Too Much of a Good Thing: Toward a Regulated Market in Human Eggs

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I. Introduction

Egg donation is a reproductive process in which one or more eggs are removed from a donor and transferred to a recipient. Egg donation was first successfully achieved in 1983. Egg donation entails the acquisition of donated eggs, then the in vitro fertilization (IVF) of those eggs, and finally the implantation of the fertilized egg into the gestational mother. During the 1990’s, oocyte donation was increasingly accepted as a method of assisting women without healthy oocytes to have children. In addition to coordinating the voluntary and unpaid donation of oocytes from friends and relatives, a number of programs offer financial incentives to prospective oocyte donors. These incentives can take the form of monetary payment to donors or reduced IVF fees to women undergoing IVF who agree to provide oocytes to others.

The use of financial incentives raises two ethical questions that will be addressed in this paper: (1) are egg donors and recipients’ interests sufficiently protected by a system that uses financial incentives, and (2) is human life devalued by such a system?

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5 Id. These specific ethical issues have been addressed in depth in the current legal literature.
This paper will further focus on the need for a more comprehensive and uniform method of regulating the practice and industry of egg donation. The purpose of this paper is to justify the current practice of allowing payments for egg donations and to discuss the need for and benefit of regulating this human egg market.

As the demand for assisted reproductive technologies (ART) increases, the supply of such technologies responds accordingly. Today, egg donation is a fairly common method of assisted reproduction. Egg donors are often paid for their medical expenses and time, as well as for their actual eggs. Public and private financial exchanges are blended in the sale of human eggs. Some transactions, such as advertising for donors, are held completely in the public eye. On the other hand, much of the process is totally removed from public scrutiny and is conducted completely privately. The negotiation between donors and recipients, contractual arrangement and medical treatments all take place privately and without the benefits and protections of a consistent regulatory scheme. The commercial aspect of the industry is largely unregulated. Therefore, it is necessary to establish a "legal infrastructure" that can clarify the effects and consequences of participating in the egg donation market.

Donated eggs help individuals and couples who choose to attempt to have children. Through this process doctors, lawyers and the fertility industry as well as the donors contract and exchange fees for services. Egg donations come about in one of two ways: someone who desires an egg will recruit a donor who she knows, or, as is more commonly the case, will select a donor who is unknown to her.

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7 Evidence has shown an increase in infertility rates among women. Two factors for such an increase have been identified by researchers: delayed childbearing and sexually transmitted diseases. Vanessa S. Browne-Barbour, Bartering for Babies: Are Preconception Agreements in the Best Interests of Children? 26 WHITTIER L. REV. 429, 433 (2004).
8 The term donation is used throughout this article to refer to purely donative transactions but also to those transactions in which there is some sort of monetary gain for an involved party.
10 Id.
11 Id.
12 Id at 390.
14 Goodwin, supra note 9, at 390.
15 Helen M. Alvare, The Case for Regulating Collaborative Reproduction: A Children's Right's Perspective, 40
The procedure of egg donation is physically invasive and hugely time consuming for both the donor and the recipient. According the Reproductive Science Center, the egg transfer procedure is “complicated by a variety of factors, including the relative inaccessibility of donors, the inability to freeze eggs, and the need to synchronize the menstrual cycles of the donor and the recipient.” The donor must undergo invasive medical procedures including genetic screening and blood tests. The donor receives injections of Lupron for three weeks which shut down her ovaries so that no eggs are produced. Menopause-like symptoms often result: hot flashes, difficulty with short-term memory, and insomnia. The donor then switches to follicle-stimulating hormones, which hyperstimulate the ovary causing the release of a dozen or more eggs. Lastly, the donor receives an injection of human chorionic gonadotropin (HCG) and after a thirty-four to thirty-five hour waiting period, the eggs are retrieved either by laparoscopy or ultrasound.

The donor is subject to a number of medical risks including ovarian cysts, which can be caused by over-stimulation of her ovaries and possible bleeding, and injury or infection during the egg removal procedure. Both the donor and the recipient are subjected to physical risk and time demands of the necessary coordination of the donor’s and recipient’s ovulatory cycles. This process requires close monitoring and, in the event that the recipient has ovarian failure, estrogen proestrogen replacement to achieve a state of endometrial maturation.

It is only fair for egg donors to receive payment for undergoing this arduous process. There is a demand for something that these women can produce with their bodies and people currently exchange money for the production of donor eggs. It is not only the donors who receive payment; doctors, lawyers and egg brokers also receive fees.

19 Id.
20 Id.
21 Id at 265.
22 Schiff, supra note 17.
23 Id.
24 Id.
for their participation. The existence of a market for human eggs is beneficial and protective of rights possessed by both the donors and recipients. However, a system of governmental regulation of this market would be advantageous for all the involved parties.

II. Surrogacy and Egg Donation

Surrogacy is a somewhat analogous procedure to egg donation, in that one woman’s body is being used during the pre-birth stage of parenting; nonetheless, this woman is not the intended rearing parent of the child. Due to the parallels that can be drawn between the two procedures, a review of the current regulation of surrogacy, especially the contracts entered into by the gestational mother and the intended rearing parents prior to the actual pregnancy, is useful. In 1988, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Status of Children of Assisted Conception Act (USCACA). The USCACA presented two alternatives for interpreting the validity of surrogacy agreements: regulating these agreements through judicial review, or declaring such agreements void. The USCACA was overwhelmingly rejected by individual states.

Currently, there is a lack of uniformity among states' regulation of the practice of surrogacy. Several States have enacted some sort of legislation that serves to

26 Browne-Barbour, supra note 7, at 430, n.2. In a surrogate motherhood contract, a gestational woman agrees to become pregnant with the specific intent to bear a child, and then relinquish all legal rights to and obligations for the child, and deliver the child to an individual or couple who intend to raise the child as their own. Id.
27 The Uniform Parentage Act prefers the term “gestational agreement” over “surrogacy agreement” to describe these arrangements. Browne-Barbour, supra note 8, at 430
28 But see Alexa E. King, Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction, 5 UCLA L.J. 329, 340-41 (1995) (highlighting fact that surrogacy differs from egg donation in that latter is more accurately described as a social arrangement rather than a medical procedure; surrogacy refers more to a relationship between the parties than a specific technology; even so, surrogacy still plays an important role in assisted reproduction).
29 Browne-Barbour, supra note 7, at 444.
30 Id.
31 Browne-Barbour, supra note 8, at 444-45. Two states, North Dakota and Virginia, did adopt provisions of the USCACA. Id. North Dakota accepted the provision voiding surrogacy agreements; while, Virginia selected to regulate surrogacy agreements through judicial review. Id.
32 Such legislative enactments declare these agreements enforceable, void and unenforceable, or enforceable if there is no exchange of payment. Browne-Barbour, supra note 7, at 443-44.
regulate surrogacy arrangements; however, these states have failed to provide a comprehensive legislative scheme for the regulation of these preconception agreements.\textsuperscript{33} Despite the states' reluctance to adopt the USCACA, nearly a majority of individual states have addressed surrogacy (or gestational) agreements either through the courts or legislatures.\textsuperscript{34} The choice by some states to ban compensation for the gestational woman in such arrangements limits the number of women willing to undertake this commitment and may lead to forum shopping for more favorable jurisdictions, as well as questions regarding the full faith and credit given to agreements made outside of the parties' home state; however, such discussion is beyond the scope of this paper.\textsuperscript{35}

III. Legislative and Judicial Attention Paid to Reproductive Technologies

In the United States, the process of transferring gametes\textsuperscript{36} has received relatively little attention by either legislative bodies or courts.\textsuperscript{37} The issue of what to do regarding frozen embryos in the event of divorce or death has been litigated.\textsuperscript{38} A few

\textsuperscript{33} Id. at 440.
\textsuperscript{34} Id. at 445. As of 2000, roughly eleven states expressly permitted gestational agreements; six states voided these statutes via statute, while approximately eight states statutorily banned paid compensating the gestational woman. Id.
\textsuperscript{35} Id. at 445.
\textsuperscript{36} "A gamete can be either a sperm or egg cell; it is a cell that contains half the genetic material needed for human procreation. . . The rigorous medical procedures undertaken coupled with the scarcity of egg donors as well as the use of advertising and high payments to induce women to donate their eggs raise ethical questions which had not been voiced concerning sperm donation." See Mary Lyndon Shanley, \textit{Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs}, 36 LAW & SOC'Y REV. 257, 265 at n.6 (2002) (discusses the cultural and social values intertwined with the process of egg donation versus that of sperm donation, stating: "[s]perm is easily removed from the body, ejaculation is pleasurable, and the act can be repeated without difficulty or harm to the body. Egg transfer, by contrast, cannot be done alone and unobserved and requires hormonal injections and surgery, both of which cause discomfort or pain. The need to coordinate the menstrual cycles of provider and recipient suggests a cooperative partnership between provider and recipient even when they do not know one another. Egg transfer should not be repeated frequently because no one knows the long-term effects of hormonal manipulation or of the ovarian scarring that may occur during extraction. Weighty cultural values associated with 'motherhood' also make egg transfer seem more portentous and troubling than sperm transfer: since time immemorial men have impregnated women to whom they are not married and have walked away without a backward glance; women, by contrast, have been expected to love and devote themselves to their children, and those who do not are deemed monstrous").
\textsuperscript{37} Id at 259.
\textsuperscript{38} See, \textit{e.g.}, In re Marriage of Whitten, 672 N.W.2d 768 (Iowa 2003); Vitakis-Valchine v. Valchine, 793 So.2d 1094 (Fla. Dist. Ct. App. 2001); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); A.Z. v. B.Z.,
state statutes address oocyte transfer; however, most existing state and federal statutes concern in vitro fertilization. These statutes implicate egg donation because of its reliance on in vitro fertilization (IVF). “For the most part these statutes fall into categories of gamete donor medical screening guidelines, clinic reporting requirements, and insurance coverage guidelines.” It is this absence of governmental recognition of and response to the practice of egg donation which prompts the need for a regulated market scheme. Such a system will acknowledge the need and desire for women willing to donate their eggs as well as address the inherent medical (as discussed, supra) and ethical risks in such a transaction.

A. Traditional Ethical Considerations Regarding Egg Donation

Oocyte donation is a form of assisted reproduction like IVF, artificial insemination or surrogacy. They are all forms of reproduction that take place outside the traditional hetero-sexual reproduction paradigm. Today, the concept of assisted reproduction is nothing new. Egg donation, however, seems to raise more acute debate concerning the commodification of both existing human tissue and potential human life.

725 N.E.2d 1051 (Mass. 2000); Davis v. Davis, 842 S.W.2d 588 (Tenn.1992).
40 “In in vitro fertilization, eggs are surgically removed from the ovary and mixed with sperm outside the body in a Petri dish. In Vitro literally means “in glass”. After about forty hours, the eggs are examined and the eggs that have become fertilized by the sperm and are dividing are then placed in the women’s uterus.” American Society for Reproductive Medicine at http://www.asrm.org/Patients/faqs.html#Q5 (last visited July 26, 2005).
42 Louise Brown, the creation of the first successful human pregnancy using in vitro fertilization, was born on July 25, 1978. Baum, supra note 41, at n.12.
43 “The term ‘commodification’ can be construed narrowly or broadly. Narrowly construed, commodification describes actual buying and selling (or legally permitted buying and selling) of something. Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions.” Margaret Jane Radin, Market-Inalienability, 100 HARVARD L. REV. 1849, 1859 (1987).
One of the basic questions regarding assisted reproduction that society must answer is why to allow it at all, why shouldn't people who cannot reproduce sexually but still desire children either turn to adoption or continue their lives childless? The arguments supporting assisted reproduction recognize implications regarding procreative liberty as well as the desirability of preserving the genetic and gestational bonds between parents and children.

Theories involving procreative liberty recognize that all individuals should have the right to decide whether or not to exploit their reproductive capacity and that in the absence of strong justification for limiting this right, including clearly identifiable and tangible harms, individuals should have all possible means of achieving that choice. As John Robertson argued, “[p]rocreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one’s life.” For many, the motivation behind exercising this right includes a desire (perhaps narcissistically) to pass on their genes and biological history to the next generation. Acceptance of the proposition that there is a right to procreate based on a human's liberty interest, leads to the recognition that artificial reproduction is necessary in order to protect this right. For women who are unable to produce or use their own eggs (due to fear of transmitting genetic diseases), egg donation ensures the ability to exercise their right to choose to procreate. Egg donation allows these women a reproductive experience which includes as much as possible of the gestational experience from traditional sexual reproduction.

be for sale as a recognition of either the significance of reserving some facets of the body form commodification, or because economic pressure might coerce poor people to sell body parts.

45 Baum, supra note 41, at 113. For a more in depth treatment of this question see, e.g., John A. Robertson, Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation, 39 CASE W. RES. L. REV. 1 (1989).

46 Baum, supra note 41, at 113

47 Id.


50 Baum, supra note 41, at 114.

51 Even for a woman who is unable to use her own eggs, using an egg donor allows participation from the very beginning of the reproductive process, unlike many adoption situations. Egg donation also affords many women the opportunity to carry the child themselves and to create maternal bonds with the developing fetus. Although the genetic relationship is missing, the ability to select a donor with similar traits as the egg recipient provides a greater chance that the child will possess these traits. See, e.g. Susan Frelch Appleton, Adoption in the Age of Reproductive Technology, 2004 U.CHI.LEGAL.F. 393, 408 (2004).
B. Treatment of Egg Donation by the Judiciary

Courts, by in large, have not propounded boundaries specifically for egg donation or the property rights enjoyed by the participants in the donative process. However, the California Supreme Court has refused to recognize a patient’s continuing property interest in excised spleen cells. The implication, by analogy, may be that if egg donors do not enjoy a property right in their removed eggs the courts may not recognize an action for breech of contract in a dispute over the terms of any pre-donation contracts between the donor and recipient. Though, the two situations are sufficiently dissimilar that a court may not entertain the parallel.

The United States Supreme Court’s decisions have established a Fourteenth Amendment fundamental liberty right to chose not to conceive, and in the case of a pregnancy, the right to terminate that pregnancy up to viability. These decisions recognize a woman’s right to avoid reproduction through contraception and abortion, but the liberty interest in engaging in reproduction through egg donation, as with legislatures and lower courts, has not been expressly addressed by the Supreme Court.

The Supreme Court has, nonetheless, issued constitutional decisions holding reproduction to be one of the basic human civil rights. In Bragdon v. Abbott, the Court held reproduction to be a “major life activity.” An established principle of negative freedom can be inferred through these decisions; that is, the freedom to engage in or avoid reproduction without state interference. The use of reproductive technologies, including egg donation can be protected within this liberty interest and civil rights framework.

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52 Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (court refused to recognize an action for conversion in the case of a patient whose spleen was removed by doctors who then grew a highly profitable cell line from the patient’s rare cancer).
53 Baum, supra note 41, at 133.
55 Robertson, supra note 49, at 452-53.
56 Robertson, supra note 49, at 453. See also Skinner v. Oklahoma, 316 U.S 535 (1942) (dicta citing the right to procreate as a “basic civil right of man”).
57 Robertson, supra note 49, at 454. See also Bragdon v. Abbott, 524 U.S. 624 (1998) (case concerning the Americans with Disabilities Act, recognizing ability to have healthy offspring as a major life activity, a loss of which entitled an HIV positive person to protections under the Act).
58 Robertson, supra note 49, at 453.
IV. Feminist Arguments For and Against Egg Donation

Since it is a topic that has profound implications on women's lives, a discussion about egg donation begs a review of the differing feminist arguments, both those supporting and those opposing the process. Some feminist opponents to egg donation base their opposition to the practice on the theory that commodification of eggs and reproduction alienates women and is therefore undesirable. Legal theorist Margaret Jane Radin summarizes this argument, stating that the feminist argument "against the market is roughly that in this nonideal world of ours, treating women like anonymous fungible breeders objectifies them and recreates subordination."59 Commodification both expresses and creates alienation of the individual, thereby objectifying and projecting power and action onto commodities and diminishing the inherent and intangible value of individual women.60 In the context of egg donation, this commodification results from the sale of women's body parts for monetary compensation. Egg donation has also been viewed as the ultimate form of patriarchy, where male doctors and egg brokers encourage healthy, fertile female donors to undergo invasive procedures to help infertile women at unknown risk to the donor.61

The feminist response to these critiques surrounds arguments emphasizing the autonomy of adult women and the right of a woman to decide for herself what is the most appropriate use for her body.62 Restricting or prohibiting a woman's reproductive choice and methods available to effectuate that choice infantilizes adult women.63 Within this line of argument the market is seen as a source of both power and liberation for women. Denying women access to a market of human eggs enforces paternalistic social constructions and maintains existing gender-based power inequities.64 The problems involved in a human egg market should be for the women participating in such a market to weigh through their own moral deliberation and choice.65 Women should be left to make the same autonomous decisions as men. The societal concern with commodification through egg donation and lack of such concern over sperm donation devalues women as autonomous equals with men. Consequently, it is

60 Kari L. Karsjens, Boutique Egg Donations: A New Form of Racism and Patriarchy, 5 DePaul J. Health Care L. 57, 82 (2002).
61 Id at 85.
63 Baum, supra note 41, at 161.
64 Id.
beneficial to all women that some voluntarily enter such a market.\textsuperscript{66}

V. A Human Egg Market

Arguments against a market-based donation scheme for human eggs echo the previously discussed feminist concerns over commodification of human body parts. Concerns that exist over the fact that the market is driven by efficiency rather than morality, and is contradictory with human existence, are undermined by the fact that many aspects of human life are already commodified.\textsuperscript{67} People with intelligence, physical beauty, athletic prowess, and even willingness to submit to scientific experimentation are paid for such traits and skills. Genes and genetic sequences are patented and serve as the basis for multi-bullion dollar industries.\textsuperscript{68} Standardized charts that place values on body parts serve as the guidelines for damages in personal injury cases.\textsuperscript{69} Drawing the line at egg donation inflicts a direct harm on those who desire to participate in such a system while allowing these commodification practices to continue.

Critical race theory also highlights the fact that egg donation perpetuates certain traits, namely being Caucasian and of European descent and talented in some area such as music or sports.\textsuperscript{70} Racial characteristics matter for prospective families and there is an overwhelming demand for white donors. Critical race theorists view the profitable process of egg donation as encouraging a racial hegemony by excluding minorities from the pool of both donors and recipients.\textsuperscript{71} However, despite these criticisms, the demand for human eggs exists and as long as people desire the benefits of assisted reproduction through the use of donated human eggs the process will continue.

VI. Egg Donation Compared to Organ Donation in the United States

Of course, the fact that a demand for human eggs exists does not suffice, on its own, as justification for a market in those eggs. An objection against the sale of any human body part is illustrated by the state and federal bans on the sale of human organs.

The current proscriptions against organ sale in the United States do not apply to

\textsuperscript{66} Baum, \textit{supra} note 41, at 162.
\textsuperscript{67} \textit{Id.} at 135.
\textsuperscript{68} \textit{Id.} at 135.
\textsuperscript{69} \textit{Id.} at 135.
\textsuperscript{71} Karsjens, \textit{supra} note 60, at 78.
egg donation. The Uniform Anatomical Gift Act (UAGA) and the National Organ transplant Act of 1984 (NOTA) describe the federal stance on organ donor compensation. All states and the District of Columbia have adopted some form of the UAGA. The UAGA prohibits purchase or sale, for valuable consideration, of a human body part for “transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.” This language expressly limits the Act’s application to removal of the body part after the death of the donor; and consequently, does not apply to egg donation.

A system of organ allocation is inherently a system for allocating life to some and death to others. Therefore, organs are different than other goods and perhaps demand preferential treatment. Human eggs are, arguably, different. The fact that the demand for transplantable organs is greater than the supply of suitable organs means that for each person who receives an organ the chance is greater that someone will not. Human eggs, however, are not scarce resources. The supply meets the demand, in that when one recipient receives an egg this does not mean that there is some other woman who will not. The fact that there is a constitutionally recognized negative right to procreation is consistent with this laissez-faire, market driven and unregulated approach to egg donation. This approach, nevertheless, fails to adequately address the inherent shortcomings of a purely market based approach to egg donation.

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72 The UAGA was enacted in 1968 to establish a consistent and coordinated system for organ donation in the United States. The NOTA, 2 U.S.C §§ 273-74 (2000), established the current United States’ system for organ donation and allocation which is run by the United Network of Organ Sharing, a non-profit organization that contracts with the Department of Health and Human Services to regulate traffic in transplant organs. Kenneth Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, 2001 B.Y.U.L. REV. 107, n.69 (2001).


74 UNIF. ANATOMICAL GIFT ACT 1987 § 10.

75 Baum, supra note 41, at 147 (discussing distinction between organs and other goods). “Society accepts that only the wealthy can afford the very best, as long as there are other (through lower quality) alternatives....Since there is no other alternative when someone needs an organ transplant, the implication of a wealth-based organ allocation system is that society values the lives of the wealthy over the lives of the poor.” Id.

76 Other consumer goods, cars with state-of-the-art safety systems or home security systems, may be the difference between life and death and are allocated throughout society based on ability to pay the asked price, but this discussion is beyond the scope of this paper.

77 Baum, supra note 41, at 148-149.

78 Id., at 150 (discussing variation of quality and money for desirable characteristics).
Some sort of governmental regulation is necessary to ensure enforceability of pre-donation contracts between donors and recipients, unify the process of egg donation, provide for the safety of both donors and recipients, guarantee against Orwellian-type genetic enhancement and the specter of eugenics, and act as some sort of quasi-guardian of the best interests of the child who is the intended result of this whole process. A system for egg allocation totally devoid of market influence leaves room for allowing social worth criteria to determine oocyte allocation. Market forces damper the influence of such criteria. A human egg market embraces recognition of procreative liberty in the recipient and the liberty interest in the donor to choose to elicit a monetary profit from her eggs. It is simply the scope of these liberties, not the exercise of the liberties themselves, that should be regulated. An absence of such legislation leaves a void which must be addressed by courts on a case-by-case basis. A more uniform analysis of and attention to the issues implicit in the human egg market is necessary to avoid a piecemeal treatment of those issues and the resulting harm to the involved parties, including the intended child.

VII. Contract and Property Law Applications to the Human Egg Market

The contractual considerations of egg donation revolve around notions of equality for women as independent moral and economic agents. Allowing pre-donation contracts between the donor and recipient to be invalidated on anything other than contract law interpretations would represent a reversion to the theory that women are not capable of understanding the substance of the contracts that they enter into. Women do not need to be protected from entering into such contracts. Contract law prohibitions against fraud, duress and unconscionability should be applied to egg donation contracts, as with any other contract, as protection for the contracting parties.

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79 Goodwin, supra note 9, at 333-40 (discussing problems of social worth in the context of organ donation).
80 Robertson, supra note 48, at 448 (discussing association between actual reproduction and presumption of liberty right in conducting that activity).
84 But see Browne-Barbour, supra note 7, at 471-72 (arguing preconception agreements, in context of surrogacy, are incongruous with best interest of child and devalue women and children).
The application of contract law to the issue of egg donation is hardly an original concept. Contract law has a longer history in the context of parentage than does paternity. Through sperm donation, genetic fathers are allowed to contract away their rights and obligations for financial remuneration. Most surrogacy contracts effectuate the same result. The intent of the parties, their expectations and reliance interest are considered in these situations. A California court has gone so far as to declare that, "in a true egg donation situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law."  

Of course, contract and property law are inherently related, and as much as there is a resistance to applying contract law to issues involving human eggs, there is the same resistance to applying property law to parts of the human body. The resistance is heightened when, as is the case with egg donation, the debate is over a contractual and property law application to an exchange dealing with the potentiality of a child. Within the context of egg donation, the property interest in the egg originates with the woman who decides to donate her eggs. This is much the same as the control the mother exercises over the origination of the parenthood property interest in the father in the traditional heterosexual paradigm of child rearing. The woman who donates her eggs rightly receives compensation for relinquishing her rights in them, but this process, like so many other transfers, needs to be regulated in order to protect the interests of all parties, including those of the intended child. 

Regulation will also address the concern that poor women are coerced into selling their eggs for the economic return when they would not choose to become egg donors under other circumstances. The concern is over a lack of consent when the

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86 Baker, supra note 85, at 26.
87 Id.
89 Id. at 782.
90 Baker, supra note 85, at 44.
91 Id.
92 Id. at 46 (discussing how mother doles out parental status to others and how men gain this status through relationships with women; mother initially decides, once pregnant, to extend the pregnancy to term and reveals to father that he is, in fact, a father).
93 S. Gregory Boyd, Considering a Market in Human Organs, 4 N.C.J.L. & TECH. 417, 464 (2003). In the context of organ sales the concern is that the poor would literally be sacrificing 'a pound of flesh', exchanging bodily integrity for the resources they need. Id.
poor are consenting to become donors but this consent is not based on an equal bargaining position as women who are not consenting under economic constraints, since, "it is a simple fact that most donors are not as economically well-off as most recipients." On the other hand, it is unduly restrictive and paternalistic to end the practice of paid egg donation because poor and wealthy women alike should be allowed to profit from the exploits and labor of their bodies, just as men and women profit from the physical and mental labors performed by their bodies. Regulation, where the price for human eggs was not solely determined by market forces, would allow autonomy on the part of women who chose to sell their eggs. It would allow poor women more of a framework in which to bargain for the selling price of their eggs while also ensuring that boutique eggs do not fetch exploitatively large sums.

A totally private egg donation market perpetuates the overwhelming demand for white donors and the disproportionately low number of minority donors. The fear is that the wealthy will be allowed to employ racial selection, paying the high fees demanded by their selected donor, while minority families will not be able to participate in the process at all, or will be forced to accept the less desirable eggs. The desire is to avoid the 'whiteness as property' concept from permeating the process of egg donation. Most advertisements offering to pay the highest sums to donors request white, blond, tall and intellectually exceptional potential donors to respond. Some regulation of the market will provide a platform from which to address the threat of racial hegemony by increasing access to minority egg donors and recipients.

Unified regulations would be able to implement a system of donor egg disease screenings. Currently individual fertility clinics' screening procedures vary considerably. Some states have enacted laws requiring donor screening in the case of

95 Karsjens, supra note 60, at 61. The term boutique egg donations refers to the phenomenon of large donation fees being offered to women matching specific qualifications of intelligence, athletic prowess and physical attributes desired by prospective recipients. Id.
96 Id. at 79.
97 See Cheryl Harris, Whiteness as Property, 106 HARV. L. REV. 1707 (1993). Whiteness as property is the perception that being white connotes property rights and privileges; its undesirability in this context is that the racial selection in egg donation impacts the racial characteristics of future generations. Id. If people disproportionately choose to have white babies from white eggs those choices will have an objectionable societal impact, the significance of the choice is that being born a white child carries some inherent privilege, while the fact of being born non-white is oppressive and de-legitimizing. Id.
98 Goodwin, supra note 9, at 390.
99 Karsjens, supra note 60, at 80.
sperm donation, but where these laws do exist they offer varied protections.\textsuperscript{101} Some state laws covering tissue donations cover egg donations.\textsuperscript{102} The federal government has not enacted any legislation concerning the health of donated eggs.\textsuperscript{103} Market regulation could incorporate a more unified system for ascertaining the health and viability of donated eggs.

Market regulation could also be the hook for implementing fertility clinic and egg broker oversight. Clinics are presently required by federal act to report pregnancy success statistics.\textsuperscript{104} The influence of the American Society for Reproductive Medicine had a hand in classifying the selection, screening and matching of egg donors and recipients as ‘medical services’ which are beyond the scope of this systematic regulation.\textsuperscript{105} This leaves a gap in the protections offered to the women who receive egg donation services in these clinics that can be closed through a more regulated market. Regulation can provide women on both sides of the transaction with full information, assurance that they will not be receiving experimental procedures and the opportunity for counseling.\textsuperscript{106}

Regulation can also address failures inherent in an unregulated market itself. Lack of regulation in the fertility industry has led to practices of price fixing in some states as well as matchmaking agendas resembling end of year solicitations by charitable organizations.\textsuperscript{107} At one point fertility clinics in New York tacitly agreed to lower compensation for egg donors.\textsuperscript{108} It was reported that egg donors in New York were rarely paid more than $2500.00 for their donations. A clinic in New Jersey replied by offering double the compensation offered by New York clinics, creating price wars and

\textsuperscript{101} \textit{Id.} Some states require HIV testing along with tests for syphilis and hepatitis, while others require only HIV testing.
\textsuperscript{102} \textit{Id} at 28.
\textsuperscript{103} \textit{Id.} The Food and Drug administration has proposed an oversight system for the sperm donation process. Federal law does penalize an HIV positive person who knowingly donates or sells semen. \textit{See also} Protection Against the Human Immunodeficiency Virus, 18 U.S.C § 1122(a) (2002).
\textsuperscript{104} Fertility Clinic Success Rate and Certification Act, 42 U.S.C. § 263a-1 (2002). This act requires that fertility clinics report pregnancy success rated to the Center for Disease Control in a standardized form. Alvare, \textit{supra} note 15, at 28.
\textsuperscript{105} Alvare, \textit{supra} note 15, at 28.
\textsuperscript{106} \textit{Id} at 29 (citing \textit{ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES} 322 (Annette Burfoot ed., 1999)).
\textsuperscript{107} Goodwin, \textit{supra} note 9, at 391.
questions concerning whether human eggs should be offered on a market at all.\textsuperscript{109} This is an undesirable result which could be tempered with market regulation which would prevent monopolistic control by fertility clinics and the price wars which result when clinics break free of the monopoly.

Egg donation also allows untraditional families to choose to reproduce. Single people, gay and unmarried heterosexual couples can take advantage of egg donation as a method of employing their choice to become parents.\textsuperscript{110} An egg market allows these families to be based on intention rather than biology and heterosexuality.\textsuperscript{111} With increasing legitimate recognition of homosexual relationships including marriage and civil unions the demand for donor eggs for these couples will probably increase.\textsuperscript{112} This increased source of demand will intensify the need for regulation of the market.

VIII. Conclusion

Decades ago the fertility market was not nearly as robust as it is today. Advances in biotechnology have led to greater instances of people turning to assisted reproduction. These advances have far outpaced judicial and governmental intervention. Privacy and liberty concerns as well as the growing acceptance of forms of assisted reproduction serve to support a market in human eggs; however, regulation is needed to assist and protect the interests of the parties involved. The current void in market regulation concerning egg donation will continue to grow as egg donation’s popularity as a method of artificial reproduction increases.\textsuperscript{113} This cavity in the law demands attention because of the continued impact of egg donation on society. Regulation of the market will provide clarity as to the legal consequences of the relationships that form and the transactions that occur when people choose to donate and receive human eggs.

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\item Goodwin, supra note 9, at 391.
\item Id at 392-93.
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