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Tax Talk and Reproductive Technology

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TAX TALK AND REPRODUCTIVE TECHNOLOGY

BRIDGET J. CRAWFORD*

ABSTRACT

*The tax system both reacts to and helps create attitudes about the value of certain behaviors and choices. This Article makes three principal claims—one empirical, one normative, and one interpretative. The Article demonstrates through data that a representative sample of fertility clinics in the United States does not make information about the tax consequences of compensated human egg transfers—commonly called egg “donation”—publicly available. In 2015, in a case of first impression, the United States Tax Court decided in *Perez v. Commissioner* that a compensated egg transferor must report as income any amount she receives for her eggs. Although the Tax Court missed an opportunity to clarify further complex questions about the tax consequences of transfers of human bodily materials, the basic holding of *Perez* was clear. Even so, a content-based analysis of public internet forums and bulletin boards suggests that compensated egg transferors remain unclear about their tax obligations. This confusion is due in large part to the absence of what this Article calls “tax talk” on the part of the fertility clinics themselves.*

Women who receive compensation for providing eggs reject the idea that they are engaged in any sort of commercial activity, preferring to think of themselves as altruistic actors who receive money only because of their generosity and willingness to endure discomfort and inconvenience. Intended parents benefit from construing egg transferors as “donors” because that allows the intended parents to relegate compensation to a secondary role in any negotiations with the egg transferor. The absence of tax talk also allows intended parents to minimize the specter of “baby buying.” That cloud hovers over any assisted

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reproductive technology involving compensation for either gestational services or activity resulting in gamete transfers. Fertility clinics reinforce the altruism narrative and provide the foundation on which a multibillion-dollar industry stands. The absence of tax talk depresses the price of eggs and allows most of the industry profits to go to the drug manufacturers, the fertility clinics, and the doctors who own the clinics. They all profit handsomely from others' reproductive work.

The normative solution to the absence of tax talk in the reproductive-technology context is for the Internal Revenue Service to issue clear guidance to all fertility clinics regarding the tax consequences of egg transfers. Furthermore, the American Society for Reproductive Medicine should require issuance of appropriate tax forms to compensated egg transferors. This will put taxpayers on notice of their filing obligations and likely increase tax compliance.

From an interpretative perspective, taxing compensated egg transfers recognizes the importance of that activity. Taxation signals that reproductive work deserves to be treated like any other labor. The tax system thereby exercises its power to mark an activity as important and within the mainstream of human experience. The alternative—allowing compensated human egg transfers to escape taxation despite the law—turns compensated reproductive work into a preferred (and economically risky) type of labor activity with unintended consequences for women and others.

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INTRODUCTION

"Any tax is too high."¹ That is the assessment of a woman who received money eight times for the transfer of human eggs from her body to one or more individuals who intended to have a baby, possibly with the assistance of a sperm provider, a gestational surrogate, or both.² The same woman further reflected:

I can not [sic] say that I would not have donated if I knew about these taxes beforehand, but I would have been better prepared. The shots, the invasive procedures, the hours in the car driving to and from the appointments, the hours of missed work . . . I donated eggs eight times to help people make families, families that ultimately will go on to pay more taxes.³

In other words, this woman believes that she should not pay any taxes on the money she received for her eggs because the egg transfers played a literal role in creating more taxpayers.⁴ This opposition to paying income tax typifies the resistance that many women voice when confronted with the reality that U.S. law imposes a tax on the income received for transferring human eggs.⁵

¹ MellFire, Comment to *Egg Donation and My Personal Tax Hell*, MELLFIRE (Feb. 26, 2013, 3:15 AM), <https://mellfirecom.wordpress.com/2012/04/15/egg-donation-and-my-personal-tax-hell/> [<https://perma.cc/KQE9-3J93>].

² A gestational surrogate is someone who has no genetic connection to the fetus she gestates. See, e.g., *In re Roberto* d.B., 923 A.2d 115, 117 (Md. 2007) ("In a traditional surrogacy context, the egg donor, who is also the carrier of the child, or the 'gestational carrier,' is artificially inseminated with the sperm of the intended father, carries the child to term, and then relinquishes parental rights after birth, with the father acknowledging paternity and taking custody of the child; his spouse typically adopts the child. In a gestational surrogacy context, the donated egg begins outside of the gestational carrier, who is impregnated with a fertilized embryo, often as a result of *in vitro* fertilization of the egg of the intended mother with the sperm of the intended father." (citation omitted)). See generally Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" *A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009) (discussing difference between traditional and gestational surrogacy); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109 (discussing Illinois's Gestational Surrogacy Act).

³ MellFire, *supra* note 1.

⁴ MellFire's reasoning seems to be that because she received compensation for contributing to the creation of a human being, and that human being presumably will go on to recognize income that will be subject to taxation, she should not be taxed on the egg transfer. Extending this logic reveals its absurdity. If any activity that goes to the creation or sustaining of another human being who will go on to become a taxpayer generates tax-free income, then presumably every parent whose earnings are used to support a child would end up owing little to nothing in taxes. Such a result would undermine the existence of the entire income tax system.

⁵ Fertility clinics routinely rely on compensated transfers of human female and male gametes (i.e. eggs and sperm). The United States is understood to be one of the largest exporters of sperm to the rest of the world. See Sarah Kramer, *America is the Largest Exporter of Sperm in the World—Here's Why*, BUS. INSIDER (Mar. 10, 2016, 8:18 AM),

This Article explores compensated human egg transfers—commonly called egg “donation”⁶—and argues that the manner in which both compensated egg

<http://www.businessinsider.com/sperm-donations-anonymity-us-canada-2016-3> [<https://perma.cc/2HHP-FJKZ>] (describing non-U.S. market for U.S.-origin sperm). Although there is little reliable data, there are estimated to be approximately twenty-four commercial sperm banks in the United States and deposits at sperm banks are said to result in an estimated 30,000 to 50,000 live births per year. See Jeff Stryker, *Regulation or Free Markets? An Uncomfortable Question for Sperm Banks*, SCI. PROGRESS (Nov. 7, 2007), <http://scienceprogress.org/2007/11/regulation-or-free-markets/> [<https://perma.cc/ASU4-CGSH>] (calling estimated number of live births per year a “guesstimate”). The United States does not officially track the number of men who have made sperm deposits, the number of deposits currently held by sperm banks, or the number of children born from sperm purchased from a sperm bank. See Rene Almeling, Opinion, *The Unregulated Sperm Industry*, N.Y. TIMES, Dec. 1, 2013, at SR4 (describing “information gap” in market for compensated sperm transferors and egg transferors). For a critique of this outdated figure, see Wendy Kramer, *30k-60k US Sperm and Egg Donor Births Per Year?*, HUFFPOST (Oct. 6, 2015, 9:20 AM), https://www.huffingtonpost.com/wendy-kramer/a-call-to-to-stop-using-t_b_8126736.html [<https://perma.cc/S2Y9-8WMQ>] (critiquing “pitiful lack of oversight within the US sperm donor industry” and lack of accurate, accessible, or reliable data).

In contrast to the many sperm banks in the United States, Canada has a limited number of deposits in sperm banks, likely due to the Canadian prohibition on anonymous contributions. A male sperm depositor must make his information available to any genetically related children once they reach the age of majority. See Kramer, *supra* (comparing number of sperm transferors in United States, which has population of approximately 326 million, with an estimated 60 compensated sperm transferors in Canada, which has population of 35 million). The same is true in the United Kingdom. That country saw a marked decrease in sperm availability after the passage of a law in 2005 that removed the depositing man’s right to anonymity. See, e.g., David Batty, *Fertility Treatment Drops Following Ban on Anonymous Sperm Donation*, GUARDIAN (June 26, 2008, 5:28 AM), <https://www.theguardian.com/uk/2008/jun/26/women.health> [<https://perma.cc/9HGQ-P3XF>] (“The number of women treated with donated sperm fell by nearly one-fifth, from 2,727 in 2005 to 2,107 in 2006 - the first full year after the change in the law . . .”). The United Kingdom has a population of approximately sixty-six million people—“its largest ever,” according to the Office of National Statistics’s latest release. See OFFICE OF NAT’L STATISTICS, OVERVIEW OF THE UK POPULATION: NOVEMBER 2018, at 2 (2018), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/november2018> [<https://perma.cc/DH5N-ACT7>].

⁶ This Article uses the phrases “compensated human egg transferor” or “compensated egg transferor” instead of the more common phrases “egg donor” or “egg donation” because words about “donations” connote a gratuitous transfer. Although there are undoubtedly some women who transfer their eggs without receiving any compensation, that does not appear to be the norm in the fertility industry. See RENE ALMELING, SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM 110-41 (2011) (describing experiences of compensated egg providers and sperm providers). For income tax purposes, in order to be characterized as a gift (and therefore not subject to taxation under I.R.C. § 102(a)), the transfer must be made with “‘detached and disinterested generosity,’ ‘out of affection, respect, admiration, charity or like impulses.’” *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960) (citation omitted) (first quoting

transferors and the fertility clinics operating as “brokers” between the potential egg transferors and the intended parent(s) talk (or, more often, fail to talk) about taxation is part of a larger cultural and legal story—the story of the way that the tax system both reacts to and helps create attitudes about the value of certain social behaviors and choices.⁷ The resistance to “tax talk” in the fertility context reveals the power of tax law to challenge the ways that legal actors perceive themselves. Women who receive compensation for providing eggs contest the notion that they are engaged in any sort of commercial activity, instead construing themselves as altruistic actors for whom any money they receive is a mere token of recognition for their extraordinary generosity and willingness to tolerate discomfort and inconvenience.⁸ This self-narrative of altruism, reinforced powerfully by fertility clinics, is what allows a multibillion-dollar fertility industry to flourish. Most of the industry profits go not to the egg transferors themselves, however; drug manufacturers, fertility clinics, and the doctors who own the clinics profit handsomely from the reproductive work of other individuals.

Part I of this Article provides an overview of the tax treatment of compensated human egg transfers in the United States, with a brief reference to limitations on such transfers in other countries, including Canada. In 2015, in a case of first impression, the United States Tax Court ruled in *Perez v. Commissioner*⁹ that the remuneration a woman received for the transfer of her eggs was, in fact,

Comm'r v. LoBue, 351 U.S. 243, 246 (1956); then quoting *Robertson v. United States*, 343 U.S. 711, 714 (1952)); see also I.R.C. § 102(a) (2012) (excluding gifts from definition of gross income). For gift tax purposes, a gift is a transfer “for less than an adequate and full consideration in money or money’s worth.” I.R.C. § 2512(b). On the discrepancies in the tax definitions of “gifts,” see *Comm'r v. Beck’s Estate*, 129 F.2d 243, 246 (2d Cir. 1942) (“Perhaps to assuage the feelings and aid the understanding of affected taxpayers, Congress might use different symbols to describe the taxable conduct in the several statutes, calling it a ‘gift’ in the gift tax law, a ‘gaft’ in the income tax law, and a ‘geft’ in the estate tax law.”). Academics have written extensively about these discrepancies. See, e.g., Mitchell M. Gans & Jay A. Soled, *Reforming the Gift Tax and Making It Enforceable*, 87 B.U. L. REV. 759, 765-70 (2007) (explaining perceived flaws in gift tax definition of gratuitous transfers); Douglas A. Kahn & Jeffrey H. Kahn, “Gifts, Gafts, and Gefts”—*The Income Tax Definition and Treatment of Private and Charitable “Gifts” and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441, 445-50 (2003) (discussing difference between income tax and gift tax definitions of “gift”); Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 851-52 (2005) (describing differences in income tax and gift tax definitions of donative transfers).

⁷ On the ways in which tax laws express a society’s larger social values, see generally Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J.L. & PUB. POL’Y 301 (2017).

⁸ See, e.g., *infra* note 39 and accompanying text (quoting compensated egg provider describing her physical suffering).

⁹ 144 T.C. 51 (2015).

taxable income and should be reported on her annual income tax return.¹⁰ Although clear in its holding, the *Perez* decision represents a missed opportunity for the court to clarify important questions about the nature, extent, and character of income received from compensated human egg transfers.

Part II explores the reaction to the *Perez* case from women who have received compensation for egg transfers or who are contemplating doing so in the future. Through a content-based analysis of publicly available online fora and bulletin boards, Part II reveals that, notwithstanding the clarity of the Tax Court's holding in *Perez*, many women continue to insist that the amounts they receive are not income and object to paying any tax on those monies.¹¹ Taxation seemingly does not square with women's perception of their activities. The *Perez* decision has not eliminated any confusion or convinced compensated egg transferors of their obligation to pay income taxes.¹²

Part III details the results of an empirical analysis of the websites of the twenty-five fertility clinics in the United States that conduct the greatest number of assisted reproductive technology ("ART")¹³ cycles involving embryos from so-called "donated" eggs to determine what tax-related information, if any, these clinics make publicly available. Not surprisingly, most of the clinics do not include on their websites any information about the tax consequences of compensated human egg transfers.¹⁴ On one hand, that is not surprising, as the ordinary individual does not expect to receive tax advice from every website she might use to sell items, such as art, antiques, memorabilia, clothing, or household items.¹⁵ On the other hand, the absence of such information is

¹⁰ *Id.* at 61 ("But we must hold that when she forgoes that interest—and consents to such intimate invasion for payment—any amount she receives must be included in her taxable income.").

¹¹ See *infra* Section II.B (presenting empirical data regarding some women's opinions on whether compensated egg transfer is appropriately taxable income).

¹² See *infra* Section II.B (describing post-*Perez* world).

¹³ Assisted reproduction is defined by the Centers for Disease Control and Prevention as: All treatments or procedures that include the handling of human eggs or embryos to help a woman become pregnant. ART includes but is not limited to in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), tubal embryo transfer, egg and embryo cryopreservation, egg and embryo donation, and gestational surrogacy.

NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT app. at 531 (2017) [hereinafter NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, FERTILITY CLINIC SUCCESS RATES REPORT].

¹⁴ See *infra* Part III (detailing fertility clinics' failure to provide tax information). To be sure, the clinics may be providing tax information to prospective egg transferors in person, but anecdotal evidence suggests that many clinics do not. *Id.*

¹⁵ See, e.g., *How Do I Sell*, TRADESY, <https://www.tradesy.com/help/article/220630447/how-do-i-sell/> [<https://perma.cc/777Q-3DPW>] (explaining how to "sell straight from your closet" on Tradesy, but not providing any tax information) (last updated Feb. 4, 2019); *Invitation to Consign: Paintings, Drawings & Sculpture*, SOTHEBY'S (Dec. 12, 2016),

noteworthy given the importance of the *Perez* case in settling what had been for years an open question—and a question that seems to persist among the pool of potential egg transferors.¹⁶

Part IV offers multiple explanations for the clinics' failure to provide clear tax information. To be sure, the clinics may not believe that they, any more than any other "middleman," have an obligation to inform the parties of the tax consequences of any money that changes hands, and there are some sites devoted to egg "donation" that *do* provide appropriate tax information. At the same time, the subject clinics' failure to provide clear statements about tax liability contributes to confusion among potential egg transferors, thus depressing the price that women may demand and allowing the clinics to maintain the salience of the altruism narrative that serves as the foundation for the entire fertility industry.¹⁷ The introduction of "tax talk" therefore has enormous potential to destabilize the supply of human eggs (and thus the clinics' profits), so clinics have few incentives to volunteer that tax information.¹⁸

Part IV also proposes a simple administrative solution to the lack of readily available tax information. The Internal Revenue Service ("IRS") should issue clear guidance to all fertility clinics regarding the tax consequences of egg transfers and regularly audit clinics to make sure that they are issuing the appropriate tax forms to the compensated egg transferors. Furthermore, the American Society for Reproductive Medicine ("ASRM") should require more

<https://www.sothebys.com/en/articles/invitation-to-consign-paintings-drawings-sculpture> [<https://perma.cc/WYA2-KHY6>] (providing details for how to receive complimentary estimate of any item one would like to consign for auction, but not providing any tax advice); *Selling*, EBAY, <https://www.ebay.com/help/selling> [<https://perma.cc/6QR5-N6MS>] (last visited Aug. 22, 2019) (providing "how to" instructions for individuals and retail sellers who may wish to offer variety of goods for sale to public, but providing no tax information to potential buyers or sellers).

¹⁶ See *infra* Section II.B (describing actual participants' views).

¹⁷ See *infra* Section IV.A (discussing economics of fertility industry).

¹⁸ According to one study by the research firm Global Markets Insight Group, the estimated size of the global market for ART in 2023 will be \$31.4 billion. *Assisted Reproductive Technology (ART) Market Size Worth USD 31 Billion by 2023*, GLOBENEWSWIRE (July 5, 2016, 10:00 AM), <https://www.globenewswire.com/news-release/2016/07/05/853690/0/en/Assisted-Reproductive-Technology-ART-Market-size-worth-USD-31-Billion-by-2023-Global-Market-Insights-Inc.html> [<https://perma.cc/PGQ5-DSPG>]. Ninety-five percent of the North American market share is attributable to the United States. *Id.* Fifty-five percent, or over 600,000, of all reported ART cycles are attributable to Europe. *Id.* Over ten years ago, Harvard Business School Professor Debora Spar estimated that revenue generated from the U.S. fertility industry in 2004 was approximately \$2.9 billion: \$1.3 billion from fertility drugs, 1 billion for IVF, 375 million from diagnostic tests, 74 million from third-party provided sperm, 38 million for third-party provided eggs, and 27 million for surrogate carriers. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 3 tbl.1-1 (2006).

than physical and psychological screening of compensated egg transferors.¹⁹ The ASRM should *require* clinics to issue to compensated egg transferors a Form 1099-MISC, the annual statement of miscellaneous income paid to persons who are not employees.²⁰ This will put taxpayers on notice of their filing obligations and likely lead to greater compliance with the law.

Part V connects the absence of “tax talk” surrounding the transfer of human eggs with the way that some people construe tax-free status or favorable tax treatment as indicating the social or political value of a particular activity or transaction. This Part argues for an alternate viewpoint: to tax a transaction such as compensated egg transfers is to recognize that activity’s importance. Taxation signals that reproductive work deserves to be treated like any other labor. In this way, the tax system has the power to mark an activity as important and within the mainstream of human experience. The alternative—allowing compensated human egg transfers to escape taxation—would turn that work into a preferred type of economic activity with unintended consequences for women and others.

The Article concludes with a brief policy discussion of the importance of recognizing that active reproductive markets exist in many parts of the world, especially in the United States. Tax talk about these markets permits a more nuanced understanding of the experiences and choices of the legal actors involved in the fertility industry, as well as the industry’s overall operations. Tax talk is necessary in order to make sense of the value accorded by the U.S. tax system to choices and practices that are banned outright in other countries.²¹

¹⁹ The 2006 ASRM Guidelines for Gamete and Embryo Donation recommended a variety of physical and psychological tests for compensated egg transferors. See Am. Soc’y for Reprod. Med. Practice Comm., *2006 Guidelines for Gamete and Embryo Donation*, 86 FERTILITY & STERILITY S38, S45-46 (Supp. 2006). The most recent guidelines contain similar recommendations. See Am. Soc’y for Reprod. Med. Practice Comm., *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, 99 FERTILITY & STERILITY 47, 57 (2013).

²⁰ *Internal Revenue Form 1099-MISC and Instructions for Form 1099-MISC*, IRS, <https://www.irs.gov/pub/irs-pdf/f1099misc.pdf> [<https://perma.cc/5X88-UH73>] (last visited Aug. 22, 2019) [hereinafter *Form 1099-MISC*].

²¹ See *infra* Section IV.B (discussing importance of tax talk); see also, e.g., *Paradiso v. Italy*, (No. 25358/12), HUDOC (Jan. 24, 2017), <http://hudoc.echr.coe.int/eng?i=001-170359> [<https://perma.cc/TB2K-8YYR>] (denying legal parental status to Italian couple that contracted for gestational surrogacy that resulted in birth of child, on grounds that entering into illegal domestic surrogacy agreement or legal international surrogacy agreement to avoid domestic law prohibitions indicated lack of parental fitness); Bulent Urman & Kayhan Yakin, *New Turkish Legislation on Assisted Reproductive Techniques and Centres: A Step in the Right Direction?*, 21 REPROD. BIOMEDICINE ONLINE 729, 730 (2011) (commenting on Turkish law prohibiting foreign travel for purposes of acquiring human gametes). President John F. Kennedy, among others, explicitly recognized the link between promoting American geopolitical “values” and America’s tax system. See John F. Kennedy, *Special Message to the Congress on Taxation*, 1 PUB. PAPERS 290, 290 (Apr. 20, 1961) (“A strong and sound Federal tax system is essential to America’s future. Without such a system, we cannot maintain our defenses and give leadership to the free world. Without such a system, we cannot

I. TRANSFERRING HUMAN EGGS GIVES RISE TO TAXABLE INCOME

A. *The Perez Case*

In 2009, Nichelle Perez, a twenty-nine-year-old sales representative for Sprint, decided to “help” an infertile couple become pregnant.²² In return for a total of \$20,000, Perez twice underwent a series of medical examinations and received (first at the clinic and then through self-administration) a series of painful hormone injections to stimulate her ovaries.²³ According to Perez, apart from the pain and bruising associated with the injections themselves, some of the medicine was “actually very painful . . . [I]t was burning the entire time you were injecting it.”²⁴ Once her eggs were mature, doctors put Perez under general anesthesia and aspirated the mature eggs by means of a large needle inserted into the vagina.²⁵ After each procedure, Perez explained that she “felt cramped and bloated; she had mood swings, headaches, nausea, and fatigue.”²⁶ Details of Perez’s experience sufficiently illustrate that the process of transferring human eggs is far more complicated than, say, making a deposit at a sperm bank.²⁷

render the public services necessary for enriching the lives of our people and furthering the growth of our economy.”).

²² Transcript of Proceedings at 29, *Perez v. Comm’r*, 144 T.C. 51 (2015) (No. 9103-12) [hereinafter *Perez Transcript*].

²³ *Perez*, 144 T.C. at 54.

²⁴ *Perez Transcript*, *supra* note 22, at 18. Judge Holmes noted in his opinion that Perez testified “with complete credibility” about the physical pain she experienced. *Perez*, 144 T.C. at 55.

²⁵ *Perez*, 144 T.C. at 54-55. For an overview of some risks associated with human egg transfers, as well as details about the process, see generally, e.g., G. David Adamson et al., *World Collaborative Report on In Vitro Fertilization*, 85 FERTILITY & STERILITY 1586 (2006) (including overview of oocyte retrieval process); Brooke Ellison & Jaymie Meliker, *Assessing the Risk of Ovarian Hyperstimulation Syndrome in Egg Donation: Implications for Human Embryonic Stem Cell Research*, AM. J. BIOETHICS, Sept. 2011, at 22; Gary S. Nakhuda, Vuk Jovanovic & Mark V. Sauer, *Laparoscopic Management of Ovarian Entrapment: A Rare Complication of IVF*, 28 J. GYNECOLOGIC SURGERY 136 (2012) (detailing rare case of ovarian displacement after egg aspiration, but suggesting that complications from oocyte transfers are infrequent).

²⁶ *Perez*, 144 T.C. at 55.

²⁷ See, e.g., *What Does Sperm Donation Involve?*, STAN. U., <http://web.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/spermint.htm> [https://perma.cc/E6RE-T7CF] (last visited Aug. 22, 2019) (describing mechanics of making sperm deposits at commercial sperm bank); see also U. Van den Broeck et al., *A Systematic Review of Sperm Donors: Demographic Characteristics, Attitudes, Motives and Experiences of the Process of Sperm Donation*, 19 HUM. REPROD. UPDATE 37, 49 (2013) (suggesting that counseling is important for sperm donors because “there is some evidence to suggest that not all donors are aware of their motivations for donation or the future implication of their donation. Counselling could then be of value in clarifying values and attitudes, providing information and support for donors, which may lead to a change in attitudes after counselling”).

Notably, there were two contracts related to each of Perez's egg transfers: one contract between Perez and Donor Source International, LLC ("Donor Source"), an agency that matches potential egg transferors with intended parents, and one contract between Perez and the anonymous intended parents.²⁸ Her agreement with Donor Source provided as follows:

Donor and Intended Parents will agree upon a Donor Fee for Donor's time, effort, inconvenience, pain, and suffering in donating her eggs. This fee is for Donor's good faith and full compliance with the donor egg procedure, not in exchange for or purchase of eggs and the quantity or quality of eggs retrieved will not affect the Donor Fee. . . . The Parties acknowledge and agree that the funds provided to the Donor shall not in any way constitute payment to Donor for her eggs. . . . [Perez assumes] all medical risks and agree[s] to hold The Donor Source harmless from any and all liability for any and all physical or medical harm to herself²⁹

Pursuant to her contract with Donor Source, Perez also was entitled to receive reimbursement for all travel associated with her medical appointments.³⁰ Note that the contract specified that Perez would be paid for her "good faith and full compliance with the donor egg procedure, not in exchange for or purchase of eggs and the quantity or quality of eggs retrieved."³¹ In other words, the contract was drafted to provide that any monies Perez received were related to her *compliance* with the *procedures* that would enable her to produce viable eggs that could (and would) be extracted from her body, but compensation was not contingent on actual production and extraction.³²

²⁸ See *Perez*, 144 T.C. at 53-54; *id.* at 52 ("The Donor Source is a for-profit California company that has been in business since 2003. It is one of approximately 30 donor agencies in California and in 2009 supervised roughly 250 egg-donation cycles for its customers. The Donor Source recruits donors by advertising on Craigslist, in magazines, and by word of mouth."); see also *About Fertility SOURCE Companies*, FERTILITY SOURCE COMPANIES, <https://www.fertilitysourcecompanies.com/about/> [<https://perma.cc/A4PD-T697>] (last visited Aug. 22, 2019) ("The Donor SOURCE is a premier egg donor agency that includes a database of over 750 qualified, screened and available egg donors . . .").

²⁹ *Perez*, 144 T.C. at 54 (quoting contract between Perez and Donor Source).

³⁰ *Id.*

³¹ *Id.* (quoting contract between Perez and Donor Source).

³² This distinction seems to have been persuasive to Judge Holmes, although it rings false. The careful language of the egg transfer agreement calls to mind a college party in a jurisdiction where no alcohol may be served to anyone under the age of twenty-one. Party organizers might instead charge a "door fee" that allows anyone, including an eighteen-year-old, to enter the party and obtain a cup. With no further payment required, the eighteen-year-old may fill the cup (or not) from a communal keg. The party organizers would argue that they did not sell alcohol to someone under the age of twenty-one, and that they merely sold cups to partygoers of all ages. This reasoning is too flimsy to be persuasive as a matter of law. But for a desire to consume from the keg, no one would pay for a cup. Similarly, appropriately moderated by awareness of potential complications and risks, but for the expectation that Perez would produce viable eggs for extraction and transfer, she would not have undergone

The second contract—between Perez and the intended parents—similarly provided that any amounts Perez received were “in consideration for all of her pain, suffering, time, inconvenience, and efforts.”³³ That contract further specified the medical procedures and hormone treatments she would follow prior to the transfer, her legal rights with respect to any transferred eggs, and the compensation she would receive.³⁴ Although the other contract recited that “Donor and Intended Parents will agree upon a Donor Fee,”³⁵ implying that direct bargaining would occur between Perez and the intended parents, Donor Source itself set the fee for first-time donors at a minimum \$5500.³⁶ Perez would be eligible for compensation between \$5500 and \$10,000 for subsequent transfers.³⁷

At the end of the tax year, Donor Source sent to Perez a Form 1099-MISC, the standard form that a payor must issue to any payee who receives a minimum threshold amount in royalties, rents, prizes, or awards, or for services performed by someone who is not that payor’s employee.³⁸ After consulting online with other egg donors who assured her that the amounts were nontaxable, Perez

all of the tests, examinations, injections, and procedures. To then say that her compensation was not “in exchange for or purchase of eggs” seems disingenuous at best. *Perez*, 144 T.C. at 53.

³³ *Id.* at 54 (quoting contract between Perez and intended parents).

³⁴ *Id.*

³⁵ *See id.* at 53-54 (quoting contract between Perez and Donor Source).

³⁶ *Id.* at 53 (“The Donor Source fixes the fee for first-time egg donors based on where the donor lives. For Southern California women, first-time donors are promised \$5,500—and the price goes up with each subsequent donation.”).

³⁷ *Id.* At the time of both of Perez’s compensated egg transfers, the ASRM capped the amount that transferring women could receive at \$5000 or up to \$10,000 in certain cases. *Id.* This price fixing was the subject of a class action antitrust suit. *Kamakahi v. Am. Soc’y for Reprod. Med.*, 305 F.R.D. 164, 169-70 (N.D. Cal. 2015). The case settled out of court, with the ASRM agreeing to remove from its guidelines the language limiting compensation for human egg transfers. *See Kelly Knaub, Egg Donors Get Pay Limits Axed with Antitrust Settlement*, LAW360 (Feb. 1, 2016, 7:01 PM) <https://www.law360.com/articles/753389/egg-donors-get-pay-limits-axed-with-antitrust-settlement>. For excellent analysis of the legal claims in the class action, see Kimberly D. Krawiec, *Egg-Donor Price Fixing and Kamakahi v. American Society for Reproductive Medicine*, 16 AMA J. ETHICS 57, 58-60 (2014); Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 GEO. J.L. & PUB. POL’Y 349, 358-60 (2015) [hereinafter Krawiec, *The Exchange of Human Eggs*] (discussing *Kamakahi* antitrust case in context of *Perez* decision). *See generally* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, LAW & CONTEMP. PROBS., Summer 2009, at 59, 60-63 (contrasting presumed motivation of male versus female compensated human gamete providers and relationship of altruism to price-fixing in egg market encouraged by then-existing ASRM guidelines).

³⁸ *See Instructions for Form 1099-MISC (2019)*, IRS, <https://www.irs.gov/instructions/i1099msc> [<https://perma.cc/G67C-D9LB>] (last updated Nov. 28, 2018); *supra* notes 19-20 and accompanying text.

declined to report on her federal income tax return the \$20,000 she received for the two egg transfers.³⁹

When the IRS sought to tax Perez on her receipts from the egg transfers, Perez claimed that the payments were excludable on the grounds that she received the money for the pain and suffering she had endured in injecting herself with fertility drugs and undergoing various medical procedures.⁴⁰ From a doctrinal perspective, although she did not do so by specific citation to the Internal Revenue Code, she was substantively arguing that I.R.C. § 104(a)(2) provides that gross income does not include “the amount of any damages (other than punitive damages) received . . . on account of personal physical injuries or physical sickness.”⁴¹ In other words, Perez’s argument was that she received \$20,000 for having endured pain, bruising, cramping, headaches, nausea, fatigue, mood swings, injections, and surgery, and thus she was entitled to exclude the amount from her gross income, the same as if she had been a tort plaintiff who recovered \$20,000 from an errant driver whose recklessness resulted in Perez’s breaking a leg.

In a case of first impression, the United States Tax Court disagreed with the taxpayer and required Perez to include the amounts from her compensated egg transfers in her gross income. The case has not been appealed.⁴²

B. *Questions Unanswered by the Perez Decision*

At the initial calendar call in the case, Judge Holmes suggested that the case might involve a sale of human body parts, but he quickly retreated from that view.⁴³ At the conclusion of the trial testimony, Judge Holmes said, “I had initially thought, as you know, at calendar call that this might be sale of body parts. Unless I’m missing something, it’s not.”⁴⁴ His reasoning seemed to rest entirely on the fact that neither Perez nor the IRS viewed the case as a sale of human eggs, with Perez arguing that her payments were for personal physical injury.⁴⁵ The IRS claimed that Perez had received compensation for services, which clearly is within the definition of gross income.⁴⁶ Judge Holmes appeared to rely heavily on the recitation contained in the contract between Perez and the surrogacy agency that the payments were for “good faith and full compliance

³⁹ See *Perez*, 144 T.C. at 56.

⁴⁰ *Id.*

⁴¹ I.R.C. § 104(a)(2) (2012) (excluding from gross income amounts received on account of personal physical injury).

⁴² *Perez*, 144 T.C. at 61.

⁴³ See *Perez* Transcript, *supra* note 22, at 97.

⁴⁴ *Id.*

⁴⁵ See *supra* notes 39–40 and accompanying text (describing taxpayer’s nonreporting of amounts received).

⁴⁶ *Perez*, 144 T.C. at 56 (referencing applicable precedent and statutory definitions); see I.R.C. § 61(a)(1) (defining gross income to include compensation for services).

with the donor egg procedure⁴⁷ and the assertion by both Perez and the IRS that the payments were not for the sale of her eggs.⁴⁸

To be sure, Perez, Donor Source, the intended parents, and indeed anyone with any financial stake in the fertility industry (including lawyers who draft, review, and advise about contracts concerning compensated egg transfers and related matters, such as second-parent adoption, if necessary)⁴⁹ had and continue to have incentives to characterize Perez's actions as *anything other* than the selling of human eggs; the sale of human body parts is illegal in the United States.⁵⁰ The same is true in Canada, where the Assisted Human Reproductive Act provides that it is illegal to purchase human eggs directly from a "donor" or someone acting on behalf of a donor, but it is not illegal to pay for the "donor's" out-of-pocket costs.⁵¹

It is far from obvious, however, that the parties' characterization of the contract should control for U.S. federal income tax purposes. Indeed, in other circumstances, courts have routinely declined to accept the parties' characterization of transactions for tax purposes.⁵² For example, in cases of damages and related receipts, neither party has an incentive to declare any amount paid in connection with the settlement of a tort claim for physical injury

⁴⁷ *Perez*, 144 T.C. at 54.

⁴⁸ *Id.* at 56.

⁴⁹ See, e.g., *Anticipated Costs*, AGENCY FOR SURROGACY SOLUTIONS, INC., <https://www.surrogacysolutionsinc.com/intended-parents/anticipated-costs/> [<https://perma.cc/2J6V-N23U>] (last visited Aug. 22, 2019) (explaining various costs associated with egg transfers and other fertility treatments, including attorney's fees).

⁵⁰ See National Organ Transplant Act § 301(a), 42 U.S.C. § 274e(a) (2012) (prohibiting transfer of any human organ for valuable consideration). But it is not illegal to compensate a donor for costs associated with any donation. See *id.* § 301(c)(2). Compensated organ donation is legal in Iran. See, e.g., Nasser Karimi & Jon Gambrell, *In Iran, Anyone Can Sell Their Kidney for Thousands of Dollars*, BUS. INSIDER (Aug. 25, 2016, 10:01 AM), <https://www.businessinsider.com/ap-in-iran-unique-system-allows-payments-for-kidney-donors-2016-8> [<https://perma.cc/CK5Q-S8E7>]; see also Ahad J. Ghods & Shekoufeh Savaj, *Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation*, 1 CLINICAL J. AM. SOC'Y NEPHROLOGY 1136, 1137 (2006).

⁵¹ See Canada Assisted Human Reproduction Act, S.C. 2004, c 2, s 5(1)(c) (Can.). Certain portions of the Assisted Human Reproduction Act were declared unconstitutional by the Supreme Court of Canada in *Reference Re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457 (Can.). The prohibitions against purchasing eggs but permitting reimbursement of an egg transferor's out-of-pocket costs remain in effect. See *id.* at 511. One Canadian fertility clinic suggests that reimbursable expenses include "groceries and prepared food (ex. grocery receipts leading up to, during and after the donation, meals, beverages)," "gym/fitness memberships," "note taking for missed classes," "housekeeping," "child or pet care," "massage, chiropractic, and foot care," "travel related to medical appointments," and "lost wages." *Egg Donation in Canada: What is Legal?*, FERTILITY MATCH (Aug. 22, 2017), <http://fertilitymatch.ca/2017/08/22/egg-donation-canada/> [<https://perma.cc/3UJT-NDHC>].

⁵² See, e.g., *Comm'r v. Schleier*, 515 U.S. 323, 334 (1995) (finding that respondent's characterization of damages does not determine tax treatment of receipts).

to be “punitive” damages.⁵³ Such a designation would create taxable income for the injured party and would be tantamount to an acknowledgement of wrongdoing by the alleged malfeasor.⁵⁴ Therefore, courts do not always accept parties’ characterizations of damages.⁵⁵

Similarly, a taxpayer may exclude from gross income employer-provided housing if several conditions are met, including that the employer requires the employee to accept such housing as a condition of employment.⁵⁶ Mere contract recitation of such a condition is not enough, though. One can imagine that the employee would like to have such a clause included in an employment contract in order to avoid income taxation. An employer may have no reason to object to such a clause’s inclusion if the employer already intended to offer housing as part of the employment package.⁵⁷ Given the many other transactions in which courts look to substance over form,⁵⁸ it is somewhat puzzling that Judge Holmes accepted the parties’ characterization of the contract in *Perez* without any further scrutiny.⁵⁹

⁵³ See, e.g., *Simpson v. Comm’r*, 141 T.C. 331, 334 (2013) (finding that nature of claim that is actual basis for settlement guides court’s determination of how payments will be treated for federal income tax purposes).

⁵⁴ See I.R.C. § 104(a)(2) (excluding from gross income “amount of any damages (*other than punitive damages*) received . . . on account of personal physical injuries or physical sickness” (emphasis added)); *Bagley v. Comm’r*, 121 F.3d 393, 396 (8th Cir. 1997) (acknowledging that settlement agreement’s designation of damages as “punitive” is almost never advantageous to either party).

⁵⁵ See *Robinson v. Comm’r*, 102 T.C. 116, 117, 135-36 (1994) (agreeing with petitioners’ characterization in finding that portion of their settlement attributable to punitive damages was excludable from their gross income as “damages received . . . on account of personal injuries or sickness” under § 104(a)(2)), *aff’d in part and rev’d in part*, 70 F.3d 34 (5th Cir. 1995) (reversing on this issue in finding that punitive damages are not intended to compensate plaintiffs for their injuries and are therefore not excludable under § 104(a)(2)).

⁵⁶ I.R.C. § 119(a)(2) (providing that value of employer-provided housing may be excluded from gross income if it is “for the convenience of the employer” and “employee . . . accept[s] such lodging on the business premises of his employer as a condition of his employment”).

⁵⁷ See *id.* § 119(b)(1) (“In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract . . . shall not be determinative of whether the meals or lodging are intended as compensation.”); *Bob Jones Univ. v. United States*, 670 F.2d 167, 174 (Ct. Cl. 1982) (per curiam) (examining objective facts and circumstances to determine if lodging is furnished for convenience of employer); *Erdelt v. United States*, 715 F. Supp. 278, 281 (D.N.D. 1989) (finding that court must examine all facts and circumstances because “provisions of the employment contract are not determinative”).

⁵⁸ See, e.g., *Steinfeld v. IHS Health Inc.*, No. 10 Civ. 3301, 2014 U.S. Dist. LEXIS 56178, at *30 (S.D.N.Y. Feb. 14, 2014) (examining contract as whole and using “totality of the circumstances” approach to determine parties’ intent).

⁵⁹ See *supra* notes 45-50 and accompanying text (detailing how *Perez* court handled compensation-for-services dilemma).

In the published opinion, Judge Holmes made statements in dicta about what he was *not* deciding.⁶⁰ He proclaimed that Perez's case "does not require us to decide whether human eggs are capital assets. It does not require us to figure out how to allocate basis in the human body, or the holding period for human-body [sic] parts, or the character of the gain from the sale of those parts."⁶¹ But the reasons for these proclamations are far from clear. Indeed, scholars have pointed out the inconsistencies and uncertainty in the limited, confusing, and contradictory guidance that the IRS and the courts have provided about the tax consequences of transfers of certain human bodily materials.⁶² Judge Holmes was aware of widespread interest in this case and the likelihood that internet publicity would generate even more attention.⁶³ He specifically invited amicus briefs in the case.⁶⁴ The case docket includes one brief filed by a law professor and two law review articles entered as amicus briefs by the court on its own initiative.⁶⁵ That brief and the law review articles point out that the IRS and the

⁶⁰ See *Perez v. Comm'r*, 144 T.C. 51, 56 (2015) ("We acknowledge that this case has received some publicity in tax and nontax publications, which is why it is important to state clearly what it does not concern. It does not require us to decide whether human eggs are capital assets. It does not require us to figure out how to allocate basis in the human body, or the holding period for human-body parts, or the character of the gain from the sale of those parts.").

⁶¹ *Id.*

⁶² See, e.g., Bridget J. Crawford, *Our Bodies, Our (Tax) Selves*, 31 VA. TAX REV. 695, 717-19 (2012) (reviewing IRS's conflicting approaches to whether bodily materials constitute property or service for income tax purposes); 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, 1064-65, 1072-79 (2010) (reviewing applicable precedents involving transfers of human body materials and finding that guidance provided by IRS and courts is "contradictory and incomplete"); see also *Lary v. United States*, 787 F.2d 1538, 1538 (11th Cir. 1986) (per curiam) (holding that pint of blood donated to charity constituted service and thus donation did not give rise to deduction for income tax purposes); *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (en banc) (stating in dicta that there were ways in which taxpayer's selling of blood plasma "resemble[d] work" but that it is "tangible property which in this case commanded a selling price dependent on its value"); *Green v. Comm'r*, 74 T.C. 1229, 1234 (1980) (causing taxpayer to recognize gross income on account of her selling her own blood plasma, which was property, not a service); I.R.S. Priv. Ltr. Rul. 88-14-010 (Apr. 8, 1988) (holding that sale of blood plasma gave rise to taxable income but not ruling whether sale was service or plasma was property) (not precedent under I.R.C. § 6110(j)(3)).

⁶³ See *Perez* Transcript, *supra* note 22, at 97 ("I know that this is this is [sic] going to be a landmark case, Ms. Perez. You're the first one to actually go on trial on an egg donation. So your name will become famous among tax lawyers and reproductive medicine people.").

⁶⁴ *Id.* at 97-98 ("Would there be problems if I inserted in post-trial briefing a provision for amicus briefs? . . . Once in a while, something will turn up on TaxProf Blog, you know, an order's been entered seeking amicus briefs. Is that a problem for you?").

⁶⁵ See generally Brief of *Amicus Curiae* Bridget J. Crawford, *Perez v. Comm'r*, 144 T.C. 51 (2015) (No. 9103-12), ECF No. 32 (containing Crawford, *supra* note 62); Brief of *Amicus Curiae* Lisa Milot, *Perez v. Comm'r*, 144 T.C. 51 (2015) (No. 9103-12), ECF No. 31

courts at times have treated transferring bodily material as providing a service, and in other cases, as conveying assets (for which questions about income basis and the characterization of income as capital gains or ordinary income would be highly relevant).⁶⁶ It appears that Judge Holmes deliberately declined to address these issues, ruling only on the question of whether the amounts received by Perez were income.⁶⁷ Perhaps Judge Holmes predicted that if he tried to make sense of existing precedent and provide clear guidelines addressing questions other than, “Were Ms. Perez’s receipts income?” his decision might be vulnerable on appeal. For that reason, Judge Holmes limited the scope and reasoning of his decision, holding simply that the amounts Perez received were included in her gross income and therefore were subject to taxation.⁶⁸ The

(containing Milot, *supra* note 62); Brief of *Amicus Curiae* Professor Timothy M. Todd, Jr., in Support of Respondent, *Perez v. Comm’r*, 144 T.C. 51 (2015) (No. 9103-12), ECF No. 37.

⁶⁶ See, e.g., Brief of *Amicus Curiae* Professor Timothy M. Todd, Jr., in Support of Respondent, *supra* note 65, at 32; Crawford, *supra* note 62, at 717-19 (“[In] 1942, the Service was asked to consider whether the value of a blood donation could qualify for the income tax charitable deduction. The Service initially had approved a draft response permitting the deduction. After significant internal disagreement, however, the General Counsel changed course and denied the deduction in a formal memorandum. The Service subsequently had several opportunities to reconsider its position, 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. Furnishing blood, according to the Service, ‘is analogous to the rendering of a personal service by the donor rather than a contribution of “property.”’ . . . In a General Counsel Memorandum dated September 15, 1975, the Assistant Chief of the Interpretive 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 General Counsel agreed with the conclusion of the proposed 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.’ This was contrary to the position taken by the Service in Revenue Ruling 162.” (footnotes omitted) (first quoting Rev. Rul. 162, 1953-2 C.B. 127; then quoting I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975))); Milot, *supra* note 62, at 1074-79 (adding that the “Service’s reversal of position with respect to the proper characterization of human body materials . . . failed to resolve the issue because it was contained in a [nonbinding] general counsel memorandum” and describing how the “Service has oscillated between the two approaches with no clear resolution” in litigation with taxpayers); cf. *Lary*, 787 F.2d at 1539-41 (finding that taxpayer provided a service in donating blood to a charity); *Garber*, 607 F.2d at 97-99 (acknowledging lack of clarity in law regarding tax consequences of sales of blood plasma); *Green*, 74 T.C. at 1233-38 (finding that taxpayer’s sale of blood plasma was both like work and like sale of product); I.R.S. Priv. Ltr. Rul. 88-14-010 (Apr. 8, 1988), at 1-2 (declining to specify whether blood plasma was property or a service) (not precedent under I.R.C. § 6110(k)(3)).

⁶⁷ See *Perez*, 144 T.C. at 57 (“Thus the only issue we address is whether a taxpayer who suffers physical pain or injury while performing a contract for personal services may exclude the amounts paid under that service contract as ‘damages . . . received . . . on account of personal physical injuries or physical sickness’” (quoting I.R.C. § 104(a)(2) (2012))).

⁶⁸ *Id.* at 63 (“Because Perez’s compensation was not ‘damages’ under section 104(a)(2), we must rule against her on the main issue in the case.”).

opinion thus represents a missed opportunity for the court to clarify questions that have been and remain topics of confusion.⁶⁹

The strongest part of Judge Holmes's opinion is his rejection of Perez's argument that the amounts she received were excludable from gross income on the grounds that they were "damages (other than punitive damages) received . . . on account of personal physical injuries or physical sickness."⁷⁰ Judge Holmes began by observing that the U.S. Department of the Treasury specifically defines through regulations the term "damages" for purposes of I.R.C. § 104(a)(2) as "an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution."⁷¹ Where Congress has not directly addressed the validity of any regulation, a court may declare a regulation invalid if it is "arbitrary or capricious in substance or manifestly contrary to the statute."⁷² Judge Holmes noted that Perez had consented in advance to her "personal injuries," and thus the monies received were outside the scope of I.R.C. § 104(a)(2).⁷³

Judge Holmes made a point of saying that he found believable Perez's "utterly sincere and credible testimony that the series of medical procedures that culminated in the retrieval of her eggs was painful and dangerous to her present and future health."⁷⁴ Yet the money she received could not be "damages" for purposes of I.R.C. § 104(a)(2):

We see no limit on the mischief that ruling in Perez's favor might cause: A professional boxer could argue that some part of the payments he received for his latest fight is excludable because they are payments for his bruises, cuts, and nosebleeds. A hockey player could argue that a portion of his million-dollar salary is allocable to the chipped teeth he invariably suffers

⁶⁹ See *infra* Section II.B (referencing comments from women who continue to ask in wake of *Perez* whether amounts received from compensated human egg transfers are income).

⁷⁰ See *Perez*, 144 T.C. at 56 ("After consulting other egg donors online, Perez concluded that the money was not taxable because it compensated her only for pain and suffering; therefore, she left it off her tax return."); see also I.R.C. § 104(a)(2) (stating that "gross income does not include . . . the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness").

⁷¹ Treas. Reg. § 1.104-1(c)(1) (2016).

⁷² *Perez*, 144 T.C. at 59 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52-55 (2016)); see also Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 748 n.99 (2002) (distinguishing between Supreme Court's standards when reviewing legislative regulation versus interpretive regulation).

⁷³ *Perez*, 144 T.C. at 60 (citing *Starrels v. Comm'r*, 35 T.C. 646 (1961), *aff'd*, 304 F.2d 574 (9th Cir. 1962), for proposition that "amounts contracted in advance for a consent to an invasion of privacy were taxable income" in era when statute required finding of "tort or tort-type" right for successful invocation of I.R.C. § 104(a)(2)).

⁷⁴ *Id.* at 62.

during his career. And the same would go for the brain injuries suffered by football players and the less-noticed bodily damage daily endured by working men and women on farms and ranches, in mines, or on fishing boats. We don't doubt that some portion of the compensation paid all these people reflects the risk that they will feel pain and suffering, but it's a risk of pain and suffering that they agree to before they begin their work. And that makes it taxable compensation and not excludable damages.⁷⁵

For that reason, Judge Holmes ruled, the regulations under I.R.C. § 104(a)(2) were not "arbitrary, capricious, or manifestly contrary to the Code"⁷⁶ and Perez was required to pay income tax on the \$20,000 she received in connection with the transfer of her eggs.

II. WHAT WOMEN TELL EACH OTHER ABOUT THE TAX CONSEQUENCES OF HUMAN EGG TRANSFERS

A. *Pre-Perez*

Examination of publicly available websites and discussion boards dating from before the decision in the *Perez* case in 2015 reveals multiple instances of compensated egg transferors providing each other with (mostly inaccurate) information about the tax consequences of their actions. On the popular website Surrogate Mothers Online, LLC—which bills itself as a “virtual meeting ground for the surrogacy & egg donor community”⁷⁷—one forum thread, “1099 when being an egg donor,” is representative. The thread began when one community member asked if receipt of the Form 1099-MISC was outcome-determinative with respect to income tax liability:

With my first retrieval in my contract it stated that I was not an employee of my agency and [I] haven't heard anything about getting a 1099 at the end of the year—which I am assuming is something that I would need to write off on taxes and therefore pay taxes on my compensation fee. Is this correct?⁷⁸

The first community member to respond answered (partially correctly) that, “If you receive a 1099, you must declare it on your taxes because the IRS will receive a copy of it.”⁷⁹ The response is accurate insofar as the compensated

⁷⁵ *Id.* at 63.

⁷⁶ *Id.* at 62.

⁷⁷ *SMO Message Boards*, SURROMOMSONLINE.COM, <http://www.surromomsonline.com/support/> [<https://perma.cc/NE8R-XDCD>] (last visited Aug. 22, 2019).

⁷⁸ Threeundertwo, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Aug. 19, 2005, 3:45 AM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor> [<https://perma.cc/UMN5-RU6U>].

⁷⁹ Sabrinaleah, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Aug. 19, 2005, 6:57 AM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor> [<https://perma.cc/UMN5-RU6U>].

woman must report the amount she received for her egg transfers, but that obligation exists independently from receipt of a Form 1099-MISC.⁸⁰ The issuance (or not) of the form by the payor does not impact the payee's obligation to pay income taxes.⁸¹

Four days later, another community member emphatically offered the opposite view, replying that the original poster should not report any income on her tax return: "NO IT'S NOT SELF EMPLOYMENT!!!"⁸² This same community member claimed that she had successfully challenged the IRS when it sought to tax her on amounts she received in connection with compensated egg transfers.⁸³ The next community member to respond quoted her own contract with her clinic of choice. That contract provided clearly that "[d]onor compensation is taxable income. You will receive an IRS 1099 form for use when preparing your yearly taxes. Donors participating in an ovum donation cycle are compensated for a cycle, which ends in egg retrieval."⁸⁴ These

⁸⁰ See *supra* note 20 and accompanying text.

⁸¹ Anita Campbell, *Fast Answers About 1099 Forms for Independent Workers*, SMALL BUS. TRENDS, <https://smallbiztrends.com/2014/01/irs-1099-forms-fast-answers.html> [<https://perma.cc/UMN5-RU6U>] (last updated May 22, 2018) (explaining that failure of payor to provide Form 1099 does not excuse payee from obligation to pay income tax).

⁸² Alybry4, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Aug. 23, 2005, 1:46 AM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor> [<https://perma.cc/UMN5-RU6U>].

⁸³ *Id.* ("I [received] a 1099 from 1 attorney I donated through. I thought it was ridiculous that they would 1099 me for it (including my reimbursement for gas). I did some research on the IRS page and decided not to claim the 1099. The IRS contacted me a year and a half later with an 'adjustment to my taxes.' I simply wrote them a letter, explaining that the comp was for an ED, copied the attorneys [sic] website that clearly said it was for the pain and suffering of going through the procedure and was not selling genetic material. 2 weeks later the IRS sent me a letter saying they were sorry, and my file was now closed.").

⁸⁴ Becca4277, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Aug. 23, 2015, 7:13 AM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor> [<https://perma.cc/UMN5-RU6U>]. Note the distinction between this contract, which potentially could be read as making payment contingent on egg retrieval, and Perez's contract, which required compliance with the necessary examinations, medication administration, and procedures. See *supra* notes 29-32 and accompanying text. Some scholars take this distinction to be highly relevant. See, e.g., Julie Shapiro, Comment to *Taxing Eggs: Bridget Crawford*, FACULTY LOUNGE (Mar. 1, 2014, 6:25 PM), <http://www.thefacultylounge.org/2014/02/taxing-eggs-bridget-crawford.html> [<https://perma.cc/92VW-5LP3>] ("It seems to me fairly clear that the deals are structured so that women are not offered money for their eggs per se."). According to this view, the parties technically avoid the characterization of the transaction as the selling of human eggs (an illegal practice). See *supra* note 50 and accompanying text. In contrast, it is my view that being paid for compliance with such a medically prescribed program and being paid for eggs is a distinction without a legal difference. See *supra* note 32. In addition to insisting on more "tax talk" surrounding the compensated transfer of human eggs, see *infra* Part V, I would

conflicting reports continued for four pages and sixty-five posts (made over a twelve-year period) to the online forum. Some egg transferors reported that they successfully challenged the IRS.⁸⁵ Others reported that they had been advised to (and did) pay taxes on their receipts. Still others reported that they received a Form 1099-MISC, did not report the income on their tax returns, and were never challenged by the IRS.⁸⁶

Even after the *Perez* decision on January 22, 2015, compensated egg transferors continued to ask each other in this internet forum for copies of letters that other egg transferors had sent to successfully challenge the tax authorities.⁸⁷ Three months after the *Perez* decision, one community member announced that “[t]here will not be a way to get around it this year like there has been in the past under the ruling *Perez v. Commissioner*,” citing the relevant case authority as well as a popular press article in *Forbes* magazine.⁸⁸ Yet egg transferors persisted in asking for copies of challenge letters until the thread officially was closed in July 2017 (presumably by the forum administrators in the wake of *Perez*’s clear ruling).⁸⁹

propose lifting the prohibition on the sale of human eggs, with the hope of destigmatizing the activity.

⁸⁵ See, e.g., Alybry4, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Aug. 24, 2005, 2:33 PM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor> [<https://perma.cc/UMN5-RU6U>] (“Yeah, it was worth fighting, and all it took was an hour of time to prepare the letter and copy my supporting documentation. It’s irrelevant where you received the 1099 from. They are all reported to the IRS, so if you got it from a clinic or lawyer doesn’t matter. The IRS said my cycle wasn’t taxable, and that trumps anything that a lawyer or clinic tells me. This isn’t just true of me. FFFRachel went through the same thing, and told me how she fought it.”).

⁸⁶ See, e.g., Norma, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Jan. 10, 2011, 12:25 AM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor> [<https://perma.cc/UMN5-RU6U>] (“I was given a 1099 for all of my donations. You will need to report it as income to the IRS.”).

⁸⁷ See, e.g., Anorm0625, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Mar. 21, 2015, 6:12 PM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor/page4> [<https://perma.cc/6WJ3-XPWC>] (requesting copy of taxpayer letter to IRS successfully challenging taxation of monies received from compensated human egg transfers); Nanivjo, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (July 10, 2017, 1:42 PM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor/page4> [<https://perma.cc/6WJ3-XPWC>] (same).

⁸⁸ Raek718, Comment in *1099 When Being an Egg Donor*, SURROMOMSONLINE.COM (Mar. 22, 2015, 11:06 PM), <http://www.surromomsonline.com/support/showthread.php?60157-1099-when-being-an-egg-donor/page4> [<https://perma.cc/6WJ3-XPWC>].

⁸⁹ Nanivjo, *supra* note 87 (“Is anyone amble [sic] to send me a copy of the letter as well please and thank you[?]”).

B. *Post-Perez*

Even in the post-*Perez* era, after the Tax Court has ruled clearly that amounts received in connection with compensated egg transfers are taxable income,⁹⁰ there persists a significant amount of misinformation on the internet. Even the major tax return preparation company TurboTax hosts a community forum that includes confusing advice for these women. For example, approximately two years ago, one taxpayer posted this question in the community “Real Money Talk”: “I received a 1099 MISC for egg donations. Can that be categorized as ‘NO intent to earn money’ as it was not actually a job and my intent was to help infertile couples?”⁹¹ Curiously, the response marked as the “best answer” is, “Yes, you can indicate that the amount you received on the 1099-MISC stemmed from services *without the intent to earn money*,”⁹² even though the respondent goes on to qualify that answer by saying, “*even if you do answer like that, it will still be included as income on your return. This is because you did in fact receive a form of compensation, regardless of the underlying reason for your donation. Fortunately, answering in this way prevents self-employment tax from being assessed.*”⁹³ In other words, the community respondent’s advice was that the compensated egg transferor could make statements that might help her avoid self-employment tax, but not income tax. Query whether the average visitor to

⁹⁰ See *infra* Part I.

⁹¹ Rach.mccoy15, Comment to *Get Your Taxes Done*, INTUIT TURBO REAL MONEY TALK (June 5, 2019, 10:18 PM), <https://tlc.intuit.com/questions/3084384-i-received-a-1099-misc-for-egg-donations-can-that-be-categorized-as-no-intent-to-earn-money-as-it-was-not-actually-a-job-and-my-intent-was-to-help-infertile-couples> [<https://perma.cc/6ENR-5UBP>].

⁹² ChristinaR, Comment to *Get Your Taxes Done* (June 5, 2019, 10:18 PM), INTUIT TURBO REAL MONEY TALK, <https://tlc.intuit.com/questions/3084384-i-received-a-1099-misc-for-egg-donations-can-that-be-categorized-as-no-intent-to-earn-money-as-it-was-not-actually-a-job-and-my-intent-was-to-help-infertile-couples> [<https://perma.cc/4NM8-AK9F>].

⁹³ *Id.*

the TurboTax AnswerXchange would understand the difference, however.⁹⁴ The respondent then cites directly to the *Perez* case.⁹⁵

On a different website, more than two-and-a-half years after the *Perez* decision, a compensated egg transferor reported that she had “read on a forum that you only pay tax if you receive more than \$15,000” because she “recently donated [her] eggs and received over \$5,000 but under \$15,000.”⁹⁶ A certified public accountant and founder of a “surrogate escrow management firm”

⁹⁴ The self-employment tax under I.R.C. § 1401 is a notoriously understudied and poorly understood tax about which only a few law review articles have been written. To illustrate, a Westlaw search in the “Law Reviews & Journals” database for the term “self-employment /2 tax” in the “title” field generated seventy-eight results, only seven of which were published in student-edited law reviews housed at law schools (as opposed to practitioner-oriented publications, bar newsletters, professionally produced law journals, or journals for which professionals are responsible for article selection but students handle production work). Full-time faculty members wrote two of these articles. See generally Philip E. Harris, *Self-Employment Tax for Farmers*, 6 DRAKE J. AGRIC. L. 119 (2001); Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633 (2012). A practitioner wrote one article. Thomas E. Fritz, *Flowthrough Entities and the Self-Employment Tax: Is It Time for a Uniform Standard?*, 17 VA. TAX REV. 811 (1998). Students contributed notes, comments, and case notes to their home institutions’ journals. See generally Robert W. Brown, Jr., Case Note, *Brandschain v. Commissioner*, 80 T.C. 746 (1983), 9 S. ILL. U. L.J. 249 (1984); Robert W. Brown, Jr., Comment, 26 U.S.C. § 1402(a)(10)(1982), 9 S. ILL. U. L.J. 443 (1984); Laura E. Erdman, Note, *Reinterpreting the Limited Partner Exclusion to Maximize Labor Income in the Self-Employment Tax Base*, 70 WASH. & LEE L. REV. 2389 (2013); Jason Henderson, Note, *Tax Consequences for Owners of Farmland: Why Owners Who Rent Their Land to Farming Employers Are Probably Liable for Self-Employment Tax on Rent Received and Why Congress Should Change the Current Policy*, 76 N.D. L. REV. 605 (2000).

On the question of whether compensated human egg transfers should be subject to self-employment tax, see Milot, *supra* note 62, at 1077, 1080 n.136 (discussing application of self-employment tax to compensated egg transfers by analogy to self-reported example of taxpayer upon whom IRS sought to impose a self-employment tax as result of sperm sales); Lawrence Zelenak, *The Body in Question: The Income Tax and Human Body Materials*, 80 LAW & CONTEMP. PROBS., no. 1, 2017, at 37, 81 (noting that self-employment tax receives scant attention in context of compensated transfers of material from the human body, but that “economic significance of whether the self-employment tax applies to transactions in body materials is comparable to the economic significance of whether gains from transactions in body materials are taxed at ordinary rates or at the rates applicable to long-term capital gains”).

⁹⁵ ChristinaR, *supra* note 92 (citing *Perez v. Comm’r*, 144 T.C. 51 (2015)).

⁹⁶ See Edward Brockschmidt, *Is Egg Donation Taxable Income?*, SEEDTRUST (July 7, 2017), <https://seedtrustescrow.com/is-egg-donation-taxable-income/> [<https://perma.cc/4DYW-M8DW>] (responding to question from “Emily M.”).

responded accurately that the taxpayer was obligated to report the money received, regardless of the amount.⁹⁷

In reviewing publicly available postings to internet fora, one is left with the distinct impression that prospective, current, and past compensated egg transferors are not receiving (or giving) accurate tax information. That sets the stage for investigation into what tax information, if any, the fertility agencies are providing.

III. WHAT FERTILITY CLINICS TELL WOMEN ABOUT THE TAX CONSEQUENCES OF HUMAN EGG TRANSFERS

To understand what fertility agencies tell clients about the tax consequences of compensated egg transfers, I reviewed the publicly accessible websites of major fertility clinics in the United States. Selection of particular agency websites was made after consulting the 2015 *Fertility Clinic Success Rates Report*, published in 2017 by the Centers for Disease Control and Prevention ("CDC").⁹⁸ This report includes data from 464 reporting clinics and a total of 231,936 ART cycles.⁹⁹ I selected the five clinics doing the greatest number of cycles involving fresh or frozen embryos created from "donor" eggs¹⁰⁰ in the

⁹⁷ *Id.* (replying to question of whether amounts received from egg transfer are taxable and stating, "[The] simple answer is yes, you will need to report the money you received on your taxes. It does not matter how much money you received, as there is no threshold for it," but opining, without offering any authority or support, that "mileage, meals, and travel expenses" are deductible expenses because they are "related to going through the process").

⁹⁸ NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, FERTILITY CLINIC SUCCESS RATES REPORT, *supra* note 13, at 4 (explaining that reporting on ART is typically delayed because clinics track every pregnancy until birth, if any, and then must report that data to CDC, which must then check it); *see also* NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 47 (2017) (reporting greater number of live births from transfers of fresh embryos from donor eggs than nondonor eggs).

⁹⁹ NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, FERTILITY CLINIC SUCCESS RATES REPORT, *supra* note 13, at 5.

¹⁰⁰ The CDC defines an ART "cycle" as beginning "when a woman begins taking fertility drugs or having her ovaries monitored for follicle production." *Id.* at 531. A complete and successful cycle involves retrieval and fertilization of nondonor or donor eggs with nondonor or donor sperm, embryo development and implantation, pregnancy, and live birth. *Id.* Under the CDC definition, an ART cycle includes "any process in which (1) an ART procedure is performed, (2) a woman has undergone ovarian stimulation or monitoring with the intent of having an ART procedure, or (3) frozen embryos have been thawed with the intent of transferring them to a woman." *Id.* The CDC uses the term "donor" eggs but does not distinguish between compensated egg transfers and egg transfers that are wholly altruistic. *See id.*

five most populous states: California,¹⁰¹ Florida,¹⁰² Illinois,¹⁰³ New York,¹⁰⁴ and Texas.¹⁰⁵ These agencies did not necessarily work exclusively with “donor” eggs

¹⁰¹ The California agencies are: (1) San Diego Fertility Center (505 cycles); (2) HRC Fertility-Pasadena (411 cycles); (3) California Fertility Partners (305 cycles); (4) Pacific Fertility Center (274 cycles); and (5) Fertility and Surgical Associates of California (230 cycles). *See respectively* SAN DIEGO FERTILITY CTR., <https://www.sdfertility.com> [<https://perma.cc/36WH-YSNE>]; HRC FERTILITY, <https://www.hrcpasadena.com> [<https://perma.cc/SYD8-XUA5>]; CAL. FERTILITY PARTNERS, <http://www.californiafertilitypartners.com> [<https://perma.cc/EB44-8647>]; PAC. FERTILITY CTR., <https://www.pacificfertilitycenter.com> [<https://perma.cc/3E53-SEM6>]; FERTILITY & SURGICAL ASSOCIATES CAL., <https://fertilityassociates.com> [<https://perma.cc/SZ6U-LS2W>] (sources last visited Aug. 22, 2019).

¹⁰² The Florida agencies are: (1) The Reproductive Medicine Group (91 cycles); (2) Florida Institute for Reproductive Medicine (86 cycles); (3) Center for Reproductive Medicine (76 cycles); (4) Brown Fertility (75 cycles); and (5) IVF Florida Reproductive Associates (69 cycles). *See respectively* REPROD. MED. GROUP, <https://www.floridafertility.com> [<https://perma.cc/72LQ-PQY7>]; FLA. INST. FOR REPROD. MED., <https://www.fertilityjacksonville.com> [<https://perma.cc/XF9H-MUH8>]; CTR. FOR REPROD. MED., <https://ivfflorando.com> [<https://perma.cc/HR2Z-S3U8>]; BROWN FERTILITY, <https://www.brownfertility.com> [<https://perma.cc/E3D3-DK3D>]; IVF FLA. REPROD. ASSOCIATES, <https://ivfflorida.com> [<https://perma.cc/A7F7-DM5D>] (sources last visited Aug. 22, 2019).

¹⁰³ The Illinois agencies are: (1) Advanced Fertility Center of Chicago (979 cycles); (2) Fertility Centers of Illinois—Highland Park IVF Center (247 cycles); (3) Fertility Centers of Illinois—Chicago/River North IVF Center (215 cycles); (4) Reproductive Medicine Institute (107 cycles); and (5) IVF1 (75 cycles). *See respectively* ADVANCED FERTILITY CTR. CHI., <https://www.advancedfertility.com> [<https://perma.cc/5E9P-U4CE>]; FERTILITY CTRS. ILL.—HIGHLAND PARK IVF CTR., <https://fcionline.com/our-center/our-locations/highland-park-ivf-center> [<https://perma.cc/37DJ-BX9N>]; FERTILITY CTRS. ILL.—CHI./RIVER NORTH IVF CTR., <https://fcionline.com/our-center/our-locations/chicago-river-north-ivf-center> [<https://perma.cc/6C5T-PP9R>]; REPROD. MED. INST., <https://www.reproductivemedicineinstitute.com> [<https://perma.cc/E6KS-DSQS>]; IVF1, <https://www.ivf1.com> [<https://perma.cc/64NQ-QDMF>] (sources last visited Aug. 22, 2019).

¹⁰⁴ The New York agencies are: (1) CNY Fertility Center (279 cycles); (2) Reproductive Medicine Associates of New York, LLP (271 cycles); (3) Weill Cornell Medicine Center for Reproductive Medicine (197 cycles); (4) Columbia University Center for Women’s Reproductive Care (141 cycles); and (5) NYU Langone Fertility Center (132 cycles). *See respectively* CNY FERTILITY, <https://www.cnyfertility.com/> [<https://perma.cc/S73V-M87V>]; RMA N.Y., <https://rmany.com/> [<https://perma.cc/ZM7X-JTB9>]; WEILL CORNELL MED. CTR. FOR REPROD. MED., <https://ivf.org> [<https://perma.cc/A2GH-ZV7C>]; COLUM. U. CTR. FOR WOMEN’S REPROD. CARE, <http://columbiafertility.org> [<https://perma.cc/EZY4-BPMG>]; N.Y.U. LANGONE FERTILITY CTR., <https://nyulangone.org/locations/fertility-center> [<https://perma.cc/6VB3-UTMY>] (sources last visited Aug. 22, 2019).

¹⁰⁵ The Texas agencies are: (1) Houston Fertility Institute (234 cycles); (2) Texas Fertility Center (156 cycles); (3) Houston Fertility Specialists (106 cycles); (4) Dallas IVF (102 cycles); and (5) Fort Worth Fertility (96 cycles). *See respectively* HOUS. FERTILITY INST., <https://www.hfi-ivf.com> [<https://perma.cc/DY6V-7QJ7>]; TEX. FERTILITY CTR.,

and were not solely devoted to reaching the population of potential compensated egg transferors.¹⁰⁶ With respect to each of the twenty-five selected agencies, I then engaged in a content-based analysis to determine (a) whether the website contains any mention of the words “tax,” “income,” “Form 1099,” or any variation of these terms;¹⁰⁷ and (b) if the website did include tax-related words, whether the tax terms specifically related either to compensated egg transfers or to surrogacy (whether traditional or gestational).¹⁰⁸ Although it is possible that agencies provide tax information to prospective transferors who inquire by

<http://txfertility.com> [<https://perma.cc/W258-Q3PB>]; HOUS. FERTILITY SPECIALISTS, <https://www.houstonfertilityspecialists.com> [<https://perma.cc/H5Q6-DGF5>]; DALL. IVF, <http://www.dallasivf.com> [<https://perma.cc/K4E5-88AW>]; FORT WORTH FERTILITY, <http://www.fwivf.com> [<https://perma.cc/DP32-HPGP>] (sources last visited Aug. 22, 2019).

¹⁰⁶ Cf. *About Circle*, CIRCLE SURROGACY, <https://www.circlesurrogacy.com/about> [<https://perma.cc/4UHG-FAJP>] (last visited Aug. 22, 2019) (“Our experienced team is made up of former surrogates, egg donors and parents through our program.”).

¹⁰⁷ At least two of the agencies in the study have websites that mention support for a tax credit under The Family Act—legislation sponsored by Senator Kirsten Gillibrand and first introduced in 2011. See Family and Medical Insurance Leave (FAMILY) Act, S. 463, 116th Cong. (2019). Although ultimately unsuccessful, that legislation would have provided taxpayers with an income tax credit of more than \$13,000 for expenses related to in vitro fertilization. See, e.g., Celement, *HFI to Participate in Advocacy Day in Washington D.C. to Campaign for Tax Credit for IVF*, HOUS. FERTILITY INST. (Apr. 10, 2012), <https://www.hfi-ivf.com/2012/04/10/hfi-advocacy-day-in-washington-d-c/> [<https://perma.cc/WU6K-LCZD>]. As this was not information intended to inform compensated egg transferors or gestational surrogates about the income tax consequences of their receipts, mentions of advocacy or legislative support for Senator Gillibrand’s legislation were not counted. See *id.*; *Support the Federal Tax Credit for Fertility Patients*, PAC. FERTILITY CTR.: FERTILITY BLOG (May 25, 2011), <https://www.pacificfertilitycenter.com/blog/support-the-federal-tax-credit-for-fertility-patients-2> [<https://perma.cc/L38B-KJK5>].

¹⁰⁸ The website searches were conducted in two stages: a visual review of the site content followed by a Google search of the site. See, e.g., Corey Wainwright, *How to Search an Entire Website in Google*, HUBSPOT (Mar. 23, 2013, 9:00 AM), <https://blog.hubspot.com/marketing/how-to-do-a-google-site-search> [<https://perma.cc/D982-V7GU>].

On the difference between traditional and gestational surrogates, see, e.g., Shady Grove Fertility Ctr., *What’s the Difference Between a Gestational Carrier and a Surrogate?*, PR NEWSWIRE (May 7, 2012, 4:23 PM), <https://www.prnewswire.com/news-releases/whats-the-difference-between-a-gestational-carrier-and-a-surrogate-150487325.html> [<https://perma.cc/TGU5-96WT>] (explaining that traditional surrogate “is someone who donates her egg and then subsequently carries the child; she is genetically linked to that baby. Today, such cases of true surrogacy are very rare. In the case of a gestational carrier, the woman carrying the pregnancy is in no way biologically related to the child she is carrying; the eggs and sperm are derived from the ‘intended parents’ (or possibly an egg or sperm donor), through the process of In Vitro Fertilization (IVF). The egg is fertilized in the lab, and then the embryo (or embryos) is placed into the uterus of the gestational carrier”).

phone or visit in person,¹⁰⁹ the research goal was to occupy the same position as any woman who is at the initial stages of considering a compensated transfer at one of these major fertility clinics and who wants information about available compensation and its tax consequences without interacting with live clinic personnel or by posting questions to an internet forum.¹¹⁰ To be sure, in-depth interviews or surveys of clinic personnel or women who receive compensation for egg transfers would reveal details about what the various players know and share about the tax consequences of compensated human egg transfers.¹¹¹ But such interviews would move the research methodology farther away from the perspective of a woman at the initial stages of gathering information about the compensated egg transfer process.

Of the twenty-five agency websites studied, only three included information about the tax consequences of compensated egg transfers.¹¹² In other words, only

¹⁰⁹ Anecdotal evidence suggests that fertility clinics do not routinely provide tax information and that many compensated egg transferors are confused about their tax obligations even after *Perez*. See *supra* Part II.

¹¹⁰ Obtaining health-related information online is increasingly common. See, e.g., R.J.W. Cline & K.M. Haynes, *Consumer Health Information Seeking on the Internet: The State of the Art*, 16 HEALTH EDUC. RES. 671, 672 (2001) (describing “large and growing” use of internet by laypeople to obtain health-related information at beginning of twenty-first century); Wura Jacobs, Ann O. Amuta & Kwan Chan Jeon, *Health Information Seeking in the Digital Age: An Analysis of Health Information Seeking Behavior Among U.S. Adults*, COGENT SOC. SCI., Mar. 2017, at 1, 2 (reporting that “one in three US adults use the internet to diagnose or learn about a health concern”).

¹¹¹ For an example of outstanding research on the fertility industry based on in-depth personal studies, see generally ALMELING, *supra* note 6; Nancy J. Kenney & Michelle L. McGowan, *Looking Back: Egg Donors’ Retrospective Evaluations of Their Motivations, Expectations, and Experiences During Their First Donation Cycle*, 93 FERTILITY & STERILITY 455 (2010) (reporting results of internet-based or mail-based questionnaire of eighty women from twenty states who donated eggs between 1989 and 2002).

¹¹² The clinics providing tax information specifically for compensated egg transferors are: (1) Pacific Fertility Center; (2) NYU Langone Fertility Center; and (3) IVF1. See *respectively* *Egg Donor FAQs*, PAC. FERTILITY CTR., <https://www.pfcdonoragency.com/egg-donor/for-egg-donors/egg-donor-faq#question-558> [<https://perma.cc/DJ2E-LVF3>] (“Compensation for egg donation is considered taxable income by the Internal Revenue Service and the PFC Egg Donor agency is obligated to report this income to the IRS. You will receive a 1099 tax form at the beginning of the year after your egg donation so that you can report your earnings and pay the appropriate taxes.”); *Donating Your Eggs*, N.Y.U. LANGONE FERTILITY CTR., <https://nyulangone.org/locations/fertility-center/donating-your-eggs> [<https://perma.cc/PY2C-TUJR>] (“The Fertility Center provides you with a 1099 tax form for the payment amount, as you are required to report the income to the Internal Revenue Service.”); *Egg Donor Information*, IVF1, <http://www.ivf1.com/egg-donor-information> [<https://perma.cc/3786-Z6RF>] (“[Y]ou must pay taxes on any money you receive for donating your eggs. We must report how much we pay you, and you will receive a Form 1099 to use in preparing your tax return.”) (sources last visited Aug. 22, 2019).

One Florida agency appears to conduct a lottery for a free IVF cycle, seemingly based on

twelve percent of the subject clinics provide readily publicly available tax information to compensated human egg transferors. One of the agencies' websites includes an older article, written before the *Perez* decision, that encourages intended parents (not egg transferors) to consult with their tax advisor regarding their obligation to issue a Form 1099 to a compensated egg transferor.¹¹³ A study of agencies devoted solely to or mostly interfacing with prospective compensated egg transferors and transferees, instead of patients needing a range of fertility services, might yield different results.¹¹⁴

All of the twenty-five agencies' sites did include financial-related information for prospective parents who are concerned about how to afford ART.¹¹⁵ This information appears aimed at addressing intended parents' questions and concerns in a way that makes ART seem affordable.¹¹⁶ To talk about the cost of

attendance at an in-person informational seminar. See *Terms and Conditions for Recipient of Free Non-Surrogacy IVF Cycle Drawing*, FLA. INST. FOR REPROD. MED., <https://www.fertilityjacksonville.com/terms-and-conditions-for-ivf-drawing/> [<https://perma.cc/YYA6-Q75J>] (last visited Aug. 22, 2019) (providing that winner of lottery must acknowledge that "[r]esponsibility for any tax liability arising from winning the free IVF cycle is mine alone, and is to be determined by myself or my designated tax preparer"). It is unclear why this particular agency is able to give clear income tax advice regarding the treatment of prizes and awards under I.R.C. § 74 (prizes and awards generally subject to income tax) but not under I.R.C. § 61 (income from services, dealings in property, and other activities).

¹¹³ See Yifat Sahltiel, *Egg Donation Takes Legal Planning*, CNY FERTILITY (Sept. 27, 2013), <https://www.cnyfertility.com/egg-donation-takes-legal-planning-by-yifat-shaltiel-esq/> [<https://perma.cc/3ZGC-BCJA>] (advising in post written pre-*Perez* and not since updated that with respect to payments by intended parents to a compensated egg transferor, "Your attorney and a certified accountant will assist you in answering important questions, such as whether the compensated egg donor must receive a Form 1099 to use in her own tax return preparation, and whether the egg donor fees and expenses would be an allowable medical care expense under a flexible spending account").

¹¹⁴ See *FAQs: Egg Donors*, CIRCLE SURROGACY, <https://www.circlesurrogacy.com/egg-donors/faqs> [<https://perma.cc/YNL4-KJM8>] (last visited Aug. 22, 2019) ("Is egg donation compensation taxable income? Yes. The United States Tax Court has concluded that amounts received by a donor represents [sic] taxable compensation income. Circle Egg Donation will issue 1099s for all egg donors who receive egg donors fees on or after January 15, 2015.").

¹¹⁵ See, e.g., *Flexible Financial Options*, SAN DIEGO FERTILITY CTR., <https://www.sdfertility.com/fertility-financing#fertility-financing-plans> [<https://perma.cc/BC3L-BPD3>] (last visited Aug. 22, 2019) (describing financing options from various private lender discounts on "packages" of fertility services and "Success Guarantee Plan" that reimburses 100% of cycle fee if cycle does not result in live birth); *Patient Resources and Links*, HRC FERTILITY, <https://www.hrcpasadena.com/patient-resources> [<https://perma.cc/6JCH-ESSH>] (last visited Aug. 22, 2019) (providing link to nonprofit organization that provides financial assistance to low-income families struggling with infertility issues).

¹¹⁶ *Egg Donation Cost*, ADVANCED FERTILITY CTR. CHI., <https://www.advancedfertility.com/eggdonationcost.htm> [<https://perma.cc/4SDM-G658>] (last visited Aug. 22, 2019) (showing breakdown of \$26,000 complete cost of one egg donation cycle).

ART, it would appear to be necessary to discuss taxes as part of the reality of the process that intended parents must confront, but discussion of taxes is absent from the discourse on the studied sites. As discussed in the next Part, introducing the topic of taxation into the ART conversation would expose its commercial aspects instead of keeping the focus on a family with children, financial sacrifices that might be necessary to achieve that, and giving the gift of life.

IV. EXPLAINING AND ADDRESSING THE ABSENCE OF TAX TALK

A. *Why Fertility Clinics Do Not Make Tax Information Available*

Together, the shortage of reliable and accurate information about the tax consequences of compensated egg transfers and the lack of open discussion about the commercial aspects of the fertility industry add up to an absence of “tax talk.” Without tax talk, potential egg donors, intended parents, and the fertility clinics themselves can operate primarily within a discourse of altruism. Fertility clinics push the altruism narrative on potential egg transferors (and surrogates), but do not do so with prospective male sperm transferors.¹¹⁷ Altruism functions as a proxy for women’s likely compliance with medical protocols and honesty about one’s personal and family health history.¹¹⁸ This altruism narrative is encouraged by egg agencies that advise women to use words like “help” in writing their profiles, which are shown to intended parent(s).¹¹⁹ Even the advertising directed by the clinics at potential compensated egg transferors urges women to “give the ultimate gift”¹²⁰ and ask themselves if they have a “giving spirit,” because “[m]aking others happy makes you happy.”¹²¹ A

¹¹⁷ See ALMELING, *supra* note 6, at 36 (“In appealing to women’s sense of altruism, physicians placed much more emphasis on egg donors’ motivations than they ever had with sperm donors.”). Almeling demonstrates that early researchers believed that if a woman’s motivation was primarily monetary, she would be less likely to comply with the multiple steps required to produce extractable eggs, and she might not be honest about her health history. See *id.* at 37 (“[I]f [the prospective egg provider’s] motivation isn’t correct, then they may not be telling you the truth. Their motivation, it may cloud their honesty in terms of saying whether they have had an infectious disease in the past or whether there’s a genetic disease in the family.” (quoting interview with physician-researcher)).

¹¹⁸ *Id.* (providing rationale for expectation that women have altruistic motivations in donating eggs).

¹¹⁹ *Id.* at 47 (showing that vast majority of potential egg transferors at three major fertility clinics reported exclusively altruistic motives, a small percentage reported mixed altruistic and financial motives, and almost none reported being motivated by financial payments alone); see also Krawiec, *The Exchange of Human Eggs*, *supra* note 37, at 354-56 (analyzing fertility industry’s reliance on altruism narrative).

¹²⁰ See, e.g., *Become an Egg Donor: Giving the Ultimate Gift*, SEATTLE REPROD. MED., <https://seattlefertility.com/understanding-fertility/donors-and-surrogacy/become-an-egg-donor/> [<https://perma.cc/XHA5-NH3K>] (last visited Aug. 22, 2019).

¹²¹ See, e.g., *10 Signs You’d Make a Great Egg Donor*, CONCEIVEABILITIES (Sept. 4, 2018), <https://www.conceiveabilities.com/about/blog/signs-you-d-make-a-great-egg-donor>

recent Canadian study, however, suggests that most compensated egg transferors have mixed motives.¹²² Those researchers acknowledge that attitudes toward compensated egg transfers may vary from country to country, depending on public policy and the legal regime.¹²³

For intended parents in the United States, the absence of tax talk has the benefit of creating a psychological distance from the commercial aspects of the fertility industry as a whole. If there is no mention of taxes, then intended parents can remain uninformed about the fact that their payments to the egg transferor will be taxed just like payments for any other kind of work. The intended parents are then free to embrace the altruism narrative. Indeed, the terms of the egg transfer contract facilitate the characterization of payments by the intended parent(s) to the compensated egg transferor as a sort of gratuity or “make-whole” payment for the woman’s inconvenience, instead of a direct quid pro quo of eggs for money.¹²⁴ If intended parents (and compensated egg transferors) remain uninformed of the tax consequences of their actions, they might be less likely to think of themselves as engaged in “baby buying” or “baby selling”—

[<https://perma.cc/YTQ6-RE8W>] (providing examples of characteristics that would make woman prime candidate for compensated egg transfers, including being a nonsmoker, being generous, wanting to make others happy, having a flexible schedule, having a “go-getter” personality, being a “tough cookie,” falling into correct age range, and maintaining proper mental and physical fitness).

¹²² Lindsay B. Gezinski et al., *Exploring Motivations, Awareness of Side Effects, and Attitudes Among Potential Egg Donors*, 41 HEALTH & SOC. WORK 75, 77 (2016) (“Research suggests that the two largest motivating factors in a woman’s decision to donate are monetary compensation and altruism; however, there are conflicting data about which motivation is primary. Financial compensation has been found to be a larger motivating factor among college students, who may have limited financial means of support.” (citations omitted)); see also S. Purewal & O.B.A. van den Akker, *British Women’s Attitudes Toward Oocyte Donation: Ethnic Differences and Altruism*, 64 PATIENT EDUC. & COUNSELING 43, 47 (2005).

¹²³ Gezinski, *supra* note 122, at 76 (reporting study that found that attitudes about compensated egg transfers in general and with regard to specific questions, such as whether child should know their genetic parents, may be influenced by “national policy and liberalization”).

¹²⁴ See, e.g., *supra* text accompanying notes 29-32 (describing contractual details between egg transferor and donor agency); *supra* text accompanying note 33 (giving one example of contract between a compensated egg transferor and intended parents). On certain ART payments to third parties as a form of “baby buying,” see generally Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009) (calling for removal of bans against baby selling and other laws that diminish capacity of babymarket suppliers to access marketplace); Gregory Pence, *De-Regulating and De-Criminalizing Innovations in Human Reproduction*, 39 CUMB. L. REV. 1 (2008) (arguing against federal and state prohibitions of new forms of human reproduction). The suggestion that payments for human egg production are tantamount to baby buying would be negatively received by intended parents and scholars, among others, because “baby buying” is, of course, illegal and thus stigmatized.

transactions that are illegal and stigmatized.¹²⁵ Yet if one focuses on the substance of the transactions, it is far from obvious that the intended parent(s) are *not* engaged in buying the constituent genetic material or labor in order to create a baby or that the compensated egg transferor is *not* engaged in selling the same. The intended parent(s) compensate a woman for following a particular medical protocol designed to cause her to produce eggs that can be fertilized with sperm from one of the intended parents or a commercial sperm bank and then gestated by one of the intended parents or a paid surrogate. All of the elements necessary to create human life are brought together in commercial transactions. While that may not be the same as buying or selling an actual baby, the practices may not differ significantly in substance.

Introducing tax talk into the discussion of compensated egg transfers could help minimize or even eliminate the taboo or shame many people associate with infertility and sterility.¹²⁶ Recognizing the commercial nature of the payments to compensated egg transferors, for example, should not be read as tantamount to an invitation to disallow the payments and transfers (or similar payments for sperm or surrogacy services). ARTs create many happy families.¹²⁷ Many of those families are led by persons who (unfairly and for too long) have been denied the ability to become biological or legal parents.¹²⁸ The law should

¹²⁵ See *supra* note 84 (suggesting decriminalizing and destigmatizing commercial trade in human eggs). See generally Jonathan G. Stein, Note, *A Call to End Baby Selling*, 24 T. JEFFERSON L. REV. 39 (2001) (arguing that Hague Convention's consent requirements are not strong enough to end international baby selling).

¹²⁶ In the United States, there is a national organization devoted to the support of "[a]ll people challenged in their family building journey [because these people] should reach their resolution by being empowered by knowledge, supported by community, united by advocacy, and inspired to act." RESOLVE, <https://resolve.org/> [<https://perma.cc/47AK-PMA7>] (last visited Aug. 22, 2019). Resolve organizes local support groups and provides a variety of resources, including tips for "managing infertility stress." See *Managing Infertility Stress*, RESOLVE, <https://resolve.org/support/managing-infertility-stress> [<https://perma.cc/3R9Y-BWRE>] (last visited Aug. 22, 2019).

¹²⁷ See Stryker, *supra* note 5 (providing "guesstimate" of 30,000 to 50,000 live births per year from commercially banked sperm).

¹²⁸ See, e.g., *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375-76, 1385 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004) (denying gay couple right to adopt); *In re Adoption of H.*, 330 N.Y.S.2d 235, 247-48 (Fam. Ct. 1972) (denying adoption and removing thirteen-month-old child from single-parent house in favor of married couple); *In re W.E.R.*, 663 S.W.2d 887, 888 (Tex. Ct. App. 1983) (affirming trial court's denial of adoption to unmarried doctor), *rev'd*, 669 S.W.2d 716 (Tex. 1984) (per curiam); see also NAT'L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 309, 311 (2012) (arguing for amendment to Americans with Disabilities Act to protect rights of disabled individuals to access reproductive technology services and to adopt); Emily Friedman, *Obese Face Obstacles in Adoption Process*, ABC NEWS (July 31, 2007), <http://web.archive.org/web/20150406230031/https://abcnews.go.com/Health/story?id=3429655&page=1> (reporting that Missouri man weighing 500 pounds was denied right to adopt infant cousin).

support the creation of loving families in whatever form they come, and without regard to the sex, gender identity, marital status, or sexual preferences of the intended parent(s). Indeed, it is important to acknowledge that use of reproductive technologies is unlikely to be rolled back in the United States or anywhere else. If anything, demand for ART likely will increase.¹²⁹ Ignoring the commercial aspects of the transactions obscures how the fertility industry functions and who profits the most.

Fertility clinics, and those who own them, benefit from the absence of tax talk. If potential compensated egg transferors were certain of their tax liabilities, the women might demand a “gross up” in the price they charge.¹³⁰ If the compensated egg transferors raise prices too high, the market of potential parents would shrink and the clinics’ profits would decline.¹³¹ To be sure, fertility clinics may not perceive themselves as having an obligation to inform the parties of the tax consequences of any money that changes hands. At the same time, tax liability is still an area that many potential (and experienced) compensated egg transferors do not understand, even in the wake of *Perez*.¹³² By failing to provide easy-to-access tax information, the clinics allow potential egg transferors to remain confused or uninformed, thus depressing the price that the women may demand and maintaining the altruism narrative that serves as the foundation for the entire fertility industry.

The introduction of “tax talk” has the potential to destabilize or even disrupt the supply of human eggs. That might be because of an association of taxation with a negative social judgment about the activity of compensated egg transfers (which might repel some potential compensated egg transferors). Any price increase that women might demand for their eggs to cover their tax liability might negatively impact the size of the market for intended parent(s). It is not

¹²⁹ If anything, the market for ART appears to be increasing even though price caps on the amount that women can demand for their eggs have been lifted in wake of the settlement of the class action lawsuit in *Kamakahi v. American Society for Reproductive Medicine*, 305 F.R.D. 164 (N.D. Cal. 2011). See *Assisted Reproductive Technology (ART) Market Size Worth USD 31 Billion by 2023*, *supra* note 18; Knaub, *supra* note 37.

¹³⁰ This is possible because of the settlement in *Kamakahi*.

¹³¹ ART is already expensive for individuals who cannot or choose not to reproduce on their own. See, e.g., Jim Hawkins, *Financing Fertility*, 47 HARV. J. ON LEGIS. 115, 115-16 (2010) (“One common treatment, in vitro fertilization ‘IVF,’ costs over \$12,000 for a single cycle. But unlike other expensive treatments, fertility treatments are not covered by most health insurance programs, leaving patients to determine how to pay for treatments on their own. Given these prohibitive costs, only a small fraction of those seeking IVF treatment can afford it.” (citations omitted)); Lauren R. Roth, *Reproductive Selection Bias*, 27 HEALTH MATRIX 263, 263 (2017) (“Decades after the advent of assisted reproductive technology . . . it remains a tool largely of upper-class whites. . . . If reproductive liberty is tied to equality through access to medical procedures, scholars must finally answer the question of what equality requires in a system that permits the use of ARTs.”).

¹³² See *supra* Section II.B (discussing what women tell each other about tax consequences of human egg transfers post-*Perez*).

clear, however, whether that market is elastic in a way that very few markets are, given how strong the desire to have a baby can be and the financial sacrifices that intended parent(s) are willing to make in order to have a baby that is biologically related to one, both, or neither of them.¹³³ In any event, clinics have no incentive to provide clear tax guidance or engage in substantive tax talk.¹³⁴

B. *Administrative Solutions to the Absence of Tax Talk*

Generally speaking, each business in the United States is required to issue Form 1099-MISC to any nonemployee who provides services to the business.¹³⁵ It cannot be assumed that the absence of publicly available tax information on twenty-two out of twenty-five clinics' websites is evidence that most clinics do not issue Form 1099-MISC to their compensated egg transferors,¹³⁶ but this Article's empirical analysis raises the possibility that many or most fertility clinics do not comply with the obligation to issue Form 1099-MISC. The first step the IRS should take is issuing clear guidance to all fertility clinics that they are obligated to issue Form 1099-MISC to any compensated egg transferor. The IRS should also periodically audit fertility clinics for their compliance with the obligation to issue Form 1099-MISC. The failure of an individual taxpayer to report income shown on Form 1099-MISC should be easily caught by the IRS's Automated Underreporter Program.¹³⁷ But the IRS audits fewer than 1.2 percent of individual income tax returns in the United States each year, so there is a limited likelihood of actual taxpayer audits, even if a discrepancy is caught by its program. And even if audits were to occur, any revenue that the payment of income tax would generate on amounts received for compensated egg transfers

¹³³ See, e.g., Nina Bahadur, *The Cost of Infertility: This Is How Real People Pay for IVF*, SELF (Jan. 8, 2018), <https://www.self.com/story/the-cost-of-infertility> [<https://perma.cc/D874-J5DQ>] (describing financial toll of reproductive technology on five families that turned to savings, borrowing against retirement funds, borrowing from friends and family, taking out personal loans, and spending maximum permitted on credit cards). For a general discussion of market elasticity, see, e.g., Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 480-94 (2010) (exploring market definition and relationship to elasticity and cross-elasticity); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 963 (1981) (describing entities' power in marketplace as dependent on variety of factors, including elasticity of supply and demand).

¹³⁴ See *supra* text accompanying note 18 (noting that introducing "tax talk" has potential to destabilize the supply of human eggs).

¹³⁵ See generally *Form 1099-MISC*, *supra* note 20.

¹³⁶ See *supra* Part III (finding that only three of twenty-five agencies studied include tax consequences of compensated egg transfers on their websites).

¹³⁷ IRS, U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERVICE DATA BOOK, 2014, at 37 (2015) (describing how IRS uses its Automated Underreporter Program to "match[] . . . information returns to tax returns and contact[] taxpayers to resolve discrepancies").

would be de minimis in terms of total tax revenue. Pursuing these audits is not an especially efficient use of the government's resources.¹³⁸

For that reason, the ASRM and the Society for Assisted Reproduction, key players in the fertility industry, could leverage their role as accreditors of fertility clinics to require the issuance of Form 1099-MISC to compensated egg transferors.¹³⁹ This would put taxpayers on notice of their filing obligations and likely lead to greater compliance by both fertility clinics and compensated egg transferors. Although the transferors, intended parents, and fertility clinics all have an incentive to remain either ignorant of or silent about the tax consequences of their activities, the accrediting agencies have an obligation to make sure that the clinics in their network are complying with the law.

Beyond issuing Form 1099-MISC, fertility agencies should include on their websites a short statement to inform compensated egg transferors that the law may require them to report their income to the IRS, that they may owe income tax, and that each individual should consult with her tax adviser. This proposal does not contemplate that fertility agencies get into the business of providing specialized advice to each and every prospective compensated egg transferor. Rather, the clinics' publicly accessible websites should include a generic statement about the taxability of any payments received and the importance of seeking professional advice, not unlike the statement that one might receive after making a contribution to a charitable organization.¹⁴⁰

V. THE IMPORTANCE OF TAX TALK

A. *Taxation and Identity*

Professor Tsilly Dagan has argued that tax law plays a key role in identity formation in the process of sorting through human behaviors and assigning monetary value to those behaviors.¹⁴¹ This is what Dagan calls the "currency of taxation."¹⁴² She writes that:

[T]he currency of taxation necessarily sorts through attributes and actions and measures and arranges them along the income tax scale [T]his process of classifying, comparing, and measuring has certain features that

¹³⁸ See *id.* at 27 tbl.9b (reviewing individual income tax returns examined by size of adjusted gross income).

¹³⁹ See *supra* note 20 and accompanying text (arguing that ASRM should require issuance of Form 1099-MISC to compensated egg transferors).

¹⁴⁰ See, e.g., *Charitable Contributions*, AM. RED CROSS, <https://www.redcross.org/donations/ways-to-donate/charitable-contributions.html> [<https://perma.cc/4NAZ-EBZC>] (last visited Aug. 22, 2019) ("The American Red Cross is recognized by the IRS as a not for profit 501c3 charitable organization. Your donation to the Red Cross is tax deductible to the full extent of the law.").

¹⁴¹ Tsilly Dagan, *The Currency of Taxation*, 84 *FORDHAM L. REV.* 2537, 2537 (2016).

¹⁴² *Id.*

challenge and, at times, even reconstruct the reality it is intended to measure, thereby shaping our identities in a number of ways.¹⁴³

In other words, the tax law cocreates the social meaning for certain behaviors, based on the tax treatment accorded to that behavior, as the tax law goes about its business of comparing taxpayers and their activities. Dagan distinguishes between “baseline” questions, which are normative questions about whether a particular activity is (or should be) taxable, and valuation questions, involving the monetary value assigned to the activity for tax purposes.¹⁴⁴ It turns out that compensated egg transfers implicate both levels of concerns for the egg transferors themselves.

At the baseline level, many compensated egg transferors object to the notion that the payments they receive are taxable.¹⁴⁵ The resistance seems located in an ideology much more complicated than a general aversion to taxation that most people share. After all, no one likes paying taxes.¹⁴⁶ But the objections to taxation voiced by compensated egg transferors are better understood as related to: (a) their stated altruistic motives for engaging in the activity, (b) the nature of the activity being somehow beyond the scope of taxation, and (c) their belief that contracted-for physical injuries should be entitled to tax-free compensation. It is not unusual to read an egg transferor’s explanation that she is “helping” an infertile couple have a baby.¹⁴⁷ Others talk about the priceless “gift of life” that they are giving.¹⁴⁸ Still others emphasize the physical pain and suffering they endure in the form of painful injections and other treatments.¹⁴⁹

¹⁴³ *Id.* at 2537-38.

¹⁴⁴ *Id.* (proposing method for measuring income effectively through income tax).

¹⁴⁵ *See, e.g., supra* note 82 and accompanying text (providing example of compensated egg transferor who believed that payments she received should not be taxable).

¹⁴⁶ Justice Oliver Wendell Holmes famously wrote that “[t]axes are what we pay for civilized society.” *Compañía Gen. de Tabacos v. Collector*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

¹⁴⁷ *See, e.g.,* Lisa Belkin, *An Egg Donor Responds*, N.Y. TIMES: MOTHERLODE (July 22, 2011, 2:11 PM), <https://parenting.blogs.nytimes.com/2011/07/22/an-egg-donor-responds/> (“Like one third of anonymous egg donors in the United States, I was motivated to donate for altruistic reasons . . . I saw the anxious looks on the faces of couples arriving for open-house meetings [at a social services agency] about the adoption process and heard heartbreaking stories about the great lengths that people go to in order to become parents.”); *cf.* JULIA DEREK, CONFESSIONS OF A SERIAL EGG DONOR 21-22 (2004) (detailing primarily financial motivation for egg transfers and negative assessment of infertility industry’s treatment of compensated egg providers).

¹⁴⁸ *See, e.g., Egg Donor*, INDIAMART, <https://www.indiamart.com/proddetail/egg-donor-7373294997.html> [<https://perma.cc/2KEA-GDKF>] (last visited Aug. 22, 2019) (“Each of our egg donors have the wonderful experience of giving the gift of life, all while earning money for school, their family or future goals. We are proud of the genuine relationships we develop with our egg donors, as we guide them through the egg donation process.”).

¹⁴⁹ *See supra* text accompanying note 24 (detailing Perez’s testimony regarding physical pain she experienced when transferring eggs).

The problem with the altruism line of argument is that, but for the money changing hands, it is unlikely that many (or perhaps any) women would choose to transfer their eggs to people they do not know. Indeed, the rhetoric of altruism is the bedrock on which the fertility industry is built. To have the compensated egg transferors conceive of themselves as “giving” a “gift” to an infertile couple allows the industry to keep prices low.¹⁵⁰

The second argument—that the gift of life should be untaxed—is undergirded by a view about biology itself that is not entirely foreign to the tax system. Dagan has identified human talents, disabilities, and place of residence as three factors that the tax system treats as “merely part of who that person is” and thus beyond the reach of taxation.¹⁵¹ Although no compensated egg transferor makes this argument explicitly, extending Dagan’s analysis to the context of compensated egg transferors reveals the theoretical basis of a potential argument for nontaxation. The reasoning proceeds as follows: biology itself, in the form of a woman’s ability to produce eggs or carry a child to term, may be so intrinsically part of who she is that it should be irrelevant for tax purposes. According to this line of reasoning, if she chooses to be compensated for any biological material or services, that compensation should be beyond the reach of the tax system.

The problem with this argument, however, is that it fails by reference to both legal precedent and by analogy to the taxation of imputed income. In the past, the IRS has ruled that an uncompensated donation of blood—a necessary fluid in order to stay alive—constitutes the provision of a service (and thus gives rise to no charitable deduction for income tax purposes).¹⁵² On the other hand, the IRS’s Chief Counsel in 1975 opined that donating breast milk is treated as a donation of property for income tax purposes (and thus theoretically gives rise to an income tax charitable deduction, although the value of the deduction in that particular case was zero because the taxpayer was required to make reductions for certain built-in capital gain).¹⁵³ Receiving compensation for one’s blood plasma does give rise to taxable income, although it is not clear whether that is because the taxpayer is providing a service or selling property.¹⁵⁴

¹⁵⁰ See *supra* Section IV.A (detailing altruism rationale for transferring eggs).

¹⁵¹ Dagan, *supra* note 141, at 2538 (noting factors beyond tax system’s reach).

¹⁵² Rev. Rul. 162, 1953-2 C.B. 127, 128 (finding that donation of blood is a service); see also Treas. Reg. § 1.170-2(a)(2) (1969) (“No deduction is allowable [under § 170] for 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.”).

¹⁵³ I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975) (explaining that taxpayer was not entitled deduction for fair market value of her breast milk because she had zero basis in milk and it was not a capital asset held for more than six months).

¹⁵⁴ *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (en banc) (resolving case on procedural grounds but stating in dicta that “blood plasma, like a chicken’s eggs, 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,” while also noting that activity of compensated plasma transferor “does resemble work”).

Consider also the personal nature of imputed income. If a woman cares for her own minor child instead of hiring a babysitter, she has imputed income equal to the value of these self-rendered services.¹⁵⁵ However, that income is not subject to taxation under U.S. tax law.¹⁵⁶ The reason appears to be that doing something for oneself (or for one's minor child, whom the parent has a legal duty to support) is simply too personal, and perhaps too difficult to value, to take it into account for tax purposes. But if the same woman provides compensated care for a third party's minor child, the care provider does not have imputed income.¹⁵⁷ She has actual income.¹⁵⁸ So, then, the argument goes, when a woman's ovaries release an egg each month, she is not subject to taxation because it is part of *who she is*. But if someone pays the same woman to take medicines to produce eggs, and the eggs are extracted and transferred to the intended parent(s), the payment should be (and is) subject to taxation.

B. *Dirtying Activities with Taxation*

There is something about the act of taxation itself that egg transferors find objectionable, as if taxation devalues the act of egg transferral in a way that compensation on its own does not.¹⁵⁹ In other words, egg transferors believe in their right to be compensated (notwithstanding the "gift" rhetoric); they find that the *compensation* is not dehumanizing, but the *taxation* is. It is almost as if taxation itself functions as a kind of social or moral devaluation or disapproval of paid transferors' activities.

Sociologist Viviana Zelizer has argued that the labels applied to money carry clear value judgments with them.¹⁶⁰ Sociologist Bruce Carruthers has extended the same analysis to taxation, saying that "the social meaning of an activity can migrate to a tax that is imposed on that activity and to the revenues that it

¹⁵⁵ On imputed income generally and its relationship to taxation of the family, see, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1426 (1975) (stating that income splitting is treated as form of tax "loophole" based on notion of "taxpaying capacity that takes into account the imputed income of one-job married couples but not the imputed income of other persons"); Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 45 (1996) (describing way imputed income escapes taxation as it is "both non-monetary and the taxpayer provides it to herself"); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1574 (1996) (arguing in favor of taxation of imputed income arising from household labor).

¹⁵⁶ See, e.g., Silbaugh, *supra* note 155, at 45 (explaining tax treatment of imputed income).

¹⁵⁷ See, e.g., I.R.C. § 61(a)(1) (2012) (stating that gross income includes amounts received as compensation for services).

¹⁵⁸ *Id.* (noting that compensation for services is included in individual's gross income).

¹⁵⁹ See Bruce G. Carruthers, *The Semantics of Sin Tax: Politics, Morality, and Fiscal Imposition*, 84 FORDHAM L. REV. 2565, 2565 (2016) ("Legal but morally problematic market-based activities can be discouraged through the price system: the imposition of a government tax raises prices and makes the taxed activity more expensive for participants to undertake.").

¹⁶⁰ Viviana A. Zelizer, *The Social Meaning of Money: "Special Monies,"* 95 AM. J. SOC. 342, 365-67 (1989) (describing meaning of "pin money" and family budgets).

generates. Taxes can *represent* meaning.”¹⁶¹ Thus, in many contexts, taxation functions as a form of social or governmental disapproval. Consider so-called “sin taxes,” like taxes on alcohol or cigarettes.¹⁶² With those products, the tax is used as a signifier for a behavior that is socially undesirable. The tax may be used as a sort of “cleansing mechanism,” such as when taxes on cigarettes are used to fund public schools, for example.¹⁶³

But it is not necessarily the case that to tax something is to disapprove of it. There is a rich tradition in critical race theory that invites consideration of legal rules and invocation of laws (presumably including tax laws) as a way of marking a transaction as worthy of respect and dignity. In *The Alchemy of Race and Rights*, Professor Patricia Williams describes her white male colleague’s experience renting an apartment in New York, where the deal was closed with a cash deposit but no formal lease or keys.¹⁶⁴ The colleague said “he didn’t need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a form contract.”¹⁶⁵ In contrast, Williams, an African American woman, reports a different rental experience when she leased an apartment in a building owned by friends: “In my rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm’s-length transactor.”¹⁶⁶ For Williams, formality in the transaction clearly delineated her rights and signaled the landlord’s respect for her as a tenant. She referenced her experience with white landlords in the neighborhood of her youth: “I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; . . . such informality in most white-on-black situations signals distrust, not trust.”¹⁶⁷ This line of reasoning, one that recognizes that power is expressed through law, and that law’s power may operate differently depending on the race of the legal actors, is one of the hallmarks of critical race theory.¹⁶⁸

¹⁶¹ Carruthers, *supra* note 159, at 2566-67 (footnote omitted).

¹⁶² *Id.* at 2574, 2578 (describing purpose and effect of “sin taxes” on alcohol and cigarettes).

¹⁶³ Linda Sugin, Professor of Law, Fordham Univ. Sch. of Law, Remarks at the Fordham University Law Review Symposium: We Are What We Tax (Nov. 13, 2015) (notes on file with author).

¹⁶⁴ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146 (1991) (“It turned out that Peter had handed over a \$900 deposit in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation.”).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 147.

¹⁶⁷ *Id.* at 147-48.

¹⁶⁸ See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, at ix (1992) (calling racism “an integral, permanent, and indestructible component of this society”); DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* 9 (2007) (“[I]n using the traditional approach to legal problem-solving, race crits

Extending the critical-race analysis to taxation, there is a way to view the taxation of compensated egg transfers as a way of bringing that activity into the mainstream of commercial activity. Rather than marking the activity as “sinful” or “bad,” imposing a tax on the transfer of human eggs recognizes that it is work like any other. Failing to impose taxation on the transfers would have the consequence of turning the reproductive work into tax-preferred work.¹⁶⁹ Given the choice between earning \$20,000 through, say, office work that is taxable, or earning the same amount through reproductive work that is nontaxable, the rational actor would always choose the nontaxable work as long as she is able.¹⁷⁰ Such tax-preferred status would be an incentive for women to engage in reproductive work over other market labor that presumably would count toward future Social Security benefits and similar programs.¹⁷¹ This type of preference would skew women’s choices and ultimately put them at an economic disadvantage in the long term compared to their male counterparts.¹⁷²

CONCLUSION

Tax talk about the consequences of compensated human egg transfers and other reproductive technologies is crucial to understanding how the fertility

do not concede the universality or objectivity of the law.”); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 120-29 (Richard Delgado & Jean Stefancic eds., 3d ed. 2017) (exploring critical race theory’s critique of power, especially as expressed by criminal justice system).

¹⁶⁹ Professor Nancy Staudt makes this argument in the context of women’s unpaid labor in the home. See Staudt, *supra* note 155, at 1571 (“By providing only a limited childcare subsidy, for example, the Tax Code provides financial incentives for women to work in the home after bearing children.”). For a similar argument made in the context of gestational surrogacy, see generally Bridget J. Crawford, *Taxing Surrogacy*, in *CHALLENGING GENDER INEQUALITY IN TAX POLICY MAKING: COMPARATIVE PERSPECTIVES* 102 (Kim Brooks et al. eds., 2011) (“[S]urrogacy is taxed-preferred work. When faced with the choice of doing market labour or serving as a gestational surrogate, if the compensation is the same, a woman may be more motivated to act as a surrogate.”).

¹⁷⁰ Admittedly, compensated egg transfers are available as a form of work for only some women and only for a limited period of time during their lives. It is not uncommon for a fertility clinic to require that any potential transferor meet certain age, weight, and educational requirements. See, e.g., *Become an Egg Donor: Giving the Ultimate Gift*, *supra* note 120 (listing “egg donor qualifications” as being between twenty-one and thirty-two years old, being nonsmoker, being non-drug user, having maximum body mass index of thirty, and having at least high school diploma or its equivalent).

¹⁷¹ See Crawford, *supra* note 169, at 107 (“Taxing surrogacy will benefit women’s long-term economic strength because their otherwise unvalued or undervalued work will count as market labour for purposes of social security and other benefits.”).

¹⁷² See, e.g., Claire Cain Miller, *10-Year Baby Window Is Key to Women’s Pay Gap*, N.Y. TIMES, Apr. 11, 2018, at B3 (citing study by Census Bureau that pay gap between married women with children and married men with children “grows larger with each additional child. It does not begin to shrink until children are around 10. For most women, their pay never reaches that of their husbands”).

industry operates. It is difficult to understand the persistence of the altruism narrative as applied to compensated egg transferors until one understands that the continued vitality of that narrative depends in part on the suppression of tax talk. Without tax talk, one cannot see clearly that the majority of the financial benefits from the vast amount of money changing hands in the fertility industry accrues to the drug-makers, doctors, and clinics on which people who are eager (and sometimes desperate) to have children rely.¹⁷³ Those who do the actual reproductive work are not profiting the most, either.

Active reproductive markets exist in many parts of the world, especially in the United States. This is a complex and even troubling subject for anyone who values women's autonomy and a woman's right to say what happens to her own body, while being simultaneously concerned about the commodification of bodies—especially the bodies of women and children.¹⁷⁴ Regardless of one's evaluation of the morality of these markets in genetic materials and bodies, the reality is that it is unlikely that any country will scale back on the legal uses of reproductive technologies. If anything, the industry is likely to expand as the technologies become more sophisticated, numerous, and perhaps even affordable.¹⁷⁵

Tax talk allows all participants in and observers of the fertility industry to evaluate the social value accorded by the tax system to its constituent choices and practices and the economic value assigned to different legal actors. In the United States, taxation has the potential to bring reproductive work into the realm of recognized and respected labor. Worldwide, taxation plays a role in

¹⁷³ See *supra* note 18 and accompanying text (discussing ART's market size both domestically and globally).

¹⁷⁴ See, e.g., *In re Baby M*, 537 A.2d 1227, 1249-50 (N.J. 1988) (“[T]he essential evil is the same [as in the sale of a child for adoption], taking advantage of a woman's circumstances (the unwanted pregnancy or the need for money) in order to take away her child There are, in a civilized society, some things that money cannot buy. . . . [T]he surrogate mother's agreement to sell her child is void.”); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 74 (1990) (arguing that when women's capacity to carry children “is treated as a commodity, the women who perform it are degraded”). *Baby M* was the first traditional surrogacy case in the United States. *In re Baby M*, 537 A.2d at 1234 (“In this matter the Court is asked to determine the validity of a contract that purports to provide a new way of bringing children into a family.”). In that case, the New Jersey Catholic Conference argued in an amicus brief that surrogacy is “a new form of prostitution” that “traffics for profit in human lives,” degrading women and “dehumaniz[ing] babies.” Craig R. McCoy, *Surrogate Parenting Assailed: N.J. Bishops Call It a Form of Prostitution*, PHILA. INQUIRER, July 16, 1987, at B1 (quoting brief); see also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928-36 (1987) (analyzing surrogacy as commodification of women's reproductive services and of children).

¹⁷⁵ See *Assisted Reproductive Technology (ART) Market Size Worth USD 31 Billion by 2023*, *supra* note 18.

how individuals perceive themselves and each other.¹⁷⁶ All tax systems take account of the business profit side of the fertility industry, even as other aspects of receptive legal systems safeguard the industry's medical, safety, and other practices. The tax system—and the way we talk about taxes—must also account for the income tax consequences of reproductive labor. When tax laws are unclear, underenforced, or poorly understood, then the truth is obscured. A keen desire to understand “life in all its fullness”¹⁷⁷ makes urgent the need for more and better tax talk about reproductive technology.

¹⁷⁶ See *supra* Section IV.A (discussing reasons fertility clinics do not disclose tax information to potential egg donors).

¹⁷⁷ See *Welch v. Helvering*, 290 U.S. 111, 114-15 (1933) (“Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.”).

