complexities of surrogacy and assuage any concerns they might have about asking a woman to relinquish a child to whom she gives birth.[289] If the tax system enforces income tax reporting by surrogates, surrogacy loses its claim to being "not work" and comes to look more like baby-selling.[290]

For intended parents, treating surrogacy as work just like any other might facilitate the view, articulated by one intended father, that the gestational surrogate is merely an "oven" in which the baby is created,[291] a facility that can be rented for a particular project. There exists a real tension, then, between accountability in the form of regularized income tax reporting and the potential that a gestational carrier will be seen as a worker like any other. Whether women would prefer surrogacy work to other work might depend on the individual, but if altruism takes second place to monetary reward in the cultural story, potential surrogates will be less likely to embrace it.[292]

Notwithstanding this potential negative side of enforcing a surrogacy tax, extending Anita Allen's theory of privacy[293] allows for the possibility that surrogacy tax, a form of accountability, is an appropriate concession for the freedom to choose to be a surrogate.

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and the Nanny Tax Debate, 3 J. GENDER, RACE & JUST. 1, 6 (1999). Banks also argues that "[n]anny, the term used by affluent professional women, romanticizes and conceals the exploitative nature of the employer-employee relationship. The term nanny genders as female, and normalizes surrogate childcare and domestic labor in the private sphere, reinforcing the notion that men are entitled to women's domestic labor." *Id.* at 4.

288. Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 118 (1983).

289. Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 305 (2007) (explaining how surrogacy agencies capitalize on the altruism paradigm to attract intended parents).

290. *See* MARKENS, *supra* note 269, at 82 (noting critics who "equate . . . commercial surrogacy with 'baby-selling'" and who have asked "facetiously" if babies would then be subject to sales tax).

291. One man said of his gestational surrogate, "She was an oven . . . . she doesn't see herself as the mother. We don't see her as the mother and that's the way it is." Ragoné, *The Gift of Life*, *supra* note 103, at 218.

292. *Id.* at 214 (noting that the "gift formulation" idea of surrogacy "holds particular appeal for surrogates").

293. *See supra* notes 247-58 and accompanying text (discussing Anita Allen's theory of privacy).

Allen describes what she calls a "New Accountability," an escalating demand for information, as "a product of Americans' extensive social, economic, and political freedoms and our ambivalence about forms of privacy that hide truths useful to others."[294] These freedoms also provide a firm basis for accountability. In return for citizens' ability to use reproductive technology, the government may enforce the income tax laws that clearly treat a surrogate's receipts as income.[295]

V. FORGETTING AND REMEMBERING MOTHERHOOD

If enforcing a surrogacy tax weakens the cultural story of altruism, its supporters need to find other support for the practice. Indeed, the income tax law is one place to which surrogacy's supporters might turn. After all, the Internal Revenue Code is full of provisions that are designed to encourage some behavior, like homeownership,[296] and discourage other behavior, like drug use.[297] There could be special exemptions for a certain percentage of income from surrogacy, or deductions or tax credits for associated expenses. Tax law and social policy are no strangers.[298] Offering tax incentives for surrogacy is a choice society can make in order to increase its appeal.[299]

Reproductive technology undoubtedly allows many people the otherwise unattainable experience of forming a family and becoming a parent.[300] And in some ways, reproductive technology and adoption laws have responded much faster to changes in family structure than, for example, marriage and divorce laws have.[301] The practice

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294. ALLEN, *supra* note 247, at 199.

295. *See* I.R.C. § 61 (2009) (defining "gross income" to include compensation for services).

296. *See id.* § 121 (excluding from gross income the gain on the sale of a principal residence). The income tax law also encourages charitable donations. *See id.* § 170 (allowing deductions for certain transfers to charity).

297. *See id.* § 25A(b)(2)(D) (disallowing the Hope Scholarship credit in the case of a student who has been convicted of a felony or state drug possession or distribution offense).

298. *See* FRANK SAMMARTINO & ERIC TODER, THE URBAN INSTITUTE, SOCIAL POLICY AND THE TAX SYSTEM 21 (2002), http://www.urban.org/UploadedPDF/310418_TaxSystem.pdf ("The tax system is being used to achieve some goals of social policy and is likely to be employed for others.").

299. *See id.* (discussing how tax benefits have been used to encourage home ownership, charitable giving, and retirement saving, among other purposes).

300. J. Barnes et al., *The Influence of Assisted Reproduction on Family Functioning and Children's Socio-emotional Development: Results from a European Study*, 19 HUM. REPROD. 1480, 1485 (2004) (emphasizing that families formed with the aid of assisted reproductive technology are as likely to be successful as families conceived naturally).

301. Denise A. Skinner & Julie K. Kohler, *Parental Rights in Diverse Family Contexts: Current Legal Developments*, 51 FAM. REL. 293, 293-97 (2002) (outlining the legal developments in parental rights as family structures have changed, specifically relating to adoption, assisted reproductive technology, step-parents, and gay- and lesbian-headed families); *cf.* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay*

of surrogacy must be understood, however, as facilitating parenthood and thus reinforcing the idea that motherhood is the default vocation for women and that children are the default status for families.[302] Surrogacy both creates new possibilities for gay men, to give one example, to become biological parents,[303] but it also shores up traditional gender roles and expectations.[304] It is a medical way of easing the real pain that childless women (and some men) feel.[305] It makes more difficult the radical reconsideration of the possibilities for human fulfillment.[306] In this sense, surrogacy operates as a kind of cultural propranolol.[307] Scientists believe that this drug, typically used to treat hypertension, can recondition certain memory pathways in the brain so that post-traumatic stress disorder victims and survivors of sexual trauma will not suffer from flashbacks.[308] The use of propranolol has tremendous appeal; it can alleviate the suffering of many people.[309] But opponents condemn propranolol on the grounds that it deprives the individual of the moral and ethical enrichment that comes from human suffering.[310] The law, however, should not give cognizance to the notion that there is inherent virtue in suffering traumatic memories or in childlessness, for that matter. Ultimately, each person must decide

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and Lesbian Families, 18 CARDOZO L. REV. 1299, 1302 (1997) (discussing gay and lesbian marriage and stating, "historically, American family law has reflected and reinforced the traditional nuclear family model").

302. *See* Uma Narayan, *Family Ties: Rethinking Parental Claims in Light of Surrogacy and Custody*, *in* HAVING AND RAISING CHILDREN: UNCONVENTIONAL FAMILIES, HARD CHOICES, AND THE SOCIAL GOOD 65, 70 (Uma Narayan & Julia J. Bartkowiak eds., 1999) (arguing that commercial surrogacy is linked to gender-role and economic exploitation).

303. Susan Donaldson James, *More Gay Men Choose Surrogacy to Have Children*, ABC NEWS, May 12, 2009, http://abcnews.go.com/Entertainment/OnCall/story?id=4439567.

304. Narayan, *supra* note 302, at 70.

305. Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL MED. & BIOETHICS 153, 156 (2000).

306. *See* Lise Motherwell & Suze Prudent, *Childlessness and Group Psychotherapy: Psychological and Sociological Perspectives*, 22 GROUP 145, 155 (1998) (advocating group psychotherapy to help childless women find other forms of fulfillment).

307. Propranolol is a beta blocker that acts to "suppress the action of epinephrine" and is primarily used "for the prevention and treatment of heart disease and hypertension." PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 222 (2003) [hereinafter BEYOND THERAPY].

308. Michael Henry et al., *Propranolol and the Prevention of Post-Traumatic Stress Disorder: Is it Wrong to Erase the "Sting" of Bad Memories?*, 7 AM. J. BIOETHICS 12, 13 (2007); Roger K. Pitman et al., *Pilot Study of Secondary Prevention of Posttraumatic Stress Disorder with Propranolol*, 51 BIO. PSYCHIATRY 189, 192 (2002); Anda H. van Stegeren et al., *Memory for Emotional Events: Differential Effects of Centrally Versus Peripherally Acting β-Blocking Agents*, 138 J. PSYCHOPHARM. 305, 309 (1998).

309. BEYOND THERAPY, *supra* note 307, at 224 ("For those suffering from . . . disturbing symptoms, a drug that could separate a painful memory from its powerful emotional component would appear very welcome indeed.").

310. *Id.* at 221-27 (discussing the effects of propranolol on memory and the ethical problems associated with "memory-blunting").

for himself or herself how much pain to tolerate. If surrogacy eases that pain, then it is justified. The government may properly tax the activity, but it cannot prohibit it.

CONCLUSION

People give, rent and sell body parts for many reasons. Their motivations may be love, money, publicity, a desire to help, or any combination of factors.[311] Some transfers have permanent and serious consequences. Consider the Long Island man who donated a kidney to his wife in 2001 "in a gift meant to save her life and their foundering marriage."[312] When the marriage deteriorated several years later, the husband requested during divorce proceedings that the kidney be treated as a marital asset for purposes of equitable distribution.[313] He claimed that the kidney was worth $1.5 million.[314] The Special Referee in the case denied the husband's request, reasoning that human organs are not "'marital property'" and that the husband "inappropriately equate[d] human organs with commodities."[315] Human organs may not be commodities for purposes of divorce law, then, but regenerable body parts like blood and breast milk certainly are for income tax purposes.[316]

Tax is not the only area of law that permits (or at least tolerates) a commercial trade in bodies. Legalized prostitution systematizes it.[317] In jurisdictions like Germany, for example, prostitution is

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311. *See supra* notes 11-18 and accompanying text (discussing motivations for giving or selling blood); *supra* notes 65-73 and accompanying text (discussing motivations for rental or sale of body parts); *supra* notes 270-78 and accompanying text (discussing motivations of surrogates).

312. Larry McShane, *Long Island Doctor Richard Batista to Estranged Wife: Give Me My Kidney Back or $1.5M*, N.Y. DAILY NEWS, Jan. 8, 2009, http://www.nydailynews.com/ny_local/2009/01/07/2009-01-07_long_island_doctor_richard_batista_to_es.html.

313. Bill Hutchinson, *Judge Rejects Long Island Doctor Dr. Richard Batista's Bid to Charge Estranged Wife for* Kidney, N.Y. DAILY NEWS, Feb. 26, 2009, http://www.nydailynews.com/ny_local_2009/02/25/2009-02-25_judge_rejects_long_island_doctor_dr_rich.html; *see also* N.Y. DOM. REL. LAW § 236-B(5)(c) (McKinney 2009) (requiring marital property to be distributed equitably in divorce).

314. McShane, *supra* note 313.

315. Hutchinson, *supra* note 314.

316. *See supra* notes 34-39 and accompanying text (discussing the tax treatment of regenerable body parts).

317. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008) *available at* http://www.state.gov/g/tip/rls/tiprpt/2008/105386.htm.

> Annually, according to U.S. Government-sponsored research completed in 2006, approximately 800,000 people are trafficked across national borders, which does not include millions trafficked within their own countries. Approximately [eighty] percent of transnational victims are women and girls and up to [fifty] percent are minors. The majority of transnational victims are females

legal.[318] In 2009, a woman there sold her virginity to the highest bidder on an internet auction site.[319] She received $13,827.[320] Curiously, prostitution is legal in Germany, but gestational surrogacy is not.[321] Perhaps the long history of selling sex[322] makes it seem less offensive than gestational surrogacy, a twentieth century phenomenon.[323] Perhaps the state takes a limited role in prostitution because two adult parties with presumed equal bargaining power are presumed to have agreed about the uses to which they will put their bodies.[324] Surrogacy, on the other hand, involves not just two (or more) consenting adults, but also a child — someone who was not party to the initial contract — and so it merits greater state involvement.[325] Yet,

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> trafficked into commercial sexual exploitation. These numbers do not include millions of female and male victims around the world who are trafficked within their own national borders — the majority for forced or bonded labor.

Id.

318. Katherine L. Morrow, Comment, *Soccer, Sex, and Slavery: Human Trafficking in the World Cup*, 17 TUL. J. INT'L & COMP. L. 243, 256 (2008).

319. Leon Watson, *Teen is Chaste by the Taxman*, SUN (London), May 21, 2009, http://www.thesun.co.uk/sol/homepage/news/2441238/Teen-is-chaste-by-the-taxman.html.

320. *Student Who Auctioned Virginity Online May Have to Pay Half Her Earnings in Taxes*, SUN (London), May 21, 2009, http://www.foxnews.com/story/0,2933,520982,00.html?test=latestnews.

321. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1458 (2008) (stating that the Embryo Protection Act proscribes gestational surrogacy); *see also* John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT'L L. 189, 203-205 (2004) (noting that "controversy . . . over the status . . . of embryos and the need for regulation of the IVF procedures that created them . . . led to the Embryo Protection Act of 1990"); Am. Soc'y for Reprod. Med., *IFFS Surveillance 07*, 87 FERTILITY AND STERILITY S51 tbl.15.1 (2007), *available at* http://www.iffs-reproduction.org/documents/Surveillance_07.pdf (stating that Germany does not permit IVF surrogacy).

322. Prostitution has existed at least since biblical times. *See Genesis* 38:12-19. In that passage, Tamar is mistaken by her father-in-law, Judah, as a "harlot; because she had covered her face." *Id.* at 38:15. Judah then offered Tamar a promise to pay her with a goat in the future, secured by his signet, bracelets, and staff, in return for sexual services. *Id.* at 38:17-18. "And he gave *it* her, and came in unto her, and she conceived by him." *Id.* at 38:18.

323. The first report of live birth by a gestational surrogate was in 1985. *See* Wulf H. Utian et al., *Successful Pregnancy After In Vitro Fertilization and Embryo Transfer from an Infertile Woman to a Surrogate*, 313 N. ENG. J. MED. 1351, 1351-52 (1985) (reporting a successful in vitro fertilization). Traditional surrogacy, in contrast, has been known since biblical times. *See Genesis* 16:2-3 ("And Sa'rai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sa'rai. And Sa'rai Abram's wife took Ha'gar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife.").

324. Nicole Bingham, Note, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 78 (1998) (explaining the "contractarian" perspective of prostitution).

325. *See* A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59, 60 (Larry Gostin ed., 1990) (discussing the state's role as *parens patriae*,

still, there is no logical reason that state involvement must be an absolute ban on gestational surrogacy, instead of regulation.

Undoubtedly, surrogacy is a complicated arrangement. It invites questions about the meaning of "mother," "father," and "family."[326] Surrogacy challenges the belief that women are irrevocably connected to the children they bear.[327] It raises a myriad of ethical questions. But in an economic sense, surrogacy is rather simple. It is work that gives rise to taxable income. The mandate for the legal system is clear: enforce and collect the tax. Of all of the unanswered (and unanswerable) questions about surrogacy, taxation is not one of them.

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having the legitimate interest in protecting children in the family context).

326. *See, e.g.*, Susan Dalton, *Nonbiological Mothers and the Legal Boundaries of Motherhood: An Analysis of California Law*, *in* IDEOLOGIES AND TECHNOLOGIES OF MOTHERHOOD: RACE, CLASS, SEXUALITY, NATIONALISM 191, 192-93 (Heléna Ragoné & France Winddance Twine eds., 2000) (discussing how gestational surrogacy complicates the traditional definition of "mother").

327. Christine Ward Gailey, *Ideologies of Motherhood and Kinship in U.S. Adoption*, *in* IDEOLOGIES AND TECHNOLOGIES OF MOTHERHOOD: RACE, CLASS, SEXUALITY, NATIONALISM 11, 14 (Heléna Ragoné & France Winddance Twine eds., 2000) (noting that some question the creation of a "'birth bond'").