

**SELLING SEX CELLS:
DIGNITY, AUTONOMY, AND THE MARKET OF HUMAN GAMETES**

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Abstract

The right to personal autonomy has been interpreted by legal and political theory scholars as both a secondary right that flows from the concept of human dignity, and—conversely—as a concept that may conflict with dignity when it is understood as a boundless right to self-determination. The sale of gametes and embryos through assisted reproductive technologies (ART) has posed such a conflict. Recent advancements in ART have driven the expansion of a new form of bodily commodification that complicates the relationships and tensions between autonomy and dignity by removing more boundaries between what may and may not be sold. Ethical concerns about the commodification of human life and the exploitation of donors have led some to argue for the prohibition of gamete sale, but prohibitionist stances are also challenged on the grounds that they infringe personal autonomy. The aim of this thesis is to explore—primarily through comparative conceptual analyses—which theoretical approaches may most effectively reconcile personal autonomy with the threats that the market of gametes may pose for the principle of human dignity.

Introduction

This thesis engages with philosophical and bioethical debates on assisted reproduction to critically analyze the role of two central concepts—human dignity and autonomy—within them. The development of assisted reproductive technologies (ART) in recent decades has raised many important and contentious questions about the ethics of their use. A related question addresses whether these ethical objections may justify state-enforced regulations of assisted reproduction. Many of these objections appeal to the inviolability of human dignity and have already served as the basis of various regulations introduced since the in-vitro fertilization (IVF) procedure was successfully established with human embryos in the 1970s.¹ Originally, IVF was available primarily to infertile couples seeking to use their own reproductive materials and labor to conceive.² More recent advancements in ART have enabled couples to use donor gametes and surrogacy arrangements to have children without ever participating directly in reproduction. Unpartnered individuals and same-sex couples, who are often barred from becoming parents through adoption agencies, can also rely on these procedures to have children.³ Modes of reproduction that were once imagined as impossible, futuristic fantasies are now expanding human control over the creation, manipulation and deselection of new life.

Critics who identify with feminist, Marxist, and disability perspectives have challenged the romanticization of assisted reproduction as a fundamentally emancipatory and autonomy-enhancing development. Many of these perspectives include an overlapping acknowledgement—

¹ Tian Zhu. In vitro fertilization. *Embryo Project Encyclopedia* (2012).

² Ibid.

³ Dorothy Greenfeld and Emre Seli. Assisted reproduction in same sex couples. *In Principles of Oocyte and Embryo Donation*, pp. 289-301. Springer, London, 2013.

one which is central to my own position—that having access to a broader range of reproductive choices does not, in itself, empower women, who shoulder most of the labor entailed in reproduction. They are attentive to how the uncritical valorization of ART may reinforce covert forms of coercive influence on reproductive choice: namely, gendered pronatalist attitudes, the commodification of labor and life, and the devaluation of people with disabilities and other deselected characteristics.

This thesis focuses on a particular form of commercial reproduction: that of compensating donors for the use of gametes or embryos in IVF. This process evokes distinctive ethical concerns about the roles of coercion and commodification in donor arrangements. There are also important social and medical differences between the ways that egg and sperm sale are treated in the infertility industry, and these differences are reflected in the disproportionate attention given to egg sale in critiques of commercial reproduction. Scholars, medical professionals and policymakers have also engaged with the ways that commercial assisted reproduction has benefited those who access it. Donor arrangements have empowered people who would like to have children, but cannot—due to myriad factors including infertility, the lack of a partner, or the desire to avoid or delay pregnancy—to experience reproduction on their own terms. For those who participate in assisted reproduction as donors, the process may be both emotionally rewarding and a valued source of income. Many critics, however, argue that these benefits do not hold sufficient weight against the deontological and consequentialist critiques of commercial assisted reproduction.

One of the core concerns associated with this debate, particularly in the European legal context, is that instrumentalizing gametes and embryos for the purposes of reproduction or biomedical research undermines the value of human dignity. Germany’s laws that regulate

reproductive donation—which include the Embryo Protection Act and Stem Cell Act—are among the most restrictive in the world, and both laws are founded upon recognition of the need to protect human dignity and the non-instrumentalization of life.⁴ Reproductive treatment patients in Germany have sought out donors in countries with less restrictive regulations, such as the Czech Republic and Spain, in order to conceive through commercial assisted reproduction.⁵ The Catholic Church and the Christian Democratic Party in Italy also made appeals to human dignity, which they conceptualized as the sanctity of human life, but this framing was ultimately not supported by secular actors in Italy’s regulation debate.⁶ In the United States, human dignity has not been integrated into any federal regulations of reproductive donation, but religious conservatives have fervently advocated for strict regulations by stressing the inviolability of dignity.⁷

A related issue is whether paid “donations” of gametes and embryos constitute an unjustifiable form of commodification, and whether assigning monetary value to products of the body diminishes the distinctive ways in which human persons ought to value each other. Payment, indeed, seems to contradict the characterization of gamete sale as a donation, which connotes gift-giving. The language of donation nonetheless continues to pervade discussions of the infertility industry, which may reflect an interest in maintaining the perception of gamete provision as something that ought to be done altruistically. Due to the absence of alternative terminology in the extant literature, and for the sake of brevity, this thesis also refers occasionally to “donors” and “donations” in its discussion of gamete sale; but it is important to note that this terminology is

⁴ Parfenchyk, Volha, and Alexander Flos. Human dignity in a comparative perspective: embryo protection regimes in Italy and Germany. *Law, Innovation and Technology* 9, no. 1 (2017): 5.

⁵ Sven Bergmann. Reproductive agency and projects: Germans searching for egg donation in Spain and the Czech Republic. *Reproductive BioMedicine Online* 23, no. 5 (2011): 600-608.

⁶ *Ibid*, 17.

⁷ Robert Klitzman and Mark V. Sauer. Payment of egg donors in stem cell research in the USA. *Reproductive biomedicine online* 18, no. 5 (2009): 605.

inadequate and linked to the language of altruism. It would also be misnominal to instead refer to compensated donors as egg or sperm “sellers,” given that their labor comprises an important part, if not the entirety, of what is compensated.

Even in the absence of a monetary exchange, commodification may be identified in the treatment of the “products” of conception as nothing more than products.⁸ Those who access preimplantation genetic diagnosis (PGD) are able to select or deselect embryos based on their genetic characteristics, which is one among many practices that have contributed to widespread concerns about a possible resurgence of eugenics in the contemporary era. Critiques centered on the issue of commodification emphasize that treating gametes and embryos as commodities devalues their status as actual or potential human lives, while also devaluing the lives of those with deselected traits.

The issue of exploitation—or the use and abuse of persons for an unfair gain—is also at the root of many ethical objections to commercial assisted reproduction. In some legal systems, such as that of Canada, where paid egg donation is prohibited, the potential for exploitation to occur in the donation process serves as the primary rationale for prohibition.⁹ The serious risks to donor health entailed in the process, compounded with the fact that most donors are in a position of vulnerability relative to the recipient, has convinced some critics that egg sale is exploitative and therefore ethically unjustifiable. Low income women, women of color, donors participating in transnational arrangements, and those who lack access to the medical information and resources

⁸ Katz Rothman, Barbara. Reproductive technology and the commodification of life. *Women & health* 13, no. 1-2 (1988): 95-100.

⁹ Cattapan, Alana. Risky business: Surrogacy, egg donation, and the politics of exploitation. *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société* 29, no. 3 (2014): 361-379.

that would allow them to make an informed decision to become donors without jeopardizing their health, are disproportionately affected by exploitation in the infertility industry. While, arguably, all service industries are fraught with the potential for exploitation, many critics of the infertility industry have advanced the case that the presence of coercion, eugenic thinking, discrimination and health risks in the donor process make it distinctively exploitative.

Each of these concerns is in tension with liberal arguments that call attention to how assisted reproduction has enhanced and expanded reproductive choice. For many proponents of commercial donation, the choice to donate one's gametes and embryos is protected by the right to personal autonomy, conceived as a capacity for self-determination. The primacy of autonomy in these perspectives is in conflict with the argument that certain reproductive choices violate human dignity and are therefore indefensible. Not all concepts of autonomy, however, assume individuated subjectivity and dismiss the intersubjective violations that reproductive choices may entail. Feminist scholarship, most notably, has contributed the concept of relational autonomy to this debate. Relational theories of autonomy seek to examine the ways that autonomous subjects, rather than having perfectly free agency, are "embedded in relations with flesh-and-blood others and [are] partly constituted by these relations."¹⁰ Many scholars have also challenged the argument that the development of ART has enhanced reproductive choice. Specifically, they have underscored how ART may, instead, subject women to further coercion by medical professionals and brokers in the industry of assisted reproduction.

This thesis will integrate the concepts of human dignity, personal autonomy, commodification and exploitation into an analysis of the ethics of utilizing ART for gamete and

¹⁰ Keller, Jean. Autonomy, relationality, and feminist ethics. *Hypatia* 12, no. 2 (1997): 154.

embryo sale. There is a broad and growing range of assisted reproductive technologies available today, and an even greater number of ways to use and regulate them. The complexity of fast-changing technological and legal developments cannot be adequately captured in this thesis. While other procedures, such as surrogacy and uterine transplants, arguably fall within the scope of commercial assisted reproduction, each of these types of arrangements is bound up with particular ethical and political issues that demand nuanced attention. Therefore, I will focus specifically on issues related to egg and embryo donation for IVF, one of the most commonly used and controversial ART procedures. In the US, about one in eight people who access IVF rely on eggs or embryos from a donor.¹¹ Among women who are 48 and older, the rate of donor egg or embryo use in IVF cycles is approximately 90%.¹² The use of donor eggs and embryos has been the focus of most critiques of IVF because the health and identity of other persons—who often have less wealth and power than recipients—may be at stake in the donation process. Drawing primarily from theoretical literature to analyze the concepts that are at the center of this debate, I will argue that the concerns raised by commercial donation may be best addressed through a theory of relational autonomy: one that affirms the role of agency in individuals’ choices to seek and provide reproductive assistance through donation, while ethically problematizing the relations of domination and coercion that mediate them. I will also argue that relational autonomy is incompatible with conceptions of human dignity that posit that an independent, rational moral capacity is the source of humanity’s inherent worth.

¹¹ Centers for Disease Control (CDC) and US Department of Health and Human Services, 2010 Assisted Reproductive Technology, *National Summary Report* (2012) 1–75.

¹² Centers for Disease Control (CDC) and US Department of Health and Human Services, 2015 Assisted Reproductive Technology, *National Summary Report* (2012) 1–74.

Human Dignity

Human dignity is the basis of many deontological critiques that regard the instrumentalization of gametes and embryos as intrinsically unethical. In both philosophical and legal discussions, human dignity is an elusively defined concept. Appeals to the idea of human dignity have informed and vindicated the development of human rights, and they have increasingly factored into the regulation of medical research and practice. Critical approaches to human dignity highlight the concept's apparent vacuousness, its conduciveness to an anthropocentric worldview, and its capacity to obscure injustice despite its intended role in the modern human rights framework as a concept that will lend itself to justice. This section will provide an overview of how human dignity has been construed in political philosophy and the human rights framework. Beginning with this overview will lay the necessary groundwork for analyzing the concept's relationship to autonomy and its implications for commercial reproduction.

The Kantian Conception of Dignity

Modern secular conceptions of human dignity, it is often argued, derive their meaning from Kantian ethics. In his *Foundational Principles of the Metaphysics of Morals*, Kant conceptualizes dignity as a quality "beyond all value"—a quality that human beings, and not non-human animals or objects, have by virtue of their moral capacity.¹³ Dignity is distinct from market value and "fancy value" (i.e., the value of that which satisfies human preferences and tastes). Whereas objects of these forms of value can be exchanged for objects with an equivalent value, dignity is not fungible. In Kant's terms, it "constitutes the condition under which alone anything can be an end in itself," rather than a means to an external source of value.¹⁴ That which has market value may

¹³ Stephen Holland, ed, *Arguing about Bioethics* (Routledge, 2012), 155.

¹⁴ Immanuel Kant, *Foundational Principles of the Metaphysics of Morals*, (Indianapolis, Bobbs-Merrill, 1949).

have equivalency in price, or the representation of market value, but the only way in which human beings may be equivalent to each other is through their humanity and morality. Kantian ethics rejects the assignment of price to these distinct, intrinsic forms of worth.

According to this perspective, gametes and embryos would not necessarily be excluded from the scope of that which has dignity—even if one accepts that these are not forms of human life, but rather, products that constitute and are constituted by it. That which has dignity is not only human life as such, but "morality, and humanity insofar as it is capable of morality."¹⁵ Dignity is therefore not universal, but conditional: that which lacks moral capacity also lacks a necessary presupposition of dignity. However, a capacious understanding of humanity as the quality of being human, which may be distinct from the quality of having human life, would allow for the inclusion of products of the human body within the Kantian understanding of that which has dignity. While Kant does not address this question directly, he includes actions that have the quality of being moral, such as keeping promises and expressing selfless benevolence, within the scope of morality, and therefore dignity. If this reasoning were extended to an interpretation of "humanity," it may be deduced that not only human life—but also human cells, organs, embryos, corpses and so on—have a similarly intrinsic worth, as products that extend from humanity in a way that is parallel to how moral actions extend from morality.

For Kant, autonomy is the basis upon which moral capacity and dignity can be validated. He construes autonomy as the ability to exercise free will, or a will that is self-legislating. A person has autonomy if he is both rational and "free as regards all laws of physical nature, and obeying

¹⁵ Ibid.

those only which he himself gives”¹⁶ Kant's conception of autonomy, as many feminist philosophers have charged, presupposes that the existence of a free, independent and atomistic self is possible, and that those who lack the ability to rationalize also lack autonomy. Given that autonomy grounds dignity, both products of the human body and human persons without moral capacity may, arguably, only have dignity by virtue of their humanness and their particular relation to autonomous subjects. Although gametes and embryos do not have autonomy, one may make the case that they have qualities that are distinctively human: this would make their instrumentalization as only means to an end unjustifiable within Kantian ethics.

Dignity and the Development of Human Rights

The development of international human rights that had an explicit grounding in the concept of human dignity emerged in the aftermath of the Second World War. Most notably, the term "human dignity" appears in the preamble of the Charter of the United Nations (1945) and in Article 1 of the Universal Declaration of Human Rights (1948). Human dignity has also factored prominently into the development of domestic constitutional rights. The concept was included in the constitutions of Germany, Italy and Japan following WWII, and today, only a minority of UN member countries do not include dignity in their national constitutions.¹⁷ Formulations of dignity vary across international and constitutional law documents, but most formulations share a regard for human dignity as something that is inherent, inviolable, and a foundation for human rights rather than a right in itself. The Kantian conception of dignity as an intrinsic value—one whose recognition does not require justification by other values, but rather, functions as their basis—is

¹⁶ Immanuel Kant, *Foundational Principles of the Metaphysics of Morals*, (Indianapolis, Bobbs-Merrill, 1949), 53.

¹⁷ Shulztiner, Doron, and Guy E. Carmi. Human dignity in national constitutions: functions, promises and dangers. *The American Journal of Comparative Law* 62, no. 2 (2014): 470.

widely captured in international and domestic human rights documents. The Helsinki Declaration of Human Rights (1975), which establishes medical and research guidance for participating states, includes the statement that rights and freedoms "derive from the inherent dignity of the human person."¹⁸ The function of human dignity in the constitution of Germany has been interpreted as the "right to have rights" and the constitution's supreme principle. Article 1 of the constitution begins with the declaration that "Human dignity shall be inviolable." The second part of the article then establishes that the rights protected by the constitution are based on this recognition of dignity and the duty to protect it: "The German people, therefore, acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." In this formulation, human dignity is the reason that human rights are acknowledged but requires no reason for its own acknowledgement: it is an inherent and self-evident quality.¹⁹

The fact that human dignity is construed in international and constitutional law as inherent and inviolable does not erase the historically contingent character of its legal recognition. In an essay that addresses the relationship between human rights and human dignity, Habermas argues that rights, as they are known today, developed not through a positive recognition of human dignity, but rather in response to violations of it. He poses the following question in his introduction: "Is it only against the historical background of the Holocaust that the idea of human rights becomes, as it were, retrospectively morally charged—and possibly over-charged—with the concept of human dignity?"²⁰ Habermas' reading of the history of human rights suggests that they

¹⁸ Kretzmer, David, and Eckart Klein, eds. *Concept of Human Dignity in Human Rights Discourse*. Columbia University Press, 2002.

¹⁹ Enders, Christoph. The Right to have Rights: The concept of human dignity in German Basic Law. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 2, no. 1 (2010).

²⁰ Habermas, Jürgen. The concept of human dignity and the realistic utopia of human rights. *Metaphilosophy* 41, no. 4 (2010): 465.

are, in fact, a product of specific conditions under which dignity was systematically violated, but that these violations did not emerge only in the context of the Second World War. There has always been a constitutive connection between human dignity and human rights, but the drafting of the Universal Declaration of Human Rights was the context within which this connection was explicitly recognized in law for the first time.

The experiences and testimonies of those who were murdered, tortured, humiliated and degraded under the Nazi regime informed the framing of the Declaration, which identified these forms of treatment as being among the conditions under which dignity is violated. Dignity was the grounding concept for "liberal" rights to be protected from these violations, and to exercise freedom insofar as it is within the bounds of one's duty to respect the rights of others. Dignity also grounded "democratic" rights to participate in public life, and the status of democratic citizenship is a precondition for the protection of both liberal and democratic rights. When one right or category of rights becomes subordinated to another, the concept of dignity may serve a mediating function; Habermas emphasizes that dignity "grounds the *indivisibility* of all categories of rights. Only in collaboration with one another can basic rights fulfill the moral promise to respect the human dignity of every person equally."²¹ Human dignity, in other words, has played a distinct role as the supreme principle to which no other principle within the framework of human rights may be subordinated. For Habermas, human rights discourse appeals to a "realistic utopia": one that has yet to be realized, but whose realizability is manifest in the purportedly universal character of its recognition by democratic states.

²¹ Ibid, 468-469.

The Legal Role of Dignity in Gamete and Embryo Donation

It is unsurprising that the primacy of dignity within human rights discourse is clearly observable in countries that were affected most intensely by the rise of fascism in the twentieth century. In the context of the debate on gamete and embryo sale, concerns about the violation of dignity arguably take precedence over other ethical concerns in German law, and almost ubiquitously among religious actors in Italy. In addition to being present in the constitutions of many European countries, dignity was also a core concept in the 1997 European Convention on Human Rights and Biomedicine (“Oviedo Convention”). The Oviedo Convention is a notable example of how international cooperation on human rights issues has responded to the specific ethical concerns posed by emerging biomedical technologies, including ARTs. In a discussion of the history of the Convention, Roberto Adorno writes that Council of Europe member states had been involved in developing responses to bioethical issues throughout the 1980s, when biomedical researchers made rapid advancements in areas such as genetic testing, embryo research and reproductive medicine.²² The purpose of the Convention, as it was articulated in a proposal by the Ad Hoc Committee of Experts on Bioethics, was to provide a context for member states to “set out common general standards for the protection of the human person in the context of the development of the biomedical sciences.”²³ Adorno describes human dignity as the “bedrock” of the Oviedo Convention, alongside the related concepts of identity and integrity of the human person. He enumerates three instances in the Preamble of the Convention that made a reference to dignity:

the first, when it recognizes “the importance of ensuring the dignity of the human being”;
the second, when it recalls that “the misuse of biology and medicine may lead to acts

²² Roberto Adorno. The Oviedo Convention: a European legal framework at the intersection of human rights and health law. *Journal of International Biotechnology Law* 2, no. 4 (2005): 133.

²³ Ibid.

endangering human dignity”; the third, when it expresses the resolution of taking the necessary measures “to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine.”

These references to dignity highlight its inherent presence in human beings, its endangerment by contemporary biomedicine, and its need to be protected through the development of human rights instruments. The Convention did not connect this idea of dignity directly to any protocol for egg and embryo donation, but it did critically address other common procedures used in medically assisted reproduction: namely, genetic discrimination, interventions intended to modify the human genome, reproductive cloning and sex-selection.²⁴ The rationale for the Convention’s criticism of these procedures had less to do with bodily commodification than with eugenic exclusion and the potential to introduce harmful alterations of genes and gene sequences. The implication of the protocols of the Convention is that dignity may be infringed through efforts to modify human life at the stage of conception.²⁵ The absence of discussion on the use of donor gametes in IVF suggests that, as it concerns the infringement of human dignity, there is an important distinction between reproductive assistance and reproductive engineering. The Convention also makes an exception for genetic testing and sex selection when it is carried out for the purpose of preventing the creation of new life with genetic or sex-specific diseases. It recognizes another distinction, therefore, between genetic conditions that are pathological and those that are, for whatever reason, considered personally or socially undesirable by the recipients.

In some national legal contexts in Europe, the concept of dignity is explicitly mentioned in relation to the regulation of egg and embryo donation. In Germany, egg donation is prohibited on

²⁴ Ibid, 140.

²⁵ Council of Europe. *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*. Oviedo, 1997.

the grounds that separating gestational and genetic motherhood will create confusion about whom children should regard as their mothers and give rise to harmful issues with the development of the child's identity. Heike Trappe, in a review of the status of ART regulation in Germany, explains that sperm donation is not equivalently restricted because there are greater “depths” entailed in the egg donation process.²⁶ The fact that so-called traditional motherhood rests upon a dual genetic and gestational relationship to the child reinforces the perception that mothers contribute more than fathers to the child's identity. The interdependent relationship between dignity and identity in German law, furthermore, implies that individuals' worth is undermined when their identity is confused, diffused or unstable. This rationale is less connected to the principle of non-instrumentalization than to normative notions about what constitutes healthy identity development.

The German Embryo Protection Act²⁷ prohibits egg donation and surrogacy, while other forms of reproductive assistance—such as IVF with the gametes of the couple seeking to conceive, PGD for the purpose of diagnosing genetic diseases, and sex selection based on gender-specific diseases—are legally permitted in Germany. The prohibited assisted reproduction procedures share a common element that the permitted procedures lack: the introduction of genetic and gestational ties to the cell or embryo that are external to its intended familial ties. The genetic/gestational separation, it has been argued, may violate the right to identity, and may also grant aspiring parents greater control in determining the genetic characteristics of their child. This latter concern, unlike concerns about identity confusion, more closely reflects a conception of

²⁶ Heike Trappe. Assisted Reproductive Technologies in Germany: A Review of the Current Situation. In *Childlessness in Europe: Contexts, Causes, and Consequences*, pp. 269-288. Springer, Cham, 2017.

²⁷ H. M. Beier and J. O. Beckman. German Embryo Protection Act (October 24th, 1990): Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz-EschG). *Hum Reprod* 6 (1991): 605-6.

dignity as worth that commands non-instrumentalization. Habermas, in *The Future of Human Nature*,²⁸ explains why such processes that introduce further "quality control" measures into reproduction raise a distinctive ethical problem. The chapter on human dignity discusses the use of PGD, a procedure that gives potential parents knowledge about the genetic profile of embryos prior to their implantation, in relation to non-selective abortion. Habermas asserts that PGD brings in "the instrumentalization of conditionally created human life according to the preferences and value orientations of third parties. Selection is guided by the desired composition of the genome."²⁹ Genetic testing, and the deselection of eggs and embryos based on a detailed profile, enables potential parents to effectively manufacture human life just as object products are manufactured for the market.

It is important to note that selection based on genetic characteristics does not always occur in the gamete and embryo donation processes. However, it is common for recipients to access PGD for donated embryos, and to connect with donors through agencies that systematically exclude donors based on characteristics that are wholly or partly determined by their genetic profile. Jason Keehn et al., in a study on online donor recruitment in the United States, found that donors were selected only if they met minimum criteria for desired or "in demand" traits, such as strong cognitive, physical, and artistic ability. Additionally, the study found that payment offered to donors varied according to the desirability of their profile, despite the fact that trait-based payment variation violates the ethical guidelines established by the American Society for Reproductive Medicine.³⁰ These findings are consistent with other research on the discriminatory recruitment

²⁸ Jürgen Habermas. *The future of human nature*. John Wiley & Sons, 2014.

²⁹ *Ibid*, 37.

³⁰ Jason Keehn, Eve Holwell, Ruqayyah Abdul-Karim, Lisa Judy Chin, Cheng-Shiun Leu, Mark V. Sauer, and Robert Klitzman. Recruiting egg donors online: an analysis of in vitro fertilization

and treatment of donors in the infertility industry, which will be discussed in more detail in a later discussion of commodification. The reason for their inclusion in the present section is to suggest that egg and embryo donation may be construed as a violation of dignity in two ways: by potentially depriving children conceived through donation of their right to an identity, and by treating donors and their "products" as mere means to the end of recipients' satisfaction.

If egg and embryo donation does violate human dignity in these ways, however, it is not clear where the boundaries of such violations lie. Adopted children, for example, may also develop identity issues due to having separate genetic and social parents; yet ethical objections to adoption that appeal to identity and dignity are scarcely articulated in legal and scholarly debates. The potential damaging effects of ignorance about one's genetic parents on identity development, furthermore, reflects a cultural conception of the family as a genetically determined social unit. For many of those born without connections to their genetic parents, identity is not constituted by this absence, but is rather separately constituted by the meaningful social relationships that do exist in their lives. In claiming that the lack of a social connection to one's genetic parents undermines dignity by creating identity confusion, other social relationships may be tacitly devalued.

Similarly, it is considered problematic, but not unjustifiable, for people to select romantic and sexual partners on the basis of traits such as physical ability and level of education; such selectivity, however, is not widely condemned as a eugenic practice. Perhaps the difference between amorous selectivity and trait-based selection in the infertility industry is a matter of the type and magnitude of information available to the "selector." It is rare, for example, for recipients of gamete and embryo donation to spend extensive periods of time developing a social bond with

clinic and agency websites' adherence to American Society for Reproductive Medicine guidelines. *Fertility and sterility* 98, no. 4 (2012): 998.

donors and becoming intimately familiar with their personalities. In the case of sperm donation, recipients may come to know nothing more about the donor than the information available in their profiles. In contrast, individuals often spend years getting to know the personality of their partners before making the decision to have children with them; and during those years, it is possible to learn nothing at all about their partners' genetic profile beyond that which is manifest in their physical or psychological conditions.

To explain these differences concisely: gamete and embryo donation tends to give individuals greater access to information about the genetic traits of donor parents, while "traditional" parenthood tends to cultivate knowledge of all other traits of the person. It is important to note that these tendencies are just that—tendencies—and not necessary qualities of parental relations within and outside of assisted reproduction. Just as it is possible for recipient families to have intimate and non-instrumental relationships to their donors, it is possible for individuals to form families independently through an instrumentalizing motivation (e.g., to gain wealth, social status or sexual gratification). Critiques of egg and embryo donation that are founded upon the principle of dignity, therefore, should account for the fact that specific uses of ART have specific consequences and bearings on deontological values. The principle of human dignity does not appear to ethically preclude people from using others as a means to an end, provided that their worth as ends in themselves is also recognized. If all forms of human instrumentalization were within the scope of what it means to violate dignity in the Kantian sense of the term, no polity would be able to provide adequate protection for it. It may be more fruitful to instead conceptualize dignity as a principle that precludes the use of humanity as *only* a means to an end, and nothing more. The creation of contingent life toward the end of a desired set of genetic characteristics—one that may render a potential life disposable in its absence—arguably constitutes such total

instrumentalization, because it implies that the value of a potential life is reducible to the value of those characteristics. The threat of a resurgence of eugenic practices is sufficient to demonstrate why the principle of non-instrumentalization should have a claim on ethical considerations about commercial assisted reproduction. The particular ways in which non-instrumentalization may be framed and enforced, however, raise their own set of ethical problems that have led some of their critics to reject the category of dignity; these arguments will be the focus of the next section.

Arguments Against Dignity: Instrumentalizing Non-Instrumentalization

This discussion has so far focused on how the relationship between dignity and non-instrumentalization has factored into political and bioethical debates on assisted reproduction. The idea that human persons have intrinsic worth may encourage a cautious approach to relations and actions that cause persons to be devalued, degraded and reduced to the status of objects. Critiques of human dignity have shown, however, that in its material applications, the concept may also undermine justice and respect for personal autonomy—or, alternatively, that it refers to nothing other than autonomy, and should therefore be discarded in bioethical discussions. Ruth Macklin presents this latter view in a medical journal editorial, provocatively titled "Dignity is a Useless Concept." Macklin begins by noting that references to human dignity in international documents, such as the UN declaration and the Council of Europe's convention on human rights and biomedicine, fail to give dignity a distinctive meaning. The latter document emphasizes "the need to obtain informed, voluntary consent; the requirement to protect confidentiality; and the need to avoid discrimination and abusive practices."³¹ This document, which is one of few international conventions that make an explicit reference to dignity in a discussion of bioethics, suggests that dignity's meaning is limited to respect for persons and their autonomy. Appeals to dignity that

³¹ Ruth Macklin. Dignity is a useless concept. (2003): 1419.

imply that it is something "over and above" this meaning are unclear and ungrounded, according to Macklin's critique.

In the context of US law, references to human dignity are made in relation to death and dying: recognition of "the right to die with dignity" undergirded the 1976 California Natural Death Act, which allowed patients with a terminal condition to provide advance consent to be removed from life-sustaining treatment. Appeals to dignity and its potential violation are also prominent in US ethical debates concerning the use of dead bodies in the education of medical students. In this context, dignity has little to do with the autonomy of the living and their ability to provide advance consent for end-of-life and after-life procedures; instead, dignity is a quality extended to cadavers that prevents their use for education.³² In the early 2000s, the period during which Macklin's editorial was published, the US President's Council on Bioethics encouraged Congress to develop a "Dignity of Human Procreation Act" that would appeal to dignity to prohibit in-vitro fertilization. The same appeal was present in the Council's report on human dignity and cloning, but in both cases, the Council did not offer further clarification of dignity's intended meaning in its discussion.

Today, perhaps due to the vagueness or redundancy of these formulations, there are limited references to human dignity in US law. Dignity has nonetheless continued to inform efforts to advance a more conservative approach to ART and other emerging biotechnologies. In response to Macklin's critique, the Council developed a report called *Human Dignity and Bioethics*, which was intended to contribute clarity to the meaning of dignity and its role in US bioethical debates. Cognitive scientist Steven Pinker, in a 2008 review of this report, argues that the Council failed to accomplish this aim. The majority of its main contributors either directly advocated for the

³² Ibid.

extension of religious influence in public policy or worked for pro-clerical Christian institutions. Pinker observes that the contributors' religiosity overtly affected their discussions of human dignity. Seven essays in the report explicitly aligned themselves with Judeo-Christian doctrine, and many made references to passages in the Judeo-Christian Bible. Most notably, the biblical idea that man was made in God's image was interpreted to suggest that man has inherent dignity, and that any medical procedures or treatments believed to alter his nature must be restricted. For Leon Kass, the founding director of the Council, this includes ART procedures as well as "organ transplants, autopsies, contraception, antidepressants, even the dissection of cadavers."³³

Although Kass' position is comparatively extreme in the context of US bioethical debates, it demonstrates that nearly the entire fields of medicine and biotechnology may be brought to a crisis when dignity is construed as a quality that ought not be violated through any significant alteration of the body. Through the claim that dignity can only be protected through the protection of the body in its natural state, human worth may be reduced to persons' embodiment and their willingness to refrain from altering it. The long history of abuses carried out by medical institutions against those who have been excluded from the categories of "natural," "healthy," and "human" is an undeniable reason to maintain a critical attitude toward those institutions. To grasp what is meant by abuse in this context, one would need to look no further than, for example, the racial instrumentalization in medical experiments such as the Tuskegee Syphilis Study, the pathologization and forced "treatment" of same-sex sexual attraction, or the systemic involuntary sterilization of women and girls with disabilities. Similar violations in medical research and practice continue today and justify caution toward the increasing medicalization different areas of life. However, a critique of medicine that expresses a commitment to maintaining and disciplining

³³ Steven Pinker. The stupidity of dignity. *The new republic* 28, no. 05.2008 (2008).

the “natural” body—a commitment that has been disrupted by many contemporary uses of biotechnologies—may only reinforce the abuse for which medical institutions are responsible. Human dignity, when conceptually tied to notions of what is *natural* for bodies, may then be protected at the expense of those whose embodiment is externally determined to be *unnatural*. The protection of human dignity, I argue, should instead involve protecting human beings’ agency and their power to determine what happens to their bodies, with the exception of those changes that are presently inevitable.

If the idea of dignity has a justifiable restrictive function, then the limits of that function demand the consideration of those working at the intersection of bioethics and politics. In Pinker’s terms, dignity cannot be used as a foundation for bioethics if its meaning and applications continue to be *relative* (lacking wide inter-contextual continuity), *fungible* (easily compromised by indefinite relations and actions), and *harmful* (used to justify violence and oppression). Despite Pinker’s clear scientific bias, which lends itself to hasty dismissal of religious appeals to dignity, his critique acknowledges that human dignity has a distinctive and defensible “sense.” This sense, even in the absence of a distinctive meaning, can carry a weight that commands respect for human persons, which cognate concepts such as autonomy sometimes lack. Autonomy, when understood as *self-governance*, can diminish the obligation to *others* that, for some, is more salient in the “sense” that dignity provokes.

One of the limitations of the critiques of dignity advanced by Macklin, Pinker and other life scientists is that they tend to perform an analysis of dignity that is mostly textual. In looking for a clear, direct definition of human dignity in documents that appeal to it, it is easy to overlook the ways that meaning is constructed *around* the concept (i.e., through its contextualization within those documents, and through its actual use in societies for which dignity grounds human rights

and bioethics). Ranjana Khanna's "Indignity," looks beyond human rights documents to probe the origins of the category of dignity. She traces an arc of continuity between dignity's original meaning and its contemporary usage, with a focus on the South African context. Before Kant developed his notion of dignity, Cicero used "dignitas" (the Latin source of "dignity") in reference to "high political rank, or social rank," and to "masculine beauty, [...] good gait, thought rather than impulse, and the power of speech in relation to propriety."³⁴ Augustine's works also referred extensively to dignity and grounded it in the idea that man was made in the image of God: a formulation that, as Pinker's critique highlights, has been maintained in the contemporary era among American Christian conservatives.

Khanna suggests that the notion of dignity later developed in Kantian ethics and human rights discourse represented a combination of these emphases on propriety and human nature as something that reflects the nature of God. The secular analog of this idea of man's relation to God appealed, instead, to autonomy as the basis of human nature. Hannah Arendt's discussion of dignity, which Khanna characterizes as "unmistakably Kantian," places dignity at the core of individuals' inclusion in a human community, which is not automatically lost when individuals are stripped of rights. Dignity, in Arendt's conception, does not ground any rights other than "the right to have rights." Specific rights may be lost entirely to a person, but because dignity is essential to inclusion in a polity, the right to have rights cannot be lost unless one experiences the "loss of a polity" responsible for protecting it. Dignity, for Arendt, grounds the right of stateless people to have rights, and the responsibility of polities to ensure that that right is not lost to anyone. Arendt's

³⁴ Ranjana Khanna. Indignity. *Ethnic and racial studies* 30, no. 2 (2007): 262.

statement in *The Origins of Totalitarianism* that dignity is not natural, but political, may lead us to question Khanna's reading of her notion of dignity as Kantian. Arendt writes:

The concept of human rights can again be meaningful only if they are redefined as a right to the human condition itself, which depends upon belonging to some human community, the right never to be dependent upon some inborn human dignity which *de facto*, aside from its guarantee by fellow-men, not only does not exist but is the last and possibly most arrogant myth we have invented in all our long history.³⁵

Unlike Kant, Arendt regards dignity as something that is constructed and “communally constituted” within a political order.³⁶ This passage suggests that Arendt might have agreed with Khanna's critique of human dignity as a value that has been invoked to obscure the historical reality of human disposability. For Arendt, the non-intrinsic character of dignity means that it can only be guaranteed through the political recognition and protection of the right to have rights; and the claim that dignity is intrinsic may enable political communities to look past cases where this right has been denied. If there is any quality of humanity that Arendt attributes to nature, it is only that human beings' share a plural existence in the world together.

Khanna's argument is founded upon the disconnect between the rights and responsibilities that dignity supposedly commands, and the real experiences of stateless people and others against whom dignity has been violently instrumentalized. To illustrate this point, she turns to a 1998 incident in which three black Mozambicans who illegally immigrated to South Africa were savagely attacked by police dogs while police officers laughed and encouraged the attack. This brutal use of dog violence by South African police officers was not an isolated incident: Khanna notes that twenty-two other similar incidents were being investigated when “Indignity” was

³⁵ Hannah Arendt. *The origins of totalitarianism*. Vol. 244. Houghton Mifflin Harcourt, 1973: 66.

³⁶John Douglas Macready. *Hannah Arendt and the Fragility of Human Dignity*. Lexington Books, 2017: 60.

written. An international police dog trainer, Hans Schlegel, proposed that, because the majority of South African police dogs were so vicious and “psychologically sick,” most of them should be killed, or allowed to die with dignity. Khanna offers a compelling reflection on how dignity serves as an instrument of violence for the state in such a proposal:

It is as if killing the dogs will allow for the dignity of peoples, hallowed in the new South African constitution. Dignity would therefore be maintained through this remedial act of violence. The tainted dog is to be killed in order to save the idea both of dog and of human, and of a distinction between the two. Impossible to provide the dog with amnesty, as one might have done with the policemen a few years previously, they are to be killed. Entirely instrumentalized and used as a means, they carry the trace of political embarrassment. Because they are animals, their ‘psychological sickness’ cannot be treated and agency cannot be returned to them.

If the dignity of dogs can be protected by killing them, this may have troubling implications for how dignity is protected for human beings who, like these ‘sick’ dogs, are denied or born without agency. Dignity has already served as an instrument behind human suffering in, for instance, its use by regimes that have sought to protect the dignity of certain groups by violating the dignity of others through incarceration, torture and state-sanctioned violence.³⁷ It may be argued that the ideal notion of dignity in Kantian ethics and human rights would exclude such violations, because dignity is recognized as a universal and intrinsic quality of humanity: not a quality to be granted or maintained for dominant groups. Habermas insists that the “tension between idea and reality” does not demand an abandonment of the idea of dignity, even as dignity continues to be disrespected by the very institutions that have assumed responsibility for protecting it.³⁸ Efforts to protect dignity that depend on its continued violation, however, raise the question

³⁷ Matthijs Bal. A Review of Human Dignity. In *Dignity in the Workplace*, 55. Palgrave Macmillan, Cham, 2017.

³⁸ Habermas, Jürgen. The concept of human dignity and the realistic utopia of human rights. *Metaphilosophy* 41, no. 4 (2010): 478.

of whether dignity—whose meaning is relative, and tainted with connotations of wealth and rank—ought to be upheld as the basis of ethical responsibility.

The claim that human dignity should be protected by a polity presupposes that dignity may be lost to a person. This supposition is incompatible with a view of dignity as inherent and inextricable from the “nature” of the human. If one therefore abandons the idea that human persons have dignity by virtue of their bare human life—and not because of how they are positioned or treated in their social worlds—then dignity, as a relative worth, may be instrumentalized against those who are thought to be without it. Khanna explores how these internal contradictions in the category of dignity are manifest in the South African Constitution, whose core principle is respect for human dignity. A Constitutional Court case ruled that prostitution should remain criminalized in South Africa because the Constitution values “the fundamental dignity of the human body.” Two judges writing on the case noted that “The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute.” If dignity is indeed worth that cannot be infringed, it would not follow that human dignity necessitates the criminalization of prostitution, because payment for sex would have no effect on the fact that the prostitute is dignified. In Khanna’s terms: “To acknowledge that by definition, and by law, she is not dignified would be to challenge the intrinsic value of the human, and to reveal the obfuscation that the embrace of the category of dignity enacts.”³⁹ Even if the Constitution avoided this obfuscation by reformulating dignity as an alienable quality, its logic would still be undermined by the fact that criminalization exposes some prostitutes to circumstances that are arguably further “indignifying,” such as homelessness, poverty and incarceration. Dignity, construed as something

³⁹ Ranjana Khanna. Indignity. *Ethnic and racial studies* 30, no. 2 (2007): 267.

that is intrinsic to the human, cannot also be something that is vulnerable to infringement—unless one denies the humanity of those who sell access to their bodies.

Many critics of commercial assisted reproduction have analogized it to prostitution because both types of transactions are assumed to involve a “sale of the body,” which has dignity and therefore should not be assigned a price. There is, however, no intrinsic quality that meaningfully distinguishes these transactions from those that involve the sale of other forms of physical labor. That is, unless one accepts the claim that sexual and reproductive labor are arbitrarily exceptional and non-saleable: a claim that, for centuries, has subjected women to the expectation that they should altruistically offer the labor of reproduction and other “women’s work” without or with minimal compensation. Feminist political theorist Silvia Federici is well-known for her critiques of women’s exploitation, un(der)paid reproductive, sexual and domestic labor, and the interrelationships of these phenomena to colonialist expropriation. The International Wages for Housework Campaign of the 1970s,⁴⁰ which was formed by Federici and other feminists, articulated demands for the public payment of labor that women disproportionately perform without compensation: including housework, sexual reproduction and childcare. In “Precarious Labor: A Feminist Viewpoint,” Federici challenges dominant theories of precarious labor on the grounds that they ignore “one of the most important contributions of feminist theory and struggle, which is the redefinition of work, and the recognition of women’s unpaid reproductive labor as a key source of capitalist accumulation.”⁴¹ By reproductive work, Federici refers not only to the labor of sexual reproduction, but to all labor, including housework and care work, that reproduces labor power. If women were to cease the provision of any of these dimensions of reproductive

⁴⁰ Nicole Cox and Silvia Federici. Counter-planning from the kitchen: wages for housework, a perspective on capital and the left. *New York Wages for Housework Committee*, 1976.

⁴¹ Silvia Federici. Precarious labor: A feminist viewpoint. *The Middle of a Whirlwind* (2008): 6.

labor, this would mean ceasing the production of persons deemed fit to work and thereby sustain capitalist production.

This critique of women's exploitation has been scarcely applied in debates on the compensation of egg donors. One of the reasons for this omission may be that, in the case of some paid egg donor arrangements, women are not being compensated for work that they would otherwise do for free, but are rather drawn to the work primarily because it offers a source of income. Federici's critique can nonetheless inform an understanding of how compensating egg donors, when combined with other efforts to recognize (both socially and materially) the historically exploited labor of women, is consistent with feminist struggles against the instrumentalization of women's bodies. As Alana Cattapan emphasizes in an article that explores egg donation as work, viewing donors as workers, rather than gift or healthcare providers, may empower them to "negotiate the terms of their donation and to participate more actively in the conditions of their work."⁴² This understanding, Cattapan notes, also has the potential to subvert the naturalization of reproductive labor as something that women should give altruistically. Viewing egg donation as work only has emancipatory potential, however, in contexts where women have access to other work that is meaningful, adequately paid, and less precarious than egg donation. In the absence of such alternatives, offering compensation to donors can instead create pressure for women to sell their reproductive labor to people who can afford to command it.

It may also be argued that, in the case of commercial egg and embryo donation, what is for sale is not only the labor involved in producing biological material, but the material itself. The question of how this commodification differs from that of other products does call for further

⁴²Alana Cattapan. Precarious labour: on egg donation as work. *Studies in Political Economy* 97, no. 3 (2016): 251.

consideration. Is the fact that a product originates materially in the body—as opposed to immaterially, in the case of affective or cognitive products—something that raises separate ethical concerns with respect to its compensation? In a later discussion of issues of autonomy, I will argue that it does, but that these concerns derive from the conditions under which the sale of eggs and embryos may occur, not from the compensation itself.

Dignity as Positive, not Punitive

In many national contexts for which dignity grounds the rights of citizens, the concept is also appealed to as justification for introducing punitive consequences for participating in commercial reproductive donation. Interestingly, in the case of South Africa, there is not also a reference to dignity in the legislation that regulates assisted reproduction. The role of dignity as South Africa's core constitutional concept, however, suggests that it was likely part of the rationale for the prohibition of commercial reproduction. Chapter 8 of the National Health Act of 2003, which controls the use of human gametes, states that gametes may be removed only under medically prescribed conditions and with the informed consent of an adult. Although the law prohibits the sale and trade of gametes, donors in South Africa may still be compensated for costs incurred during the donation procedure.⁴³ In South Africa, and many other contexts in which compensation for donors is prohibited, the law enacts an erasure of the labor involved in the donation process and implies, instead, that only altruistic donations are compatible with the principle of dignity. In these contexts, dignity is punitively instrumentalized against poor women who may have turned to egg sale as a source of income.

Canada's *Assisted Human Reproduction Act (AHRA)*, to explore another example, does explicitly mention dignity. It begins by declaring that the benefits of ART can best be secured by

⁴³ Parliament, S. A. (2003). National Health Act No. 61 of 2003. *Pretoria: Government Printers.*

“taking appropriate measures for the protection and promotion of human health, safety, dignity and rights”⁴⁴ in their use. In accordance with these principles, the AHRA criminally bans attempts to sell and purchase human gametes; but it does not prohibit for-profit fertility clinics from charging IVF patients to make a profit.⁴⁵ In the case of Canada, as in other cases with a partial prohibition on payment, the law does not prevent the commodification of human gametes, but rather selectively criminalizes individuals and recipient families seeking to enter into paid arrangements. The criminalization of the egg trade in Canada remains largely symbolic, given that many couples and donors bypass the law by going to neighboring states in the US where paid arrangements are legal: it is estimated that more than 80% of cross-border treatments sought by Canadians are IVF with donor eggs.⁴⁶

The fact that a market in eggs and embryos continue to exist in places where it is prohibited suggests, furthermore, that issues of exploitation may be better addressed by empowering those who experience it in the infertility industry to seek legal recourse. Black markets in eggs have developed in response to various countries’ moves to outlaw compensation, and while research on these markets remains limited, some suggest that they only expose donors to further risk. In one extreme case, a seventeen-year-old girl who illegally sold her eggs to an infertile couple in Mumbai died shortly after undergoing faulty extraction procedures.⁴⁷ In such cases where a donor experiences complications during the donation process, under conditions of criminalization, it is

⁴⁴ *Assisted Human Reproduction Act*, S.C. 2004, c. 2

⁴⁵ Maneesha Deckha. Holding onto Humanity: Animals, Dignity, and Anxiety in Canada’s Assisted Human Reproduction Act. *Unbound: Harvard Journal of the Legal Left* 5 (2009): 40.

⁴⁶ Edward Hughes and Deirdre DeJean. Cross-border fertility services in North America: a survey of Canadian and American providers. *Fertility and Sterility* 94, no. 1 (2010): e16-e19.

⁴⁷ Chatterjee, Pyali. Human Trafficking and Commercialization of Surrogacy in India. *European researcher. Series A* 10-2 (2014): 1839.

not feasible for the donor to appeal to the law to remedy her situation.⁴⁸ These problems, granted, are also prevalent in contexts where lawful compensation may take place, but donors at least then have the option to legally mediate them. A concept of dignity that simultaneously problematizes commodification and criminalization may offer the most promise for minimizing harm in the infertility industry. It is possible to regard wage labor as fundamentally exploitative while also recognizing that unpaid labor may have equal, if not stronger, exploitative elements; it is likewise possible to affirm objections to the commodification of gametes and embryos while also finding one-sided altruism further objectionable.

If dignity has any claim on ethical considerations related to commercial assisted reproduction, it is that paying for labor should not equate to paying for the license to abuse persons or reduce them to instruments. The health and safety risks entailed in assisted reproduction—rather than being regarded as an inevitable consequence of the marketization of eggs and embryos—might instead be conceived as risks that brokers, medical professionals, and recipients in the transaction all have a responsibility to minimize and compensate for. This standard has been scarcely implemented in donor agencies, which often seek to extract the maximum amount of eggs during each donor cycle at the expense of donor health. One of the consequences of the commodification of eggs and embryos has been the erasure of the time, life and labor upon which their production depends.

Donna Dickenson, an American philosopher who specializes in bioethics, writes about this erasure in “The Lady Vanishes: Eggs for Reproduction and Research.” While donors themselves do not ‘vanish’ in the donation process—which involves close and continuous social engagement

⁴⁸ Charis Thompson. Why we should, in fact, pay for egg donation. (2007): 203-209.

with the recipients—their imposed status altruistic gift-givers (even in the case of compensated donation) undermines full acknowledgement of donors’ contribution. What “vanishes,” in Dickenson’s words, is the “labour and risk-taking that the women put into egg retrieval, along with the contractual commodification of eggs, camouflaged by the mask of ‘gift’.” Instrumentalization occurs in reproductive donation when there is limited recognition of donor labor and risk acceptance, because the value of the donor’s contribution is then located disproportionately in the “product”, or end, of the donation process. The product is valued above the person when, for instance, donors are excluded or not fairly compensated because their reproductive material does not match a desired genetic profile. Donors are similarly devalued when adequate precautions are not taken to minimize health risks because doing so could limit the net profitability of the donor arrangement. In such cases, the worth of the potential lives in question are genetically determined, rather than regarded as equal; and recognition of their worth is contingent upon a refusal to fully recognize the worth of the donor. There is often a clear disparity, Dickenson argues, between the actual value that the donor contributes in the donation process, and the valuation of their contribution by recipients and third parties. Like Khanna, Dickenson insists that greater attention should be directed to the “other” of dignity, but focuses instead on its role in the debate on exploitation in the ART industry. She suggests “a three-part model of exploitation, which adds the wrongs of degradation and loss of dignity to the injustice of disparity.” Exploitation, in other words, is not just about the value disparities between what is produced and what profit is gained: it may also be present when human beings are treated without respect or as mere instruments.

This section has explored the diverse roles of dignity as a philosophical concept that holds a claim about human nature, a foundation for human rights, and as a punitive instrument. The concept of human dignity, as an ethical imperative, may command deeper respect for the health

and labor of donors. It may, conversely, express damaging, ahistorical hypocrisy in the face of these continued violations—which are systematically enacted, not against humanity as a monolithic category, but against those who have been dehumanized on the basis of the particular status of their bodies and identities. Khanna proposes that “dignity” should be replaced with “disposability”, which incites attention to how populations have been singled out as targets for dehumanization. Dignity, given its universal character, may obscure the ethical problems raised by instances where one person or group becomes dignified through the dehumanization of another. “Disposability,” Khanna writes, “forces an understanding of how chrematistics is as much reliant on an idea of disposable income as it is on an idea of disposable people.”⁴⁹ The category of disposability, when examined in relation to income, wealth and human life, can also inform a realistic understanding of instrumentalization in reproductive donation. In the absence of access to free donations, it is primarily wealthy recipients who are still able to conceive through reproductive donation. Their wealth gives them command over the labor and reproductive material of women who may be economically poor, but “rich” in their fertility.

The globalization of reproductive medicine has given rise to widespread exploitation of cheap reproductive labor by fertility tourists from wealthy countries: a phenomenon that has appropriately been characterized as biological colonialism. Alison Bailey notes that wealthy recipients have been the primary beneficiaries of transnational paid fertility arrangements: “Wealthy and middle-class couples from North America, the Middle East, [China], Europe, New Zealand, and Australia travel to fertility clinics in India, Malaysia, Thailand, South Africa, Guatemala, Russia, and the Ukraine where services are significantly less expensive.”⁵⁰ These

⁴⁹ Ibid, 275.

⁵⁰ Alison Bailey. Reconceiving surrogacy: Toward a reproductive justice account of Indian surrogacy. *Hypatia* 26, no. 4 (2011): 716.

trends do not constitute a phenomenon that is unique to the age of assisted reproduction, but are rather an extension of the enduring exploitation of women’s labor at the intersection of capitalism, colonialism and sexism. Jyotsna Gupta, in an article on reproductive technology and self-determination, urges readers to question biomedicine that “imposes on us a relationship to one’s body that is based on laying claims on the body parts of others.”⁵¹ Irrespective of whether donor eggs are defined as “body parts” or products of the body, Gupta’s point holds: it is important to question conceptions of self-determination that are predicated on others’ exploitation. The category of disposability, in relation to the deselection of disability and certain genetic characteristics in commercial reproduction, can also inform challenges to conceptions of personal autonomy that regard the exclusionary creation of contingent life as a matter of self-determination.

Dignity insists that human persons share equal intrinsic worth, and that they should be treated as such; it encourages consideration of how a person may be treated as disposable, but *nonetheless be dignified*. Disposability acknowledges that those without wealth and power continue—despite ongoing appeals to human rights—to be treated as though they are worthless, or as though their worth is reducible to an external end. It invites consideration, instead, of how a person may be human, but *nonetheless be considered disposable*. The aim of this discussion is not to defend disposability as a concept that should formally replace dignity as a foundation for bioethics. Rather, it is to suggest that the concept of dignity—in its dominant formulation and deployment in human rights discourse—is insufficient for understanding and challenging the instrumentalization of reproductive labor and its products. The claim that the state should be the guarantor and protector of supposedly intrinsic dignity is questionable, especially when it is used

⁵¹ Jyotsna Agnihotri Gupta and Annemiek Richters. Embodied subjects and fragmented objects: Women’s bodies, assisted reproduction technologies and the right to self-determination. *Journal of Bioethical Inquiry* 5, no. 4 (2008): 248.

punitively against those who choose to sell their gametes and reproductive labor. If dignity is intrinsic to humanity, then a person's dignity cannot also be vulnerable to violation by oneself or others, unless the person's humanity is also denied. Especially for poor women the choice to sell eggs may be a matter of survival, and many proponents of its prohibition that appeal to dignity are effectively criticizing efforts to survive. Rather than functioning as a punitive instrument against women participating in commercial reproduction, dignity should undergird efforts to improve access to safer and more secure sources of income; resist the pathologization of infertility; and lead society to be more hospitable to people with disabilities and other traits that have become targets for deselection. These pillars would empower legal systems to shift toward a deployment of dignity that emphasizes positive, rather than punitive, intervention into the ethical issues surrounding commercial reproduction.

My critique of dignity's retributive role in many legal systems is three-pronged. Firstly, this role contradicts dignity's conceptual status as intrinsic, inviolable worth by presupposing that individuals can infringe their own and others' dignity. Secondly, it seeks to remedy a supposed violation of dignity by ethically problematizing the choices of individuals who are subjected to its violation, rather than the conditions that may compel them to "sell their bodies." Finally, the claim that gamete sale constitutes a particularly problematic form of instrumentalization may obscure the equally significant ways that bodies, ideas and affects are used in other labor arrangements, both paid and unpaid. If the use of bodies for economic and social gain infringes human dignity, then critiques of commercial reproduction that appeal to dignity are limited insofar as they do not challenge all labor that is not free from coercion. Bodies are used and harmed, to different degrees, in virtually every industry; in some industries, such as mining and construction, the risks of physical harm are often greater than those entailed in commercial reproduction. In other industries,

such as film and fashion modelling, workers (especially women) may be harmed in the ways that their physical attributes are treated as the primary or sole source of value in their labor. However, critics of the objectification, exploitation, and devaluation of labor that pervades these industries rarely suggest that entry into them should be criminalized.

The disparity between these critiques and those that target commercial reproduction suggests that women's reproductive labor, and the products thereof, are regarded as exceptional. This exceptional status is widely accepted without justification or explanation, and it has served to perpetuate both the criminalization of poor women and potentially exploitative demands for uncompensated reproductive labor. Research on gender disparities in the infertility industry has suggested that sperm sale, unlike egg sale, is regarded as work and that the commodity-quality of sperm is relatively uncontested in critiques of the infertility industry.⁵² The market in eggs is often differently contested on the grounds that egg donation should be provided altruistically, or that payment introduces a coercive incentive that may give rise to exploitation. Critics who emphasize the ethical unacceptability of the decision to become an egg donor often overlook the complicity of others in the production of donors' poverty and circumstances of desperation. Unless poverty ever ceases to be a driving force behind women's decision to sell their labor, then selective moral arguments against the compensation of specific forms of labor will remain limited through their failure to address the underlying causes of the violations at stake.

The purpose of this section has not been to reject the principle of non-instrumentalization. Rather, it is to ask how we might arrive at this principle through an understanding of human selves as relational—as subject always, and in particular ways, to laws that are not given by the self to

⁵² Diane M. Tober. Semen as gift, semen as goods: reproductive workers and the market in altruism. *Body & Society* 7, no. 2-3 (2001): 137-160.

self—and through an understanding of human nature, in the Arendtian sense, as something that presupposes nothing more than the fact of human beings’ plurality. In asking also how the principle of non-instrumentalization has itself been instrumentalized in the service of punitive interventions into assisted reproduction, one might cultivate constructive skepticism about the promises of dignity as a policy instrument, and about what Habermas calls “the realistic utopia of human rights.” The next section, which examines conceptions of autonomy and their relation to bioethics, will further explore the choice to participate in commercial reproduction and its contextualization within social relations that are often not freely chosen.

Autonomy

The above discussion has explored the relationship between autonomy and dignity, and autonomy’s primacy in the debate on commercial reproduction, in limited detail. It has noted that Kantian approaches construe reason as the basis of moral autonomy, autonomy as the basis of the human, and humanity as the basis of dignity. Autonomy of the will (or practical reason), for Kant, is a property of the will “by which it is a law to itself independently of any property of the objects of volition.” Many interpretations of this conception suggest that it means that the exercise of the will, if it is to be considered autonomous, must be unforced by factors other than an individual’s own reason. Such factors include, for instance, state-imposed laws that are not born from the reasoning of citizens, or conditions within the person that are thought to preclude action in accordance with independent rationality. Individuals who have autonomy, in the Kantian sense of the term, are capable of freely applying the faculty of reason to give moral laws to themselves.

The previous section also discusses how this approach to autonomy has importantly informed the development of ethical standards in the fields of medicine and biotechnology. The

doctrine of medical informed consent, for example, is based on the idea that patients should be free from coercive influence by doctors. The “informed” component of this doctrine recognizes that the capacity for meaningful medical decision making is optimized when patients are presented with comprehensive information about the options available to them, as well as the consequences that choosing each option would entail. The fact that autonomy is respected through informed consent does not, however, exonerate medical procedures from other ethical criticisms. In particular, procedures that are believed to harm the patient or other persons—which include commercial reproduction as well as procedures such as euthanasia, organ donation, genital reconstruction and abortion—have been problematized despite the possibility that they may be executed with informed consent. The prevalence of these criticisms suggests that respect for autonomy—construed as the capacity to make unforced decisions toward the end of self-determination—may not adequately serve as the sole basis for bioethical considerations.

Liberal defenses of gamete sale often characterize the donation procedure as autonomy-enhancing for both the recipient and the donor. For individuals and couples who struggle with infertility but hope to conceive a child, gamete sale introduces options that are often preferable to involuntary childlessness or adoption arrangements (which are sometimes more costly and complicated, if not wholly inaccessible). The use of donor gametes also enables the possibility of having a child with a genetic and gestational relationship to the recipients, which is rarely possible in the case of adoption. Additionally, these autonomy-enhancing experiences are often only possible for prospective recipients who are independently wealthy and can afford to pay for the medical procedures in the donation process. Furthermore, as IVF and reproductive donation become increasingly accessible and popular, some critics have expressed concern that their widespread use will exert coercive pressure on women who might not otherwise desire children to

conceive through ART. In a society where childless women are still stigmatized and devalued, it is questionable whether enhancements in women's capacity to reproduce should be unconditionally regarded as enhancements to their personal autonomy.

Commercial assisted reproduction may be autonomy-enhancing for donors by reducing coercive pressure to altruistically share their reproductive labor and materials with others. It may also enhance autonomy by offering a source of income that is favorable to alternatives that are less emotionally rewarding, more time-consuming, or more labor-intensive. For donors who do not want to have their own children, gamete sale can give fertile people the opportunity to enable their reproductive capacity to help themselves and others in ways that would not otherwise be possible. Commercial assisted reproduction may therefore challenge traditional gender roles that limit women's autonomy by encouraging women to have only one kind of relationship to their reproductive labor: namely, that of desiring and freely performing it within the confines of the heterosexual family.

On the other hand, the expansion of ART may subject prospective donors to the same pressure to engage in its use that recipients experience. Fertility treatments and egg retrieval, furthermore, are high-risk procedures that may compromise donor health. Some have argued that women who lack access to adequate information and resources for assessing these risks are not able to make an autonomous decision about whether to accept them. The compensation of egg donation, furthermore, may compel economically disadvantaged women who would not otherwise accept the risks of the procedure to become donors; critics emphasize that payment may undermine women's autonomy by incentivizing them to engage in potentially harmful procedures. It may be the case that reproductive donation is preferable, in some cases, to other sources of income; but Marxist anti-work perspectives have argued that the necessity of selling one's labor, and labor's

devaluation through the extraction of profit, makes all paid labor arrangements coercive. The assimilation of reproductive labor into the wage system would arguably grant greater recognition to its value; but it would not, in itself, challenge what some view as the inherent coerciveness of the wage system on a broader scale.

In this section, I will argue that relational conceptions of autonomy offer the best model for understanding what is ethically at stake in the debate on commercial assisted reproduction. The section begins with a discussion of relational autonomy's object of critique: liberty-centric perspectives that valorize self-determination while understating the moral significance of self-other relations. This will be followed by a discussion of relational approaches to autonomy and their formulation within feminist theory. The section will conclude by addressing how these relational approaches can be integrated into the debate on commercial assisted reproduction.

Liberal Conceptions of Autonomy

In many versions of liberal political theory, conceptions of autonomy are influenced by a Kantian notion of the self as an agent with a rational will. As the basis of human dignity, autonomy is an intrinsic human quality in Kantian ethics. However, unlike dignity, autonomy is less widely conceived as a natural quality that is maintained regardless of how persons are treated: instead, autonomy may be absent, denied, enhanced or restored. The above critique stresses the incompatibility of dignity's conceptual status as worth beyond all value, on the one hand, and its treatment as a value that may be taken away, on the other. Autonomy has a different, measurable character: many theorists write in terms of its diminishment or of a person having "more" or "less" autonomy. In the Kantian conception, autonomy is maximized when a person has the highest degree of independence—as a giver, not a follower, of moral law—from external influence. For some liberal theorists engaged in the debate on assisted reproduction, this end entails maximizing

the range of available options for reproduction as well as the refusal of it. Before examining how conceptions of autonomy are pertinent to this debate, however, I will briefly discuss liberal autonomy's theoretical foundations.

The work of John Rawls has been interpreted as one of the most influential contemporary endorsements of Kantian autonomy in liberal political theory. Rawls' concept of the Original Position (OP) is an expository device that has been compared to Kant's Categorical Imperative (CI), in that both devices rely on the supposition of rational, independent subjectivity. Unlike Kant, Rawls employs this device of representation to derive principles of justice, rather than universal moral principles, that are "political and not metaphysical."⁵³ In other words, the OP is concerned with the nature of democratic citizens instead of metaphysical ideas about the nature of the self.⁵⁴ Rawls explains that his conception of justice as fairness aims to arrive at overlapping consensus that accommodates diverse, plural conceptions of the good. The realization of justice as fairness, he writes, allows "the value of full autonomy" to also be realized; Kantian ethics, on the other hand, relies on a "comprehensive moral doctrine" to affirm the value of full autonomy.⁵⁵ In "Themes in Kant's Moral Philosophy" Rawls interprets the Kantian conception of autonomy as freedom from subjection to laws that would not emerge from an independent will:

the autonomy of a reasonable and rational being is to be "subjected to no purpose which is not possible by a law which could arise from the will of the passive subject itself." But when this passive subject [i.e, a subject affected by the actions of others] considers which laws can arise from its will, it must apply the CI- procedure.

⁵³ John Rawls. "Justice as Fairness: Political Not Metaphysical." In *Equality and Liberty*, 224. Palgrave Macmillan, London, 1991.

⁵⁴ Ibid, 231.

⁵⁵ Ibid, 246-247.

At an earlier point in the text, Rawls outlines the four steps of the CI-procedure presented in Kant's *Foundational Principles*. The first step involves stating the action to be undertaken by a person who is assumed to be a rational agent, the circumstances of the action, and the end of the action. The second and third steps involve universalizing the maxim that justifies the action in step 1 by imagining that it were to be applied by all people, always, under similar circumstances. If the stated maxim defeats its purported end once it is imagined as a universal law of nature, then the maxim must be rejected as a moral principle in the final step of the CI-procedure.⁵⁶ Rawls concisely outlines the process of moral deliberation undergone in this formulation of Kant's categorical imperative: "If we cannot at the same time both will this perturbed social world and intend to act from this maxim as a member of it, we cannot now act from the maxim even though it is, by assumption, rational and sincere in our present circumstances."⁵⁷

While the formula of humanity commands respect for persons as ends in themselves because they are autonomous, the formula of universality commands a rejection of any maxim that agents cannot will to become a universal natural law. Both of these formulas of the CI require that the agents are autonomous, or able to give moral laws to themselves, and without any moral order imposed upon them prior to being able to carry out this deliberative procedure. The idea of the original position developed in Rawls' *A Theory of Justice*, while intended as a device for arriving at practical rather than metaphysical principles, mirrors the CI by relying on a method of derivation that requires agents to abstract themselves, in thought, from their real, particular position. It may be argued that the OP involves a comparable procedure of universalization, given that this abstraction may lead individuals to imagine themselves not as disembodied subjects, but as

⁵⁶ Ibid, 3.

⁵⁷ Ibid.

subjects who may occupy the position of any and all other free and equal citizens. Rawls' explains that through this device, representatives assume a "veil of ignorance":

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.⁵⁸

Representatives in this situation, because they imagine themselves as free and equal, are "autonomous and the obligations they recognize self-imposed."⁵⁹ One limitation of this device that has widely been raised is that it may counter-factually assume that persons are naturally autonomous and not shaped by socially and historically contingent factors. In "Political not Metaphysical," Rawls later dismisses this charge in by noting that it is based on a failure to regard the OP as a representational device rather than a claim about the nature of the self. The veil of ignorance, he writes "does not imply that the self is ontologically prior to the facts about persons that the parties are excluded from knowing. We can, as it were, enter this position any time simply by reasoning for principles of justice in accordance with the enumerated restrictions."⁶⁰ Rawls' reason for developing the idea of the OP is not to defend a particular metaphysical doctrine, but rather to empower parties within it to arrive at principles of justice that are founded upon ideal conditions of freedom and equality—which, he suggests, are preconditions for full autonomy. If citizens develop laws based on a conception of themselves as free and equal, and if those laws are agreeable to all who are subject to them, then citizens have autonomy in the Rawlsian sense of the term: they give the law to themselves.

⁵⁸ John Rawls. *A theory of justice: Revised edition*, 11. Harvard university press, 2009.

⁵⁹ *Ibid*, 12.

⁶⁰ John Rawls. "Justice as Fairness: Political Not Metaphysical." In *Equality and Liberty*, 224. Palgrave Macmillan, London, 1991.

The OP nonetheless remains vulnerable to the charges that ideal autonomy may not be a condition of independence of the self from others, and that abstracting from our social and historical contingencies—even if only through a synthetic device—is a suitable way to derive principles of justice. To illustrate how the OP does not make any metaphysical claims about the nature of the self, Rawls compares it to a game of Monopoly, wherein players imagine themselves as competing landlords but do not commit themselves to believing that the game reflects their actual position.⁶¹ Relational critics might respond that even in the context of such a game, our real, socially embedded selves influence the way that we play, and that it is better to confront them in their full visibility than to deploy an imagined position of full autonomy as a point of departure for thinking about justice. Autonomous agents in the OP are also responsible for deriving principles of justice in profoundly limited terms of distributable benefits and burdens: limited, perhaps, because the veil of ignorance is deployed to minimize any consideration of subjective experiences and values.

Acknowledging this limitation does not require a rejection of the contribution that Rawls and other liberal political theorists have made: distributive justice is undoubtedly relevant to the politics of assisted reproduction and its commercialization. In an article that examines Rawlsian principles of justice alongside the question of whether public coverage for IVF is justifiable, Vida Panitch suggests that infertility treatment may be understood as a basic need insofar as infertility “eclipses our ability to reflect rationally on questions of value, or to commit ourselves to goals as such, the way hunger, thirst or fever do.”⁶² Given that this sense of need is not experienced by everyone, and that infertility is an “unpredictable incident,” Panitch argues for a contractarian

⁶¹ Ibid, 239.

⁶² Vida Panitch. Assisted reproduction and Distributive Justice. *Bioethics* 29, no. 2 (2015): 113.

insurance-based model of public health care, in which IVF would be covered under two conditions: cases of medical necessity, and cases of inability to afford the procedure.⁶³ Regardless of whether this conclusion is convincing, it offers one example of how distributive justice has meaningful applications to the debate on assisted reproduction. Questions of economic inequality, health care needs, and the responsibility of political communities to provide for those needs collectively are all questions that pertain to distributive justice. However, liberal distributive justice and its autonomous subject have limited applications to important issues of justice concerning that which is not distributable. Such issues that are at stake in the present discussion include, for example, the social imposition of gender roles, the devaluation of certain forms of embodiment, and the treatment of intersubjective relations as object relations. These injustices concern not only the distribution of rights and resources, but also the affective dimensions of suffering, fear, stigma and degradation, whose qualitative substance is effaced when one synthetically assumes full autonomy.

Like the Kantian concept of dignity, the Rawlsian concept of autonomy is based on an ideal, rather than material, understanding of human beings' experience in the world. Gendered social pressures and poverty have not been eradicated in the era of assisted reproduction, and neither donors nor recipients are able to exercise the neutral, abstracted form of rationality assumed by Rawls and other liberal theorists. This point is not intended to suggest that women, and poor women in particular, are incapable of rational deliberation as it concerns reproductive choices. Instead, it suggests that the risks and stakes of these choices are higher than, and qualitatively different from, those that are faced by men. The relational approach to autonomy emphasizes that

⁶³ Ibid, 117.

these differences must be contended with in any discussion of the ethical issues posed by commercial reproduction. I will now turn to a more detailed analysis of this perspective.

Relational Critiques of Liberal Autonomy

Feminist bioethical theory has challenged the dominant view in bioethics that informed consent is the only basis upon which a medical choice may be considered autonomous. Relational approaches seek to unearth the ways in which consent, rather than being neutral and uniform among those who provide it, is context-dependent. Feminist philosopher Susan Sherwin, in a critique of liberal autonomy developed when the field of bioethics was emerging, notes: “we need to move away from the familiar Western understanding of autonomy as self-defining, self-interested, and self-protecting, as if the self were simply some special kind of property to be preserved.”⁶⁴ In order for a theory of autonomy to retain its relevance for women, it should take into account not only the self, but also self-other relations and their enmeshment in systems of power. These considerations shift our attention away from efforts to enhance autonomy by promoting informed consent, and toward ways of ensuring that consent emerges from a consideration of plural, meaningful, and accessible options.

A relational approach is particularly crucial for understanding issues of autonomy in assisted reproduction, in which interdependent relations between fetuses, their genetic and gestational parents, and those who mediate the donation process are each influencing the choices of all involved parties. Reproductive choices are made within a complex web of social relations, and particularly in the case of reproductive donors, the interests of fetuses, recipient families, doctors and brokers are all operant and considered to some degree. In this sense, it is not realistic

⁶⁴ Susan Sherwin. *The politics of women's health: Exploring agency and autonomy*. Temple University Press, 1998: 35.

to think of autonomy in assisted reproduction in terms of mutually self-interested and individuated actors. This understanding is nonetheless compatible with a view of autonomy that affirms self-determination as a goal. Relational theories of autonomy, in the words of legal scholar Pamela Laufer-Ukeles, “acknowledges the many social and contextual constraints that may be placed on choices while simultaneously recognizing that there is value in self-determination.”⁶⁵ For Laufer-Ukeles, self-determination is not achieved merely by leaving women alone to choose, but by also empowering them with the information, resources, and opportunities for reflective deliberation that are essential to meaningful reproductive choice. She argues for the replacement of the informed consent model of medical ethics by a relational model of an informed consent “consultation.” Within this model, women seeking to undergo ART procedures would have an opportunity to consult with informed consent counselors that would allow them to discuss and deliberate any concerns, motivations, or sources of confusion.⁶⁶

While it would be beyond the scope of the present discussion to contend with the advantages of this specific model for enhancing women’s autonomy in assisted reproduction, the limitations of informed consent that it seeks to remedy are pertinent. Specifically, proponents of the informed consent model tend to regard consent and autonomy as fixed, rather than variable, conditions. Laufer-Ukeles emphasizes that autonomy is a condition that can only be facilitated—not guaranteed—and that consensual behavior may occur in a coercive environment and may not be “truly desired under more optimal conditions.”⁶⁷ Some feminist scholars argue that consent given within coercive social environments are wholly invalid, and that choices cannot be

⁶⁵ Pamela Laufer-Ukeles. Reproductive choices and informed consent: fetal interests, women's identity, and relational autonomy. *American Journal of Law & Medicine* 37, no. 4 (2011): 584.

⁶⁶ *Ibid*, 587.

⁶⁷ *Ibid*, 585.

considered autonomous if they are significantly influenced by those environments. Contrary to this position, I argue in favor of a view of relational autonomy that accepts that it is impossible for individuals to reason and act outside of their given social contexts, but affirms the possibility of agency that is not altogether socially determined.

Mark Bevir emphasizes the importance of the distinction between autonomy and agency in a reading of Foucault's theory of power: a theory that is drawn upon by many contemporary critiques of the sovereign, independent subject. In Bevir's reading, agency is the condition of being able to exercise reason, formulate beliefs and act within regimes of power/knowledge. According to Foucault's theory, subjects are never autonomous agents who are able to act independently from their social contexts. However, agency must nonetheless be retained in an understanding of the formation of the human subject, if only because "we cannot individuate beliefs or actions by reference to the social context alone."⁶⁸ Whereas liberal autonomy connotes individuation and separation from relationships and social circumstances, agency emerges through "collective action as well as individual self-reflection," and is directed toward targets that are both cultural and individual.⁶⁹ The value of self-determination is retained in feminist conceptions of agency, but through the understanding that selves are determined by relational, rather than independent, subjects. By building upon this framework of relationality, the next section will examine several core issues in commercial assisted reproduction that complicate the perception of ART as a largely autonomy-enhancing development. Versions of this critique are already prominent in feminist and disability rights scholarship on assisted reproduction, so I will not devote extensive attention to

⁶⁸ Mark Bevir. Foucault and critique: Deploying agency against autonomy. *Political theory* 27, no. 1 (1999): 68.

⁶⁹ Kathryn Abrams. From autonomy to agency: Feminist perspectives on self-direction. *Wm. & Mary L. Rev.* 40 (1998): 805.

rehearsing them. My primary aim is to show how the discourses of dignity and relational autonomy, and their interconnections, can shed new light on our understanding of the central ethical issues in the ART debate.

Issues of Autonomy in Assisted Reproduction: Integrating the Relational Approach

Commodification, Exploitation and the Agency of Donors

The problems of commodification and exploitation in commercial reproduction have already been discussed in regard to how they may infringe human dignity. This section is specifically concerned, instead, with how these problems also undermine donors' capacity for autonomy in the context of the donation process. Commodification refers to the process by which something is increasingly treated a marketable, fungible good. Exploitation is widely conceived as a related process whereby individuals are used, and value is extracted from their labor or bodies, primarily for the benefit of those with power over them. In Marxist theory, both of these processes are understood to be driven and exacerbated by capitalist production. As capitalist production continues to expand, no object or product is invulnerable to commodification, and no workers who are dependent on wage labor for their survival is free from exploitation. The age of assisted reproduction has progressed concomitantly with new, but familiar, forms of commodification and exploitation; and these developments pose serious limitations for the autonomy of women donors.

Donna Dickenson describes the commodification of “practically everything”—from all forms of labor, to all objects, to, increasingly, all human bodies and their parts—as a pernicious effect of late capitalism. In her description of the Marxist framework, this commodification corresponds to the breaking down of walls “between the natural and productive realms”⁷⁰ which

⁷⁰ Donna Dickenson. Commodification of human tissue: implications for feminist and development ethics. *Developing World Bioethics* 2, no. 1 (2002): 63.

might alternatively be conceptualized as that which is believed to have inherent value and that which has market value. Since the possibility of using donor gametes and embryos in IVF was first introduced, the development of this process has been plainly observable: products of the body that were once non-saleable are now widely sold, subjected to quality control measures and treated as exchangeable property. Dickenson emphasizes that it is not the fact of compensation for eggs, and the labor entailed in providing them, that alone constitutes a form of commodification. Compensation can serve as a way of recognizing their value, rather than seeking to obscure how commodification is also present in the context of “gift” relationships.⁷¹ There is no purely altruistic gift-giving in donor arrangements that allow third parties to lucratively benefit from the “gift” of egg donation. “If donors believe they are demonstrating altruism,” she writes, “but biotechnology firms and researchers use the discourse of commodity and profit, we have not ‘incomplete commodification’ but complete commodification with a plausibly human face.”⁷² While recipients of altruistic reproductive donation do not explicitly use similar language, many treat their “gifts” as though they are commodities: subject to demands for particular features and standards of quality.

Another line of distinction between that which is commodified and that which is non-marketable is that of property: individuals may claim a proprietary relationship (i.e., one of ownership) to any commodities in a market simply by buying them. That which is non-marketable, conversely, cannot be owned in the same way by single individuals. There are at least two ways in which the commodification of eggs and embryos may undermine donors’ autonomy: by introducing further social pressures and economic incentives for women to sell their eggs, and by

⁷¹ Ibid, 61.

⁷² Ibid, 62.

contributing to the development of property rights in the body, which compromises donors' claim to how their eggs are used. Merleau-Ponty and other theorists of embodied subjectivity construe the body not as an alienable object that subjects may *own*, but rather as the being that subjects *are*.⁷³ In contrast, relational accounts of the subject—while acknowledging that agency gives subjects the status of being more than their bodies—grant that the body is importantly constitutive of personhood and subjectivity. Claims to property rights in human body parts and products, in this sense, may amount to claims to components of others' personhood. In the case of both egg sale and altruistic donations, property rights in eggs are recognized, claimed, transferred and renounced. The treatment of eggs as property is especially prevalent in legal systems where donor arrangements have been assimilated into contract-based and informed consent models. In the United States, for example, egg donors seeking to retroactively withdraw consent for the recipient family to use their eggs cannot easily do so. In most states, while donor contracts are not legally enforceable, donors would have to appeal to courts of law to prevent the eggs from being used in IVF.⁷⁴

Proponents of donor arrangements' assimilation into contract law often emphasize that the right to self-determination should include the right to alienate and transfer their biological materials. Even if one grants recognition of this right, however, it is important to take seriously the context and consequences of an irrevocable and binding model of transference. In non-transactional contexts where access to the body is consented to (e.g., in sex or medical procedures), few would object to the idea that consent can be retracted. However, when a product or function

⁷³ Nick Crossley. Body-subject/body-power: agency, inscription and control in Foucault and Merleau-Ponty. *Body & society* 2, no. 2 (1996): 99-116.

⁷⁴ Andrew W. Vorzimer, The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract. *Whittier L. Rev.* 21 (1999): 415.

of the body is commodified and paid for, payment corresponds to a sense of entitlement to others' bodies. This entitlement constitutes one of the core reasons why the commodification of reproductive materials poses a threat to the autonomy of donors, and in particular, those whose entry into donor arrangements is influenced by economic desperation. Countless critics of transnational reproduction, as previously noted, have called attention to how it depends on the exploitation of poor women in poor countries, predominantly in the Global South, and predominantly by wealthy infertile couples.⁷⁵ Some liberal proponents of the commodification of reproductive labor and materials, meanwhile, highlight its potential to generate new, meaningful economic opportunities for poor women.⁷⁶ While this potential advantage should not be discounted, and while the claim that poverty and agency are mutually exclusive should be rejected, it is not evident that labor arrangements that are often insecure, unsafe, and exploitative should be lauded as an empowering expansion of economic opportunity.

Margaret Jane Radin, whose theory of market inalienability is prominently referenced in critiques of the commodification of human biological materials, calls the choice between starving and self-commodification a “double bind.” Rather than arguing for the universal non-commodification of labor, however, Radin maintains that only certain goods and services are market inalienable (i.e., unfit for sale in a free market).⁷⁷ Her position is that it is morally unacceptable to speak of *personal* attributes, such as bodily integrity, as *fungible* objects. She draws an unclear distinction between that which is personal and that which is fungible by defining these categories primarily through examples. If that which is market inalienable includes anything

⁷⁵ Michal Nahman. Reverse traffic: intersecting inequalities in human egg donation. *Reproductive Biomedicine Online* 23, no. 5 (2011): 631.

⁷⁶ Michelle Leve. Reproductive bodies and bits: Exploring dilemmas of egg donation under neoliberalism. *Studies in Gender and Sexuality* 14, no. 4 (2013): 277-288.

⁷⁷ Margaret Jane Radin. Market-inalienability. *Harvard law review* (1987): 175.

that is importantly constitutive of personhood, then it demands an embrace of labor's universal non-commodification. Radin and others who reject universal non-commodification often insist that commodification has progressed too far for any argument for its full reversal to be feasible. While I concede to this claim, there are minimum ethical commitments that opponents of commodification should hold in this age of hyper-commodification: namely, the fair compensation of labor, the treatment of workers as persons and not things, and resistance to exploitation. These commitments should be informed by an understanding that all labor is inextricably bound to personhood and to the body.

What makes the use of poor women's eggs in transnational reproductive donation exploitative is not that their impoverishment alone "forces" them to enter into donor arrangements; to reduce this decision to a matter of capitulation to force is to deny that poor women donors also exercise agency. Rather, exploitation occurs when wealthy couples take advantage of their condition of impoverishment to undervalue donors' labor and reproductive materials. In a chapter on unconscionable contracts in *Exploitation*, Alan Wertheimer argues that the conscionability of contracts must be assessed from the perspectives of both autonomy and the contract's consequences. The conditions of conscionability, in Wertheimer's theory, are that those who are bound to it enter "freely and with (relatively) full information," and that the contract is mutually advantageous and fair.⁷⁸ A contract may be consensual, but nonetheless unfair, and therefore unconscionable. Disparate exchanges of value, abuses of bargaining, and the act of one party taking advantage of a weakness of the other are all factors that may undermine the fairness of a contract.⁷⁹

⁷⁸ Alan Wertheimer. *Exploitation*. Princeton University Press, 1999: 39.

⁷⁹ *Ibid*, 40.

Each of these exploitative elements may be present in egg and embryo donor arrangements, and they are particularly prevalent in the case of transnational reproduction involving poor donors and wealthy recipients. Indeed, one of the most common motivations that drive transnational reproduction, aside from the avoidance of legal barriers, is to compensate donors with the minimum value possible. To put international compensation disparities in perspective: some US egg donors can expect to be paid up to \$30,000 per donation cycle, while many donors in the Global South are often paid considerably less.⁸⁰ Admittedly, the compensation offered to economically disadvantaged donors may be greater than, and preferable to, their alternative sources of income; but the very fact of its preferability—despite the routine underpayment of donors from poor countries—may compel some to turn to reproductive donation when they might otherwise not. The autonomy-enhancing effects of reproduction’s entry into market relations, therefore, are arguably limited to privileged recipients and donors who have access to a range of other equally rewarding options.

Pronatalism and the Pressure to Reproduce

Another crucial limit to the autonomy of those engaging in commercial reproduction is the social pressure to have children that many adult women experience. This pressure is arguably more elusive and covert today than it has been historically; but it continues to uphold the attribution of reproductive and maternal affinity to the “nature” or “essence” of women. Pronatalism and liberal regulations of ART are also linked to nationalism in some countries. Michal Nahman’s research on Israel, which has more IVF clinics per capita than any other country, notes that the state’s demographic policies “are designed to encourage the growth of the Jewish population in its

⁸⁰ Dickenson, 62.

demographic race against Palestinians.”⁸¹ It is now also well-known that a selective pronatalism-nationalism link was evident in Nazi Germany’s policies on abortion, forced sterilization, and forced pregnancy—all of which differently affected “German-blooded” and Jewish women.⁸² Both pronatalism and antinatalism, particularly when they take the shape of policies formally endorsed by the state, can undermine women’s autonomy by limiting the extent to which their reproductive choices derive from their own agency. When women’s reproductive decisions are based principally on consideration of the adverse social consequences of choosing either to have children or to remain child-free, these decisions may hardly be considered fully autonomous. Some feminist critics have argued that the development and growing use of ART has contributed to the expectation for women to have children. Women who do not want children, for example, can now have them relatively easily even if potential barriers such as infertility or an active career would otherwise prevent it. These are no longer conditions, in other words, that spare women who embrace voluntary childlessness from the pressure to reproduce.

Ethnographic research on women’s lived experiences with IVF has shed light on how the stigma attached to childlessness, and the emotional pain associated being stigmatized, factors significantly into women’s decisions to seek infertility treatments. While, prior to the age of assisted reproduction, infertile couples would choose to remain childless or adopt, Whiteford and Gonzalez find that the promises of new medical interventions have led many infertile women to become “consumed” by the desire to conceive, sometimes “even to the detriment of their own health, marriage and financial status.”⁸³ In the US and other pronatalist societies, this desire is

⁸¹ Nahman, 626.

⁸² Gisela Bock. Racism and sexism in Nazi Germany: Motherhood, compulsory sterilization, and the state. *Signs: journal of Women in Culture and Society* 8, no. 3 (1983): 411.

⁸³ Linda M. Whiteford and Lois Gonzalez. Stigma: the hidden burden of infertility. *Social science & medicine* 40, no. 1 (1995): 27.

influenced and reinforced, for example, by government policies that reward parenthood through tax deductions and other public benefits. Whiteford and Gonzalez' interviews with women who underwent fertility treatment also reveal that many women experience pressure from their doctors to regard their infertility as an illness for which a medical intervention is necessary.⁸⁴ Even when infertile couples are able to conceive through IVF with donor gametes, however, having a child does not eliminate the burden of infertility stigma, as the infertile status of the recipient(s) is not changed through third-party intervention. In another ethnographic study of couples who conceived through assisted reproduction, Ken Daniels finds that the social stigma of infertility may have a permanent negative impact on the self-image of couples, which leads some to keep their use of IVF a secret.⁸⁵

It is especially apparent, for recipient mothers, how egg donation for IVF can lend itself to a pronatalist agenda. Donor agencies, as for-profit businesses, benefit from the escalating medicalization and pathologization of reproduction; they also benefit from the corresponding commodification of reproductive labor. It is less clear whether the discourse surrounding donors, on the other hand, echoes a similar form of pronatalism. Firstly, donors often serve as intermediaries between recipient families and their potential children—not as people who participate directly in raising children. Secondly, many of the health-based objections to ART highlight the potential damage to, or loss of, women's fertility. These arguments, in turn, reinforce the pathologization of infertility even as they claim to be opposed to it. Just as a robust conception

⁸⁴ Ibid, 28.

⁸⁵ Ken Daniels. Does assisted reproduction make an impact on the identity and self-image of infertile couples?. *Journal of assisted reproduction and genetics* 16, no. 2 (1999): 58.

of personal autonomy should include the freedom to enter unfair contracts, reproductive autonomy should include the freedom to regard one's fertility as disposable.

Ableism, Disability Deselection, and Genetic Determinism

Ableism also poses limits to women's autonomy in assisted reproduction, particularly as it concerns recipient mothers. The development of ART has allowed women to exercise greater selectivity in determining the genetic profile of their potential children. Many donor agencies facilitate the deselection not only of genetic diseases, but also the (de)selection of genetic traits that correspond to skin tone, height, hair and eye color, and cognitive, artistic and athletic abilities. The genetic determinism exercised in this process, particularly in the US context, is attributable not only to the demand of recipients: donor agencies often deselect traits considered "undesirable" at the stage of donor recruitment and preliminary counseling. Donor selection processes within the infertility industry both constitute and are constituted by the desire of many couples to have children that are both healthy and genetically related to them.

Seline Quiroga, in an article on the deployment of race and racialized desire in the industry, asserts that US donor agencies' claim that they "help create families" is misleading. They facilitate the creation of a particular kind of family: namely, the "heteropatriarchal model of a white nuclear family."⁸⁶ To corroborate this claim, she explores genetic "matching" practices within both sperm banks and donor agencies, wherein traits of gametes are identified, labeled, and offered to related families. Donor samples at a sperm bank in California, for example, are categorized racially, and those samples that cannot be connected to a "pure" (i.e., unmixed) racial category receive labels

⁸⁶ Seline Szkupinski Quiroga. Blood is thicker than water: Policing donor insemination and the reproduction of whiteness. *Hypatia* 22, no. 2 (2007): 144.

that refer to “unique ancestry donors.”⁸⁷ This pure/mixed distinction reinforces the privileging of genetic relatedness in the infertility industry, while also advancing the socially determined and contestable idea that there is such a thing as “pure” races and ancestral backgrounds.

Genetic disorders detected in eggs and sperm samples, meanwhile, are not only categorized and separated, but also systematically removed from the pool of options available to recipient families. During the application stage, donors are asked about their medical history and are typically disqualified if they report a history of genetic disorders, disabilities or mental health diagnoses.⁸⁸ Donor selectivity in the infertility industry does not merely mimic the selectivity of couples who choose to have children independently. In an empirical analysis of a large sample of donor gamete data in the US, Daniels and Forsythe found that “positive eugenic” beliefs are mirrored in the ways that recipient families base their selection on an expansive and detailed profile that incorporates factors such as genetic information, ethnicity, education level and height and weight.⁸⁹

The fact of donors’ compensation, again, corresponds to a sense of entitlement to exercising this excessive selectivity. The prevalence and depth of selectivity in genetic traits constitutes another way that commercial assisted reproduction can undermine autonomy on the part of both prospective donors and recipients. While recipient families could feasibly reject the option to select donor gametes on the basis of their genetic profile, the pervasiveness of genetic

⁸⁷ Ibid, 150.

⁸⁸ Jason Keehn et al. Recruiting egg donors online: an analysis of in vitro fertilization clinic and agency websites' adherence to American Society for Reproductive Medicine guidelines. *Fertility and sterility* 98, no. 4 (2012): 995-1000.

⁸⁹ Cynthia Daniels and Erin Heidt-Forsythe. Gendered eugenics and the problematic of free market reproductive technologies: Sperm and egg donation in the United States. *Signs: Journal of Women in Culture and Society* 37, no. 3 (2012): 719-747.

determinism in the infertility industry would cause such a choice to be treated as abnormal, and therefore covertly discouraged. For prospective donors, the economic and emotional benefits of becoming a donor may be fully denied based on a factor as trivial as not meeting a minimum height requirement. It is important to acknowledge the autonomy-enhancing benefits of the development of gamete donation, but it is equally important to understand that the particular shape these developments have taken mean that those benefits are accessible only to a particular portion of people who access ART procedures.

Conclusion

This thesis has explored how the concepts of dignity and autonomy both intersect and conflict with each other in contemporary debates on the politics of commercial assisted reproduction. Scholars in these debates have hitherto engaged with the conceptual roles of dignity and autonomy independently, and my objective has been to integrate these concepts in a way that elucidates and reconciles their tensions. The discourse of dignity is primarily divided between those who regard it as a crucial buffer against the reduction of human life to a mere instrument, and those who argue that dignity is empty, redundant, or a hindrance to scientific progress. My analysis has shown how a different, marginal critique of dignity—one that upholds the principle of non-instrumentalization, but rejects the deployment of dignity as justification for state coercion—may be fruitfully applied to ethical considerations about the sale of human gametes. In order to have a legal role as the principle of non-instrumentalization, furthermore, dignity should be understood as worth that is politically affirmed, rather than naturally granted. The view of dignity as intrinsic assumes that human beings are dignified irrespective of how they are treated, and therefore works as a weaker imperative for rejecting the treatment of people as mere

instruments. Although the Kantian conception of dignity is grounded in human beings' autonomy, dignity has also been appealed to in ways that undermine autonomy by moralizing the decisions that people make about what happens to their bodies. The case of assisted reproduction is only one such example, but this appeal is relevant to a broad range of other bioethical debates, including those on abortion, sex reassignment surgery, euthanasia and substance use. While respect for personal autonomy may necessitate respect for the freedom to make independent decisions about these and other issues, I have argued that only a relational approach to autonomy can allow scholars and policymakers to account substantively for how such decisions are influenced by their social contexts. When society impresses upon people that certain forms of life are disposable or not worth living, then efforts to enhance and respect autonomy by respecting individual agency must be paired with efforts to minimize the damaging social pressure that stems from this impression.

An overarching claim of this thesis is that there is no monolithic narrative of the consequences of gamete donation and other ART procedures that would allow one to characterize them as essentially degrading or emancipatory. People who engage in assisted reproduction have diverse motivations and experiences with their choice to do so. Claims that this choice is always free, or otherwise not a choice at all, reduce the complexity of their narratives to something that can be understood through idealized conceptions of dignity or autonomy. Punitive state interventions into assisted reproduction are often founded upon one such ideal conception, as are arguments for ART's assimilation into a fully unregulated, free-market model of economic and reproductive choice.

I have not proposed and defended specific policy approaches that would allow this complexity to be respected and accounted for in the regulation of ART procedures. Rather, this thesis has sought to demonstrate the necessity of developing such approaches, which leaves fertile

ground for future research on assisted reproduction and its regulation. I have underscored the limitations of policy models that criminalize women for seeking to benefit from compensated donor arrangements. This critique has been formulated alongside a concession to equally important critiques of US-style approaches, which are characterized by hyper-commodification and the pursuit of problematic ideals of health, able-bodiedness and racial purity. Each of these models has a strength that the other one lacks, and bioethical researchers and policymakers should develop ways to integrate them. The general policy approach that this thesis gestures toward is one that affirms women's agency, resists criminalizing them for entering into consensual arrangements, and respects human dignity by discouraging the instrumentalization of human gametes for the creation of genetically contingent life.

The goal of enabling commercial assisted reproduction to positively affirm dignity and agency cannot, however, be limited to internal interventions. Many of the ethical concerns associated with assisted reproduction derive not from the procedures themselves, but from their contextualization within environments that exert coercive pressure on people, and particularly women, to use them in specific ways. Future research should also address issues outside of the realm of assisted reproduction—including issues related to poverty and global inequality, capitalist production, gendered social pressures, ableism and genetic determinism—to contend with the problems within it. When scholars and policymakers narrowly focus their attention on ways to extend the criminalizing capacity of the state, necessary attention may be lost to the structural economic and political conditions that drive the problems of instrumentalization, commodification and exploitation.

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