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Our Bodies, Our (Tax) Selves

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I. INTRODUCTION

"Get paid for what you're already doing!" reads one sperm bank's advertisement.[1] "$50,000 for an extraordinary egg donor," announces an advertisement in an Ivy-League college newspaper.[2] A robust commercial market in human reproductive material is the foundation for a multi-billion dollar fertility industry. Yet existing law does not provide a clear answer to the question of whether human reproductive material is property like any other. The tax law, for example, has never addressed the tax consequences of sales and gifts of human eggs and sperm. Courts and the Internal Revenue Service (Service) have ruled, however, on sales of blood plasma and human breast milk. Similarly, the law of trusts and estates is silent on the question of whether ova and sperm may be freely transferred at death. But in some contexts, the law permits posthumous reproduction.[3]

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[1] Mandy Van Deven, *Secrets of the Sperm Bank*, SALON.COM, Sept. 25, 2011, http://www.salon.com/2011/09/25/sex_cells_interview/.

[2] David Tuller, *Payment Offers to Egg Donors Prompt Scrutiny*, N.Y. TIMES, May 10, 2010, at D5 ("Ads in newspapers at Harvard, Princeton and Yale promised $35,000 for donors, Dr. [Aaron] Levine [of the Georgia Institute of Technology] found, while an ad placed on behalf of an anonymous couple in The Brown Daily Herald offered $50,000 for 'an extraordinary egg donor.'").

[3] *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 542 (2002) (respecting post-mortem conception where "the deceased intestate parent affirmatively consented (1) to

Comprehensive and logical property-law treatment for eggs and sperm might lead to absurd results for human sexual relations. At the same time, however, ignoring the existing commercial market creates a de facto tax preference for the work of selling sperm or eggs.

This article proceeds in five parts. Part I surveys the existing markets for human bodily material — such as organs, blood, and tissue — as well as bodies themselves (i.e., corpses). There are more sick people who would benefit from donated kidneys, lungs, and blood than there are donors of this material.[4] Hence, medical professionals and health advocacy group use public awareness campaigns to encourage organ donations.[5] In some states, a signature on the back of one's driver's license can serve as legal evidence of the holder's desire to become an organ donor.[6] In these jurisdictions, it is easier for a person to make a death-time gift of his organs than, say, his marketable securities.[7] Nevertheless, the persistent asymmetry between organ supply and demand has led to the development of an illegal market in human organs. News stories of suspected international organ traffickers shock the conscience[8] and require us to contemplate whether the human body is itself property. If the body is *always* property, *never* property, or something in between, what does that mean for the law?

Part II considers how courts and the Service — unevenly and incompletely — have answered the question of whether the human body is property like any other. On the one hand, any judicial or administrative determination of the tax consequences of a particular transaction or item reveals only that — i.e., how that transaction or item will be treated for tax purposes. On the other hand, if courts or rule-makers are to contemplate the tax consequences of a commercial trade in human blood and breast milk, then they must resolve baseline legal questions about the nature of the human body.[9]

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the posthumous reproduction and (2) to support any resulting child").

[4] The total number of organs transplanted in 2008 was 27,281; 100,597 people were registered on organ waiting lists during the same period. U.S. DEP'T HEALTH & HUM. SERV., 2009 ANNUAL REPORT OF THE U.S. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK AND THE SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS: TRANSPLANT DATA 1999-2008 (2009).

[5] *See, e.g.*, *April: National Donate Life Month*, U.S. DEP'T HEALTH & HUMAN SERV., http://www.organdonor.gov/materialsresources/materialsntlevents.html.

[6] *See, e.g.*, N.Y. VEH. & TRAF. L. § 504(1)(a) (McKinney 2007).

[7] *Compare id.* (allowing organ donation preferences to be indicated on driver's license), *with* N.Y. REAL PROP. § 243 (McKinney 2006) (real property transfers must be in writing and either acknowledged or attested by one witness).

[8] *See infra* notes 24–35 and accompanying text.

[9] Bridget J. Crawford, *Taxation, Pregnancy and Privacy*, 16 WM. & MARY J. WOMEN & L. 327, 333 (2010); Bridget J. Crawford, *Taxing Surrogacy*, *in* CHALLENGING GENDER

Part III imagines and evaluates a hypothetical legal system that would treat human gametes as property like any other. The laws of wills and donative transfers could be adapted to apply to transfers of human ova and sperm, but also could trigger results that are undesirable from a policy perspective. The tax consequences of fully descendible human gametes would be significant, as well. If human gametes are just another type of personal property, then their sale should result in the recognition of taxable income, a lifetime gift could attract gift tax liability, and their value would be includable in a decedent's gross estate. If the applicable exemption from estate tax stays at $5 million,[10] the estate tax inclusion would result in minimal or no additional tax revenue, but administrative and compliance costs would increase. Taxpayers would be required to disclose lifetime and death-time transfers that otherwise have not been routinely reported to the Service. The application of tax rules to transfers of human gametes is awkward, and may conflict with an intuitive argument that even if human gametes are "property," their transfers might nevertheless escape gift and estate taxation, at least. The wealth transfer tax rules do not intend to reach all wealth transfers, and there is an argument to be made that the gift and estate tax should not apply to human gamete transfers.

Part IV extends the gift and estate tax analysis to consider how classifying human eggs or sperm as descendible and devisable property could have far-reaching and even absurd consequences for human sexual relations. In light of these hypothetical tax results, this Part considers proposals for an elective property regime for human gametes under which human eggs and sperm would be treated as *property* for some tax purposes, and as *not property* for other tax purposes. These proposals may lack consistency for tax purposes, but they comport with both common sense and the underlying realities of a commercial market in human gametes. The possibility that bodies are "property" for any purpose will offend many, no doubt. Entertaining the proposition, however, forces a clear articulation of the interests and policies that the laws of taxation (and reproductive technology) should serve.

Part V turns to policy considerations. Tax law will not be and should

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INEQUALITY IN FISCAL POLICY MAKING 95–108 (Asa Gunnarsonn et al. eds., 2011).

[10] *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010) (signed into law by President Barack Obama on December 17, 2010) [hereinafter 2010 Tax Act]. The 2010 Tax Act reinstated the federal estate tax, otherwise in abeyance in 2010, retroactively to January 1, 2010. Any decedent dying in 2010, 2011 or 2012 has a $5 million estate tax exemption (called the "basic exclusion amount"), adjusted for certain lifetime transfers. Unless Congress acts, the estate tax exemption will revert on January 1, 2013 to $1 million, with a top rate of 55%. *See id.* § 101(a)(2).

not be the primary lens for considering complex questions regarding human reproduction. Nevertheless, one can see that policy interests of predictability, fairness, and equity are enhanced by a consistent tax approach to the transfers of human reproductive matter. Failure to tax these transfers may contribute to information asymmetries in the human fertility market. These asymmetries benefit those other than the gamete providers themselves. A rule treating human gametes as descendible and taxable is preferable to the existing system, and such a rule is consistent with a legal system that maintains a strong commitment to individual autonomy.

II. DEALING IN THE HUMAN BODY

A. Organs

One hundred million people in the United States plan to give away some or all of their body parts when they die.[11] For people dying in 2010, the number of actual organ donors was close to 8000.[12] More than 6000 people made lifetime donations of organs in the same year.[13] For the most part, donation is treated as a noble act. Newspapers may feature stories of a husband who donates a kidney to a wife,[14] or a young father who suffered a brain hemorrhage whose family donates his organs to several others in need.[15] In colloquial terms, donation is the ultimate "gift of life."[16]

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[11] *The Need is Real: Data*, U.S. DEP'T HEALTH & HUMAN SERV., http://www.organdonor.gov/about/data.html ("Currently, more than 100 million people in the U.S. are signed up to be a donor — sign up and join them.").

[12] DONORS RECOVERED IN THE U.S BY DONOR TYPE, U.S. DEP'T HEALTH & HUMAN SERV., http://optn.transplant.hrsa.gov/latestData/rptData.asp. In the United States in 2010, the number of living organ donors was 6565; the number of deceased organ donors was 7943. *Id.*

[13] *Id.*

[14] Shawn Floyd, *After Diagnosis and Dialysis, He Found the Perfect Match*, DALLAS MORNING NEWS, Nov. 25, 2007, at 3B.

[15] Denise Grady, *One Death Provides New Life for Many*, N.Y. TIMES, May 16, 2011, at D1 (describing decision by family of Julio Garcia, who died at age thirty-eight, to donate his corneas, heart, lung, pancreas, both kidneys, and liver).

[16] *See Giving Life a Second Chance Through Organ and Tissue Donation*, GIFT OF LIFE DONOR PROGRAM, http://www.donors1.org. Such "gifts of life" have been the unfortunate subject of regret in at least one notable divorce case. Tabloid newspapers buzzed with speculation that Ann Lopez would request return of the kidney she previously donated to her husband, comedian and actor George Lopez, when they divorced after seventeen years. *See* Kelly Magee, *Kidney-Ian Giver Lopez to Divorce*, N.Y. POST, Sept. 28, 2010, at 77. A Long Island doctor who donated a kidney to his wife in 2001 requested return of the kidney (or a monetary settlement) when his wife filed for divorce. Chau Lam & Ridgely Ochs, *Give Back My Kidney*, NEWSDAY, Jan. 8, 2009, at A8; Larry McShane, *Where Has My*

It is illegal in the United States[17] and all other countries (other than Iran)[18] to buy or sell organs for transplantation.[19] Nevertheless, a black market in human organs flourishes in the United States and abroad. A 2008 investigation by New York State Attorney General Andrew Cuomo found that Premier Exhibitions, the promoter of "Bodies: The Exhibition," could not prove how it had obtained the bodies on display or the circumstances in which those individuals had died.[20] Some members of the public claimed that the bodies belonged to Chinese prisoners who had not consented to their exhibition.[21] In settlement of the Attorney General's complaint, Premier Exhibitions had to refund the cost of admission to any prior visitors to the exhibit and to disclose publicly that the origins of the bodies were uncertain.[22] For future exhibitions, the company was required to provide

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Kidney Been?, N.Y. DAILY NEWS, Jan. 87, 2009, at 7. In the matrimonial proceeding, the Special Referee denied the request on public policy grounds: "While the term 'marital property' is elastic and expansive . . . its reach, in this court's view, does not stretch into the ethers and embrace . . . human tissues or organs." *Id.*

[17] The National Organ Transplant Act provides:

> It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. The preceding sentence does not apply with respect to human organ paired donation.

National Organ Transplant Act, 42 U.S.C.A. § 274e(a) (West 2011). A donor may be paid for costs associated with the donation. *See id.* § 274e(c)(2) ("The term 'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.").

[18] *See, e.g.*, A.J. Ghods & S. Savai, *Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation*, 1 CLINICAL J. AM. SOC'Y NEPHROLOGY 1136 (2006).

[19] Forced organ "donation" as a condition of criminal parole is, however, not unknown in the United States. Governor Haley Barbour of Mississippi suspended the sentences of two sisters jailed for life for their role in an armed robbery in which the amount stolen was less than $200. Douglas Stanglin, *Inmate Sisters who Agreed to Kidney Donation Leave Miss. Prison*, USA TODAY, Jan. 7, 2011, *available at* http://content.usatoday.com/communities/ondeadline/post/2011/01/inmate-sisters-who-agreed-to-kidney-donation-leave-miss-prison-/1. The suspension was conditioned on one sister's agreement to "donate" a kidney to the other, whose dialysis while an inmate otherwise was the financial responsibility of the state. *Id.*

[20] *See* Press Release, NY State Attorney General, Cuomo Settlement With "Bodies. . .The Exhibition" Ends The Practice of Using Human Remains of Suspect Origins(May 29, 2008), *available at* http://www.ag.ny.gov/media_center/2008/may/may29a_08.html.

[21] *Id.*

[22] *Id.*

proof of consent by any decedent whose body was on public display.[23]

A similar specter of illegally-obtained human body parts arose in 2009, when the Federal Bureau of Investigation (FBI) arrested a Brooklyn man for his alleged role in an illegal international organ-trafficking network.[24] The activities came to light during an FBI investigation of money laundering and bribery involving New Jersey politicians.[25] The FBI investigation ultimately resulted in the conviction of Jersey City Deputy Mayor Leona Beldini for taking illegal campaign contributions[26] and a forty-one-month prison sentence for former New Jersey Assemblyman Daniel Van Pelt for extortion and bribery.[27] According to news reports, an undercover agent sought Levy Izhak Rosenbaum's help finding a kidney for her "uncle."[28] Mr. Rosenbaum charged $150,000 for the kidney,[29] and the money was paid in cash[30] or to a charitable organization that was not named in the criminal complaint.[31] Mr. Rosenbaum presently is free on bail and has not been brought to trial.

On the heels of Mr. Rosenbaum's arrest and the New Jersey corruption scandal came the report that Israeli citizen Nick Rosen had flown to New York in 2005 and received $20,000 for "donating" his kidney to a Long

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[23] Michael Wilson, *'Bodies' Exhibitors Admit Corpse Origins Are Murky*, N.Y. TIMES, May 30, 2008, at B2.

[24] Michael Daly, *Anthropologist's Dick Tracy Moment Plays Role in Arrest of Suspected Kidney Trafficker*, N.Y. DAILY NEWS, July 24, 2009, *available at* http://articles.nydailynews.com/2009-07-24/news/17927934_1_organ-trafficking-levy-izhak-rosenbaum-fbi-agent.

[25] *See N.J. Corruption Probe: List of Politicians, Religious Leaders Charged*, NJ.COM, July 23, 2009, http://www.nj.com/news/index.ssf/2009/07/nj_corruption_probe_full_list.html.

[26] *See* Joe Ryan, *Jersey City Deputy Mayor Leona Beldini is Found Guilty on Two Charges in N.J. Corruption Trial*, NJ.COM, Feb. 11, 2010, http://www.nj.com/news/index.ssf/2010/02/beldini_nj_corruption_trial_dw_2.html.

[27] *See* Associated Press, *Assemblyman Ban Pelt Begins 41-Month Prison Sentence for $10k Bribe Conviction*, N.J.COM, Jan. 6, 2011, http://www.nj.com/news/index.ssf/2011/01/ex-assemblyman_van_pelt_begins.html.

[28] *E.g.*, David W. Chen, *Life Can Imitate Art: Indictments Describe Deals More Fit for a Crime Movie*, N.Y. TIMES, July 24, 2009, at A20. The complaint has been sealed by the court. *See* Docket Report, *United States v. Rosenbaum* (D. N.J. 2009) (Mag No. 09-3620). Several unsigned copies are available on the internet, however. *See* Complaint at 1, *United States v. Rosenbaum* (D. N.J. July 21, 2009) (Mag. No. 09-3620), *available at* http://abclocal.go.com/wpvi/feature?section=news&id=6929872 (last visited July 29, 2011) [hereinafter Unsigned Criminal Complaint].

[29] Unsigned Criminal Complaint, *supra note* 28, at ¶ 9.

[30] *Id.* ¶ 20.

[31] *Id.* ¶ 17.

Island businessman.[32] Mr. Rosen made a short film (called *Kidney Beans*)[33] about his experience,[34] which included lying to doctors and social workers at Mount Sinai Medical Center in New York about his relationship to the transplant recipient and his receipt of compensation for the "donation."[35]

Illegal trade is a well-documented consequence of demand in excess of supply.[36] Simply stated, more people want organs than are able to obtain them through legal means (i.e., true donations), and so people will turn to illegal means (i.e., compensated "donations," or purchases).[37] As much as we would like to maintain a belief that the human body is sacrosanct, outsized demand for human organs gives rise to an illegal trade of the human body and its constituent parts. The body thus enters into the flow of commerce just like any other property.[38]

From a legal perspective, it may be that treating the body as property is not *per se* objectionable. Indeed in jurisdictions that permit prostitution,[39] the law declines to interfere with commerce based on the human body, on the theory that the decision to engage in prostitution is freely made and rational. By parity of reasoning, the law should not impede a market in

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[32] Nick Rosen, *Pot-Smoking Israeli Sold Kidney For $20K in U.S. Black Market*, HUFFINGTON POST, Aug. 18, 2009, http://www.huffingtonpost.com/2009/08/18/nick-rosen-potsmoking-isr_n_262347.html.

[33] KIDNEY BEANS (Nick Rosen 2007).

[34] Drew Griffith & David Fitzpatrick, *Donor Says He Got Thousands for His Kidney*, CNN, Sept. 1, 2009, http://www.cnn.com/2009/WORLD/meast/09/01/blackmarket.organs/index.html.

[35] *Id.*

[36] *See* Steven M. Davidoff, *Black Market Capital*, 1 COLUM. BUS. L. REV. 172, 217–18 (2008) ("A black market's economic causes and effects are well documented. Its cause is relatively simple: a good is made scarcer or illegal by governmental action forbidding or limiting its sale or otherwise imposing production or sale restrictions, such as price controls, which limit its availability. If the good is made illegal, people will economically react in one of two ways. The first is the legal option. . . . Alternatively, consumers will search and locate another market in which to purchase the good. This is either an illicit market — the traditional notion of a black market — at a higher than normal price, or a legal market in another jurisdiction.").

[37] *Id.*

[38] Conceiving of the human body as a type of property is not without precedent. Prostitution's opponents, for example, would characterize it as the sale or rental of one human's body (typically, a woman's) by another (typically, a man). *See, e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES 132–36 (1996). Prostitution's supporters characterize it as consensual adult sexual activity that is work like any other. *See, e.g.*, Martha C. Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 713 (1998).

[39] *See* Daniel J. Franklin, *Prostitution and Sex Workers*, 8 GEO. J. GENDER & L. 355, 356 n.5 (2007) (listing state prostitution statutes).

human organs on the theory that the decision to sell one's kidney, for example, can be equally free and rational.[40] For both opponents of prostitution and the market in human organs, there is a suspicion — however inchoate — that the prostitute or the organ seller might have been coerced, that she might not have meaningful alternative methods of financial gain, and that she might not understand the long-term consequences of her choice.[41]

Consider the possibility, then, that the law need not approach the human body as *always* property or *never* property. Rather, the law's approach to a market in human bodies or body parts could depend on the conditions under which a person enters that market, and whether the specific subject of commerce is replaceable, regenerable, or held in abundance. The next Part considers the existing legal support for a market for human blood, a fluid that the human body naturally replenishes.

B. Blood

According to the American Red Cross, 9.5 million people in the United States donated blood in 2006.[42] Every year, blood drives take place in over 50,000 locations across the country.[43] For the most part, whole blood comes from noncompensated donors, but plasma "donations" typically come from compensated individuals.[44] In fact, the Food and Drug Administration (FDA) requires blood banks and hospitals to distinguish between paid and volunteer donors, for purposes of labeling blood or blood components used in transfusions.[45] Paid donors are those who "receive monetary payment for a blood donation."[46] A volunteer donor is someone who "does not receive monetary payment for a blood donation."[47] Certain "gifts" or "rewards" are defined as nonmonetary payment, for purposes of FDA classification. These

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[40] This sentiment finds expression in a variety of forms. *See, e.g.*, Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y 125,129 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.") (J. Cardozo).

[41] *See, e.g.*, F.L. Delmonico, *What is the System Failure?*, 69 KIDNEY INT'L 954–55 (2006).

[42] American Red Cross, Blood Facts and Statistics, http://www.redcrossblood.org/learn-about-blood/blood- facts-and-statistics (last visited Aug. 8, 2011).

[43] *Id.*

[44] NOTA does not apply to blood plasma. *See* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 85–87 (2009).

[45] Guidance for Industry: Recognition and Use of a Standard Uniform Blood and Blood Component Container Labels, 21 C.F.R. § 606.121(c)(5) (2005).

[46] *Id.* § 606.121(c)(5)(i).

[47] *Id.* § 606.121(c)(5)(ii).

include benefits that are nontransferrable, not redeemable for cash, and for which there is no existing market.[48] Examples of nonmonetary payment are time off from work, cookies and juice for blood donors, or coupons for a local merchant's services, if the coupon is not redeemable for cash. Presumably the labeling requirement has a signaling function for the intermediate user of the blood (i.e., a hospital).[49]

The FDA does not require labels to distinguish between paid and volunteer donors if the blood products will be used in further manufacturing.[50] Presumably this is because whatever risks are more present in a population of paid whole-blood donors are mitigated or eliminated by the further processing. Manufacturing typically involves a process known as plasmapheresis, the separation of red blood cells from the rest of the blood material.[51] The red blood cells are reinjected into the donor,[52] and the remaining matter, called "Source Plasma" by the FDA,[53] is used to develop treatments for disorders including Kawasaki's disease,[54] chronic lymphocytic leukemia,[55] idiopathic thrombocytopenic purpura,[56] and Alpha-1 antitrypsin deficiency,[57] among others.[58] There is no legal

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[48] U.S. FOOD & DRUG. ADMIN., COMPLIANCE POLICY GUIDE § 230.150, BLOOD DONOR CLASSIFICATION STATEMENT, PAID OR VOLUNTEER DONOR (May 7, 2002), *available at* http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm122798.htm.

[49] Historically, paid donors appear to come from lower socio-economic groups. *See* Robert M. Solow, *Blood and Thunder*, 80 YALE L.J. 1696, 1699 (1971) ("Data from blood banks, whether profit-making or not, which draw mainly on paid donors exhibit the expected heavy dependence on the low-paid occupational groups and, especially, on the unemployed.").

[50] *Id.* ("The requirement that the label of blood and blood components indicate whether the product came from a volunteer or a paid donor applies only to blood and blood components intended for transfusion, such as Whole Blood, Red Blood Cells, Fresh Frozen Plasma, Platelets, and Cryoprecipitated AHF. The donor classification labeling requirement does not apply to products that will be used for further manufacturing, such as Source Plasma.").

[51] *See* 21 C.F.R. § 606.3(e) (2008).

[52] *Id.*

[53] *Id.* § 640.60 (definition of source plasma). Source Plasma is "the fluid portion of human blood collected by plasmapheresis and intended as source material for further manufacturing use. The definition excludes single donor plasma products intended for intravenous use." *Id.*

[54] *See* Mark Ballows, *Intravenous Immunoglobulins: Clinical Experience & Viral Safety*, J. OF AM. PHARM. ASS'N, May 2002, at 449.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Need for Plasma*, DONATINGPLASMA.ORG, http://www.donatingplasma.org/needfor

prohibition on the compensation of providers of Source Plasma.[59] Typically these "donors" receive $25 to $50 per draw, and may donate up to twice every seven days.[60] Compensation for blood products is an everyday occurrence. Plasma-based medicine manufacturing is estimated to be a $6 billion business.[61]

There is a qualitative difference in social attitudes toward blood sales in comparison with organ sales. The difference arises in no small part from the fact that the former are legal and the latter are illegal. Equally important, perhaps, are the characteristics of blood itself. First, blood is regenerable. The human body naturally will manufacture blood to replace any that is donated or sold. Second, the removal of blood from one's body is far less invasive than the removal of a kidney.[62] Third, there are no long-term health risks from selling blood, whereas the sale of one kidney leaves the selling individual in a somewhat compromised, but not terminable, health position.[63] Many people can function their entire lives with only one kidney,[64] but certain trauma, injury, or disease will be more risky to the person with one kidney than to the person with two kidneys.[65] Fourth, both the risk and reward associated with blood sales are relatively small in comparison to the risks and rewards of kidney sales. That is, one's financial gain from the sale of blood likely will be modest, at best, but so is the risk. The sale of an organ is both more remunerative and riskier.[66] One might be legitimately concerned that, when the potential reward is high, the anticipated compensation unfairly influences a decision to sell any

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plasma/plasmaprotein.aspx.

[59] *See* Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207 (1986).

[60] *See How to Make $400 a Month Giving Plasma*, EHOW, http://www.ehow.com/how_4776122_make-month-giving-plasma.html.

[61] Jeff Sturgeon, *Plasma Profitablity*, THE ROANOKE TIMES, Mar. 30, 2006, *available at* http://www.roanoke.com/business/wb/wb/xp-58860.

[62] Typically, blood donation takes no more than fifteen minutes. *See* Mark F. Anderson, *Encouraging Bone Marrow Transplants from Unrelated Donors: Some Proposed Solutions to a Pressing Social Problem*, 54 U. PITT. L. REV. 477, 530 n.49 (1993). In contrast, a kidney donation requires surgery and hospitalization. *See* Roger D. Blair, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 YALE J. ON REG. 403, 408 (1991).

[63] *See* Jeffrey Prottas, *Human Tissues as Medical Treatment*, 65 S. CAL. L. REV. 445 (1991) ("People with single kidneys are at greater risk of an accident or illness that leaves them without renal function.").

[64] *Id.*

[65] *Id.*

[66] If an individual is able to sell plasma once every three days for $15 per draw, then in a particular month, he or she would be able to earn $150. *See* Anderson, *supra* note 62, at n.49.

particular bodily fluid, tissue, or organ.

This comparison of the law's treatment of (illegal) organ sales to the law's treatment of (legal) blood sales does not turn on whether the constituent parts and fluids of the body are (or are not) property. Important factors appear to be the fact that blood, unlike a kidney, for example, is regenerated by the body. Blood can be extracted with minimal medical intervention, and is a low-risk process. The financial gains from selling blood are not sufficiently high to raise questions about undue influence on an individual's autonomous decision about the use of his or her own body. The theoretical distinction, then, is not the "work" of property-law concepts but rather the nature of the bodily material and the circumstances of its transfer. Yet when there is a dispute between two parties about the rightful ownership of bodily material, the property question comes to the fore. The next Part considers the decision by one court that attempted to answer the question of whether or not a person's bodily tissues are property. The context was a patient's claim against a doctor who had removed his tissue without fully disclosing all facts relevant to its post-removal commercial use by the doctor.

C. Tissue

In *Moore v. Regents of the University of California*,[67] a medical patient challenged medical researchers' use of tissue taken from his body.[68] John Moore had consented to the removal of his spleen in order to "slow down the progress" of his leukemia.[69] Over a seven-year period, Mr. Moore consented in follow-up visits to the withdrawal of "blood, blood serum, skin, bone marrow aspirate, and sperm."[70] The doctor did not inform Mr. Moore that the doctor and another researcher were conducting a variety of post-extraction experiments on his cells in order to develop a cell line for commercial use.[71] The doctor did, and along with the University of California and a fellow researcher, received a patent for the cell line.[72] Mr. Moore sued, alleging lack of informed consent or a breach of fiduciary duty, or, alternatively, wrongful possession or ownership of his personal property.[73]

The Supreme Court of California found that the doctor had breached

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[67] Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

[68] *See id.*

[69] *Id.* at 481.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 482.

[73] *Id.* at 479–80.

his duty to Mr. Moore.[74] The court reasoned that the doctor had an obligation to disclose any research or economic interests in Mr. Moore's health, and that failing to make such disclosure constituted a breach of fiduciary duty.[75] On the property question, however, the court declined to recognize Mr. Moore's interest in his cells once they had been extracted from his body, because that would require scientists "to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose."[76] In other words, the policy of encouraging medical research outweighed any rights Mr. Moore had in his cells.[77] Furthermore, Mr. Moore's cells were used to develop the commercial products, but were separate from the products themselves.[78] The court was careful to note that, "[W]e do not purport to hold that excised cells can never be property for any purpose whatsoever."[79] Thus the California Supreme Court hinted that the human body or its constituent parts might be property *sometimes*.

In the *Moore* case, one must consider the court's reluctance to characterize a patient's tissue as his property in the larger context of medical research. The court imagined a world in which a patient's property rights in his own cells could thwart scientific developments. The court did not mention it, but the nature of the extracted material may have factored into the decision as well. The doctor did not take Mr. Moore's entire body without his consent (as objectants to "Bodies: The Exhibition" alleged those promoters had[80]), nor did they leave him with a compromised physical structure (as the seller of an organ would have). Rather the doctor subjected Mr. Moore to unnecessary — but relatively noninvasive — medical procedures more akin to blood donation than organ removal. The doctor then developed the excised cells into a commercial product, without

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[74] *Id.* at 497.

[75] *Id.* at 483.

[76] *Id.* at 487–89 ("Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for conversation he must have retained and ownership interest in them.").

[77] *See* David J. Leibson, *The "Property" Which May Be Converted*, 13 KY. PRAC. TORT LAW § 8:4 (2011).

[78] *Moore*, 793 P.2d at 489 ("[T]he particular genetic material which is responsible for the natural production of lymphokines, and which the defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.").

[79] *Id.* at 493.

[80] *See supra* note 21 and accompanying text.

informing Mr. Moore of the doctor's intention to do so. To the extent that the extracted cells were noncancerous, Mr. Moore did not "need" them for the proper functioning of his body, and they were potentially regenerable. To the extent that the extracted cells were cancerous, Mr. Moore benefited from their removal.

The determination that Mr. Moore's cells were *not property* was, in many ways, unnecessary to the court's decision. In other words, the court could have held that Mr. Moore did "own" his cells, and that those cells had some de minimis financial value, but it was the doctor's personal efforts that developed the cells into a commercially viable product. The court could have recognized that Mr. Moore had indeed been separated from "his" cells, without awarding him a financial interest in the products developed from his cells. This view is supported generally by Professor Michele Goodwin, who has suggested that, "[i]f perhaps adjudicated today, the ultimate holding in *Moore* might be significantly different."[81] She identifies a jurisprudential trend away from treating the individual as lacking dominion over her own body toward a recognition that an individual is "in full possession and in some ownership of herself, at least in life, and perhaps also in death."[82] The scope of an individual's dominion over her own body is the core consideration in the law's treatment of a decedent's directions for burial, cremation, or other post-mortem dispositions of the body, discussed in the next section.

D. Corpses

At common law, the only recognized legal rights in the human body were the "quasi property" interests held by the next of kin for purposes of burying or disposing of a dead body.[83] As science and technology have advanced, however, so has the law.[84] Now the law recognizes an individual's right to direct the disposition of his or her own body, and this right is superior to the rights of any other individual.[85] Indeed enough

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[81] Michelle Goodwin, *Rethinking Legislative Consent Law?*, 5 DEPAUL J. HEALTH CARE L. 257, 300 (2002).

[82] *Id.* (citing David E. Jeffries, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 627 (1998)).

[83] *See, e.g.*, Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991).

[84] *See, e.g.*, Goodwin, *supra* note 81, at 257 ("[A]s law and technology have evolved in the area of genetics, for example, individuals may not claim interest in the disposal of their own bodies. This right has not always been clear. In fact, some courts have recognized it as a limited right . . . . However, some of the common law limitations have been lifted by subsequent statute, thereby creating and grating the decedent herself first interest of corpse disposition." (citations omitted)).

[85] Unif. Anatomical Gift Act § 4 (2006) (permitting gifts of "a donor's body or part . . .

people are interested in having a say over the disposition of their bodies that it is a topic of conversation among estate planners and model legislation.[86] Statutes such as the Uniform Anatomical Gift Act, to provide just one example, are designed to permit a person to make known her wishes regarding post-mortem anatomical gifts.[87] Typically this is done by means of a donor card or registry, an oral statement to two adults, or by a testamentary provision.[88] Courts almost always will give effect to these and any other lawful instructions of a decedent, even if the decedent's instructions are contrary to the wishes of the surviving relatives.[89] The decedent's rights with respect to his own body thus are superior to any rights held by his next of kin.

A decedent's right of bodily disposition is not absolute, by any measure. A body is not property like any other. A person cannot will her body to a favorite nephew, or direct that it be divided into parts and distributed to family members, for example. Social mores and public health laws prescribe how and where a corpse may be buried or where bodily remains may be interred or distributed.[90] Indeed a decedent cannot even direct the post-mortem commercialization of her body. A decedent's direction to sell her body to a medical school would not be respected (although such a *gift* to a medical school is permitted).[91] As one court has explained, "laws relating to wills and the descent of property were not intended to relate to the body of a deceased."[92] In this way, a person's right to direct the disposition of her own body is less extensive than her right to dispose of items traditionally considered tangible personal property, such as jewelry, for example.

Curiously, in the event that a decedent or his family does donate the

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for the purposes of transplantation, therapy, research or education").

[86] *See, e.g.*, Posting of Judy L. Doesschate, to trusts-estates@lists.nysba.org (Mar. 24, 2011), *reprinted in* TRUSTS & EST. L. SEC. NEWSLETTER (New York State Bar Association Trusts & Estates Law Section), Summer 2001, at 37; Posting of Lori Perlman, loriperlman@yahoo.com to trusts-estates@lists.nysba.org (Mar. 24, 2011), *reprinted in* TRUSTS & EST. L. SEC. NEWSLETTER (New York State Bar Association Trusts & Estates Law Section) at 37.

[87] *See, e.g.*, Unif. Anatomical Gift Act § 4 (2006).

[88] *Id.* § 5.

[89] *See* 25 C.J.S. *Dead Bodies* § 5.

[90] Elaine Kaufman, the eponymous owner of a famous New York restaurant, directed that her ashes be scattered over Second Avenue. *See* James Barron, *Last Wish Of Elaine's Owner May Be Illegal*, N.Y. TIMES, Jan. 7, 2011, at A17. The executor declined to do so, citing public health laws. *Id.*

[91] *See, e.g.*, Unif. Anatomical Gift Act § 4 (2006); *see also* Goodwin, *supra* note 81, at 296.

[92] *In re* Estate of Moyer, 577 P.2d 108, 110 (Utah 1978).

body to a medical school, for example, that medical school can turn around and sell the cadaver to a peer institution.[93] What is *not property* (or not fully property) in the hands of the decedent (or his estate) becomes *property* in the hands of the donee. The medical school can buy and sell cadavers in a structured market, but individuals cannot. Similarly, in the *Moore* case,[94] cells were *not property* in the hands of the individual, such that the doctor was not liable for conversion, but the same cells were *property* in the hands of the doctor who commercialized them. Once he had extracted the cells, the doctor was free to do with them as he wished, without regard to any prior rights that Mr. Moore may have had.

E. Gametes

Both in the marketplace and the popular imagination, there exists a "gray" trade in human eggs. The rhetoric of altruism and emotion serves as the foundation for a largely collusive market in which human eggs, sperm, and gestational services are routinely bought and sold.[95] The marketplace is "gray" insofar as the principal actors in it — the providers of human gametes, intended parents, and doctors — are loathe to acknowledge the direct connection between their activities and the money that changes hands. Professor Kimberly Krawiec has suggested that the altruism narrative should be understood as the product of multiple voices, including fertility centers, intended parents, and egg donors.[96] Profit-seeking egg donors are looked on with suspicion or rejected outright.[97] Intended parents wish to think of egg donors as selfless actors, rather than baby sellers.[98] Egg

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[93] *See, e.g.*, David E. Harrington & Edward A. Sayre, *Paying for Bodies, but Not for Organs*, 29 REG. 14, 14 (2006-2007) ("Medical schools often have a surplus of cadavers while other institutions cannot find the tissues and body parts they need via markets. According to *USA Today*, Tulane Medical School typically receives 'about three times the number of bodies it needs,' leading Tulane to sell its 'surplus bodies' to body brokers. One of the reasons for the glut of cadavers at medical schools is that most states allow government officials to donate unclaimed bodies to medical schools, often specifying which schools are eligible for the bodies."); *see also* Michael Anteby, *Markets, Morals and Practices of Trade: Jurisdictional Disputes in the U.S. Commerce in Cadavers*, 55 ADMIN. SCI. Q. 606, 613–14 (2010).

[94] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 480 (Cal. 1990).

[95] As Kimberly Krawiec has noted, "[T]he sperm market is robust, and appeals to donor altruism are rare." Krawiec, *supra* note 44, at n.63.

[96] Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1757–59 (2010) (describing screening of potential egg donors for any profit motive).

[97] *Id.* at 1758 ("[F]ertility-center and donor-agency screening practices . . . eliminate as unacceptable potential egg donors who claim monetary compensation as the overriding motivation for egg donation.").

[98] *Id.* ("[D]onor-agency staff report a belief that fertility customers do not want egg

donors use the mask of altruism to disconnect from the reality of what they are doing (transferring away their rights in their own children in return for compensation) while shoring up their self-esteem as a giving, generous person.[99]

By some estimates, the fertility industry is a billion dollar business.[100] Confidentiality policies, nonreporting policies, and poor or nonexistent record-keeping make it difficult to know precisely how big the business is, however. Informed commentators suggest that 41,000 children were born from assisted reproduction in 2001, and 6000 of those involved "donated" eggs.[101] For the year 2008, more than 61,000 children were born from assisted reproduction.[102] Approximately 12% of all assisted reproductive technology cycles involved "donated" eggs.[103] On a proportional basis, that would mean more than 7000 children were born from "donated" eggs.

Almost anyone who has opened a college newspaper has seen offers of compensation to college-age women who are willing to "donate" their eggs. One ad in *The Dartmouth*, for example, promised $20,000 to an egg donor who would help a couple "give our precious baby boy a sibling."[104] Egg "donors" may earn between $3500 and $50,000.[105] For individuals or

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donors who reveal monetary motivations for the desire to donate.").

[99] *Id.* ("In addition to normalize what is otherwise a jarring dichotomy . . . there is an obvious appeal to believing that one's selfless behavior helps another.").

[100] *See* MACHELLE M. SEIBEL & SUSAN L. CROCKIN, FAMILY BUILDING THROUGH EGG AND SPERM DONATION: MEDICAL, LEGAL, AND ETHICAL ISSUES 24 (1996) (stating that $1 billion was spent to overcome infertility in 1987); DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 3 (2006).

[101] Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2007 (finding 1000 children born via surrogates).

[102] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 15 (2010), http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf (displaying data for number of infants born as a result of ART cycles).

[103] *Id.* at 16 (total number of ART cycles reported in 2008 divided by number of ART cycles using donor eggs).

[104] Advertisement, THE DARTMOUTH, May 8, 2000, *described in* Carl Burnett, *Wanted: Smart, Healthy and Operable Women's Eggs*, THE DARTMOUTH, May 10, 2000, av*ailable at* http://thedartmouth.com/2000/05/10/news/wanted.

[105] Burnett, *supra* note 104; *see also* SPAR, *supra* note 100, at xi ("As of 2004 . . . top notch eggs were going for as much as $50,000."); *Donor Information Page*, CHOICES DONATIONS, http://www.choicesdonations.com/donorinfo.htm (stating donors receive $5000); *Egg Donor FAQ's*, PACIFIC FERTILITY CENTER, http://www.donateyoureggs.com/egg_donor_faq.htm#expenses (advertising $7500 for repeat donors). Sperm donors, in contrast, receive between $100 and $2950 per sample. SPAR, *supra* note 100, at xvi ("Eggs, for example, cost far more than sperm — $4,500 versus $300 on average, and $50,000 versus $2,950 for the top end of the market."); *When and How Often Do You Receive*

couples seeking to have children through assisted reproduction, it is possible to browse online the profiles of potential egg "donors" or surrogates.[106] The experience would appear to be not entirely dissimilar to internet shopping for jewelry or furniture.

Compensation to egg "donors" typically is packaged as remuneration for time, effort, or living expenses, not genetic material.[107] In reality, however, payments are in no way calibrated to the woman's actual investment of time, effort, or living expenses, laying bare the altruism rhetoric as cover for a market in human genetic material and the infants created from it.

Unlike egg donation, sperm donation seems relatively uncontroversial.[108] Perhaps for this reason, sperm is available in the marketplace in greater abundance than human eggs. Indeed one can order sperm over the internet.[109] Almost all sperm banks compensate men for their "donations," although organizations may differ in stating that they are compensating "donors" for the sperm itself[110] or for the man's time and effort. At least one sperm bank states on its website: "Although these monies are taxable, you will not receive a 1099 from BioGenetics Corporation because we are reimbursing you for your time, traveling to our laboratory, and your efforts in complying with the program requirements."[111]

If one lifts the curtain on the fertility industry's rhetoric of altruism, a highly legal (if unregulated) commercial trade in human bodily material reveals itself. This trade flourishes notwithstanding the prohibition on paid surrogacy and the sale of human eggs.[112] Allegedly motivated by concerns

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Payment Once in the Program?, SPERM BANK OF N.Y., http://www.sperm1.com/biogenetics/donor.html#Anchor-When-47857.

[106] *See, e.g.*, *Circle Surrogacy Donors*, CIRCLE SURROGACY, *http://new.circlesurrogacy.com/donors* (last visited July 15, 2011) (showing nonpassword protected profiles of egg donors including photos of prospective donors, providing height, weight, ethnic background, and state of residence).

[107] *See* Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 62 (2002) ("Enticing monetary offers of 'generous compensation for time and inconvenience' usually prompt the prospective donor to contact the fertility center.").

[108] Krawiec, *supra* note 44, at 61.

[109] *Ordering of Anonymous Sperm*, SPERM BANK OF N.Y., *http://www.sperm1.com/biogenetics/index.html* (last visited July 15, 2011).

[110] *See, e.g.*, *Donate Sperm for Cash*, CASH FOR DONATING, *http://www.cashfordonating.com/page.php?id=3* (last visited Aug. 2, 2011).

[111] *When and How Often Do You Receive Payment Once in the Program?*, SPERM BANK OF N.Y., http://www.sperm1.com/biogenetics/donor.html#Anchor-When-47857.

[112] *See, e.g.*, MICH. COMP. LAWS ANN. § 710.44(5) (2009); MICH. COMP. LAWS ANN.

about profit-seeking women, the American Society for Reproductive Medicine sets guidelines for egg "donor" compensation.[113] Kimberly Krawiec has studied in detail the economic underpinnings of what she calls the "baby market and its distribution networks."[114] That distribution network includes agencies, doctors, lawyers, counselors, and other facilitators, all of whom profit from the business of creating babies. Krawiec suggests that market restrictions, often masquerading as "public-interested regulation in the form of 'baby selling' restrictions and other laws dictating the allocation of parental rights,"[115] function mostly to maximize profits for the middlemen, and to prevent women who supply eggs and gestational services from realizing the financial value of their contributions to the creation of a child.[116]

Perhaps uniquely, decisions concerning human gametes and associated reproduction are regarded — by both the public and the law — with a certain deference. For those on the political left, an individual's decisions about her reproductive practices are intensely personal ones in which the state should not interfere. For those on the political right, reproductive technology is a welcome affirmation of life, when employed by traditional families. "Donations" of eggs or sperm then are treated as largely private decisions, even if subject to light regulation in the form of "guidelines" issued by ethical or medical bodies.[117] Participants in the fertility industry — agencies, intended parents, egg donors, surrogates, and doctors — along with their supporters treat the exchange of money for human gametes or reproductive services as a minor by-product of the larger commitment to either privacy (for those on the left) or traditional families (for those on the right). Legal deference to an individual's reproductive decisions arises out of a long, if not flawless, constitutional commitment to privacy and liberty.[118]

710.54(2)(a)–(d) (2009). *But see* Rob Stein, *N.Y. To Pay for Eggs for Stem Cell Research*, WASH. POST, June 26, 2009, at A4 (describing New York's policy to permit compensated contributions of eggs in stem cell research undertaken by government-paid researchers).

[113] Krawiec, *supra* note 96, at 1759–60 ("[T]he ASRAM-SART (Society for Assisted Reproductive Technology) oocyte-donor compensation guidelines amount to horizontal price-fixing of the type long considered per se illegal in other industries.").

[114] Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 6 WASH. & LEE L. REV. 203, 206 (2009).

[115] *Id.* at 210.

[116] *Id.* at 206–07; *see also* Krawiec, *supra* note 44.

[117] *See supra* notes 112–116 and accompanying text.

[118] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579 (2003) (overturning state sodomy law as contrary to due process right of liberty); Eisenstadt v. Baird, 405 US 438, 453 (1972) (finding right of individual to be "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.");

Against this background, it is perhaps not surprising that courts have recognized a limited right to control the disposition of one's gametes. Most of the cases have arisen in the context of post-mortem contests about the disposition of preserved sperm, but there is no reason to think that the results would not apply equally to cases involving human ova, as well. In *Hecht v. Kane*,[119] the California Court of Appeal ruled that a decedent possessed a property-like interest in his sperm previously deposited with a sperm bank; thus the probate court properly could give effect to the decedent's testamentary instructions that the sperm be released to his surviving girlfriend. The decedent's adult children objected to the release of the sperm, on a variety of procedural and policy grounds. In permitting the release of the sperm to Ms. Hecht, the decedent's girlfriend, the Court of Appeal reasoned:

> We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of [California] Probate Code section 62.[120]

The court took care to distinguish Kane's sperm from both a fertilized embryo, which represents a potential human life, and from human tissue that plays no role in reproduction. Thus the court recognized that human gametes have special qualities. Nevertheless the *Hecht* court appears to have treated the decedent's interest in his own sperm as property over which he had "decision making authority as to the use of his sperm for reproduction."[121] The court did not label the decedent's right as a property right per se, but rather as an interest "in the nature of ownership," i.e., a property-*like* right, if not a property right.[122]

The *Hecht* court also emphasized the terms of the decedent's agreement with the sperm storage facility, as well as the decedent's will. The decedent had directed the storage facility to release the sperm to Ms. Hecht, upon her request. In his will, he specifically bequeathed his stored sperm specimens to Hecht. Thus because the decedent had a property-right

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Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (finding married couple's privacy right in use of contraceptives); *see also* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291 (2010); Bridget J. Crawford, *Taxation, Pregnancy and Privacy*, 16 WM. & MARY J. WOMEN & L. 327 (2010).

[119] Hecht v. Kane, 20 Cal. Rptr. 2d 275, 279 (Cal. Ct. App.1993).

[120] *Id.* at 283.

[121] *Id.*

[122] *Id.*

or quasi-property right in his sperm, and because his intentions regarding the use of that sperm were clear, the probate court could give effect to the provisions of the decedent's will. One infers from this reasoning that the court might have reached a different result if the decedent's intent regarding the posthumous use of his sperm had been ambiguous.

In its decision, the *Hecht* court referred to *Parapalaix v. CECOS*,[123] a decision by a French court to award control over a decedent's sperm to his heirs. In that case, a terminally ill man banked his sperm. After his death, the sperm bank refused to release the sperm to the decedent's widow and parents, who collectively were his heirs at law. The court relied on testimony from the decedent's widow and parents to find that the decedent intended that his sperm be used posthumously by his widow. This intent alone — not property rules or contract status — governed the sperm's disposition. The sperm ultimately was released to the widow, who failed to become pregnant.[124] Logically speaking, the decision rested on recognition of the decedent's legal interest in controlling the posthumous disposition of his stored sperm. Thus, notwithstanding its protests to the contrary, the *Parapalaix* court accorded the decedent the same, or perhaps greater, level of control over his sperm as he had over his property.

Approximately fifteen years after the decision in *Hecht*, a California court again addressed similar facts. In *Kievernagel v. Kievernagel*, the decedent's widow sought control over the decedent's sperm held by a fertility clinic.[125] The decedent had deposited the sperm with the clinic for the in vitro fertilization of his wife. The "IVF Back-Up Sperm Storage and Consent Agreement" signed by both the depositor and his wife acknowledged that the sperm was the depositor's sole and separate property, and that the sperm would be discarded in the event of the depositor's death. After the decedent died in a helicopter accident, the clinic refused to release the sperm to the widow, on the grounds that the agreement required destruction of the sample. The widow argued that the decedent had not read the agreement, that the agreement was not probative of the decedent's intent because of the emotional strains that IVF had placed on a couple, that the decedent intended her to have his child, and that

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[123] Parpalaix c. Centre d'étude et de Conservation du Sperme (CECOS), T.G.I. Cereil, Aug. 1, 1984, Gaz. Du Pal. 1984, 2, pan. jurispr. 560.

[124] Hecht v. Kane, 20 Cal. Rept. 2d 275, 288 (Cal. Ct. App.1993) (citing Parpalaix c. Centre d'étude et de Conservation du Sperme (CECOS), T.G.I. Cereil, Aug. 1, 1984, Gaz. Du Pal. 1984, 2, pan. jurispr. 560) ("Property rights and status became irrelevant to that decision. The court framed the issues it had to decide as only whether Alain Parpalaix intended his widow to be artificially inseminated with his sperm and whether that intent was 'uneqiuvocable.'").

[125] Kievernagel v. Kievernagel, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

failure to release the sperm was an abrogation of the widow's procreative rights.

The California Court of Appeal, Third District, rejected all of these claims and denied the widow's petition for release of the sperm. The court reasoned that the intent of the gamete depositor controlled the sperm's disposition, and that the lower court had made a proper factual finding of the decedent's intent as evidenced by the contractual provision for the sperm's destruction in the event of the depositor's death. The appellate court declined to adopt a balancing test, on the theory that the only rights at issue were the decedent's rights to control the disposition of his banked sperm. The court distinguished the facts from the *Davis* case, in which a court had to balance a divorcing couple's interest in pre-embryos created with both of their gametes.[126] In this case, the *Kievernagel* court reasoned, only one person's genetic material was at issue. Furthermore, even if the court were to consider the widow's procreative rights, the nonrelease of the sperm did not prevent her from becoming pregnant with sperm of someone other than her deceased husband.

One possible interpretation of the *Kievernagel* decision is as an expansive reading of procreative rights to include a man's right to direct the post-mortem disposition of his sperm. Another possible interpretation of the *Kievernagel* decision is that courts are willing to treat sperm as a type of nonprobate property or as quasi-property, to be disposed of as provided in a lifetime contract. Two conclusions would follow from a determination that human gametes are property that can be disposed of after death (via lifetime designation or testamentary provision) or by lifetime contract. First, human sperm and eggs, and perhaps other bodily fluids or material, are *property* (or sufficiently property-*like*) such that they can be said to be "owned" by someone at any particular point in time. Second, to the extent that we know that human gametes have a market price, then the tax law, which is concerned with accessions to and transfers of wealth, should concern itself with the "value" of such property for tax purposes. But neither the Service nor the courts have squarely addressed the tax consequences of the transfer of human gametes. In fact, tax authorities are in conflict over whether bodily material is in fact "property" for tax purposes, notwithstanding the fact that rights to donate (but not sell) an organ for transplantation,[127] to transfer blood gratuitously or for compensation,[128] or to give (but not sell) one's entire body for medical research[129] exist in other contexts. Tax law

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[126] *Id.* at 315-17 (citing Davis v. Davis, 842 S.W.2d. 588 (Tenn. 1992)).

[127] *See supra* Part I.A.

[128] *See supra* Part I.B.

[129] *See supra* Part I.D.

thus finds itself in a different place than the courts in *Hecht*,[130] *Parapalaix*,[131] and *Kievernagel*.[132]

The next Part considers how the Service and courts have addressed tax questions that arise in transactions involving the compensated transfer of human bodily material, namely blood and human breast milk. These are all income tax cases, with no direct application to estate or gift taxes. Nevertheless, these cases provide a basis for asking whether the human body is itself a kind of material wealth and what relationship, if any, the tax system does or could have to a trade in the human body.

III. TAXING BODILY TRANSFERS

A. Blood is a Service

War requires money and blood. It is no coincidence, then, that the first blood center appeared in Europe in 1917.[133] In 1937, the United States had its first hospital-based blood bank, and by the outbreak of World War II, blood banks were common throughout the United States and Europe. By 1942, the Service was asked to consider whether the value of a blood donation could qualify for the income tax charitable deduction.[134] The Service initially had approved a draft response permitting the deduction.[135] After significant internal disagreement,[136] however, the General Counsel

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[130] Hecht v. Kane, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

[131] Parpalaix c. Centre d'étude et de Conservation du Sperme (CECOS), T.G.I. Cereil, Aug. 1, 1984, Gaz. Du Pal. 1984, 2, pan. jurispr. 560.

[132] Kievernagel v. Kievernagel, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

[133] *See, e.g.*, IRA RUTKOW, SEEKING THE CURE: A HISTORY OF MEDICINE IN AMERICA 210 (2010) ("As blood transfusions became safe, a physician at Chicago's Cook County Hospital established a laboratory in 1937 that stocked donated blood. He coined the phrase 'blood bank,' explaining that term 'is not a mere metaphor. . . . Just as one cannot draw money from a bank unless one has deposited some, so the blood preservation department cannot supply blood unless as much comes in as goes out.'") (quoting Dr. Bernard Fantus, M.D.); *see also* HAROLD ELLIS, A HISTORY OF SURGERY 147 (2002) ("By the end of the First World War, citrated blood was stored before major battles. By 1939, the Red Cross had organized a register of blood donors and it was well recognized that refrigerated citrated blood could be stored safely for up to a couple of weeks."); MAXWELL M. WINTROBE, BLOOD, PURE AND ELOQUENT: A STORY OF DISCOVERY, OF PEOPLE, AND OF IDEAS 679 (1980).

[134] *See* I.R.S. Gen. Couns. Mem. 36,419 (Sept. 15, 1975) ("This office first considered the question of whether the value of a blood donation can be deducted as a charitable contribution in G.C.M. 23310, A-37321 (July 6, 1942).").

[135] *Id.* ("G.C.M. 23310 reversed the original position approved for a taxpayer's ruling letter that allowed a deduction for a blood donation.").

[136] *Id.* ("The underlying legal file . . . contains two dissenting memorandums and others that indicate that the final decision involved policy as well as legal considerations.").

changed course and denied the deduction in a formal memorandum.[137]

The Service subsequently had several opportunities to reconsider its position,[138] but did not do so. In 1953, the Service issued Revenue Ruling 162 disallowing an income tax charitable deduction for blood contributed to a blood bank.[139] Furnishing blood, according to the Service, "is analogous to the rendering of a personal service by the donor rather than a contribution of 'property.'"[140] Because the value of services furnished to a charitable organization was not deductible,[141] supplying blood would not be deductible. Charitable contribution deductions, the Service stated, "are confined to donations of money and of things which are generally thought of as being comprehended by the term 'property' as distinguished from the value of the service rendered."[142] Blood was decidedly not property, at least in 1953 and for income tax purposes, in the opinion of the Service. Over the next thirty years, questions regarding the tax treatment of the human body continued to arise for the Service and the courts. The next section explores the Service's approach to donations of human breast milk.

B. Breast Milk is Property

In a General Counsel Memorandum dated September 15, 1975, the Assistant Chief of the Interpretative Division considered a proposed revenue ruling's disallowance of an income tax deduction for the value of human breast milk donated to a charitable organization. The proposed ruling followed Revenue Ruling 162, which had disallowed a deduction for a blood donation on the grounds that the provision of blood was a service.[143] The General Counsel agreed with the conclusion of the proposed

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[137] *Taxation With Representation Fund v. IRS*, 485 F. Supp. 263, 266 (D.D.C. 1980) (General Counsel Memoranda "contain the reasons behind the adoption of revenue rulings, private letter rulings, and technical advice memoranda" and have "important precedential value in determining future tax questions.").

[138] I.R.S. Gen. Couns. Mem. A-497,518 (June 24, 1953); I.R.S. Gen. Couns. Mem. 27,590 (Oct. 17, 1952); I.R.S. Gen. Couns. Mem. A-485,674 (June 13, 1952); I.R.S. Gen. Couns. Mem. A-480,160 (Apr. 3, 1952); I.R.S. Gen. Couns. Mem. A-380,413 (Mar. 30, 1943); *see also* I.R.S. Gen. Couns. Mem. 2,770 (Aug. 6, 1953); I.R.S. Gen. Couns. Mem. A-483,225 (July 7, 1952).

[139] Rev. Rul. 162, 1953-2 C.B. 127.

[140] *Id.*

[141] *See* Treas. Reg. § 1.170A-1(g) (1969) ("No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution.").

[142] *Id.*

[143] Rev. Rul. 162, 1953-2 C.B. 127.

ruling (i.e., the denial of a deduction), but not with the reasoning. Instead, the General Counsel stated its view that the breast milk donation "is one of property."[144] This was contrary to the position taken by the Service in Revenue Ruling 162.[145]

The taxpayer in the breast milk case was a nursing mother who produced more milk than her baby needed.[146] The taxpayer contacted a local charity for information about where she could donate her excess milk.[147] After identifying an appropriate organization and making the necessary arrangements, the taxpayer expressed milk daily and froze it between weekly pick-ups by a charitable organization.[148] On her income tax return, the taxpayer sought to deduct as a "charitable contribution" the fair market value of her donated milk.[149]

In an internal communication, the Service proposed ruling against the taxpayer, on the grounds that donating breast milk constituted the provision of a service to a charity (the value of which is not deductible), as opposed to the contribution of property (the value of which would be deductible).[150] Thus the Service indicated its intent to follow its own precedent. By Memorandum, however, the General Counsel outlined its disagreement with the Service's proposed reasoning. In the Counsel's view, the Service's earlier decision "to disallow a charitable contributions deduction for a blood donation was controversial when it was made and we doubt whether the same decision would be made today."[151] Counsel believed that it was appropriate to treat human breast milk as property, thus making the taxpayer eligible for a deduction:

> Although the milk is produced by the taxpayer, apart from the taxpayer, mother's milk is property within the general definition of the term. The dictionary defines property as something that is or may be owned or possessed such as wealth, goods or a piece of real estate. Each week the taxpayer donated and the donee received . . . mother's milk. The milk was tangible and transferable; in fact, it was a marketable commodity. The underlying file in this case indicates that the taxpayer could have sold her extra milk . . . to a milk bank where the milk would have

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144 I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

145 Rev. Rul. 162, 1953-2 C.B. 127.

146 I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

147 *Id.*

148 *Id.*

149 *Id.*

150 *See* I.R.C. § 170.

151 I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

been processed and resold.

Several aspects of the General Counsel Memorandum are significant. First, note the emphasis on the milk as something that could be "owned or possessed."[152] Second, it was "tangible and transferable."[153] Third, there was an existing commercial market for the milk, of which the taxpayer did not avail herself.[154] The ability to profit, ipso facto, was evidence of the milk's status as property, according to the General Counsel Memorandum.[155]

In the view of the General Counsel, between the time of the first blood case (Revenue Ruling 162 in 1953) and this breast milk case (in 1975), blood itself had *acquired* the characteristics of property, and, by implication, Revenue Ruling 162 was no longer correct.[156] For the Service to insist that a donation of financially valuable bodily fluid such as blood is a service would be "contrary to an ordinary understanding of the facts presented," according to the General Counsel.[157] That reasoning "ignores the fact that today blood is a commodity with a commercial market and value apart from its donor."[158] Thus, in the General Counsel's view, what arguably might have been a correct decision in 1953 ("we doubt whether the same decision would be made today"[159]) no longer was in 1975. Because the marketplace had changed, Counsel argued, the tax analysis should change, too.[160] Both blood and breast milk should be treated for income tax purposes as tangible property with commercial value.[161]

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[152] I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

[153] *Id.*

[154] *Id.*

[155] *See id.*

[156] *Id.*; Rev. Rul. 162, 1953-2 C.B. 127.

[157] I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

[158] *Id.*

[159] *Id.*

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> To be consistent with the rationale of Rev. Rul. 162, one would have to say that where a taxpayer wants to donate clothes to the Salvation Army and is required to walk two miles to the depository, the taxpayer is rendering the personal services of delivery and not contributing property. Permitting blood to be withdrawn, and thereby delivering it to the donee, does not render the blood worthless as property donated.

Id.

[161] Linda Fentiman has documented the robust market in human breast milk. *See* Linda C. Fentiman, *Marketing Mother's Milk: The Commodification of Breastfeeding and the New Markets for Human Milk and Infant Formula*, 10 NEV. L.J. 29 (2009); *see also* Sara Waldeck, *Encouraging a Market in Human Milk*, 11 COLUM. J. GENDER & L. 361 (2002).

Therefore, the charitable contribution of either should give rise to an income tax charitable deduction.[162]

The General Counsel Memorandum went on to include a vivid, if unfortunate, analogy:

> Milk is a commodity, whether from a human being or a cow. The donee receives bottles of frozen mother's milk just as it might get bottles of cow's milk from a dairy or store. Unlike the circumstances of blood donations the donee does not perform any operation upon the donor in order to obtain the mother's milk. Milk is property that can be given away or sold. It would be unrealistic and out-dated to say in this case the taxpayer is performing services as a wet nurse for the recipient baby. The taxpayer merely gave away property she possessed.[163]

The comparison may have taken the analogies too far. But while bracketing the implied similarities between women and cows, it is not clear why the absence of "any operation upon the donor" of breast milk has legal significance. True, blood donations typically occur in a medicalized (although not necessarily medical) setting, and require physical participation by another to draw the blood.[164] The expression of human breast milk, in contrast, may occur anywhere and is facilitated by, but not dependent on, physical participation of another.[165] It is not immediately obvious, however, that the participation of another should matter (or not) to the determination that a bodily fluid is or is not property. Perhaps it is best understood as a factor that points to the relative ease with which the breast milk can be brought to market.

The General Counsel further extended its characterization of both blood and breast milk as that which (1) could be "owned or possessed," (2) was tangible, and (3) had an existing commercial market. The General Counsel noted that the taxpayer could have profited from the transaction, but instead chose to donate her milk to charity. All of these factors, it reasoned, pointed to the characterization of the taxpayer's milk as property. The General Counsel went on to explain, however, that regardless of whether the breast milk was considered a service (as proposed by the Service) or as property (as the General Counsel believed it was), the

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[162] I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

[163] *Id.*

[164] *See phlebotomist*, MOSBY'S MEDICAL DICTIONARY 1444 (8th ed. 2009).

[165] *See generally* HAND EXPRESSION OF BREAST MILK, http://newborns.stanford.edu/Breastfeeding/HandExpression.html.

taxpayer's income tax charitable deduction would be zero in either case.[166] Under the tax law in effect at the time, the amount of the taxpayer's deduction was the fair market value of the property transferred to charity, less any short-term capital gain.[167] The General Counsel stated explicitly that the taxpayer had a zero basis in her milk "unless she showed that she incurred expenses directly attributable to its production."[168] There was nothing to suggest that the taxpayer could make a showing of such expenses. Therefore, the General Counsel reasoned, all of the taxpayer's gain on the sale of her milk "would not have been long-term capital gain because the milk was not a capital asset held for more than six months,"[169] and thus the value of the charitable contribution deduction was the fair market value of the milk, reduced by any and all gain.[170] Incidentally, it is not clear whether the General Counsel believed the milk failed the test for a capital asset, or whether the requisite holding period was not satisfied. In either case, her contribution would have to be reduced by the amount of her gain, and thus would be zero.

The General Counsel recognized that the explicit adoption of its reasoning (i.e., the characterization of human breast milk as property) would require modification of Revenue Ruling 162, a change welcomed by the General Counsel. But Counsel also struck a cautionary note, predicting that modification of Revenue Ruling 162 would have ripple effects beyond income tax charitable deductions. Specifically, the General Counsel warned that the estate and gift tax consequences would be massive in scope:

> If blood is property, then any part of the human body is property. . . . If any part of the body is property then a gift tax should be levied on the gift of a kidney for transplant if it is not given through a charitable organization. Likewise, a taxpayer's estate includes the value of all property in which he had an interest at death. The value of a decedent's body should therefore be includible in his estate. In today's world where transplants take place daily, these issues are not illusory.[171]

Perhaps overwhelmed by the specter of a massive, and perhaps politically unenforceable, incidence of taxation, the Commissioner has never modified Revenue Ruling 162. The Service has maintained a steady silence about the

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166 *See* I.R.C. § 170 (1954).

167 *Id.*

168 I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975).

169 *Id.*

170 *Id.*

171 *Id.*

wealth transfer tax consequences of commodified bodily materials. Enter this article, then, into the territory identified by General Counsel in 1975 and ignored by the Service ever since.

Just as science and markets had evolved in the years between Revenue Ruling 162 and the General Counsel Memorandum, they since have continued to evolve — perhaps exponentially. In the more than thirty-five years following the publication of General Counsel Memorandum 36,418, science has advanced and the commercial market for human bodily materials has become larger and more sophisticated. Most people probably would consider their bodily fluids and parts to be "property," in an ordinary sense of the word, and understand that their property sometimes can be transferred for a very high price. In three cases discussed in the next part, courts have confronted the commercial marketplace for human blood, but have yet to deal with a similar marketplace in human gametes. Courts have ruled, and the Service has made at least one private ruling, that the sale of blood gives rise to taxable income. Unfortunately the gift and estate tax consequences of transfers of human bodily material remain unconsidered and underexplored, potentially to the detriment of those who bring them to the marketplace.

C. BLOOD IS PROPERTY (MAYBE)

1. *United States v. Garber*

Dorothy Garber was a South Florida mother and wife.[172] After the birth of her third child, Mrs. Garber learned that her blood contained a rare antibody.[173] This antibody had commercial value for use by laboratories and blood banks in the development of marketable products.[174] In 1967, Mrs. Garber entered into an agreement to sell her blood plasma to a local company.[175] Prior to furnishing the blood, Mrs. Garber often received an injection intended to increase her production of the rare antibodies.[176] Hepatitis and blood clots were risks of this injection and the subsequent blood extractions.[177] After the plasma had been separated from her red blood cells, the lab technicians reinjected Mrs. Garber with her own red

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[172] *See* United States v. Garber, 607 F.2d 92, 93 (5th Cir. 1979).

[173] *Id.* at 94 ("Garber's blood is so rare she is one of only two or three known persons in the world with this antibody. . . .").

[174] *Id.*

[175] *Id.* at 93.

[176] *Id.* at 94.

[177] *Id.*

blood cells.[178]

Mrs. Garber initially received modest compensation — $200 per draw.[179] But after a bidding war with a competing company, Mrs. Garber's fee went up to $1600 per bleed.[180] She also received a weekly salary of $200, the use of a car and, for one of the tax years in question, a $25,000 bonus.[181] In some months, she earned over $9000.[182] In today's dollars, that would be the equivalent of more than $45,000 for a month's work.[183]

For the tax years in question, Mrs. Garber paid income tax on her weekly salary, but she did not declare or pay tax on any of the additional fees or monies she received.[184] At trial in the United States District Court for the Southern District of Florida, the court did not allow into evidence testimony from either the government's or the defense's expert witnesses; they took opposite views on the taxability of amounts received by Mrs. Garber.[185] Mrs. Garber was indicted for criminal tax evasion for filing fraudulent income tax returns.[186] She was convicted and sentenced to eighteen months in prison, receiving a suspended sentence for sixteen of those months, with probation and a civil penalty.[187]

Mrs. Garber appealed her conviction to the United States Court of

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[178] *Id.* at 93–94.

[179] *Id.* at 94.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] PURCHASING POWER CALCULATOR, *http://www.buyupside.com/calculators/purchasepowerjan08.htm* (last visited Feb. 27, 2011).

[184] *Garber*, 607 F.2d at 94.

[185] The government had offered expert testimony to the effect that Mrs. Garber's fees were gross income. The expert's opinion had two bases: either Mrs. Garber received compensation for services or she sold her blood in which she had zero basis. *Garber*, 607 F.2d at 95. The defense offered expert testimony to the effect that blood plasma was "so personal that its value is not susceptible to measurement," and that its worth necessarily must have been the amount for which Mrs. Garber sold it, meaning that she had no taxable gain from the sale. *Id.* The defendant's expert based his view on the characterization of Mrs. Garber's blood as a capital asset. *Id.*

[186] *Id.* at 93.

The specific statute was this:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7201 (1972) (cited in *Garber*, 607 F.2d at 93).

[187] *Garber*, 607 F.2d at 93.

Appeals for the Fifth Circuit, alleging that she had not received a fair trial.[188] Specifically, she claimed that the trial court erred in declining to instruct the jury that the law was unclear about the taxability of the fees she received from the sale of her plasma.[189] Mrs. Garber's argument, in effect, was that she could not willfully and knowingly evade the income tax laws if the laws were not certain, and so the trial court erred in failing to permit the defense's expert testimony that the state of the law was unclear.[190] Initially, the Fifth Circuit affirmed Mrs. Garber's conviction.[191] On rehearing en banc, however, the Fifth Circuit reversed Mrs. Garber's conviction and remanded to the District Court.[192] There is no reported decision on remand.

In its en banc decision, the Fifth Circuit acknowledged two lines of reasoning that could apply to Mrs. Garber's arrangement. She either was "working" for a fee, or "selling" a "product" for a price.[193] In some ways, her activity "does resemble work," the court observed.[194] On the other hand, blood plasma was a commercially viable product for which there was a market: "[B]lood plasma, like a chicken and egg, a sheep's wool, or like any salable part of the human body, is tangible property which in this case commanded a selling price dependent on its value."[195]

Unfortunately for present purposes, the Fifth Circuit never reached the question of whether Mrs. Garber was working for a fee or selling a product for a price. The majority decided the case on procedural grounds, holding that the trial court erred in failing to allow the defense to present testimony that Mrs. Garber could not have willfully evaded the law because the law itself was unclear.[196] The Court of Appeals reversed the conviction and remanded to the lower court.[197]

The case generated one concurrence and two separate dissents.[198] In his concurring opinion, Judge Hill opined that Mrs. Garber's furnishing of her blood plasma was a service for federal income tax purposes, and criticized

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188 *Id.*

189 *Id.* at 96.

190 *See id.*

191 *Id.*

192 *Id.* at 100.

193 *Id.* at 103.

194 *Id.* at 97.

195 *Id.* This is resonant of the somewhat opposite conclusion reached by Shakespeare's Shylock, who said, "A pound of man's flesh, taken from a man, is not so estimable, profitable neither, as flesh of muttons, beefs, or goats." WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3.

196 *Garber*, 607 F.2d at 99–100.

197 *Id.* at 100.

198 *Id.*

the majority for failing to find so explicitly.[199] Judge Hill did not disagree with the decision to reverse and remand.[200]

The first dissent took the strong view that Mrs. Garber recognized taxable income from the sale of her blood.[201] Judge Ainsworth, who had been the deciding judge on the first appeal, also characterized Mrs. Garber's receipts as income under any definition of the word.[202] Judge Ainsworth did not specify whether he believed that Mrs. Garber had engaged in work (thus earning a salary) or sold property (thus recognizing gain).[203] He did imply that if Mrs. Garber had been selling blood, she had not offered any evidence that would suggest she had anything other than a zero basis in her plasma.[204] Thus, under the charitable income tax deduction rules in effect at the time, the taxpayer would not be entitled to any deduction.[205]

In the second dissent, Judge Tjoflat opined that "the monies so clearly part of Garber's gross income that no reasonable person could have supposed otherwise."[206] He expressed incredulity at Mrs. Garber's failure to seek professional tax advice, and found the defense's proffered expert testimony to be so far from a mainstream position on the law that it did not merit any consideration.[207] Judge Tojoflat refrained from any dicta concerning whether Mrs. Garber was engaged in work for a fee or selling property for a price.[208]

The *Garber* case represents an extraordinary missed opportunity for the court to provide clarity in cases involving commercial trade in human bodily materials. Although the majority opinion does not explicitly state that Mrs. Garber was engaged in the sale of a product (i.e., her blood), it grapples — initially, at least — with the services versus property analysis undergirding Revenue Ruling 162 and the General Counsel Memorandum. This framework was at the core of a United States Tax Court case decided just one year later.

2. *Green v. Commissioner*

Shortly after the decision in *United States v. Garber*, the United States

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199 *Id.*

200 *Id.*

201 *Id.* at 101–03.

202 *Id.*

203 *Id.*

204 *Id.* at 103.

205 United States v. Garber, 589 F.2d 843, 848 (5th Cir. 1979).

206 *Garber*, 607 F.2d at 111.

207 *Id.* at 113.

208 *See id.* at 109–16.

Tax Court ruled in *Green v. Commissioner*,[209] another case involving a taxpayer who received money in return for her blood. Margaret Green was the single mother of three children.[210] She had a rare blood type.[211] In 1976, she received approximately $7000 for providing blood to a commercial facility.[212] Ms. Green acknowledged, and the Tax Court readily agreed, that this was taxable income.[213] She sought to deduct as business expenses several items: the cost of her health insurance, the cost of high-protein food and dietary supplements, the cost of travel to the lab, and other deductions for depletion of minerals in her blood.[214]

In order to be eligible for business deductions under Internal Revenue Code (Code) section 162, Ms. Green needed to be "carrying on" a trade or business. In other words, she could not take a business deduction for costs associated with selling her blood unless she was engaged in the business of selling her blood. The United States Tax Court cited *Garber*[215] and *Glenshaw Glass*[216] for the proposition that Ms. Green's sales of her blood plasma resulted in gross income. The Tax Court specifically found that Ms. Green was in fact engaged in the business of selling a product, i.e., her blood plasma, not performing a service.[217]

> [E]xcept for the unusual nature of the product involved, the contract between the petitioner and the lab was the usual sale of a product by manufacturer to a distributor or of raw materials by a producer to a processor. The tangible product changed hands at a price, paid by the pint.[218]

The Tax Court also repeated language from the *Garber* decision likening the sale of the taxpayer's blood to sales of animal products.

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[209] Green v. Commissioner, 74 T.C. 1229 (1980).

[210] *Id.* at 1237 ("[P]etitioner's household consisted of petitioner and three teenagers.").

[211] *See id.* at 1230.

[212] *Id.*

[213] *Id.* at n.2.

[214] *Id.* at 1230–32.

[215] United States v. Garber, 607 F.2d 92 (5th Cir. 1979).

[216] Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (finding income includes "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion").

[217] 74 T.C. at 1234 ("Under the facts of this case, we find that petitioner's activity was the sale of a tangible product. From petitioner, who did little more than release the valuable fluid from her body, the plasma was withdrawn in a complex process. . . . Petitioner performed no substantial service. . . . A tangible product changed hands at a price, paid by the pint.").

[218] *Id.*

> [Selling plasma was profitable] just as it is profitable for other entrepreneurs to purchase hen's eggs, bee's honey, cow's milk, or sheep's wool for processing and distribution. Although we recognize the traditional sanctity of the human body, we can find no reason to legally distinguish the sale of these raw products of nature from the sale of petitioner's blood plasma. Even human hair, if of sufficient length and quality, may be sold for the production of hairpieces. The main thrust of the relationship between petitioner and the lab was the sale of a tangible raw material to be processed and eventually resold by the lab.[219]

Thus blood was like any other "tangible raw material."[220] That it came from Mrs. Garber's body did not make it any less of a product than an animal's wool, honey, or milk.

The Tax Court referred to the level of the taxpayer's blood plasma sales in finding that she was "actively engaged in the continual and regular process of producing and selling blood plasma to the lab for profit."[221] The court allowed some of the claimed deductions but disallowed others. The taxpayer had argued that her health insurance was no different from business insurance on a machine.[222] The Service and the Tax Court rejected this comparison, saying that health insurance is "primarily a personal concern, not merely a business concern."[223] The court did not say so, but one infers that the court believed Ms. Green would pay for health insurance even if she were not in the business of selling her blood.

With regard to deductions for special food and dietary supplements, the Tax Court permitted a deduction to the extent of the taxpayer's expense "beyond that necessary for her personal needs."[224] Certain food and vitamins that were "intimately related to petitioner's production of acceptable blood plasma . . . incurred . . . solely in furtherance of her business selling blood plasma" were deductible.[225]

With respect to travel, the court ruled that Ms. Green was not commuting (a nondeductible expense) when she traveled to the lab.[226]

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219 *Id.*

220 *Id.*

221 *Id.* at 1235 (citations omitted).

222 *Id.*

223 *Id.* at 1236.

224 *Id.* at n.12.

225 *Id.*

226 *Id.* at 1237–38 ("The nature of her product was such that she could not transport it to market without her accompanying it. Of necessity, she had to accompany the blood plasma to the lab. Unique to this situation, petitioner was the container in which her product was

Rather, the court reasoned that she was transporting her "product" (i.e., her blood) to the marketplace.[227] The court characterized it thus: the petitioner was "the container in which her product was transported to market. Had she been able to extract the plasma at home and transport it to the lab without her being present, such shipping expenses would have been deductible as selling expenses."[228] Hence her travel was for business purposes and therefore was deductible.[229]

The court denied the taxpayer's last claimed deduction for depletion.[230] The taxpayer had argued that the loss of her blood mineral content was like the depletion of mineral deposits in the ground.[231] Despite Ms. Green's creative argument, the Service and the Tax Court denied the deduction, reasoning that a taxpayer's body did not contain the type of mineral deposit for which the depletion deduction was intended. [232]

The *Green* decision is important for three reasons. First, it clearly classifies bodily fluids and materials as *property*. Second, the decision acknowledges that taxable income results from the sale of such material. Third, it finds, as a matter of law, that the sale of bodily fluids and material may constitute a taxpayer's business. Thus, the Tax Court arrived to exactly the position that the 1975 General Counsel Memorandum predicted. A federal court then addressed one additional blood-related case which, together with *Green*, sets the intellectual stage for discussion of the estate and gift taxation of transfers of human gametes.

3. *Lary v. United States*

In *Lary v. United States*,[233] a married couple claimed a variety of income tax deductions, including a charitable deduction for the value of a pint of blood donated by the husband to charity.[234] Notwithstanding the Tax Court's determination in *Green* that blood is property, both the Service and the United States District Court for the Northern District of Alabama had held that the contribution of blood to a charity constituted the provision of a personal service, and therefore did not give rise to a charitable income tax

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transported to the market.").

227 *Id.*

228 *Id.* at 1238.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 Lary v. United States, 787 F.2d 1538 (11th Cir. 1986).

234 *Id.* at 1538.

deduction.[235] Thus the Service and the District Court maintained the position of Revenue Ruling 162 and did not follow the Tax Court.[236]

On appeal, the United States Court of Appeals for the Eleventh Circuit declined to rule whether blood donation constitutes a service or a property transaction. The Court of Appeals reasoned that the tax results would be the same in either case. If donating blood were a service, no deduction would be permitted. If blood were property, no deduction would be permitted because, as the General Counsel had advised in its 1979 Memorandum, the charitable contribution deduction must be reduced by the sum of built-in gain other than long-term capital gain.[237] And, because the taxpayers failed to claim that they had any basis in the blood or that they had held the blood for longer than the requisite six months, the value of their deduction would be reduced (to zero) by the full amount of the gain.[238] The appeals court specifically acknowledged that its decision "leaves open the question of whether the sale or contribution of blood is the performance of a service or the sale or contribution of a product."[239] The *Lary* court offered in dicta that the *sale* of blood would cause the taxpayer to recognize income, but the court did not extend its analysis.[240]

4. Private Letter Ruling 8814010

In 1988, the Service issued Private Letter Ruling 88-14-010[241] in response to a taxpayer's request for a ruling on the income tax consequences of the transfer of blood.[242] As in the cases of *Garber*[243] and *Green*,[244] the taxpayer had a rare blood type with commercial value.[245] The taxpayer received fees for transferring her blood to the company, and sought the Service's guidance on whether this was taxable income.[246]

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[235] *Id.* at 1539.

[236] *Id.* at 1540.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* (citing Green v. Commissioner, 74 T.C. 1229, 1232-1233 (1980)).

[241] I.R.S. Priv. Ltr. Rul. 88-14-010 (Apr. 8, 1988). Under Internal Revenue Code (Code) section 6110(k)(3), neither a private letter ruling nor a National Office Technical Advice Memorandum may be cited or used as precedent. I.R.C. § 6110(k)(3) (2010).

[242] I.R.S. Priv. Ltr. Rul. 88-14-010 (Apr. 8, 1988).

[243] *See supra* Part II.C.1.

[244] See *supra* Part II.C.2.

[245] I.R.S. Priv. Ltr. Rul. 88-14-010 (Apr. 8, 1988).

[246] *Id.*

In ruling that it was, the Service cited both *Green*[247] and *Lary*[248] for the proposition that amounts "received for the sale of blood are includable in the gross income of the blood donor."[249] The taxpayer did not request a statement about the nature of the income, and the Service made none. Were the proceeds from blood sales income from services or the sale of property? The Service left the question unanswered.

Existing tax jurisprudence provides no ready answer to the question of whether the body is property, or what relationship, if any, the tax system should have to transactions involving the human body. The next Part moves towards answers to both of those questions by contemplating a legal system in which human gametes are treated as property like any other. An evaluation of such system's desirability and functionality follows.

IV. INHERITING LIFE

A. Transferrable Gametes

1. Lifetime Transfers of Gametes

For human gametes to be treated fully as property like any other, there would be few restrictions on the sale of eggs or sperm for any purpose, whether reproductive or research. Egg donors and sperm donors would be free to bargain for the full fair market value of their gametic material, something that does not occur in the existing marketplace.[250] The cultural and legal treatment of blood sales provides a model for such a system. Like blood, sperm is regenerative, and separating sperm from a living human body is not ordinarily an intrusive medical procedure. The retrieval of a woman's eggs is more complicated, and necessarily involves medical intervention, but is a far less risky procedure than, say, a kidney donation, and has no associated long-term risks.[251] Women have a finite number of eggs, like kidneys. Unlike kidneys, however, a female child is born with more eggs than she will need or "use" for procreative purposes during her lifetime. In that sense, eggs sales should be less objectionable than sales of kidneys. Similarly, because of the relatively low risk and the relative abundance of eggs that a woman possesses at birth, the price for eggs likely will never rise as high as the market for scarcer organs. Concerns about coercive payments therefore recede where there is a large delta between risk

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[247] *See supra* Part II.C.2.

[248] *See supra* Part II.C.3.

[249] I.R.S. Priv. Ltr. Rul. 88-14-010 (Apr. 8, 1988).

[250] *See* Krawiec, *supra* note 44, at 60.

[251] *But see supra* note 65 and accompanying text.

and price.[252] Thus the most significant obstacle to treating human gametes as fully transferrable is the pervasive nature of the legal fiction that egg "donation," in particular, is an altruistic act. (That fiction has never been as strong with respect to sperm sales.[253]) As a psychological matter, it is one thing to sell one's blood, and yet another to sell one's potential genetic child.

Even in a legal regime of fully transferrable human gametes, public health or ethical concerns might warrant some restrictions on transfer. For example, the government would maintain a strong interest in prescribing the circumstances under which genetic material may be extracted, stored, and transferred. Reasonable limitations on the number of embryos created with "donor" eggs or sperm reduce the likelihood that children born of this assisted reproductive technology could later encounter each other and marry.[254] Legal rules or guidelines might also seek to guard against the possibility of coercion in cases where egg donation is extremely remunerative (e.g., the "donor" is a Nobel Prize winner).[255] Similarly, market adjustments might be necessary if a person can earn so much more from selling her eggs than from any other market labor for which she is qualified. Otherwise, financial incentives might skew toward gamete sales as a form of labor, which may not be desirable in a macroeconomic sense.[256]

2. Death-Time Transfers of Gametes

Courts have shown an inclination to honor a decedent's wishes for the post-mortem disposition of human gametes in some contexts, namely, where the decedent had preserved his sperm during lifetime for procreative purposes, and where the sperm was to be used by a surviving spouse or partner for procreative purposes.[257] There is no logical reason that courts

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[252] *But see supra* note 66 and accompanying text.

[253] Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 328 (2007) ("[E]gg agency advertisements appeal to women's altruism while men are informed of a job opportunity."); *see also* Krawiec, *supra* note 96, at nn.65–70.

[254] *See, e.g.*, John A. Robertson, *Liberty, Identity, And Human Cloning*, 76 TEX. L. REV. 1371, 1452 (1998) ("The reason for these limits is to protect the donors and to minimize the risks of consanguineous marriages occurring unwittingly between people who are half-siblings.").

[255] *See supra* Part I.B. (discussing of the risks and rewards of compensation for blood and organs).

[256] I make a similar point with respect to paid gestational surrogacy. *See* Crawford, *supra* note 9.

[257] *See supra* Part I.E.

would decline to extend the same treatment to a female decedent who during lifetime had preserved her eggs for use by a surviving spouse or partner (with a gestational surrogate) for procreative purposes. Although it is unlikely that a court would broaden significantly such a dispositive right, consider nevertheless the features or limits desirable in a legal system that treated gametes as descendible and devisable.

The easiest case, admittedly, exists where a decedent has taken lifetime measures to have his or her sperm or ova preserved. If the gametes were transferrable at death, then the decedent's will could control their disposition. To the extent that a will provision conflicted with a lifetime designation, a default rule could grant priority to one or the other. Arguably giving precedence to a will provision allows an individual to change any prior designation without the involvement of the fertility clinic or storage facility. The formalities attendant to a will's execution operate to make sure that the testator takes the act seriously, that the testator is acting free from undue influence of others, and that a court will be able to interpret the instrument as the expression of the testator's wishes.[258] In that sense, a testamentary provision deserves significant weight. On the other hand, conflicting lifetime and testamentary designations could lead to mistake, administrative confusion, or increased litigation.

Imagine further the inevitable question of whether the residuary clause of a decedent's will ("I give, devise and bequeath all the rest, residue and remainder of my estate. . . .") is an effective disposition of gametic material.[259] The law of wills would have to be calibrated to avoid any conflict with a decedent's right to refrain from engaging in posthumous reproduction.[260] If the decedent had stored sperm during his lifetime, and made no explicit provision for its disposition on his death, then allowing the

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[258] *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 4–13 (1941) (describing ritual, evidentiary and protective function of will execution formalities); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975) (describing channeling function of will execution formalities).

[259] In New York, for example, the residuary clause is deemed to exercise any power of appointment held by the decedent, unless the governing instrument provided for the manner of exercise. N.Y. EST. POWERS & TRUSTS § 10-6.1 (McKinney 2002). *But see* RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 19.1 (1999) (power of appointment exercised to the extent that "donee manifests an intent" to do so).

[260] *See generally* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); Tracey S. Pachman, *Disputes Over Frozen Preembryos and the "Right Not to Be a Parent,"* 12 COLUM. G. GENDER & L. 128 (2003); *see also* June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1021 (2010); Mark P. Strasser, *You Take the Embryos But I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFF. L. REV. 1159, 1177 (2009).

sperm to pass under his residuary clause would interfere with the decedent's individual autonomy, were the residuary taker to use the sperm for reproduction. Thus, the law of wills should be used to effectuate clear statements of the decedent's intent, but not to provide a default taker for sperm that is not specifically bequeathed. The sperm should be destroyed in these cases.

A case of second-order complexity presents if a decedent takes no steps during lifetime to medically preserve his sperm or her eggs, but nevertheless has clear intentions to engage in posthumous reproduction. Assume, for example, that a decedent signs a written, witnessed statement directing the post-mortem medical retrieval of his sperm for use by his wife to conceive a child. Practically speaking, an individual would be ill-advised to rely solely on his will to convey this intention, as a will usually is not discovered at the precise moment of death, and may not be probated within the time-frame permissible for posthumous sperm retrieval.[261] But, as a matter of principle, should the law give effect to such a provision? Yes, if decedent's wishes are known within the appropriate period of time, and his estate will bear the cost of the post-mortem retrieval. Indeed, there have been cases where a decedent's family has consented to the posthumous medical retrieval of sperm based on far lesser evidence of the decedent's intent.[262] The post-mortem transfer of sperm is consistent both with the decedent's constitutional rights as well as a property interest in his own gametes.

Consider a third-order case involving a similar decedent — one who has not taken steps during lifetime to medically preserve his sperm, but nevertheless directs post-mortem retrieval — where the sperm is to be used for nonprocreative purposes. If the law were to treat gametes as property like any other, then it must give legal effect to a variety of testamentary dispositions. Imagine a direction to posthumously retrieve sperm and transfer that sperm as a donation to a research facility. This is perhaps the easiest case, as it would appear to be supported by the Uniform Anatomical Gift Act.[263] As long as the decedent's estate bears the cost of the retrieval, the law should give effect to the transfer. But what if the decedent directed that retrieved sperm be transferred to his 90-year old grandmother, for display on her mantle? What if the decedent directed the sale of such sperm,

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[261] *See* Susan M. Kerr et al., *Post-mortem Sperm Procurement,* 157 J. UROLOGY 2154, 2154 (1997) (explaining that viable sperm need to be surgically extracted from deceased males within twenty-four hours of their death).

[262] Mike Celizic, *Mother Defends Harvesting Dead Son's Sperm*, TODAY (April 9, 2009), http://today.msnbc.msn.com/id/30133582.

[263] Unif. Anatomical Gift Act (2006).

with the proceeds payable to his 90-year old grandmother?[264]

These may seem like fanciful hypotheticals, but if gametes were fully descendible, then these bequests would need to be given legal effect. Intuitively, testamentary directions to transfer the sperm to a medical facility, for display, or to monetize the sperm have minimal legal (and perhaps emotional) purchase. Deference for the decedent's procreative rights (as well as public sympathies) might dictate a tolerance for the posthumous reproduction, but not the other posthumous transfers. For the law to support post-mortem retrieval and use for nonreproductive purposes would, in effect, be to allow the decedent to convert a nonproductive economic asset into a productive one. In other words, sperm in a man's body has no inherent market value. Once retrieved from the body, the sperm takes on qualities of a commercial good, capable of being sold and purchased at a particular price. Discomfort with this directed commodification of the human body suggests a possible reasonable limit to treating human gametes as fully descendible and devisable.

Political concerns also might factor into consideration of the desirability of freely devisable human gametes. For many, treating human sperm or eggs as property like any other is fundamentally at odds with a respect for life and life's potential. The extent to which religious communities, for example, tolerate assisted reproductive technology depends to a certain extent on the absence of federal funding and governmental involvement.[265] This has led to the flourishing of private clinics that undoubtedly enable many people to become parents with the help of science and technology.[266] Full and unfettered devisability of human gametes would demand a level of government entanglement that might jeopardize the ability of doctors and others to continue to function in that private sphere. This entanglement would include administration of tax rules that apply to sales and gifts of human gametes.

B. Taxable Gametes

1. Income Tax

The Service and the courts have struggled mightily with the question of

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[264] To a certain extent, such a direction resembles a demonstrative devise, a general financial benefit payable from the sale of specific property. *See* RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 5.1 (1999) (classification of devises).

[265] *See* Carbone & Cahn, *supra* note 260, at 115–31.

[266] In a similar context, I have expressed concerns that reproductive technology may serve to limit adult development in capacities as other than child-bearers or child-rearers. *See* Crawford, *supra* note 9, at 364–65.

whether human bodily fluids and material are, for tax purposes, at least, "property" or not.[267] If states were to enact a law that provided that sperm and eggs were transferrable and descendible property, then the income tax consequences would be relatively clear.[268] The analysis is as follows.

Section 1 of the Code imposes a tax on all "taxable income."[269] Taxable income is defined in section 63 as "gross income" minus certain deductions.[270] Under Code section 61(a), a taxpayer's gross income includes "all income from whatever source derived, including, but not limited to" fifteen enumerated items. One of those enumerated items is "gains derived from dealings in property."[271] So, to illustrate, if a human egg is property and a taxpayer sells her egg, she will recognize taxable income to the extent she has "gain."

To calculate gain, one must follow another statutory patchwork of cross-references. Under Code section 1001(a), gain is the "excess of the amount realized" over the "adjusted basis."[272] Adjusted basis, as defined in Code section 1011, is basis as determined under Code section 1012 (cost basis), adjusted as provided in Code section 1016 (principally, adjustments for capital expenditures and depreciation).[273] Amount realized, as defined in Code section 1001(b), is "the sum of any money received plus the fair market value of property (other than money) received."[274] This is true whether the subject property is a painting or a human egg. In either case, if

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[267] *See supra* Part II.

[268] The confusion of both the Service and the courts pales in comparison to the advisory free-for-all on the Internet. *Compare How Does a Sperm Donor Report His Profits to the IRS? Or Does He?*, IRS LAWYER TAX (July 15, 2011), http://irslawyertax.com/how-does-a-sperm-donor-report-his-profits-to-the-irs-or-does-he.irs-tax ("Payments you receive are miscellaneous income reported on Line 21 of Form 1040. The payments are not subject to self-employment taxes."), *with When and How Often Do You Receive Payment Once in the Program?*, SPERM BANK OF N.Y., http://www.sperm1.com/biogenetics/donor.html#Anchor-When-47857 ("[W]e are reimbursing you for your time, traveling to our laboratory, and your efforts in complying with the program requirements."). Misleading tax information appears to be the norm. *See, e.g.*, Delwyn Lounsbury, *Is Surrogacy or Surrogate Fee Taxable?* (July, 15, 2011), http://www.surrogacy-surrogate-mother.com/surrogate-fee-taxable.html. ("Being an egg donor is not without pain and suffering. Shots and drugs to induce egg formation etc. Then there's the going in after the eggs. Money paid to donors could fall under compensatory damages that one receives for physical damage or illness and therefore be non-taxable income.").

[269] I.R.C. § 1 (2010).

[270] *Id.* § 63.

[271] *Id.* § 61(a)(3).

[272] *Id.* § 1001(a).

[273] *Id.* §§ 1001(a), 1012, 1016.

[274] *Id.* § 1001(b).

the seller sells for $6000, the amount realized is $6000.[275] A seller's basis in property usually is her "cost basis."[276] Consider the example of a person who buys a painting at second-hand store for $500.[277] Her cost basis is $500. If she then sells the painting years later for $6000, her gain is $5500. Unless an exclusion provision is available, the entire amount of gain or loss determined under Code section 1001 shall be recognized (that is, taken into account for tax purposes).[278]

To the extent that legal commentators have addressed the issue of tax basis in the human body, there appears to be unanimous agreement that a woman who sells her own egg, for example, would have a zero basis in it.[279] One's cost basis in self-created property (such as a painting) is limited to the cost of the material used to create the property (i.e., the cost of the paint and canvas in the case of a painting).[280] Humans likely have a zero basis in their gametes. The reason, simply stated, is that a person pays nothing to acquire her eggs or sperm. To the extent that she must consume food, for example, to maintain a living body (and thus her eggs), those expenditures are not an investment in a tax sense, but rather incident to life itself.[281] So, a woman who sells her egg for, say, $6000 will realize and recognize a full $6000 of gross income.

The final income tax question in such a scenario is whether any gain is capital or ordinary. Gains from the sale or exchange of a capital asset are eligible for taxation at a rate (fifteen percent) that is lower than the rate imposed on ordinary income.[282] To determine if property is a capital asset, one proceeds from the default position that all property is capital, unless the

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[275] For illustration purposes, assume that $6000 is the fair market value of the painting and the egg. *But see infra* Part II.E. (exogenous constraints on market for human eggs may depress price). To the extent that either the painting or the egg is transferred for less than fair market value, there is a taxable gift. *See infra* Part III.B.

[276] *See supra* note 273 and accompanying text.

[277] I.R.C. § 1012 (2010).

[278] I.R.C. § 1001(c) (2010).

[279] *But cf.* Green v. Commissioner, 74 T.C. 1229 (1980) (disallowing a depreciation deduction for the mineral content of the taxpayer's blood). Other scholars who have addressed the issue appear to agree that a taxpayer would have a zero basis in her own eggs. *See* Lisa Milot, *What Are We — Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1104 (2010); Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 949–50 (1999); Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842, 853–54 (1973).

[280] *See* I.R.S. PUB. 551: BASIS OF ASSETS 1 (2002), *available at* http://www.irs.gov/pub/irspdf/p551l.pdf (stating tax basis is the amount an individual has invested in a tax sense).

[281] *See supra* Part II.C.3. (discussing *Green v. Commissioner*).

[282] *See, e.g.*, I.R.C. § 1221 (2010) (capital gains).

tax law provides otherwise.[283] In other words, all property is a capital asset unless the Code says it is not.[284] Common categories of property that are not capital (i.e., ordinary) assets include inventory,[285] depreciable property used in a trade or business,[286] and certain intellectual property and artistic creations.[287]

There is no law, administrative ruling, or case that states definitively whether the human body is a capital asset. There is language in the *Green* case to suggest that the taxpayer could be considered as carrying on the business of selling her blood.[288] Could a woman be treated as carrying on the business of selling eggs, then? The United States Court of Appeals for the Tenth Circuit explained in *Mauldin v. Commissioner* that "[t]here 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."[289] The *Mauldin* court did, however, identify several of the factors relevant to the determination that someone is engaged in a particular trade or business: "the purposes for which property was acquired,

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[283] Under Code sections 1221(1) and (3), capital gain is defined as gain from the "sale or exchange" of a "capital asset." I.R.C. § 1221(1), (3) (2010). A "capital asset" is defined in Code section 1221(a) in the negative. Capital asset means "property held by the taxpayer (whether or not connected with his trade or business)," except specifically designated categories of property. I.R.C. § 1221(a)(1)–(8) (2010).

[284] *Id.* § 1221(a).

[285] *Id.* § 1221(a)(1) ("stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business").

[286] *Id.* § 1221(a)(2) ("property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in [the taxpayer's] trade or business").

[287] *Id.* § 1221(a)(3) (referring to "a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by — (A) a taxpayer whose personal efforts created such property, (B) in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced, or (C) a taxpayer in whose hands the basis of such property is determined (other than by reason of section 1022), for purposes of determining gain from a sale or exchange, in whole or part by reference to the basis of such property in the hands of a taxpayer described in subparagraph (A) or (B)"). For further discussion of the intellectual property described in Code section 1221(a)(3), see John Sare & Bridget J. Crawford, *Estate Planning for Authors and Artists*, 815 Tax Mgmt. (BNA) (2004).

[288] *See supra* notes 210–223 and accompanying text.

[289] Mauldin v. Commissioner, 195 F.2d 714, 716 (10th Cir. 1952); *see also* Friend v. Commissioner, 198 F.2d 285, 287 (10th Cir. 1952); Cole v. United States, 141 F. Supp. 558, 561 (D. Wyo. 1956); Winston v. Commissioner, 15 T.C.M. (CCH) 477 (1956).

whether for sale or investment; and the continuity and frequency of sales as opposed to isolated transactions."[290] In cases involving the human body, one's own gametes are not "acquired" property in any common understanding of the term. A female is born with all of the eggs she will ever produce,[291] and a healthy male has the bodily ability to create sperm after puberty. Thus a human being need take no action in order to "acquire" gametes. In *Malat v. Riddle*,[292] the Court of Appeals for the Ninth Circuit articulated a slightly different test for determination of an asset's status as capital or ordinary. In that case, Mr. Malat participated in a real estate joint venture to develop an apartment project on land for the purposes of either renting apartments or selling it.[293] The court shifted its focus from the purposes for which the property is acquired to the purposes for which it is *held*.[294] Even under that test, a human being should not be considered to be holding her eggs or his sperm for the purpose of sale. This bodily material is constitutive of the body itself. Absent unnecessarily medical intervention, one could not separate one's gametes from oneself.

In terms of "continuity and frequency of sales,"[295] it is noteworthy that the American Society for Reproductive Medicine guidelines recommend that a woman "donate" her eggs no more than six times.[296] In the case of sperm donors, the recommended limit is twenty-five births per population of 800,000.[297] Some sperm banks have more stringent limits.[298] But there is

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[290] *Mauldin*, 195 F.2d at 716.

[291] *See* Soled, *supra* note 279 at 950 ("Eggs are part of every donor's birthday package.").

[292] Malat v. Riddle, 347 F.2d 23 (9th Cir. 1965).

[293] *Id.*

[294] *Id.* at 26 ("In our judgment the answer in such a case must be found in the scope of the gain-producing purpose for which the property was acquired and *held*") (emphasis added). As one leading treatise explains, "[t]he line of demarcation is especially difficult to establish in the real estate field when, for example, a tract of land acquired for investment or farming is subdivided and sold in small parcels, since the courts recognize that an 'investor' can become a 'dealer' of the purpose for which his assets are held changes in midstream." BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 31.04[1] (3d ed. 2002).

[295] *Mauldin*, 195 F.2d at 716.

[296] *See* Robertson, *supra* note 254.

[297] The American Society for Reproductive Medicine provides the following guidance:

> Institutions, clinics, and sperm banks should maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible. It is difficult to provide a precise number of times that a given donor can be used be- cause one must take into consideration the population base from which the donor is selected and the geographic area that may be served by a given do-nor. It has been suggested that in a population of 800,000, limiting a single

no bright line to mark the difference between "frequent" and "infrequent" sales, at least for capital gains purposes. "[S]ales that are few in number and that occur at irregular intervals are more characteristic of investors than of dealers."[299] Thus in the case of a woman who sells a single egg, where that egg is definitively "property" for income tax purposes, then the resulting gain should be capital. Subsequent sales likely would be treated as involving a capital asset, as well, but that result is not certain.

Whether a gamete seller's gain is "short-term" or "long-term" is a final consideration. Under Code section 1222(1), "short-term capital gain" is defined as gain from the sale or exchange of a capital asset held for not more than one year, if and to the extent such gain is taken into account in computing gross income.[300] Under Code section 1222(3), "long-term capital gain" is defined as gain from the sale or exchange of a capital asset held for more than one year, if and to the extent such gain is taken into account in computing gross income.[301] A woman selling her egg has possessed it since birth, and thus the egg should be treated as long-term property.[302] It is less clear whether a man's sperm would be treated as long-term property. Spermatogonia (sperm stem cells) are produced continuously over a man's lifetime,[303] and are reabsorbed by the body if not used.[304]

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donor to no more than 25 births would avoid any significant increased risk of inadvertent consanguineous conception. This suggestion may require modification if the population using donor insemination represents an isolated subgroup or if the specimens are distributed over a wide geographic area.

AM. SOC'Y FOR REPROD. MED., 2008 GUIDELINES FOR GAMETE AND EMBRYO DONATION: A PRACTICE COMMITTEE REPORT S35–S36 (2008), *available at* http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf.

[298] *See, e.g.*, *Choosing A Donor*, SPERM BANK OF CALIFORNIA, http://www.thespermbankofca.org/content/choosing-donor ("We have a limit of no more than 10 families per donor. This is one of the lowest family limits nationally. Many sperm banks have limits of 20, 40 or more."); *see also* RAINBOW FLAG HEALTH SERVICES, http://www.gayspermbank.com/ ("We limit our donors to have children by only 4-6 different women. Other sperm banks use a donor to produce children by 10 different women! Some banks have no limits!").

[299] BITTKER ET AL., *supra* note 294; *see, e.g.*, Byram v. Commissioner, 705 F.2d 1418 (5th Cir. 1983) (finding twenty-two sales of subdivided real estate did not convert property to ordinary income property because of taxpayer's lack of involvement in promoting sales); Newman v. Commissioner, 43 T.C.M. (CCH) 474 (1982) (finding three sales of subdivided real estate did not convert property to ordinary income property).

[300] I.R.C. § 1222(1).

[301] *Id.* § 1222(3).

[302] *See id.* § 1222(1).

[303] *See, e.g.*, Yves Claremont, *Renewal of Spermatogonia in Man*, 118 AM. J. ANAT. 509, 509–10 (1966).

[304] *See, e.g.*, Rex A. Hess et al., *A Role for Oestrogens in the Male Reproductive*

Sperm cells are produced in the testes and combine with semen produced by the gonads.[305] Biologically speaking, a man does not "hold" his sperm for over a year. In any event, whether the gain is short-term or long-term, because the seller has a zero basis in her or his own gametes, the entire amount realized will be included in gross income. Sales of human gametes should be eligible for capital gains treatment, a point on which the few legal commentators who have considered the question likely would agree.[306] The next section considers how the gift tax would apply to transfers of human gametes, in a truly (if rare) donative scenario.

2. Gift Tax

A four-part analysis applies to determine whether a particular transfer is subject to gift tax. One asks first whether there has been a *transfer* of a *property* interest. Transfers of property are subject to gift tax, but transfers of services are not.[307] Second, is the transfer *complete*? The test for completion is whether the transferor has "so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another."[308] A retained power to direct the disposition of property will make the transfer incomplete for gift tax purposes, and no gift tax can be imposed.[309] Third, is the transfer a *gift*? The answer to that question depends, according to the Treasury Regulations, on simple mathematics: "[w]here the property is transferred for less than adequate consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift."[310] In other words, if the transferor

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System, 390 NATURE 509, 509–12 (1997).

[305] *See, e.g.*, *Seminal Vesicle-Secreted Proteins and Their Reactions During Gelation and Liquefaction of Human Semen*, 80 J. CLIN. INVEST. 281 (1987).

[306] Dorothy Brown believes that a one-time kidney sale would be treated as a capital transaction. She writes, "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." Crawford, *Taxation, Pregnancy and Privacy*, *supra* note 9, at 333 n.40 (2010) (quoting Dorothy A. Brown, *Contested Commodities: Lessons from Tax Policy*, *in* 21ST CENTURY LAW (Michele Goodwin ed., forthcoming 2010) (manuscript at 12)). Lisa Milot believes that "excised human body materials should be considered capital assets unless fitting one of the eight exceptions to the capital asset definition." Milot, *supra* note 279, at 1096; *see also* Soled, *supra* note 279, at 923–29 (finding human eggs as a capital asset).

[307] *See* Commissioner v. Hogle, 165 F.2d 353 (10th Cir. 1947) (finding grantor's investment advice to trusts created by him did not constitute an additional gift to the trust).

[308] Treas. Reg. § 25.2511-2(b) (as amended in 1999).

[309] *Id.*

[310] I.R.C. § 2512(b).

"gives" more than she "gets" in return,[311] she makes a *gift* in a transfer tax sense. Fourth and finally, one asks whether there is any *exclusion* or *deduction* that would allow the transfer to be treated as nontaxable. The most common of these are the gift tax annual exclusion under Code section 2503(b),[312] the exclusion for direct payments of medical and educational expenses under Code section 2503(e),[313] the marital deduction under Code section 2523 for certain transfers to spouses,[314] the charitable deduction under Code section 2522 for certain transfers to exempt organizations,[315] and the applicable exemption ($5,000,000 in 2012).[316]

Most egg "donations" are not gifts at all.[317] They are transfers for value (i.e., sales). But it is not inconceivable that a woman could make a true donative transfer of her egg. A likely scenario might involve Sister *A* giving an egg to infertile Sister *B*, to enable Sister *B* to become pregnant. Assume for purposes of this analysis that the ovum is a property interest, and that no money changes hands. For simplicity purposes, assume also that Sister *A* has no out-of-pocket medical expenses associated with the egg donation and no money changes hands between the sisters. We will assume that the appropriate contracts are drawn and that Sister *A* retains no interest in, or power with respect to, the transferred property.[318]

Analyzing the hypothetical most literally, Sister *A* has *transferred* her egg to Sister *B*. The transfer is *complete*, insofar as Sister *A* retains no interest in the transferred property, and she has no power to revoke, alter, amend, or terminate the transfer.[319] The transfer is a *gift*, because Sister *A*

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[311] *See* Bridget J. Crawford, *Tax Avatars*, 2008 UTAH L. REV. 793, 798–99 (2008) (gift where property transferred has greater value than property received).

[312] I.R.C. § 2503(b). The annual exclusion is $13,000 in 2012. *See* Rev. Proc. 2011-52, 2011-45 I.R.B 701.

[313] I.R.C. § 2503(e). In order to qualify for this exclusion, the payment must be made directly to the medical provider or to an educational institution. If the payment passes through the beneficiary's hands, the exclusion will be unavailable. *See* Treas. Reg. § 25.2503-6, Example 6 (1984) (no gift tax exclusion available to D taxpayer where D reimburses C for C's medical expenses).

[314] I.R.C. § 2503(e) (direct payments of medical and education expenses).

[315] *Id.* § 2522 (gift tax deduction for charitable contributions).

[316] *Id.* § 2505. The applicable exemption is the amount of gifts that may be made tax-free by any taxpayer. Under prior versions of the law, this amount has been referred to as the "unified credit" or the "exemption equivalent," depending on how the amount mathematically functioned in the calculation of estate and gift taxes. *See* JOSEPH M. DODGE ET AL., FEDERAL TAXES ON GRATUITOUS TRANSFERS: LAW AND PLANNING 32–33 (2011).

[317] *See supra* Part I.E.

[318] Treas. Reg. §25.2511-2(b) (as amended in1999).

[319] *Id.*

receives no consideration for the egg.[320] Sister *A* "gives" more than she "gets" in return.[321] Therefore Sister *A* makes a gift in a transfer tax sense. Might there be any *exclusion* or *deduction* that would allow the transfer to be treated as nontaxable?[322] If the fair market value of the egg is less than $13,000 (in 2012), and Sister *A* has not made other taxable transfers to Sister *B* during the calendar year, the transfer would be eligible for the annual exclusion under Code section 2503(b).[323] If the fair market value of the egg is greater than $13,000, or if Sister *A* has made other transfers subject to gift tax to Sister *B*, then Sister *A* would need to use a portion of her applicable exemption ($5,000,000 in 2012) to avoid gift tax.[324] No other deduction or exclusion appears to be available.[325]

Query, however, whether a less literal approach to the statutes might lead to a different gift tax result. In *Dickman v. Commissioner*,[326] the Supreme Court of the United States held that in the intra-family context, a demand loan bearing no interest would be treated as a taxable gift to the lender of the amount of the foregone interest.[327] In other words, by making an interest-free loan, the lender, in effect, allows the borrower "rent-free" use of the loan amount. The Court framed the issue as follows:

> We have little difficulty accepting the theory that the use of valuable property-in this case money-is itself a legally protectable

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[320] I.R.C. § 2512(b) ("Where the property is transferred for less than adequate consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift."). If *W* had been the intended mother of a child to be conceived in vitro and carried by a gestational surrogate, the analysis would be different. *See* Crawford, *Taxing Surrogacy*, *supra* note 9. This hypothetical, however, is intended as a scenario in which neither *W* nor the gestational surrogate plan to have (or do in fact have) any legal rights or relationship with any child resulting from their genetic material (in *W*'s case) or the gestation (in the surrogate's case).

[321] *See* Crawford, *supra* note 311.

[322] *See supra* notes 312–316 and accompanying text.

[323] I.R.C. § 2503(b). The annual exclusion is $13,000 in 2012. *See* Rev. Proc. 2011-52, 2011-45 I.R.B 701.

[324] I.R.C. § 2505. The applicable exemption is the amount of gifts that may be made tax-free by any taxpayer. Under prior versions of the law, this amount has been referred to as the "unified credit" or the "exemption equivalent," depending on how the amount mathematically functioned in the calculation of estate and gift taxes. *See id.*

[325] *Cf.* I.R.C. § 2522 (charitable deduction for certain transfers to exempt organizations); I.R.C. § 2503(e) (exclusion for direct payments of medical and educational expenses to the medical provider or to an educational institution). The analysis that applies to transfers of human eggs should apply to transfers of human sperm as well.

[326] Dickman v. Commissioner, 465 U.S. 330 (1984) (making interest-free demand loan to a family member constitutes a taxable gifts of foregone interest).

[327] *Id.*

> property interest . . . . The right to the use of $100,000 without charge is a valuable interest in the money lent, as much so as the rent-free use of property consisting of land and buildings. In either case, there is a measurable economic value associated with the use of the property transferred. The value of the use of money is found in what it can produce; the measure of that value is interest — "rent" for the use of the funds.[328]

It is true that the law does not require a person to make his assets productive, but that applies only with respect to personal consumption or waste, the Court explained:

> It is certainly true that no law requires . . . that a transferor charge interest or rent for the use of money or other property. An individual may, without incurring the gift tax, squander money, conceal it under a mattress, or otherwise waste its use value by failing to invest it. Such acts of consumption have nothing to do with lending money at no interest . . . . If the taxpayer chooses not to waste the use value of money, however, but instead transfers the use to someone else, a taxable event has occurred.[329]

So a person with $1 million can bet it all at a racetrack or stuff it under her mattress. These would be what the *Dickman* Court characterized as acts of personal consumption or waste.[330] Once the person with $1 million decided to do something other than consume or waste it, a tax may be imposed on the transfer.

The *Dickman* reasoning applies somewhat uneasily to the hypothetical in which Sister *A* gives her egg to Sister *B* and receives no compensation of any kind. Sister *A* was under no obligation to monetize the value of her ova. She could have taken no action to transfer her eggs, in which case her own body would "waste" (at the time of menstruation) or "use" (if the egg were fertilized by sperm) her egg. But if the human egg is property, then once Sister *A* decides to transfer the egg to Sister *B*, where that transfer is for no consideration, she has effectively transferred the "use" of the egg (and made a taxable gift) to Sister *B*.

As long as human gametes are treated as *property* for tax purposes, then it would appear that the gift tax applies to donative transfers. The estate tax, discussed next, applies similarly.

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[328] *Id.* at 336–37.

[329] *Id.* at 340.

[330] *Id.*

3. Estate Tax

At the most basic level, the estate tax applies to transfers of all property owned by a decedent at his or her death.[331] Thus the taxpayer's executor must include in her gross estate the value of all stock, jewelry, and furniture owned by the decedent at the time of his or her death.[332] To the extent the value of that property exceeds $5 million, it will be subject to estate tax.[333] But what if the taxpayer directs that her favorite diamond necklace, worth $60,000, be buried with her? She cannot avoid estate taxation by burying the necklace.[334] Whether or not the necklace passes to a beneficiary, its value will be included in her gross estate.

The result is different in practice when the same diamonds are not part of a necklace, but rather incorporated into the body. Consider hip-hop performer Kanye West, who has diamond-encrusted lower teeth (not a detachable "grill"). One New York tabloid estimates that Mr. West's teeth may have cost up to $60,000.[335] Assume that Mr. West dies and is buried with these diamond teeth. The Service has not yet pursued the estate taxation of tooth fillings or tooth adornments (unlike the necklace), although there is no theoretical basis to prevent the Service from doing so. Economically, the teeth are indistinguishable from the necklace. Presumably the Service could seek to include the diamonds' value in the decedent's gross estate if the Service were aware that a decedent had diamond teeth with significant value, and the inclusion might trigger estate tax liability (although one does wonder about the valuation of such an unusual asset, and how many diamond teeth would be necessary to cause an otherwise nontaxable estate to become taxable, in light of the $5 million threshold).[336]

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[331] I.R.C. § 2033 ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.").

[332] For decedents dying in 2012, the exemption equivalent is $5 million. *See* DODGE ET AL., *supra* note 316, at 33.

[333] *Id.*

[334] *See* I.R.C. § 2033.

[335] Rosemary Black, *Want a Diamond Smile like Kanye West? Prepare for Broken Teeth and Bleeding Gums*, N.Y. POST DAILY NEWS (Oct. 21, 2010), *available at* http://articles.nydailynews.com/2010-10-21/entertainment/29441484_1_diamond-tooth-gums.

[336] For estate tax purposes, fair market value is "the price at which such 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." Treas. Reg. § 25.2512-1 (2012). Of course, no one could have predicted the market for chipped dishes in Mrs. Onassis's estate either, and yet some casual dinnerware brought over $6900 a piece at auction. *See* Associated Press, *Jackie's Auction Total Hits $34.5M,* USA TODAY (Apr. 26, 1996), *available at* http://www.usatoday.com/life/special/jackie/ljack033.

Extending this reasoning, if human gametes are "property" for tax purposes, then a decedent's executor should include in the value of the decedent's gross estate the value of the decedent's human gametes (and any other bodily material with market value). At least one scholar estimates that the fair market value of the aggregate constituent parts of a human cadaver is $220,000.[337] The value allocable to gametes may depend on a variety of factors, including the age and health of the decedent. As an intellectual matter, however, the value of the gametes would be included in the gross estate.[338]

Consider, also, the application of the *Dickman*[339] reasoning to the estate tax consequences of a gratuitous transfer of a human egg or sperm.[340] If gametes are property having value, then the gratuitous transfer of an egg by Sister *A* to Sister *B*, for example,[341] effectively removes value from Sister *A*'s estate and enriches the value of Sister B's estate. Ex post transfer, Sister B is in a better economic position than she was ex ante, and were Sister *B* to die the day after receiving the ovum from Sister *A*, Sister *B* would be required to include the value of the egg in her gross estate.[342] The *Dickman* dicta, with its emphasis on consumption,[343] suggests that if Sister *B* were to discard the gifted egg, that would be akin to (nontaxable) personal consumption.[344] But if Sister *B* uses the egg to become pregnant, it is awkward to suggest that she has "consumed" the egg. She has created life, or life's potential (depending on one's religious or ethical stance), and it is admittedly uncomfortable to think of a pre-embryo, embryo, fetus, baby, or human being as "property."

To the extent that one is comfortable with treating human gametes (alone) as property, the inclusion of their value in a decedent's gross estate will have limited real-world consequences as long as the estate tax exemption remains in the millions of dollars.[345] Nevertheless one must understand the technical tax consequences and other conceptual implications of a determination that gametes are property. The next Part grapples with some of the problematic implications of a system that treats

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[337] MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 178 (2006).

[338] *See* I.R.C. § 2033.

[339] *See supra* notes 326–330 and accompanying text.

[340] *See supra* Part III.B.3.

[341] *See supra* Part III.B.2.

[342] *See, e.g.*, I.R.C. § 2033.

[343] *See supra* notes 326–330 and accompanying text.

[344] *Id.*

[345] *See* DODGE ET AL., *supra* note 314, at 33.

human gametes as "property" for tax purposes.

V. TRANSFERRING (AND TAXING) PROBLEMS

A. Absurdity

Treating transfers of human gametes by one person to another as *always* taxable could have absurd implications for human bodily functions and intimate sexual relationships. Would all or some acts of coitus be treated as taxable transfers? Under what circumstances would sexual services be treated as "adequate and full consideration in money or money's worth," so that no taxable gift occurs?[346] Would only some types of sexual services be treated as consideration?[347] The potential complications are endless.

Consider the hypothetical taxation of human gametes in the context of one of the widely-accepted justifications for a wealth transfer tax: its anti-concentration effect.[348] To the extent that almost all females possess ova at birth, and to the extent that almost all males have the bodily ability to manufacture sperm, there is a pre-existing dispersal of "wealth" in the population. The number of people who must buy eggs or sperm in any given year represents a relatively small percentage of the population.[349] Medical guidelines that limit the number of gametes that any one person may "donate"[350] are an exogenous restriction on that already small market. It is extremely unlikely that individuals would convert other forms of more liquid wealth into a stockpile of human gametes that they have no intention of using for reproductive purposes.[351] The law of property and taxation

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[346] I.R.C. § 2512(b) (defining taxable gift).

[347] The gift tax does not broach pleasure — psychic or physical — as a form of consideration. But presumably the dance has some market value, as evident by the ubiquitous "lap dance" in so-called "gentlemen's clubs." *See Is This a Fair Price for a Lapdance?*, posting of jwd708 to Yahoo! Answers (May 19, 2008), *available at* http://answers.yahoo.com/question/index?qid=20080519151308AAoivTT ("I was at a strip joint the Friday night (my buddies drag me along) and I got a dance from a girl for two and a half songs at $45. She did let me touch her body just not you know where. I thought it was an okay price but I'm probably wrong. I only been to two clubs and the other dance I had the girl was going fast (one song at $20), and at this one she took it slow which made it a lot better.").

[348] David Frederick, *Historical Lessons from the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197, 208 (2007) (quoting Gerald R. Jantscher).

[349] *See supra* Part I.E.

[350] *See supra* note 296 and accompanying text.

[351] Admittedly there are several historical examples of unusual and unpredicted investment patterns. *See, e.g.*, ANNE GOLDGAR, TULIPMANIA: MONEY, HONOR, AND KNOWLEDGE IN THE DUTCH GOLDEN AGE (2007) (describing, *inter alia*, the "tulip bubble" of

reveal themselves as blunt instruments for dealing with transfers of human bodily matter.[352]

Adopting a unitary approach is a move toward clarity and predictability. To the extent that human bodies are always property for tax purposes, in most cases transfers of human gametes will not result in any payment of gift or estate taxes, as long as the wealth transfer tax exemption remains relatively high (currently $5 million).[353]

Such a unitary approach presents other problems, however. In another context, Professor Radhika Rao has suggested that the law need not take a single approach to the human body.[354] Instead, in Rao's view:

> [W]hether the body should be identified as the subject of a privacy interest or the object of property ownership depends essentially upon (1) whether it is living or dead; (2) whether it is integrated with the whole person or a separate part; and (3) whether it is involved in a personal relationship or an object relationship.[355]

Rao's analysis could extend into a critique of treating the human gametes as *always* taxable. Using Rao's approach as a model, one might seek to tax only those transfers of human gametes undertaken for purposes of nonsexual reproduction, where an individual has taken active medical steps to separate his or her gametes from the body. In other words, where a taxpayer has taken an "object" position with respect to her gametes, the transfer is taxable. To the extent that a gamete transfer is incidental to sexual activity of an intact body, the transfer would not be taxed. In other words, the taxpayer has maintained a "subject" position with respect to her gametes. Query, then, how to treat heterosexual coitus that has reproduction as its aim. Is a taxpayer in an "object" or "subject" position with respect to her gametes? Gamete transfer — and potential gamete union — is integrated with, and the result of, sexual activity. Perhaps the most logical view is that procreation, regardless of its hedonic benefit, is the ultimate relational act, and therefore transfer taxation is wholly inappropriate.

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the 1630s).

[352] In *Moore v. Regents of University of California*, the plaintiff's cells had been extracted from his body, and concerning a patient's property rights in such cells, the court stated that the laws "deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property." Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990).

[353] *See supra* note 314 and accompanying text.

[354] Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 445–46 (2000).

[355] *Id.*

B. Inconsistency

Treating human gametes as property for tax purposes admittedly is at odds with the existing law comprising a patchwork of court decisions and administrative rulings and pronouncements that treat the human body as sometimes property and sometimes not property.[356] Professor Lisa Milot has proposed a contextual approach to determining when a body should be treated as "property" for tax purposes.[357] It is through a nuanced definition of property that Milot reaches what she believes are the correct tax results.

She identifies three baseline principles.[358] "First, intact living bodies are subjects. . . ."[359] "Second, human body materials removed from a living person and transferred in a commercial transaction are property," but gratuitously transferred body materials are not property.[360] Third, a cadaver is not property unless "it or its constituent parts are sold commercially."[361] Milot resists a "binary approach which views all transactions in human body materials as either transfers of property or as the performance of a service that finds expression in current tax jurisprudence."[362] With regard to lifetime use or disposition of an intact body, Milot posits that "intact living bodies are subjects, and thus transactions with respect to them are only taxable as services."[363] So assume that Sister *A* agrees to act as a gestational surrogate for Brother *B* and Brother *B*'s wife. An embryo created from

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[356] *See supra* Part II.

[357] Milot, *supra* note 279, at 1092.

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] *Id.* Her conclusions can be expressed graphically as follows:

Is the Body "Property"?		
Fact Pattern Involves . . .	Lifetime Transfer	Death-Time Transfer
Whole body and uncompensated use or disposition	No	No
Whole body and compensated use or disposition	No (but gives rise to income from services)	Yes
Excised bodily material and uncompensated use or disposition	No	No
Excised bodily material and compensated use or disposition	Yes	Yes

Id. at 1092–1103.

[363] *Id.* at 1092 ("To the extent the human body materials involved in a transaction are part of an integrated living human, they are not property.").

Brother *B*'s sperm and his wife's egg is implanted into Sister *A*. Sister *A* gestates and gives birth to the genetic child of Brother *B* and his wife. Assume for simplicity purposes that no money changes hands. Sister *A* does not receive any payments or reimbursement from Brother *B* or Brother *B*'s wife. Has Sister *A* made a taxable gift to Brother *B* and/or Brother *B*'s wife? The answer is no under Milot's analysis. Sister *A* has provided an uncompensated service (i.e., gestation) for which Sister *A* has not transferred property to another. Because services are not subject to gift tax (nor do they give rise to any tax deduction),[364] the uncompensated surrogacy is ignored for tax purposes. This view is entirely consistent with existing tax jurisprudence, especially Revenue Ruling 162, holding that the provision of blood was a service.[365]

If we shift the facts just slightly, the tax results change, too. Assume now that Sister *A* agrees to act as a gestational surrogate for an unrelated third party, *X*, and *X*'s wife. An embryo created from *X*'s sperm and *X*'s wife's egg is implanted into Sister *A*. Sister *A* gestates and gives birth to the genetic child of *X* and *X*'s wife. *X* and *X*'s wife transfer to Sister *A* money that is designated either for her services or for her "expenses" associated with the pregnancy and delivery. What are the tax consequences of that transaction? Sister *A* recognizes income on account of her surrogacy services. It is quite clear again that she has not transferred *property* to the genetic parents, but she has, in effect, "exchanged" her labor for payment; this is not different in an economic sense from the teacher, welder, or executive who receives a salary in return for his or her services.[366] This is consistent with the decisions in *Garber*[367] and *Green*.[368]

With regard to post-mortem or lifetime dispositions of entire corpses, select bodily parts or excised bodily material, Milot argues for taxation only to the extent that the corpse or bodily material is introduced into commerce.[369] A donated corpse or bodily material would not be deemed "property,"[370] and thus the donation would give rise to no gift tax liability or income tax deduction, and the value of the corpse or bodily material would not be included in the decedent's gross estate for estate tax

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[364] This conclusion is consistent with my analysis in Crawford, *Taxing Surrogacy*, *supra* note 9, and Crawford, *Taxation, Pregnancy, and Privacy*, *supra* note 9.

[365] *See supra* Part II.A.

[366] This is the subject of a lengthier discussion in Crawford, *Taxing Surrogacy*, *supra* note 9.

[367] *See supra* Part II.C.1.

[368] *See supra* Part II.C.2.

[369] Milot, *supra* note 277, at 1101–02.

[370] *Id.* at 1102.

purposes.[371] The only circumstance in which excised bodily material could be treated as property during lifetime would be if the taxpayer commercializes the material, i.e., sells an egg or sperm.[372]

Milot's characterization of human bodies and their constituent parts as "property" or "not property" makes sense in light of the inconsistent and incomplete approach that current tax law takes to the human body. In support of her context-specific approach, Milot identifies several transfers that are treated as taxable (or not) based on the identities of parties involved.[373] She cites in particular provisions for the nonrecognition of gain or loss in the case of a sale between spouses,[374] and the gift tax exclusion

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[371] *Id.* The practicalities of post-mortem organ donations are such that if death occurs outside a controlled environment of a hospital, a successful transplantation is difficult. Factors that influence a determination that an organ is viable for transplantation include the donor's age, and medical history. New York State Task Force on Life & the Law, *Donation after Cardiac Death: Analysis and Recommendations from the New York State Task Force on Life & the Law*, at 35 (Apr. 17, 2007), *available at* www.health.state.ny.us/regulations/task_force/donation_after_cardiac_death/docs/donation_after_cardiac_death.pdf. Cadaveric organ transplants are a relatively common occurrence, but usually follow the harvest of organs from individuals who have been declared "brain dead." *See* Maxine M. Harrington, *The Thin Flat Line: Redefining Who Is Legally Dead in Organ Donation After Cardiac Death*, 86 DENV. U. L. REV. 335, 336 (2009). The Uniform Determination of Death Act defines death as either the irreversible cessation of the functioning of the entire brain or the irreversible cessation of heart and lung function. *Id.* at 337; *see also* Eelco F.M. Wijdicks, *The Diagnosis of Brain Death*, 344 NEW ENG. J. MED. 1215, 1215–18 (2001). In the hospital setting upon a declaration of death due to a cessation of brain function, heart and lung function are maintained through artificial support until the organs can be harvested. Harrington, *supra* note 369, at 337. Yet when death occurs due to the irreversible cessation of heart and lung function, the viability of the organs is threatened. COMM. ON INCREASING RATES OF ORGAN DONATION, ORGAN DONATION: OPPORTUNITIES FOR ACTION 131 (2006). When the heart stops beating, it also stops pumping blood through the circulatory system and to the various organs. As a result, the organs are deprived of oxygenated blood. *Id.* Without oxygenated blood, the organs begin to deteriorate, decreasing the likelihood of successful outcome. When the organs are deprived of oxygenated blood at room temperature, this phenomenon is referred to as warm ischemia. ROBERT D. ODZE & JOHN R. GOLDBLUM, SURGICAL PATHOLOGY OF THE GI TRACT, LIVER, BILIARY TRACT, AND PANCREAS, 1178 (2009). For organ viability to be ensured, warm ischemia time must be limited. Sam D. Shemie et al., *National Recommendations for Donation After Circulatory Cardioc Death in Canada*, S14 (Oct. 2006), *available at* www.cmaj.ca/cgi/reprint/175/8/S1.pdf. Under most general recommendations, it is recommended that warm ischemia time be limited to one hour for the kidneys and pancreas and thirty minutes for the liver. D.J. Reich et al., *ASTS Recommended Practice Guidelines for Controlled Donation After Cardiac Death Organ Procurement and Transplantation*, AM. J. TRANSPLANTATION, 2004, 2009 (July 2009), *available at* www.asts.org/Tools/Download.aspx?fid=1194.

[372] Milot, *supra* note 279, at 1096–1102.

[373] *Id.* at 1094, 1094 nn.199–202.

[374] *See* I.R.C. § 1014 (purchasing spouse takes as adjusted basis in property acquired

available with respect to direct payment of medical or educational expenses,[375] and annual exclusion gifts.[376]

The different tax treatment of the same item or transaction based on the identity of the transferee has precedent in the tax law. As a further example, recall that the tax consequences of a transaction that is a gift in part and a sale in part depend on whether the transferee is a charity or a noncharity.[377] But note that these part-sale part-gift rules merely serve to delay (or accelerate) recognition of income. They do not alter the character of the transferred object from "property" to "not property." Similarly, in the estate tax context, a decedent's estate might be eligible for an extended period for the payment of estate tax liability, if particular property in the decedent's estate passes to designated individuals, but not others.[378] Again, though, the identity of the recipient affects the *timing*, but not *incidence*, of taxation.

There appears to be no clear precedent in the tax law itself for the proposition that a body or bodily material — whether blood plasma, a human ovum, sperm, a liver lobe, or any other matter — is "property" if sold, but "not property" if gifted. To the extent that the law has taken a dual approach, it has been in a nontax context. This is not to say that Milot's approach lacks common sense. Indeed, it is abundantly sensible and likely would be relatively easy to administer. But the approach does depart from existing modes of tax analysis, and that departure is no less significant than treating all human bodily material as property.

C. Unpalatablity

Political considerations present perhaps the most significant obstacle to treating human gametes as (taxable) property. Reducing the human body to its constituent parts and assigning value to those parts will affront many people's religious and ethical sensibilities.[379] These sensibilities permeate

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from selling spouse the selling spouse's adjusted basis).

[375] *See id.* § 2503(e) (exclusion for certain transfers for educational expenses, or medical expenses).

[376] *Id.* § 2503(b)(1) (gift tax annual exclusion).

[377] *See* Treas. Reg. §§ 1.1001-1(3) (2012) (calculation of transferor's gain in part sale/part gift transfer to non-charity), 1.1015-4 (2012) (calculation of transferee's basis in part sale/part gift transfer to non-charity).

[378] I.R.C. § 6166 (2001) (extension of time to pay estate tax where estate comprised of certain percentage of closely-held business assets).

[379] *See, e.g.*, Prue Vines, *The Sacred and the Profane: The Role of Property Concepts in Disputes About Post-Mortem Examination*, 29 SYDNEY L. REV. 235, 243 (2007) (describing religious and emotional objections to treating body as property); World Council of Indigenous Peoples, Resolution Condemning the Human Genome Diversity Project, Res. No. WCIP/VII/GUA/1993/2 (Dec. 10, 1993), *available at* http://www.ipcb.org/resolutions/

the legal and popular culture, as well,[380] and likely would coalesce into a multi-cornered resistance to characterizing the body as property of the type subject to quantitative taxation.[381] Yet the suggestion that the human body has economic (and thus tax) value is hardly a radical one. The law of damages, for example, provides several examples of how readily human reproductive capacities can be quantified in financial terms.[382] Consider any tort case that addresses damages to a plaintiff's reproductive organs and ability to procreate.[383] For better or for worse, the law is in the business of quantifying the value of procreation.

It bears further emphasis that property and tax rules can, but need not, have a signifying function. Cass Sunstein describes law as a codification of social norms.[384] In the criminal law context, that description resonates. Murder, for example, is a crime because civilized society does not condone the killing of its members.[385] The description of law as norm manifestation applies inelegantly to issues of property and taxation, however. Consider, for example, President Franklin D. Roosevelt's executive order prohibiting individuals from owning gold bullion and coins, except in certain circumstances.[386] This property-law prohibition was based on currency

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htmls/res_wcip.html (stating objections to genetic research).

[380] *See, e.g.*, *In re* Conroy, 486 A.2d 1209, 1221 (N.J. 1985) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

[381] *See also supra* Part III.A.

[382] In Michigan, for example, there is a cap on recovery of noneconomic damages in medical malpractice cases. Normally, the limit is $280,000, but under certain circumstances, including damage to a reproductive organ rendering the plaintiff unable to have children, the cap is raised to $500,000. MICH. COMP. LAWS ANN. § 600.1483 (West 2011).

[383] *See* Endresz v. Friedberg, 248 N.E.2d 901, 902 (N.Y. 1969). In that case, the highest court in New York State ruled that the distributees of a stillborn fetus may not recover under the state's wrongful death statute, but the mother herself could recover for damages to her reproductive capacity caused by medical malpractice. *Id.* at 903.

[384] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) ("What can be said for actions can also be said for law. Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.").

[385] *See generally, e.g.*, Luís Ernesto Chiesa Aponte, *Normative Gaps in the Criminal Law: A Theory of Wrongdoing*, 10 NEW CRIM. L. REV. 102 (2007) (explaining, *inter alia*, why murder is a crime).

[386] Exec. Order No. 6102 (reprinted in 12 U.S.C. § 248); *see* MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960 462–63 (1963) (describing order as gold anti-hoarding measure in connection with larger currency stabilization effort); Timothy A. Canova, *Lincoln's Populist Sovereignty: Public Finance Of, By and For the People*, 12 CHAP. L. REV. 561, 573 (2009).

stabilization policies, not some social norm about the expressive value of gold.[387] Contrast the Roosevelt-era prohibition with the U.S. Comprehensive Anti-Apartheid Act, enacted in 1986.[388] That legislation prohibited the importation of several commodities from South Africa, including gold kruggerand,[389] as a form of economic pressure on, and political protest against, South Africa's state-sponsored racial discrimination.[390] Further, contrast both of those scenarios with the federal prohibition on the transfer of bald eagle feathers, for example, except under very specific circumstances.[391] Under regulations promulgated by the Secretary of the Interior, certain members of Indian tribes[392] may receive a permit to use eagle feathers for "religious purposes," such as ceremonial rites, and the feathers can be passed down to other Indians, but may not be given, sold or bequeathed to non-Indians or to Indians, but for nonreligious purposes.[393] Underlying this prohibition is a public policy concern for the

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[387] *See, e.g.*, John J. Chung, *Money as Simulacrum: The Legal Nature and Reality of Money*, 5 HAST. BUS. L.J. 109, 138–39 (2009) (describing purpose and effect of anti-gold order and legislation).

[388] 22 U.S.C. §§ 5001-5116 (1988 & Supp. III 1991), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149 § 4(a)(1), (2), Nov. 23, 1993, 107 Stat. 1504.

[389] 22 U.S.C. § 5051 (ban on importation of kruggerands); 22 U.S.C. § 5052 (ban on importation of military articles); 22 U.S.C. § 5059 (ban on importation of products from "parastatal organizations"); 22 U.S.C. § 5070 (ban on importation of iron and steel); 22 U.S.C. § 5073 (ban on importation of any sugar or sugar products of South Africa).

[390] *See, e.g.*, H.R. REP. NO. 99-638 (1986) ("Anti-Apartheid Act of 1986 . . . [p]rohibits U.S. persons from importing uranium ore, uranium oxide, coal, and steel from South Africa. . . . [P]rohibitions shall not apply if, within 12 months of enactment of this Act: (1) the President certifies to the Congress that South Africa has totally dismantled the apartheid system; and (2) a joint resolution is enacted approving such certification.").

[391] 16 U.S.C. § 668 ("Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both.").

[392] The tribe must be recognized by the federal government. *See* Gibson v. Babbitt, 72 F. Supp. 2d 1356, 1357 (S.D. Fla. 1999), *aff'd*, 223 F.3d 1256 (11th Cir. 2000) (plaintiff was of American Indian descent but not eligible to receive permit to allow him to possess eagle parts because tribe not recognized by the federal government).

[393] 50 C.F.R. 22.22 ("Bald or golden eagles or their parts possessed under permits issued pursuant to this section are not transferable, except such birds or their parts may be handed down from generation to generation or from one Indian to another in accordance with tribal or religious customs.").

preservation of a species — once endangered[394] — that serves as a national symbol, accompanied by a desire to respect traditional culture of Native Americans.[395]

Property and tax laws have multiple purposes, including revenue generation. Tax law is both political and politicized,[396] and may operate to prefer or provide incentives or disincentives for certain types of behavior.[397] So-called "sin" taxes illustrate the point. Cigarettes are subject to significant excise tax,[398] and proposed taxes on pornography [399] and soda are popular in some jurisdictions.[400] While some critics believe that the act of taxation is itself an endorsement of a product or service, the taxes are perhaps better understood first as a revenue source, second as an economic push-point with intended behavioral effects, and third as an adjutant to other laws. This third point is illustrated by the income taxability of illegal gains.[401] No one would regard the conviction of notorious gangster Al

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[394] *See, e.g.*, H.R. 2104, 76th Cong. (3d Sess.1940) ("[I]f the destruction of the eagle and its eggs continues as in the past this bird will wholly disappear from much the larger part of its former range and eventually will become extinct.").

[395] *See, e.g.*, H.R. 1450, 87th Cong. (2d Sess. 1962) (The eagle is "important in enabling many Indian tribes, particularly those in the southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them.").

[396] *See, e.g.*, Jonathan G. Blattmachr, Member, Milbank, Tweed, Hadley & McCloy LLP, Philip B. Blank Memorial Lecture on Attorney Ethics at Pace University School of Law, Suicide of the Guardians: The Executive Branch, Tax Regulations, and the Attorney-Client Relationship (Mar. 5, 2007) (describing tax law as one of most political laws in existence).

[397] These taxes have been described as Pigovian taxes, named after economist Arthur Cecil Pigou, who believed that those activities that place a cost on the rest of society, deserve negative tax treatment. *See* David Leonhardt, *Sodas a Tempting Tax Target*, N.Y. TIMES, May 19, 2009, *available at* http://www.nytimes.com/2009/05/20/business/economy/20leonhardt.html.

[398] These taxes are not without vociferous critics. *See, e.g.*, *Posting of Gerald Prante to Tax Policy Blog*, http://www.taxfoundation.org/blog/show/2267.html (March 16, 2007). He writes:

> Once again, lawmakers are using the tax code to push their own agendas and moral views onto all citizens who supposedly live in a free society that values individual liberty foremost. We've seen it with special taxes on pornography, casinos, alcohol, plastic surgery, and the list goes on.

Id.

[399] Reese Schonfeld, *A Porn Tax Reconsidered*, THE HUFFINGTON POST, Jan. 6, 2009, http://www.huffingtonpost.com/reese-schonfeld/a-porn-tax-reconsidered_b_155 540.html.

[400] *See, e.g.*, Leonhardt, *supra* note 397.

[401] James v. United States, 366 U.S. 213 (1961) (finding embezzled funds are includable in embezzler's taxable income).

Capone on income tax evasion charges,[402] for example, as an endorsement of Mr. Capone's other illegal activities. By parity of reasoning, devaluation of the human body is not an inevitable result of a legal system that treats bodies as (taxable) property. Rather, such an approach reflects the underlying economic realities of an extant market in human gametes, in particular, and provides a new lens for examining the fertility industry, but more work needs to be done. The next Part identifies opportunities and avenues for further inquiry.

VI. TAXING (AND TRANSFERRING) BENEFITS

A. Clarity

Tax law is not and should not be the primary lens for considering complex questions regarding human reproduction. Nevertheless, one can see that policy interests of predictability, fairness, and equity are enhanced by a consistent tax approach to the transfers of human reproductive matter. In the absence of a clear statement of the law from the Service, fertility industry brokers may be giving incorrect or misleading advice, if they give advice at all.[403] Certainly the onus is on the taxpayer to report income, regardless of what statements a fertility clinic makes or fails to make. Nevertheless players in the fertility industry other than the gamete providers may benefit from lack of clarity surrounding tax rules. For example, consider a doctor or a clinic that notifies potential egg donors that their fees are subject to taxation. Unless the tax law is clear and understood by all, then some clinics will and some clinics will not provide this sort of information to potential egg donors. Clinics that do furnish the information might lose business to those that do not, as the market itself penalizes any player who attempts to comply with existing income tax rules, or with a new wealth transfer tax rule.

This, in turn, raises the question of what role fertility agents should play with respect to the tax system and any reporting requirements imposed on gamete providers. Like most businesses, fertility clinics, brokers and doctors must report the income they earn. Thus in complying with the income tax rules for their own purposes, the middlemen have full access to the information that should be shared with those who are buying and selling

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[402] *See* Capone v. United States, 56 F.2d 927 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932).

[403] *See supra* notes 110–111 and accompanying text. On the conflicting advice given by surrogacy agencies to surrogates, see Crawford, *supra* note 9, at 99–100 (stating that of 18 surrogacy agencies surveyed, affiliates of agency report that six agencies issues Forms 1099 and 12 do not).

gametes. They are able to cheaply and easily furnish that information to all concerned. Failure to enact clear tax rules effectively guarantees confusion and inefficiency in the marketplace.

B. Increased Gifts

If human bodies and bodily materials were clearly property, then donations for charitable purposes might be expected to increase. The nonprofit sector runs on donations, whether lifetime gifts or charitable bequests.[404] In 2010, benefactors gave an estimated $21 billion to health-related organizations and causes alone.[405] If the Service clearly stated that transfers of blood would be treated as transfers of property that qualify for the income tax charitable deduction, it is likely that more people would donate their blood. Currently, less than ten percent of the U.S. population donates blood.[406] Blood shortages could be eliminated if the number of donors increased by one percent.[407] Women and men might be willing to donate gametes for medical research. No doubt, many existing and prospective donors are motivated entirely by altruism, and an income tax deduction would have no impact on their behavior. Note, however, that an income tax charitable deduction for contributions of bodies and bodily material would cause no loss of revenue to the government (as no deduction currently is permitted)[408] and could both solve a public health issue and advance medical research.

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[404] According to the Center on Philanthropy at Indiana University, total charitable giving in 2009 exceeded $300 billion. GIVING USA 2010: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2009 EXECUTIVE SUMMARY 5, *available at* http://www.pursuantmedia.com/givingusa/0510/export/GivingUSA_2010_ExecSummary_Print.pdf.

[405] Of the estimated $303.75 billion in gifts, approximately 7% went to the health sector. *Id.*

[406] *See, e.g.*, William Riley et al., *The United States' Potential Blood Donor Pool: Estimating The Prevalence of Donor-Exclusion Factors on the Pool of Potential Donors*, 47 TRANSFUSION 1180–88 (July 2007).

[407] *56 Facts About Blood*, AMERICA'S BLOOD CENTERS, *available at* http://www.americasblood.org/go.cfm?do=page.view&pid=12 (last visited March 1, 2011). The large shortages are created by a variety of factors including holidays and emergencies. *See Why Is There Often a Blood Shortage? Frequently Asked Questions*, BLOOD BANK OF ALASKA, *available at* http://www.bloodbankofalaska.org/donating/ faq.html (last visited March 1, 2011) ("Major accidents, multiple patient incidents, roller coaster donating trends, and managing expiration dates of blood are all important elements that are constantly being juggled. An emergency occurs when one of these elements gets out of control. . . . Holiday weekends and seasonal shifts also create complications.").

[408] *See supra* Part II.A.

C. Fair Pricing

Admittedly, the revenue effect of a wealth transfer tax on human bodies and bodily material is likely to be minimal.[409] Consider, however, how such a tax would align the incentives of the government and gamete providers. Both would benefit from fair market value transactions and thus would have an incentive to oppose existing price caps. The American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) engage in informal and formal practices that effectively limit the amount of compensation a woman can receive for her egg.[410] In its report from 2000, the ASRM Ethics Committee stated that "[a]lthough there is no consensus on the precise payment that oocyte donors should receive, at this time sums of $5000 or more require justification and sums above $10,000 go beyond what is appropriate."[411] Professor Kimberly Krawiec has remarked on the unprecedented nature of this oocyte price-fixing:

> This naked price-fixing of egg donor compensation is so unusual in the modern U.S. regulatory environment of unrestrained competition that the most intriguing question it raises is not whether it violates the Sherman Act—under existing precedent it does. Rather, the relevant question is how, given the government's substantial enforcement resources and the presence of an active and entrepreneurial plaintiffs' bar, this buyers' cartel has managed to survive unchallenged since at least 2000. One is tempted to assert that the twenty-dollar bill cannot be real, given that it is still lying on the sidewalk.[412]

One egg "donor" filed a suit in April 2011 challenging the fertility industry's practice of limiting compensation.[413] The case is still pending.

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[409] *See supra* notes 10 and 336 and accompanying text.

[410] Krawiec, *supra* note 44, 76–78, 76–78 nn.94–111.

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

[412] Krawiec, *supra* note 44, at 60.

[413] Kamakahi v. Am. Soc'y for Reprod. Med. et al., No. 11 CV 1781, *complaint filed* (N.D. Cal. Apr. 12, 2011). For commentary on the case, see, e.g., Kim Krawiec, *Kamakahi v. ASRM et al. — Updates*, FACULTY LOUNGE BLOG (May 20, 2011), http://www.thefaculty lounge.org/2011/05/kamakahi-v-asrm-et-al-updates.html; Kim Krawiec, *Politics And Profits in The Egg Business (When Sunny Samaritans Sue, IV)*, FACULTY LOUNGE BLOG (Apr. 21, 2011), http://www.thefacultylounge.org/2011/04/politics-and-profits-in-the-egg-business-when-sunny-samaritans-sue-iv.html; Kim Krawiec, *When Sunny Samaritans Sue, Part III*, FACULTY LOUNGE BLOG (Apr. 19, 2011), http://www.thefacultylounge.org/2011/04/when-

SART has informed all egg donor agencies with which its doctors work that the agencies are expected to follow the ASRM guidelines.[414]

Both individuals and the government could be expected to oppose these formal and informal price-fixing measures, if human gamete transfers were subject to wealth transfer taxation. In such a scenario, individuals will want to maximize profit, and the government will want to maximize revenue. Undoubtedly, the incidence of taxation alone would drive up the price for human gametes, as individuals will seek to receive on an after-tax basis as much as they received in a nontaxable (or at least tax-confused) environment. Doctors and agencies are unlikely to absorb the increased costs, but would seek to pass them on to the consumer. This, in turn, may drive out of the market some "consumers" of bodily products or services, such as intended parents using egg donors.

As long as any increased costs are absorbed by consumers, the organized fertility industry should have no economic reason to oppose the characterization of human gametes as descendible and taxable. No effective opposition likely would be mounted by intended parents, for example, because they do not have pre-existing channels of communication to facilitate organization. Furthermore, most intended parents are not likely to have the financial or political resources to oppose any legislation.

Another way that taxation will enhance fairness is by disrupting the narrative of altruism, leaving gamete providers free to bargain without recourse to language about the "giving" self. [415] In other words, if there is no doubt — legally speaking — that the human body is "property," then economic interests are transparent to all involved. Individuals then will be able to engage in a more frank and realistic assessment of the nature of reproductive technology and the fertility industry. Without the veil of altruism, one sees plainly what is taking place: the buying and selling of bodies. Tax rules should comport with economic reality and be clear to all.

D. Neutrality

Taxing the transfers of human bodies and bodily material is necessary in order to avoid making that work tax-preferred.[416] In other words, assume

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sunny-samaritans-sue-part-iii.h tml; Kim Krawiec, *When Sunny Samaritans Sue, Continued*, FACULTY LOUNGE BLOG (Apr. 16, 2011), http://www.thefacultylounge.org/2011/04/kamakahi-v-asrm .html; Kim Krawiec, *When Sunny Samaritans Sue*, FACULTY LOUNGE BLOG (Apr. 14, 2011), http://www.thefacultylounge.org/2011/04/when-sunny-samaritans-sue.html.

[414] Krawiec, *supra* note 44, at 75.

[415] *Id.*

[416] For a similar discussion in the context of compensated surrogacy, see Crawford,

that Job *A* and Job *B* pay the same amount. If the earnings from Job *A* are taxable and the earnings from Job *B* are not, then as between the two, a rational taxpayer will choose Job *B*. Tax ambiguity has a similar effect. If the earnings from Job *C* are taxable and it is not clear or well understood that the earnings from Job *D* are taxed, then Job *D* becomes tax-preferred in a self-reporting (and low audit) system.[417]

Practically speaking, a variety of factors, including medical/ethical limitations, operate to limit the number of people who will profit from gamete sales, as well as the quantum of their profit.[418] Nevertheless there is no reason that the law should make the transfer of human bodily materials into tax-preferred work. Taxation, therefore, operates as a balancing thumb on the scale of decision-making in a way that is consistent with individual autonomy.

VII. CONCLUSION

Permitting lifetime and death-time transfers of human gametes is, at its core, consistent with a human autonomy principle. If we take autonomy to mean, as Joseph Raz does, "awareness of one's options and the knowledge that one's actions amount to charting a course that could have been otherwise,"[419] then self-direction (*read*: choice) is a necessary precondition for autonomy. Raz acknowledges that the constituent conditions of autonomy include "mental abilities, adequacy of options, and independence [that] admit of degree. Autonomy in both its primary and secondary senses is a matter of degree."[420] Given that, one may accept some restraints, structural or otherwise, on human options. It thus would be an ineffective critique of tort law, for example, to complain of a rule that penalizes the reckless driver who disobeys the speed limit. In the name of public safety, speed limits provide a structure within which the driver can make meaningful choices — to take this route, not that one; to drive in the right lane or in the left; to drive at the speed limit or under it. But the driver who exceeds the speed limit cannot complain of limitations on his autonomy to drive as fast as he would like.[421]

Kwame Anthony Appiah cautions against a theoretical practice that too

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supra note 9, at 101–02.

[417] *Id.*

[418] *See supra* notes 296–297 and accompanying text.

[419] JOSEPH RAZ, THE MORALITY OF FREEDOM 370–71 (1988).

[420] *Id.* at 373.

[421] *See* KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 52–60 (2005) (interpreting Raz's theory of autonomy).

readily seeks to wield labels of "autonomy" and nonautonomy.[422] He posits that "there is something to be gained by disconnecting these concepts from each other analytically; by proceeding with the discourse of structure without always seeking an agent-based reduction."[423] In other words, "noncoherence can be seen as both necessary and desirable; what we ask of a theory is that it be adequate to its own constitutive project — that it earn its *as ifs*."Against this backdrop of tolerance for the inconsistent, one might accept the tax law's analytic status quo[424] or accept a positional approach like the one suggested by Professor Lisa Milot.[425]

The quest for autonomy, however, must serve some larger goals of social order. In the case of descendible (and taxable) human gametes, those goals include public health, individual economic maximization, and robust rights in private property. Even so, one might be committed to all of those goals, and remain uncomfortable with the use of reproductive technology. Taxing the transfer of human bodies or bodily materials, including gametes, serves only to expose the transactions for what they are in a financial sense. Undistracted, one can then undertake a more neutral look at the long-term social and ethical implications of a market in the very stuff of which humans are made. For those who believe in the sanctity of human life, that is an important result indeed.

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422 *Id.* at 60.

423 *Id.*

424 *See supra* Part I.

425 *See supra* Part IV.B.