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## The Social Life of Blood, Milk and Sperm

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## THE SOCIAL LIFE OF BLOOD, MILK & SPERM

Martha M. Ertman\*

KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK AND SPERM IN MODERN AMERICA* (HARVARD UNIVERSITY PRESS 2014) PP. 352. HARDCOVER \$ 37.00.

### I. INTRODUCTION

In *Banking on the Body* Kara Swanson exhaustively documents Americans' long and varied history buying and selling blood, mothers' milk, and sperm.<sup>1</sup> By mapping the social life of these things<sup>2</sup> as they have moved in and out of the market from the late nineteenth century until the present day, she debunks the myth that human bodies (and their components) have remained outside of the market since the Thirteenth Amendment abolished slavery and involuntary servitude. No longer can any reasonable person claim that an impermeable barrier separates things that are for sale from those that are not.

Instead, as commodification theorists have long pointed out, things go in and out of the market.<sup>3</sup> Cocaine was sold in Coca-Cola and the Sears catalogue until criminal statutes forbade its sale and consumption, a transition greased by racist fears that the drug drove African-American men to rape white women.<sup>4</sup> After decades of being banned, marijuana is gradually re-entering the market, first for medicinal purposes, and in some states for

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1. KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK & SPERM IN MODERN AMERICA* (2014).

2. ARJUN APPADURAI, *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 3 (1986).

3. See, e.g., RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* (2011); MARTHA M. ERTMAN & JOAN C. WILLIAMS, *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 9 (2005); ELIZABETH ALICE CLEMENT, *LOVE FOR SALE: COURTING, TREATING, AND PROSTITUTION IN NEW YORK CITY 1900-1945* 1 (2006); MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006); VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 169-70 (1994); VIVIANA A. ZELIZER, *THE SOCIAL MEANINGS OF MONEY: PIN MONEY, POOR RELIEF, PAYCHECKS, AND OTHER CURRENCIES* 7 (1997); VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 18-19 (2007); I. Glenn Cohen, *Can the Government Ban Organ Sale? Recent Court Challenges and Future of U.S. Law on Selling Human Organs and Other Tissue*, 12 AM. J. TRANSPLANTATION 1983 (2012).

4. James Hamblin, *Why We Took Cocaine out of Soda*, THE ATLANTIC (Jan. 31, 2013), <http://www.theatlantic.com/health/archive/2013/01/why-we-took-cocaine-out-of-soda/272694>.

recreational use.<sup>5</sup> Children available for adoption were once listed in newspaper classified ads, but today adoptive parents cannot pay a birth mother to relinquish her child (though they can pay for her medical and legal bills, and sometimes living expenses like rent and maternity clothes).<sup>6</sup>

Sociologist Viviana Zelizer uses the phrase “hostile worlds” to describe the analytic error of seeing some things and relationships as essentially inside or outside of the market.<sup>7</sup> In the same way that Swanson describes blood, sperm, and milk going in and out of the market, Zelizer has documented Americans’ initial resistance to letting life insurance put a price on someone’s life and would-be adoptive parents paying adoption agencies.<sup>8</sup> My own work builds on this idea, revealing exchanges in unexpected contexts. For example, people routinely contract in and out of parenthood even in jurisdictions where courts claim to reject parenthood by contract.<sup>9</sup> Family law, through the Uniform Parentage Act in its various iterations, allows gamete donors to sell their parental right and duties and allows recipients of that sperm or those ova to purchase parenthood.<sup>10</sup>

But norms are another matter. Even if pot and parenthood are for sale, maybe they should not be. Maybe, as in the case of sex, it should be given only as a gift instead of for money or something else of value. Michael Sandel articulates a value he calls “giftedness” to argue that things like sperm ought not to be exchanged for money.<sup>11</sup> Richard Titmuss’s 1970 classic book *The Gift Relationship* likewise champions altruism and worries that allowing for blood sales could crowd out generosity in other contexts. This idea—separation of market and non-market transactions as “hostile worlds”—remains influential both in and outside of the academy despite idioms like “marriage markets” and doctrines like the loss of consortium.<sup>12</sup>

Zelizer argues for a more nuanced view that acknowledges overlaps between market

5. See Nat’l Conference of State Legislatures, *State Medical Marijuana Laws*, NCSL (Nov. 9, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. Jessica Glenza, *Oregon Becomes Fourth U.S. State to Legalize Recreational Marijuana*, THE GUARDIAN U.K. (July 1, 2015), <http://www.theguardian.com/us-news/2015/jul/01/oregon-recreational-marijuana-legalized>.

6. MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* 67 (2015).

7. Viviana A. Zelizer, *the Purchase of Intimacy*, 25 L. & SOC. INQ. 3 (2000); see Joan C. Williams & Viviana Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in *RETHINKING COMMODIFICATION*, *supra* note 3, at 362.

8. VIVIANA A. ROTMAN ZELIZER, *MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* 111 (198); ZELIZER, *PRICING THE PRICELESS CHILD*, *supra* note 3.

9. ERTMAN, *LOVE’S PROMISES*, *supra* note 6, at 25-63; Martha M. Ertman, *What’s Wrong with a Parenthood Contract? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003); see also T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004).

10. ERTMAN, *LOVE’S PROMISES* *supra* note 6, at 46-47, 52-59.

11. MICHAEL SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* 91 (2007).

12. RICHARD MORRIS TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970). See also Margaret Jane Radin, *Market-Inalienability* 100 HARV. L. REV. 1849, 1850 (1987); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 257 (1992); Clark C. Havinghurst, *Trafficking in Human Blood: Richard Titmuss (1970) and Products Liability*, 72 L. & Contemp. Probs. 1 (2009); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 98 (1978); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 945-46 (1985); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 365 (2000).

and non-market realms, showing that exchange can shape social relationships in positive ways. At a dinner party, for example, good manners dictate that guests bring a small contribution to the meal such as a bottle of wine. Though both guest and host know that the wine cost money, it would be rude to just hand the host a twenty-dollar bill instead of the wine. The question is not whether exchanges run through intimate relationships, but rather how they shape them, and how the relationships shape the exchange. The most useful work on commodification resists the temptation to force things and relationships into a box labeled either gift or exchange and opts instead to map the particularities of who, when, how, and why exchanges occur toward the end of figuring out who controls and benefits from them—and who is controlled and harmed. That information can dictate how law and society ought to treat these transactions.<sup>13</sup>

*Banking on the Body* provides a bounty of data to answer these questions. Because the goal of the book is to map this territory between cash and the incommensurable, its engaging and detailed stories demonstrate the policy and practices of people who created and use markets in milk, blood and sperm. Vivid stories about Boston milk brigades, the first Chicago blood bank, and New York doctors performing alternative insemination in the 1940s should engage historians and commodification theorists as well as people in the business of buying and selling bodily fluids. As a whole, Swanson's stories integrate the great man (or woman) theory of history with one that sees larger social, legal, and economic forces as providing a more complete understanding of the past.

Three personalities who come to life on the pages of *Banking on the Body* show that Swanson's choice of these three substances also yields a cross-contextual case study of how the "holy trinity"<sup>14</sup> of class, race and gender influence the markets in bodily fluids. Swanson's stories about these people crisscross the country and span more than a century, illuminating common themes among the markets in various bodily fluids in different times and places.

This review recounts a few of these stories and then discusses some ways that class, race, and gender shape the benefits and harms in markets in milk, blood, and sperm, as well as who controls them. The predictable allocation of benefits and control to some at the expense of others—based on race and gender as well as class—is all the more striking in light of a complementary pattern that Swanson does not discuss.

I have written elsewhere, that cases like *Moore v. Regents of the University of California*<sup>15</sup> give corporations and other artificial persons property rights in bodily materials like Mr. Moore's cell line, but refuse to allow the flesh and blood natural persons from whose bodies the materials come to either benefit or control those transactions.<sup>16</sup> In light of the class, race, and gender patterns that Swanson's book provides, this tendency of law to play favorites between artificial persons (and the human beings who own and manage them) and natural persons who provide milk, blood, and sperm, is all the more disturbing. Swanson's focus is largely historical, with occasional references to altering rules like the

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13. Williams & Zelizer, *supra* note 7, at 363.

14. Kwame Anthony Appiah & Henry Louis Gates, 18 CRITICAL INQ. 625 (1995).

15. See generally 793 P.2d 479, 480 (Cal. 1990).

16. Martha M. Ertman, *For Both Love and Money: Viviana Zelizer's The Purchase of Intimacy*, 34 LAW & SOC. INQ. 1017, 1030 (2009).

National Organ Transplant Act (NOTA) that are consistent with civic property principles, leaving to commodification theorists the task of synthesizing her immense data collection into existing or new theoretical frameworks.

The review concludes with a few words about Swanson's core argument that banking metaphors for bodily fluids were born of cold war rhetoric and political economy. Battles over communism and socialized medicine may well have contributed to the remarkable success of the bank metaphor in markets for bodily fluids. But other factors also explain the metaphor's persistence, including deep structural parallels between money and milk, blood, and sperm. The most important contribution of *Banking on the Body* is its comprehensive refutation of the myth that bodies and markets occupy separate spheres. Scholars in bioethics, law, medicine, economics and history will rely on it as they explore the key questions of who benefits from and controls those markets.

## II. STORIES

Swanson picks up the story of each market at the moment when the milk, blood, or sperm became sufficiently separated from the human providers to be pooled and assume the fungible characteristics of commodities like grain. Both human and commercial sides of these markets come through in colorful portraits of the people who exercised ingenuity and technical expertise to achieve that transformation.

Take Mrs. Henderson, who worked as a nurse on Boston's early-twentieth-century floating hospital, designed to provide poor women and children "access to cool and refreshing sea breezes in the heat of Boston summers."<sup>17</sup> Because some of those infants needed milk that their own mothers could not provide, on-shore milk donors provided milk for sixty cents per quart. Mrs. Henderson gave each donor "'proper instruction about cleanliness,' a daily sterile bottle," and supervised the "daily collection and transport of the milk to the hospital, packed in ice."<sup>18</sup>

A few decades later—in 1937—and a thousand miles away, Dr. Bernard Fantus invented the blood bank in Chicago, also to care for indigent patients.<sup>19</sup> Refrigeration and scientific advances on typing blood made possible the pooling of blood for transfusions, which in turn made possible surgical advances like open heart surgery and organ transplantation. Fantus' genius was to make blood accessible beyond the well-to-do patients who could pay \$25-\$50 per 500 cc of blood to be used in a surgery.<sup>20</sup> Fantus' Blood Preservation Laboratory allowed patients to get blood with non-monetary "payments," withdrawing as much blood as they or their friends and family deposited.<sup>21</sup> He modeled his blood bank on the financial bank, reasoning that customers should only take out what they had earlier deposited.<sup>22</sup>

Swanson sketches the human face of sperm banking in *Banking on the Body* through

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17. SWANSON, BANKING ON THE BODY, *supra* note 1, at 31.

18. *Id.*

19. *Id.* at 5.

20. *Id.* at 48.

21. *Id.* at 6.

22. SWANSON, BANKING ON THE BODY, *supra* note 1, at 36.

Jerome Sherman. A zoologist studying animal husbandry, in 1953 he invented the process in which human sperm could survive to do its deed even after being frozen and thawed.<sup>23</sup> While Fantus was celebrated for his innovation in blood banking, Sherman's peers in assisted reproduction all but shunned him.<sup>24</sup> For decades, OB/GYNs had quietly inseminated women whose husbands were infertile, obtaining sperm from medical students and hospital staff.<sup>25</sup> Loath to give up that control, doctors so firmly rejected Sherman's contribution that the American Society for the Study of Sterility opted not to hold the annual prize competition for the best research paper in 1953, rather than give it to Sherman.<sup>26</sup>

### III. THE HOLY TRINITY OF CLASS, RACE, & GENDER

Class, race, and gender so powerfully shape social life that they have been called the "holy trinity" of sociology.<sup>27</sup> Surprising factoids in *Banking on the Body* vividly demonstrate the role of these characteristics in the social life of milk, blood, and sperm. Though they are only substances—lacking either class, race or gender—the holy trinity colors the transactions because the human bodies that produce, sell, and purchase the substances have those characteristics.

The unfairness of allocating most or all of the profits of markets in bodily fluids to artificial persons—hospitals, the Red Cross, sperm banks—becomes especially clear when you consider the role of class, race, and gender in those markets. As Swanson demonstrates, bias has too often deprived the flesh-and-blood people the full benefit and control of these markets in these materials that are so valuable that all three have been called "liquid gold."<sup>28</sup>

#### A. Milk

The physical intimacy required to extract mother's milk provides a stark example of market differentiation. Sellers get treated differently depending on their class and race, with low-income women who sell out of necessity enjoying considerably less privacy and dignity than their well-heeled counterparts who provide milk as a charity.

##### 1. Class

In Boston, Mrs. Henderson recruited milk donors from the working poor in tenements.<sup>29</sup> These poor, often immigrant women—whom one doctor called "that necessary

23. *Id.* at 212, 199.

24. *Id.* at 214-15. Fantus did weather criticism for the commercial connotations of the bank metaphor, but the overall response to his credit & debit system was, Swanson says, "highly favorable." *Id.* at 59-60.

25. *Id.* at 212.

26. SWANSON, BANKING ON THE BODY, *supra* note 1, at 215-16.

27. KEVIN WEHR, HERMES ON TWO WHEELS: THE SOCIOLOGY OF BICYCLE MESSENGERS 70 (2009).

28. See Judy Dutton, *Liquid Gold: The Booming Market for Human Breast Milk*, WIRED (May 17, 2011), [http://www.wired.com/2011/05/ff\\_milk](http://www.wired.com/2011/05/ff_milk); *Going for (Liquid) Gold!* AUSTL. RED CROSS (May 10, 2010), <http://www.donateblood.com.au/media-centre/news/national/going-for-liquid-gold>; SHERRI SHEPHERD, PERMISSION SLIPS: EVERY WOMAN'S GUIDE TO GIVING HERSELF A BREAK 187 (2009).

29. SWANSON, BANKING ON THE BODY, *supra* note 1, at 36.

but often slatternly female”<sup>30</sup>—sold their milk to the Boston Floating Hospital for consumption by poor infants treated in the purportedly health-giving breezes of Boston Harbor.<sup>31</sup> By 1929, twenty U.S. cities had mother’s milk stations that bought and sold milk.<sup>32</sup> In Kansas City, milk providers had to cover their heads with a cloth and don a special garment that left the nipples exposed so that matrons could scrub both their hands and breasts for ten minutes.<sup>33</sup> In New York City, mothers selling milk had to wear surgical masks, while Chicago’s “municipal mother’s station” subjected the women to examination by a male doctor and a scrubbing “within an inch of their lives” followed by toweling with sterile towels handed to them on “sterilized metal tongs.”<sup>34</sup>

Gradually, however, conditions changed as middle and upper middle class women like the Women’s City Club and Junior League began providing milk, sometimes donating it as a charitable act for worthy cases like helping to feed the Dionne Quintuplets.<sup>35</sup> Customers paid between fourteen and thirty cents per ounce, prices set to meet overhead costs but not generate a profit.<sup>36</sup> In Evanston, Illinois, the Junior League founded the Evanston Hospital Premature Babies Milk Bank,<sup>37</sup> which drew donors from the middle and upper strata that hardly needed the money. Newspaper articles documented the Evanston bank’s process of collecting milk, one describing a woman using the family’s second car after “her banker husband had caught his commuter train to Chicago’s financial district.”<sup>38</sup>

## 2. Race

Though these mothers were quite different from the “impoverished immigrant wom[e]n” of earlier decades, race remained fairly constant.<sup>39</sup> Many of the early twentieth century donors were Irish Catholic (especially in Boston), and by the 1960s and 1970s, newspaper features still referenced milk donors who were “invariably white.”<sup>40</sup> Similarly, the Detroit mothers’ milk bureau stopped purchasing from African American women in the 1920s, citing resistance from white buyers, but milk stations in other cities pooled milk from women of all races.<sup>41</sup>

## 3. Gender

As a substance produced only by women, milk markets starkly reflect gendered patterns. The price paid for milk stayed stable from the 1930s until the 1970s. Paying women

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30. *Id.* at 21.

31. *Id.* at 31.

32. *Id.* at 33.

33. *Id.*

34. SWANSON, BANKING ON THE BODY, *supra* note 1, at 33.

35. *Id.* at 37.

36. *Id.* at 38.

37. *Id.* at 173.

38. *Id.* at 174.

39. SWANSON, BANKING ON THE BODY, *supra* note 1, at 21.

40. *Id.* at 181.

41. *Id.* at 65.

to sell their milk was not perceived as a problem,<sup>42</sup> but donors were referred to as “mothers” instead of “professional donors” or “businesswomen,”<sup>43</sup> Postwar banks emphasized “the milk of human kindness” and downplayed commercial aspects of the trade.<sup>44</sup> Unlike the poorer women who were manhandled and matron-handled in early decades of the twentieth century, these middle and upper class mothers were credited with “good hygienic habits.”<sup>45</sup> Administrators told them to wash their arms, hands, and breasts and avoid touching the inside of sterile bottles, but did not directly supervise that process. These prosperous women “were allowed to express their milk at home and bring it in bottles to the bank.”<sup>46</sup> Supervising doctors noted that the women invested the money they were paid in savings bonds for their children, marking the payments as consistent with conventional maternal obligations of care rather than more masculine acts to provide for the whole family’s food, clothing, and other basic needs.<sup>47</sup>

### B. Blood

Both men and women can provide blood, and no scientific principles require that men receive blood only from men, nor women only from women. The same holds true for race. Yet Swanson shows that banks employed both sex and race restrictions, revealing the complex social life of blood. Readers of the British sociologist Richard M. Titmuss know that class also played a big role, since he argued that poor men who sold blood contaminated medical procedures and that the practice “promoted egoism over altruism, corrupting society.”<sup>48</sup>

#### 1. Class

Prior to safe sterilization and storage, live donors of blood were necessary. By the 1930s, though, refrigeration allowed doctors to replace what some derided as a “hoard of excited, noisy, gesticulating foreigners[.]”<sup>49</sup> with test tubes that could be pulled off of a shelf.<sup>50</sup> In 1937, Cook County, Illinois instituted the Blood Preservation Laboratory. Its founder Dr. Fantus coined the term “blood bank,” explaining that “the term ‘blood bank’ is not a mere metaphor.”<sup>51</sup> He elaborated that “just as one cannot draw money from a bank unless one has deposited some, so the blood preservation department cannot supply blood unless as much comes in as goes out.”<sup>52</sup>

Swanson explains that this framework replaced the cash-for-blood model with a

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42. *Id.* at 164.

43. *Id.* at 167. Blood donors in contrast were commonly called “professional donors” and “businessmen” who donated to provide for their families. *Id.* at 42.

44. SWANSON, BANKING ON THE BODY, *supra* note 1, at 168.

45. *Id.* at 171.

46. *Id.*

47. *Id.*

48. *Id.* at 122.

49. SWANSON, BANKING ON THE BODY, *supra* note 1, at 55.

50. *Id.* at 57.

51. *Id.*

52. *Id.*



blood-for-blood model. Fantus' blood bank even kept accounts of deposits and withdrawals, shown in a sample ledger reproduced in the text.<sup>53</sup> The bank model expanded the market for blood, making it easier to find unpaid suppliers and also to provide blood to patients who could not pay cash.<sup>54</sup> By increasing access to medical advances that required blood transfusions, Fantus' system of debits and credits went a good way toward equalizing access to medical care across class.

But that advantage came to seem dangerous after World War II, as any hint of socialism—in medicine or otherwise—triggered larger anxieties about threats posed by communism. The keystone of Swanson's thesis is that this cold war atmosphere generated support for a capitalist view of blood banks. Her painstaking documentation of the mid-century battle over the marketization of blood situates this basic medical commodity as a pawn in larger ideological battles. Non-profit community blood banks like the Irwin Memorial Blood Bank in San Francisco argued that donors should be paid for providing blood in the form of a credit they could draw against should they or a friend of family need blood. The American Medical Association likewise supported this "pay as you go" system, seeing the specter of socialized medicine if recipients of blood got "something for nothing."<sup>55</sup> One doctor objected to "free" blood because it would lead to "'free' obstetrics, 'free' surgery, 'free' medicine, for that matter, 'free everything' . . . available to all regardless of financial ability."<sup>56</sup> The Red Cross and the federal government, in contrast, saw blood availability as a "public resource" that should be available to anyone who needed it, regardless of ability to pay (in cash or reciprocal blood donation).<sup>57</sup>

But doctors, hospitals, and the Red Cross all wanted a free ride themselves when one Mrs. Perlmutter successfully argued that providers of blood could face product liability for providing her with hepatitis-tainted blood.<sup>58</sup> They successfully cut off future claims by getting states to enact blood shield statutes that relieved them of liability. Swanson calls them on this double-standard: "Organized medicine, hospitals and blood bankers wanted to have it both ways: they wanted blood to be treated as a market commodity by patients but as a special sort of 'therapeutic merchandise' by the courts."<sup>59</sup>

This "awkward" and "self-contradictory" logic prevailed, producing a situation in which corporations can get the raw material for blood transfusions for free then sell it for a profit.<sup>60</sup> This re-distribution of wealth (and access to health care) has profound class implications by privatizing gain and socializing the loss when patients like Mrs. Perlmutter are injured by tainted blood.

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53. *Id.* at 58.

54. SWANSON, BANKING ON THE BODY, *supra* note 1, at 58.

55. *Id.* at 108.

56. *Id.* at 98.

57. *Id.* at 85-87.

58. *Id.* at 126.

59. SWANSON, BANKING ON THE BODY, *supra* note 1, at 128.

60. Michele Goodwin has documented the same pattern. GOODWIN, *supra* note 3, at 118.

## 2. Race

The irrationality of white supremacy also runs through the history that Swanson documents, which is not surprising given the mythology—often enshrined in law—that “one drop of blood” from an African-American ancestor could make a person legally black. Although blood from African-American donors is indistinguishable from blood drawn from white donors, many banks segregated blood by race, believing that white patients would want to avoid blood from African American donors.<sup>61</sup> Johns Hopkins hospital in Baltimore created two separate blood banks, housing blood from each bank on different shelves in the same refrigerator.<sup>62</sup> Yet even segregationists acknowledged the medical mindlessness of the separation, as when Memphis doctors systematically disregarded the color line in emergencies.<sup>63</sup> Even the banks that did not separate their blood supplies by the donors’ race, like San Francisco’s Irwin Memorial Blood Bank, still labeled each vial with the donor’s race.<sup>64</sup>

The federal government likewise segregated blood in its Blood for Britain program, a policy that its African-American director Dr. Charles Drew—arguably the leading American expert in blood banking—later spoke out against.<sup>65</sup> After World War II, the Red Cross nationalized the Jim Crow segregation in Southern Blood banks in the same breath as it acknowledged that “there is no difference in the blood of humans based on race or color.”<sup>66</sup> Though the Red Cross stopped keeping records of donors’ race in 1950, hospitals in Louisiana retained a policy against trans-racial blood transfusions as late as 1969.<sup>67</sup>

## 3. Gender

The social life of blood is also gendered. Although sex, like race, is medically irrelevant for donated blood, Chicago’s Dr. Fantus and other blood bankers recorded the sex as well as race of donors.<sup>68</sup> But the more striking aspect of gender running through blood banking is the social construction of male donors as “men of business” providing for their families or earning tuition money to improve themselves. By the 1920s and ‘30s, as technologies like blood typing and refrigeration allowed for greater use of donated blood, a national campaign sought to define the donor as heroic, respectable and usually male.<sup>69</sup> As Swanson explains, “the medical profession deliberately framed the professional blood donor role as a masculine job.”<sup>70</sup> But the wartime Red Cross program, which collected blood from volunteers and did not charge the recipients of that blood, attracted almost as many female as male donors. After the war ended female participation decreased with women accounted for less than twenty percent of banked

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61. SWANSON, BANKING ON THE BODY, *supra* note 1, at 64.

62. *Id.*

63. *Id.* at 64.

64. *Id.* at 65.

65. *Id.* at 62.

66. SWANSON, BANKING ON THE BODY, *supra* note 1, at 141.

67. *Id.* at 142.

68. *Id.* at 64.

69. *Id.* at 42.

70. *Id.* at 234.

blood in America in 1957.<sup>71</sup>

That framing is consistent with patterns Swanson documents regarding women's donation of milk. In the early decades of the twentieth century administrators viewed milk donation as a "double charity" that benefitted both the working poor and often immigrant women donating and the poor babies who needed the milk.<sup>72</sup> Later, as wealthier matrons began to donate their for charity instead of their own financial gain, the non-market framework remained, and in the 1970s and '80s some milk bank supporters saw it as an "anticapitalist institution of women's power in which an intimate act was extended to strangers to save them from reliance on the cold, impersonal world of the market represented by artificial feeding choices."<sup>73</sup>

Thus transactions in bodily fluids tend to be framed as an exchange when a man provides the goods, and a gift when a woman is the provider. As Swanson concisely put it, "[w]omen donate body products for love and men donate for money."<sup>74</sup>

### C. Sperm

Of the three bodily fluids that Swanson explores, sperm is most obviously a market commodity today. She notes the 2,000 percent mark-up sperm banks today charge over the amount they pay the men who provide those gametes, demonstrating the stake that artificial persons like sperm banks have in protecting the market.<sup>75</sup> Yet more than money is at stake, shown by the impact of race and gender in sperm sales.

#### 1. Class

Starting in the 1930s, the market for alternative insemination began using sperm from medical students and hospital personnel for the insemination of paying patients. By the 1970s, technical innovations facilitated cryopreservation.<sup>76</sup> Having written about alternative insemination myself,<sup>77</sup> I was surprised to learn that the first sperm banks catered to men, not women. In the 1970s, men paid to store their sperm before having vasectomies that had been made popular by the zero population growth movement.<sup>78</sup> As Rene Almeling also found, only the advent of AIDS opened up the market for alternative insemination by making it cheaper and available to anyone who could order it from commercial sperm banks. Because HIV made insemination with fresh sperm hazardous the medical profession finally gave up its control over the process of selecting donors and began to use frozen sperm. That led to the large-scale sperm banks like the California Cryobank, which have

71. SWANSON, BANKING ON THE BODY, *supra* note 1, at 114.

72. *Id.* at 39, 44.

73. *Id.* at 187.

74. *Id.* at 235.

75. *Id.* at 225.

76. SWANSON, BANKING ON THE BODY, *supra* note 1, at 219.

77. ERTMAN, LOVE'S PROMISES, *supra* note 6; Ertman, *What's Wrong with a Parenthood Market?*, *supra* note 9.

78. SWANSON, BANKING ON THE BODY, *supra* note 1, at 220.

a sufficiently large inventory that prospective mothers can choose a donor based on education, height, weight, ethnicity, and even hobbies and baby pictures.<sup>79</sup> Today middle class women—often single or gay—buy sperm based on catalogs and three-generation health histories provided online. Educated donors then and now are so valued highly that sperm banks are often located near universities.<sup>80</sup>

## 2. Race

Unlike milk or blood, sperm can transmit characteristics associated with race such as skin color and hair texture. Accordingly, sperm banks store and send their inventory in clearly marked packaging that indicates the race of the donor. Donors of color—especially African Americans—are less numerous, and perhaps in less demand by the majority white customer pool. Mistakes in this process have resulted in national media stories depicting outrage at a white woman bearing an African-American child. One mother’s complaint for damages due to having to raise a black child in a racist community highlights the continued view of whiteness as a valuable property interest.<sup>81</sup>

Swanson shows the straight line that can be drawn between these stories and the sperm market’s eugenic origins. Early research in alternative insemination was performed on enslaved women by J. Marion Sims, an infamous white supremacist who claimed that the enslaved women on whom performed experimental gynecological surgeries did not feel pain.<sup>82</sup> In 1920, Dr. Robert Latou Dickinson urged members of the American Gynecological Society to embrace the process he called “artificial impregnation” as having “enormous potentialities of betterment of the race.”<sup>83</sup> Dr. Frank Davis, who published a treatise promoting “do-it-yourself artificial insemination” in 1917, worried about “race suicide” and wanted the right sort of Americans to reproduce themselves.<sup>84</sup>

But most fascinating is Dr. Frances Seymour, who in the 1930s spoke publicly of inseminating women.<sup>85</sup> She required “a minimum I.Q. of 120 in all receptive mothers, and . . . [required] prospective parents [to] take out an educational insurance policy” to ensure the proper education of their children.<sup>86</sup> But she was less biased than her peers in one respect, her willingness to inseminate “unmarried businesswomen.”<sup>87</sup> She paid her sperm donors \$100-\$150, a very high price, but required them to remain confined at the hospital “until the artificial insemination was successful, keeping them available as

79. ALMELING, *SEX CELLS*, *supra* note 3, at 31.

80. SWANSON, *BANKING ON THE BODY*, *supra* note 1, at 211.

81. Abby Philip, *White Woman Accidentally Impregnated with Black Man’s Sperm*, WASH. POST, Sept. 5, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/05/white-woman-accidentally-impregnated-with-black-mans-sperm-loses-legal-battle>.

82. Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 315 (2010).

83. SWANSON, *BANKING ON THE BODY*, *supra* note 1, at 201-02.

84. *Id.* at 201, 203.

85. *Id.* at 204.

86. *Id.* at 205. Class, race, and gender overlap. Financial requirements screen out recipients of modest means and also convey the expectation that donor-conceived children will enjoy higher incomes and the social status that comes with advanced education.

87. *Id.* at 204.

needed.”<sup>88</sup>

### 3. Gender

Sociologist Rene Almeling has thoroughly documented the gendered nature of sperm donation as piece work in which providers are only paid for samples with a sufficiently high sperm count to survive freezing.<sup>89</sup> Swanson adds to this by depicting the early history of sperm banking as under the control of mostly male doctors, who initially resisted freezing, in part because it took away their power both to select donors themselves and to screen recipients to ensure the worthiness of those seeking to become parents.<sup>90</sup>

These examples are plucked from mountains of detail that Swanson provides. Experts and policy-shapers in a particular field will dip in to discover the precise contours of the transactions that they investigate. The best use of this book, to my mind, is to counter inequalities deeply embedded in markets for body products. Especially pressing is the need to recognize and remedy the current tendency to grant artificial persons greater rights and protections than the flesh and blood people from whom the body products come.

## IV. ARTIFICIAL PERSONS VS. NATURAL PERSONS

The law treats bodily products in inconsistent ways. Take blood and taxes. People who sell blood to a company such as Biolife that purchases plasma must pay taxes on that income. But if they instead “donate” that valuable blood to the Red Cross, they cannot list it as a charitable contribution on their tax returns.<sup>91</sup> Yet the Red Cross sells the blood to hospitals that in turn sell it to patients. Blood, it seems, is property in the “hands” of an artificial person like the Red Cross or a hospital, but generally something else when a natural person makes a claim to it.

In *Moore v. Regents of the University of California*, the Supreme Court of California adopted what Viviana Zelizer has dubbed a “hostile worlds” approach by describing Moore’s claims to privacy and dignity as “round pegs” that should not be forced into the “square hole of property.”<sup>92</sup> This rubric treated the market-oriented nature of property as fundamentally different from nonmarket transactions in products of the human body. Justice Arabian’s concurrence even more clearly used hostile language to condemn Moore’s conversion claim for “coming[ing] the sacred with the profane.” He asserted that Moore, in seeking to protect “a right to sell one’s own body tissue *for profit*,” asked the court “to regard the human vessel—the single most venerated and protected subject in any civilized society—as an equal with the basest commercial commodity.”<sup>93</sup> Yet the very same court allowed artificial persons, such as universities and biotechnology companies, to treat Moore’s genetic material as a commodity:

88. SWANSON, BANKING ON THE BODY, *supra* note 1, at 205.

89. ALMELING, SEX CELLS, *supra* note 3, at 136.

90. SWANSON, BANKING ON THE BODY, *supra* note 1, at 206-07, 209, 210-11.

91. Internal Revenue Service, *Charitable Contributions: For Use In Preparing 2014 Returns* (2014), <https://www.irs.gov/pub/irs-pdf/p526.pdf>.

92. *See Moore v. Regents of the Univ. of California*, 793 P.2d 479, 490 (Cal. 1990).

93. *Id.* at 497 (Arabian, J., concurring).

[T]he theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. . . . Because liability for conversion is predicated on a continuing ownership interest, “companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.”<sup>94</sup>

In a contest over commodifying body products, the court rejected Moore’s property claim in order to support property claims asserted by the universities, biotechnology companies, and researchers.

In contrast, Judge Mosk’s dissenting opinion in *Moore* represents a view that recognizes both property and personhood by concluding that “every individual has a legally protectable property interest in his own body and its products,” an interest grounded in “a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona.”<sup>95</sup> In this view under-commodification can threaten human dignity, a welcome recognition in light of the more common concern about over-commodification.

While *Banking on the Body* argues for a view of milk, blood and sperm as civic property, I find that Mosk’s and Zelizer’s views more fully grasp the unfairness of allocating control and benefit from markets in bodily fluids to artificial persons at the expense of the human beings who make the markets possible.

#### V. STRENGTH AND WEAKNESS OF THE BANK METAPHOR

The sole weaknesses of *Banking on the Body* are repetitiveness and over-reliance on the theory linking the bank metaphor to cold war politics. Swanson presents compelling data about American resistance to communism and socialized medicine, linking the latter to the medical establishment’s insistence that recipients pay for blood. She also ably demonstrates the hypocrisy of that same establishment preventing donors from being paid and recipients from asserting claims when the blood caused injuries like hepatitis. Yet she leans too hard on the metaphor.<sup>96</sup> It seems more like correlation or interest convergence than causation, and also related to the rise of insurance companies. Moreover, Swanson misses the chance to show the hypocrisy of artificial persons—the Red Cross, hospitals—benefitting at the expense of natural persons (both providers and recipients). Future commodification theorists may well use Swanson’s data to show how the medical establishment has successfully privatized its gains from blood and socialized its losses through blood shield statutes.<sup>97</sup>

The bank metaphor also has traction beyond cold war politics because it captures deep structural associations between milk, blood, sperm and money. All three bodily substances are liquid and we often speak of money in terms of fluidity. People with cash are said to have liquidity. Those short of funds suffer from a constricted cash flow, which, unremediated, can lead to insolvency. Moreover, all three bodily fluids flow through the

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94. *Id.* at 495-96.

95. *Id.* at 515 (Mosk, J., dissenting).

96. SWANSON, *BANKING ON THE BODY*, *supra* note 1, at 12.

97. *Id.* at 85.

body and are regenerated just as water travels through the water cycle in an ecosystem. Finally, blood and milk are largely fungible, and a central characteristic of money is that a single one-dollar bill is the same as any other. Swanson painstakingly maps the process of milk, blood and sperm's separation from their human providers. Once pooled, they become anonymized products share a quality of fungibility with money.

Although Swanson did not convince me that cold war rhetoric and conditions single-handedly shaped markets in bodily fluids, her argument has changed how I view those markets. The larger contexts of blood use during WWII and the war's political and economic aftermath doubtless shaped the way law and society treat bodily fluids. Today, abortion wars shape gamete markets by preventing states from meddling into assisted reproduction in ways that would pave the way for impositions on reproductive, dignity and choice in the coital context.

#### V. CONCLUSION

The biggest contributions of *Banking on the Body* is its careful documentation of the history of milk, blood and sperm travelling in and out of the market. Swanson's effective storytelling illustrates the humanity and social factors that shaped the decades-long process of creating markets in bodily fluids. Future scholars likely will build on this strong foundation to follow the money—show who benefits and controls these transactions, and who is harmed or controlled by them. Coupled with a theoretical framework that explains inclusion or exclusion of milk, blood and sperm from markets, that analysis should provide the basis for more sensible and fair laws and policies than the ones created under the current mythology that body parts are not for sale.