Our Bodies, Our Price: Accepting Commodification and Racial Categorization in Assisted Reproductive Technology

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I. INTRODUCTION

I am a forty-four-year-old childfree woman. During my late twenties and early thirties, I donated my eggs seven times. Two were for the same couple, whom I met prior to donating when my egg broker set us up for drinks in San Francisco. It was like a first date with two men, where procreation was the explicit reason we were meeting, and it was fine to ask about my family history of mental disorders. What was their conversation like on the drive home, evaluating my appearance, my not-quite-quirky awkwardness, the fact that I was a Harvard graduate making $11 an hour cooking in a commercial kitchen? *Is this how we*

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want our children to turn out?

I imagine one of the most decisive factors was my mixed ethnicity. One man was Chinese, his husband, English; my father is Chinese, and my mother is English. Any mixture of my genes with either might create children that appear mixed—double eyelids above almond eyes, and dark, wavy hair against light brown skin.

One's journey as an egg donor does not always begin with talk of depression over drinks, but immediate preparation for egg retrieval is fairly uniform.[1] First, donors inject a synthetic hormone to suppress normal ovarian function.[2] Next, donors begin hormone injections that hyperstimulate follicles to rapidly mature.[3] During this period, I remember frequent blood draws and ultrasounds, as reproductive endocrinologists carefully monitored my follicles, counting and measuring over twenty enlarging dark blobs crowding my ovaries.[4] After eight to fourteen days, a shot of human chorionic gonadotropin (hCG) induces the final stage of egg maturation.[5] Approximately thirty six hours after this injection, egg donors are placed under light anesthesia while doctors retrieve mature follicles via transvaginal ultrasound aspiration.[6] Suitable eggs are then fertilized in a laboratory.[7] Once fertilized, the embryo is implanted in the recipient, either an intended parent[8] or a gestational surrogate.[9] Except for the couple I met and one other family, I have no idea how many lives my donations created, whether follicles containing my DNA remain cryopreserved, able to create humans even if I die.[10]

I knew minor side effects of the initial round of fertility drugs could include:

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1. *See* AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 4-6 (2018), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/art-booklet2.pdf [https://perma.cc/4TLL-Q7BY].
2. *Egg Donation Process for Donors*, UCSF HEALTH, https://www.ucsfhealth.org/education/egg-donation-process-for-donors [https://perma.cc/8ATD-DFRH] (last visited Feb. 10, 2024).
3. I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 490-91 (2010); Pamela Foohey, *Paying Women for Their Eggs for Use in Stem Cell Research*, 30 PACE L. REV. 900, 906 (2010).
4. *See* Egg Donation Process for Donors, *supra* note 2.
5. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 6.
6. *Id.* at 6, 7.
7. *Id.* at 8.
8. AM. SOC'Y FOR REPROD. MED., GAMETE (EGGS AND SPERM) AND EMBRYO DONATION (2014), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/gamete_eggs_and_sperm_and_embryo_donation_factsheet.pdf [https://perma.cc/7FK5-ARWK] (noting that "intended parent" is the person who will raise the child; in this context, an intended parent is a biological woman able to carry the embryo in her uterus).
9. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 15.
10. Chantel Cross, *Freezing Eggs: Preserving Fertility for the Future*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/wellness-and-prevention/freezing-eggs-preserving-fertility-for-the-future [https://perma.cc/3RBQ-XN5R] (last visited Jan. 28, 2024).

> [H]ot flashes, difficulty with short-term memory, and insomnia . . . vaginal dryness, hypertension, formation of blood clots, intestinal bleeding, fluid accumulation in the limbs, swelling of the limbs, numbness of the limbs, fatigue, depression, mood swings, chest pain, bone pain, joint pain, muscle pain, migraines, vision problems, dizziness and blackouts, nausea, vomiting, diarrhea, anemia, and thyroid enlargement.[11]

These did not dissuade me any more than taking any prescription medication. I was afraid of the injections, but I barely felt the miniscule needles, even though my belly was covered in small bruises. I signed consent forms acknowledging the serious risks: ovarian hyperstimulation syndrome (OHSS),[12] ovarian torsion,[13] cancer.[14] For long-term psychological harms, I had to proceed on best guesses. Would I deeply regret bringing humans into this world? Should I meet my genetic offspring one day, would I become attached to them? I was worried about the unknown long-term risks of shutting down my ovaries and then cranking them into overdrive,[15] but these distant physical and psychological concerns just pooled with the many amorphous anxieties for future me.[16] I did not get to sign a waiver

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11. Foohey, *supra* note 3, at 906 (citations and internal quotation marks omitted).
12. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 15-16 (explaining approximately 30% of women may experience a "mild case" of ovarian hyperstimulation, which includes symptoms such as bloating and nausea that will resolve themselves). *See also* Diane M. Tober, Kevin Richter, Dougie Zubizarreta & Said Daneshmand, *Egg Donor Self-Reports of Ovarian Hyperstimulation Syndrome: Severity by Trigger Type, Oocytes Retrieved, and Prior History*, 40 J. ASSISTED REPROD. & GENETICS 1291, 1292-93 (2023) (citations omitted) (noting that approximately 1% to 10% of women experience severe OHSS requiring hospitalization. Symptoms of severe OHSS include rapid weight gain, bloating requiring removal of fluid from the abdomen, difficulty breathing, and kidney distress).
13. INST. MED. & NAT'L RSCH. COUNCIL, ASSESSING THE MEDICAL RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH: WORKSHOP REPORT 3 (Linda Giudice, Eileen Santa & Robert Pool, eds., 2007), https://nap.nationalacademies.org/catalog/11832/assessing-the-medical-risks-of-human-oocyte-donation-for-stem-cell-research (available for download) (stating that ovarian torsion occurs when an ovary "twists around its supporting ligament and cuts off its blood supply").
14. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 16 (stating, without more, that "numerous recent studies support the conclusion that fertility drugs are not linked to ovarian cancer. Nevertheless, there is still uncertainty whether a risk exists, and research continues to address this question."). *See also* Foohey, *supra* note 3, at 908 (noting certain "small, limited studies" suggest a link between fertility drugs and breast, ovarian, and uterine cancer but "[t]he long-term health risks of shutting-down a woman's ovaries and then hyperstimulating them to produce numerous eggs remain unknown and generally unstudied.").
15. *See* Foohey, *supra* note 3, at 908.
16. Ethics Comm. Am. Soc'y for Reprod. Med., *Interests, Obligations and Rights in Gamete and Embryo Donation: An Ethics Committee Opinion*, 111 FERTILITY & STERILITY 664, 667 (2019) https://www.asrm.org/globalassets/_asrm/practice-guidance/ethics-opinions/pdf/interests_obligations_and_rights_in_gamete_and_embryo_donation.pdf [https://perma.cc/V5TC-8Q35] (noting "Donors . . . should be aware that data are lacking about the long-term emotional and psychological impact of participating in gamete donation"); Jennifer K. Blakemore, Paxton Voigt, Mindy R. Schiffman, Shelley Lee, Andria G. Besser & M. Elizabeth Fino, *Experiences and Psychological Outcomes of the Oocyte Donor: A Survey*

for the myriad hazards of existing; at least here I could consent to something more concrete and potentially quantifiable.[17]

I am risk-averse in so many ways—I drive cautiously, do not drink, wear a flashing light vest when I walk my dogs in the dark. Yet I was a donor willing to go beyond the American Society for Reproductive Medicine's (ASRM) recommendation of six cycles, as it is these donors that are most likely to experience severe OHSS, which can lead to kidney failure and even death.[18] Twenty-nine-year-old me likely cognized the possibility of death the same way I do today, as arms-length away from the banal.[19] Egg donation was risky, but so was getting in my car every day. I would not have accepted the risks of donation without compensation, but I recognized them as statistically slim, well worth the relief of paying off my credit cards and traveling to India.[20] After retrievals, I would cramp and bloat, but this discomfort was de minimis, as the cash made living slightly more bearable.

After a few years of traveling from Hawai'i to San Francisco, Los Angeles, Shady Grove, and San Diego for donations, I was done injecting my abdomen with hormones, done with the blood draws and ultrasounds, done going under anesthesia for the retrieval. I had my fallopian tubes plugged with metal coils, an act both symbolic and pragmatic. I had health insurance that would cover the procedure, but it was reassuring to know that I would never become pregnant. I have always been disgusted by the thought of having a fetus growing inside my

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of Donors Post-Donation from One Center, 36 J. ASSISTED REPROD. & GENETICS 1999, 2004 (2019) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6823395/pdf/10815_2019_Article_1527.pdf [https://perma.cc/BZ3X-DAZP] (urging researchers to study long-term psychological impacts on donors because the majority of respondents in a limited, single fertility center study of mostly white individuals reported psychiatric symptoms of mental disorders such as depression and anxiety). *See also* Jane E. Brody, *Do Egg Donors Face Long-Term Risks?*, N.Y. TIMES (July 10, 2017), https://www.nytimes.com/2017/07/10/well/live/are-there-long-term-risks-to-egg-donors.html (discussing the lack of—and need for—a registry tracking the long-term health impacts on egg donors).

17. *See, e.g.*, Tober et al., *supra* note 12, at 1292 (describing a study of oocyte donors in which "researchers found a 1.5% risk of severe OHSS and a 33.5% risk of moderate OHSS among 149 donors over 400 egg retrieval cycles. Another clinical study of 587 oocyte donors at a single IVF center found 9% of cycles had to be cancelled due to OHSS, out of caution for donor health. Another retrospective survey study of 246 . . . noted that 13.4% of donors in their study reported OHSS, among other complications, but the severity of OHSS is not discussed." (citations omitted)); Sarah B. Angel, *The Value of the Human Egg: An Analysis of Risk and Reward in Stem Cell Research*, 22 BERKELEY J. GENDER L. & JUST. 183, 204-05 (2007) (noting the rarity of severe cases and that measures can be taken to reduce risk).

18. Tober et al., *supra* note 12, at 1301-02. *See also* Prac. Comm. of the Am. Soc'y for Reprod. Med. & Prac. Comm. of the Soc'y for Assisted Reprod. Tech., *Repetitive Oocyte Donation: A Committee Opinion*, 113 FERTILITY & STERILITY 1150, 1151 (recommending six cycles as the limit because of the lack of studies on the long-term health effects and concerns regarding cumulative risk).

19. *See* AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 16 (discussing potentially serious risks of oocyte donation, including death).

20. *See* Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 221 (2009) [hereinafter Krawiec, *Altruism and Intermediation*] (explaining that the "more serious risks are quite rare, and egg donation is normally little more than a time-consuming and physically uncomfortable inconvenience.").

body, feeding off me. Forcing it into a nonconsensual existence as my child would traumatize us both. I imagined scar tissue weaving around the coils, building miniscule barricades, protecting my body in the way that mattered most.

A. Assisted Reproductive Technologies

One would imagine the language of creating human embryos outside of human bodies to mirror the miracle. Instead, the language of reproductive technology is scientific, disconnecting, overtly sterile.[21] A person who donates their eggs is an "oocyte donor."[22] Couples or individuals who purchase these oocytes are "intended parents."[23] The person whom an intended parent might compensate to carry an embryo is the "gestational carrier."[24] These actors together engage in the most significant act of the "genetic offspring's" life—the offspring's creation—yet the connection between donors and intended parents, and between donors and gestational carriers, remains depersonalized by contractual labels. An act of ineffable profundity becomes obscured by legal and medical jargon.[25]

Assisted Reproductive Technology (ART) makes "collaborative reproduction" possible.[26] Any fertility treatment that involves eggs or embryos falls under the umbrella of ART,[27] an ever-advancing industry.[28] The law, meanwhile, lags behind not only because of rapid scientific developments[29] but

21. *See, e.g.*, AM. SOC'Y FOR REPROD. MED., THIRD-PARTY REPRODUCTION: A GUIDE FOR PATIENTS (2018), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/third-party_reproduction_booklet_web.pdf [https://perma.cc/JKV4-A2LV] Prac. Comm. Am. Soc'y for Reprod. Med. & Practice Comm. For Soc'y for Assisted Reprod. Tech., *Guidance Regarding Gamete and Embryo Donation*, 115 FERTILITY & STERILITY 1395, 1395-96 (2021), https://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/recs_for_gamete_and_embryo_donation.pdf [https://perma.cc/P4X2-37D4] (using language such as "quarantine," "gamete source," and "'ineligible' tissue").
22. Tober et al., *supra* note 12, at 1291.
23. AM. SOC'Y FOR REPROD. MED., THIRD-PARTY REPRODUCTION, *supra* note 21, at 3.
24. *Id.* at 18.
25. For example, the "names" on one of my contracts were "Intended Father #5510A" and "Intended Father #5510B." I was "Donor #5510." Egg Donation Agreement (Apr. 11, 2011) (on file with author).
26. Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 683 (2004).
27. *What is Assisted Reproductive Technology?*, CDC, https://www.cdc.gov/art/whatis.html [https://perma.cc/UZ6N-PJ9E] (last visited April 23, 2023). The medical model of "assisted" reproduction is distinguished from "unassisted" reproduction, which is "traditional conception" where a biological man impregnates a biological woman who is ovulating via vaginal penetration. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 3-4.
28. *See* Manning, *supra* note 26, at 679 (citations omitted); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: Arts, Mistakes, Sex, Race, and Law*, 12 COLUM. J. GENDER & L. 1, 6 (2003) (noting that "our judicial system has trailed woefully behind the complex bioethical dilemmas that accompany the rapid advances in biotechnology, biomedicine, and assisted reproductive technologies.").
29. *See, e.g.*, Naomi Cahn, *Accidental Incest: Drawing the Line – Or the Curtain? – For Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 76 (2009) ("The lack of market oversight has repeatedly been traced to the comparatively limited use of the technology until the 1980s") (citations omitted); Bender, *supra* note 28, at 13 ("Legislation that does get enacted

also because of the complex ethical issues implicated by ART, ranging from the commodification of human tissue[30] to eugenics[31] to procreative rights.[32]

The American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) emerged to self-police the industry, determining the policy for collaborative reproduction in the United States via nonbinding guidelines.[33] On one hand, the nonexistent federal and limited state statutes that govern reproductive technology[34] seem preferable—why should families requiring assisted reproduction by no fault of their own be burdened with regulations,[35] when those not requiring assistance are essentially free to procreate? On the other hand, assisted reproduction involves third parties and donor-conceived children, whose health and interests may require protection.[36] Between 2016 and 2017, there were 49,193 donor egg retrievals in the United States.[37]

The lack of regulation has led to considerable scholarly debate on the many aspects and market participants involved in ART.[38] Some scholars have suggested

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often fails to anticipate the newest ARTs and their unique twists.").

30. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1855-56 (1987) (describing a commodification as the decision that something is "suitable for trade in a laissez-faire market" and citing examples of human tissues that are and can be commodified); Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1762 (2010) [hereinafter Krawiec, *A Woman's Worth*] (suggesting that the industry endeavors to demonstrate effective self-regulation because "perceiving a market run amok with the potential to commodify women and children and coerce and exploit egg donors, the natural impulse would be top-down state or federal regulation of the entire industry.").
31. *See, e.g.*, CAMISHA A. RUSSELL, THE ASSISTED REPRODUCTION OF RACE 70 (2018).
32. *See, e.g.*, AM. SOC'Y FOR REPROD. MED., STATE ABORTION LAWS: POTENTIAL IMPLICATIONS FOR REPRODUCTIVE MEDICINE (Oct. 10, 2022), https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/dobbs/state_abortion_laws_p2_oct_22.pdf [https://perma.cc/LLS7-QDKJ]; Cahn, *supra* note 29, at 76 ("The lack of market oversight has repeatedly been traced to . . . the contested nature of the technology's relationship to parenthood and other social issues." (citations omitted)).
33. *See, e.g.*, Wynter K. Miller, *Assumption of What? Building Better Market Architecture for Egg Donation*, 86 TENN. L. REV. 33, 50 (2018); Cahn, *supra* note 29, at 76, 81.
34. *See, e.g.*, Saylor S. Soinski, *Paid Donation: Reconciling Altruism and Compensation in Oocyte Transfer*, 20 YALE J. HEALTH POL'Y, L. & ETHICS 513, 515 (2021) (citations omitted); Miller, *supra* note 33, at 49 (citations omitted) ("[G]eorgia, Louisiana, and Oklahoma have passed blanket prohibitions on compensation for egg donation. Florida and Virginia broadly permit 'reasonable' egg donor compensation but have neglected to define 'reasonable.'"); Michael Ollove, *States Not Eager to Regulate Fertility Industry*, STATELINE (Mar. 18, 2015), https://stateline.org/2015/3/18/states-not-eager-to-regulate-fertility-industry/ [https://perma.cc/X2RU-LQGT].
35. *See* Susan Frelich Appleton & Robert A. Pollak, Exploring the Connections Between Adoption and IVF: Twibling Analyses, 95 MINN. L. REV. HEADNOTES 60, 68 (2011) (characterizing IVF as "self-regarding and expensive but free from burdensome regulation").
36. *See, e.g.*, Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 621 (2012).
37. Jennifer F. Kawwass, Patrick Ten Eyck, Patrick Sieber, Heather S. Hipp & Brad Van Voorhis, *More Than the Oocyte Source, Egg Donors as Patients: A National Picture of United States Egg Donors*, 38 J. ASSISTED REPROD. & GENETICS 1171, 1172 (2021).
38. *See, e.g.*, Krawiec, *A Woman's Worth*, *supra* note 30, at 1741-42; Janelle E. Thompson, *The Eggsploitation of the United States' Organ and Egg Donation Systems*, 48 VAL. U. L. REV. 469, 512-14 (2013) [hereinafter Thompson, *Eggsploitation*]; Lynn M. Squillace, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMEDICAL L. 135, 146-50 (2005).

regulating egg donation in the same way organ donation is regulated,[39] but in such a scenario there would be increased oversight without compensation.[40] The fertility industry, its pockets likely only deepening as technology advances, will likely resist regulation akin to organ procurement.[41] While human aversion to organ selling is a long-held sentiment,[42] ART is a modern development that has advanced into a booming industry despite any existential "yuck" factor.[43] Other avenues for regulation include scholar Dov Fox's suggestion the government impose a commercial ban on sperm bank "race-attentive and race-exclusive" advertising;[44] Michele Goodwin's proposal that ART be regulated via tort law;[45] and Douglas NeJaime's urgent recommendation that state legislatures and judicial

39. Thompson, *Eggsploitation*, *supra* note 38, at 512-14 (recommending Congress amend the National Organ Transplant Act to include "ovum" in its definition of "human organ" and thus adopt a supervised market approach for egg donation).

40. 42 U.S.C. § 274e ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation.").

41. *See* MarketResearch.biz, *Fertility Clinics Market Rising Steadily at 11.2% CAGR; Aiming for US$ 92.9 Bn by 2032*, GLOBENEWSWIRE (July 17, 2023) (explaining that "rising technological advancements in fertility treatments and the increasing availability of healthcare facilities are the significant factors that drive market growth."); Brenda Reddix-Smalls, *Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs But Not Our Livers?*, 10 VAND. J. ENT. & TECH. L. 643, 681, 685-87 (arguing that the dominant market forces such as fertility clinics, pharmaceutical companies, and egg brokers have "captured" regulating agency oversight).

42. *See* Misia Landau, *The Organ Trade: Right or Wrong?*, HARVARD MED. SCH. (Mar. 7, 2008), https://hms.harvard.edu/news/organ-trade-right-or-wrong [https://perma.cc/ZV39-P89C].

43. *See* Joan O'C. Hamilton, *What Are the Costs?*, STAN. MAG., Nov./Dec. 2000, https://stanfordmag.org/contents/what-are-the-costs [https://perma.cc/WD9X-S5H7]. While the development (or lack thereof) of legal regulations for ART is beyond the scope of this paper, some history is useful. Social mores prior to the mid-twentieth century considered sperm "donation" immoral and adulterous. Noa Ben-Asher*, The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1888-90 (2009). Beginning in the 1950s, sperm donation became legitimized as a medical treatment for infertility, *id.* at 1891-92, garnering additional support because of its "promise of eugenics." *Id.* at 1895. The new medical paradigm that treated sperm donation as a "cure" ultimately led to a market where "lack of regulation and a relatively low price for the gametes mean that it is both an open market in which a large number of people can participate, and a free market that flourishes because of its comparative freedom from regulation." *Id.* at 1897 (quoting Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 15-16 (2003)). The first egg donation resulting in a birth was in 1984, JUDITH DAAR, I. GLENN COHEN, SEEMA MOHAPATRA & SONIA M. SUTER, REPRODUCTIVE TECHNOLOGIES AND THE LAW 242 (3d ed. 2006), and egg donation did not meet "legal, medical and feminist resistance" since it was considered a legitimate medical treatment. Ben-Asher*, supra*, at 1912. The problem with this medical paradigm is that it is gendered; has the effect of oppressing those who cannot "naturally" have children as requiring a "cure;" and limits access for groups such as single men, same-sex couples, and lower-income families. *Id.* at 1922-24. *See also* Lisa Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1033 (1996) (noting how reproductive technology has been characterized as treatment for infertility—as if childlessness is a condition requiring medical intervention—now that such technology available).

44. Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1897-98 (2009) (noting such a ban would raise First Amendment issues).

45. Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1039, 1043 (2010) (focusing on the "negligent application of ART").

decisions reform parentage law to resolve the persistent inequalities in legal treatment of queer parents, many of whom are nonbiological parents to their ART-created children.[46] These proposals are not mutually exclusive, and only demonstrate the complexity of regulating an industry that generates human life. As reproductive rights are increasingly curtailed, perhaps it is preferable "to allow non-legal institutions such as 'science' or 'medicine' to be the primary forum for policy debate and resolution."[47]

This paper explores current issues at the intersection of race and reproductive technology in the United States. First, I introduce the broad social justice issues implicated by the fertility industry. Next, I explain the industry's problematic donor compensation structure. Third, I review racial disparities in the use of reproductive technologies. Next, I explain how fertility clinics employ racial selection and categorization. Lastly, I argue that people with oocytes[48] from historically marginalized groups must affirmatively disrupt the whiteness of the fertility industry by pushing back against the donation framework, becoming savvy sellers of their valuable genetic material.[49]

II. SOCIAL JUSTICE ISSUES IN THE FERTILITY INDUSTRY

Because intended parents who need assisted forms of reproduction explicitly choose the traits they desire, ART implicates many social justice issues, spotlighting inequalities on the stage of procreation.[50] ART could be considered an "aggravating factor in an existing inequality of power" for every historically marginalized population.[51] This is because the affluent white population has the primary ability to access ART, revealing "preferred" traits.[52] While trait-based selection for procreative purposes occurs when it comes to choosing a partner, such as height and intelligence, once traits become selectable in the same way as one might select options for an inanimate online purchase,[53] these choices take eugenic form.[54]

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46. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2331-33 (2017).
47. Larry I. Palmer, *Private Commissions, Assisted Reproduction, and Lawyering*, 38 JURIMETRICS 223, 234-35 (1998) (book review).
48. While I chose the phrase "people with oocytes" to be inclusive of the capacity of nonbinary and trans individuals to donate reproductive material and participate in pregnancy, I frequently use "woman/women" if the study or example is connected to a gendered stereotype.
49. *See* Marissa Steinberg Weiss & Erica E. Marsh, *Navigating Unequal Paths: Racial Disparities in the Infertility Journey*, 142 OBSTETRICS & GYNECOLOGY 940, 942 (2023).
50. *See generally* DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 246-93 (1997) [hereinafter ROBERTS, KILLING THE BLACK BODY].
51. Nanette R. Elster, *ART for the Masses? Racial and Ethnic Inequality in Assisted Reproductive Technologies*, 9 DEPAUL J. HEALTH CARE L. 719, 721 (2005).
52. *See* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 939 (1996) [hereinafter Roberts, *Race and the New Reproduction*].
53. *See id.* at 945.
54. RUSSELL, *supra* note 31, at 70 ("Today's genetics proceeds under the shadow of eugenics. Nowhere is this shadow more obvious than in the case of reproductive and reprogenetic technologies.").

One example of this potential is the frequent use of Pre-implantation Genetic Diagnosis (PGD), where early-stage embryos are analyzed for genetic abnormalities.[55] This implicates issues of ableism and eugenics, as families may choose not to begin a pregnancy if certain "disfavored" traits are detected[56] thus devaluing individuals who possess these traits.[57]

Another social justice issue involves LGBTQIA rights. Dysfertile[58] queer families who desire genetically related children may not be able to access ART services because of the costs, which can be up to $200,000.[59] This financial barrier likely denies many dysfertile families the option to procreate and experience the same personal satisfaction of having genetic children that fertile heterosexual families experience.[60]

This paper focuses on the social justice issue of race in the fertility industry. Historically, only white individuals have had access to reproductive services.[61] The modern fertility industry reinforces the biological myth of race[62] and stereotypes about race[63] because clinics openly racially categorize donors.[64] Donor eggs are racially marked, enabling families searching donor databases to

55. *Pre-Implantation Genetic Diagnosis*, UCSF HEALTH, https://www.ucsfhealth.org/treatments/pre-implantation-genetic-diagnosis [https://perma.cc/LFL4-PN9G] (last visited Feb. 9, 2024).

56. Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 792 (2009) [hereinafter Roberts, *Race, Gender*].

57. *Id.* at 794.

58. Ikemoto, *supra* note 43, at 1008-09, 1053 (introducing the term "dysfertile" because "infertile" has traditionally only encompassed women, and to make visible the distinct procreative challenges of lesbians and gay men, long ignored by the fertility industry). Ikemoto chose "dysfertile" because the industry had viewed procreation outside of the heterosexual framework as "dysfunction," and scholars such as Harvard Law School professor I. Glenn Cohen continue to use the term. I. Glenn Cohen, *Borrowed Wombs: On Uterus Transplants and the "Right to Experience Pregnancy"*, 2022 U. CHI. LEGAL F. 127, 137 (2022) (expanding the category of "dysfertile" in his scholarship to include "all individuals who have no medical limitation to their fertility but instead face an obstacle towards their reproduction" and noting similar use of the term "socially infertile.").

59. *See The Cost of Surrogacy, Egg Donation, & Third-Party IVF Explained,* HATCH FERTILITY (Feb. 24, 2021), https://www.hatch.us/blog/surrogate-and-egg-donor-costs [https://perma.cc/4AUZ-QX32].

60. *See* Dov Fox, *Reproducing Race in an Era of Reckoning*, 105 MINN. L. REV. HEADNOTES 233, 242 (2021) [hereinafter Fox, *Reproducing Race*].

61. *See* Elster, *supra* note 51, at 721 ("Racial inequality in reproductive services has existed long before the advent of ARTs and may, according to some, be perpetuated by the increasing use and access to ARTs by some groups and not by others.").

62. *E.g.*, Roberts, *Race, Gender, supra* note 56, at 789, 799.

63. *See, e.g.*, Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, 31 HASTINGS CTR. REP. 13, 13 (2001) ("Race-based gamete selection raises two major, linked ethical issues. One is the harm that racial stereotypical causes to individuals, and the second is the public awareness that racial stereotyping is an accepted feature of this largely unregulated market.").

64. Charis Thompson, *Skin Tone and the Persistence of Biological Race in Egg Donation for Assisted Reproduction*, *in* SHADES OF DIFFERENCE 131, 134-35 (Evelyn Nakano Glenn ed., 2009) [hereinafter Thompson, *Skin Tone*] (explaining the belief held by donors, intended parents, and medical practitioners that there are ethnoracial attributes that can be genetically passed on from donor to child).

select genes based on race.[65] This is problematic because race is not biological, yet racial categorization demonstrates that intended parents may believe that racial traits can be genetically transmitted.[66] As one legal scholar explained:

> Biological racism maintains that racial groups are physically distinct species, with specific characteristics or capabilities attributable to group members' similar genes and biology. The racism part of biological racism separates or divides human beings into hierarchically ranked groups with more or less power and privileges; the biological part of biological racism makes those divisions seem scientifically supportable and natural, as if they were based on true physical distinctions between races.[67]

Additionally, dysfertile families may not be able to access ART services due to the exorbitant costs.[68] As such, this also makes it nearly impossible for families with lower socioeconomic status, the majority of whom are Black or Hispanic, to access ART.[69] The industry thus perpetuates unequal access because of its astronomical costs.[70]

III. DONOR COMPENSATION STRUCTURE

Before exploring how racial inequities in the fertility industry may be mitigated by increasing the supply and demand of gametes from historically marginalized people, it is important to understand how donors are currently compensated.[71] The Ethics Committee of ASRM has deemed compensation for egg donors ethically justified mainly because of the time, inconvenience, and physical discomfort involved.[72] In 2007, this Committee issued a report that used

65. *See* Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom, and the Quest for the Perfect Child*, 104 MINN. L. REV. 2375, 2403-06 (2020).

66. *See* Thompson, *Skin Tone*, *supra* note 64, at 131.

67. Bender, *supra* note 28, at 54.

68. *See* Fox, *Reproducing Race*, *supra* note 60, at 242.

69. Rich, *supra* note 65, at 2401; John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html [https://perma.cc/D6R6-8ZQJ] (showing that Black and Hispanic Americans have poverty rates of 18.8% and 15.7%, respectively, while Asians and Non-Hispanic whites have a poverty rate of 7.3%).

70. *See* Rich, *supra* note 65, at 2401; Elster, *supra* note 51, at 721-22.

71. The compensation of gestational surrogates, while beyond the scope of this paper, is also controversial for many of the same reasons as egg donor compensation. *See, e.g.*, Krawiec, *Altruism and Intermediation*, *supra* note 20, at 246 ("As in the case of the egg market, formal attempts to cap surrogate compensation and the persistent dialogue of altruistic donation in the surrogacy market may further complicate the ability of surrogates to fully reap the value of their services."). One distinguishing factor is that intended parents do not need to consider the race of the gestational surrogate. *Id.* at 225.

72. Ethics Comm. Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 307 (2007); Ethics Comm. Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors: An Ethics Committee Opinion*, 116 FERTILITY & STERILITY 319, 321 (2021).

an hourly rate to calculate compensation for egg donation based on sperm donation, determining that "the average payment to sperm donors was $60–$75, which . . . would justify a payment of $3,360–$4,200 to oocyte donors."[73] In 2021, this same Committee removed this compensation range, stating only the "compensation to women providing oocytes should be fair and not used as an undue enticement that will lead prospective donors to discount risks."[74]

Thus, the amount of compensation is neither legally limited nor specifically narrowed by the ASRM Ethics Committee, yet egg brokers and fertility clinics use the rhetoric of altruism to emphasize that donors should donate their eggs to compassionately help another woman by giving the gift of life,[75] a gift "beyond measure."[76] ART is a multibillion-dollar industry where fertility clinics profit immensely,[77] yet these clinics, as well as egg donor agencies, use language that

73. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 308 (2007).

74. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 322 (2021).

75. *See* Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 319-21 (2021); Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242; *see, e.g.*, *Egg Donor Compensation*, PAC. FERTILITY CLINIC, https://www.pfcdonoragency.com/become-a-donor/egg-donor-compensation [https://perma.cc/CW68-64PE] (last visited Feb. 19, 2024) ("For many egg donors, the act of helping others fulfil their dreams of building a family can be more rewarding than monetary compensation."); *Become an Egg Donor*, FERTILITY INSTIT. HAW., https://www.ivfcenterhawaii.com/3rd-party/become-an-egg-donor/ [https://perma.cc/G7BC-G8DG] (last visited Feb. 19, 2024) ("[G]ive the gift of motherhood. . . . The generosity of egg donors like you continues to make this possible."); *Your Journey to Parenthood Starts Here!*, CONCEPTIONS CTR. FOR OVUM DONATION, https://www.conceptionscenter.com/ [https://perma.cc/N7VJ-W3FT] (last visited Feb. 19, 2024) (matching "warm and compassionate egg donors to couples and individuals worldwide who need help building a family"); *Donor Information*, A PERFECT MATCH, https://www.aperfectmatch.com/Egg-Donation-Program/For-Donors/donor-information.html [https://perma.cc/B4VJ-VBSM] (last visited Feb. 19, 2024) ("[O]ur donors say their greatest reward comes from knowing they made a difference in someone's life by giving of themselves in such a personal way." "[The Agency], however, strongly encourages its donors to request compensation that realistically reflects the time and effort required of the donor to do an egg donation—*and that includes a level of altruism*." (emphasis added)).

76. *Donor Information*, *supra* note 75.

77. *See The Fertility Business is Booming,* ECONOMIST (Aug. 8, 2019), https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming ("Data Bridge, a research firm, predicts that by 2026 the global fertility industry could rake in $41bn in sales, from $25bn today. . . . Add high operating margins—of around 30% in America for a $20,000 round of IVF—plus the recession-proof nature of the desire for offspring, and investors are understandably excited."); *Assisted Reproductive Technology Market is Expected to Reach USD 56.18 Billion By 2028 with a CAGR of 9.94% Over the Forecast Period Due to Demand in Healthcare Industry*, MEDGADGET (Oct. 7, 2022), https://www.medgadget.com/2022/10/assisted-reproductive-technology-market-is-expected-to-reach-usd-56-18-billion-by-2028-with-a-cagr-of-9-94-over-the-forecast-period-due-to-demand-in-healthcare-industry.html [https://perma.cc/QY4D-SFE8]; Arizton Advisory & Intelligence, *U.S. Assisted Reproductive Technology (ART) Market to Hit $4.5 Billion by 2027*, GLOBAL NEWSWIRE (Mar. 24, 2022), https://www.globenewswire.com/news-release/2022/03/24/2409807/0/en/U-S-Assisted-Reproductive-Technology-ART-Market-to-Hit-4-5-Billion-by-2027.html [https://perma.cc/GF56-3BGT]; Rebecca Torrence, *The Fertility Business is Booming as Startups Go After Big Profits in a $54 Billion Market, Even as Other Healthcare Companies Slump*, BUS. INSIDER (Jun. 13, 2023), https://www.businessinsider.com/fertility-startups-booming-despite-market-downturn-2023-6 [https://perma.cc/2NLT-UQJR] (Because health insurance does not cover many ART procedures, *see infra* Section IV, fertility clinics are profitable because patients pay them out of pocket. "Clinics get that cash directly, rather than seeking reimbursement from health plans,

pressures individuals to "donate" their eggs rather than seek financial gain.[78] Egg brokers may reject prospective donors who assert a primary interest in earning money from their donations,[79] will coach donors to downplay financial motivations,[80] and express discomfort advocating for donors' desired compensation.[81]

Despite all the rhetoric of altruism, where intended parents supposedly "compensate" donors for their eggs, intended parents are in fact providing payment to people with oocytes for their oocytes, a product of their bodies.[82] This rhetoric poorly disguises a traditional market exchange as a gift,[83] with the fertility industry effectively treating eggs as commodities on the marketplace.[84] If eggs were truly inalienable, for example, there would be no opportunity for negotiation between intended parents (buyers) and donors (sellers).[85] Organs, which society also considers inalienable, are banned from the transplant marketplace under federal law.[86] So too is bone marrow,[87] which arguably should be less inalienable than ova because bone marrow can save lives that already exist.

Meanwhile, "compensation" for eggs varies between four thousand to over one hundred thousand dollars,[88] a sign to any prospective donor that their compensation deserves closer scrutiny, as an exchange with such variability suggest it is not actually a donation. Clinics and egg brokers use the rhetoric of altruism without pushback because the ART industry has long-standing moral sentiments on its side.[89] Society considers bodily products too sacred to treat as

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which tend to negotiate down the costs of services. That model can yield hefty profits for fertility players. . .").

78. *See, e.g.*, Rene Almeling*, Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOCIO. REV. 319, 319 (2007); Miller, *supra* note 33, at 38 ("[M]arket rhetoric and industry nomenclature are carefully designed to ensure alignment with the appropriate narrative.").
79. Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 GEO. J.L. & PUB. POL'Y 349, 355 (2015) [hereinafter Krawiec, *Markets, Morals*] ("Potential egg donors who claim monetary compensation as their overriding motivation, for example, are often eliminated as undesirable."); Miller, *supra* note 33, at 38.
80. Almeling, *supra* note 78, at 327, 329-30.
81. *Id.* at 333 ("[S]taff do not appreciate 'girls that really ask you to negotiate' a higher fee. [Egg Agency's] director expresses 'disappointment' in these women, saying, 'I really don't like that. It's really uncomfortable, and couples don't like it.'").
82. Krawiec, *Markets, Morals*, *supra* note 79, at 354.
83. *See* Stephanie Karol, *The Market for Egg Donation*, 27 DUKE J. ECON., Aug. 10, 2016, at 1 (describing donated oocytes as "straddle[ing] the line between 'tradeable good' and 'gift'").
84. *Id.* ("[T]he institutions . . . facilitate an exchange of money for an end product, which has all the traditional trappings of a market mechanism.").
85. *See* Krawiec, *Markets, Morals*, *supra* note 79, at 354 (describing aspects of oocyte donation, including payment from buyer to seller, that indicate commodification).
86. 42 U.S.C. § 274e.
87. *Id.*
88. *Become an Egg Donor*, *supra* note 75 (offering $4,000 to $6,000 for a single donation cycle); *Egg Donor Compensation*, PAC. FERTILITY CLINIC, *supra* note 75 (advertising that an egg donor's "cumulative earning potential can be up to $111,000" depending on the number of cycles, "donor location, prior donation, ethnicity, and other factors").
89. *See* Krawiec, *Markets, Morals*, *supra* note 79, at 354-55 (giving examples of altruistic rhetoric in egg donation).

marketplace commodities in order to avoid exploitation of vulnerable individuals and existential harms that may result from treating body parts as salable goods.[90] These theoretical harms are largely philosophical and are centered on commodification's alleged injury to personhood due to objectification,[91] which will "do[] violence to our conception of human flourishing."[92] Therefore, society purportedly benefits from this play acting because it allegedly preserves human dignity, even though an egg donation functions like a traditional market exchange where good is transferred for value.[93] Kimberly Krawiec explains that this anti-commodification argument fails because the fertility industry is a massive capitalist enterprise: "Arguments against commodification, then, are simply claims that the supplier/egg donor should be excluded from the full profits generated by ARTs that employ donated eggs, while fertility clinics enjoy the surplus created by the ability to procure their inputs at below-market prices."[94]

The anti-commodification argument offers flimsy support for the paternalistic justification that low compensation protects women.[95] I argue that

90. *See, e.g.*, Jody Lyneé Madeira, *Conceiving of Products and the Products of Conception: Reflections on Commodification, Consumption, ART, and Abortion*, 43 J.L. MED. & ETHICS 293, 296 (2015) ("Addressing egg donation, surrogacy, prenatal testing and preimplantation genetic diagnosis (PGD), scholars argue that women's bodies and reproductive capacities, embryos, fetuses, and children should not be commodified, and warn that ART can coerce and exploit patients. They argue that it is impossible or unwise to monetarily value certain goods, that monetary valuation does not capture these goods' significance, that valuation and exchange can warp those goods, and that transactions exchanging these goods for money are involuntary or accessed unequally."); Nicolette Young, *Altruism or Commercialism? Evaluating the Federal Ban on Compensation for Bone Marrow Donors*, 84 S. CAL. L. REV. 1205, 1206 ("[M]oral concerns include the commodification of the human body, the exploitation of poor and ethnic minority populations, and the general repugnance that some feel toward the idea of selling one's body.") *But see* Squillace, *supra* note 38, at 144 ("Concerns that exist over the fact that the marketplace 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. 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-billion-dollar industries. Standardized charts that place values on body parts serve as the guidelines for damages in personal injury cases.") (citations omitted).

91. Radin*, supra* note 30, at 1881 ("Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person.").

92. *Id.* at 1885 ("In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people. Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable 'objects.' This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.").

93. *See id.* at 1885-86 ("[W]e must reject universal commodification, because to see the rhetoric of the market . . . as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing.").

94. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 241.

95. I choose the gendered term "paternalistic" because only people with oocytes can donate oocytes, and limitations on the parameters of donation implies that these individuals are incapable of making informed decisions over their bodily autonomy and are vulnerable to

egg donors do not benefit from forced altruism and feigned "donation" because they create an exploitative devaluation of donors' inner and market worth.[96] This is because the fertility industry uses societal unease with the commodification of bodily materials to its advantage to coerce women into being commercially compliant while doctors, for example, profit immensely.[97] Donors requesting higher compensation, after all, will reduce what is available for the other actors involved.[98] Yes, there are harms to selling body parts, but consider the greater harm of denying people with oocytes the right to participate in the ART market while they are well aware of how greatly others profit.[99] This policy materially devalues a donor, unlike potential philosophic disquietude.

Reading legal scholarship on egg donation over a decade after my own has clarified sentiments I felt but for which I had no conceptual foundation. Saylor Soinski explains, "Parties to oocyte transfer . . . frame the oocyte as a gift and avoid the *discomfort* of openly commodifying human parts."[100] I would have

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coercion, thus requiring protection—whether it is by fertility clinics or ethic committees. *See* Stephen J. Ware, *Paternalism or Gender-Neutrality?* 52 CONN. L. REV. 537, 554-58 (2020) (providing examples where use of the word "paternalism" is appropriate, including in discussions of surrogacy contracts and reproductive health). *But see* Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 85 (2002) (arguing that "the epitome of patriarchy and paternalism" is "[m]ostly male physicians encouraging healthy, fertile women to undergo procedures that will help infertile women, at a cost and risk unknown to the donor.") I find Karsjens's counterargument less persuasive, because it is more paternalistic to treat people with oocytes as unable to push back against this narrative—especially when these individuals desire to help others, desire to earn a substantial amount, and are aware that certain risks are currently unknown.

96. *See* Krawiec, *Markets, Morals*, *supra* note 79, at 354-55 (describing conflicting altruism and commodification in the egg market).

97. *See* Lawrence Zelenak, *The Body in Question: The Income Tax and Human Body Materials*, 80 L. & CONTEMP. PROBS. 37, 70 (2017) ("By artificially depressing the compensation paid to the donors, the assisted reproduction industry increases its own profits."); Krawiec, *Markets, Morals*, *supra* note 79, at 350 ("Societal unease with the literal egg market is mediated through the cultural understanding of egg donation as at least partly a nonmarket gift exchange."); Krawiec, *A Woman's Worth*, *supra* note 30, at 1764 (noting that assisted reproduction is "a multi-million dollar, highly commercial industry"). Many consumers of ART in fact expect fertility clinics to provide near-luxury accommodations, yet do not extend this concept of value and worth to donors. Madeira, *supra* note 90, at 298 ("Most care-seekers expect to pay high prices (which may perversely increase ART's mystique), expect good doctors to be well-paid, and anticipate that clinics will be not merely comfortable, clean, and sanitary but lavish and fashionable.").

98. Anna Curtis, *Giving 'Til It Hurts: Egg Donation and the Costs of Altruism*, FEMINIST FORMATIONS, Summer 2010, at 88 ("[T]he more compensation an egg donor receives, the less money recipients will be willing to pay for clinics' and agencies' recruitment services.").

99. *See* Squillace, *supra* note 38, at 144 ("Drawing the line at egg donation inflicts a direct harm on those who desire to participate in such a system while allowing [other] commodification practices to continue."). Even through my compensation was never restricted by black letter regulation or law, not being able to sell my oocytes on my terms felt like just another form of reproductive oppression. *See also* Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 33 (2015) ("The term reproductive oppression refers to the myriad ways in which pregnancy, childbearing, and mothering (as distinct from simply parenting or from being a father) can deny women access to a full range of human experiences. Being born with a womb or living in a body presumed to contain a womb has traditionally required that women, far more frequently than men, take account of their reproductive capacity and deal with the ways in which others frame that capacity.").

100. Soinski, *supra* note 34, at 525 (emphasis added) (citing Karol, *supra* note 83, at 2).

preferred a little metaphysical discomfort over the actual disturbance I felt from being manipulated by a system that guaranteed massive profits to others.[101] Being able to decide the monetary "worth" of my unique Chinese-Caucasian oocytes would have been empowering.[102] If I had earned $700,000 (at $100,000 per donation), rather than the approximate $83,000 I actually earned, this amount would have significantly supplemented the low wages I earned as a cook, enabling me to travel, write, and thrive. I completely disagree with the notion that a restraint on alienability when it comes to the oocyte market truly protects some amorphous conception of "human flourishing."[103] I have found great consonance in scholars such as Kimberly Krawiec, who writes:

> [T]he commodification objection seems an especially implausible vehicle through which to raise concerns about societal degradation or the economic and social well-being of women. In an economic exchange that requires an oocyte for completion, does limiting the monetary benefit of only a single actor—the egg donor herself—significantly reduce any degrading effects of what remains a highly profitable and expensive economic transaction?[104]

The burden should not be on individual donors to risk their health *and* take the financial hit; highly philosophical justifications provide no comfort to donors who are not contemplating contested commodification or inalienability while splayed on an operating room table.

One aspect of the exploitation argument of commodification is that egg donors cannot give genuine informed consent to the medical procedure because of the unknown long-term harms, such as cancer. I understood in signing consent forms that not every risk may be listed, and I was accepting certain unknowns. There is much scholarly concern with egg donor risks,[105] while women having

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101. *See* Krawiec, *A Woman's Worth*, *supra* note 30, at 1764. ("[A]nticommodification objections are a poor fit in the face of a multi-million dollar, highly commercial industry."); Arizton Advisory & Intelligence, *supra* note 77 (highlighting projected expansion in market valuation for the assisted reproductive technology sector partly due to increased investments, expanded access to clinics, and growing infertility).

102. *See* Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 307 (2007); Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 321 (2021) (noting that clinics and donor agencies, not oocyte donors, are setting prices for donations).

103. *See* Radin, *supra* note 30, at 1885 (presenting an argument against commodification).

104. Krawiec, *A Woman's Worth*, *supra* note 30, at 1764.

105. *See, e.g.,* Karsjens, *supra* note 95, at 83-85 (questioning egg donors' ability to give informed consent to the risks of egg donation); H. Deniz Kocas, Tonya Pavlenko, Ellen Yom & Lisa R. Rubin, *The Long-Term Medical Risks of Egg Donation: Contributions Through Psychology*, 7 TRANSLATIONAL ISSUES IN PSYCH. SCI. 80, 83-85 (using psychological theory to analyze the communication of long-term medical risks to egg donors). *But see* Angel, *supra* note 17, at 210-12 (arguing that egg donors should be able to give informed consent under the same rationale that participants can give informed consent for Phase I clinical trials. "Despite this deficiency of information about risks in humans, there is general consensus that it is acceptable to allow individuals to participate in these trials, and to make their own decisions as to whether the potential benefits to themselves or society in general outweigh the possible, unknown risks. The trials are allowed to proceed because society believes that the informed consent process sufficiently protects volunteers from exploitation.").

eggs retrieved for their own use—whether for freezing or IVF—are not chased by scholars waving red flags and yelling, "exploitation!" So long as prospective donors are informed that consent may not encompass all known risks, this consent should be sufficient. A federal registry of egg donor data could aggregate statistical information about OHSS, for example.

Kimberly Krawiec argues that the scholarly emphasis against egg donors receiving higher compensation may reveal gender and class bias:

> There are many dangerous jobs regularly performed for compensation, often by employees with lower socio-economic status and education levels than egg donors (who are often valued for their academic credentials, among other characteristics). Those jobs are also performed primarily, if not exclusively, by men. For example, fishing, logging, aircraft pilot, and construction top the list of the most dangerous jobs, and more than ninety-two percent of all workplace fatalities are men. Yet, wage capping of these occupations is not suggested as an appropriate response to the jobs' inherent dangers. Nor are industry collusion or government regulation to limit worker compensation invoked as necessary mechanisms to "protect" these employees from financial coercion.[106]

The concern with coercion and exploitation is not invalid, but the physical and psychological risks of egg donation should cut in favor of donors being able to decide for themselves what these risks are worth. As bioethicist Elizabeth Yuko similarly states, "There are a lot of things people are allowed to do with their bodies for money that are risky: pro sports for example, being a firefighter…We're fine with people using their bodies in those ways to make money. Why shouldn't women have the option to donate their eggs?"[107] Additionally, coercion happens when there is financial need: egg donor donation limitations apply to all potential donors, and thus do not directly implicate actual instances of coercion.[108]

When I began donating my eggs in 2008, an ASRM Ethics Committee had just released an opinion stating that "sums of $5,000 or more require justification and sums above $10,000 are not appropriate."[109] ASRM emphasized that egg donors undergo far more discomfort and risk than sperm donors, but even though there was "no consensus on the precise payment," the accepted compensation of $5,000 aligned with the amount most SART member clinics provided.[110]

Throughout my seven donations, I questioned how an ethical boundary of $10,000 was able to prevent the commodification of human tissue.[111] This

106. Krawiec, *A Woman's Worth*, *supra* note 30, at 1764-65 (citations omitted, parentheses in original).
107. Donna De La Cruz, *Should Young Women Sell Their Eggs?*, N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/20/well/family/young-women-egg-donors.html.
108. *See* Krawiec, *A Woman's Worth*, *supra* note 30, at 1765.
109. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 308 (2007).
110. *Id.*
111. *See* Krawiec, *A Woman's Worth*, *supra* note 30, at 1764; Ethics Comm. Am. Soc'y for Reprod.

boundary resulted in having to engage in behavior that felt unethical only as a result of this cap. My egg broker instructed me to lie (if asked) to the fertility clinics regarding my compensation, which varied between $12,000 and $18,000. My broker told me fertility clinics would not work with donors whose compensation exceeded ASRM's ethical cap. The fact that my legally valid fifteen-page Egg Donor Agreements openly stated my compensation amount felt at odds with ASRM's ethical boundary.[112] I was living a moral reasoning hypothetical—if a medical committee set an ethical cap, but egg brokers do not abide by this cap and instruct donors to lie so that donors can receive slightly higher amounts, yet the donors still do not receive the compensation they ask for and are made to feel guilty—how is this ethical?

I also felt indignant that a medical committee could decide the value of my bodily tissue[113] when I was the one enduring a risky medical process.[114] My feelings were confounded by the fact that I sincerely wanted to help other families who could not conceive without ART. Still, because my desired compensation was $40,000, it felt offensive when intended parents offered $12,000, knowing full well that they were not negotiating with the reproductive endocrinologist or attorney. Even if intended parents can afford to pay donors higher amounts, they generally prefer donors who have an altruistic nature, perhaps believing this too is somehow inheritable.[115] Because my broker already made me feel as though my compensation was in excess of the ethical cap, further negotiation was tacitly inappropriate.[116] As a woman in her twenties with no business acumen, I was profoundly unqualified to negotiate.[117] The protection I needed was not from commodification in a commercial industry[118] but from an advocate who would affirm that it was acceptable for me to desire and demand the price I had set. I chose $40,000 because it was a reasonable discount on the advertisements I had seen offering at least $50,000.[119] I was empathetic to the families knowing very

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Med., *supra* note 72, at 308 (2007).

112. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 308 (2007).

113. *Id.* at 308-09 (illustrating that fifteen men and women on the Ethics Committee determined that sums exceeding $10,000 were "not appropriate").

114. *See* AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 15-16 (2018); Tober et al., *supra* note 12, at 1292 (citations omitted); INST. MED. & NAT'L RSCH. COUNCIL, *supra* note 13, at 3.

115. *See* Curtis, *supra* note 98, at 88.

116. *See, e.g.*, Almeling, *supra* note 78, at 329-30 (explaining that donation agencies may coach donors to downplay financial motivations instead of negotiating for a higher price); Soinski, *supra* note 34, at 528 ("[T]he industry continues to be dominated by the idea that financial, motivations, to some extent, preclude the existence of altruistic motivations." (citations omitted)).

117. "Though little is known about the *actual* demographics of these donors, the ideal donor profile is clear: she is young, intelligent, highly educated, and has yet to realize her earning potential." Miller, *supra* note 33, at 43. Business negotiation is not in the skillset of the average donor and certainly was not in my skillset at the time of my donations.

118. *See* Krawiec, *Altruism and Intermediation*, *supra* note 20, at 241 ("[O]bjections to the egg market (or any other baby market sector) cannot persuasively rest on concerns over commodification and commercialization, as the market was commodified and commercialized long ago.").

119. *See, e.g.*, O'C. Hamilton, *supra* note 43 (giving the example of a full-page ad placed in the

well there was no empathy in fertility clinics' calculations. Asking for $40,000 felt excessive, but it somehow still made me feel less than.

Moreover, imagine my surprise having to pay income tax on my "donation."[120] I am not the only donor whose broker failed to inform her of tax liability on "donations,"[121] as one donor writes:

> One of the worst parts is that egg "donations" are classified at the end of the year as "Miscellaneous" income on par with lottery winnings and hobby income. It is taxed at the highest amount possible. Even though the sale of body parts is a federal offense and ILLEGAL in the U.S., the agency and IRS will classify your "service" as taxable income. None of this was explained to me at the time of my egg donation.[122]

In 2016, a federal court ordered ASRM and SART to remove language that specified an ethical cap from its guidelines and clinic requirements.[123] Nonetheless, the perception of egg donation as a means to a windfall remains pervasive.[124] Current examples of compensation egg donors receive if they donate directly to a clinic includes $10,000 to $20,000,[125] $4,000 to $6,000,[126] and $7,000.[127] Examples of compensation amounts for donors who choose to use an

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Sanford Daily and in student newspapers at Harvard, Yale, UCLA [sic] and other schools last spring that read, 'Give the Gift of Life & Love.' It promised $100,000 to a Caucasian woman under age 30 with 'proven college-level athletic ability' willing to donate eggs. Numerous other ads have offered between $10,000 and $80,000.").

120. *See* Bridget J. Crawford, *Tax Talk and Reproductive Technology*, 99 B.U. L. REV. 1757, 1761-63 (2019) (discussing a 2015 court opinion finding that remuneration received for egg donation was taxable income and must be reported).

121. *Id.* at 1796 ("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."). Some agencies, however, are now upfront about egg donation being taxable income. *See, e.g.*, *Egg Donor Compensation: How Much Does Egg Donation Pay?*, CONCEIVEABILITIES, https://www.conceiveabilities.com/egg-donors/egg-donor-pay/ [https://perma.cc/U86Z-7LLY] (last visited Feb. 22, 2024) (telling potential donors they will be issued a 1099-S because egg donation compensation is taxable income).

122. M, *What I Wish I Knew Before I Donated My Eggs*, WE ARE EGG DONORS (Nov. 13, 2015), https://www.weareeggdonors.com/blog/2015/11/13/what-i-wish-i-knew-before-i-donated-my-eggs [https://perma.cc/7LYV-AK6M].

123. Kamakahi v. Am. Soc'y Reprod. Med., No. 3:11-CV-1781 JCS, 2016 WL 7740288, at *2 (N.D. Cal. Aug. 26, 2016).

124. *See, e.g., Egg Donor Compensation*, FAM. SOL. INT'L, https://thedonorsolution.com/egg-donation/egg-donation-compensation/ [https://perma.cc/HM9B-35Y6] ("Some people have the impression that a woman who chooses to donate eggs for money can make $100,000 or more. In reality, compensation for egg donors very rarely exceeds $10,000, even in areas where starting compensation is higher.") (last visited April 23, 2023).

125. *Egg Donor Compensation*, PAC. FERTILITY CLINIC, *supra* note 75 ("Compensation amount is determined by donor's location, prior donations, ethnicity, and other factors.").

126. *Become an Egg Donor*, *supra* note 75.

127. *How Will I be Compensated for Egg Donation?*, SHADY GROVE FERTILITY (Aug. 10, 2017), https://www.shadygrovefertility.com/article/egg-donor-compensation/ [https://perma.cc/SSY9-MMG8].

egg agency includes $5,000 to $10,000[128]; $10,000 to $12,000 "or more"[129]; and compensation that begins at $10,000 without an explicit limit.[130] The fertility industry benefits from the claims that donor participation is non-commercial and that this protects women from commodification, because clinics are then exempt from price-fixing regulations.[131]

Even though there is no longer an explicit cap, and some donors do receive over $10,000, the typical donor payment appears to still be less than $10,000, meaning the industry continues to implicitly set the same standard as over a decade ago.[132]

IV. CURRENT LANDSCAPE OF RACE AND ART

Infertility, which is defined by the Center for Disease Control as an inability "to get pregnant (conceive) after one year (or longer) of unprotected sex,"[133] is a disease.[134] In the United States, about 8% of married and cohabitating women of reproductive age struggle with infertility,[135] and about 12% have received infertility services.[136] There is mixed data on whether infertility affects white individuals more than Black, Asian, or Hispanic individuals,[137] yet white

128. *Prospective Donors*, EGG BANK AM., EGG DONOR AM., https://www.eggdonoramerica.com/become-egg-donor/egg-donor-compensation [https://perma.cc/M9YS-D58L] (last visited April 23, 2023).

129. *Being an Egg Donor is Rewarding in More Ways Than One*, GROWING GENERATIONS, https://www.growinggenerations.com/egg-donation/for-egg-donors/pay/ [https://perma.cc/5HCG-9SEP] (last visited Feb. 22, 2024).

130. *Egg Donor Compensation and Benefits*, HATCH FERTILITY, https://www.hatch.us/egg-donor-compensation (offering compensation starting at $10,000 "with room for growth according to your achievements, education, and prior cycles.") (last visited Feb. 22, 2024);

131. *See* Krawiec, *Altruism and Intermediation*, *supra* note 20, at 239 ("Formal and informal agreements to depress the price of eggs pervade the fertility industry…[T]hese attempts by the fertility industry to control egg prices amount to the same type of horizontal price fixing agreement long deemed *per se* illegal by the Supreme Court. Yet these agreements to depress egg prices thus far have failed to elicit regulatory notice, public criticism, or legal consequence. Although several factors may contribute to this lapse, the persistent dialogue of altruism and donation that shrouds the egg business and distracts from the commercial nature of the industry is surely a contributing factor." (citations omitted)).

132. *See, e.g.*, Egg Donor Compensation, PAC. FERTILITY CLINIC, *supra* note 75; Become an Egg Donor, *supra* note 75; Prospective Donors, *supra* note 128; Egg Donor Compensation, FAM. SOL. INT'L, *supra* note 124.

133. Infertility FAQs, CDC, https://www.cdc.gov/reproductivehealth/infertility/index.htm/ [https://perma.cc/YN2K-2MGG] (last visited April 30, 2023).

134. *Infertility*, WHO, https://www.who.int/news-room/fact-sheets/detail/infertility [https://perma.cc/T3E9-23H9] (last visited April 30, 2023).

135. Morgan Snow, Tyler M. Vranich, Jamie Perin & Maria Trent, *Estimates of Infertility in the United States: 1995-2019*, 118 FERTILITY & STERILITY 560, 563 tbl.2.

136. CDC, *2020 Assisted Reproductive Technology Fertility Clinic and National Summary Report* 2 (2022), https://www.cdc.gov/art/reports/2020/pdf/Report-ART-Fertility-Clinic-National-Summary-H.pdf [https://perma.cc/8HTS-EMKR].

137. Angela S. Kelley, Yongmei Qin, Erica E. Marsh & James M. Dupree, *Disparities in Accessing Infertility Care in the United States: Results from the National Health and Nutrition Examination Survey, 2013-16*, 112 FERTILITY & STERILITY 562, 565-66 (2019) (analyzing National Health and Nutrition Examination Survey (NHANES) cycles from 2013 to 2016 and finding no significant differences in the prevalence of infertility by race or socioeconomic

individuals seek out ART services at a disproportionately higher rate than Black, Asian, and Hispanic individuals.[138] This reduced use of ART services by Black, Asian, and Hispanic individuals perpetuates the flawed idea that white people with oocytes ought to procreate in abundance.[139] Consider also the structural racism embedded in an industry that provides infertile white families with multiple ART-created offspring, while welfare laws limit the amount of children a Black person with oocytes may have.[140]

Where do the roots of this reproductive inequity begin?[141] In order to systematically analyze the multiple racial disparities in everything from IVF outcomes[142] to live birth rates,[143] Doctors Marissa Weiss and Erica Marsh created a pyramid-shaped infertility model, including stages such as "Diagnosed with infertility," "Referred to a specialist," "Gets appointment with specialist," "Engages in fertility treatment," and "Engages in IVF (if needed)."[144]

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background). *But see* Snow et al., *supra* note 135, at 563 (indicating that Non-Hispanic Black women are in fact significantly more likely to experience infertility than Non-Hispanic white women).

138. *See, e.g.*, Deepa Dongarwar, Vicki Mercado-Evans, Sylvia Adu-Gyamfi, Mei-Li Laracuente & Hamisu M. Salihu, *Racial/Ethnic Disparities in Infertility Treatment Utilization in the US, 2011-2019*, 68 SYS. BIOLOGY REPROD. MED. 180, 185 (finding that Hispanic and Non-Hispanic Black women were 70% less likely to use infertility treatment, but acknowledging the limitations of the study's "inability to account for important sociodemographic factors such as income and insurance coverage for ART" and noting other studies that have controlled for these factors and still demonstrated racial disparities in ART utilization between Non-Hispanic-Black and white women, and Hispanic and Non-Hispanic women); David B. Seifer, Linda M. Frazier & David A. Grainger, *Disparity in Assisted Reproductive Technologies Outcomes in Black Women Compared with White Women*, 90 FERTILITY & STERILITY 1701, 1701, 1707 (2008) ("Black, white, and other race/ethnicity women underwent 3666 (4.6%), 68,607 (83.5%), and 8036 (11.9%) IVF cycles, respectively."); Iris G. Insogna & Elizabeth S. Ginsburg, *Infertility, Inequality, and How Lack of Insurance Coverage Compromises Reproductive Autonomy*, 20 *AMA J. ETHICS*, E1152, E1154 (2018) ("There is evidence that African American, Chinese, and Hispanic patients are much less likely to seek care than white patients."); Kelley et al., *supra* note 137, at 566 (finding data consistent with previous studies demonstrating "black and Hispanic women with infertility may seek infertility care less often than non-Hispanic whites, Asians, and women of multiracial backgrounds"). *But see* Saswati Sunderam, Dmitry M. Kissin, Yujia Zhang, Amy Jewett, Sheree L. Boulet, Lee Warner, Charlan D. Kroelinger & Wanda D. Barfield, *Assisted Reproductive Technology Surveillance—United States, 2018*, MORBIDITY & MORTALITY WEEKLY REP. SURVEILLANCE SUMMARIES, Feb. 2022, at 11 (stating data indicated that "ART use was highest among Asians or Pacific Islanders, followed by non-Hispanic White women, whereas non-Hispanic Black, Hispanic, and non-Hispanic American Indian or Alaska Native women had substantially lower levels of ART use").

139. Roberts, *Race, Gender, supra* note 56, at 785 (describing how the use of race in reproductive technology has perpetuated the casting of "white women as the only consumers of reproductive technologies and women of color only as victims of population control policies").

140. *Id.* at 784-85.

141. Reviewing current scientific literature is notably problematic. First, research employs heteronormative and cisnormative bias by, for instance, excluding many individuals from studies that examine demand for ART, for example. Second, racial groups that are not white are underrepresented in this research. Weiss & Marsh, *supra* note 49, at 941.

142. *Id.* at 942 (stating that IVF utilization is higher among white women "[e]ven after adjusting for relevant factors such as age, marital status, education, and payment method.").

143. *Id.* at 944 (noting a contributing factor to racial disparities in live-birth rates is that Black women have a higher incidence of miscarriages following ART treatments).

144. *Id.* at 941 fig.1.

Weiss and Marsh found "inequities at every stage of the path to parenthood."[145] At the outset, Black women are half as likely as white women to be evaluated for infertility.[146] Other disparities include: Black and Hispanic women wait longer to see infertility specialists;[147] Black women have lower odds of getting pregnant using IVF;[148] and, particularly relevant to this Article, Black recipients of donor eggs are not only less likely to get pregnant than white recipients, but have the "lowest probability of pregnancy regardless of the race of the oocyte donor."[149] This probing is significant because one of the core values of SisterSong Women of Color Reproductive Justice Collective's[150] reproductive justice framework is the right to have a child.[151] It is disconcerting that maternal race can predict both ART utilization and outcome.[152] Action must be taken to prevent this reproductive injustice.

Even though the number of ART cycles has doubled since 2009,[153] "the majority of individuals undergoing fertility treatment are still white, highly educated, and financially privileged."[154] One reason Black and Hispanic women use ART services less than white women is the expected financial barriers that emerge from the intersection of race and class.[155] ART services requiring donor

145. *Id.* at 944.

146. *Id.* at 941. The reasons for this require further examination by researchers, but Doctors Weiss and Marsh surmise that "factors such as limited fertility knowledge, misconceptions, and mistrust of the health care system among Black women, compounded by physician bias based on longstanding stereotypes" play a role. *Id.* (citations omitted). Black and Hispanic women may choose to delay infertility evaluations an average of twenty months longer than white women. *Id.* (citations omitted).

147. *Id.* at 942 (noting results from a 2021 study showing no racial difference in getting a fertility appointment or the potential obstacle of taking time off from work).

148. *Id.* at 943.

149. *Id.*

150. SISTERSONG, https://www.sistersong.net/about-x2 [https://perma.cc/W45B-53XS] (last visited Jan. 21, 2024). SisterSong is "a Southern based, national membership organization; [whose] purpose is to build an effective network of individuals and organizations to improve institutional policies and systems that impact the reproductive lives of marginalized communities").

151. *Visioning New Futures for Reproductive Justice*, SISTERSONG, https://www.sistersong.net/visioningnewfuturesforrj [https://perma.cc/X5KW-973Y] (last visited Feb. 16, 2024).

152. Dandison Nat Ebeh & Shayesteh Jahanfar, *Association Between Maternal Race and the Use of Assisted Reproductive Technology in the USA*, 3 SN COMPREHEN. CLIN. MED. 1106, 1107, 1112 (citing research suggesting racial differences in ART utilization and concluding that racial differences in ART procedure success "persist even when adjusting for disease (infertility) severity, age, insurance coverage, marital status, income, and educational status" (citations omitted)).

153. *See* CDC, *supra* note 136, at 12.

154. Weiss & Marsh, *supra* note 49, at 942. *See also* Kelley et al., *supra* note 137, at 565 (explaining that "despite equivalent rates of infertility, women who accessed infertility care the least have lower income, have less education, are non-U.S. citizens, are uninsured, and use the emergency department as their primary source of health care").

155. *See* Elster, *supra* note 51, at 726 (citing Tarun Jain & Mark Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221, 223 (2005)) ("With regard to infertility patients, potential barriers to access to care may include lack of appropriate information, racial discrimination, lack of referrals from primary care physicians, lack of adequate insurance coverage among lower socioeconomic

eggs and a gestational surrogate can cost up to $200,000.[156] This is a financial barrier because in many states, there is no mandated insurance coverage for ART services.[157] Without insurance coverage, the gap in access widens between individuals from historically marginalized groups who cannot afford ART and affluent white families who can.[158]

Public and federal insurance rarely covers infertility treatments,[159] and there is mixed data on whether state insurance mandates regulating private insurance coverage reduce the racial disparity in ART usage.[160]

Among Black women, other barriers to ART usage are sociodemographic factors such as cultural norms and acceptance,[161] religious beliefs,[162] and stigma.[163] For example, stereotypes about Black women being highly fertile may cause them to feel embarrassed about seeking medical intervention to conceive.[164]

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groups, and cultural bias against infertility treatment.").

156. *See The Cost of Surrogacy, Egg Donation, & Third-Party IVF Explained*, *supra* note 59.

157. *See Insurance Coverage by State*, RESOLVE: THE NAT'L INFERTILITY ASS'N. https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/ [https://perma.cc/3TFQ-MEMV] (last visited Feb. 16, 2024) (noting that as of September 2023, only twenty-one states and the District of Columbia have fertility insurance coverage laws), *See also* Kelley et al., *supra* note 137, at 565 (stating "health insurance is a proxy for improved medical access," but "health insurance alone is insufficient to guarantee access to care and/or that cultural factors may influence an individual's decision to pursue medical care for infertility").

158. Kelley et al., *supra* note 137, at 565.

159. Gabriela Weigel, Usha Ranji, Michelle Long & Alina Salganicoff, *Coverage and Use of Fertility Services in the U.S.*, KAISER FAM. FOUND. (Sept. 15, 2020) https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/ [https://perma.cc/7FQ4-LBK8] (noting that as of January 2020, Medicaid covers fertility treatments in only one state (New York), but "no state Medicaid program currently covers artificial insemination (IUI), IVF, or cryopreservation").

160. *See* Sunderam et al., *supra* note 138, at 1 (finding white women use ART more than Black and Hispanic women even when insurance coverage is the same); Ada C. Dieke, Yujia Zhang, Dmitry M. Kissin, Wanda D. Barfield & Sheree L. Boulet, *Disparities in Assisted Reproductive Technology Utilization by Race and Ethnicity, United States, 2014: A Commentary*, 26 J. WOMEN'S HEALTH 606, 606 (2017) ("Although our results suggest that ART utilization was higher in states with IVF (insurance) mandates regardless of race/ethnicity, in states with a mandate, utilization rates for black non-Hispanic and Hispanic women were still lower than the overall utilization rates for those states."). *But see* Insogna & Ginsburg, *supra* note 138, at E1154 (citations omitted) (finding studies demonstrating that when partial insurance equalizes coverage, Black individuals utilize ART four times more than when insurance is an issue).

161. Roberts, *Race and the New Reproduction*, *supra* note 52, at 940; Ebeh & Jahanfar, *supra* note 152, at 1112.

162. Angela Hatem, *Sperm Donors are Almost Always White, and it's Pushing Black Parents Using IVF to Start Families that Don't Look Like Them*, INSIDER (Sept. 17, 2020), https://www.insider.com/egg-sperm-donor-diversity-lacking-race-2020-9 [https://perma.cc/EVF5-4S7W] ("A survey conducted by Fertility IQ found that Black women were roughly three times more likely than Caucasian women to believe their ability to conceive relied upon 'religious faith' or 'God's will.' They were also less likely to view fertility as something dependent on a medical provider.").

163. Ben Carter, *'Why Can't I Find an Afro-Caribbean Egg Donor?',* BBC (Jan. 12, 2020), https://www.bbc.com/news/stories-51065910 [https://perma.cc/MWH4-VSUL] (describing infertility as a "taboo" subject in the Black community).

164. Elster, *supra* note 51, at 728-29 (citing Ziba Kashef, *Miracle Babies: One in Ten Black Women Will Face the Anguish of Being Unable to Conceive, but Today's Fertility Treatments are*

One Black woman who struggled with infertility expressed that "[b]eing African-American, I felt that we're a fruitful people and it was shameful to have this problem."[165]

Additionally, women of color may not seek ART services with the same frequency as whites because of the racist history of medical institutions.[166] This is particularly true considering the involuntary sterilization of women of color, a disturbing historical practice that has continued through present day to women detained at the U.S. Immigration and Customs Enforcement's Irwin County Detention Center.[167] In order to increase usage of ART by historically marginalized groups, individuals need to feel they can trust medical providers. Yet without more usage, there are no statistics or even anecdotal stories to improve this trust.[168]

As will be discussed in section VI, there is also an insufficient supply of donor eggs.[169] Limited access to ART combined with limited supply of donor eggs is particularly fraught because if white eggs are practically the only gametes available, then this could implicate societally acceptable racial design at the pre-existence stage.[170]

Improving the Odds, ESSENCE, Jan. 1998 ("[I]n a culture that often portrays Black women as stoic earth mamas and baby-making welfare queens, this myth may be especially potent among African-Americans.")); Weiss & Marsh, *supra* note 49, at 941.

165. ROBERTS, KILLING THE BLACK BODY, *supra* note 50, at 259 (citing Martha Southgate, *Coping with Infertility*, ESSENCE, Sept. 1994, at 28).

166. Elster, *supra* note 51, at 730 ("This distrust has historical antecedents rooted in the abuses of the Tuskegee syphilis study, the misunderstanding surrounding sickle cell carrier testing in the 1970's that led to the firing or grounding of black pilots if they were carriers of the sickle cell trait and publications such as the Bell Curve, which suggested a genetic link between race and intelligence.").

167. *See, e.g.*, Natasha Lennard, *The Long, Disgraceful History of American Attacks on Brown and Black Women's Reproductive Systems*, THE INTERCEPT (Sept. 17 2020), https://theintercept.com/2020/09/17/forced-sterilization-ice-us-history/ [https://perma.cc/2SGS-VR9Q]; *see also* Roberts, *Race and the New Reproduction*, *supra* note 52, at 944 ("What does it mean that we live in a country in which white women disproportionately use expensive technologies to enable them to bear children, while Black women disproportionately undergo surgery that prevents them from being able to bear any?").

168. Elster, *supra* note 51, at 732 (speaking to distrust of medical providers, and speculating, "Trust will grow if ARTs do not seem to be yet another social control measure over the reproductive choices of minorities. Increasing access is one way to accomplish this goal illustrating the very circuitous nature of this dilemma").

169. *E.g.*, Hatem, *supra* note 162 (emphasizing the "short supply of African-American, Asian, and Middle Eastern donors"); Amber Ferguson, *America has a Black Sperm Donor Shortage. Black Women are Paying the Price*, WASH. POST (Oct. 20, 2022), https://www.washingtonpost.com/business/2022/10/20/black-sperm-donors/; Annabel Rackham, *Lack of Ethnic Diversity Among Egg and Sperm Donors*, BBC (Nov. 30, 2022), https://www.bbc.com/news/health-63796862 [https://perma.cc/6NZZ-LXJL].

170. *E.g.*, Karsjens, *supra* note 95, at 79 ("[T]he entire premise of boutique egg donation is to perpetuate certain characteristics that are deemed salient by a select few. Wealthy couples, who utilize egg brokers or high-profile advertisements, do not seek general traits. These couples are seeking a 'perfect gene pool' for their commodity. . .").Rapper Da Brat and her wife, who are Black, explained that they chose a white sperm donor because there was only one Black donor in a pool of 300. A high-profile Black couple with substantial resources struggling to find a Black donor is just one example that demonstrates the scarcity of Black gametes. Barnaby Lane, *Rapper Da Brat Says She and Her Wife Chose a White Sperm Donor Because the Only Black Donor Presented to Them 'Looked Like Jiminy Cricket*,' INSIDER

V. RACIAL SELECTION IN ART

I remember advertisements seeking egg donors when I attended Harvard University in the late 1990s. They were always seeking the same sort of egg donor: Caucasian, taller than 5′6″, blue-eyed, with the highest percentile of SAT scores.[171] I am half Chinese, 5′4″, brown-eyed, and did not have the highest percentile SAT scores. Was I valued less than the preferred choice, or just not a genetically similar-enough match?[172] Why did these specific traits matter so much for the people who put out these advertisements? My mother did not go to college, and I still ended up at an Ivy League university. I may not be tall, but my sister certainly is. These ads' explicit preferences for Caucasian donors are not unusual, as racial categorization is one of the fertility industry's defining features.[173]

ART allows intended parents to be very selective of traits that may never manifest in the resulting child because they are simply not inheritable traits.[174] Families who do not require ART do not articulate a racial choice when reproducing. Once race becomes attached to an exorbitantly priced process, the explicit racial choice becomes conspicuous.[175] But is this analysis being too critical of the motivations behind racial selection? Is eugenics really implicated if intended parents happen to be white and want a child with stereotypically white characteristics? Perhaps they simply want what those who can reproduce "naturally" already have—children that look like them.[176] As an egg donor, it felt deeply unfair that certain families must go through the tremendous challenges of ART, relying on an entire cast of strangers to have a family, while others just…have sex. When reading such harsh scholarly critique of ART, I wonder if participants deserve to be the subject of such scrutiny when we do not subject those who are able to reproduce "unassisted" to the same scrutiny.

Notwithstanding intended parents' motivation, racial categorization by the fertility industry harms individuals and society because by racially categorizing donor gametes, the fertility industry reinforces the idea that race is not socially constructed, but inheritable.[177] Donor race is the top one or two characteristics

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(May 3, 2023), https://www.insider.com/da-brat-wife-white-sperm-donor-black-donor-jiminy-cricket-2023-5 [https://perma.cc/Z4V9-Y66Q]. In the UK, where there is a shortage of Asian egg donors, couples also have to consider using white eggs. *Asians Could Use Caucasian Donor Eggs*, BBC (Oct. 6, 2015), https://www.bbc.com/news/av/health-34455016 [https://perma.cc/5TWG-DDHZ].

171. *See, e.g.*, *Egg Donor Needed*, BROWN DAILY HERALD, https://bpb-us-w2.wpmucdn.com/blogs.cofc.edu/dist/5/554/files/2013/02/563418_10152529250955391_2118584874_n.jpg [https://perma.cc/2HGM-T7VD] (an example of an ad that could be found in college papers).

172. *See* Rich, *supra* note 65, at 2398-99 ("[S]ales of eggs show that race plays a key role in pricing. A blonde, highly educated egg donor can fetch as much as $100,000 for her eggs. More recently eggs from Asian donors, particularly 'pure-blood Chinese eggs' have commanded a high price.").

173. *See, e.g.*, Thompson, *Skin Tone*, *supra* note 64, at 134-35.

174. *See id.* at 146.

175. Fogg-Davis, *supra note* 63, at 14.

176. Roberts, *Race and the New Reproduction*, *supra* note 52, at 945.

177. *See, e.g.*, Roberts, *Race, Gender, supra* note 56, at 789-90, 799; Fogg-Davis, *supra note* 63, at 13-14; Amrita Pande, *"Mix or Match?": Transnational Fertility Industry and White*

intended parents use in choosing donor eggs,[178] yet the industry's packaging of race has no discernable standards and reinforces antiquated, artificial conceptions of race.[179] A donor may self-identify as one ethnicity or race, yet the clinic may decide the donor should be categorized as "Black" if the donor has one Black grandparent, adhering to a modern "one drop" rule.[180] My sister and I are far fairer than our 100 percent Chinese father.[181] We would likely be categorized as "Asian" by fertility clinics, and definitely not "white," despite being equally both. Rosa Yadira Ortiz, struggling to find a sperm donor, stated, "My wife wanted to carry [our child], and it was really important to her to carry on her genes. . . I realized that I really wanted Mexican sperm. It's stupid. What is Mexican sperm?"[182]

The industry's oversimplification is demonstrated by gamete banks that color-code labels—black labels for Black gametes, yellow labels for Asian gametes, white labels for white gametes.[183] Is a Jewish person considered white by this classification system?[184] Racial category is clinics' primary selection feature of clinics, yet these categories are overly broad and fail to take into account the contours of ethnic variation.[185] Clinics and agencies may screen out mixed-race donors from the "white" category, believing that by doing so there is a greater likelihood that the children will not exhibit certain phenotypic characteristics.[186]

Adding to the problematic nature of the industry's reinforcement of racial categories is that intended parents will purchase a donor's genetic material believing it possesses certain qualities, yet race is not genetically transmittable.[187] Intended parents may hope a certain skin tone or facial feature will make the children resulting from donated gametes appear more like them, when in fact variation is likely.[188]

Currently, U.S. policies allow anonymous egg and sperm donation, enabling heteronormative families to "hide" the use of assisted reproduction.[189] This is one

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Desirability, 40 MED. ANTHRO. 335, 336 (2021) [hereinafter Pande, *"Mix or Match?"*] ("[S]cholars have demonstrated a fundamental irony of race in assisted reproduction – while social scientists continue to argue that race is a social construct, these technologies reinforce the concept of race as a biological category, and shared race as shared kinship.")

178. Rich, *supra* note 65, at 2391-92.

179. *See id.*

180. *Id.* at 2402.

181. *See generally* Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. IRVINE L. REV. 1105, 1113-15, 1120 (2013) (explaining that skin color does matter within some Asian communities to indicate both class and beauty, with lighter skin higher in the skin tone hierarchy).

182. Miriam Zoila Pérez, *Where Are All the Sperm Donors of Color?*, REWIRE NEWS GROUP (Nov. 28, 2018), https://rewirenewsgroup.com/2018/11/28/where-are-all-the-sperm-donors-of-color/ [https://perma.cc/43K9-Q4R8].

183. Rich, *supra* note 65, at 2404-05.

184. *See id.* at 2408-09.

185. *See, e.g.*, Thompson, *Skin Tone*, *supra* note 64, at 134-35; Rich, *supra* note 65, at 2407-08.

186. *See* Rich, *supra* note 65, at 2409.

187. *Id.*

188. Thompson, *Skin Tone*, *supra* note 64, at 139, 146.

189. Proponents of donor non-disclosure policies argue it advances the privacy and autonomy of intended parents by:

rationale to attempt racial matching.[190] Anonymity as the worldwide industry default has become extremely controversial,[191] and may become less meaningful with the wide availability of consumer DNA tests such as 23andMe and Ancestry.com.[192] Those who oppose donor anonymity argue that it harms donor-conceived children.[193] Donor anonymity policies are connected to compensation because in the case of sperm donors, a recent study has suggested that legally-mandated identity disclosure could lead to a sperm shortage, as some donors would refuse to donate[194] and some would require at least a 29% increase in compensation.[195] Donations from historically marginalized groups, already in short supply, would likely be most impacted.[196] Mandatory disclosure could further deplete scarce gamete options, such as eggs from Black and Asian donors.[197]

I first became interested in race and reproductive technology when a professor posed the following question to our class: "Do you think a white woman should be able to choose an egg from a Black donor?" My immediate intuition was no. I tried to sort why I felt it was fine for a white person to choose a Black partner to "naturally" have children with, but also why this type of selection via ART felt problematic. What if this white person was not infertile? Would this be

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> ensuring that, firstly, the nongenetic parent feels connected to the child; secondly, the child develops a strong bond with the one genetic parent; thirdly, the appearance of a 'normal' family is maintained; fourthly, there is as little disruption of the child's stability as possible; and finally, *the genetic parent's infertility (a condition that may still carry a negative stigma in some societies) is able to remain undisclosed*.
>
> Clark, *supra* note 36, at 639 (emphasis added). The only intended parents who connected with me were gay male couples—one prior to my donation (non-anonymous), and one after an anonymous donation.

190. *Id.*

191. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 292-93. Internationally, prohibitions on anonymous donations are increasing, although the U.S. has yet to adopt such prohibitions. *Id.*

192. Meghana Keshavan & STAT, *Consumer DNA Tests Negate Sperm-Bank-Donor Anonymity*, SCI. AM. (Sept. 12, 2019), https://www.scientificamerican.com/article/consumer-dna-tests-negate-sperm-bank-donor-anonymity/ [https://perma.cc/C6HZ-GYFZ]; *see* Clark, *supra* note 36, at 658.

193. Courtney Megan Cahill, *Universalizing Anonymity Anxiety*, 3 J.L. & BIOSCIENCES 647, 654 (2016) ("[T]he potential universality of the purported harms associated with donor anonymity might give regulators and mandatory disclosure proponents pause before eliminating anonymity."); Clark, *supra* note 36, at 621 (stating research "supports the argument that knowledge of one's genetic background is crucial to the development of a sense of identity or self"), 650 (explaining donor-conceived children should be able to learn about their genetic history for medical reasons); Meghana Keshavan & STAT, *supra* note 191 (mentioning psychological harms that stem from children not knowing their biological origins).

194. Glenn Cohen, Travis Coan, Michelle Ottey & Christina Boyd, *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J.L. & BIOSCIENCES 468, 485, 487-88 (2016).

195. *Id.* at 485.

196. *See id.* at 486.

197. *See* Bernstein, *supra* note 190, at 304-06 (cautioning against open identity systems because they may result in gamete shortages).

cultural appropriation at the most fundamental level? What if a person chooses eggs from a Native Hawaiian donor because they want to connect to Native Hawaiian customs and traditions by proxy of their child? Should an individual's procreative rights encompass the right to select the race and ethnicity of that individual's child?[198]

Generally, fertility clinics and agencies encourage racial matching.[199] In 2014, a Canadian fertility clinic restricted intended parents from using donor gametes that were not an ethnic match.[200] Doctors from the clinic explained that a child should have a "cultural connection" with their parents and to be able to "identify with their ethnic roots."[201] Another fertility clinic rejected a New Age Buddhist German (white) couple specifically seeking a South Asian donor.[202] While not a racial match, this couple felt a South Asian donor was a religious and cultural match.[203] The fertility clinic decided this was not in the best interest of the child because the couple's reasons were superficial, and the couple seemingly desired a child of color to legitimize their own Buddhism.[204]

How much should clinics and agencies get to decide that the racial motivations of the intended parents matter? As one woman expressed:

> I am an American woman, of Ashkenazi Jewish ancestry, and I strive to live my life as an active agent against racism and white supremacy. . . If I choose a donor of color, am I condemning my child to be born into a system designed not to serve them? Or can I use my white privilege to help them fight that system? Would my future child of color feel separated from their heritage with me as their mother? If I choose a white donor, am I succumbing to racist ideas of what traits are "desirable," or taking the "easy road" in knowing my child will look more like me?[205]

This woman acknowledged the reality that it is easier to be a white woman in our current society. Choosing white eggs thus feels like a problematic doubling down on the desirability of whiteness. But what if a Black family chooses white gametes[206] because they too worry about "*condemning [their] child to be born*

198. *See* Thompson, *Skin Tone*, *supra* note 64, at 143 (giving an example of a fertility clinic rejecting a couple's request to choose an egg donor who did not match their race and ethnicity).
199. *See generally* Aziza Ahmed, *Race and Assisted Reproduction: Implications for Population Health*, 86 FORDHAM L. REV. 2801 (2018).
200. Jessica Barrett, *No 'Rainbow Families': Ethnic Donor Stipulation at Fertility Centre 'Floors' Local Woman,* CALGARY HERALD (July 25, 2014), https://calgaryherald.com/news/local-news/no-rainbow-families-ethnic-donor-stipulation-at-fertility-centre-floors-local-woman [https://perma.cc/F3HT-X4V6].
201. *Id.*
202. Thompson, *Skin Tone*, *supra* note 64, at 143.
203. *Id.*
204. *Id.* at 143-44.
205. Kwame Anthony Appiah, *How Should I Think About Race When Considering a Sperm Donor?*, N.Y. TIMES, (June 16, 2020), https://www.nytimes.com/2020/06/16/magazine/how-should-i-think-about-race-when-considering-a-sperm-donor.html.
206. *See* Ikemoto, *supra* note 43, at 1014-15.

into a system designed not to serve them"?[207] Black women have in fact desired to use white gametes because of the advantages of being a non-marginalized race.[208] One Black woman stated, "A white person knows they have a level of comfort. You know when there is a physical aspect about you that gives you an edge. I knew being African-American was going to be hard for my kids."[209] Black women choosing white gametes does seem problematic for affirming the desirability of whiteness,[210] but at the same time it is true that Black children in our society face profound, mortal challenges that white children do not face.[211] Does this make the choice of white oocytes by Black families more morally acceptable?

Racial classification and colorism also act as a social hierarchy within cultures, demonstrated by certain Asian parents desiring babies with a pale skin tone.[212] Light skin tone is connected to higher class and a more valuable aesthetic in Asian cultures, where use of skin whitening creams is prevalent and many seek surgery for stereotypically "white" features, such as double eyelids and less "flat" noses.[213] If Asian families choose white donors, is yet another historically marginalized group choosing whiteness? In her fieldwork on the transnational fertility industry, Amrita Pande interviewed a doctor in Cambodia who said the following regarding same-sex Asian male clients:

> Many of our Asian married patients (intended parents) choose from our Asian database. . . But yes, every third patient asks for white eggs. Everyone wants a beautiful face for the next generation. . .We let the patients make the choice, we don't question. And many don't ask for our advice. . .They (the IP) hear from word of mouth that that is a possibility

207. Appiah, *supra* note 204.
208. Ikemoto, *supra* note 43, at 1014 n.25.
209. Hatem, *supra* note 162.
210. Karsjens, *supra* note 95, at 79-80.
211. *See, e.g.*, John Gramlich, *Gun Deaths Among U.S. Children and Teens Rose 50% in Two Years*, PEW RESEARCH CENTER (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/06/gun-deaths-among-us-kids-rose-50-percent-in-two-years/ [https://perma.cc/YT6K-8GKR] ("In 2021, 46% of all gun deaths among children and teens involved Black victims, even though only 14% of the U.S. under-18 population that year was Black."); Giulia Heyward & João Costa, *Black Children Are 6 Times More Likely to be Shot to Death by Police, Study Finds,* CNN (Dec. 17, 2020), https://www.cnn.com/2020/12/17/us/black-children-police-brutality-trnd/index.html [https://perma.cc/P89Z-F8TJ]; Ilena Peng, *Covid Death Rate Among Black Children Nearly Three Times Higher Than White Kids*, BLOOMBERG (Mar.14, 2023), https://www.bloomberg.com/news/articles/2023-03-14/covid-killed-black-children-three-times-more-often-than-white-children; Christina Caron, *Why Are More Black Kids Suicidal? A Search for Answers*, N.Y. TIMES (Nov. 18, 2021, updated June 22, 2023), https://www.nytimes.com/2021/11/18/well/mind/suicide-black-kids.html.
212. Amrita Pande, *Want Your Eggs Black or White?*, MAIL & GUARDIAN (Feb. 1, 2019), https://mg.co.za/article/2019-02-01-00-want-your-eggs-black-or-white/ [https://perma.cc/8FFL-3R4K].
213. Jones, *supra* note 181, at 111; Anthony Youn, *Asia's Ideal Beauty: Looking Caucasian*, CNN (June 26, 2013), https://www.cnn.com/2013/06/25/health/asian-beauty/index.html [https://perma.cc/9PN5-8E7B].

> here—that you can get white egg donor. And they see these pictures of couples with lovely mixed-race babies and they say 'why not'? And we say 'why not'?[214]

On one hand, racial matching is problematic in an industry dominated by white intended parents, and should be discouraged.[215] On the other hand, pushing against racial matching may only increase whiteness if Black or Asian individuals, for example, demonstrate a marked preference for white gametes.[216] Perhaps one intended parent articulated this complex desire when he said, "I am looking for a white, Asian-looking girl."[217]

VI. DIVERSIFYING THE EGG MARKET

As explained in Part III, the fertility industry exploits people with oocytes using the rhetoric of altruism. Yet in order for more Black, Hispanic, Indigenous, and Asian individuals to access ART services, there needs to be an increased supply of gametes from these groups. Scholars have argued that including more people of color with oocytes in the fertility industry may not reduce the racial stratification in the industry and would simply reinforce the idea of race as inheritable, a profoundly dangerous idea that supports the disenfranchisement of historically marginalized groups.[218] I believe that no more damage is possible given the peak whiteness of the industry and people with oocytes who are not white ought to disrupt the fertility industry by opting in.[219] Dorothy E. Roberts wrote, "Increasing access to an unjust market doesn't solve the problem of systemic devaluation."[220] Yet if prospective egg donors utilize the fertility industry's reliance on racial categorization to make themselves marketable, this process may attach value to historically marginalized groups,[221] provide donors with financial gain, and make reproductive injustice visible.[222]

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214. Pande, *"Mix or Match?"*, *supra* note 177, at 342.
215. *See, e.g.*, *id.*, Karsjens, *supra* note 95, at 79-80.
216. *See, e.g.*, Christina Weis, *Changing Fertility Landscapes: Exploring the Reproductive Routes and Choices of Fertility Patients from China for Assisted Reproduction in Russia*, 13 ASIAN BIOETHICS REV. 7, 9-10, 16-17 (2021) (describing studies which reveal an international demand for white eggs, even among families from China traveling to Russia to create children that would be lighter skinned).
217. Pande, *"Mix or Match?"*, *supra* note 177, at 342.
218. *E.g.*, Roberts, *Race, Gender, supra* note 56*, at 7*99.
219. *See* Weiss & Marsh, *supra* note 49, at 942.
220. Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 UC IRVINE L. REV. 611, 614 (2017).
221. Fogg-Davis, *supra* note 63, at 15 (explaining that race is "prominent in private advertisements soliciting egg and sperm donors" and is "the first category on the donor lists of most fertility clinics"). Perhaps minority-race donors could be proactively anti-eugenic by providing photos in their online profiles of family members, displaying the range of skin tones and features, and thus lessening the harms of racial selection. *See also* RUSSELL, *supra* note 31, at 144-45.
222. *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and The Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2054 (2021) (explaining that reproductive justice "goes beyond contraception and abortion—the traditional subject matter of reproductive rights—to consider a broad range of issues that impact reproductive freedom, including sterilization, assisted reproductive technology, access to childcare, pregnancy discrimination,

To resolve moral concerns with encouraging people with oocytes who are not white to participate in the multi-billion-dollar fertility industry, donors need to empower themselves. Empowerment comes through understanding the dysfunctionality of the industry, including how clinics and brokers use the rhetoric of altruism to make donors feel guilty for asking for "too high" a price.[223] The industry's suppression of egg donor compensation harms women by first depriving them of an adequate fee and then conveying that it is unacceptable to be motivated by money when it comes to the labor of egg donation, which is easier than many physically demanding professions.[224] For me, the periods when I travelled to donate my eggs were welcome vacations from twelve-hour days in a commercial kitchen. I do not recall the sentimentalized story I told my egg broker, but "[M]any egg donors report in surveys that helping infertile couples achieve parenthood was one of the primary concerns motivating their decision. Donors often are more forthcoming in informal interviews, however, explicitly discussing the motivating force of money in the decision to become an egg donor."[225] Donors should not feel they have to mask their motivations, even if that motivation is a desire for a six-figure payout.[226]

Fertility for Colored Girls[227] and The Broken Brown Egg[228] are examples of volunteer-run organizations that provide egg donors with valuable support, testimonies, information and even grants for infertility treatment, but donors need additional parties to advocate for their interests throughout the donation journey: brokers who do not also represent the intended parents, independent legal representation and reproductive endocrinologists. This is a costly proposition. National nonprofits should be established to provide such services at minimal cost to the donor. Additionally, there needs to be comprehensive studies of the physical and psychological impacts on past donors, and a federal registry to track donor

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community safety, food and housing insecurity, the criminalization of pregnancy, and access to reproductive health care") (internal quotation marks and citations omitted).

223. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242 ("Even those ads offering donor compensation well above the average nearly always include an appeal to altruistic impulses, frequently exhorting young women to 'give the gift of life,' or requesting the help of a 'sunny Samaritan.'").

224. *See id. See also* ASIAN CMTYS. FOR REPROD. JUST., A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005) https://forwardtogether.org/tools/a-new-vision (available for download). ("[T]he regulation of reproduction and exploitation of women's bodies and labor is both a tool and a result of systems of oppression based on race, class, gender, sexuality, ability, age and immigration status.").

225. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242.

226. *See id.* (noting that "donors whose primary motivation is financial will be disqualified" by fertility clinics); Prac. Comm. Am. Soc'y for Reprod. Med. & Practice Comm. For Soc'y for Assisted Reprod. Tech., *supra* note 16, at 1400 ("Payment to donors varies from area to area but should not be such that monetary incentive is the primary motivation for gamete donation.").

227. FERTILITY FOR COLORED GIRLS, https://www.fertilityforcoloredgirls.org/ [https://perma.cc/SQ9M-MG2J] (last visited Jan. 29, 2024).

228. THE BROKEN BROWN EGG, https://thebrokenbrownegg.org/ [https://perma.cc/B69M-HULP] (last visited Jan. 29, 2024).

data moving forward.[229] Former donors should be transparent about their compensation and advise first-time donors through the negotiation process.[230] Better advocacy will hopefully lessen the likelihood of exploitation and reduce broader moral concerns with harm to donor personhood. Research and data collection on the long-term physical and psychological impacts on donors will enable them to have actual knowledge of the risks they are accepting.

Kari Karsjens articulates the difficulty in reconciling the feminist position of allowing women to do what they choose with their bodies and how it is also "disheartening and troubling to think that a legal theory, committed to de-emphasizing gender inequality and subordination, supports a practice that essentially places young women in positions of extreme commodification through human tissue exploitation."[231] I was that woman, and disempowerment came from not being able to say: this is from my body, it is for sale, and this is what I want for it.

Egg donation literature—medical, legal, and philosophical—focuses primarily on the physical impacts, coercive potential,[232] and harm to personhood. On the other side of egg donation is the substantial financial assistance, ineffable meaning, and ego gratification of a family choosing you to help create their family.[233] Discussing the financial gain, one donor wrote, "I would consider doing this again. I do worry about how it would impact my body, but the impact on my life would be so significant. I don't know if I could deny that."[234] For every

229. Jacob Radecki, *The Scramble to Promote Egg Donation Through a More Protective Regulatory Regime*, 90 CHI-KENT L. REV., 729, 753-56 (2015) (suggesting Congress adopt federal reporting requirements to track long-term effects of donation); Brody, *supra* note 19 (noting that "The Centers for Disease Control and Prevention collects information on in vitro fertilization, but not on those who donate their eggs either anonymously or to family members or friends unable to get pregnant with their own eggs" and discussing the need for an egg donor registry to "keep[] track of the medical or psychological fate of egg donors"). The FDA requires ample medical testing and record-keeping to determine whether a donor is eligible at the screening stage, but does not require collection of follow-up health impacts. *See* 21 C.F.R. §§ 1271.45-1271.90 (2004).

230. For example, as part of the negotiation process, experienced donors can advise prospective donors that the fertility clinic provide insurance coverage. *See* Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 16, at 667 (2019) (explaining that "Programs have an ethical obligation to ensure that there is a reasonable mechanism in place to cover the costs of treatment for adverse outcomes. . . For example, some programs purchase insurance to cover donors for health-related expenses incurred specifically through participation in the program.").

231. Karsjens, *supra* note 95, at 81.

232. Krawiec, *A Woman's Worth*, *supra* note 30, at 1768 ("The coercion defense fares no better. Far from saving the poorest and most vulnerable from tragic choices, the restrictions on taboo markets explored here impede earnings or market entry, increase risk, or raise social stigma, making the market less attractive. Yet underlying economic and social disparities ensure that, for those with few other viable income opportunities, sex, eggs, and surrogacy services will continue to be sold.").

233. *See* Mutcherson, *supra* note 99, at 64 ("Those who sell gametes or reproductive labor may also have a desire to experience a sense of purpose or power that comes from providing something precious to one who needs or wants it. They can be viewed as seeking the kind of karmic wellness that comes from donating blood or an organ, but doing so with much better remuneration.").

234. Ellie Houghtaling, *I Sold My Eggs for an Ivy League Education—But was it Worth it?*, THE

potential risk, prospective donors should contemplate the deep impact of helping in such a rare way. As Yasmin Sharman expressed, "I never fully grasped the level of joy giving to somebody else in this way could bring me. You may think it would be nice to help someone have a family, but actually doing it and then embracing the knowledge that a baby has been born [with your help] is a different kind of gratitude."[235] It has taken me over a decade to understand this kind of gratitude, bearing witness from afar to the families I helped create.

Women of color becoming egg donors adds an additional layer of significance because their participation is a type of activism, fighting against reproductive injustice.[236] Egg donors are notably absent from reproductive injustice dialogues.[237] Yet reproductive justice is concerned with the very nexus an egg donor inhabits:

> Women's ability to exercise self-determination—including in their reproductive lives—is impacted by power inequities inherent in our society's institutions, environment, economics, and culture. The analysis of the problems, strategies and envisioned solutions must be comprehensive and focus on a host of interconnecting social justice and human rights issues that affect women's bodies, sexuality, and reproduction.[238]

The fertility industry plays to power inequities by suppressing donor compensation to the industry's benefit.[239] ART is primarily accessible only to the white and wealthy for whom using such services is culturally acceptable. The egg donor thus has a unique role in possessing the power to alleviate one aspect of reproductive injustice, which donors of color have identified.

For example, a Chinese woman named Elaine Chong explained that when she learned there was a shortage of eggs from women of color, she thought about how her Chinese background could help other Chinese people who struggled to

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GUARDIAN (Nov. 7, 2021), https://www.theguardian.com/lifeandstyle/2021/nov/07/i-sold-my-eggs-for-an-ivy-league-education-but-was-it-worth-it [https://perma.cc/Z4WY-MGHQ].

235. Edikan Umoh, *The Immeasurable Joy of Becoming a Black Egg Donor*, REFINERY29 (Apr. 11, 2023), https://www.refinery29.com/en-us/2023/04/11355383/ivf-fertility-black-egg-donors [https://perma.cc/R3P8-ZA8V].

236. *See* Murray, *supra* note 221, at 2054 (noting that "[t]he reproductive justice framework 'highlights the intersecting relations of race, class, sexuality, and sex that shape the regulation of reproduction,' and therefore considers "a broad range of issues that impact reproductive freedom, including. . . assisted reproductive technology. . ."') (citations omitted). *See also* ASIAN CMTYS. FOR REPROD. JUST., *supra* note 223 at 1-2. Asian Communities for Reproductive Justice (ACRJ) helped found the SisterSong Women of Color Reproductive Health Collective, demonstrating the work of women of color across racial division to address reproductive injustice. *Id.* at 1.

237. *See, e.g.*, ASIAN CMTYS. FOR REPROD. JUST., *supra* note 223 (lacking discussion of reproductive technology or egg donors); *Visioning New Futures for Reproductive Justice*, *supra* note 151 (writing that reproductive justice is for people who've had abortions, for parents, for people who have sex for pleasure, for queer and transgender people, for people of faith, for undocumented people, for people of any age, for healthcare providers, for disabled people, etc.—without mentioning reproductive technology or egg donors).

238. ASIAN CMTYS. FOR REPROD. JUST., *supra* note 223, at 2.

239. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242.

have a family.[240] Black donor Journee Clayton stated, "[T]his way I can help and be a face for women looking to donate but don't know that donating is an option for them."[241] Writing about Yasmin Sharman, Edikan Umoh explained "the nurses at her egg donation facility said they could count on one hand the number of Black women that have donated eggs [at their facility], and she felt empathetic to the Black women and couples going through the stress of the IVF treatment without the option of having a baby that looks like them."[242] Lyne Mugema researched egg donation and articulated her reasons for donating:

> In 2015/2016 when this whole topic was welling in my head, social media was full of violence against Black bodies and my instinct every single time was that I wanted to go out and have a mess of dark skin, nappy-headed children as a 'fuck you!' to the world. It was a way for me to do that without having to be a slave to that rebellion while giving a Black life, hopefully a dark skin, gap-tooth, nappy-headed, wide-nose one at that, [a chance], and to empower a woman and relieve the sense of tension over something that I don't necessarily want, but have just been conditioned to go after.[243]

Additionally, to dilute the whiteness of the fertility industry, clinics, brokers, and the media should increase public awareness regarding the color blindness of infertility, addressing the fact that Black and Hispanic families may feel a stronger stigma around assisted reproduction.[244] As donor Journee Clayton, who is mixed race, explains, "It is okay to talk about infertility. There's a huge stigma around it—that we should keep it to ourselves because it's not other people's business, but I learnt that it's something that is okay to talk about."[245] A Black woman named Natasha struggled to find an Afro-Caribbean donor in the United Kingdom.[246] She attended a race, religion, and reproduction session at Fertility Fest in London, and explained that "The taboo, the stigma, not talking about it in communities, that all came out . . . There was a room full of people of colour all talking about it. People are finding their voice now."[247] Promisingly, fertility clinics no longer only market to potential white clients, and include people of color in their marketing materials.[248] Coverage of these issues must also include the dysfertile—

240. Elaine Chong, *Why I Chose to Donate My Eggs*, BBC (Nov. 15, 2017), https://www.bbc.com/news/stories-41936041 [https://perma.cc/SGQ3-6NYW].
241. Umoh, *supra* note 233.
242. *Id.*
243. Lauren Porter, *At 28, I Knew I Never Want to Be a Mom, So I Donated My Eggs Instead*, ESSENCE (Oct. 24, 2020), https://www.essence.com/lifestyle/black-women-donate-eggs-20s-what-to-know/ [https://perma.cc/9KSC-J3DQ].
244. Carter, *supra* note 163.
245. Umoh, *supra* note 235.
246. Carter, *supra* note 163.
247. *Id.*
248. Roberts, *Race, Gender, supra* note 56, at 786 ("Women of color are now part of the market and cultural imaginary of the new reprogenetics."); *see, e.g.*, SHADY GROVE FERTILITY, https://www.shadygrovefertility.com/ [https://perma.cc/7JM8-KZU7] (last visited Feb. 19, 2024) (displaying photos of diverse users of ART services); *Donors by Ethnicity*, DONOR

single parents, non-nuclear combinations and queer families.[249]

As Dorothy E. Roberts has explained, "it is precisely the connection between reproduction and human dignity that makes a system of procreative liberty that privileges the wealthy and powerful particularly disturbing,"[250] Even if the supply of donors increases, low-income families will not be able to access ART due to myriad other costs that are unlikely to be covered by insurance.[251] Prospective donors who are financially stable can act as genuine "donors" and help families that cannot access ART services due to financial limitations. However, women should not have to volunteer their bodies to achieve societal goals of reproductive justice,[252] and policy makers must develop solutions. Faster than scholars can theorize on societal impacts, technology hurls forward. On the commercial horizon: artificial wombs;[253] the ability to create a child from two women or two men;[254] and the use of CRISPR-Cas9 to modify genes and actually create "designer babies."[255]

I would not encourage people with oocytes who have no interest in egg donation or who have profound concerns about the health risks to become donors. Those that are willing and informed should not accept anything less than the price they decide they are worth.

VI. CONCLUSION

Despite scholarly speculation and concern with white women choosing to use ART and Black women choosing not to, Dorothy E. Roberts wrote that "[e]vidence is hard to come by."[256] The lack of information is shocking. Women have been undergoing egg donations and IVF for forty years now, yet there remains a lack of longitudinal information on the impacts of hyperstimulating hormones. There are no studies comparing "mixed-race children born of assisted reproduction to black parents as opposed to white ones"[257] that could dissuade those who argue same-race gamete selection results in better social or psychological adjustment for donor-conceived children. There is as scarce

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CONCIERGE, https://www.donorconcierge.com/egg-donor-search/ethnicities/armenian-greek-egg-donors [https://perma.cc/7JM8-KZU7] (last visited July 7, 2023).

249. *See* Fox, *Reproducing Race*, *supra* note 60, at 242.

250. Roberts, *Race and the New Reproduction*, *supra* note 52, at 946.

251. *E.g.*, Kelley et al., *supra* note 137, at 565; Mutcherson, *supra* note 99, at 73 ("[I]n order to achieve equality of access, the government likely needs to affirmatively create opportunities for financial assistance to those seeking access to assisted reproduction, which could be done in part through public and private insurance programs.").

252. *See* Murray, *supra* note 221, at 2054.

253. Yehezkel Margalit, Orrie Levy & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Parenthood*, 37 HARV. J.L. & GENDER 107, 126-27 (2014) (citations omitted).

254. *Id.* at 116-17.

255. Naomi Cahn & Sonia M. Suter, *The Art of Regulating ART*, 96 CHI-KENT L. REV. 29, 35-37 (2021).

256. Roberts*, Race and the New Reproduction*, *supra* note 52, at 949.

257. Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection,* 104 CORNELL L. REV. ONLINE 114, 129-30.

information on Indigenous people and ART as there are Indigenous donors.

Once we are aware of the inequities in reproductive justice, "we must shift our focus from identifying disparities to dismantling them."[258] One path to this dismantling is for people with oocytes openly embrace commodification and leverage the power they possess as market scarcities in an industry dominated by whiteness. While this places an onus on individuals to provide an avenue for social change, these individuals can aptly cognize the potential physical and psychological harms of donation and determine a price for assuming such risks.[259]

In writing this piece, I re-read a magazine article I wrote at thirty-two, as I finished my final donation.[260] Over a decade later, cancer and COVID-19 have taken the lives of friends who never explicitly chose a medical procedure for cash. It is hard for me to engage with the risks of my oocyte donations because they seem far more remote compared to the "risks" I see family and friends knowingly engaging in daily: smoking cigarettes[261] or eating red meat and highly processed foods.[262] In the balancing test of life, bodily autonomy means determining our own self-care calculus.

In 2012, I wrote:

> I am an egg donor, and my role in the lives of the couples I donate to ends the moment my last ova hits the aspirator. What I go through medically and psychologically is not easy, but, at the end, we exchange dreams: the Intended Parents get families, I get freedom. The freedom to work a little less so I can do what I love a lot more: garden, rock climb, create, cook for

258. Weiss & Marsh, *supra* note 49, at 944.

259. *See* Squillace, *supra* note 38, at 143 (citing Radin, *supra* note 30, at 1849) ("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."); Joel Schwarz, *Most Women Report Satisfaction with Egg Donation; Some Claim Problems*, UNIV. WASH. NEWS (Dec. 17, 2008), https://www.washington.edu/news/2008/12/17/most-women-report-satisfaction-with-egg-donation-some-claim-problems/ [https://perma.cc/FZY2-X3M3] ("73 percent [of donors]—reported being aware of some of psychological risks associated with egg donation prior to donating. These included the chance they might develop concern for or attachment to their eggs or to a potential or resulting offspring, concern that the donor or resulting child might want a future relationship with them, the possibility of having a genetic child in the world or the stress resulting from the donation process.").

260. Jennifer Meleana Hee, *Egg Donations: A Honolulu Woman's Story*, HONOLULU MAG. (Apr. 10, 2012), https://www.honolulumagazine.com/egg-donations-a-honolulu-womans-story. [https://perma.cc/W5DE-X8KU].

261. *See Health Effects of Cigarette Smoking*, CDC https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [https://perma.cc/JUD3-AC5V] (last reviewed Oct. 29, 2021) (Smoking is the main cause of preventable death in the U.S.).

262. *See What's the Beef with Red Meat?*, HARV. HEALTH PUBL'G (Feb. 1, 2020), https://www.health.harvard.edu/staying-healthy/whats-the-beef-with-red-meat [https://perma.cc/D9PJ-XUEQ] (Red and processed meats increase health risks and can lead to higher rates of heart disease, diabetes, cancer and premature death); Maria Godoy, *What We Know About the Health Risks of Ultra-Processed Foods*, NPR (May 25, 2023), https://www.npr.org/sections/health-shots/2023/05/25/1178163270/ultra-processed-foods-health-risk-weight-gain [https://perma.cc/3K7B-7Z4K] (Overconsumption of processed foods is linked to poor health outcomes including obesity, type 2 diabetes, heart disease, and cancer.)

> loved ones, write and travel. . . I will never be a mother, but I worry for what becomes of my eggs, for all the unborn and the Pandora's box of agonies that life unbounds for them, but, eventually, out of ovary, out of mind.[263]

Instead of being out of mind, they have entered existence, entered mine. Much like society's apprehension over the commodification of body parts, when I was an egg donor, my anxieties were abstract: my genetic offspring would suffer by being, and I was complicit. Harms are still possible: commodification may injure personhood; fertility hormones may cause my cells to become cancerous; the heaviest of griefs may make the lives of my gametes feel less worth living. But the tethered truth is that I did not spend enough time imagining the rewards. Now I have met the people formerly known as Intended Fathers #5510A and #5510B. My genetic offspring are their children. Clichés abound: I gave them eggs, but gay men gave my life meaning. We are all indebted, and I am forever grateful.

263. Hee, *supra* note 258.