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## ARTICLES

### SPERM AND EGGS IN CONSIDERATION OF MONEY: A POUND OF FLESH FOR THREE THOUSAND DUCATS?

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Donor conception is a practice in which a donor sperm or egg (or both) is used to conceive a child. Usually, the donor sperm or egg is procured in a financial transaction: gametes exchanging hands for money. The “donor” in donor conception is a bit of an oxymoron, for a donation it is not when money—and sometimes big money—is a feature of the practice, not a bug. This Article will show that donor conception is not proper to who human beings are given their nature as embodied beings, with particular attention to the children of donor conception and to the donors. The bargained-for exchange of sperm and eggs for money also does not satisfy the requirement of commutative justice, historically understood to be of paramount importance in the doctrine of consideration in contract law. Further, the aspects of both the embodied nature of the person and the impropriety of trading on the body present in donor conception are considered in light of William Shakespeare’s play *The Merchant of Venice*. This Article concludes that donor conception, being unjust and not oriented to human flourishing, ought not to be done. A re-orientation of the law toward a proper respect for each person’s embodied nature and toward fostering a posture of gratitude in receiving each child as a gift would be welcome.

#### I. INTRODUCTION

Eli Baden-Lasar has thirty-two half siblings, perhaps more.<sup>1</sup> He was conceived using the sperm of a donor, and as he grew up, he became curious about any half siblings out there.<sup>2</sup> He went on a quest to find as many half siblings as he could, and when he found them, he met with them and took

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1. Eli Baden-Lasar, *A Family Portrait: Brothers, Sisters, Strangers*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/magazine/sperm-donor-siblings.html> [<https://perma.cc/L9B3-4ZLU>]. As of 2019, he has taken photographs of thirty-two of his half siblings. *Id.*

2. *Id.*

photographs of them.<sup>3</sup> One day, he and three half siblings were huddled together, listening to a recording of the voice of their father from long ago. Their father was speaking to the sperm bank that collected his sperm.<sup>4</sup> In Baden-Lasar's words:

The bank asks the donor at the end of the audio interview whether he has anything he would like to tell any children conceived with his sperm. Our donor's response: "I wish them all the luck." One sibling scribbled that on his bedroom wall during high school in colorful chalk as if it were an inspirational quote. I heard it more as an irreverent provocation: My job here is done. May the odds be ever in your favor.<sup>5</sup>

This Article explores "the odds" of the children of donor conception, given the nature of the practice. Part I of this Article lays out the practice of donor conception and the greater fertility industry of which it is a part. Part II briefly sketches the historical context of commutative justice and its relationship with the doctrine of consideration in contract law. Part III considers the practice of donor conception from the perspective of the child's resulting genealogical bewilderment, the commodification of the child, and the health risks involved in the practice for the child and the egg donor. It also considers some counterarguments to the position taken in the Article. Part IV considers how William Shakespeare's play *The Merchant of Venice*, with its story of the bargain of a pound of flesh for a sum of money, might shed light on the practice of donor conception.

This Article will show that donor conception is not proper to who human beings are given their nature as embodied beings, with particular attention to the children of donor conception and to the donors. The bargained-for exchange of sperm and eggs for money also does not satisfy the requirement of commutative justice, historically understood to be of paramount importance in the doctrine of consideration in contract law. The aspects of both the embodied nature of the person and the impropriety of trading on the body present in donor conception are illuminated in the lessons of *The Merchant of Venice*. This Article concludes that donor conception, being unjust and not oriented to human flourishing, ought not to be done. A re-orientation of the law toward a proper respect for each person's embodied nature and toward fostering a posture of gratitude in receiving each child as a gift would be welcome.

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3. *Id.*

4. *Id.*

5. *Id.* Eli Baden-Lasar's take on the meaning of their father's comment to his children ("*May the odds be ever in your favor*") comes from *The Hunger Games* trilogy, a series of dystopian novels that tells of a society that sacrifices children in bloody, fatal games. The children are sacrificed in the games for the sake of, among other things, the enjoyment of the people: The games are popular, and it's what the people want. See *THE HUNGER GAMES*, SUZANNE COLLINS (2008); *CATCHING FIRE*, SUZANNE COLLINS (2009); *MOCKINGJAY*, SUZANNE COLLINS (2010).

## II. THE PRACTICE OF DONOR CONCEPTION

To borrow from Leon R. Kass, if the reader will pardon the impropriety, I will not beat around the bush: the subject is sperm and eggs, the goal is making babies, the question is, “To market or not to market?”<sup>6</sup>

Donor conception is a practice in which a donor sperm or egg (or both) is used to conceive a child. Usually, the donor sperm or egg is procured in a financial transaction: gametes exchanging hands for money. The cast of characters in donor conception are the sellers of the gametes, the buyers of those gametes, and—out of the transaction—the resulting children. The term “donor conception” masks the sale involved: Buyers pay the sperm “donor” for his sperm and the egg “donor” for her eggs.<sup>7</sup> Perhaps the masking is not unintentional. The term “donor” softens the impact on the hearer.<sup>8</sup> For the buyers in this market buy sperm and eggs not for the sake of buying sperm and eggs, but for the sake of having children.<sup>9</sup>

The fertility industry, estimated as a \$33.1 billion industry globally in 2020,<sup>10</sup>

6. The original quote is, “If the reader will pardon the impropriety, I will not beat around the bush: the subject is human flesh, the goal is the saving of life, the question is, ‘To market or not to market?’” Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, NAT’L AFF. 65, 65 (June 11, 1991), <https://www.nationalaffairs.com/storage/app/uploads/public/58e/1a5/0fb/58e1a50fb5d22479581310.pdf> [<https://perma.cc/K6VA-67U8>]; see also DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION xv-xvi, at 195-96 (2006); KARA W. SWANSON, BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA 225-37, 240 (2014) (exploring the market rhetoric and practice for sperm and eggs).

7. See Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2226 (2020); Henry T. Greely, *The End of Sex and the Future of Human Reproduction*, 130 HARV. L. REV. 1785, 1785 (2017); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2264 (2017); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, YALE L.J. F. 589, 599-600 (2018); SPAR, *supra* note 6, at 200-01; Brenda Reddix-Small, *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, 652 (2008); Paris Martineau, *Inside the Quietly Lucrative Business of Donating Human Eggs*, WIRED (Apr. 23, 2019, 7:00 AM), <https://www.wired.com/story/inside-lucrative-business-donating-human-eggs/> [<https://perma.cc/VUN2-E8RX>].

8. See SPAR, *supra* note 6, at 6; SWANSON, *supra* note 6, at 4-8, 205. Consider, for example, the oxymoron in the following gamete donation advertisement: “Get Paid [T]o Donate?” Sonia F. Epstein & Polina N. Whitehouse, *Inheriting the Ivy League: The Market for Educated Egg and Sperm Donors*, HARV. CRIMSON (Apr. 30, 2020), <https://www.thecrimson.com/article/2020/4/30/inheriting-the-ivy-league/> [<https://perma.cc/8DD4-NXL7>]; see Melissa Moschella, *Reproductive Technologies and Human Dignity*, PUB. DISCOURSE (Nov. 17, 2019), <https://www.thepublicdiscourse.com/2019/11/57961/> [<https://perma.cc/QP2G-GJ5H>].

9. See SPAR, *supra* note 6, at xv-xvi, 3, 195-96.

10. *Fertility Market Size to Hit Around US\$ 47.9 Billion by 2030*, GLOBENEWSWIRE (Feb. 10, 2021, 10:46 AM), <https://www.globenewswire.com/news-release/2021/02/10/2173389/0/en/Fertility-Market-Size-to-Hit-Around-US-47-9-Billion-by-2030.html> [<https://perma.cc/R2R3-HPJ2>].

markets to both buyers and sellers of gametes.<sup>11</sup> The buyers are would-be parents, be they couples, singles, or those in some other arrangements<sup>12</sup> who need a sperm, egg, or both, to have a baby through in-vitro fertilization (“IVF”).<sup>13</sup> The process is involved and not cheap, so it is not for the faint of heart—or for the poor.<sup>14</sup> The fertility industry markets to potential sellers too, targeting students and professionals<sup>15</sup> who would make for young<sup>16</sup> and healthy<sup>17</sup> gamete donors (bonus points for smart, accomplished, and attractive<sup>18</sup>). College campuses are lucrative markets.<sup>19</sup> California Cryobank, for example, a leading sperm-and-egg bank in the country,<sup>20</sup> has locations within walking distances of or near Harvard University, MIT, Stanford University, NYU, and UCLA.<sup>21</sup> College students routinely find

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11. Michele Goodwin, *Introduction*, in *THE GLOBAL BODY MARKET: ALTRUISM’S LIMITS* xvii, xix (Michele Goodwin ed., 2014); O. CARTER SNEAD, *WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS* 188-89 (2020); SPAR, *supra* note 6, at 37, 39.

12. See IAN JENKINS, *THREE DADS AND A BABY: ADVENTURES IN MODERN PARENTING* (2021); SPAR, *supra* note 6, at 1-6; Ian Jenkins, *Our Poly Family Legal Battle: Answering FAQs*, PSYCH. TODAY (Mar. 1, 2021), <https://www.psychologytoday.com/us/blog/better-or-worse/202103/our-poly-family-legal-battle-answering-faqs> [<https://perma.cc/D75S-WTZH>]; *Single Mothers by Choice*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/single-mothers> [<https://perma.cc/8KH9-M22Z>] (last visited Apr. 14, 2022); Brett Wilkins, *Mass. Lesbian ‘Throuple’ Expecting First Child*, DIG. J. (Apr. 24, 2014), <http://www.digitaljournal.com/life/lifestyle/mass-lesbian-throuple-expecting-first-child/article/381913> [<https://perma.cc/RQ5G-CLZR>].

13. See SNEAD, *supra* note 11, at 186-200; SPAR, *supra* note 6, at 31-67.

14. See, e.g., *Egg Donor Fees at West Coast Egg Donation*, W. COAST EGG DONATION, <https://www.westcoasteggdonation.com/egg-donor-program/costs-fees> [<https://perma.cc/F6XT-TYV5>] (last visited Apr. 14, 2022); Samantha Fields, *The Cost of Building a Family Using Donor Sperm*, MARKETPLACE (Oct. 24, 2019), <https://www.marketplace.org/2019/10/24/the-cost-of-building-a-family-using-donor-sperm/> [<https://perma.cc/VL86-H5AC>]; *Frozen Donor Egg Cycle Cost at the Advanced Fertility Center of Chicago*, ADVANCED FERTILITY CTR. CHI., <https://advancedfertility.com/fertility-treatment/affording-care/frozen-donor-eggs-cost/> [<https://perma.cc/G8CD-U4J2>] (last visited Apr. 14, 2022); Rachel Gurevich, *How Much Does IVF Really Cost?*, VERYWELL FAM., <https://www.verywellfamily.com/how-much-does-ivf-cost-1960212> [<https://perma.cc/7VPY-G3XX>] (last updated Nov. 27, 2021); Sharon Mazel, *Using a Donor Egg To Get Pregnant*, WHAT TO EXPECT (Mar. 29, 2019), <https://www.whattoexpect.com/getting-pregnant/fertility-tests-and-treatments/donor-egg/> [<https://perma.cc/JQS5-PYZS>].

15. SPAR, *supra* note 6, at 37.

16. Richard A. Epstein, *How to Create Markets in Contestable Commodities*, in *THE GLOBAL BODY MARKET: ALTRUISM’S LIMITS* 44, 60 (Michele Goodwin ed., 2014).

17. SPAR, *supra* note 6, at 37.

18. *Id.* at x, xi, 37, 81; see SWANSON, *supra* note 6, at 230-33.

19. SPAR, *supra* note 6, at 39; SWANSON, *supra* note 6, at 198-99.

20. Press Release, California Cryobank, California Cryobank Offers World’s Largest Sperm/Egg Donor Catalog (Feb. 21, 2018), <https://www.cryobank.com/about-us/press-releases/california-cryobank-offers-world-s-largest-sperm/egg-donor-catalog/> [<https://perma.cc/J2LT-BXUE>].

21. See *Branch Laboratories*, CAL. CRYOBANK, <https://www.cryobank.com/about-us/>

advertisements by sperm and egg banks in their campus newspapers, with a noble call to help would-be parents in exchange for payment.<sup>22</sup> Payment to sperm donors is about \$75 per specimen<sup>23</sup> and to egg donors ranging from \$2,500 to \$50,000, depending on the donor's "qualifications."<sup>24</sup> (One ad promised payment of \$100,000.<sup>25</sup>) So-called "Ivy eggs," eggs from a woman with an Ivy League college on the résumé, have commanded \$50,000.<sup>26</sup> Buyers, on their part, choose the sperm or egg with desired characteristics and qualifications<sup>27</sup> out of the website catalogue:<sup>28</sup> Clean family medical history?<sup>29</sup> Height of at least 5'9"?<sup>30</sup> Blond(e) hair?<sup>31</sup> Jewish?<sup>32</sup> Asian?<sup>33</sup> Indian?<sup>34</sup> White?<sup>35</sup> SAT score of at least

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locations/ [https://perma.cc/2WZG-UBT6] (last visited Apr. 14, 2022); *see also* Epstein, *supra* note 16, at 60.

22. *Egg Donor Wanted, "B" Students Need Not Apply*, STAN. DAILY (May 30, 2012, 12:05 AM), <https://www.stanforddaily.com/2012/05/30/egg-donor-wanted-b-students-need-not-apply/> [https://perma.cc/NWY4-94PL]; *Elitist and Racist Egg Donation Ads Have No Place in Student Newspapers*, TECH (Feb. 18, 2021), <https://thetech.com/2021/02/18/egg-donation-ad-editorial> [https://perma.cc/3FYX-G6Q6]; Kat Huang, *Egg Donor Ads Target Women of Ivy League*, YALE DAILY NEWS (Mar. 22, 2005, 12:00 AM), <https://yaledailynews.com/blog/2005/03/22/egg-donor-ads-target-women-of-ivy-league/> [https://perma.cc/Z69Z-EDJC]; Rachel P. Kovner, *Egg-Seeking Ad Draws Nearly 30 Harvard Applicants*, HARV. CRIMSON (July 2, 1999), <https://www.thecrimson.com/article/1999/7/2/egg-seeking-ad-draws-nearly-30-harvard/> [https://perma.cc/6PFP-9N9T]; Divya Subrahmanyam, *'Ivy League Egg Donor Wanted'*, YALE DAILY NEWS (Apr. 23, 2008, 12:00 AM), <https://yaledailynews.com/blog/2008/04/23/ivy-league-egg-donor-wanted/> [https://perma.cc/BN9W-UU5Q].

23. SPAR, *supra* note 6, at 39.

24. *Id.* at x, xi, 46, 81; *see* SWANSON, *supra* note 6, at 230-33.

25. SPAR, *supra* note 6, at 46.

26. *Id.* at 64, 81; Susan Weidman Schneider, *Jewish Woman's Eggs*, LILITH (Sept. 19, 2001), <https://lilith.org/articles/debut-57/> [https://perma.cc/P5J4-TXVR].

27. Epstein, *supra* note 16, at 60; SNEAD, *supra* note 11, at 189; SPAR, *supra* note 6, at x; SWANSON, *supra* note 6, at 229.

28. SWANSON, *supra* note 6, at 2-3.

29. SPAR, *supra* note 6, at 46; Epstein & Whitehouse, *supra* note 8.

30. Donna Dickenson, *Exploitation and Choice in the Global Egg Trade: Emotive Terminology or Necessary Critique?*, in THE GLOBAL BODY MARKET: ALTRUISM'S LIMITS 21, 37-38 (Michele Goodwin ed., 2014); SWANSON, *supra* note 6, at 232.

31. From a real advertisement in a 1999 college newspaper, cited in Andrew Wancata, Note, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 J. L. & HEALTH 199, 200 n.4 (2003); Epstein & Whitehouse, *supra* note 8.

32. Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. LEGIS. 1, 13 (2003); Epstein & Whitehouse, *supra* note 8; Martineau, *supra* note 7.

33. Alvaré, *supra* note 32, at 13; Epstein & Whitehouse, *supra* note 8; Martineau, *supra* note 7.

34. Epstein & Whitehouse, *supra* note 8; Martineau, *supra* note 7.

35. SPAR, *supra* note 6, at 46; Michele Goodwin, *The Body Market: Race Politics & Private*

1400?<sup>36</sup> Plays the cello?<sup>37</sup> Does modeling and calligraphy on the side?<sup>38</sup> Or even . . . Nobel Prize winners and Olympic athletes?<sup>39</sup>

The popular view is that donor conception, the practice of which involves paying the donor for the gametes, is fine.<sup>40</sup> The thriving fertility industry includes a robust market for sperm and eggs, a market that exists to produce babies—“the baby business,” dubbed Debora L. Spar.<sup>41</sup> So the market at this point seems to be taken for granted,<sup>42</sup> which is to say, that the acceptability of the buying and selling of human gametes seems to be similarly settled. Certainly the buyers of the gametes have often walked a long road of infertility’s sorrow, and the aching longing for children is deep and heartbreaking.<sup>43</sup> And certainly the sellers are often motivated by altruism in their desire to help those who want to have children by providing the requisite gametes, even if at the same time the payment is important to them.<sup>44</sup> But if the bargained-for exchange is gametes for money, how does that consideration satisfy the requirement of commutative justice, historically an important principle in contract law? And what does donor conception entail, particularly from the perspectives of the resulting children and from the egg donors?

### III. COMMUTATIVE JUSTICE AND CONSIDERATION

Aristotle and Aquinas thought of contract-making as an exercise of moral virtue, with one such important virtue being commutative justice.<sup>45</sup> Commutative

*Ordering*, 49 ARIZ. L. REV. 599, 608 (2007).

36. Dickenson, *supra* note 30, at 37-38; SPAR, *supra* note 6, at 46.

37. Dickenson, *supra* note 30, at 37-38; SPAR, *supra* note 6, at 81.

38. See Wesley J. Smith, *A Right to the Baby We Want*, FIRST THINGS (Oct. 27, 2017), <https://www.firstthings.com/web-exclusives/2017/10/a-right-to-the-baby-we-want> [<https://perma.cc/65KY-CAJ8>].

39. SPAR, *supra* note 6, at 37. The sperm bank that marketed the sperm of Nobel Prize winners closed in 1999, and as it turned out had carried the sperm of only three Nobel Laureates, which in turn did not fertilize any eggs. SNEAD, *supra* note 11, at 189.

40. Melissa Moschella, *Rethinking the Moral Permissibility of Gamete Donation*, 35 THEORETICAL MED. & BIOETHICS 421, 422 (2014).

41. SPAR, *supra* note 6, at xvii.

42. *Id.*

43. See SPAR, *supra* note 6, at 31-46; see, e.g., *Stories from Our Donor Egg Families*, DONOR EGG BANK USA, <https://donoreggbankusa.com/success-rates/testimonials> [<https://perma.cc/U625-965C>] (last visited Apr. 14, 2022); *I Used an Egg Donor*, PARENTS (Sept. 10, 2018), <https://www.parents.com/getting-pregnant/trying-to-conceive/i-used-an-egg-donor/> [<https://perma.cc/9QPT-X2FS>]; Sarah Kowalski, *The Truth About Infertility for Women Over 40*, HARPER’S BAZAAR (Feb. 21, 2018), <https://www.harpersbazaar.com/culture/features/a15943359/egg-donor-infertility-ivf/> [<https://perma.cc/MV76-VNVL>].

44. See SPAR, *supra* note 6, at xi; SWANSON, *supra* note 6, at 198-99.

45. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 7, 10-12 (2011) [hereinafter GORDLEY, *ORIGINS*]; see also JAMES GORDLEY, *THE JURISTS: A CRITICAL*

justice requires that “in an exchange, the value of what each party gives should equal that of what he receives, thereby preserving each party’s share of purchasing power.”<sup>46</sup> In other words, commutative justice is about meeting the requirement of roughly equal values being exchanged<sup>47</sup> that neither party be unjustly enriched at the other’s expense.<sup>48</sup> If the *telos* or end of law is the common good<sup>49</sup> and the common good requires justice, then the *telos* of justice, commutative justice included, is flourishing, a life of virtue.<sup>50</sup> Law, then, inescapably deals with morality, as morality is but “another name for a fully reasonable concern for human flourishing in all its basic aspects, integrally considered,” John Finnis writes.<sup>51</sup>

Commutative justice was part of the bedrock of contract law for over half a millennium in the Western legal thought.<sup>52</sup> Being the beneficiary of jurists following the late scholastic, humanist, and modern jurists<sup>53</sup> who have dropped certain aspects of the Aristotelian–Thomistic understanding of law and commutative justice in contracting, which has resulted in a rather incoherent theory of contracts, we would do well to go back to the roots of contract law in our jurisprudence<sup>54</sup>—natural law’s understanding of fairness and its relationship to justice and flourishing.

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HISTORY 109 (2013) [hereinafter GORDLEY, JURISTS].

46. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 404 (2007) [hereinafter GORDLEY, FOUNDATIONS].

47. See MARY L. HIRSCHFELD, AQUINAS AND THE MARKET: TOWARD A HUMANE ECONOMY 134 (2018); GORDLEY, FOUNDATIONS, *supra* note 46, at 361; GORDLEY, JURISTS, *supra* note 45, at 93-95; GORDLEY, ORIGINS, *supra* note 45, at 13-14; C. Scott Pryor, *Revisiting Unconscionability: Reciprocity and Justice*, in CHRISTIANITY AND PRIVATE LAW 178, 179 (Robert F. Cochran, Jr. & Michael P. Moreland eds., 2021).

48. GORDLEY, FOUNDATIONS, *supra* note 46, at 287, 404; GORDLEY, JURISTS, *supra* note 45, at 84; GORDLEY, ORIGINS, *supra* note 45, at 55.

49. THOMAS AQUINAS, SUMMA THEOLOGIAE (I-II, q.96, a.1).

50. See John Finnis, *Aquinas and Natural Law Jurisprudence*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 17, 19, 24, 34, 38, 41, 46, 51, 53 (George Duke & Robert P. George eds., 2017); JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 161 (1980); GORDLEY, JURISTS, *supra* note 45, at 84, 107, 110; GORDLEY, ORIGINS, *supra* note 45, at 19-20, 22-23, 244-48; see also Christopher Tollefsen, *Natural Law, Basic Goods and Practical Reason*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra*, at 133, 156.

51. John Finnis, *The Nature of Law*, in THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 38, 47 (John Tasioulas ed., 2020); see also 1 JOHN FINNIS, *Commensuration and Public Reason*, in REASON IN ACTION 233, 243 (2013); Finnis, *supra* note 50, at 19-20; Robert P. George, *Natural Law, God and Human Dignity*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra* note 50, at 59; Tollefsen, *supra* note 50, at 151, 153.

52. Pryor, *supra* note 47, at 179.

53. GORDLEY, FOUNDATIONS, *supra* note 46, at 287-88; GORDLEY, JURISTS, *supra* note 45, at 109-10.

54. See GORDLEY, ORIGINS, *supra* note 45, at 7-9, 230, 232.

Historically, “*causa*,” or Latin for “reason,”<sup>55</sup> also often understood as motive,<sup>56</sup> has evolved into consideration, which has since modernly evolved, or perhaps better stated “redesigned,” into the concept of bargained-for exchange.<sup>57</sup> Despite the similarities, different understandings and sensibilities informed each doctrine’s development and definition. Commutative justice is no longer an important principle in the modern doctrine of consideration as bargained-for exchange, with, for example, the modern doctrine of consideration jettisoning the virtue of liberality or gift as a valid reason to enforce a contract.<sup>58</sup> There went the validity of love and affection as consideration also.<sup>59</sup>

That the modern doctrine of consideration is rather incoherent as a result<sup>60</sup> may be seen, for example, in the tortured treatment of adequacy of consideration: Courts now say that they are restrained from scrutinizing the adequacy of consideration—but if the value of what is exchanged is too blatantly unequal, it is suspect as a gift or gratuitous consideration, which is *not* valid consideration.<sup>61</sup> Similarly, if adequacy of consideration is truly not an issue, why require a detriment be “fresh,” invalidating past consideration and moral consideration?<sup>62</sup> Of course if adequacy of consideration is truly of no issue at all, commutative justice is weakened because there would then be no requirement that the value of what is being exchanged be equal.<sup>63</sup> And yet the doctrine of consideration shows ambivalence in committing to such a stark conception of the law, bereft of commutative justice. The incoherence evident in consideration is a result of it.

*Causa*, by contrast, recognized that contracts needed to fulfill the requirement of commutative justice,<sup>64</sup> even if modern consideration may only give an uneasy nod to it.<sup>65</sup> The doctrine of unconscionability, for example, is used in an answer

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55. *Id.* at 50.

56. A. W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 321, 322, 373-74 (2005); *see also* Harold J. Berman, *The Christian Sources of General Contract Law*, in CHRISTIANITY AND LAW: AN INTRODUCTION 125, 134-36 (John Witte, Jr. & Frank S. Alexander eds., 2008); C. M. A. McCauliff, *A Historical Approach to Contractual Ties that Bind Parties Together*, 71 FORDHAM L. REV. 841, 850 (2002).

57. *See* GORDLEY, FOUNDATIONS, *supra* note 46, at 288; GORDLEY, JURISTS, *supra* note 45, at 210-12; GORDLEY, ORIGINS, *supra* note 45, at 49.

58. GORDLEY, ORIGINS, *supra* note 45, at 137-39.

59. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (AM. LAW INST. 1981).

60. GORDLEY, FOUNDATIONS, *supra* note 46, at 288; GORDLEY, ORIGINS, *supra* note 45, at 230, 236-38.

61. Berman, *supra* note 56, at 136; GORDLEY, ORIGINS, *supra* note 45, at 146-58, 171-72, 205-08, 237; *see* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b, c (AM. LAW INST. 1981).

62. GORDLEY, ORIGINS, *supra* note 45, at 173, 175; James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 515-17 (1899); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a, § 86 cmt. a (AM. LAW INST. 1981).

63. *See* Berman, *supra* note 56, at 136.

64. GORDLEY, ORIGINS, *supra* note 45, at 79; *see* GORDLEY, JURISTS, *supra* note 45, at 211.

65. GORDLEY, ORIGINS, *supra* note 45, at 147-58.

to the injustice of unequal exchange.<sup>66</sup>

Also by contrast, historically, a contract of any valuable consideration is fine,<sup>67</sup> but consideration must not have an immoral object.<sup>68</sup> The doctrine of *causa* for the earlier canonists is represented by Astexanus's statement: "[E]very pact is to be kept if it be such that it can be kept without harm to the soul or the safety of the body . . . so long as it is lawful, honest, and possible."<sup>69</sup>

But what constitutes an "immoral object" in consideration?<sup>70</sup> What might constitute "harm to the soul" or "safety of the body"?<sup>71</sup> This article will take up some aspects of donor conception as related to these questions and to commutative justice.

#### IV. DONOR CONCEPTION, CONSIDERED

##### *A. Genealogical Bewilderment*

We humans are embodied beings: We *are* our bodies,<sup>72</sup> not minds or souls who happen to have bodies. This is the "understanding of the human person in which the body is an essential and intrinsic aspect of personal identity, rather than a mere extrinsic instrument of the conscious, thinking willing 'I' or self."<sup>73</sup> This view, the Aristotelian-Thomistic hylomorphism,<sup>74</sup> understands the human person as one of "a substantial unity of mind and body."<sup>75</sup>

Melissa Moschella explains the embodiment of the child and his relationship to his parents:

The parents' combined gametes are the biological cause of their child's existence and identity as a human organism, which in turn is the basis of that child's overall continuity of personal identity overtime. The child is who he is because of who his parents are; to be begotten by other parents is, simply, to be someone else.<sup>76</sup>

66. Berman, *supra* note 56, at 131-32; GORDLEY, ORIGINS, *supra* note 45, at 147-58, 236; Pryor, *supra* note 47, at 178-79; *cf.* the Aristotelian tradition on unjust price, GORDLEY, FOUNDATIONS, *supra* note 46, at 366.

67. 2 WILLIAM BLACKSTONE, COMMENTARIES \*444.

68. Berman, *supra* note 56, at 131, 135; EDWARD JENKS, THE HISTORY OF THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW 23, 75 (1892); *see also* SIMPSON, *supra* note 56, at 317.

69. SIMPSON, *supra* note 56, at 385.

70. *See* Jenks, *supra* note 68, at 23.

71. SIMPSON, *supra* note 56, at 385.

72. SNEAD, *supra* note 11, at 3.

73. MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG?: PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY 9 (2017); *see id.* at 36.

74. PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS 17-18, 48-49 (2008); Melissa Moschella, *The Wrongness of Third-Party Assisted Reproduction: A Natural Law Account*, 22 CHRISTIAN BIOETHICS 3, 5-8 (2016).

75. MOSCHELLA, *supra* note 73, at 36.

76. *Id.* at 35; *see also* Moschella, *supra* note 40, at 430.

Clarity with regard to our origins is needed to understand our identity, our own selves.<sup>77</sup> It is the parents' united gametes, carrying the genetic information from each parent, that produced the child, and so the child is dependent on the parents for both his existence and identity.<sup>78</sup> His parents' presence, guidance, and relationship with him is necessary for the child to make sense of his *own* person and identity because of the genetic relationship between them.<sup>79</sup> Loss of his genetic parents results in a genealogical bewilderment from having been separated from one's parents.<sup>80</sup> This makes sense only if we are *not* ghosts in machines, but rather embodied beings.<sup>81</sup>

Aquinas says that a child "is by nature part of" his parents, as "enfolded in the care of its parents," physically first in his mother's womb, then also in the "spiritual womb" of the family.<sup>82</sup> Parents are, at least initially, the closest people to the child by virtue of their given genetic relationship,<sup>83</sup> which makes their relationship one of the strongest among all human relationships.<sup>84</sup> If so, then children and parents belong together, and genealogical bewilderment makes sense if children and parents are torn apart.

There is then an inherent longing to know and be known, to love and be loved, by our parents, by those to whom we owe our existence and identity.<sup>85</sup> Children have a special need to be, and indeed the *right*, to be known, raised, and loved by their biological parents.<sup>86</sup> There is a special benefit to be loved by them

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77. Leon R. Kass, *LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS* 100 (2002).

78. See Moschella, *supra* note 40, at 429, 432.

79. See MOSCHELLA, *supra* note 73, at 28; Moschella, *supra* note 40, at 430.

80. Katy Faust, *Why Embryo Adoption Damages Children's Rights*, THEM BEFORE US (Dec. 5, 2019), <https://thembeforeus.com/why-embryo-adoption-damages-childrens-rights/> [<https://perma.cc/KVR7-VXF6>].

81. See KASS, *supra* note 77, at 181-82; LEE & GEORGE, *supra* note 74, at 67.

82. THOMAS AQUINAS, *SUMMA THEOLOGIAE* (II-II, q.10, a.12); MOSCHELLA, *supra* note 73, at 25-26.

83. MOSCHELLA, *supra* note 73, at 37.

84. Moschella, *supra* note 40, at 430; see FINNIS, *supra* note 50, at 205-10; MOSCHELLA, *supra* note 73, at 50-51.

85. MOSCHELLA, *supra* note 73, at 37, 41; Alvaré, *supra* note 32, at 48; Moschella, *supra* note 40, at 433-34; William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RESV. L. REV. 1, 146 (1990).

86. See MOSCHELLA, *supra* note 73, at 39, 41; Moschella, *supra* note 74, at 4, 15; Wagner, *supra* note 85, at 146; Devorah Goldman, *Gene Editing and Planned Parenthood*, PUB. DISCOURSE (Nov. 12, 2020), <https://www.thepublicdiscourse.com/2020/11/72616/> [<https://perma.cc/N3LU-SMCH>]; Christopher O. Tollefsen, *Making Children, Unmaking Families*, PUB. DISCOURSE (Aug. 19, 2020), <https://www.thepublicdiscourse.com/2020/08/70265/> [<https://perma.cc/NEP6-SK76>]. Contrasted with the argument that *adults* have the right to have children, see, e.g., JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 16,

and to be able to respond to that love.<sup>87</sup>

Conversely then, to be known, raised, and loved by their biological parents are *owed to the children*.<sup>88</sup> This needed love and relationship, by their very nature grounded in their unique genetic relationship, are not replaceable by other people's loves, however grand and deep those loves may be.<sup>89</sup> That is to say, the will of those who brought the child into existence in the case of donor conception and are now raising him may very well be accompanied by a generous and genuine love for him, and yet the child's embodiment, with all its needs and longings, testifies against our notions of bringing forth children as if they were "unencumbered selves," free of any "unchosen obligations," who would be alright if they were wanted and loved enough.<sup>90</sup> Rather, the child needs the love that is *that* child's biological parents' love for *him*, the relationship between *that* child and *his* parents.<sup>91</sup> This obligation of personal love and care that the parents owe to the child is non-transferable, because no one else will do; no other people bear this special relationship between biological parents and child.<sup>92</sup>

Our navel and genitalia are a reminder of our ancestors before us and our children after us,<sup>93</sup> "our bodily mark of linkage, pointing ultimately forward to our descendants," Leon R. Kass says.<sup>94</sup> But it is a physical, ever-present reminder of the pain, loss, confusion, and dissonance for those with unknown donor parents. This may be far from the minds of would-be parents who buy the gametes with the best of intentions, but from the child's perspective as an embodied being, *he is bereft not of his sperm or egg donor, but of his very father*

40, 42 (1994) ("procreative liberty"); Debora L. Spar, *Free Markets, Free Choice?*, in *THE GLOBAL BODY MARKET: ALTRUISM'S LIMITS* 3, 16 (Michele Goodwin ed., 2014), this position focuses on *children*—what they need, what is owed to them, and thus their rights—as opposed to the adults, adults' wishes, and adults' desires. See Alvaré, *supra* note 32, at 55. CanaVox, a movement dedicated to marriage and family, states the case well: "Every child has a right to a mother and a father; no one has a right to a child." *What We Cheer For*, CANAVOX, <https://canavox.com/what-we-cheer-for/> [https://perma.cc/TT69-25YT] (last visited Apr. 14, 2022). Helen M. Alvaré has also argued eloquently that there is no constitutional protection to collaborative reproduction such as donor conception. Alvaré, *supra* note 32, at 33-41.

87. Moschella, *supra* note 40, at 433-34.

88. See Moschella, *supra* note 74, at 11-15; Alana S. Newman, *What Are the Rights of Donor-Conceived People?*, PUB. DISCOURSE (Aug. 2, 2013), <https://www.thepublicdiscourse.com/2013/08/10511/> [https://perma.cc/68BE-43QE]; see also Spar, *supra* note 86, at 19 (welcoming the dimension of the child's right to the discussion of reproductive ethics).

89. MOSCHELLA, *supra* note 73, at 41; Moschella, *supra* note 40, at 425-26, 429; Moschella, *supra* note 74, at 11-12.

90. See SNEAD, *supra* note 11, at 86-87, 269-70; see also Epstein & Whitehouse, *supra* note 8. See generally SNEAD, *supra* note 11, at 65-105; LEE & GEORGE, *supra* note 74, at 149.

91. MOSCHELLA, *supra* note 73, at 41; Moschella, *supra* note 40, at 425-26, 433-35; Moschella, *supra* note 74, at 11-12.

92. Moschella, *supra* note 40, at 428-34; see also SNEAD, *supra* note 11, at 232.

93. KASS, *supra* note 77, at 182-83.

94. *Id.* at 101.

or mother.

So from wondering whether one's donor parent similarly has deep-set eyes, or a wide nose, or hates the taste of cilantro,<sup>95</sup> or enjoys restoring houses,<sup>96</sup> to deeper questions of identity and longing for closeness and relationship,<sup>97</sup> sixty-five percent of sperm donor-conceived children in a survey agreed with the statement that "my sperm donor is half of who I am."<sup>98</sup> Lindsay Greenawalt, for example, said, "I feel my right to know who I am and where I come from has been taken away from me."<sup>99</sup> Said another, Olivia Pratten, "I think of myself as a puzzle; the only picture I have ever known is half-complete."<sup>100</sup>

The imagery of loss, a hole, a wound, or having something missing, is a common one.<sup>101</sup> Tom Ellis, submitting his DNA to the UK donor link registry to look for his sperm donor father, said, "[H]e is a part of me and without him, I will never feel completely whole."<sup>102</sup> To the extent that the gamete donation was made anonymously, or that laws are such that finding one's biological parent would be harder for the child, they only make things worse, not better.<sup>103</sup> Whereas "[t]he bond of natural necessity which tied sexual union to engendering children, engendering to pregnancy, pregnancy to a relationship with the child, gave us the

95. See Kyle Swenson, *Nineteen Children and Counting*, WASH. POST (Sept. 7, 2020, 2:15 PM), [https://www.washingtonpost.com/national/sperm-donor-father-19-children/2020/09/07/97b6f8de-ba65-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/national/sperm-donor-father-19-children/2020/09/07/97b6f8de-ba65-11ea-8cf5-9c1b8d7f84c6_story.html) [<https://perma.cc/4DD7-4YZG>].

96. Kathryn Francisco, *It's Okay to Believe That the Method of Your Conception Was Wrong and Still Give Thanks for Your Life*, THEM BEFORE US (Jan. 21, 2020), <https://thembeforeus.com/kathryn-francisco-its-okay-to-believe-that-the-method-of-your-conception-was-wrong-and-still-give-thanks-for-your-life/> [<https://perma.cc/V82J-WRS8>].

97. See ELIZABETH MARQUARDT ET AL., MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 11-12 (2010); Goldman, *supra* note 86; California Cryobank, *Kids of Donor 5114*, YOUTUBE (May 29, 2013), <https://www.youtube.com/watch?v=PPEEvkCWMA> [<https://perma.cc/N72B-22QM>].

98. MARQUARDT ET AL., *supra* note 97, at 5.

99. *Id.* at 21.

100. *Id.*

101. Of course this fragmentation is a two-way street, however infrequently explored. Thus, Paul Ramsey remarks of the donor *parents*, "But to be debiologized and recombined in various ways, parenthood must first be broken or removed. When the transmission of life has been debiologized, human parenthood as a created covenant of life is placed under massive assault and men and women will no longer be who they are." PAUL RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* 135 (1970); see also Epstein & Whitehouse, *supra* note 8; Alana Newman, *I Donated My Eggs, and I Regret It*, VERILY, <https://verilymag.com/2015/10/reproductive-health-fertility-donating-eggs> [<https://perma.cc/UG37-KTDA>] (last updated Jan. 25, 2018); *Three Things You Should Know About Sperm "Donation,"* CTR. BIOETHICS & CULTURE NETWORK, [http://www.cbc-network.org/pdfs/3\\_Things\\_You\\_Should\\_Know\\_About\\_Sperm\\_Donation-Center\\_for\\_Bioethics\\_and\\_Culture.pdf](http://www.cbc-network.org/pdfs/3_Things_You_Should_Know_About_Sperm_Donation-Center_for_Bioethics_and_Culture.pdf) [<https://perma.cc/A5NK-L5DB>] (last visited Apr. 14, 2022); see *infra* notes 231-38 and accompanying text.

102. MARQUARDT ET AL., *supra* note 97, at 21.

103. See *id.* at 51-54.

foundation of our *knowledge* of human relationships in this area,”<sup>104</sup> the missing biological parent(s) and the related kin relationships and network in the lives of donor-conceived children make for a bewildering, fragmented life.<sup>105</sup>

Research supports this. Recalling Eli Baden-Lasar’s story, the young man who searched for and photographed as many of his half siblings as he could, and his understanding of his father’s nonchalant, even dismissive, legacy comment to all his children as saying, “*May the odds be ever in your favor,*”<sup>106</sup>—the odds are, well, frankly *not* in their favor. Empirical data suggest that children do best when raised by their biological parents, married to each other.<sup>107</sup> Children conceived through donor conception suffer from delinquency, substance abuse, and depression at a significantly higher rate than children raised by their parents.<sup>108</sup> Certainly a child can do well outside of the household of married-biological parents, and there are many children outside of this environment who do thrive.<sup>109</sup> And certainly these children are very much wanted and may very much be well loved.<sup>110</sup> But still the data point to the optimal set of conditions for children, which are for their biological parents to be the ones raising them in a

104. OLIVER O’DONOVAN, *BEGOTTEN OR MADE?: HUMAN PROCREATION AND MEDICAL TECHNIQUE* 48 (1984).

105. See MARQUARDT ET AL., *supra* note 97, at 7-8, 11-12; Wagner, *supra* note 85, at 171; Goldman, *supra* note 86. A contrast between the modern practice of donor conception and a couple of ancient practices as recorded in the book of Genesis is worth noting. The patriarchal pattern (as when Hagar was offered to Abraham to bear a child who would be considered the child of Abraham and his then-barren wife Sarah) and the institution of levirate marriage both presuppose “a close relationship between the representative and the represented, so that there is some meaning in the transfer of responsibility,” O’DONOVAN, *supra* note 104, at 33-34, however inconceivable such transfer of responsibility seems to us modernly. By contrast, in the modern practice of donor conception, the gamete donor is kept “deliberately anonymous” and missing from the child’s life. *Id.* at 34.

106. *Supra* note 5 and accompanying text.

107. RYAN T. ANDERSON, *TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM* 148-52 (2015); Kristin Anderson Moore et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, *CHILD TRENDS* 1, 1-2, 6 (2002), <https://www.childtrends.org/wp-content/uploads/2002/06/MarriageRB602.pdf> [<https://perma.cc/3G6N-FB7Z>]; Alysse ElHage, *How Marriage Makes Men Better Fathers*, *INST. FAM. STUD.* (June 19, 2015), <https://ifstudies.org/blog/how-marriage-makes-men-better-fathers> [<https://perma.cc/CLM9-NMTE>]; David C. Ribar, *Children Raised Within Marriage Do Better on Average. Why?*, *CHILD & FAM. BLOG* (Oct. 2015), <https://www.childandfamilyblog.com/child-development/children-marriage-do-better-why/> [<https://perma.cc/4A8D-JMXM>]; Ana Samuel, *The Kids Aren’t All Right: New Family Structures and the ‘No Differences’ Claim*, *PUB. DISCOURSE* (June 14, 2012), <https://www.thepublicdiscourse.com/2012/06/5640/> [<https://perma.cc/MJ78-32MM>].

108. MARQUARDT ET AL., *supra* note 97, at 9.

109. MOSCHELLA, *supra* note 73, at 41.

110. *Id.*

married household.<sup>111</sup> Thus the child may be well-loved by another parent, not the biological parent, and that parent may even do a *better* job raising the child, and yet there is still harm to the child for not being known, raised, and loved by his biological parents.<sup>112</sup>

Adoptive parents merit a special mention here for being especially heroic: stepping in, picking up, welcoming, and grafting into their families children, not theirs biologically, who come from (already-existing) broken situations.<sup>113</sup> But it is a very different case in donor conception, when the parents who raise you *participated* in your separation from your biological parent(s). Here, the parents who raise you played a hand in creating that wound,<sup>114</sup> as contrasted with adoptive parents, who care for children who *already* exist, whose circumstances are *already* less than ideal.<sup>115</sup> Research supports this painful internalization. Empirical data show that donor-conceived children may suffer from greater psychological harm, and even physical harm, than adopted children.<sup>116</sup> One might observe that whereas adoption serves the child,<sup>117</sup> donor conception serves the parents, not the child.<sup>118</sup>

For children of donor conception, their own sense of alienation, loss, and longing may well sit in tension with the disposition of the parents who raised them. One person who was conceived with a donor sperm said, “My mom paid thousands of dollars for my creation, so for me to just tell her that I want to know where half of my DNA has originated, for me to tell her that I want to look at the man that is my biological father in the eyes, for me to want more than just her in my life, it’s wrong.”<sup>119</sup> One woman conceived through sperm donation, Alana S.

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111. *Id.*; see *supra* note 107.

112. MOSCHELLA, *supra* note 73, at 41; Moschella, *supra* note 40, at 432, 435.

113. See O’DONOVAN, *supra* note 104, at 36-37, 40; Moschella, *supra* note 40, at 435; Moschella, *supra* note 74, at 13. Empirical data also suggest that adoptive children still struggle and carry the wound of separation from their biological parents, which is in line with the data that show that children do best when raised by their married, biological parents. ANDERSON, *supra* note 107, at 148-52; Moschella, *supra* note 40, at 435; see Nicholas Zill & W. Bradford Wilcox, *The Adoptive Difference: New Evidence on How Adopted Children Perform in School*, INST. FAM. STUD. (Mar. 26, 2018), <https://ifstudies.org/blog/the-adoptive-difference-new-evidence-on-how-adopted-children-perform-in-school> [<https://perma.cc/Y6ZM-4KTU>].

114. Moschella, *supra* note 8.

115. See MARQUARDT ET AL., *supra* note 97, at 14; O’DONOVAN, *supra* note 104, at 36, 40; Moschella, *supra* note 40, at 435; Moschella, *supra* note 74, at 13; Goldman, *supra* note 86.

116. MARQUARDT ET AL., *supra* note 97, at 28; Moschella, *supra* note 40, at 435 n.32; Moschella, *supra* note 8. Other things that may be bothersome about donor conception, in particular to the children conceived with donor sperm, are the use of pornography and masturbation in the ejaculation of their donor sperm. See Alvaré, *supra* note 32, at 10, 25, 44.

117. O’DONOVAN, *supra* note 104, at 36-37.

118. *Id.*; Alvaré, *supra* note 32, at 55.

119. Katy Faust, *Why It’s Probably Not a Coincidence That the Mother Transing Her 7-Year-Old Isn’t Biologically Related*, FEDERALIST (Oct. 24, 2019), <https://thefederalist.com/2019/10/24/why-its-probably-not-a-coincidence-that-the-mother-transing-her-7-year-old-isnt-biologically->

Newman,<sup>120</sup> said, “I knew from an early age that I was purchased and selected from essentially a catalog. I knew that my blonde hair and blue eyes was somehow valued above other colorations . . . I always knew that I was purchased and created precisely to make [my mother] happy[;] that was my *raison d’etre*.”<sup>121</sup> Yet another donor-conceived child, Bethany, put it bluntly thus, “Being ‘wanted’ can sometimes feel like a curse, like I was created to make you happy, my rights be damned.”<sup>122</sup> Unlike children in adoption, donor-conceived children may find it harder to grieve their loss and to express it because doing so may be taken to mean that they reject the parents who have raised them, or else condemn these parents’ decision.<sup>123</sup>

Relatedly, being raised in family with one’s biological siblings, those who are similarly situated to oneself, helps with identity formation and making sense of one’s self, which is also missing for donor-conceived children—which is yet another loss.<sup>124</sup> Anxiety about not knowing one’s family and extended family, along with its attendant problems like unwittingly meeting, dating, or marrying one’s half sibling;<sup>125</sup> or not knowing one’s medical history from the donor parent’s side of the family;<sup>126</sup> is also common among donor-conceived children.

In one case, at least nineteen children were born in the same area in Oregon from the sperm of a man, Bryce Cleary, who had given it to Oregon Health & Science University’s fertility clinic.<sup>127</sup> (The clinic told him that his sperm would be used to conceive babies in the East Coast, and at most five babies at that.<sup>128</sup>) Cleary went on to marry and have four children with his wife.<sup>129</sup> The twenty-three

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related/ [https://perma.cc/487M-TSKA].

120. Alana S. Newman, *Children’s Rights, or Rights to Children?*, PUB. DISCOURSE (Nov. 10, 2014), <https://www.thepublicdiscourse.com/2014/11/13993/> [https://perma.cc/N6RP-AYRE]. Alana S. Newman founded the “Anonymous Us Project,” a website where children (and other characters) of third-party reproduction are welcome to share their stories. *About*, ANONYMOUS US, <https://anonymousus.org/about/> [https://perma.cc/XJP2-GCM9] (last visited Apr. 14, 2022).

121. Katy Faust, “#BigFertility” *Documentary Exposes 3 Ways Surrogacy Harms Children*, CTR. BIOETHICS & CULTURE NETWORK (July 24, 2019), <http://www.cbc-network.org/2019/07/bigfertility-exposes-ways-surrogacy-harms-children/> [https://perma.cc/AY6H-NV6E].

122. Faust, *supra* note 119.

123. *See* Faust, *supra* note 80.

124. *See* MOSCHELLA, *supra* note 73, at 40.

125. *See* RAMSEY, *supra* note 101, at 127-28; Goldman, *supra* note 86.

126. *See* RAMSEY, *supra* note 101, at 127-28; Goldman, *supra* note 86; *Sperm Donation*, CTR. BIOETHICS & CULTURE NETWORK, <http://www.cbc-network.org/issues/making-life/sperm-donation/> [https://perma.cc/Z45P-XZC5]; *Three Things You Should Know About Sperm “Donation”*, *supra* note 101.

127. Meagan Flynn, *Sperm Donor Who Discovered He Fathered at Least 17 Kids—Most in the Same Area—Says Fertility Clinic Lied*, WASH. POST (Oct. 3, 2019, 3:51 AM), <https://www.washingtonpost.com/nation/2019/10/03/oregon-sperm-donor-children-lawsuit/> [https://perma.cc/DN2B-V38J]; Swenson, *supra* note 95.

128. Flynn, *supra* note 127.

129. *Id.*

children now run the risk of meeting and interacting with each other without knowing that they are siblings.<sup>130</sup> Two of the children were students at the same elementary school, at least two were at the same high school, some others socialized in the same circles (social events, churches), and one had a job at a coffee shop not a few of blocks away from another child's house.<sup>131</sup> Cleary himself, a medical student when he gave his sperm, is now a physician in Corvallis, Oregon, practicing in family medicine.<sup>132</sup> At least one of the children lived in the same town, Corvallis.<sup>133</sup> One child worked in the very same building where Cleary practiced.<sup>134</sup> Cleary is now faced by the possibility that, as a doctor, he may have treated his own children as a doctor without the slightest bit of idea.<sup>135</sup>

For Eli Baden-Lasar,<sup>136</sup> discovering early in his quest to find his half siblings that a friend he had known from a program in high school was actually his half brother

was a moment of glee but also of horror. I knew that as a story it was mind-blowing, but it was also disturbing—to have the script switched, to go from friends to brothers. In our experiential-learning program, we were constantly being asked to write personal essays to try to understand our lives. For four months, we were doing that and reading each other's work and sleeping on the same floor of a dorm, all the while not knowing that we were half brothers—the perversity of that was not lost on either of us.<sup>137</sup>

Producing children with donor gametes is not appropriate, not honoring, to our nature as embodied beings of body-soul unity.<sup>138</sup> It impoverishes us from our full humanity.<sup>139</sup> Put more bluntly, it is rather *injurious* to who we are as embodied beings: leading to a bewildering life, characterized by a sense of loss, fragmentation, and even woundedness—a “harm to the soul” spoken of earlier.<sup>140</sup>

### *B. Children as (Luxury) Goods?*

A gamete has special properties as carriers of genes and identity of a

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130. *See id.*; Swenson, *supra* note 95.

131. Flynn, *supra* note 127.

132. *Id.*; Swenson, *supra* note 95.

133. Flynn, *supra* note 127.

134. Swenson, *supra* note 95.

135. Flynn, *supra* note 127. The man filed a lawsuit against Oregon Health & Science University, where the fertility clinic was. One of the man's four children in his marriage was an attorney, who represented his father in the lawsuit. *Id.*

136. Baden-Lasar, *supra* note 1.

137. *Id.*

138. *See* KASS, *supra* note 77, at 100.

139. *See id.*

140. *Supra* notes 69, 71, and accompanying text.

person,<sup>141</sup> properly thought of not as eggs or sperm “from” a person, but the eggs or sperm “of” a person.<sup>142</sup> Gametes are constitutive of some aspect of the self.<sup>143</sup> Should a gamete meet the other, requisite gamete, that meeting will produce a child—which is precisely what the contract for buying and selling gametes is for. In contrast to the classification of gametes and embryos as “property,” with which the property owners can do what they choose,<sup>144</sup> I submit that the starting point of thinking through donor conception issues should be what the *children* are owed. Put another way, the framework of consideration for the propriety of donor conception ought to be the respect for a basic and inherent aspect of the children’s well-being.<sup>145</sup> This obligation to the child is every bit as valid and in need of honoring, no matter how “unchosen [an] obligation” it is, as what is owed to every member of the human family by virtue of our humanity.<sup>146</sup>

Insofar that buying and selling gametes results in the making of babies, Margaret Jane Radin’s oft-cited argument of market-inalienability applies. She argues that certain things in life should not be alienable, that is to say, they should not be sold or traded in the market.<sup>147</sup> Babies would be one.<sup>148</sup> They should not be alienable, and in fact, when we permit baby-selling, we commodify babies.<sup>149</sup> When we commodify *these* babies in the market, we really commodify *all* babies because of the domino effect on how we as a culture think of children.<sup>150</sup> She says, “Conceiving of any child in market rhetoric wrongs personhood. . . . Conceiving of children in market rhetoric would foster an inferior conception of human flourishing, one that commodifies every personal attribute that might be valued by people in other people.”<sup>151</sup> So Leon R. Kass says that in “[s]elling our bodies, we come perilously close to selling out our souls. . . . if we come to think about ourselves like pork bellies, pork bellies we will become.”<sup>152</sup>

141. O’DONOVAN, *supra* note 104, at 43.

142. R. J. Snell, *A Hard Truth: IVF is Not Moral*, CULTURE LIFE FOUND. (Jan. 24, 2020), <https://cultureoflife.org/2020/01/24/a-hard-truth-ivf-is-not-moral/> [<https://perma.cc/S9G6-5993>].

143. See R. J. Snell, *Google and Violating Patients’ Privacy: It’s Worse Than it Appears*, CULTURE LIFE FOUND. (Nov. 27, 2019), <https://cultureoflife.org/2019/11/27/google-and-violating-patients-privacy-its-worse-than-it-appears/> [<https://perma.cc/HGF9-5XM7>].

144. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (1993); SWANSON, *supra* note 6, at 221-22; James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 761-64, 768-70 (1998) (exploring that although gametes, zygotes, and embryos may be understood as property, whether they may be bequeathed is a different issue). See generally Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 416-17, 456-59 (2000).

145. Moschella, *supra* note 8.

146. See SNEAD, *supra* note 11, at 86-87, 101; LEE & GEORGE, *supra* note 74, at 149.

147. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850, 1909 (1987).

148. *Id.* at 1925.

149. *Id.* at 1925-28.

150. *Id.* at 1926, 1933; see also Spar, *supra* note 86, at 16-17.

151. Radin, *supra* note 147, at 1927-28.

152. KASS, *supra* note 77, at 195.

Recalling that the fertility industry deals in gametes not for the sake of gametes but to the end goal of producing children, following Radin's argument, gametes then should not be alienable.<sup>153</sup> That is to say, they should not be sold or traded in the market.<sup>154</sup> The commodifying nature inherent in the transaction of gamete selling<sup>155</sup> is not proper to human beings, who should be begotten, not made or manufactured.<sup>156</sup> Children should not be treated as if they were consumer goods, even if *luxury* goods.<sup>157</sup>

There is something shocking in valuing some gametes (and their sources) more than others in how higher prices are paid to Jewish, Asian, or Indian egg donors for their eggs,<sup>158</sup> how the fertility industry prefers white sperm and egg donors,<sup>159</sup> how higher prices are paid for "Ivy eggs,"<sup>160</sup> how sperm and egg banks require a minimum SAT score or GPA for their donors,<sup>161</sup> or how higher prices are paid for the eggs of pretty,<sup>162</sup> tall,<sup>163</sup> and athletic women.<sup>164</sup> The flip side of valuing these gametes and their sources more than others is that rest are *devalued*.<sup>165</sup> The practice suggests that the fertility industry does *not* believe that all men are created equal.

Rather discomfortingly, such practice also shares the logic of eugenics in choosing certain traits over others in human breeding. This tendency toward eugenics is captured by Helen M. Alvaré in her article, with one medical personnel involved in the industry commenting that "agencies report a steady stream of would-be parents smitten by the human tendency to want to improve on nature. For recipient couples, beauty often plays as large a role as any other

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153. See also SPAR, *supra* note 6; Moschella, *supra* note 40, at 422 n.4. Thus Alana S. Newman pointedly asks, "Is gamete-selling all that different from baby-selling?" Newman, *supra* note 88.

154. See also SPAR, *supra* note 6; Moschella, *supra* note 40, at 422 n.4.

155. Alvaré, *supra* note 32, at 59; see also Dickenson, *supra* note 30, at 30; SWANSON, *supra* note 6, at 229.

156. See O'DONOVAN, *supra* note 104, at 1-2, 39-40; RAMSEY, *supra* note 101, at 137.

157. See Tollefsen, *supra* note 86.

158. Dickenson, *supra* note 30, at 37-38; Alvaré, *supra* note 32, at 13; Epstein & Whitehouse, *supra* note 8; Martineau, *supra* note 7.

159. Goodwin, *supra* note 35, at 599, 608.

160. SPAR, *supra* note 6, at 64, 81, 99; Epstein & Whitehouse, *supra* note 8; Schneider, *supra* note 26.

161. SPAR, *supra* note 6, at 46; Alvaré, *supra* note 32, at 13 n.72; Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 65 (2001); *Elitist and Racist Egg Donation Ads Have No Place in Student Newspapers*, *supra* note 22; Epstein & Whitehouse, *supra* note 8.

162. Alvaré, *supra* note 32, at 15 n.96; Karsjens, *supra* note 161, at 65; Wancata, *supra* note 31, at 200 n.4.

163. Dickenson, *supra* note 30, at 37-38; SWANSON, *supra* note 6, at 232.

164. Karsjens, *supra* note 161, at 65; *Elitist and Racist Egg Donation Ads Have No Place in Student Newspapers*, *supra* note 22.

165. Karsjens, *supra* note 161, at 64-65; see also Dickenson, *supra* note 30, at 27.

characteristics,” and a director of an egg donation program commenting that “the husband in particular, will always choose the prettiest, even if she looks nothing like his wife.”<sup>166</sup> Alvaré notes that the donor selection process has extended far beyond health considerations (for example, that the donor has good family medical history<sup>167</sup>) to other desired characteristics like thinness or academic prowess.<sup>168</sup> After all, if we are already picking and choosing the gametes, why not choose certain (better?) ones over others? Why not produce children who are more, not less, perfect?<sup>169</sup>

One might say that the eugenic nature of the donor conception is congenital.<sup>170</sup> Before the days of IVF as the vogue mode for donor conception, artificial insemination was used.<sup>171</sup> It first developed in the field of animal husbandry, the improvement of stock being a goal (farmers trying to increase the yield of their dairy cow, or using the semen of “prize stud bulls and horses”),<sup>172</sup> and the same reasoning was extended to *humans* for *human* artificial insemination.<sup>173</sup> In the words of one researcher, “[W]hat is true for animals is also true of men.”<sup>174</sup> Its “benefits” were already cited in the earliest days of artificial insemination: Dr. Robert Latou Dickinson, the 1920’s president of the American Gynecological Society, made the approving suggestion that artificial insemination had “enormous potentialities of betterment of the race,”<sup>175</sup> seemed to have

166. Alvaré, *supra* note 32, at 16; Sharon Krum, *American Beauty, Here is Lauren Bush, This Year’s Model. Americans Want Her Looks, Her Figure, Even Her Brains*, INDEP., June 17, 2001, at 1.

167. SPAR, *supra* note 6, at 46; Alvaré, *supra* note 32, at 13.

168. Alvaré, *supra* note 32, at 16, 25; *see also* SPAR, *supra* note 6, at 99-100; SWANSON, *supra* note 6, at 229-33; Epstein & Whitehouse, *supra* note 8.

169. GILBERT MEILAENDER, *BIOETHICS: A PRIMER FOR CHRISTIANS* 16 (3d. ed. 2013); SPAR, *supra* note 6, at 99-100; Alvaré, *supra* note 32, at 54; Smith, *supra* note 38; *see also* SWANSON, *supra* note 6, at 229-33; Leon Kass, *Address at the United States Holocaust Memorial Museum: A More Perfect Human: The Promise and Peril of Modern Science* (Mar. 17, 2005). The “quality control” aspect of donor and gamete selection extends also to the selection of better embryos and fetuses over others, resulting in the “termination” of some of these lives, whether still in the laboratory or already in the womb. JOHN FINNIS, *C. S. Lewis and Test-Tube Babies*, in *HUMAN RIGHTS & COMMON GOOD* 273, 278-80 (2013); Alvaré, *supra* note 32, at 25. *See generally* ROBERT P. GEORGE, *CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM* 196-97, 200-02 (2013) (explaining how each person’s life starts at conception and how human embryos are embryonic humans, exploring its ethical implications).

170. *See* SWANSON, *supra* note 6, at 201-05.

171. *Id.* at 199-218.

172. *Id.* at 212-13.

173. *Id.* at 212-14.

174. *Id.* at 213.

175. WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 66-67, 132-34 (2001); SWANSON, *supra* note 6, at 201-02; Merriley Borell, *Biologists and the Promotion of Birth Control Research, 1918–1938*, 20 *J. HIST. BIOLOGY* 51, 64-73 (1987); Robert Latou Dickenson, *Address of the President:*

avoided using the sperm of men who were “idiots, epileptic, hopelessly insane, or incurably criminal,”<sup>176</sup> and was a proponent that women who were “idiots, epileptic, hopelessly insane, or incurably criminal” be sterilized.<sup>177</sup> The realization of the embarrassing link between Nazism and eugenics in the post-World War II days cooled the overt enthusiasm for eugenics,<sup>178</sup> but eugenics quietly lives on in the practice of donor conception.<sup>179</sup> Human beings (through their gametes) are ranked and priced nowadays in donor conception according to their traits.

If artificial insemination was first started in animal husbandry with an eye toward improving stock,<sup>180</sup> the early days of *human* artificial insemination met opposition that stemmed from the ethical, social, and legal implications related to this commodifying and dehumanizing tendency of the practice.<sup>181</sup> It is unsurprising that today donor-conceived children are unsettled by the arrangement that brought them into being: a transaction, with money changing hands.<sup>182</sup> “It bothers me that money was exchanged in order to conceive me,” forty-two percent said in a study of young adults conceived from donor conception.<sup>183</sup> Eli Baden-Lasar<sup>184</sup> spoke of his project of photographing as many half siblings as he could as a balm of sorts: “The emotional labor of the project was intended to be almost reparative—a response to the transactional nature of the sperm bank and the financial exchange our parents made in order to create us.”<sup>185</sup> The *quid pro quo* of money for the making of a child is unsettling, and

*Suggestions for a Program for American Gynecology*, 45 TRANSACTIONS AM. GYNECOLOGICAL SOC’Y 1, 6, 10-11 (1920).

176. SWANSON, *supra* note 6, at 203.

177. *Id.*

178. *Id.* at 209. *See generally* Bessie Blackburn, *Cited at Nuremberg: The American Eugenics Movement, Its Influence Abroad, the Buck v. Bell Decision, and the Subsequent Bioethical Implications of the Holocaust*, 4 BOUND AWAY: LIBERTY J. HIST. 1, 1 (2021) (exploring the eugenics zeitgeist animating the time in the United States, much as it did in Nazi Germany).

179. SWANSON, *supra* note 6, at 225, 229-33; *see also* SPAR, *supra* note 6, at 101-27 (discussion of eugenics as a backdrop for the pursuit of a perfect baby).

180. SWANSON, *supra* note 6, at 212-13.

181. *See id.* at 209, 213-25; *see also* Moschella, *supra* note 8.

182. MARQUARDT ET AL., *supra* note 97, at 65; Rennie Burke et al., *How Do Individuals Who Were Conceived Through the Use of Donor Technologies Feel About the Nature of Their Conception?*, HARV. MED. SCH. CTR. BIOETHICS (Apr. 1, 2021), <https://bioethics.hms.harvard.edu/journal/donor-technology> [<https://perma.cc/6TA2-W67P>]; *see also* Newman, *supra* note 88 (“[I]t is unjust for children to have price tags.”).

183. MARQUARDT ET AL., *supra* note 97, at 7.

184. *See supra* note 1 and accompanying text.

185. Baden-Lasar, *supra* note 1; Goldman, *supra* note 86. Baden-Lasar chose to take pictures of his half siblings partly as a way to combat the commodifying nature of donor conception on children:

The camera makes images that are rich and detailed. I wanted something that was going to feel like the opposite of mass production, that would have none of the slickness that I was starting to associate with the sperm bank. It has a clean, simple, commercial

rightly so. Oliver O'Donovan says, "For whatever may be said about gametes,<sup>186</sup> children are not property to be conveyed. The notion that one might undertake to become the parent of a child in order to alienate one's parental relation to another, implicitly converts the child from a person to a commodity."<sup>187</sup>

It is not proper for gametes to be the object of the bargained-for exchange in a contract because of the intrinsic nature of what gametes are,<sup>188</sup> and because doing so is injurious to any children who are later produced. Oliver O'Donovan continues: "[W]e do not have to introduce the notion of payment to make it repugnant. The suggestion of a commercial transaction merely underlines what is already present in the deliberate purpose of incurring a parental relation in order to alienate it."<sup>189</sup> *Actually, then, because of the nature of gametes as life-producing, even if the gametes were a gift, that is, sans payment, making it an actual donation, it would still not be appropriate.*<sup>190</sup> Leon R. Kass was writing about surrogacy and prostitution here, but his remark is equally applicable to the sale of gametes in the market for children: "The buying and selling of human flesh and the dehumanized uses of the human body ought not to be encouraged" primarily because of its inherently degrading nature, and derivatively because money was involved.<sup>191</sup>

There is an impropriety of consideration or a *quid pro quo* of selling one's (or another's) life. Blackstone was writing about the wrongness of slavery in the following, but his point speaks with clarity to the consideration of money for gametes: "Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given

message about helping families and ads that present donors as superheroes, their future babies as geniuses. I wanted to produce something that would be exhaustive and overwhelming, that would complicate the industry's message—that would refute any simple narratives. Baden-Lasar, *supra* note 1.

186. See *infra* notes 228-43 and accompanying text.

187. O'DONOVAN, *supra* note 104, at 37; cf. Radin's critique of "universal commodification," wherein everything is a commodity, including children. Radin, *supra* note 147, at 1860-61. With regard to the transaction and the commissioning parents, Oliver O'Donovan asks a hard question: "[W]hat kind of identification, we must ask, might be appropriate for an act so personal? A friend may guide my hand upon the saw while I try to build a bookcase; but who may guide my hand while I embrace my wife?" O'DONOVAN, *supra* note 104, at 42. Furthermore,

If we still find ourselves thinking of the gift of sperm or ovum as the gift of self, and if we still revolt against the idea that it may be saleable? . . . Then, it seems to me, we should recognize that we are thinking in terms, which, of themselves, ought to make AID [Artificial Insemination by Donor] unthinkable. We are thinking in terms of a third personal presence in procreation, a presence which cannot be effaced.

*Id.* at 44.

188. O'DONOVAN, *supra* note 104, at 42-44; see also Dickenson, *supra* note 30, at 30.

189. O'DONOVAN, *supra* note 104, at 37.

190. We might add consent to the list: Consent does not change the inherent wrong in such alienation. See Dickenson, *supra* note 30, at 37; see *infra* notes 263, 324.

191. KASS, *supra* note 77, at 101.

for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal?"<sup>192</sup>

Blackstone is apt to be considered here because the inherent relationship of parent and child, conceived through means like donor conception or IVF, has been observed to be—as hard as this is to countenance—one of maker and a thing made; artificer and artifice; superior and inferior; master and slave, even.<sup>193</sup> It is a relationship marked by domination, with its attendant “attitude of mastery and manipulation” toward the artifice,<sup>194</sup> as opposed to one that honors the inherent equality between the two.<sup>195</sup> If human beings ought to be *begotten* and not *made*, it is the made-ness of the child that puts him at an inferior status vis-à-vis his parent, because the parent enjoys the status of having been begotten himself.<sup>196</sup> This is true, Oliver O’Donovan explains, because

Our offspring are human beings, who share with us one common human nature, one common human experience and one common human destiny . . . . But that which we make is unlike ourselves . . . . In that it has a human maker, it has come to existence as a human project, its being at the disposal of mankind. It is not fit to take its place alongside mankind in fellowship . . . . To speak of ‘begetting’ is to speak of . . . the possibility that one may form another being who will share one’s own nature, and with whom one will enjoy a fellowship based on radical equality.<sup>197</sup>

In this light, the impropriety of selling gametes that become human beings is evident. The coarsening, commodifying, and dehumanizing nature of the practice of donor conception, and the parallels between it and slavery are deeply uncomfortable and unnerving. Blackstone’s question haunts us. If the consideration in donor conception, the “*quid pro quo*” of which he spoke, is money for what becomes our children, then how could that ever be justly “equivalent,” satisfying the requirement of justice in commutative justice? How could what ought to be inalienable be properly the object of sale? In Blackstone’s forceful inquiry once more, “What equivalent can be given for life, and liberty, both of which . . . are held to be in the master’s disposal?”<sup>198</sup> Might sperm and eggs be an “immoral object” in consideration spoken of earlier?<sup>199</sup>

### C. The Health Risks of Donor Conception

Placing into focus here the physical health of the egg donor and donor-

192. 1 WILLIAM BLACKSTONE, COMMENTARIES \*412.

193. FINNIS, *supra* note 169, at 276-79, 281; O’DONOVAN, *supra* note 104, at 1-2; Tollefsen, *supra* note 86; *see also* O’DONOVAN, *supra* note 104, at 15, 42-43.

194. Tollefsen, *supra* note 86; *see* FINNIS, *supra* note 169, at 276-79; O’DONOVAN, *supra* note 104, at 1-2.

195. FINNIS, *supra* note 169, at 276-77; O’DONOVAN, *supra* note 104, at 1-2.

196. O’DONOVAN, *supra* note 104, at 1-2; *see also id.* at 15; Tollefsen, *supra* note 86.

197. O’DONOVAN, *supra* note 104, at 1-2; *see also id.* at 15.

198. BLACKSTONE, *supra* note 192, at \*412.

199. *Supra* notes 68, 70 and accompanying text.

conceived children, it is worthy of note that, first, egg donation poses health risks. The process of egg donation is not only much more involved than sperm donation,<sup>200</sup> it is also risky, with some risks under-researched and much remains unknown.<sup>201</sup> The process of eggs harvested for IVF includes *known* risks of “three stages of ovarian function suppression, ovarian hyperstimulation, and egg extraction under anesthetic,”<sup>202</sup> ovarian torsion, ovarian cysts, loss of fertility, premature menopause, kidney disease, and stroke.<sup>203</sup> Donna Dickenson says, “It is quite incredible that in an age when evidence-based medicine is the universal mantra, we know so little about the long-term risks of hyperstimulation, cancer, or infertility to healthy young women from egg provision.”<sup>204</sup> Lupron, a drug needed to stop the donor’s ovarian function, is a drug that the Food and Drug Administration has not approved.<sup>205</sup> It has been given a “Category X” rating: Should the donor become pregnant while taking Lupron, the baby in her womb would be at risk for harm.<sup>206</sup>

Aside from this, there may also be risks *unknown*: There have been *no* studies done on the long-term effects on the donor for donating eggs.<sup>207</sup> If it is disclosed to the young women who are considering selling their eggs that the process involves *no known risks* for the long term, it is easily misheard as there being *no risks* for the long term—which of course is not the same thing at all.<sup>208</sup> The Center for Bioethics and Culture Network warns that egg donation is, soberingly, “uncharted territory.”

Anecdotal accounts of egg donors who have become very sick or died following the procedure are harrowing.<sup>209</sup> Dr. Jennifer Schneider wrote on the death of her daughter Jessica, who had been a graduate student at Stanford

200. SNEAD, *supra* note 11, at 192; Epstein & Whitehouse, *supra* note 8; Martineau, *supra* note 7.

201. SPAR, *supra* note 6, at 46; 43; Jennifer Lahl, *What We Don’t Know Just Might Kill You*, PUB. DISCOURSE (Jan. 30, 2015), <https://www.thepublicdiscourse.com/2015/01/14353/> [<https://perma.cc/2LPQ-DLPB>].

202. Dickenson, *supra* note 30, at 25; Martineau, *supra* note 7.

203. Institute of Medicine and the National Research Council of the National Academies, *Assessing the Medical Risks of Human Oocyte Donation for Stem Cell Research: Workshop Report* (2007); *Three Things You Should Know About Sperm “Donation,”* *supra* note 101.

204. Dickenson, *supra* note 30, at 41; *see also* Lahl, *supra* note 203; Martineau, *supra* note 7.

205. *Three Things You Should Know About Sperm “Donation,”* *supra* note 101.

206. *Id.*

207. *Id.*

208. *Egg “Donation” and Exploitation of Women*, CTR. BIOETHICS & CULTURE NETWORK, <http://www.cbc-network.org/issues/making-life/egg-donation-and-exploitation-of-women/> [<https://perma.cc/K99Y-KD4N>] (last visited Apr. 15, 2022).

209. *See generally* Martineau, *supra* note 7; Diane Tober, *Student Debt is Driving More Americans to Donate Their Eggs—and Some Suffer Lasting Complications*, SALON (Feb. 14, 2021, 7:30 PM), <https://www.salon.com/2021/02/14/student-debt-is-driving-more-americans-to-donate-their-eggs--and-some-suffer-lasting-complications/> [<https://perma.cc/3T8Q-W8DN>].

University.<sup>210</sup> Jessica died at the age of thirty-one of colon cancer after donating her eggs three times.<sup>211</sup> There was no family history of cancer.<sup>212</sup> Maggie Eastman is another egg donor, age thirty-two years old. After going through ten rounds of egg retrievals, she was diagnosed with Stage 4 breast cancer.<sup>213</sup> She then had to undergo a hysterectomy.<sup>214</sup> Another young woman almost died after seventy of her eggs were retrieved in one cycle.<sup>215</sup>

As donor conception these days often involves IVF, health problems known to affect the children born of it are also worthy of concern. The risks for IVF babies include fetal growth restriction,<sup>216</sup> gestational diabetes,<sup>217</sup> pre-eclampsia,<sup>218</sup> low or very low birth weight,<sup>219</sup> a near fourfold increase in premature birth,<sup>220</sup> a fourfold increase in caesarean section birth,<sup>221</sup> increased NICU admission and longer hospital stay,<sup>222</sup> and a four-to-fivefold increase in stillbirth.<sup>223</sup> Additionally, children conceived through sperm donation, now adults reporting on their own health, suffer from a higher rate of type 1 diabetes, sleep apnea, acute bronchitis, thyroid disease, allergies, and other autoimmune diseases.<sup>224</sup> It is thought that the

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210. Jennifer Schneider, *Fatal Colon Cancer in a Young Egg Donor: A Physician Mother's Call for Follow-Up and Research on the Long-Term Risks of Ovarian Stimulation*, 90 FERTILITY & STERILITY e1-5 (2008).

211. *Id.* at e-1.

212. *Id.*

213. Jane Ridley, 'Being an Egg Donor Gave Me Terminal Cancer,' N.Y. POST (Dec. 3, 2015, 6:00 AM), <https://nypost.com/2015/12/03/being-an-egg-donor-gave-me-terminal-cancer/> [<https://perma.cc/TSR8-JAZE>].

214. *Id.*

215. Dickenson, *supra* note 30, at 41; Allen Jacobs et al., *Seventy Ova*, 31 HASTINGS CTR. REP. 12 (2001).

216. Esme I. Kamphuis et al., *Are We Overusing IVF?*, 348 BRIT. MED. J. 252, 253 (2014).

217. *Id.*

218. *Id.*

219. Laura A. Schieve et al., *Low and Very Low Birth Weight in Infants Conceived with Use of Assisted Reproductive Technology*, 346 NEW ENG. J. MED. 731, 734-36 (2002).

220. T.A. Merritt et al., *Impact of ART on Pregnancies in California: An Analysis of Maternity Outcomes and Insights into the Added Burden of Neonatal Intensive Care*, 34 J. PERINATOLOGY 345, 348-49 (2014); *see also* Stephanie M. Caballero, *Gestational Surrogacy in California*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 296, 302 (E. Scott Sills ed., 2016); Kamphuis et al., *supra* note 216, at 253.

221. Merritt et al., *supra* note 220, at 348-49.

222. Caballero, *supra* note 220, at 302; Merritt et al., *supra* note 220, at 348-49; Yona Nicolau et al., *Outcomes of Surrogate Pregnancies in California and Hospital Economics of Surrogate Maternity and Newborn Care*, 4 WORLD J. OBSTETRICS & GYNECOLOGY 4 (2015).

223. Merritt et al., *supra* note 220, at 348-49; *see also* Kamphuis et al., *supra* note 216, at 253.

224. Damian H. Adams et al., *Self-Reported Physical Health Status of Donor-Conceived Adults*, J. DEV. ORIGINS HEALTH & DISEASE 1-14 (2020); *Donor-Conceived Adults Have Higher Incidence of Immunology Diseases*, SCI. DAILY (Sept. 23, 2020), <https://www.sciencedaily.com/releases/2020/09/200924101846.htm> [<https://perma.cc/G23H-H3MH>].

higher rate of pre-eclampsia for pregnancies using donated gametes may be a reason for the immunological changes in the bodies of those conceived with sperm donation.<sup>225</sup>

So donor conception carries concerning risks, both known and unknown, particularly for egg donors and donor-conceived children. These risks indicate that it is worrisome enough for the women who donate their eggs, but, further, it is troubling to subject children *knowingly* to these risks through the necessary processes involved in donor conception. It is one thing for children who are conceived in a conjugal union between a man and a woman to suffer from natural illnesses, but quite another ethically to bring forth children under this cloud of known risks.<sup>226</sup> The health risks of donor conception ought not to be ignored or glossed over—and they call into question the fulfillment of that requirement in consideration, historically understood, of “safety of the body.”<sup>227</sup>

#### *D. Some Counter-Arguments Considered*

But surely it is not so bad, donor conception can't be. To begin with, it's not that *babies* are actually being bought and sold, like a scene out of some grotesque ancient foreign market. Here, the market is for nothing more than sperm and eggs. No less than the federal government condones it in the National Organ Transplant Act [NOTA]. And even if the transaction does produce babies, well, aren't children a good thing? These are some popular counter-arguments, and below is a brief consideration of each.

##### *1. For Sale: Strictly Gametes, No Children*

What to make of the transaction between the buyer and seller as for, emphatically, *gametes*, not babies? How should we consider the argument that what is being bought and sold here is not human beings, but only gametes?

It is telling that those who buy gametes are setting up a nursery after the transaction.<sup>228</sup> Buyers are patently not buying gametes merely to collect them. Debora L. Spar bluntly puts it this way: “When [buyers] buy eggs, for example, they aren't really interested in the eggs per se, but rather in the person they suspect those eggs will become.”<sup>229</sup> Thus Kara W. Swanson is admirably truthful with the choice of the following title for a chapter on the sperm market in her book: “Buying Dad from the Sperm Bank.”<sup>230</sup> If “*Dad*” is what one buys from the

225. *Donor-Conceived Adults Have Higher Incidence of Immunology Diseases*, *supra* note 224.

226. O'DONOVAN, *supra* note 104, at 83.

227. *Supra* notes 69, 71 and accompanying text.

228. Newman, *supra* note 88. Thus Alana S. Newman asks, “Do vials of sperm require crib mobiles and changing tables? No, babies do.” *Id.*

229. SPAR, *supra* note 6, at xvi.

230. SWANSON, *supra* note 6, at 198-237. *Cf.* Debora L. Spar's “Daddy arrived via FedEx” for how the sperm came to the buyer. SPAR, *supra* note 6, at 38.

sperm bank, *a baby* is what one buys with a sperm (or egg).

Sometimes the mask slips on the other side too.<sup>231</sup> Dr. Bryce Cleary, whose sperm donation earlier in life has resulted in, so far, nineteen children,<sup>232</sup> said that the children may have been an abstraction to him once.<sup>233</sup> But no longer: “Now they were real people, people whose hands he had shaken, young men and women with their own children and families, lives he could see on Facebook.”<sup>234</sup> Conflicted about his moral and ethical responsibilities toward these children, he said to himself, “Hey, wait. These are human beings running around with your genes.”<sup>235</sup> Indeed.

One egg donor said that she would check once a month or so to find out whether her eggs have (been fertilized and) produced children.<sup>236</sup> She had also stipulated that the buyers of her eggs be in a financially stable situation.<sup>237</sup> Another revealed why she cared about the state of the buyers’ finances: “I would like for my genetic children to have at least the standard of living that I had growing up, and hopefully better.”<sup>238</sup> But why check to see whether there is any news, if all one is selling is eggs *qua* eggs, not eggs for their procreative potential? Why care about the buyers’ financial state, so long as they pay for the eggs, one and done? Alas, the egg donor who spoke of envisioning an acceptable standard of living *for her “genetic children”* spoke the hard truth. No one buys eggs and sperm just to have eggs and sperm: It is *the making of children* that is the aim of this buying and selling of eggs and sperm.

Melissa Moschella considers the gamete donation *qua* gamete, contrasted to a gamete that is later united with another gamete to form a child:

The act of donation itself, therefore, cannot be done out of love for the child. Nor, by the same token, is the act of donation *in itself* a harm to the child. However, it is wrong (incompatible with a will toward integral human well-being) because it involves acting in a way that will foreseeably lead to the acquisition of a weighty, personal obligation, *with the intention of not fulfilling that obligation should it arise*.<sup>239</sup>

Put another way,

Gamete donors, by acting in a way that will foreseeably lead to their becoming a biological parent precisely on condition that they will not be called upon to raise the resulting children, thus act wrongly by failing to show adequate respect for the well-being of their future children. Their

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231. *Supra* note 101.

232. *See* Swenson, *supra* note 95; *supra* notes 127-35 and accompanying text.

233. Swenson, *supra* note 95.

234. *Id.*

235. *Id.*

236. Epstein & Whitehouse, *supra* note 8.

237. *Id.*

238. *Id.*

239. Moschella, *supra* note 74, at 13-14 (emphasis added); *see also* Moschella, *supra* note 8.

wrong consists in a conditional willingness (it is conditional because there is no certainty that a child will actually come into existence with the help of their donation) to harm their future children by depriving them of important benefits: the benefits of being loved and raised *by* their biological parents.<sup>240</sup>

There is an argument to be made that culpability would not extend to those gametes that don't become children, but for those that do, let it be made clear that culpability is owed to none other than *children* who ended up being conceived out of the sold gametes.<sup>241</sup> The gametes that become babies grow up to be children, then adults, like everyone else.<sup>242</sup> They are owed what is rightfully theirs by virtue of their humanity and inherent worth. That includes being known, raised, and loved by their genetic parents. If their parents' action creates a situation wherein the children are *intentionally* cut off from these things, as is the case with donor conception,<sup>243</sup> such action ought not to be done.

## 2. *NOTA Says It's Okay: Let Us Buy and Sell Away*

NOTA prohibits the sale of human organs, although donation is encouraged.<sup>244</sup> The Senate Report that accompanied the Act revealed the rationale for the legislation: that "human body parts should not be viewed as commodities."<sup>245</sup> By contrast, body parts such as hair, blood, breastmilk, and

240. Moschella, *supra* note 74, at 15; Wagner, *supra* note 85, at 146; *see also* Alvaré, *supra* note 32, at 11, 15, 25 (disclaimer of parental rights as a standard part of the agreement signed by sperm and egg donors); Moschella, *supra* note 40, at 424, 437-39; Wagner, *supra* note 85, at 92. Thus donor conception is to be distinguished from cases in which genetic parents, by reason of, for example, genuine incompetence, decides to give up the child for adoption. Moschella, *supra* note 40, at 436. Key to this distinction is that the decision to give up the child due to genuine incompetence is made *after* the child comes into existence, *not before*, as in the case of donor conception. *Id.* Incidentally, this argument shines light on the error of the argument that it is proper for embryos to lack full recognition of legal personhood compared to those more developed gestationally, whether inside or outside the womb; and as a corollary, that the propriety of the alienability of gametes (as the materials used to the end of producing children) and embryos would not be in question. *See, e.g.*, ROBERTSON, *supra* note 86, at 103-04; *see also* Bailey, *supra* note 144, at 764-66 (1998). Because human embryos are embryonic humans, GEORGE, *supra* note 169, at 196-97, 200-02, these embryos will grow up to be children with needs, longings, and questions. The rights of the children produced in this way cry out. If the buying and selling children is wrong, so is the buying and selling of the gametes, whose sale is for the *very purpose of producing* such children.

241. *See* Moschella, *supra* note 74, at 13-14, 15.

242. MARQUARDT ET AL., *supra* note 97, at 80.

243. *See* Moschella, *supra* note 8.

244. National Organ Transplant Act, 42 U.S.C. § 274(e); KASS, *supra* note 77, at 178; SNEAD, *supra* note 11, at 47; *see* Reddix-Small, *supra* note 7, at 646 (2008).

245. S. REP. NO. 98-382, at 17 (1984). But *see* KASS, *supra* note 77, at 177-98, for an

gametes are not covered in the text of NOTA and are sold in the market.<sup>246</sup> Thus it is commonly understood that NOTA allows for the sale of gametes, with the rationale that they are replenishable, as in the case of sperm, blood, hair, and breastmilk; or plentiful, as in the case of ova.<sup>247</sup>

But in fact, organs and body parts, unlike gametes, “do not convey [a person’s] genetic individuality”<sup>248</sup> and do not have the potential of producing other human beings, with inherent rights owed to them.<sup>249</sup> If sale of organs is

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exploration of whether organ donation is appropriate, apart from its legality.

246. Kristy Williams, *The Hidden Economy of HSC Transplantation Is Inconsistent with Prohibiting the Compensation of HSC Donors*, 16 MINN. J. L. SCI. & TECH. 215, 240 (2015); see SWANSON, *supra* note 6, at 11, 15-24, 30-38; Rao, *supra* note 144, at 375-77; Reddix-Small, *supra* note 244 at 646, 664. *But see* SWANSON, *supra* note 6, at 167 (explaining how breastmilk is perceived and treated differently in the market due to the absence of market rhetoric for it). The law with regard to other body parts are a bit all over the map. For example, it has been found that there is no cause of action in conversion for a person’s spleen that has been used without his consent for research, generating lucrative economic results, *Moore v. Regents of University of California*, 793 P.2d 479 (Cal. 1990); that there is no ownership interest retained by donors in donated biological materials, *Wash. Univ. v. Catalona*, 490 F.3d 667, 673 (8th Cir. 2007); more recently after the passage of NOTA, that bone marrow is excluded from the prohibition of human organ sale in NOTA, *Flynn v. Holder*, 684 F.3d 852, 865 (9th Cir. 2012). *See generally* Rao, *supra* note 144, at 437-38 (considering the holdings of both *Moore* and *Hecht* through the lens of privacy law). There was also a ruling that a decedent’s sperm “sufficiently constituted property” as understood under the California Probate Code. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (1993). But even if sperm or eggs could be viewed as property, *see, e.g.*, Bailey, *supra* note 144, at 759, 773-75; Rao, *supra* note 144, at 365-87, whether they should be alienable is a different question. This is the line of thought in the argument that although a woman’s body is her own, prostitution and surrogacy commodify her body such that her very *person* is commodified, and because of that, prostitution and surrogacy should not be alienable. *See Radin, supra* note 147, at 1921-36; *see also* Bailey, *supra* note 144, at 761-64, 768-70 (exploring that although gametes, zygotes, and embryos may be understood as property, whether they may be bequeathed is a different issue). *See generally* SWANSON, *supra* note 6, at 221-22; Rao, *supra* note 144, at 416-17, 456-59.

247. Williams, *supra* note 246, at 240; Kristy Lynn Williams et al., *Just Say No to NOTA: Why the Prohibition of Compensation for Human Transplant Organs in NOTA Should Be Repealed and a Regulated Market for Cadaver Organs Instituted*, 40 AM. J. L. & MED. 275, 293 (2014); *see also* Dickenson, *supra* note 30, at 25, 42-43; SWANSON, *supra* note 6, at 15-24, 30-38; Robert P. S. Jansen, *Sperm and Ova as Property*, 11 J. MED. ETHICS 123, 123 (1985). This rationale is reflected in multiple reports of congressional intent, including in the 1984 bill sent to President Ronald Reagan for his signature: that the “term ‘human organ’ is not intended to include replenishable tissues such as blood or sperm,” Complaint at 34-35, *Flynn v. Holder*, No. 2:09-cv-07772 (C.D. Cal. Oct. 26, 2009); John A. Robertson, *Paid Organ Donations and the Constitutionality of the National Organ Transplant Act*, 40 HASTINGS CONST. L. Q. 221, 229 (2013); Williams, *supra* note 246, at 240.

248. O’DONOVAN, *supra* note 104, at 43; *see also* SPAR, *supra* note 6, at 17 (noting that gamete-selling exploits donors); SWANSON, *supra* note 6, at 11; Jansen, *supra* note 247, at 124-25.

249. *See* Bailey, *supra* note 144, at 774-75, 813-14; Moschella, *supra* note 74, at 13-15;

prohibited, certainly gametes should be also.<sup>250</sup> By allowing for the sale of gametes, NOTA here is consistent with the impoverished understanding of the human person that animates our nation's bioethics laws (when there *are* laws to regulate these matters at all): the assumption that people are atomized, independent, autonomous, self-determining individuals, forgetting our embodiment as the very fabric of our nature, as our lives as actually lived in reality.<sup>251</sup>

Others argue for the opposite position: If gametes are allowed to be sold, so should organs be—arguing that commodification of the human body is here to stay<sup>252</sup>—and the way forward is merely to regulate such commodification, not eradicate it.<sup>253</sup> But commodifying gametes and children (and commodifying human flesh generally, as in the sale of organs) is not proper to the nature of human beings: It leads to dehumanization and is injurious to our well-being. Thus it should *not* be done, as opposed to merely tolerated and regulated. Donna Dickenson makes an arresting comparison to murder laws: We certainly don't stop criminalizing murder although people still commit murder against each other.<sup>254</sup> So she argues that proponents of regulation are really standing for a position of “won't regulate” as opposed to “can't regulate.”<sup>255</sup> France, for example, opted to make the sale of ova unlawful.<sup>256</sup> But perhaps the “idols of the marketplace” explains much of the laxity of donor conception and the fertility industry.<sup>257</sup> “Big Fertility,”<sup>258</sup> might this idol be called?

Some argue that just as organ donors are reimbursed for the costs associated with the process of donating the organ—while *not* allowing for payment for the organ itself<sup>259</sup>—so are gamete donors reimbursed for their time and trouble,<sup>260</sup> particularly for egg donors, who have to go through an arduous procedure for the egg extraction.<sup>261</sup> But if this were true, surely the different price points paid for

Wagner, *supra* note 85, at 146; *see also* Moschella, *supra* note 40, at 424, 437-39.

250. Dickenson, *supra* note 30, at 42-43; Karsjens, *supra* note 161, at 73-75.

251. *See* SNEAD, *supra* note 11, at 3, 7, 8, 12, 40-41, 64, 70, 78-79, 89-90, 96-96, 104-05, 191, 202, 206-07, 218, 221; *see also* ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 13 (1999).

252. SPAR, *supra* note 6, at xv, 196.

253. *See, e.g.*, Epstein, *supra* note 16, at 50, 60, 64; SPAR, *supra* note 6, at xvii-xix, 196, 203-04, 217-24; Spar, *supra* note 86, at 19-20; SWANSON, *supra* note 6, at 8, 243-52; Goodwin, *supra* note 35, at 632, 634.

254. Dickenson, *supra* note 30, at 22.

255. *Id.*

256. *Id.* at 23.

257. *Id.* at 34.

258. As aptly coined by The Center for Bioethics and Culture. Center for Bioethics and Culture, #BigFertility: *It's All About the Money*, VIMEO (Sept. 17, 2018), <https://vimeo.com/ondemand/bigfertility> [<https://perma.cc/P3GF-WU5S>] (the documentary focuses on surrogacy, an issue within the fertility industry related to donor conception).

259. S. REP. NO. 98-382, at 16.

260. Wancata, *supra* note 31, at 222-23; Martineau, *supra* note 7.

261. Dickenson, *supra* note 30, at 25, 43; *see* SNEAD, *supra* note 11, at 192; Epstein &

certain eggs over others<sup>262</sup> betray the narrative. There would be no reason to pay the pretty, tall, Ivy League Jewish, Asian, or Indian woman *more* than other women for the exact *same* procedure, time, and trouble undergone by *all* of them. The different price points testify to the reality of the world of egg-selling.<sup>263</sup>

### 3. *Children, A Very Good Thing*

Lastly, potential sperm and egg donors are frequently courted with the noble call to help in this “market where sellers often cloak their wares in the language of charity”<sup>264</sup>: “[G]ive the gift of life and love,”<sup>265</sup> or “Give the gift of family.”<sup>266</sup> And of course, for the parent(s) seeking to buy gametes to have children, what they seek is a good and worthy end. Children are a good thing, and indeed, a very good thing.

But means matter as ends do—good ends don’t justify the means.<sup>267</sup> We ought not to use children as means because people should never be made into mere tools: Doing so is unworthy of and dishonoring to man’s inherent rational nature.<sup>268</sup> “Man contradicts his rational being by treating his body as a mere instrument,” Leon R. Kass says, precisely because of our body-soul unity.<sup>269</sup> Despite the very best of intentions from the buyers and sellers of the gametes,

Whitehouse, *supra* note 8; Martineau, *supra* note 7.

262. See *supra* note 26 and accompanying text.

263. My position is that the nature of a gamete as life-, thus child-producing, upon unity with another gamete makes its transfer inappropriate, even if no payment is involved. See *supra* note 190, *infra* note 324 and accompanying text.

264. SPAR, *supra* note 6, at 196. But see SWANSON, *supra* note 6, at 233-35, for the gendered differences in the market practice for sperm and eggs, with the emphasis on helping others for egg donors. See also SPAR, *supra* note 6, at 42-44, for the altruistic history and subsequent coloring of the practice, or at least the marketing, of egg donation.

265. SPAR, *supra* note 6, at 46; James Herbert, *Donation Dilemmas: Selling of Eggs Gives Birth to Controversy*, SAN DIEGO UNION-TRIB., Sept. 3, 2000, at E1.

266. *Top Reasons to Donate Sperm*, CAL. CRYOBANK, <https://www.spermbank.com/why-donate/top-reasons-to-donate-sperm> [<https://perma.cc/F86Z-BVQC>] (last visited Apr. 15, 2022). See, for e.g., *Become an Egg Donor*, ELITE FERTILITY SOLS., <https://www.elitefertility.com/become-an-egg-donor/> [<https://perma.cc/RJP5-ZRWR>] (last visited Apr. 15, 2022) (“You can help couples build a family.”); *Why Donate Sperm*, FAIRFAX CRYOBANK SPERM DONOR PROGRAM, <https://www.beaspermdonor.com/why-donate/> [<https://perma.cc/379E-BSR9>] (last visited Apr. 15, 2022) (“You can directly help someone realize their [sic] dream of having a healthy, happy baby!”); *Why Donate?*, SPERM BANK CAL., <http://donors.thespermbankofca.org/> [<https://perma.cc/ZZ9Y-5QYG>] (“Help someone have the family they [sic] always wanted.”).

267. Finnis, *supra* note 50, at 43-44.

268. See JOHN FINNIS, *On Producing Human Embryos*, in INTENTION & IDENTITY 293, 299 (2013) (specifically with regard to child-producing using IVF); George, *supra* note 51, at 57, 60; Moschella, *supra* note 40, at 437; see also KASS, *supra* note 77, at 185; Newman, *supra* note 88.

269. KASS, *supra* note 77, at 185; see also Dickenson, *supra* note 30, at 31, 37; *supra* notes 72-76 and accompanying text.

there is an objective loss for the children. From the perspective of donor-conceived children, even when they are thankful and happy for their existence, which in their particular case would not have happened without donor conception, they may well still feel wronged by it, and grieve the loss of all that donor conception has wrought.<sup>270</sup>

The pain of those who seek to have children but cannot is nothing short of grievous, heart wrenching.<sup>271</sup> The desire to have children is surely deep and innate, written into our being.<sup>272</sup> So it is hard to hear this conclusion: that it may be that the technology of donor conception exists for making children, *but it would be wise for us to refrain from using it*. And yet an examination of what is required of our nature and the evidence of what donor conception has done to children and egg donors, in particular, leads us to that conclusion. Gilbert C. Meilaender says of the thinking that we must explore what is available to us “the tyranny of the possible.”<sup>273</sup> Similarly, Paul Ramsey observes that “man the self-creator seems also the slave of the actions that biology now makes possible.”<sup>274</sup> Just because we *can* do it, does not necessarily mean that we *should*.

#### V. SELLING A POUND OF FLESH (AND BLOOD)

Perhaps a turn to considering the matter through the lens of Shakespeare’s *The Merchant of Venice* might lend us a fresh perspective.<sup>275</sup> The play, I think, speaks to the issue of donor conception in compelling and poignant ways: It is a vivid tale that forces us to reckon with the wrongness, the grotesque ugliness of the buying and selling of the flesh. Two aspects will be considered here: first, the role of usury and its relationship to commutative justice, and second, the commodification of the body (and the person).

##### A. Usury and Commutative Justice

In the play, Bassanio borrows three thousand ducats from Shylock because he needs money to court the beautiful and wealthy heiress Portia<sup>276</sup>—with a

270. See Moschella, *supra* note 40, at 436 n.33; Francisco, *supra* note 96; Newman, *supra* note 88.

271. See SPAR, *supra* note 6, at 4-6. While the focus in this Article is on the children and donors, the would-be parents’ pain, vulnerability, and desperation seem to make exploitation by the fertility industry only easier, which is to say, worse. See SNEAD, *supra* note 11, at 221.

272. See SPAR, *supra* note 6, at 4-6.

273. MEILAENDER, *supra* note 169, at 96.

274. RAMSEY, *supra* note 101, at 108.

275. If this turn to the Bard is a bit too surprising, permit me to cite thus, “For, as the poet well knows, as does also the seer and prophet, it is only by means of these hidden analogies that the greatest truths, otherwise inexpressible, can be given a form or shape capable of being grasped by the human mind.” CAROLINE F. E. SPURGEON, SHAKESPEARE’S IMAGERY AND WHAT IT TELLS US 7 (2014).

276. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 1, ll. 160-85; *id.* act 1, sc. 3, ll. 1-12; MARJORIE GARBER, SHAKESPEARE AFTER ALL 284, 297 (2004).

pound of flesh of his best friend Antonio's body as the bond.<sup>277</sup> Antonio and Bassanio are young men in the story.<sup>278</sup> There is an interesting similarity here with how donors in donor conception tend to be young people, college students or professionals, many of whom needing money for their student loan debt.<sup>279</sup> They look to get paid with money in exchange for (a type of) their flesh: their gametes—but then again, a type of flesh that may well become their own flesh *and blood*.

The charging of interest—or to be more precise, the charging of *excess* interest—was understood as usury.<sup>280</sup> Usury was frowned upon in the medieval age.<sup>281</sup> Canon lawyers understood usury as a violation of commutative justice.<sup>282</sup> Because the interest charged in usury *exceeds* that of the normal rate of lending,<sup>283</sup> the requirement of exchange of equal values in commutative justice is violated.<sup>284</sup> Chief of the concerns about usury was whether money should be allowed to “breed.”<sup>285</sup> For canon lawyers, it was not profit-making per se that was the issue as much as it was “shameful profit” (*turpe lucrum*, “filthy lucre”), which was associated with greediness in business.<sup>286</sup> (This view seemed to hold centuries later, as reflected in Blackstone's writing on usury.<sup>287</sup>)

It is no surprise that usury by the time of Shakespeare was viewed as a contract in which people would bind themselves “into debts that would kill them”

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277. SHAKESPEARE, *supra* note 276, act 1, sc. 3, ll. 142-50; see KENJI YOSHINO, A THOUSAND TIMES MORE FAIR: WHAT SHAKESPEARE'S PLAYS TEACH US ABOUT JUSTICE 40 (2012).

278. See GARBER, *supra* note 276, at 284.

279. Epstein & Whitehouse, *supra* note 8; Moschella, *supra* note 8; Tober, *supra* note 209.

280. See Berman, *supra* note 56, at 132; GARBER, *supra* note 276, at 305.

281. See Berman, *supra* note 56, at 132.

282. See GORDLEY, ORIGINS, *supra* note 45, at 14.

283. See BLACKSTONE, *supra* note 67, at \*462-63 for a list of acceptable interest rates from sundry eras, from the time of the Romans (twelve percent) to Elizabethan England (eight to ten percent; reduced to five percent thereafter).

284. See Berman, *supra* note 56, at 132.

285. GARBER, *supra* note 276, at 305. Aristotle was against it, as were, for example, Dante's Virgil in *Inferno*, canon lawyers, and Francis Bacon. DANTE ALIGHIERI, *INFERNO* 115, 436 (Anthony Esolen trans., 2003); W. H. AUDEN, LECTURES ON SHAKESPEARE 79 (Arthur C. Kirsch ed., 2019); Berman, *supra* note 56, at 132; BLACKSTONE, *supra* note 67, at \*455; GARBER, *supra* note 276, at 305.

286. Berman, *supra* note 56, at 132; cf. HIRSCHFELD, *supra* note 47, at 136 (the Thomistic framework for the charging of interest can take into account loan-servicing, risks, or expected inflation); JOHN KERRIGAN, SHAKESPEARE'S BINDING LANGUAGE 189 (2018) (in the Elizabethan era, usurers were commonly viewed as “cheating and mendacious”); BRIAN M. MCCALL, TO BUILD THE CITY OF GOD: LIVING AS CATHOLICS IN A SECULAR AGE 175-83 (2014) (explaining and exploring the historic Catholic understanding of the difference between legitimate investment of money as a type of productive property that can be used without being consumed completely, akin to planting a potato seed to grow potatoes; and usury, which inwardly would involve a desire to do harm to the debtor, and outwardly as evinced in the lending of money with a high interest).

287. BLACKSTONE, *supra* note 67, at \*455-58.

due to such a high cost:<sup>288</sup> “a slow death,” or even “manslaughter.”<sup>289</sup> This understanding of usury was reflected in the 1571 Acte Against Usurie in England at the time of Shakespeare: It softened the former prohibition against usury to prohibiting only contracts that charged an *excessive* amount of interest, defined to be in excess of ten percent per year.<sup>290</sup>

While the Christian teaching governing usury applied to all transactions of which Christians took part,<sup>291</sup> Jews were allowed to engage in usury with non-Jews, although they were prohibited to do so with fellow Jews.<sup>292</sup> Technically, it is the bond of the pound of flesh that Shylock (cast as Jewish by Shakespeare) considers to be his consideration for the loan<sup>293</sup>—except he wants it in the form of a pound of Antonio’s flesh as specific performance, not mere money as damages.<sup>294</sup> But its connection to usury is of particular interest.<sup>295</sup>

The poet W. H. Auden comments that one reason for our alienation of sympathy to Shylock is because “his revenge is in excess of the injury,”<sup>296</sup> with its connection to the prohibition against usury as understood as the charging of excess interest readily seen. We understand that Shylock is justly owed his money back, and we can understand that he demand a bond for it—but the bond of a pound of flesh is just *too much* for what is owed, and actually *not at all appropriate*: grotesque, shocking, injurious to the point of death, even malicious. It would be a clear violation of commutative justice because of the inherent unequal exchange of the transaction: money for human flesh, even possibly human life. The human body and the human person ought not to be up for sale.

This is a high view of the human body and person that is not subscribed to universally in our late-modern age, but it is one that Shakespeare successfully

288. See KERRIGAN, *supra* note 286, at 189.

289. See *id.*

290. YOSHINO, *supra* note 277, at 38.

291. It is interesting to note that Dante placed those who committed usury rather low in the circles of hell, in canto seventeen of *Inferno*. DANTE, *supra* note 285, at 171-75. Anthony Esolen notes in his commentary on Dante that he “seems to condemn all brokerage, whereas his master Aquinas admitted that, as all goods command a just price, so could the use of money.” *Id.* at 436; see also *id.* at 450.

292. *Deuteronomy* 23:19-20; YOSHINO, *supra* note 277, at 38; see also KERRIGAN, *supra* note 286, at 189.

293. See YOSHINO, *supra* note 277, at 40-41; see also BLACKSTONE, *supra* note 67, at \*444 (explaining that “loans of money upon bond” provide consideration for a contract). Or it may be viewed as “a free loan with forfeiture” of Antonio’s flesh. See KERRIGAN, *supra* note 286, at 155, 161. But see CHRISTINA G. WALDMAN, FRANCIS BACON’S HIDDEN HAND IN SHAKESPEARE’S *THE MERCHANT OF VENICE*: A STUDY OF LAW, RHETORIC, AND AUTHORSHIP 127 (2018) (regarding the seal for the bond as what furnished the consideration, although also noting that Antonio *the person* becomes the *quid pro quo* for the transaction).

294. See SHAKESPEARE, *supra* note 276, act 1, sc. 3, ll. 142-50; GARBER, *supra* note 276, at 305; YOSHINO, *supra* note 277, at 40, 42-43.

295. See GARBER, *supra* note 276, at 305.

296. AUDEN, *supra* note 285, at 81.

harnesses and points to in the play to audience after audience, enduring as the play is from the Elizabethan age to ours.<sup>297</sup> This high view is precisely what makes the play coherent—without such a view, the play simply would not make sense. And yet it *does* make sense to us because the shocking shocks, the pathos resonates, and the wrong infuriates. If our reigning late-modern thought is one that denies this high view of the body and the person, our inner recognition that the bargained-for exchange of money for the pound of flesh in *The Merchant of Venice* is simply wrong betrays ourselves. When, in the courtroom scene, Antonio is ordered to “lay bare your bosom” for the carving out of the pound of flesh<sup>298</sup> and we hear Shylock’s ready response, “Ay, his breast. So says the bond, doth it not, noble judge? ‘Nearest his heart’—those are the very words,”<sup>299</sup> we can’t help but see that Shylock’s stubborn demand is wrong. We can’t help but blanch at it. We can’t help but recoil.

Further, usury and breeding as a leitmotif is captured in Shylock’s musing out loud of (and in the process comparing usury with) the ancient Genesis story of Jacob’s clever breeding techniques to amass his own wealth while working under Laban.<sup>300</sup> It is also captured in Shylock’s lively line when he receives the news that his daughter Jessica has eloped with Lorenzo, taking her father’s money with her, “My daughter! O, my ducats! O, my daughter!”<sup>301</sup> since one might say that both his daughter and his ducats are a result of breeding.<sup>302</sup> Breeding as a picture of Shylock’s bond of the pound of flesh, but also as his flesh and blood in his offspring,<sup>303</sup> has a discomfiting parallel to our *own* issue of breeding children<sup>304</sup> with the less-than-kosher means of the *gamete* as the pound of flesh.

### B. *The Body, Thus the Person, as a (Luxury) Good*

In the exchange with Bassanio about the loan, Shylock says, “Antonio is a good man.”<sup>305</sup> Here, there is a play on the word “good” in that it is the moral sense of the word that Bassanio has in his mind, but the financial sense of the

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297. Will Dahlgreen, *Shakespeare 400 Years On: Every Play Ranked by Popularity*, YOUgov (Apr. 22, 2016, 3:21 AM), <https://yougov.co.uk/topics/lifestyle/articles-reports/2016/04/22/shakespeare-400> (finding that among the British polled for the question of which of Shakespeare’s plays they had read or seen, *The Merchant of Venice* was ranked fifth); David Rooney, *William Shakespeare’s The Merchant of Venice*, VARIETY (Sept. 6, 2004, 4:10 PM), <https://variety.com/2004/film/awards/william-shakespeare-s-the-merchant-of-venice-1200531265/> [<https://perma.cc/4H4C-JNLV>] (“‘The Merchant of Venice’ is considered among Shakespeare’s greatest plays . . .” in an article discussing a 2004 film adaptation of the play).

298. SHAKESPEARE, *supra* note 276, act 4, sc. 1, l. 249.

299. *Id.* act 4, sc. 1, ll. 249-51.

300. *Id.* act 1, sc. 3, ll. 90-92; *Genesis* 30:25-43; GARBER, *supra* note 276, at 305.

301. SHAKESPEARE, *supra* note 276, act 2, sc. 8, l. 15.

302. GARBER, *supra* note 276, at 306; *see also* KERRIGAN, *supra* note 286, at 158-60.

303. KERRIGAN, *supra* note 286, at 204-05.

304. *See supra* notes 170-98 and accompanying text.

305. SHAKESPEARE, *supra* note 276, act 1, sc. 3, l. 11.

word that Shylock has in his.<sup>306</sup> Thus, how Antonio will be “good for the loan” can be understood as “good” or trustworthy security for Bassanio,<sup>307</sup> but also, grotesquely, as delivering the flesh as the “good” under the terms of the loan, expensive—a luxury, as it were—as it may be.<sup>308</sup> The word play continues with the loan that Shylock offers in “kind” and in “kindness”<sup>309</sup> with the word also having a double meaning, that is, as the goodness of the creditor’s heart, and as the form of payment of Antonio’s flesh, which would be “in kind” as opposed to money.<sup>310</sup>

The play brings out with clarity the grotesque reality of commodification of the body in a way that may jar us, in contrast to the more opaque, but I submit no less grotesque, reality of commodification in donor conception. Shylock and Antonio, like the seller and buyer of the gametes, are bound in what John Kerrigan calls “the carnality of their legal bond,” because “their carnal bonds meshed with financial contracts.”<sup>311</sup> In both cases, the reigning thought is that the body can be parceled out for payment.<sup>312</sup>

An astonishing line uttered by Portia upon sweeping into the courtroom, disguised as the young doctor of law Balthasar,<sup>313</sup> is, “Which is the merchant here, and which the Jew?”<sup>314</sup> It would be unthinkable that Antonio and Shylock would be hard to tell apart, since Jews in that day were consigned to wearing the “Jewish gaberdine,”<sup>315</sup> a type of garment that is long and coarse,<sup>316</sup> and because actors playing Jews on the Elizabethan stage customarily put on large noses and red wigs.<sup>317</sup> (It is interesting to note that the English at the time would actually not have been familiar with the Jews since Jews were driven out of England in 1290 and were not allowed in the land again until Cromwell was in power,<sup>318</sup> so the representation of Jews on stage would have been a powerful shaping force of the

306. See GARBER, *supra* note 276, at 297.

307. See *id.*

308. See *id.*

309. SHAKESPEARE, *supra* note 276, act 1, sc. 3, ll. 140, 176.

310. See GARBER, *supra* note 276, at 297.

311. KERRIGAN, *supra* note 286, at 175.

312. W. H. Auden compares the different attitudes toward money in *The Merchant of Venice* and *Twelfth Night*. Whereas people are careless and even carefree with money in *The Merchant of Venice*, they are world-weary and cynical about it in *Twelfth Night*, with “an awareness that services must be paid for, that people can be bought, and that money can get you what you want.” AUDEN, *supra* note 285, at 154. One wonders whether an imprudent use of money in one may not lead to another, whether there may not be a discernable line from *The Merchant of Venice* to *Twelfth Night* in following the money, or more precisely, in following money’s dark purchase powers.

313. SHAKESPEARE, *supra* note 276, act 4, sc. 1, ll. 149-66.

314. *Id.* act 4, sc. 1, l. 171; GARBER, *supra* note 276, at 308.

315. SHAKESPEARE, *supra* note 276, act 1, sc. 3, l. 111.

316. GARBER, *supra* note 276, at 308.

317. *Id.*

318. AUDEN, *supra* note 285, at 75.

imagination.) Marjorie Garber astutely observes that Portia is making a point here that the loan of three thousand ducats for a pound of flesh has made something similar out of the hitherto-different characters of Shylock and Antonio.<sup>319</sup> Likewise, in donor conception, might the privity of contract that binds both buyer and seller of gametes situate them similarly as ones who *both* treat the flesh and the person as commodities, and who *both* treat their own resulting children as commodities?

One reading of *The Merchant of Venice* yields a view that Antonio may not have taken seriously Shylock's bond of his pound of flesh, and so he does not go into the contract with eyes wide open of the possibility of being grievously injured or dead.<sup>320</sup> On the one hand, unlike Antonio, modern-day sperm and egg donors know that they are selling their flesh for some money. On the other hand, like Antonio, they may not realize the full-blown implications of it—and the arguments in these pages are certainly made without supposing that those who donate their gametes do so with the calculated intent to injure their resulting children, or themselves.

But as Kenji Yoshino points out, much as Portia's argument of "the blood spilled in acquiring the flesh" is *implied* in the enforcement of a bond of a pound of flesh for money,<sup>321</sup> so it is implied in selling one's gamete that the very *purpose* of the purchase by the buyer is to make children—of the seller's own flesh *and* blood—out of the gamete. This flesh, unlike the flesh in *The Merchant of Venice*, meets with the other gamete and becomes a human being of his own, with questions, longing, and the desire to know and to be known. Selling one's flesh inescapably makes for a wound. It kills, even—"the murderous pound of flesh," John Kerrigan calls it.<sup>322</sup> As G. K. Chesterton writes of *The Merchant of Venice*, "the pound was a part of an organic life, and that in taking that [Shylock] was in fact taking more."<sup>323</sup> But we have seen how the selling of flesh (one's gametes) injures the resulting children most obviously. It might even kill in that it creates a kind of death: a void, a real loss in the children's lives.<sup>324</sup> Portia is right after all. We can't sell our pound of flesh—and blood, in that famous twist of the story. Not without resulting in a death.

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319. GARBER, *supra* note 276, at 308-09.

320. Antonio assures Bassanio about Shylock, "The Hebrew will turn Christian; he grows kind." SHAKESPEARE, *supra* note 276, act 1, sc. 3, l. 176; *see* GARBER, *supra* note 276, at 297.

321. *See* SHAKESPEARE, *supra* note 276, act 4, sc. 1, ll. 321-29; YOSHINO, *supra* note 277, at 44; *see also* KERRIGAN, *supra* note 286, at 204-05.

322. KERRIGAN, *supra* note 286, at 168. What is more, he says, "a forfeit can deny you life by taking that by which you live." *Id.* at 171.

323. G. K. CHESTERTON, *The Pound of Flesh*, in *THE SOUL OF WIT: G. K. CHESTERTON ON WILLIAM SHAKESPEARE* 117, 119 (Dale Ahlquist ed., 2012).

324. Just as it does not require payment of money for the taking of a pound of flesh to be injurious, so it does not require payment for a gamete for it to be injurious to the resulting child (or the donor). So it holds that even if the gamete is *gifted* to the recipient, with absolutely no money changing hands, it would still be harmful and thus inappropriate. *See supra* notes 190, 263 and accompanying text.

To be sure, the analogy between *The Merchant of Venice* and donor conception breaks down at some point. Of course the flesh in *The Merchant of Venice* is not something that needs something else to be yet something of an entirely different kind, as is true of a gamete that needs a gamete mate to become an embryo. The pound of flesh is, furthermore, useless to Shylock,<sup>325</sup> except in the sense that the taking of it would injure or kill Antonio. Yet the gamete is useful to the buyer, and any injury to donor and child is emphatically *not* intended. Far from harboring malice, the actors in donor conception are most well-intentioned in their chosen course of action: The buyers want to have a baby, and the sellers want to help make that baby, even if money is involved.

Moreover, the poet W. H. Auden observes that the different treatments of who was and was not allowed to transact with usury betray the ambivalence of a society that frowned on usury but whose members still needed to borrow money from creditors, who, due to the nature of the business, ended up being outsiders to society, as Shylock was.<sup>326</sup> But unlike Shylock, the buyers in the market of gametes are not outsiders,<sup>327</sup> at least in the financial sense, since these buyers tend to be the those with means and resources.<sup>328</sup> (Both gamete buyers and Shylock do share the similarity of being in a position of having means.)

But even with these limitations of analogy, *The Merchant of Venice* sheds light on donor conception in some poignant ways: the commodification of the body, and thus the person; the impropriety, the injustice, even the basic wrongness of that commodification; and how the taking of the flesh and blood injures and brings forth a loss, a wound, even a death.

If we as a society commit to the proposition that our bodies be alienable, does that commitment not lead us to the selling of our pound of flesh and blood for money? If everything is *truly* up for sale and nothing is off limits, Richard Posner would be exactly correct that it is rather “puzzling from an economic standpoint” that one is not allowed to contract to sell himself into slavery, or that a husband cannot contract to kill himself in a fire in a funeral pyre for his wife, or that Shylock is not allowed to enforce his bond of pound of flesh.<sup>329</sup> In fact, Shylock himself points out that for all the condemnation that the Venetians direct at him for seeking enforcement of his bond of a pound of flesh, they themselves purchase slaves and work the slaves like animals.<sup>330</sup> If the Venetians were to be confronted of this wicked practice and demand were to be made of them to release their slaves, Shylock, speaking to the Venetians, makes the chilling argument that

“You will answer,  
‘The slaves are ours.’ So do I answer you.

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325. SHAKESPEARE, *supra* note 276, act 1, sc. 3, ll. 164-66; KERRIGAN, *supra* note 286, at 162.

326. AUDEN, *supra* note 285, at 79-80; *see also* GARBER, *supra* note 276, at 285-86.

327. *See* GARBER, *supra* note 276, at 285-86.

328. *See supra* note 14 and accompanying text.

329. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 187 (1977); GORDLEY, *ORIGINS*, *supra* note 45, at 235.

330. AUDEN, *supra* note 285, at 80.

The pound of flesh which I demand of him  
Is dearly bought. 'Tis mine, and I will have it.'"<sup>331</sup>

## VI. CONCLUSION

If the common good as the *telos* of law requires justice, and the *telos* of justice is human flourishing,<sup>332</sup> then it makes sense that law ought to be for the sake of persons: for their good, for their flourishing.<sup>333</sup> Law is inextricable from morality,<sup>334</sup> as morality is that dealing with care the question of human flourishing, considering integrally all the basic goods of human life.<sup>335</sup> So the questions posed earlier of an “immoral object,” “harm to the soul,” or “safety of the body”<sup>336</sup> in the doctrine of consideration within the context of donor conception can be answered as follows.

A recovery of the principle of commutative justice in the doctrine of consideration would be a recovery of the importance of equal values being exchanged in a contract. A framework of law for the buying and selling of gametes is that of consideration, the freely bargained-for exchange between a “donor” for his or her gamete and buyers for their money. It is understood as the two parties’ atomized will to contract with each other, edging out careful thought of what it does to the “product” of the contract: not gametes changing hands to be left as gametes, but the child as an embodied being, along with his needs and natural rights, and what is owed to him that he may flourish.<sup>337</sup> Thus the body, even from the embryonic stage, is “recruited as instrumentalities” of the project of the assertion of the autonomous will, as “the body and its parts are explicitly

331. SHAKESPEARE, *supra* note 276, act 4, sc. 1, ll. 96-99.

332. See *supra* notes 49-50 and accompanying text.

333. FINNIS, *supra* note 268, at 22-23; SNEAD, *supra* note 11, at 65, 68, 269.

334. A. W. Brian Simpson wrote of the connection between consideration and morality as follows,

[T]he view that the law of contract is the handmaid of commerce seems to me to be mistaken if it is opposed to the view that the law of contract expresses, in a form thought appropriate (bearing in mind the practicalities of litigation), moral ideas. For commerce, like other areas of life, must be conducted morally if the general good is to be furthered and there is no special set of principles of commercial morality. *The doctrine of consideration is indeed intensely moralistic*, and we may disagree with some of its judgments; what is mistaken is to fail to see that *a good law of contract* has as its function in relation to the commercial world *the imposition of decent moral standards*.

SIMPSON, *supra* note 56, at 488 (emphasis added). Thus to think of contracts as a product of the will only, severed from moral virtue, is to render the doctrine of contract law incoherent. GORDLEY, ORIGINS, *supra* note 45, at 7-9.

335. Finnis, *supra* note 51, at 38, 47; Finnis, *supra* note 50, at 19-20; George, *supra* note 51, at 59; Tollefsen, *supra* note 50, at 151, 153; *supra* note 51 and accompanying text.

336. See *supra* notes 70-71 and accompanying text.

337. See SNEAD, *supra* note 11, at 70, 271; Goldman, *supra* note 86; Martineau, *supra* note 7.

reduced to articles of commerce. People enter and exit intimate procreative relationships marked by contract and bargained-for exchange,” O. Carter Snead wrote.<sup>338</sup> Donor conception treats the body and the person as objects—our very own modern, grotesque version of a pound of flesh for three thousand ducats.

But if commutative justice requires what it does, what hath donor conception wrought, for the donor and for the resulting child? Should the body (or its parts) and thus the person be sold like goods, even if luxury goods? How could the human person ever rightly be reconciled as having “equal values” with money in the bargained-for exchange of the body for cash? Is this not an “immoral object” spoken of as historically prohibited in consideration?<sup>339</sup> And this, despite the worrisome health risks involved in the process necessary for donor conception, quite the concern apropos of “safety of the body” in consideration?<sup>340</sup> Should the seeds of our children be up for the exchange of money? And if we dare say yes to commodifying children, *how* much would be the appropriate sum? Such commodification surely explains the price differentials in Ivy eggs compared to other eggs. Are we prepared to justify it? If we are, are some humans then of more worth than others? It is surely a slippery slope from here to the Nazi’s *lebensunwertes leben*<sup>341</sup> to aborting Down syndrome babies in our day.<sup>342</sup> Or perhaps we are more like the Venetian slave-owners whom Shylock criticized<sup>343</sup> than we are willing to admit.

In contrast, if law ought to be for the sake of persons<sup>344</sup> and persons are embodied beings, then, as O. Carter Snead exhorts, law “must begin with the meaning and consequences of embodiment.”<sup>345</sup> The dignity of the person and what it means that he is an *embodied* person must be the starting point.<sup>346</sup> They must be paramount.<sup>347</sup> Let it be emphasized again that the profound longing for a child is for a profoundly good thing, and the devastating pain of infertility is truly grave. But no one has a right to a child; rather, it is the *child* who has a right

338. SNEAD, *supra* note 11, at 219.

339. *Supra* notes 68, 70 and accompanying text.

340. *Supra* notes 69, 71 and accompanying text.

341. J. Daryl Charles, *Lebensunwertes Leben: The Devolution of Personhood in the Weimar and Pre-Weimar Era*, 21 ETHICS & MED. 41 (2005); Robert Jay Lifton, *German Doctors and the Final Solution*, N.Y. TIMES MAG., Sept. 21, 1986, at 64; Adam S. Cohen, *Harvard’s Eugenics Era*, HARV. MAG. (Mar.-Apr. 2016), <https://www.harvardmagazine.com/2016/03/harvards-eugenics-era> [<https://perma.cc/RU65-H442>].

342. *Ed Gantt, Abortion, Down Syndrome and Eugenics*, BYU WHEATLEY INST. (Mar. 30, 2018), <https://wheatley.byu.edu/abortion-down-syndrome-and-eugenics/#> [<https://perma.cc/9W24-Y2QK>].

343. SHAKESPEARE, *supra* note 276, act 4, sc. 1, ll. 96-99; *see supra* note 331 and accompanying text.

344. FINNIS, *supra* note 268, at 22-23; SNEAD, *supra* note 11, at 65, 68, 269.

345. SNEAD, *supra* note 11, at 222.

346. *See id.* at 223, 225-27.

347. *Id.*

to his father and mother.<sup>348</sup> As painful as childlessness is, if donor conception commodifies the body and the person and unjustly creates bewilderment, fragmentation, loss, and woundedness in the child's life—that “harm to the soul” spoken of earlier<sup>349</sup>—then donor conception ought not to be done. If gametes are being exchanged for money in the name of consideration in contract law, then such an exchange ought to be called out as unjust and immoral; it ought not to be recognized as proper. The body—both the donor's and the child's—in donor conception has become a means to an end. But no body, and thus *nobody*, should be treated as a means to an end, however good or noble or worthy the end.

Donor conception, Helen M. Alvaré writes, “jeopardizes the idea of parents as recipients of a very vulnerable gift, as lovers of an unknown person.”<sup>350</sup> An examination of the framework of consideration in donor conception reveals an impoverished vision of what is owed to the characters involved in the story: the children and the donors in particular. The practice is ill-suited to, even *unworthy* of, each person's inherent dignity. A way forward would be to stop allowing for the buying and selling of gametes in the name of consideration. In so doing, we would begin to make room for law that is oriented away from treating the body as a commodity and the child as something to which we are entitled; and toward proper respect of the person and the lovely posture of receiving each child as a gift.<sup>351</sup>

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348. *Supra* note 86 and accompanying text.

349. *Supra* notes 69, 71 and accompanying text.

350. Alvaré, *supra* note 32, at 54; *see* SNEAD, *supra* note 11, at 100, 103.

351. *See* SNEAD, *supra* note 11, at 100, 103, 224; Alvaré, *supra* note 32, at 54; Moschella, *supra* note 8; *see also* Tollefsen, *supra* note 86.