

# My Body, My Bank

BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA. By Kara W. Swanson. Cambridge, Massachusetts: Harvard University Press, 2014. 352 Pages. \$35.00.

Reviewed by I. Glenn Cohen\*

All this has happened before, and all of it will happen again.

—Leoben, *Battlestar Galactica*<sup>1</sup>

We shall not cease from exploration  
And the end of all our exploring  
Will be to arrive where we started  
And know the place for the first time.

—T.S. Eliot, *Little Gidding*<sup>2</sup>

## I. Introduction

Kara Swanson's first book, *Banking on the Body: The Market in Blood, Milk, and Sperm in Modern America*, is a meticulously researched history of the banking industries in milk, blood, and sperm in America from 1908 till into our century.<sup>3</sup> It is an extremely useful read for anyone working in the field of bioethics, commodification, and property. It is exhaustive (perhaps occasionally too much so) when it tackles blood and milk banking—the latter a banking system that much less has been written on. It is less good on sperm banking. It deserves much praise and a little critique. I try to give both in this Review.

This Review is divided into two parts. The first tries to capture in short form the story Swanson aims to tell. She focuses on the blood-banking industry, giving it four of the six substantive chapters, with a chapter and a third for milk and a short chapter for sperm. In my Review I follow a similar path. I also specifically highlight a few of the important

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1. *Battlestar Galactica: Flesh & Bone* (Syfy television broadcast Feb 25, 2005).

2. T.S. Eliot, *Little Gidding*, in THE COMPLETE POEMS AND PLAYS 1909–1950, at 138, 145 (1971).

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

contributions of the book, especially in the relationship of product liability law with the development of conceptions of bio-property, something she does deftly that strikes me as quite a new story to tell.

The second Part of this Review focuses on critique, layered from milder to deeper, though many of these are disguised praise (in that I see things in Swanson's account that she may not see!). My critique centers on four elements: (1) she could do more to clarify the role (or lack thereof) for law in the story; (2) the central notion of "the bank" and the idea of a metaphor taken from finance is a bit undertheorized in the work; (3) the book could use more dialogue with the commodification discourse more generally, especially its more nuanced articulations (this is the ubiquitous *here is how I would have written your book* section of the Review); and (4) the book's take on the role of gender and body banking is underdeveloped. None of these critiques, though, mar what is itself an excellent book.

## II. The Story

### A. *The Frame*

For Swanson, the twentieth century is the story of the transformation of the human body and its parts into mass-produced commodities. In particular, it is the story of the rise of a particular kind of organization of this commerce that she seeks to show bridged the sale of blood, milk, and semen: the bank. Swanson traces the adoption of the "bank" and "banking" metaphor to Dr. Bernard Fantus in 1937, who while "working at Cook County Hospital in Chicago, borrowed the term *bank* from the world of finance to describe the organization of stored blood in his hospital, which he sought to manage like money in the bank."<sup>4</sup> The introduction has the longest discussion of the notion of the role the bank plays in her story and what it means, so it is worth quoting slightly more from the book on this topic:

The thread that links this century of history is the banking metaphor itself. . . . The banking metaphor has encouraged us to think of body products in terms of money and markets. This association was Fantus's original intention. . . .

. . . .

Taking the banking metaphor seriously led the medical profession and, later, policymakers to lose sight of Fantus's original goal of harnessing the market to serve communal ends. Instead we have allowed ourselves to become trapped in a dichotomy that is neither

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4. *Id.* at 5.

accurate nor useful. It is an inaccurate description of the experience of body product exchange to separate “gifts” from “commodities” as distinct and opposite.<sup>5</sup>

Swanson then draws on the work of sociologist Viviana Zelizer that she claims “has shown that the idealized division of the world into market and nonmarket spheres does not exist in lived experience.”<sup>6</sup> Part of her aim is to uncover the lost history of body products as property, to be sure, but a form of *civic* property. She also thinks this history will have something important to tell us about the commodification debate (a point I highlight because I return to this issue in Part II):

By adopting the metaphor of the bank, a free market institution of capitalism, the doctors who established and promulgated these institutions created links between money, bodies, and markets. These links led to current divisions between sales and gifts and the current problematic legal landscape in the United States for supplying and allocating body products. By retracing the history of body banks, we gain tools for moving beyond the gift/commodity debate to a more expansive view of body products focused on ends rather than means, a view that has ramifications not only in American law and medicine but in all countries where body product exchanges are taking place.<sup>7</sup>

#### B. *Blood and the Rise (and Fall) of the Bank*

1. *Origins.*—Swanson’s historical account begins in the early twentieth century, when the blood business faced significant technical and scientific barriers. As transfusion technology caught up and blood typing became mainstream, the first people in line to donate typically were friends and relatives. But the match criteria were too numerous and the pool of friends and relatives too small for a reliable match to result consistently. There then came an interim period that “targeted poor men living in low- or no-cost men’s boardinghouses” that one source characterized as ““rovers of the unskilled type.””<sup>8</sup>

Two problems emerged with this interim solution. The first was somewhat comical: donors often collected their money and got very drunk (ill-advised after bleeding), and the banks became worried about injury to them and bad publicity should things go awry on the way home, such that

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5. *Id.* at 6, 9.

6. *Id.* at 9.

7. *Id.* at 14.

8. *Id.* at 40 (quoting BERTRAND M. BERNHEIM, ADVENTURE IN BLOOD TRANSFUSION 86 (1942)).

doctors had to personally accompany donors home.<sup>9</sup> Second and more importantly, these “rovers” came and went, necessitating the time and expense of blood typing and testing for syphilis of new waves of donors.<sup>10</sup>

Doctors began to envision instead a regular blood supply, provided by repeat professional donors, who are the central characters in Chapter 1 of the book. These professional donors were “available by phone or otherwise on short notice, free from syphilis, of known blood type, needful of extra income, reliable and compliant—and, usually, male.”<sup>11</sup> Whenever a patient needed a transfusion, doctors would thumb through a central repository of professional donors and contact a match. The donor’s fee would be added to the patient’s medical bill. The professional donor was a striver, an up-and-comer:

Through blood selling, even an uneducated laborer could earn good money while serving others. In 1924 an Ohio newspaper devoted a half-page of its [science] feature . . . to an illustrated article, “Earning a Living by Letting Blood.” The article lauded men such as John Broady, a “plucky Kansan,” earning his way through college by selling his blood. Frank Welch, a factory worker, was acclaimed in 1929 for selling twenty-three and a half gallons of blood over five years for a total of \$5,000.<sup>12</sup>

Although framed in gendered terms for each trade, in fact there were many parallels between the male sellers of blood and the female sellers of breast milk (the focus of another chapter of the book) in this regard: “[L]ike the money earned by married women who sold their milk to augment household incomes during the lean years of the Great Depression, husbands could help provide for their families as ‘professionals,’ demonstrating their robust health, business savvy, and masculinity.”<sup>13</sup>

Three different kinds of organizations made use of professional donors: commercial agencies, hospital registries, and, for lack of a better term, “civic organizations”—most notably the Blood Transfusion Betterment Association that created a Blood Donors Bureau to supply multiple different hospitals in New York City with professional donors.<sup>14</sup> The Bureau standardized the screening and employment of donors and pressed for regulations that governed not only itself but also other kinds of

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9. *Id.* at 40–41.

10. *Id.* at 41.

11. *Id.*

12. *Id.* at 42–43 (footnote omitted). It is in little vignettes like these that Swanson’s ability to tell a story really hits its stride, giving a vivid picture of the professional donor as businessman and entrepreneur in the midst of massive unemployment.

13. *Id.* at 44.

14. *Id.* at 45.

organizations in the business.<sup>15</sup> “By municipal regulation, the new creature, the professional blood donor, was defined at law as a ‘blood donor who offers or gives his blood for transfusion purposes for a fee.’”<sup>16</sup> The law required donors to register with the city, to carry a booklet containing the donor’s physical description, photograph, blood type, and signature and to present this booklet with each donation to be marked.<sup>17</sup> The goal was to prevent sellers from selling so often it compromised their health.<sup>18</sup> There was, Swanson notes, however, anecdotal evidence that these booklets were forged, shared, and sold to circumvent the regulation at least in some cases.<sup>19</sup> Nevertheless Chapter 1 ends with the rise of the professional donor and institutional systems to organize his donations.

Chapter 2 is the story of the decline of this system. This model began to break down during the Great Depression, when public hospitals were finding it impossible to meet the demand for blood transfusions using professional donors alone.<sup>20</sup> Because the professional-donor model relied on donor-to-recipient transactions in each sale of blood, many in need could not cough up the asking price and were left untreated. Nor was a sliding-scale approach, where hospitals bought at the market price and then sold at higher rates to wealthier patients to cross subsidize the poorer ones (a strategy that had worked in milk banks) feasible: there were no wealthier patients to buy at high enough prices in some municipalities.<sup>21</sup>

To deal with these changing circumstances, Dr. Bernard Fantus of Cook County Hospital in Chicago fathered an alternative, the “bank” model: blood should be available for “withdrawal” to those who “deposit” blood, not only to those who pay.<sup>22</sup> The new donor would be “motivated neither by love [friends and relatives] nor by money [professional donors], but by indebtedness.”<sup>23</sup> Crucially, because it required in-kind payment (blood for blood) of debts, it enabled cash strapped hospitals to maintain ready supplies without payments. For Fantus, this bank was more than a metaphor, as he put it “[j]ust 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>24</sup> This, as Swanson

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15. *Id.* at 46.

16. *Id.* (quoting E.H. Lewinski Corwin, *Blood Transfusions and Donors*, 4 BULL. AM. HOSP. ASS’N 16, 118 (1930)).

17. *Id.*

18. *Id.* at 46–47.

19. *Id.* at 47.

20. *Id.* at 49.

21. *Id.* at 50.

22. *Id.* at 50–51.

23. *Id.* at 57 (internal quotation marks omitted).

24. *Id.* at 57.

emphasizes, also had the effect of depersonalizing blood exchange and making it a product that was more interchangeable, the creation of a fungible unit that created a credit instead of donation (for altruistic or commercial reasons) to a *particular* patient.<sup>25</sup> The book even contains an illustration of a 1938 blood-bank account ledger looking very much like every other bank-account document in the financial world at the time.<sup>26</sup>

It took Fantus four years of experimentation to get the model right, but his blood bank opened its doors in 1937 at Chicago's Cook County Hospital to resounding success.<sup>27</sup> Within one year of the bank's opening, the number of blood transfusions doubled; by the ten-year mark, the figure had increased twelve-fold.<sup>28</sup> Although some were understandably loath to employ a commercial term to describe a scientific organization,<sup>29</sup> media and medicine generally embraced the blood-bank concept with enthusiasm, lauding the balancing of deposits and withdrawals as an innovative solution to the blood needs of indigents.<sup>30</sup> The new system was not costless—Cook County Hospital paid an estimated 89 cents per transfusion in the early 1940s, but that was much cheaper (by a factor of fifty to one according to Swanson) than the large sums it had had to pay to the professional donor.<sup>31</sup> The professional donor never completely dropped out of the picture in that in order to meet demand Cook County and others using this model still had to buy some blood, but they could do so at a much lower rate—ten dollars per 500 cubic centimeters—than in the prior period.<sup>32</sup> While some criticized Fantus for using the commercial term of bank to describe a scientific organization, for the most part, the medical community eagerly supported and adopted his approach.

One of the most fascinating elements of this story was the question of integration versus segregation of blood banks by race. Fantus's innovation was to treat blood as widget, interchangeable, but that ran up against deep-seated prejudices about mixing the blood of the races. In the era of familial donor or the professional donor, recipient and donor would have met each other face-to-face in the operating room such that race would have been obvious and inescapable. The bank's disintermediation of that relationship, by contrast like the rise of milk banking, made "unwitting cross-racial body product exchange possible by separating donor and recipient;" that is the

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25. *Id.* at 57.

26. *Compare id.* at 58, with 89 HISTORY OF BANKING § 6, at 11 (1907).

27. SWANSON, *supra* note 3, at 50–51.

28. *Id.* at 59.

29. *Id.*

30. *Id.* at 60.

31. *Id.* at 59.

32. *Id.* at 48, 59.

new system “required doctors and patients to decide in a new context how much of the individual characteristics of the supplier traveled with each bottle of blood.”<sup>33</sup>

Banks of this era split on how to handle this situation. At Fantus’s bank, doctors labeled blood with the date of collection, the results of the donor’s physical examination, the donor’s medical history, and the donor’s race.<sup>34</sup> Other early banks, such as the one at Johns Hopkins, not only recorded information about race but placed “white” and “colored” blood in entirely separate facilities.<sup>35</sup> The bank justified its decision by deeming it “best to avoid the [race] issue,” despite acknowledging that there was “no valid objection on biologic or physiologic grounds to the transfusion of patients of one race with blood from donors of another.”<sup>36</sup> The banks in Baltimore created essentially two separate banks with their own ledgers, and others such as those in San Francisco put into place a unified system.<sup>37</sup> I emphasize this piece here just to show (a point I return to in Part II) the way in which Swanson’s account could be used to more deeply engage the typical commodification discourse. There the claim typically is that buying and selling body parts facilitates, rather than reduces, the amount of racial intolerance and the salience of race for decision makers; for example, in the case of sperm donation, some have attacked the way in which banks facilitate (and some would say even encourage) racial preferences.<sup>38</sup>

Fantus’s blood-donation experimentation spread slowly until a crisis of an even greater scale: war. On the eve of the United States’s entrance into World War II, blood centers launched across the nation in preparation for a massive wartime blood-donation program.<sup>39</sup>

This program, though, put pressures on the existing blood-banking models. Both the professional-donor model and Fantus’s balance-sheet model were unworkable in war. Instead, organizations like the Red Cross relied on unpaid donations by valorizing the role of the blood donor. As some public appeals went: “[P]eople should realize that when they give blood they are . . . saving lives just as effectively as the doctors at the

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33. *Id.* at 66.

34. *Id.* at 64.

35. *Id.*

36. *Id.* at 65 (quoting Mark M. Ravitch, *The Blood Bank of the Johns Hopkins Hospital*, 115 JAMA 171, 171 (1940)) (internal quotation marks omitted).

37. *Id.*

38. See, e.g., Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1852–53 (2009) (“[California Cryobank’s] . . . donor catalog is prominently organized according to race . . . . A message appears in bold font at the top of each catalog page identifying the racial identity of the donors listed on that page.”).

39. SWANSON, *supra* note 3, at 68.

front!”<sup>40</sup> Through “the giant blood bank,” what many called the national wartime donation movement, blood became “a public collective resource,” belying the “bank” connotations Fantus originally intended.<sup>41</sup> Also interesting was the deployment of gender as a tool for recruiting. Most Americans had never stepped foot in a hospital unless they needed a surgery or faced illness and needed some gentle encouragement. Enter the “Gray Ladies,” a core of Red Cross volunteers who acted like hostesses for the men who would donate and add a “feminine touch.”<sup>42</sup>

More generally, these programs allowed the medico-industrial establishment to mediate between two conflicting goals—making individual donors feel special and worthy of every consideration while implementing the assembly line method and its efficiency to blood retrieval and banking.<sup>43</sup> Some of the methods proved fascinating, like inviting donors to inscribe their own name on the carton of dried plasma that would be sent to the recipient and being allowed to name a particular soldier or sailor they intended to memorialize with the gift.<sup>44</sup> In this the goal was to give the “reconstituted body fluid an individualized identity and strengthened the link of generosity and gratitude between donor and recipient threatened by the more commercial terms of the banking metaphor.”<sup>45</sup>

Postwar, doctors fought to maintain a steady blood supply. The Red Cross kept its unpaid-donor model alive by adapting its wartime message to peacetime. It urged in a pamphlet that “blood [is], or should be, a pillar of national health” and that donating provided “a personal share in fighting death and disease.”<sup>46</sup> By 1963, the Red Cross collected roughly half of the nation’s blood supply.<sup>47</sup>

2. *Blood Banks and Capitalism.*—Chapter 3 of the book examines the way postwar euphoria gave way to Cold War fear, causing the unpaid-donor model to falter. As the ideological struggle between capitalism and communism escalated, blood became a part of American war strategy all over again, only its role this time around was metaphorical rather than physical. If Fantus was the protagonist of the pre-War period, now the hero (or villain) was Mrs. Bernice Hemphill, Navy wife and initially laboratory

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40. *Id.* at 75 (quoting Edwin Jordan & Arno Holm, *The Red Cross Blood Donor Service*, 21 *HYGEIA* 108, 109, 156 (1943)) (internal quotation marks omitted).

41. *Id.* at 82.

42. *Id.* at 78.

43. *Id.*

44. *Id.* at 80.

45. *Id.*

46. *Id.* at 91 (quoting ALTON L. BLAKESLEE, *BLOOD’S MAGIC FOR ALL* 24, 31 (Maxwell S. Stewart ed., 1948)) (internal quotation marks omitted).

47. *Id.* at 93.

bioanalyst. She began by taking over a blood bank in Honolulu, Hawaii, but over the course of a forty-year career she would become known as the mother of blood banking or just “Mrs. Blood.”<sup>48</sup>

In the blood-giving context, the larger ideological debate translated into disagreement as to the appropriate underlying donor model. For instance, the newly formed American Association of Blood Banks (AABB), a professional organization connecting and loosely overseeing the nation’s various community blood banks, vigorously opposed the Red Cross’s “harmful socialist approach.”<sup>49</sup> Focusing on “the difference between blood *banks* and blood *centers*,”<sup>50</sup> the AABB castigated the national Red Cross *centers* and “used the *bank* to link local control . . . to capitalism as a cornerstone of democracy.”<sup>51</sup>

And so Fantus’s bank, originally conceived as a response to the harsh consequences of a market-system-based professional-donor model, came to stand for capitalism itself. The “Red Cross advocated for free blood to all who needed it, without obligation, while” the blood-banking industry and its medical professionals “insisted that blood was a ‘personal resource’ that had to be paid for, just like any other aspect of medical care.”<sup>52</sup> Swanson treats this as a proxy war for those who wanted to move American medicine towards universal health care and those who rigidly opposed it. Indeed, at one point even the American Medical Association itself put itself on record by resolution that “any free medical service or supply offered to all without regard to ability to pay violated the principle that it is the responsibility of an individual to assume the obligations of the medical expense just as he does for other living expense[s],”<sup>53</sup> a line that has fascinating echoes of our recent debates about the individual mandate in the Affordable Care Act.<sup>54</sup>

Perhaps in this chapter Swanson indulges in a little too much detail—the other chapters feel more readable—but it does have some fascinating details. My favorite points to the way we see an insurance market arise in blood with two innovations, the replacement fee and replacement donor. The replacement fee was the “dollar value placed on the blood withdrawn, which could be paid in cash or in kind.”<sup>55</sup> The blood banker’s goal “was to

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48. *Id.* at 84–85.

49. *Id.*

50. *Id.* at 95.

51. *Id.* (emphasis added).

52. *Id.* at 87.

53. *Id.* at 100 (quoting *Red Cross Blood Banks*, 45 J. MED. SOC’Y N.J. 416, 417 (1948)) (internal quotation marks omitted).

54. Affordable Care Act, 26 U.S.C. § 5000A (2012).

55. SWANSON, *supra* note 3, at 108.

keep the replacement fee high enough that patients chose to become indebted donors”:<sup>56</sup>

Anyone who had not yet accumulated a blood debt could donate a pint and thereby earn a credit of one unit of blood. For one year the donor or anyone in his or her immediate family could receive a pint of blood without any replacement charge, a form of in-kind medical insurance. What became known as the “replacement donor” donated blood in order to repay either a present or future debt.<sup>57</sup>

One blood bank in Stockton took it even one step further, allowing local residents to “buy into a blood assurance plan with blood or money”—it collected \$1 per person or \$4 per family in 1957 to buy blood as needed when supplies ran low.<sup>58</sup>

Then Mrs. Blood herself took matters still one step further—having learned from the Federal Reserve Bank about how banks transferred credits and getting sample documents, she established the first blood clearing-house, allowing participating banks to trade blood between them and rack up debts and credits.<sup>59</sup> In some ways this extended the fungibility of blood from *within* the bank (I do not get my own blood bank but an equivalent pint of blood) to *between* banks. The more banks joined the network, the more pressing became the need for national standards on quality and methods, which the AABB itself ended up drafting in the 1950s.<sup>60</sup> But those standards were silent on the source of the blood (paid professional donors vs. unpaid replacement donors vs. true altruists).<sup>61</sup>

3. *Products Liability, Immunity, and the Contingency of Tort Law Developments.*—Swanson depicts this era of blood banking as a kind of high point for the market, titling the next and last chapter on blood markets “Market Backlash.”<sup>62</sup> In fact, though, I think this framing does a disservice to what is a more complex story Swanson wants to tell here—not so much the *fall* of blood markets, but the unintended consequences of market terms given the historical contingency of the rise of products liability theories in tort law and the decline of charitable immunity. As someone who is a pretty intensive reader of the commodification/taboo trades market literature, this is the place where I think Swanson actually makes the biggest novel contribution in the book and where the book shines as *legal*

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56. *Id.*

57. *Id.* at 109.

58. *Id.* at 111.

59. *Id.* at 111–12.

60. *Id.* at 112.

61. *Id.*

62. *Id.* at 120.

history rather than medical or market history, and perhaps she does too little to spotlight that.

Pre-World War II, the liability for “bad blood” was understood primarily in terms of medical malpractice liability. Swanson uncovers some early cases in this line, including a 1922 California case where a woman who gave blood to a dying neighbor sued when her arm did not heal properly; a Georgia case from 1925 where a woman sued the doctor based on the method of transfusion when her wound did not heal after providing her blood to her husband; and a case brought by the widow and mother of a University of California crew team professional donor who died of septicemia in 1933 after selling his blood.<sup>63</sup> Swanson appropriately notes that these scattered opinions may not accurately reflect the universe of actual injuries or cases and also mentions a 1937 survey of hospitals that found that 40 out of 350 hospitals reported transfusion “accidents,” resulting in 60 incidents, including 16 patient deaths and 1 donor death.<sup>64</sup>

These were scattered opinions and scattered incidents, but when in 1953 the level of transfusion had risen to an estimated 3.5 million blood transfusions a year, the procedure began receiving more legal scrutiny.<sup>65</sup> To be sure the death rate was still unremarkable, 1 in every 1,000 to 3,000 transfusions (roughly the same chance of dying from treatment for appendicitis or from anesthesia), but the risk of disease transmission was more serious with an estimate of 1 in 200 transfusions transmitting hepatitis in the 1950s.<sup>66</sup> What mattered was that the legal barrier to suit that hospitals enjoyed, the charitable immunity doctrine, began to crumble in the same era as hospitals were being held liable for the torts of their doctors. In *Necolayff v. Genesee Hospital*,<sup>67</sup> a case from 1946, a New York appellate court upheld a jury award of \$6,500 against a hospital when a woman suffered a transfusion reaction from being transfused with blood intended for another patient.<sup>68</sup> Courts in the District of Columbia, Mississippi, and elsewhere reached similar conclusions, and these cases were written up in the *Journal of the American Medical Association*, which told its readers that by 1957 “only about half the states continued to recognize charitable immunity doctrine.”<sup>69</sup>

The second important tort development central to Swanson’s story was the rise of products liability law. As she puts it: “Product liability law

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63. *Id.* at 123.

64. *Id.*

65. *Id.* at 124.

66. *Id.*

67. 61 N.Y.S.2d 832 (App. Div. 1946).

68. *Id.* at 833–35, 837.

69. SWANSON, *supra* note 3, at 125.

provided a way for patients injured by blood transfusions to sidestep the traditional rules of medical malpractice regarding standard of care, the need to show negligence, and, in states where it was still in force, the doctrine of charitable immunity that protected hospitals.”<sup>70</sup>

The key question legally was whether blood was a good to be “bought” and “sold”; what distinguished it from other goods that could give rise to product liability? New York once again served as a trailblazer: in 1953, a New York state trial court found a breach of implied warranty of fitness, or a warranty that “goods sold are reasonably fit for the purpose for which the buyer requires them,” in a “sale” of blood that had resulted in the recipient’s contraction of hepatitis.<sup>71</sup> The court reasoned that was the kind of transaction for which the doctrine was appropriate; in Swanson’s words “[t]he hospital-seller understood the purpose for which the blood was purchased, and the patient-buyer relied on the skill and judgment of the seller in providing safe, matched blood.”<sup>72</sup>

The state’s highest court ultimately disagreed, holding that “[c]oncepts of purchase and sale cannot separately be attached to the healing materials such as medicines, drugs, or, indeed, blood supplied by the hospital for a price as part of the medical services it offers” and that the fact that the “property or title” to something like blood was “transferred” to the patient as part of the medical procedure was not enough to make “each such transaction a sale.”<sup>73</sup> Subtly then the issue was not whether blood was “property” (it was) but whether it was a “sale.” The concern that motivated the majority was that holding this was a sale and subjecting it to products liability doctrine “would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of ‘bad’ blood.”<sup>74</sup>

While the industry had narrowly avoided this form of liability in New York, the possibility of the product liability argument growing legs elsewhere put organized medicine’s support of blood banking in something of a quandary. It “wanted blood to be treated as a market commodity by patients but as a special sort of ‘therapeutic merchandise’ by the courts.”<sup>75</sup> There was a conflicting narrative of uniqueness: blood was *not* unique from

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70. *Id.* at 126.

71. *Id.* (quoting *Perlmutter v. Beth David Hosp.*, 128 N.Y.S.2d 176, 177 (Sup. Ct. 1953)) (internal quotation marks omitted).

72. *Id.*

73. *Id.* at 127 (quoting *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 794 (N.Y. 1954)) (internal quotation marks omitted).

74. *Id.* (quoting *Perlmutter*, 123 N.E.2d at 795) (internal quotation marks omitted).

75. *Id.* at 128.

other health care goods and services (it should be sold not given freely) but *was* supposed to be unique in terms of the way in which tort law regulated its transfusion.

Blood banks, hospitals, and other groups wanting the industry to thrive tried to head off more tort liability through legislation: in 1955, California passed a law declaring that providing “banked blood for transfusion was a service and not a sale.”<sup>76</sup> They also tried some self-help remedies—some of which felt like getting the blood lady to protest too much (the AMA recommended that instead of charging for the blood itself, making an equivalent charge for the use of the facility (i.e., relabeling the charge))—and getting patients to sign consent forms stating that the blood was “incidental to the provision of services” and there was no warranty attached.<sup>77</sup>

The legal debate simmered for years as other jurisdictions confronted these questions and one by one agreed with New York that blood did not fall under the purview of product liability.<sup>78</sup> In the 1960s, the debate roared to life again when the Federal Trade Commission (FTC) began to assert jurisdiction over blood banks on the grounds that they were engaged in the “blood trade.”<sup>79</sup> This stemmed from attempts by some hospitals to boycott blood purchase from for-profit banks in favor of community nonprofit banks, which led the for-profit banks to complain to the FTC, among other institutions.<sup>80</sup> The FTC ultimately concluded that both for-profit and not-for-profit blood banks “were parts of a ‘business’ rather than parts of the practice of medicine” and thus that it had authority over them, including antitrust authority.<sup>81</sup> Blood bankers balked at the suggestion that they engaged in any such “commerce.” Indeed, the same bankers who just years prior had been adamant that blood banks were a hallmark of free trade now insisted that they “provided a service rather than a *product* and therefore that there was no trade in blood.”<sup>82</sup> A federal appellate court ultimately rejected the FTC’s argument that it had jurisdiction over nonprofit blood banks, but the court did not explicitly reject the argument that blood banks dealt in the blood trade.<sup>83</sup> For-profit organizations remained at risk, prompting a strong push for states to enact blood shield laws “designed to

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76. *Id.* at 129.

77. *Id.* (quoting *Medicine and the Law: Blood Transfusions—Mediolegal Responsibilities*, 163 JAMA 283, 286 (1957)) (internal quotation marks omitted).

78. *Id.* at 129.

79. *Id.* at 130.

80. *Id.* at 131–32.

81. *Id.* at 133 (quoting *In re Cmty Blood Bank of the Kansas City Area*, 70 F.T.C. 728, 900 (1966)) (internal quotation marks omitted).

82. *Id.* at 134.

83. *Id.* at 133.

remove banked blood from the laws regulating sales of goods.”<sup>84</sup> By 1973, all but six states had enacted such laws.<sup>85</sup>

4. *Fear of the “Other” and the End of the Blood Bank?*—At this point Swanson takes her story in a very interesting direction. She connects the 1960s and 1970s litigation and Richard Titmuss’s work, comparing the U.S. and U.K. blood supply in 1971 as “the critical perspective on blood.” Swanson writes:

[Both were] simply a reformulation of long-existing sociocultural anxieties about body product exchange that the body bank had sought to dispel but had never completely eliminated. The adoption of the banking metaphor, with its assumption that all blood was equivalent, had never been strong enough to resolve the deep-rooted cultural anxieties that all blood was *not* the same, that the transfer of blood would also transfer qualities from perceived inferiors into a vulnerable patient. . . . During this period, continuing suspicions of blood from the ‘other’ were reformulated into fear of ‘bad blood’ from those who sold it rather than those who gave it.<sup>86</sup>

Swanson uses this as a pivot point to discuss a theme that comes up earlier in the history of blood banking: racial segregation. As I discussed above, the blood-banking industry struggled with how to deal with blood from those of different races.<sup>87</sup> The degree of the racial separation in early blood banks varied by region, resulting in an uneven standard across the country that called into question “the fundamental assumption of the blood bank that all blood was equal.”<sup>88</sup> Wartime exigencies helped equalize “white” and “colored” blood but only quite slowly. At the start of World War II, the Red Cross refused to accept blood donated by African-Americans.<sup>89</sup> When it later accepted blood from African-Americans, it provided that blood only to African-American soldiers, a policy that remained in place even when President Harry Truman desegregated the armed forces in 1948.<sup>90</sup> Not until the start of the Korean War in 1950 did the Red Cross drop its separation policy.<sup>91</sup> Meanwhile, labeling persisted in many local blood banks.<sup>92</sup>

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84. *Id.* at 138.

85. *Id.*

86. *Id.* at 140.

87. *See supra* notes 33–38 and accompanying text.

88. SWANSON *supra* note 3, at 66.

89. *Id.* at 141.

90. *Id.*

91. *Id.*

92. *Id.* at 142.

During the Civil Rights Movement of the 1960s, “blood segregation became a political statement.”<sup>93</sup> To “signal state opposition to the national push for racial integration,” states in the South passed laws *requiring* the racial segregation of blood.<sup>94</sup> The federal government responded with the Civil Rights Act of 1964, which (among other things) made federal Medicare and Medicaid funds contingent upon eliminating blood segregation, though not all hospitals complied; Louisiana still segregated blood as late as 1969.<sup>95</sup>

But as blood became less segregated along racial lines, it became increasingly scrutinized along socioeconomic lines. In 1957, about one-sixth of all blood “donors” were being paid nationwide according to a Joint Blood Council survey.<sup>96</sup> In the 1960s, some blood banks “unabashedly” paid their donors, while nearly all others (save the Red Cross centers) occasionally paid suppliers to keep inventories from running low.<sup>97</sup> In the 1960s the perception was (my slogan not theirs) that bought blood = bad blood, the kind that carried disease.<sup>98</sup> The perception (that continues even in the halls of academia today) was that buying blood meant recruiting a population of financially needy individuals, desperate for cash, and willing to lie in order to make their money. Swanson does not hammer the point home as much as I might like, but her history shows that this is an oversimplification, perhaps a gross one. Among those “suspect sellers,” for example, was the Greenleafton Reformed Church of Preston, Minnesota, whose members sold blood and raised \$27,000 to rebuild its church<sup>99</sup>—hardly the typical poster boys and girls for the commodification attack on selling body parts.

A nationwide hepatitis scare exacerbated the fear. “Only in 1971 did it become possible for blood banks to screen” for hepatitis in blood, and even then sensitivity of the screen was poor, catching infection only 60% of the time.<sup>100</sup> Paid blood was the easy scapegoat. As Swanson puts it:

[D]uring the 1950s and 1960s and into the 1970s Americans were forced to rely upon stereotypes and assumptions rather than science or medicine to avoid this invisible killer. The association of disease with filth, squalor, and poverty had been reinforced again and again

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 143.

97. *Id.*

98. *Id.* at 144.

99. *Id.*

100. *Id.* at 146.

in American history. It seemed only logical that paid blood suppliers from the wrong side of the tracks were the problem.<sup>101</sup>

Except they weren't. Studies came out claiming that paid donors provided the most reliable blood supply because they were often repeat donors.<sup>102</sup> As Swanson points out: "The best way to know if an asymptomatic supplier would transmit hepatitis was whether his or her blood had transmitted it before. Professional donors, as repeat suppliers, could therefore be considered 'clean' donors, tested in the most reliable way possible—after their first donation . . ."<sup>103</sup> The professional donor thus acquired a kind of double identity; in the medical literature he was heralded as the source of the safest blood, in the public's imagination as the source of "contaminated blood."<sup>104</sup>

Nevertheless public reporting on what contamination did occur in the U.S. blood supply focused on the for-profit banks, and that is where the political and civic action focused as well. In 1967, "New York legislators proposed state and federal legislation to eliminate commercial blood banks" in New York, which the blood-banking community successfully resisted.<sup>105</sup> Around the same time, an Illinois commission proposed a licensing scheme for blood banks that would have forbidden most advertising for blood donors, also aimed at dampening the for-profit blood-bank model.<sup>106</sup> Other states also considered such measures. But ultimately "[w]ithout waiting for legislative action, Americans took matters into their own hands, opting out of the general blood supply and joining co-ops" where friends stored blood for each other or individuals stored their own blood for future potential use (autologous transfusion).<sup>107</sup>

Onto this turning tide sailed British Sociologist Richard Titmuss's book *The Gift Relationship*, which Swanson characterizes as telling

Americans that their fears were true: reliance on paid blood suppliers in the United States was causing insufficient supplies, waste, and increased risk of hepatitis. His argument was made by comparison with the British health system, which relied entirely on unpaid donors and had, he argued, much less transfusion-transmitted hepatitis and blood wastage.<sup>108</sup>

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101. *Id.* at 146.

102. *Id.*

103. *Id.*

104. *Id.* at 147.

105. *Id.* at 149. Here and elsewhere, Swanson is sometimes unclear about whether she is talking about the corporate form of the blood bank itself (for profit or not for profit) or whether the blood donors were paid or not.

106. *Id.*

107. *Id.* at 150.

108. *Id.* at 151.

At this point one might expect Swanson, who is as expert as anyone on the status of the American blood supply at the time of Titmuss's writing, to give a detailed hard look at Titmuss's claim and the evidence supporting it. One gets a sense from the surrounding materials in the book that on the safety issue Swanson is skeptical or at least thinks Titmuss overstated his case. But surprisingly she does not directly evaluate the claims from what was known at the time; instead, she uses this to pivot back to the theme of projection of stigma on the "other":

With Titmuss's assumptions about the correlation between dangerous paid donors and African American donors left unquestioned and unremarked, his book helped obscure the racial subtext of American fear of the professional donor by tying it to the earlier politics of the blood bank battles of the 1950s.<sup>109</sup>

For Swanson, the contemporaneous debate over Titmuss's work was really as much, perhaps, about his critique of capitalism for which the blood bank was only the stand-in. As she characterizes Titmuss's critique, it was not just about efficiency, but the blood-banking system of the United States was "immoral and proof of a national failing. The failure of Americans to make the civic-minded wartime volunteer who had given blood as a personal gift into the basis of a postwar blood system . . ."<sup>110</sup>

Titmuss's critique ignited governmental interest in the blood system: President Richard Nixon called for the development of a federal blood policy and "Congress introduced about forty bills addressing the blood supply between 1970 and 1972."<sup>111</sup> But Swanson concludes that this "federal attention" did not generate more "federal control of the blood supply" because "[b]etter capitalism, not socialism, was the American answer to Titmuss."<sup>112</sup> The AABB argued in its response that "the failures of the American blood supply were not due to reliance on market forces by its membership but were the result of the inability of medical societies, the Red Cross, and non-profit hospitals to establish and maintain blood banks as well-run business organizations."<sup>113</sup> Nevertheless, the AABB saw eliminating the "paid donor" as a target of opportunity that would help it deflect some of the pressure Titmuss's work and the governmental scrutiny

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109. *Id.* at 151–52.

110. *Id.* at 152.

111. *Id.* at 153. In what is otherwise a quite exhaustive account of the history of blood banking in the United States, this is one place where Swanson could helpfully have added more detail—what was the content of these bills? How many succeeded? What were the coalitions that supported and opposed them?

112. *Id.*

113. *Id.*

was bringing to bear, and “in 1972 it set 1975 as the target date for eliminating the use of paid donors.”<sup>114</sup>

If one has read the chapter up to this point and especially the data Swanson brings up suggesting the paid donors were *not* the source of infection risk, one gets the impression that they merely were targets of opportunity and an institution like the AABB decided to eliminate them fully knowing that fact. It is slightly frustrating that Swanson is unwilling to come out and say whether that is right or wrong (or even unclear), even though she strongly implies this was all kabuki theater.

In any event the AABB succeeded in phasing out the paid donor. By 1976, less than three percent of whole blood came from paid sellers and then primarily for rare blood types, and this was the result largely of self-regulation by the industry (the Food and Drug Administration’s requirement that blood be labeled as “paid” or “volunteer” came later).<sup>115</sup> Insurance finished the job and obscured the difference between the Red Cross model and the blood-bank model. With the introduction of Medicare and Medicaid and the coverage in private insurance plans, there was no longer an incentive for many of the old models because “[o]nce blood transfusion charges were covered by insurance plans, insured patients had no financial incentive to repay their blood ‘loans’ in kind, and the currently healthy lost the incentive to give against future need.”<sup>116</sup>

Swanson’s story of blood essentially ends here, with only a page and a half devoted to later events, such as the impact of this history on laws about buying and selling organs in the United States.<sup>117</sup> It feels a wee bit abrupt, but the book is already quite long and she wants to save some space for two other markets: milk and sperm.

*B. Milk and the Banking of Feminine Kindness.*—Milk and sperm banking get a chapter each. The heart of this book is in blood, and so is my exegesis of it, but I will more briefly discuss what Swanson has to say about these other banks.

*1. Standardizing Wet Nursing.*—Swanson has made the (I think) unhelpful editorial choice to split her discussion of milk markets into two parts of the book roughly 100 pages apart.

In the first chapter of the book, we are introduced to Dr. Fritz Talbot, recent Harvard Medical School grad, who is crisscrossing Boston looking for a wet nurse for a newborn baby boy in his care who is not getting

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114. *Id.* at 154.

115. *Id.*

116. *Id.* at 155.

117. *Id.* at 157–58.

enough milk from his mother.<sup>118</sup> Finding a wet nurse had always posed difficulties since one had to track down a lactating woman willing to provide services in the geographic area. By contrast, the demand was high, in that even for their own babies “[w]omen of all socioeconomic strata sought the ability to move freely outside their homes, unhampered by breast-feeding duties, out of either the necessity to earn wages or the desire to participate in social and civic life.”<sup>119</sup> The dairy industry promoted “artificial feeding” regimes, many of which were using “cow’s milk-based concoctions,” but many (though not all) pediatricians were suspicious of these products as substitutes for breast-feeding and believed they played a role in infant sickness and mortality.<sup>120</sup>

Not that wet nurses were an easy sell either:

As Talbot knew from firsthand experience, the wet nurse was often a highly unsatisfactory source of nutrition, what another doctor later called “that necessary but often slatternly female.” She was most often an unwed mother or an otherwise desperate, impoverished immigrant woman and, in Boston, frequently Irish Catholic. As both an immigrant and unwed mother, she entered a middle-class household with two strikes against her: perceived as lacking in morals and in the sociocultural assumptions of her Anglo-Saxon, native-born, Protestant employers. Employers and doctors not only worried about the nutritional content of her milk but also feared the transmission of disease, such as syphilis, as well as undesirable ethnic traits, individual moral failings, or personality flaws.<sup>121</sup>

Nevertheless the demand was there, and Talbot’s innovation was to implement the “Directory for Wet Nurses,” a simple registry of women looking for employment.<sup>122</sup> But Talbot discovered that many of the wet nurses could not sustain themselves while looking for parents to employ them (a prerequisite for the scheme to work), so he established a house where up to eight women could live with their infants, funding it out of his own income when the Directory’s income could not support it.<sup>123</sup> The housing and the Directory more generally regulated these women’s behaviors—such as by forbidding alcohol, monitoring them for tuberculosis and syphilis, and teaching them to clean and care for babies—such that parents who employed women off Talbot’s Directory could be assured a

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118. *Id.* at 15.

119. *Id.* at 18.

120. *Id.* at 18–19.

121. *Id.* at 21 (footnotes omitted).

122. *Id.* at 22.

123. *Id.*

quality product (service?).<sup>124</sup> Talbot introduced a screening process whereby every woman he selected was screened for infectious disease and physical defect, as well as being subjected to a “probation” period where he evaluated their suitability for the job.<sup>125</sup> “Troublesome” women were dismissed, but most of the others stayed for six to eight months.<sup>126</sup> Their diet, schedule, eating times, rest times, and feeding times were all standardized by Talbot and similar operations, turning the process into a kind of factory farm for human milk.<sup>127</sup>

But even this standardized and regimented form of wet nursing faced a problem: doctors could not detect the quantity or quality of milk the babies received in the process.<sup>128</sup> The solution was to get the women to express their milk first, allow medical staff to examine it, and only then give it to the baby.<sup>129</sup> The transformation to manufacture was now complete: “The wet nurse’s job thus became to produce like a dairy cow rather than to suckle an infant, and her production was measured not in cries quieted but in ounces per minute.”<sup>130</sup>

2. *From Wet Nursing to Banking.*—By 1915, the woman producing the milk and the baby receiving it could be separated in space and time. In that year Talbot’s Directory not only provided nurses for hire but bottled milk from them as well.<sup>131</sup> Parents liked disintermediating the living,

124. *Id.*

125. *Id.* at 23.

126. *Id.*

127. *Id.* at 22. All this has fascinating echoes in today’s world with international surrogacy, where surrogates in Anand, India, live communally while carrying the babies of Western genetic parents. As I wrote in my last book, the Ankansha Fertility Clinic

employs only women who have been married and have had at least one child. In 2008, there were forty-five surrogates on the payroll who lived away from their families in a compound, which one author described as a “classroom-size space . . . dominated by a maze of iron cots that spills out into a hallway.” Surrogates receive \$50 a month, plus \$500 at the end of each trimester, and the balance upon delivery. A successful Akanksha surrogate makes between US \$5,000 and \$6,000 (slightly more if she bears twins), an amount that exceeds a typical salary for several years of ordinary labor in India. If a woman miscarries, she keeps what she has been paid up to that point. If she chooses to abort—an option the contract allows—she must reimburse the clinic and the client for all expenses. . . .

. . . . The surrogates’ husbands and children may visit during the day, and some take classes such as English or computer skills.

I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 373–74 (2015).

128. SWANSON, *supra* note 3, at 23.

129. *Id.*

130. *Id.* at 24.

131. *Id.* at 32.

breathing wet nurse from their life and doctors liked selling by the ounce, so by 1927 the Directory was renamed “The Directory for Mother’s Milk” and now offered only bottled milk and not wet nursing.<sup>132</sup> This approach spread beyond its origins in Boston, and elsewhere in the country these facilities were called “milk stations” or “milk bureaus.”<sup>133</sup> Some of these, such as in Detroit, allowed women who were “reliable” providers to express milk at home and send it to the operators who pasteurized it, while other women continued to express milk on site that was left unpasteurized and labeled “certified milk,” borrowing a term from the dairy industry.<sup>134</sup>

The language changed with the process. No longer wet nurses, they were now “healthy mothers” engaged in a “legitimate trade” in mother’s milk.<sup>135</sup> To be sure, both before and after this shift the lactating women were paid, and the parents buying the milk paid.<sup>136</sup> What was different was the socioeconomic status of the women. Wet nurses were from the “bottom rungs of society—women without husbands to support them or their babies,” and it was envisioned that the scheme to some extent helped these women lift themselves out of poverty and provide for others who needed their milk.<sup>137</sup> But these women also represented to the buying populace images of illness and contamination.

The move to bottled milk was in part a response to this perception, but it also targeted very different lactating women. They were married women looking to make some extra money on the side to afford things just beyond their socioeconomic grasp. A Detroit woman reportedly earned \$3,500 during fourteen months of lactating she used to purchase a home; at another bureau a mother of three made more than \$1,700 during four years of lactation.<sup>138</sup> This was a lot of money! At the time the average annual earning of all employees (male or female) was \$1,420 for nonfarm workers and a measly \$714 per year for domestic service.<sup>139</sup> The bureaus made enough money from their trade to become financially self-sustaining but did not raise prices beyond that. “Bottled human milk could have been sold at a profit for whatever price the market would bear, as was true for formulas from . . . certified milk,” but the medicalized milk bureaus chose not to charge those profit-making prices.<sup>140</sup>

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132. *Id.*

133. *Id.* at 32–33.

134. *Id.* at 33.

135. *Id.* at 34.

136. *Id.*

137. *Id.* at 36–37.

138. *Id.* at 37.

139. *Id.*

140. *Id.* at 38.

The milk story then gets picked up in Chapter 5 of the book, which Swanson calls “Feminine Banks and the Milk of Human Kindness.”<sup>141</sup> While blood banking took off in post-World War II America, milk banking seems to have seen a decline during the same period—from 24 banks in 1944 to only 7 in 1955—likely due to the success of canned infant formula and increased acceptance of this method of feeding by doctors accompanying a more general medicalization and hospitalization of birth.<sup>142</sup> In part, because of this medical indifference and drop in demand, starting in 1955 the dominant model was instead what Swanson characterizes as “a feminized, lay-led institution that emphasized peer-to-peer maternal gifting, taking the blood bank as a model but adapting it in new ways.”<sup>143</sup>

Why did the trajectory of milk “banking” go so differently than blood? While some milk bureaus adopted the title of “bank,” as Swanson notes the “metaphor fit only loosely” for a number of reasons.<sup>144</sup>

For one thing, Fantus’s initial blood model of in-kind accounting was just impossible for milk because there could be no repayment in kind; those who needed milk from the bank were unlikely to be able to give milk themselves in the future, in part because of the timing of lactation’s connection to the timing of child birth.<sup>145</sup> Moreover, babies did not drink milk in standardized amounts and women did not express it in standardized predictable amounts, making the standardized unit-by-unit treatment that blood was given unsuitable.<sup>146</sup> What we had was instead something much more akin to a “manufacturing facility that bought its raw materials [milk from lactating women] and sold its final product at a mark-up.”<sup>147</sup>

Second, milk banks never faced product-liability concerns: there were only a handful of milk banks in operation; milk raised no immune-compatibility issues between donor and recipient; and milk banks never adopted the language of transfers, sales, deposits, and withdrawals.<sup>148</sup> The term “bank” had crossed over in some instances but not the bank’s underlying balancing concept, making it easier for courts to reject the notion of milk banking as a commercial exchange.<sup>149</sup> Still, despite this favorable legal regime many insurers became worried, and in the case of the

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141. *Id.* at 159.

142. *Id.* at 160–61.

143. *Id.* at 161.

144. *Id.* at 166.

145. *Id.* at 163.

146. *Id.*

147. *Id.* at 166.

148. *Id.* at 166–67.

149. *Id.* at 167.

San Francisco Mother's Milk Bank the insurer threatened to raise their charge 700%, causing the bank to close in 1978.<sup>150</sup>

Another key difference was that there was no controversy about paying for breast milk. If anything, the wet-nursing tradition, which was always about paying for milk, strengthened the conviction of the medical establishment that of course they had to pay for the milk.<sup>151</sup> Nevertheless, perhaps because of the gendered nature of the narrative and the supplier, the payment coexisted with a public perception of altruism—yes “milk was . . . bought and sold to the mutual benefit of buyer and seller, but it was also the ‘milk of human kindness’” and fell within a gift narrative.<sup>152</sup> Again, one can see a contemporary echo of this in the way in which women's reproductive sales are characterized—while for men sperm “donation” is portrayed as employment or shift work, for women narratives of altruism and helping other women start a family are a major part of the way in which egg donors are recruited and retained.<sup>153</sup>

Furthermore, as time passed higher socioeconomic status (SES) women were often recruited to provide milk as well. In the 1920s and 1930s the women were often married and certainly financially better off than the wet nurses that preceded them.<sup>154</sup> By the 1940s and 1950s, hospitals were recruiting even wealthier postpartum mothers, not only those who saw “selling milk as a way to avoid the necessity of leaving their baby for paid employment outside the home but also women who could afford to be full-time mothers and housewives.”<sup>155</sup> Indeed, startlingly some of the women who contributed were actually high society women, and in San Francisco they threw gala balls and fashion shows that ended up in the society pages to raise money for the banks.<sup>156</sup>

As time went on, increasing numbers of women of all social classes disavowed payment.<sup>157</sup> Initially, in the postwar era, the medical profession refused free milk and paid even the women who wanted to give it for free, but some banks, such as the one in Evanston, began transforming their activities into philanthropy; indeed, the Evanston bank became the first to not pay any suppliers at all.<sup>158</sup> Not only the running of the bank itself but

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150. *Id.*

151. *Id.* at 164.

152. *Id.* at 168.

153. See RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 87 (2011) (“[E]gg donation is organized as gift exchange, while sperm donation is likened to paid employment.”).

154. SWANSON, *supra* note 3, at 169.

155. *Id.*

156. *Id.* at 170.

157. *Id.* at 171–72.

158. *Id.* at 171–73.

the actual donating of milk, both the activities of society women, was seen within this philanthropic lens, and Swanson argues that they saw themselves as “altruistic volunteers, caring for their community and other women’s children as an extension of their primary role as mothers and homemakers”; that is, they “were mothers, not professional donors or wet nurses looking for a ‘profitable business.’”<sup>159</sup> Still, Evanston remained an anomaly, and most banks relied at least in part on paid-for milk.

What threatened to kill the milk banks was not supply but demand—the demand for “natural milk” dwindled in the face of increasingly popular “commercial milk.”<sup>160</sup> Although the post-World War II ideal of female domesticity espoused natural milk, pediatricians began in the 1960s to grow skeptical of the notion that breast milk had any real advantage over commercial formulas.<sup>161</sup> By the late 1960s, few milk banks remained.<sup>162</sup> For a while, mothers in need of natural milk would have to turn to ad hoc, informal systems of milk distribution or even direct mother-to-mother exchanges.<sup>163</sup>

The extinction of the milk bank was saved unexpectedly by the gaining of steam of the Women’s Liberation Movement in the 1960s. Women reconceptualized the milk bank 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>164</sup> Within this new institution, “the natural was superior to the commercial.”<sup>165</sup> Naturally, the Women’s Liberation Movement also changed the formerly structured manner in which milk banks operated. The milk-giving model was recast as a part of the women’s health movement: a way for women to overthrow the patriarchal control of the medical industry, with male doctors tending to female patients.<sup>166</sup> Women started “kitchen milk banks,” collecting milk in their own homes and dispersing to other women’s babies on request without any medical intervention or legal oversight.<sup>167</sup> With the resurgence of interest in natural milk, the number of milk banks nationwide increased from four to twenty-seven—nearly seven fold—between 1973 and 1982.<sup>168</sup>

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159. *Id.* at 175.

160. *Id.* at 176–77.

161. *Id.* at 176.

162. *Id.* at 177.

163. *Id.* at 180–81.

164. *Id.* at 187.

165. *Id.*

166. *Id.* at 185–86.

167. *Id.* at 187.

168. *Id.* at 184.

It is fascinating to see milk banking go so communitarian or socialist when blood banking staunchly moved in the other direction. It is hard to pin down the explanation—was it the lack of legal threat from products liability? The gendered nature of the service and the ability to recognize (or perhaps exploit) gender narratives? Was it the lack of health risks like hepatitis or syphilis being transmitted? The fact that women could only provide breast milk for specific periods tied to pregnancy as opposed to throughout the lifetime? Was it the fact that milk banking was kept more on the periphery of the medical establishment while that establishment “owned” (figuratively and literally) blood banking? Or was it the fact that demand was, even at its peak, never very high, and the service one that medicine never insured? In Swanson’s discussion one can see all these threads, but she does not put emphasis on any one of them in particular, which is perhaps wise given what the historical record can and cannot show. It would be fascinating to go comparative in this analysis and examine how milk banking developed in other countries in the same time period, but that is not something Swanson attempts in this work (perhaps her next book).

In any event, this return of the milk bank was short-lived. In the 1980s and 1990s, concern grew over informal, unregulated methods of distributing natural milk.<sup>169</sup> If “bad blood” came from the commercial donor in the public perception of the time, for milk the concern was that contamination came from donated milk.<sup>170</sup> Organized medicine formed the Human Milk Banking Association of North America (HMBANA), which “develop[ed] standard milk-bank procedures to ensure the quality and safety” of natural milk.<sup>171</sup> The HIV crisis and the first case of transmission of the virus via breast milk in 1985 made the need for this kind of regulation apparent.<sup>172</sup> Milk bankers largely adhered to HMBANA’s guidelines in the hopes that doing so would move natural milk “back into the medical mainstream,” “stabilize demand[,] and help with cash-flow problems.”<sup>173</sup>

At the end of the twentieth century and into our century, milk banking has seen something of a resurgence. Swanson reports that “[b]y 2013 there were thirteen HMBANA-accredited banks in the United States and four more planned.”<sup>174</sup> She also notes that their successors (“Big Milk” if you will), especially Prolacta Bioscience, are “for-profit business[es] that take[] advantage of the gift/commodity dichotomy and the public acceptance of

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169. *Id.* at 188.

170. *Id.* at 189.

171. *Id.* at 191.

172. *Id.* at 193.

173. *Id.* at 191.

174. *Id.* at 194.

body banks to maximize shareholder profits.”<sup>175</sup> These businesses manipulate stereotypes about paying for milk to get women to donate for free and then make profits themselves. Swanson quotes the executive director of the milk-banking association in 1996, for example, suggesting that “[p]urchasing milk could have harmful consequences” in that “infants whose mothers would sell their milk might be deprived of their own birthright to that milk,” the women “might be tempted to adulterate milk with either cow’s milk or water to increase the volume and thus the amount earned,” and the adulterated milk might also hurt downstream recipients.<sup>176</sup> Swanson may not completely connect the dots, but it is quite clear that this is a kind of scaremongering history (given the history that shows it was donated milk that was more likely to be a health risk) playing on gendered narratives (that mothers who would sell must be selfish and bad mothers depriving their own children of their “birthright,” ignoring that some of the funding would itself go towards their families).

The chapter closes by showing how companies like Prolacta that make infant formula have now gotten into the same game. They have a network of milk banks with names like “Helping Hands and Milkin’ Mamas” that seek free milk donations to “help save the lives of the most fragile infants,” where the woman donating milk is rewarded to know that her donation is “nurturing other children as she nurtures her own”; in fact, Prolacta takes that milk, processes it into a human milk-based infant formula, and sells it to hospitals like infant formula, all of this as a for-profit company.<sup>177</sup> The milk of human kindness feeds the profits of corporate America.

#### D. *Banking Sperm*

The book’s last chapter before a brief conclusion is entitled “Buying Dad from the Sperm Bank.”<sup>178</sup> It is very short, 35 pages, and does not make nearly the contribution that the other chapters do as against the existing literature.<sup>179</sup> One imagines this chapter’s addition might have been the result of the push from an editor at the press to “say something current, how

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175. *Id.*

176. *Id.* at 193–94 (quoting Lois D.W. Arnold & Laraine Lockhart Borman, *What Are the Characteristics of the Ideal Human Milk Donor?*, 12 J. HUM. LACTATION 143, 144 (1996)).

177. *Id.* at 195.

178. *Id.* at 198.

179. For some excellent books on the history, legal treatment, and current status of sperm banking, see, for example, ALMELING, *supra* note 153; NAOMI CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL RECOGNITION* (2009); JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* (2d ed. 2013); and DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* (2005).

about sperm banks?” Whatever its genesis, it does not blotch an otherwise excellent book.

As Swanson depicts it, in the United States, sperm banking and sperm “donation” have always been a business proposition without the patina of a nonmarket existence.<sup>180</sup>

Before sperm could give rise to a viable business, however, medicine needed to perfect artificial insemination, and the public needed to overcome a deep-seated moral opposition to what some religions perceived as a form of adultery.<sup>181</sup> Here Swanson notes that some early legal encounters with artificial insemination were *also* about adultery, such as the 1921 Canadian court opinion suggesting that artificial insemination might be grounds for divorce, although she claims there were no U.S. legal opinions published on the subject before 1945.<sup>182</sup> Public opinion to the practice warmed up in the 1920s, when the possibility of eugenics seemed like a solution to the “race suicide” (Theodore Roosevelt’s words apparently) threatening to result from the decreased fertility of white elites.<sup>183</sup> But “by the late 1940s[,] eugenics had fallen from favor in American public discourse, tainted by the Nazi atrocities performed in the name of racial purity.”<sup>184</sup> Unlike with blood or milk, doctors refrained from creating banks themselves, though in 1947 New York they urged the city of New York to pass regulations requiring the testing of semen from donors that medical involvement would be required.<sup>185</sup>

Secrecy was always at the heart of the early American experience—doctors did not want to be associated with the practice because of the opposition to eugenics and instructed their patients not to reveal the practice to their donor-conceived child or even other family members.<sup>186</sup> This reason for secrecy was likely reinforced by and also reinforcing of the legal uncertainty over the practice of artificial insemination, which persisted for a long time. Swanson examines some proposed bills either endorsing or repudiating the legality of artificial insemination from the 1940s and 1950s but then notes that they failed to pass.<sup>187</sup> Instead, the task of determining the legal status of artificial insemination was left to the courts, primarily

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180. See Swanson, *supra* note 3, at 199 (differentiating sperm banks from milk stations and blood banks in that sperm banking was developed outside the medical community and was for profit from the start).

181. *Id.* at 200, 202.

182. *Id.* at 209–10.

183. *Id.* at 203.

184. *Id.* at 209.

185. *Id.* at 208.

186. *Id.* at 209.

187. *Id.* at 216.

through custody disputes of children conceived through the method.<sup>188</sup> In one of the most divisive cases to capture the public's attention, an Illinois state court held in 1954 that "donor insemination, even with husband consent, was 'contrary to public policy and good morals,' and therefore [the child at issue] was an illegitimate child and [the father] was not liable for child support."<sup>189</sup> Controversy ensued. The state expressed concern for the thousands of now potentially illegitimate children who might "end up dependent on the public purse."<sup>190</sup>

Despite the legal controversy over the practice, negative public reporting, and medical refusal to sanction or run sperm banks, demand persisted and led to a commercially viable model for banking.<sup>191</sup> The first sperm banks, for profit, opened in 1971 and targeted a discrete, narrow population: men at risk of infertility.<sup>192</sup> The number of vasectomies was on the steady rise, and sperm bankers hoped that soon-to-be-infertile males would see banking as "fertility insurance."<sup>193</sup> The term "bank" was thus even more of a misnomer in the sperm context than in the milk context. The first sperm banks did not sell sperm or give it away. Instead, they merely offered storage services.<sup>194</sup> Indeed, unlike their colleagues in banking blood and milk, Swanson notes that the sperm bank operators never wanted property rights in what was provided—to own the sperm itself—instead they wanted to be one's sperm safety deposit box.<sup>195</sup>

Despite dire predictions of the "sterilization of the American male," the "safety deposit" business model never took off.<sup>196</sup> Not only was there an exceedingly limited pool of men planning sterilization who had the means to buy fertility insurance, but cryopreservation of sperm also had its limits.<sup>197</sup>

Not until the end of the twentieth century did sperm banks devise a workable business model. The key was changing the target clientele. Sperm banks "reinvented their business as marketers of goods to women rather than providers of services to men."<sup>198</sup> Several factors contributed to the success of the model. First, sperm bankers realized that people might be willing to pay extra for preferred characteristics, so they focused on creating

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188. *Id.*

189. *Id.* (quoting *Doornbos v. Doornbos*, 23 U.S.L.W. 2308, 2308 (Ill. Super. Ct. 1954)).

190. *Id.* at 216–17.

191. *Id.* at 216–19.

192. *Id.* at 219.

193. *Id.* at 220.

194. *Id.* at 219.

195. *Id.* at 219–21.

196. *Id.* at 223.

197. *Id.*

198. *Id.* at 225.

more detailed catalogues from which recipients would select, much as they would a “fine wine or artisanal cheese,” rather than the product being like “carrots or silver teaspoons.”<sup>199</sup> Second, states finally passed laws on artificial insemination, such as versions of the Uniform Parentage Act of 1973, and they often enshrined physician involvement.<sup>200</sup> Doctors’ legally recognized stamps of approval “did the cultural work of transforming what some considered a variation of adultery into a treatment for infertility, that is, ‘sin into therapy.’”<sup>201</sup> Third, the AIDS crisis actually turned cryopreservation from a drawback into a boon. Frozen sperm generally had a lower success rate of conception, but it also was less likely to transmit AIDS, and thus AIDS transformed semen “into a body product that *required* a bank for a safe exchange.”<sup>202</sup> Fourth, social movements empowered women without male partners to have children. The Women’s Liberation Movement encouraged single women to “take charge of their reproduction,” while the gay rights movement encouraged lesbian women to “embrace motherhood” and form families with their partners.<sup>203</sup>

By the 1980s what I called “Big Milk” was joined by what I might call “Big Sperm.” The use of frozen sperm plus the ability to purchase from donors now allows the banks to offer breadth and depth of inventory for potential purchasers that compete not only on their inventory but also on how much information they are willing to provide to purchasers.<sup>204</sup> This development has raised a host of issues facing the industry today that Swanson has not left herself enough room to really discuss: the fostering of eugenic impulses of those buying sperm through the cataloguing system and the recruitment process; racial segregation of sperm bank catalogues; medical tourism for U.S. sperm to circumvent domestic prohibitions in Europe and elsewhere; open-identification programs versus sperm donor anonymity and the complaints of donor-conceived children that the United States is one of the few Western countries that still permits entirely anonymous sperm donation; attempts to use Craigslist for free sperm donation and the child-support consequences; lack of limitation on the number of donations per donor, leading to large numbers of half siblings

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199. *Id.*

200. *Id.* at 226; *see also* UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 408 (2001). *See generally* I. Glenn Cohen & Travis G. Coan, *Can You Buy Sperm Donor Anonymity Identification? An Experiment*, 10 J. EMPIRICAL LEGAL STUD. 715, 724 n.29 (2013) (discussing the history of revisions to the act).

201. SWANSON, *supra* note 3, at 225.

202. *Id.* at 226–27.

203. *Id.*

204. *Id.* at 230.

who may conceive of themselves as “donor families”; and many more issues.<sup>205</sup>

The end result is the most market like of the body banks she discusses. The “product” unlike blood or milk is highly individuated; almost always, if not always, sold to the bank by the donor; highly regulated in its storage and “quality”; and always sold by the banks (rather than having some charitable distribution alongside the sale regime).

Swanson leaves herself a mere four-and-a-half pages to discuss the markets in human eggs, which is not nearly enough room to make a contribution to this literature. Relying on Rene Almeling’s excellent sociological work on the way in which sperm and egg sale is marketed differently to parties involved by the companies that manage the relationships (focusing more on altruism for eggs), Swanson suggests that this

owes less to fear of the other and the association of taint and disease with cash that helped drive paid donation out of other types of body product exchange, and more to the long history of gendering the professional donor. No matter how the payments are structured and how direct the relationship between donor and recipient, when the donor body is male, he has been a “professional,” and when the donor body is female, she has been a nurturing mother or potential mother.<sup>206</sup>

This is a provocative claim, and in some measures I think accurate, but it is not a claim Swanson has left herself space to develop or really support in the book. Indeed, I will suggest in the next Part that one big thing missing from the book is a focused discussion of gender in the other markets, and actually I find Swanson’s own account of some of these markets to make the role of gender more complex than the more typical narrative she offers here.

### III. Critique

The genre of the book review demands not just that we praise but also that we bury, at least a little. Who am I to fight the genre? I offer a few criticisms of the book, listed from least to most serious. They are: the role of law in the story, confusion over what constitutes a bank and the use of

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205. For additional information on analysis of these issues, see generally NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* (2013); COHEN, *supra* note 127; I. Glenn Cohen, Response, *Rethinking Sperm Donor Anonymity: Of Changed Selves, Non-Identity, and One Night Stands*, 100 *GEO. L.J.* 431 (2012); Cohen & Coan, *supra* note 200; I. Glenn Cohen, *What (if Anything) Is Wrong with Human Enhancement? What (if Anything) Is Right with It?*, 49 *TULSA L. REV.* 645 (2014); and Fox, *supra* note 38.

206. SWANSON, *supra* note 3, at 234.

the metaphor, the level of interaction with commodification literature, and finally the failure to adequately discuss the role of gender in the narrative.

A. *The Role of Law*

Surprisingly, though, there is not that much law in this book and it often reads more like medical or sociological history than legal history. This is not a critique so much as an observation. In some ways, some of the most interesting and novel elements of the book *are* the legal portions discussed above relating to the rise of products-liability law, the decline of charitable immunity, the role of antitrust enforcement and the good–service distinction, and the role of insurers in the progress of blood banking. To be sure, there are other legal tangents here and there (the case law on adultery for using donor sperm, for example), but overall one gets the impression at the end of the book that law had relatively little role to play in the story or at most the threat of legal regulation of industries by Congress or state legislatures was more important in fostering self-regulation than were actual legal decisions or legislation.

This is perhaps not what Swanson intended for a reader to come away with at the end of his or her reading. In some cases this impression may be a function of her emphasis and length of treatment on certain topics. In other instances it may be a function of her tendency to close the narrative at a particular point in time or slightly rush the more recent developments. For example, in the blood story, had she extended the history a little later in time, she could have looked at things like the FDA’s forbidding men who have had sex with men from donating blood and nascent legal challenges to that policy.<sup>207</sup> It is also instead possible that Swanson really wants the reader to walk away with the message “this is *not really* about the law,” which would perhaps make her account fit more with “order without law” kinds of narratives—or at least narratives of private ordering in the shadow of the law—but she does not really push an argument in that direction. What the reader might have hoped for was more of a reckoning at the end of the book about law’s role, its successes, and its failures to shape the

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207. See generally I. Glenn Cohen, Jeremy Feigenbaum & Eli Y. Adashi, *Reconsideration of the Lifetime Ban on Blood Donation by Men Who Have Sex with Men*, 312 JAMA 337 (2014) (exploring the shortcomings of the current FDA policy and proposing that a policy focused on individual risk assessment be used instead); Brody Levesque, *Teen Activist Files Lawsuit Challenging FDA Ban on Gay Blood Donors*, LGBTQ NATION (Oct. 12, 2014), <http://www.lgbtqnation.com/2014/10/teen-activist-files-lawsuit-challenging-fda-ban-on-gay-blood-donors/>, archived at <http://perma.cc/YH5W-AKYK> (reporting on a lawsuit alleging that the FDA ban is discriminatory and unconstitutional). This policy is on the verge of changing. Sabrina Tavernise, *F.D.A. Easing Ban on Gays, to Let Some Give Blood*, N.Y. TIMES, Dec. 23, 2014, [http://www.nytimes.com/2014/12/24/health/fda-lifting-ban-on-gay-blood-donors.html?\\_r=0](http://www.nytimes.com/2014/12/24/health/fda-lifting-ban-on-gay-blood-donors.html?_r=0), archived at <http://perma.cc/4FL4-2XCT>.

development of these banks. I think that would have made the book even more useful for legal academics and connected it more to the law and social movements and law and society literatures.

*B. What Is a Bank? And the Role of Metaphor*

For a book that uses “bank” in its title and for which almost no page goes by where that word is not used, it is strange to finish the book somewhat confused about what Swanson means by the word. She frequently speaks of the use of the bank metaphor and its importation from the financial world,<sup>208</sup> which may be part of the problem; to understand the evolution of body banking in twentieth-century America and to compare narratives across the three banks she uses, we need a much stronger definition or typology of banks than she offers.

The more minor portion of the critique has to do with the role of metaphor in the book. Swanson repeatedly discusses the adoption of the banking metaphor, but it is not always clear what that means or what work the metaphor is doing in each of the three types of body. There is a vast literature on the role that metaphor plays in shaping legal thinking<sup>209</sup> that it might have been useful for her to engage more with. As Justice Benjamin Cardozo put the admonition: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>210</sup> There is also a vast cognitive science and history and philosophy of science literature on the way metaphors are constructed and deployed. Because metaphor is so central to the story Swanson seems to want to tell—at some junctures it feels as though the book could have been subtitled “the story of a financial metaphor run amok”—it would have been nice to see her engage a little more critically with the role of metaphor in the story.

The more important point, though, has to do with lack of clarity on her part as to what is constitutive of the kind of “bank” this book is about.

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208. E.g., SWANSON, *supra* note 3, at 5–9, 14, 140, 166, 240.

209. For some representative entries, see Jonathan H. Blavin & I. Glenn Cohen, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265 (2002); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989); Eileen A. Scallen, *Metaphor and Reason in Judicial Opinions*, 10 CONST. COMMENT. 480 (1993) (book review). For in-depth treatment of the use of analogical reasoning, which often shades into metaphor, see generally Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1010 (1996).

210. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). For others concerned about the effects of the unreflective use of metaphors in law, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) and Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745, 764 (1992) (book review).

Swanson never gives us a straight-out definition, but the task of struggling through how to define it might have been helpful in sharpening the scope of the book and its contribution.

Dictionaries are always a useful starting point, and therein one might find this (or another similar) definition for “bank”:

1 a : an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds

b *obs.* : the table, counter, or place of business of a money changer

2 : a person conducting a gambling house or game; *specif.* : DEALER

3 : a supply of something held in reserve: as

a : the fund of supplies (as money, chips, or pieces) held by the banker or dealer for use in a game

b : a fund of pieces belonging to a game (as dominoes) from which the players draw

4 : a place where something is held available <memory ~s>; *esp* : a depot for the collection and storage of a biological product <a blood ~>. <sup>211</sup>

Intriguingly, the dictionary itself lists blood banks as one of its own examples of usage yet groups it not with financial banks but with a distinctly nonfinancial analogue—the memory bank of a computer. Swanson would of course note that this grouping is ahistorical, that the body banks she reviews borrowed the metaphor from the financial bank and not the memory bank (which was not in wide use when her story begins), but it remains salient to me as a reminder that one need not think of banking as at all financial.

Dictionaries can be helpful, but in the area of body banking it is useful to try to be more conceptual and demarcate a few separate elements (this is not an exhaustive list by any means) and press on which, if any, are necessary or sufficient conditions for something being usefully described as a bank, or at least the kind of bank Swanson has in mind. Here are three:

*1. Storage and Temporal Discontinuity vs. Contemporaneous Provision.*—A bank takes something from you, stores it, and makes it available at a later time. If this is a necessary condition for body banks, then it would exclude contemporaneous exchanges. If, as in the early days of blood history, someone provides the good contemporaneously on

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211. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 96 (11th ed. 2006).

demand rather than with storage, then it is not a blood bank. At most, perhaps you have a bank of eligible individuals (though in the milk world they called that a “Directory,” which seems more linguistically apt), but even if it is offered at a price, that is not a bank of the body any more than dating websites are body banks.

From her treatment of blood and milk I take it (though she is not completely clear on the point) that Swanson thinks of this as a necessary condition for something to be a body bank, in that it appears for her that there was a moment when *banking* rather than blood transfusion or wet nursing became possible, and the era before that was *not* an era of body banks.

If this is right, one point follows that is important for the next subpart: it seems like two of her major *bêtes noires* she sees in body banking, the anti-commodificationist critique and the fear of the other in this discourse, are in a deep way *unconnected* to banking. That is, the elements of those critiques would apply equally well to contemporaneous exchange of the goods as to the banking thereof.

If one were to try to come up with a list of concerns or issues specific to the banking (rather than the sale or exchange) element, they would look quite different than the list of things Swanson is considering in her book. To give just a few examples: how to resolve disputes about disposition of banked goods when there are fights about ownership or control (as in the case of pre-embryo disposition disputes for banked pre-embryos<sup>212</sup>)? Is there liability when a banked good is destroyed or released without proper authorization or refused release?<sup>213</sup> When storage itself damages the good in a way that creates liability for the end user, who is liable? Does product liability attach to the storage facility?<sup>214</sup> What are the responsibilities and legal disposition of a bank when it goes bankrupt or ceases operating with respect to its existing holdings?<sup>215</sup>

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212. *E.g.*, I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1136–37 (2008) (discussing courts’ resolution of these disputes); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1117–18 (2008) (same).

213. *See, e.g.*, *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989) (recognizing that a prezygote cryopreservation agreement created a bailment relationship, which imposed a duty to account for the prezygote).

214. Surprisingly, Swanson spends considerable time on this in the chapter on blood but almost no time on this in the chapter on sperm, despite important and ongoing debates on when sperm banks can be liable for poor screening activities in donor selection wrapped up in questions of wrongful birth and wrongful life liability. For some discussion of this liability regime, see generally I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 442–45 (2011).

215. *See, e.g.*, I. Glenn Cohen & Eli Y. Adashi, *Made-to-Order Embryos for Sale—A Brave New World?*, 368 NEW ENG. J. MED. 2517, 2519 (2013) (acknowledging that what “happen[s] to made-to-order embryos if the relevant clinic goes bankrupt” remains an “unanswered legal

These seem to me the pertinent questions for work on the *banking* of body parts (understood as stored and temporally discontinuous exchange) rather than their contemporaneous selling.

2. *Non-Autologous v. Autologous (and Non-Directed v. Directed)*.—Autologous body banking is storing materials for one’s own future use, as opposed to providing biological material to a bank for someone else’s use.<sup>216</sup> To be sure, the line between these two kinds of banking is not always so easy to draw—in the reproductive area couples often freeze additional pre-embryos when they undergo in vitro fertilization (IVF) for their own future use, but at a later time they might decide to donate them to another couple, turning what started as autologous into banking for the sake of others.<sup>217</sup>

Every so often the book mentions autologous storage—for example, the initial marketing of sperm banking as a form of safety deposit or fertility insurance<sup>218</sup>—but for the most part I think it is fair to say that Swanson intends to largely exclude autologous banking from the focus of her book. Of course, autologous banking raises a host of its own interesting legal issues, as well as some of the concerns about demonization of the other that does seem to be Swanson’s focus (here the other is excluded entirely by instead resorting to one’s own body material). One can see the importance of autologous banking most recently in the push of women towards egg freezing for their own fertility and the attendant legal and ethical issues that surround it.<sup>219</sup> Ironically, the very model Swanson found failed for sperm may in our century take off for eggs,<sup>220</sup> and it would be interesting to examine the reasons why that is the case.

Swanson also more implicitly seeks to exclude what I might call “directed” banking. Autologous banking is banking for anticipated future

question[.]”); Mark A. Rothstein, *Expanding the Ethical Analysis of Biobanks*, 33 J.L. MED. & ETHICS 89, 99 (2005) (discussing the treatment of biobanks in bankruptcy).

216. SWANSON, *supra* note 3, at 26.

217. *E.g.*, Cohen & Adashi, *supra* note 215, at 2517; Polina M. Dostalík, *Embryo “Adoption”? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 872–75 (2010–2011). In some of the post-divorce disposition disputes, one party to the marriage has wanted to donate the pre-embryos to an infertile person or couple as well. *E.g.*, J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992).

218. SWANSON, *supra* note 3, at 223.

219. For discussion of some of these issues, see generally John Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, 1 J.L. & BIOSCIENCES 113 (2014).

220. See Joanna Weiss, *Egg Freezing Message: Lean in, and Save the Kids for Later*, BOS. GLOBE, Oct. 16, 2014, <http://www.bostonglobe.com/opinion/2014/10/16/egg-freezing-message-lean-and-save-kids-for-later/dKGaoRtjrszo8OozNbj45K/story.html>, archived at <http://perma.cc/W59Y-ZSRM> (detailing how some employers now offer autologous egg storage for their female employees).

use by oneself, but one could instead intend to bank for a specific other person. A good current example is the practice of umbilical cord blood banking by parents with the hope that stem cells derived from that blood may be useful for their child if needed in the future.<sup>221</sup> The banking that Swanson has in mind, as she reminds us often in the book, is instead one that deindividuates the relationship of donor and recipient and breaks whatever dyadic or intentional relationship the two might have. That is a specific kind of banking but not the only one.

3. *Clinical vs. Research.*—All the banking of the body that Swanson focuses on is banking where the end use is a clinical encounter and not a research use. All those who “withdraw” seek to use for their own health needs or the health needs of someone in their care (a blood transfusion, reproducing, or milk for their infant). In fact, one of the most important modern forms of body banking is *not* for clinical use at all but for research use, what we call in the literature “biobanks,” wherein tissue samples are stored for specific research projects, potential future research uses, or both.<sup>222</sup> One scientifically quite important example of that kind of biobanking is the He-La cells that Rebecca Skloot traced back to the poor, African-American woman Henrietta Lacks;<sup>223</sup> this story has recently received significant public attention and raised issues about consent and ownership of the cells and science derived therefrom.

Swanson’s account ignores this entire industry and the legal and bioethical issues attendant to it, even though this is in some ways the most interesting and pressing form of body banking today. It would be interesting to see how a historian might interpose the rise of *this* kind of banking and the legal and ethical issues it raises with the clinical body banking that is Swanson’s focus. Again, her book is long enough and omitting this kind of banking is not something for which she deserves fault, but it would be useful to understand how this history interweaves with the

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221. Seema Mohapatra, *Cutting the Cord to Private Cord Blood Banking: Encouraging Compensation for Public Cord Blood Donations After Flynn v. Holder*, 84 U. COLO. L. REV. 933, 939–40 (2013). Mohapatra’s article also discusses the possibility of creating public cord banks available for access by unrelated individuals in need that would resemble more closely the types of banks Swanson focuses on. *Id.* at 940.

222. See generally *Wash. Univ. v. Catalona*, 490 F.3d 667, 673 (8th Cir. 2007) (holding that donors do not retain an ownership interest in biobanked prostates they donated); *Greenberg v. Miami Children’s Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1074 (S.D. Fla. 2003) (holding a donor to a research institution does not retain any property interest in the body tissue and genetic material); Brett A. Williams & Leslie E. Wolf, *Biobanking, Consent, and Certificates of Confidentiality: Does the ANPRM Muddy the Water?*, in *HUMAN SUBJECTS RESEARCH REGULATION: PERSPECTIVES ON THE FUTURE* 207, 207–19 (I. Glenn Cohen & Holly Fernandez Lynch eds., 2014) (discussing biobanks and their legal and ethical issues in great depth).

223. REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010).

one she tells and also to get a better sense of whether the theoretical underpinnings for debates about this kind of biobanking do and do not map on to the ones she has presented.

Thus far the critique merely shows that Swanson needs to be more precise about the contours of her project. She is interested in one specific form of body banking—temporally discontinuous, nonautologous, non-directed, stored biological materials for clinical and not research purposes. We could ask questions about why, when the potential alternative ambits are properly understood, it is useful to restrict the inquiry to this kind of bank and not the other kinds of body banking. Of course it is unrealistic to expect Swanson to look at everything, and she should not be faulted for failing to do so. All I want to point out is that these choices are ones she (1) has deliberately made; (2) needs to recognize shape the narrative in important ways by exclusion; and (3) perhaps should give an account as to why, as well as be more specific as to the kind of banking she has in mind.

But the research biobank exclusion is perhaps most important in the way it puts further pressure on the central metaphor she wants to draw on: the idea that the banks that are the relevant comparators to the ones she talks about are financial institutions. If what she had in mind is a purely historical account of term-borrowing, semantic contagion, I think she succeeds in spades in showing that the three industries borrowed the term from each other, initially borrowed it from financial institutions, or both. But arguably the research biobanks are much closer to financial banks than the banks she has in mind. In financial banking one deposits one's money and perhaps eventually withdraws it, and at least in the interim period the bank (hopefully) profitably uses what one has deposited to further its own ends. This is what happens in at least some research biobanks, though perhaps not the withdrawal part since most commit their tissue to the bank forever or at least until they exercise a right to destroy samples if permitted.

The main profit in financial banking comes from the ability to use the deposited money for investment that has a higher return than one pays as interest; it does not come from connecting buyers and sellers. The business model of all the banks Swanson discusses (or at least the for-profit version) is quite different: it is to pay one price (or nothing at all) for blood, milk, or sperm to the sellers of the good, then store it and resell it to a buyer at a higher price, counting the difference as profit. We could call what they do a bank, but it is not the storage and redeployment for investment that is doing the work in the model. Instead, the model is much more akin to resellers or retailers than to the financial banks that make profits on their temporary holding of a good.

When one recognizes this distinction, it makes somewhat mysterious the book's constant hand wringing over the way each of the body banks she writes about adopts the term of "bank" but then begins to depart from that

model in subtle ways. What is mysterious is that the book does not acknowledge that the very design of these banks and the way they are intended to profit are very *unlike* financial banks, such that the focus on the subtle details seems to miss the large difference. What is needed is some kind of an error theorem account—if these banks are so unlike financial banks, why were many of the writers and designers at the time so enamored with that comparison? What would be really interesting here would be to go into the history of financial banking and the public's attitude towards it, and see if the adoption or rejecting of the lingo of the bank rose and fell with the public's love or hatred for financial banks. Ponder, for the moment, whether someone offering a similar service in the Occupy Wall Street moment would be as quick to draw a comparison to financial institutions in order to inspire trust and the belief that the institution is there working hard to protect your interests.

By inquiring as to what Swanson means by “bank,” I do not mean to be merely pedantic or to fight about nomenclature. Rather it seems quite important in understanding what this book is about. Is this a book about the buying and selling of body parts or the banking of body parts (of which buying and selling may be parts or not) and the legal, ethical, and medical struggles with these concepts? Sometimes the book feels like one and other times like the other.

C. *Understanding This Book's Relationship to Commodification/Taboo Trades Debates*

There is a vast literature in law and ethics on the buying and selling of body parts and other “sacred” goods that sometimes goes under the name “commodification debate” or “taboo trades.”<sup>224</sup> Swanson's book has what I would call a “doubly ambivalent” relationship with this debate.

One ambivalence has to do with the way to frame this particular debate. The second ambivalence is as to whether this is actually the central debate that the book (and those participating in the historical events) is interested in or not.

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224. The topic is vast and includes sex, organs, blood, military service, vaccines, noble prizes, etc. For just the tip of the intellectual iceberg, see generally CÉCILE FABRE, *WHOSE BODY IS IT ANYWAYS?: JUSTICE AND THE INTEGRITY OF THE PERSON* (2006); MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); MICHAEL SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012); DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF THE MARKET* (2010); Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 3 UTAH L. REV. 683, 689–95 (1995); Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, PUB. INT., Spring 1992, at 65; Julia D. Mahoney, *Altruism, Markets, and Organ Procurement*, LAW & CONTEMP. PROBS., Summer 2009, at 17; Note, *The Price of Everything, The Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003).

On the one hand, the book often reads as though this is the key debate that Swanson is interested in—for example, when she writes in the introduction that the post-World War II embrace of property markets conflicted with

deeply held lay notions that property sourced from human bodies should be treated in special ways. The result has been polarization of the controversy around the flashpoint of markets and sales: Should body products be nonmarket gifts of love or market commodities subject to sale? The characterization of gifts and sales as opposite and mutually exclusive exchanges is often summed up by the shorthand phrase the *gift/commodity dichotomy*.<sup>225</sup>

Although on the same page, relying on Viviana Zelizer's work, Swanson wants to point out that the two poles are really more conjunctive than disjunctive (not love or money, but love and money) in that "[u]pon close inspection, the categories of gift and commodity throughout the history of body products have been neither distinct nor opposite."<sup>226</sup> At other times, as a reader of this book well-steeped in the commodification/taboo trades literature, I read into the book (it is hard to know if this was her intention or not) the following imagined monologue:

You clever bioethics and philosophy types! You are so anachronistic. You project on to the history of body banking in America your contemporaneous debates when in fact most of the developments have nothing to do with this debate. It is things like the loss of hospital immunity, the development of products liability, the developing case law on goods versus services in antitrust, the prevailing attitudes towards and against breast milk, the HIV crisis, etc., which are doing the work that is driving this debate. Where you see fancy theories I see a series of contingencies.

The book's framing and this double ambivalence leaves me doubly puzzled. First, is my imagined monologue really what Swanson is after and what she intends for me to derive from this book? More often it feels as though she wants to engage with the taboo trades literature and add to it rather than to show that it is not the force behind the subjects she is interested in as a historian.

The second puzzle is exactly what she thinks that literature is about. And this may speak as much about me as a reader (although not atypical of many of the law readers who will be interested in the book) as it does about her as a writer: I think of this literature as much more complex than the mere questions about how to characterize goods like blood or sperm as gifts

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225. SWANSON, *supra* note 3, at 9.

226. *Id.*

or commodities. Instead, as I will describe in a moment, my own take on the debate is that it has many more moving parts.

The bad news is, I think the book suffers from an undertheorization of what this debate is all about that makes it harder to read this book as making a substantial contribution to the debate. In particular, I think Swanson often equivocates between the corporate form of the bank as for profit or nonprofit and the question of whether donors will or will not be paid. Those are two quite different questions, but much of the historical back and forth that is the subject of this book pertains to the first more than (or at least as much as) the second. One could imagine a book, perhaps framed as less interesting but more “pure” than this one, that focused on just that question—whether body banking should be a for-profit business or a nonprofit calling. Such a book would very nicely tie into what Swanson has to say about the ties of the swinging of the pendulum on banking to capitalism and communism. But one could have a not-for-profit bank that pays and a for-profit bank that does not (Swanson’s discussion of Prolacta at the end of the milk-banking materials, for example<sup>227</sup>). This kind of book would go more into the history of the not-for-profit form, tax structures, and the gradual change of medicine from a public calling to its current state,<sup>228</sup> all of which are not subjects that Swanson spends much (or in some cases any) time engaging with.

The good news is that when the debate is understood in its full glory, this book has very important things to say about it. I will set out my own understanding of the terms of the debate in brief below and show how one can reconceptualize the materials Swanson has provided as speaking to the debate more fully.<sup>229</sup> To be fair, in the book’s conclusion Swanson does begin to indirectly address some of these issues, but at 14 pages and covering a myriad of other topics (including some forms of body products that have not been the subject of her book, like organ sale) it feels like too little too late.

### *1. What Is the Commodification/Taboo Trades Debate Really About?—Swanson’s account of the commodification/taboo trades literature*

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227. See *supra* notes 174–76 and accompanying text.

228. For a good recent summary on this last point, see Nicholas Bagley, *Medicine as a Public Calling*, 114 MICH. L. REV. (forthcoming 2015).

229. I have done so in greater depth in I. Glenn Cohen, *Regulating The Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS., no. 3, at 71 [hereinafter Cohen, *Organ Market*]. To be sure, for those uninterested in these debates the call for more theory might seem a bit like Christopher Walken’s call for “more cowbell” from the band Blue Oyster Cult in the iconic Saturday Night Live skit. *Saturday Night Live* (NBC television broadcast Apr. 8, 2000). But I think it is called for in this case given that those interested in these debates are some of the most likely readers of this book.

seems a bit dated and a bit procrustean. My own work and that of many others writing in this literature suggests many more moving parts than the simple “Is it a gift? A commodity? Something in between?” framing that Swanson gives the debate early on. Instead, I think it is useful to break the debate down into constituent families of normative concerns. Here I borrow from work I have done elsewhere characterizing the various concerns in the context of selling organs, but the framework I have introduced is applicable to really all taboo trades discourse. There are four basic argument types, each of which has its own subargument types.<sup>230</sup>

*a. Corruption.—*

The basic idea behind what I have elsewhere called the “corruption” argument is that allowing the practice to go forward will do violence to or denigrate our views of how goods are properly valued. This argument is sometimes also labeled the “commodification” argument, but because that term is also used in a way that encompasses some of the other arguments I discuss below, I prefer the more specific label of “corruption.”<sup>231</sup>

Sometimes the frame, for example as to selling organs, is that this would “dehumanize society by viewing human beings and their parts as mere commodities.”<sup>232</sup>

We can distinguish two subcategories of this objection, which I have elsewhere called “consequentialist corruption” and “intrinsic” corruption. “Consequentialist corruption” justifies intervention to prevent changes to our attitudes or sensibilities that will occur if the practice is allowed—for example, that we will “regard each other as objects with prices rather than as persons.”<sup>233</sup> This concern is contingent and to be successful must rely on empirical evidence, in that it depends on whether attitudes *actually* change. By contrast, “intrinsic corruption” is an objection that focuses on the “inherent incompatibility between an object and a mode of valuation.” The wrongfulness of the action is completed at the moment of purchase irrespective of what follows; the intrinsic version of the objection

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230. Much of this is freely borrowed (with permission) from Cohen, *Organ Market*, *supra* note 229, but I have omitted nearly all of the citations for brevity’s sake and shortened the account where possible. Those who want the longer version and the citations may consult that prior work.

231. *Id.* at 73 (footnote omitted).

232. Council on Ethical and Judicial Affairs of the Am. Med. Ass’n, *Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors*, 155 ARCHIVES INTERNAL MED. 581, 581 (1995).

233. Cohen, *Organ Market*, *supra* note 229, at 74 (quoting Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 296 (1991)).

obtains even if the act remains secret or has zero effect on anyone's attitudes.<sup>234</sup>

This is probably one of the most common critiques of selling body products one encounters in the literature. What is shocking about Swanson's account (in a good way) is how seldom this is the concern that is marshaled by opponents of the body banks in the history she presents. There are many things policy makers worry might be wrong with body banking, but at least in the story according to Swanson, this is not something they particularly wrestled with.

This suggests at least two possibilities: (1) the commodification/taboo trades literature is anachronistic in its emphasis on this concern and (2) the corruption objection entered the debate much later, or in the minds of theoreticians but not the actual decision makers or discourse as it unfolded. The second possibility is that the corruption concern is not transubstantive to various forms of body banking and, in part, its absence from Swanson's story is a result of the kinds of body banks she has in mind. It is worth emphasizing that blood, milk, and sperm are all renewable bodily resources in a way that solid organs are not. At least the first two may also be easier to view as severable and divorced from one's personhood in a way that, for example, solid organs and surrogacy are not. My own guess is that the second possibility seems more plausible, but Swanson's account and this dog that failed to bark therein raises the possibility that deeper engagement with the historical literature might be useful for commodification/taboo trades theorists.

One more observation on the corruption objection and Swanson's story: it is possible that some moments in the evolution of body banking had a form of exchange that was *less* problematic on the corruption objection. The early blood banks envisioned by Fantus and put into practice required in-kind payment (blood for blood) of debts, for as he put it, "[j]ust 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>235</sup> It appears that the motivation for this version of the practice was not high-minded objections of corruption but the practical reality that it enabled cash-strapped hospitals to maintain ready supplies without payments.<sup>236</sup> Still, as I have argued elsewhere, on some

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234. *Id.* at 744 (footnotes omitted).

235. SWANSON, *supra* note 3, at 57 (internal quotation marks omitted).

236. *Id.* In a similar vein Swanson mentions the practice of one New Orleans bank in the post-War era that conceptualized itself as making "blood loans" that required to be paid in kind but could instead be repaid by a steep "replacement fee" if the borrower preferred. Was this just double talk to avoid thinking of oneself as selling blood, or is this in fact a meaningful distinction from the perspective of the corruption concern?

versions of the corruption objection it may be relevant whether trades are occurring within or without spheres of valuation (or if you prefer how wide to define the relevant sphere of valuation for the good) such that a my-blood-for-your-blood exchange may register as less corrupting than a my-blood-for-your-money exchange.<sup>237</sup>

*b. Crowding Out.*—

This claim has its roots in behavioral economic work on motivational crowding out, suggesting that, contrary to the classical economic model, allowing payment for goods may change its social meaning in a way that discourages altruistic giving. The crowding-out objection posits that permitting the sale of organs will decrease the supply of organs in some way. There are actually four somewhat distinct variants of the argument. One focuses on crowding out of donat[ion] [of the good] and claims that the number of [the good (sperm, milk, blood, organs)] donated *altruistically* will decrease if compensation . . . is permitted. A stronger claim is that sale will lead to “crowding out of overall [supply of the good],” such that the *total* [amount of the good], whether procured through altruistic donation or compensated donation, will go down—that is, the decrease in altruistic donations due to permitting a market will not be outweighed by an increase in [sale of the good]. Third . . . is the crowding out of quality [goods], when even if supply remains constant or increases, the [sold versions of the good] that become available will be of inferior quality, that is, diseased or unusable, as compared to those that are available in a [system] where compensation is prohibited. This objection might also hinge on the claim that methods of detecting poorer quality [versions of the good] are unavailable [(such as blood before the hepatitis test)], or if available are not feasible for financial or other reasons.<sup>238</sup> Such an

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237. Elsewhere I have argued:

Limiting the form that compensation might take to, for example, MoreMarrowDonors.org-type scholarship funding, or organs received from the in-kind organ trading of organs that occurs in NEAD chains or simultaneous paired kidney exchanges discussed above, seem most likely to blunt the effect of consequentialist corruption. If one is convinced that these alternative benefits are part of the same or a closely allied “sphere” or “modes” of valuation as organs, these kinds of exchanges may have fewer attitude-altering effects than do exchanges for money.

Cohen, *Organ Market*, *supra* note 229, at 84 (footnote omitted).

238.

As [Michele] Goodwin makes clear, Titmuss’s claim about the blood supply was premised on a lack of technology to appropriately determine whether blood provided by individuals was diseased or not, but we now have the requisite technology for blood and certainly for organs. Further, Titmuss seemed to assume that it was

argument might also point to the crowding out of one source of [the good] for another less good source, for example, crowding out living organ donation in favor of deceased organ donations. A final variant of the argument is less concerned with the effects on supply as such, but more about a kind of coarsening of sensibilities or “crowding out of opportunities for altruism or altruistic [f]eelings” more generally. Of course, this depends on a prior view that we care about motivation independent of its effects on supply, and also that that “altruistic” motivation is one we want to valorize.<sup>239</sup>

Here it is worth emphasizing two ways in which Swanson’s account can interface with this more subtle understanding of what is considered problematic in the sale of body parts. First, there is hardly any concern expressed by the major players in her story as to the first two variants of the crowding-out objection, the crowding out of donated versions of the good or overall supply of the good. Again, for someone steeped in the theoretical rather than the historical literature on commodification/taboo trades, this is surprising, as one would expect this to be one of the major themes of opposition to the commercial banks for blood, milk, and sperm.

In part, the absence of this objection as a major part of the historical opposition may stem from what I think of as the way Swanson’s account problematizes what I will call the “paradise lost” leitmotif in the commodification/taboo trades debate. The fable goes something like this:

Once upon a time people were good, altruistic, and loved their neighbors. Exchanges were done out of a motivation of altruism, not for profit. Somewhere along the line we fell into sin, and we began selling that which “money can’t buy.” Sometimes we received our biblical retribution (the spread of hepatitis in the blood supply in the U.S., which worshipped filthy lucre unlike the U.K.!). More often the contamination was to our moral beings. Still there is hope. With the right regulation we can return to the halcyon days when exchanges were altruistic.

Am I having a bit of fun in characterizing the fable? Absolutely. No one really speaks in quite this way. But at the same time there is very much a romanticization and nostalgia that suffuses this literature about return to an earlier era. What Swanson’s book does so nicely is show that body banks were very much “born in sin.” For blood, most of the first providers for transfusion sold their blood instead of giving it away. Milk banking has

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commercially supplied blood but not altruistically donated blood that provided the contamination risk; in fact, as Goodwin suggests, a good deal of the blood contamination of the 1980s was due to altruistic donation by gay men in an era before the HIV virus was widely known to be transmitted through blood transfusion.

*Id.* 75 n.14 (citation omitted).

239. Cohen, *Organ Market*, *supra* note 229, at 74–75 (footnotes omitted).

its origin in the wet nurse, who was invariably paid. Sperm banking has known almost nothing other than compensation for provision in the United States. The history is thus a more complicated one that zigs and zags between permitting and discouraging sale rather than a straight slouching towards Gomorrah.

Once this is understood, the baseline against which crowding out is measured becomes more tendentious. In some of the markets it appears as though sale is necessary to augment supply rather than the traditional story in which sale reduces supply. The story of the professional donor in blood that Swanson tells in Chapter 2 is that banks began to move off his having a major role because they could not keep up with demand but that professional donors were often still involved on the margins of the new model when supply was low. In the story of milk the tendency to sell versus altruistically donate milk and the organization of milk supply organizations seems to *follow* largely exogenous shocks in demand (movements towards or away from canned infant formula as a substitute for milk from lactating mothers).

By contrast to the first two crowding-out variants, the crowding out of quality instances of the good in favor of inferior ones *does* seem to be a predominant concern in the histories Swanson recalls. But from Swanson's account one can make two observations that, I think, upset the traditional story to some extent.

First, it is frequently the altruistically donated versions of the good that are the ones that carry the risks of disease or are otherwise low quality, not the sold versions. Swanson's review of the literature of the 1960s and 1970s shows that paid donors provided the most reliable blood supply, because they were often repeat donors and because the "best way to know if an asymptomatic supplier would transmit hepatitis was whether his or her blood had transmitted it before. Professional donors, as repeat suppliers, could therefore be considered 'clean' donors, tested in the most reliable way possible—after their first donation."<sup>240</sup> For sperm, the banking industry and its buying and selling of sperm enabled a robust disease-screening program and made it less likely to transmit HIV, which transformed semen "into a body product that *required* a bank for a safe exchange."<sup>241</sup> For milk, much of the contamination concern of the 1970s was from *donated* milk, as Swanson's research uncovers.<sup>242</sup>

Second, it seems as though Big Milk manipulated the narrative to suggest the very opposite—that, in the words of the executive director of

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240. SWANSON, *supra* note 3, at 146.

241. *Id.* at 227.

242. *Id.* at 189.

the milk-banking association: women who sold milk “might be tempted to adulterate milk with either cow’s milk or water to increase the volume and thus the amount earned” as a way of pushing against milk sale in favor of donation, as well as playing on gendered narratives of the woman who sold her milk as a bad mother who sold her own child’s birthright.<sup>243</sup> Thus, far from being the real concern motivating public policy against sale for these substances, one can read Swanson’s narrative as (at least in part) a story of rhetorical manipulation of the *seller* as the other—dirty, greedy, ill—with the *donor* being virtuous, selfless, clean; all this despite the fact that much of the contemporaneous science pointed in the other direction.

*c. Coercion, Exploitation, Undue Inducement, and Justified Paternalism.*—The third family of commodification/taboo trades arguments focuses on the harming or wronging of the seller. While there is some loose family resemblance between these four types of concerns, as I have argued elsewhere, they are often improperly run together and are quite distinct.<sup>244</sup>

“Coercion” is the claim that poor sellers are improperly forced into selling [the good] by brokers or recipients who have no right to propose this, because the seller has no reasonable economic alternative. . . . In what is probably the leading bioethical account of the idea, Alan Wertheimer suggests that (to use a stylized framing) we imagine *A* proposing to *B*,

1. If you do *X*, I will bring about or allow to happen *S*.
2. If you do not do *X*, I will bring about or allow to happen another state of affairs, *T*.

Has *A* then coerced *B*? Wertheimer provides a two-pronged test for whether a proposal constitutes a coercive threat. The first part, which Wertheimer names the “choice prong,” determines whether “*A*’s proposal creates a choice situation for *B* such that *B* has no reasonable alternative but to do *X*.” Importantly, this prong does not ask whether *B* has *some* alternative to doing *X*, but rather whether the alternatives available to *B* are *acceptable* ones. Indeed, even in the mugger’s demand “your money or your life” the victim has *some* choice, he can choose to surrender the money. Instead, the problem is that surrendering one’s life is not an acceptable alternative to turning over one’s money; it is too costly an alternative to complying with *A*’s demand. Rather than calling for an empirical determination that *B* has “no choice” but to do what *A* proposes, the choice prong

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243. *Id.* at 193–94 (quoting Arnold & Borman, *supra* note 176, at 144).

244. COHEN, *supra* note 127, at 287; see also I. Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J.L. MED. & ETHICS 269, 273–79 (2013) [hereinafter Cohen, *Transplant Tourism*] (distinguishing these four types of concerns).

requires a judgment as to whether the costs to *B* of not doing what *A* proposes are too high. What qualifies as an acceptable choice is an inherently normative determination. . . .

[More importantly,] [f]inding that the person receiving the proposal has no acceptable choice is a *necessary* but not *sufficient* condition for finding coercion. Wertheimer gives the example of a surgeon who refuses to amputate a patient's leg for a fair price, but although the patient had no acceptable choice, we do not think the act morally problematic nor would we allow him to renege on the contractual obligation. This points us to the need for a second prong to find coercion, what Wertheimer calls the "proposal prong," which asks whether the proposal is one that *A* has or does not have a right to make. . . .

. . . .

Of course, what kind of proposals one does or does not have the right to make is itself an inherently normative inquiry. Wertheimer would incorporate a "moral" test to distinguish the two types of proposals, whereas legal scholars have suggested the existing law could also define what we do and do not have the right to propose.

. . . [I]n determining whether the proposal prong is met one must "distinguish between *B*'s rights against other *individuals* and *B*'s rights against the *society* or the state."<sup>245</sup>

Moreover, as Wertheimer notes, his approach leaves open the possibility of distinguishing "between *B*'s background conditions for which *A* is not responsible and rights-violating threats to *B*'s welfare which are specifically attributable to *A*."<sup>246</sup> This tracks, for example, the difference between demanding a "rescue fee" of a drowning person you stumble upon versus one you yourself pushed in the water.<sup>247</sup>

Someone can be exploited if not coerced and coerced if not exploited. The concept of "exploitation" comes in several varieties, but the most prominent philosophical account distinguishes harmful from mutually advantageous exploitation—a distinction that turns on whether "both parties (the alleged exploiter and the alleged exploitee) reasonably expect to gain from the transaction as contrasted with the pretransaction status quo"—and consensual versus nonconsensual exploitation.

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245. Cohen, *Organ Market*, *supra* note 229, at 75–77 (quoting ALAN WERTHEIMER, COERCION 172, 218 (1987)) (footnotes omitted).

246. WERTHEIMER, *supra* note 245, at 219.

247. See, e.g., I. Glenn Cohen, *Conscientious Objection, Coercion, the Affordable Care Act, and US States*, 20 ETHICAL PERSP. 163, 176 (2013) (discussing the importance of distinguishing cases of "taking advantage of someone's existing condition versus putting a person in a condition which you then exploit" (emphasis omitted)).

To determine that *A* has wrongfully exploited *B*, philosophers usually stipulate that two requirements must be met: (1) *A* benefits from the transaction, (2) the outcome of the transaction is harmful (harmful exploitation) or at least unfair (mutually advantageous exploitation) to *B*, and *A* is able to induce *B* to agree to the transaction by taking advantage of a feature of *B* or his situation without which *B* would not ordinarily be willing to agree. Those opposing the [selling of body parts on this ground] will often suggest that even if consensual, [a sale] can wrongfully exploit the seller either because (1) the seller is ultimately harmed (harmful exploitation) by the transaction as compared to the pretransaction baseline, or more commonly (2) because the buyer induced the seller to sell at a given price by taking unfair advantage of the seller's poverty or other need, without which the seller would not have sold the organ.

Although often labeled "exploitation," "undue inducement" is in fact a separate and in some respects, opposite concern about the sale. In the case of exploitation, the claim is that the seller is getting offered too little, a "raw deal," whereas undue inducement is the claim that they are being paid *too much*, the "offer too good to refuse," such that their autonomy is in some sense overwhelmed by the price offered and the decision is (again in some sense) less than voluntary.

All three of these concerns are to be contrasted with opposition to . . . sale as a form of "justified paternalism." Such arguments seek to protect [the] seller[s] from making the "wrong" decision. Typically, these arguments look to see whether purported consent to sell . . . is really consensual in a more robust sense of the term. That is, they think whatever formal consent the seller gives, be it contractual or otherwise, falls short because it is involuntary, uninformed, or otherwise invalid because the seller lacks competence or capacity . . . . These arguments would forbid what appears to be a voluntary transaction by pointing to at least one of these defects in the consent process and by the presence of anticipated harm to the seller.<sup>248</sup>

In this Review I am not seeking to evaluate these arguments—work I have done elsewhere. Instead I want to ask: what role do these four argument types play in the historical story Swanson tells? Again, the answer is that they play a surprisingly small role. It is surprising since these concerns—all related to the welfare and autonomy of the provider of the

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248. Cohen, *Organ Market*, *supra* note 229, at 78.

good or service (blood, milk, sperm)—are a predominant fixture of the commodification/taboo trades literature.

Again, one possibility is that the kinds of risks that worry theorists in this debate—be they the physical risks of organ transplantation<sup>249</sup> or the risks of emotional labor and self-repressing in the case of surrogate mothers<sup>250</sup>—are simply not present in the markets that Swanson is discussing. That may be true for blood and milk (replaceable unlike organs), but the case of sperm seems to at least be tempting as a target for these kinds of emotional risks: one might think that as with surrogacy there is a real worry that the sperm donor is called on to minimize or repress the significance and emotional attachment to his genetic contribution and ordinary fatherhood relationship as kind of a dehumanization of someone who has merely masturbated into a cup on a fixed weekly schedule. Now it may be that the gendered narrative—mothers are to be attached to their children, fathers only sperm suppliers—historically overcame the impulse towards this kind of critique. That is a possibility, but one for which there is not enough evidence in this book to make a real judgment. In any event, here would be a place where one wishes Swanson had really developed the history of egg provision as a comparison group to sperm, since there you have both the emotional risks and some of the physical risks (such as ovarian hyperstimulation syndrome).<sup>251</sup> This would help us to better understand why this argument does or does not manifest in her narrative on sperm.

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249. For summaries of these four concerns as directed to organ sale, see Cohen, *Transplant Tourism*, *supra* note 244, at 274–78.

250. See, e.g., Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 81 (1990) (“[T]he surrogate industry . . . requir[es] the mother to engage in a form of emotional labor. . . . [S]he agrees not to form or to attempt to form a parent-child relationship with her offspring.” (footnote omitted)).

251. Scholars argue:

It is wrong to leave people vulnerable to the harms of unregulated trade in human eggs (whether intra or transnational)—these harms . . . include: the commercialization and commodification of reproduction and the exploitation of children, women, and men (hence, the prohibition on the sale of eggs and restrictions on reimbursements); violations of autonomy (hence, the consent requirements); and risks to human health and safety including the risk of transmission of disease (hence, the controls on distribution, use, and importation).

Jocelyn Downie & Françoise Baylis, *Transnational Trade in Human Eggs: Law, Policy, and (In)Action in Canada*, 41 J.L. MED. & ETHICS 224, 232 (2013) (footnotes omitted). For discussion of the risks to women who provide eggs, see AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 15–18 (2011), available at [https://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/ART.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf), archived at <http://perma.cc/QAE6-SWVF>.

What's more, although she does not entirely tie it together in this way,<sup>252</sup> one might argue that not only are these kinds of arguments dogs that did not bark in the true history of the buying and selling of these substances in the United States, but in fact there is evidence in the historical record to suggest that many of these concerns were actually checked by the real facts about the populations doing the selling.

The professional donor of the 1920s was often a family man trying to make some extra income on the side during the Depression rather than a desperate person going from blood sale to blood sale (though some of the stories Swanson tells of poor men donating and then drinking after payment in the era *before* this one may cut the other way). Far from being paid too little, some of the 1920s blood sellers Swanson writes about were making thousands of dollars for selling their blood<sup>253</sup>—suggesting no exploitation but perhaps increasing concern about undue inducement, if that was a form of taboo trades concern that one thought was persuasive. In the 1950s, the blood sellers were not (or it would appear from Swanson's account not predominantly) poor homeless men seeking to do what they could to afford shelter or a hot meal but included, for example, the Greenleafton Reformed Church of Preston, Minnesota, whose members sold blood and raised \$27,000 to rebuild its church.<sup>254</sup>

The story of milk banking is even more interesting in this regard in that it is a story of sellers of progressive social mobility. The wet nurse much more resembled the figure of this element of the commodification/taboo trade concern, “an unwed mother or an otherwise desperate, impoverished immigrant woman and, in Boston, frequently Irish Catholic.”<sup>255</sup> But the xenophobic tendencies of the wealthier women who employed them and the desire to keep them out of their households ultimately propelled the development of milk banking, which in turn

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252. She does briefly address exploitation in one paragraph in the conclusion, noting that “[w]hile offering money for blood at midcentury did attract the economically marginal and for-profit middle men who may have taken advantage of some donors, it also attracted carloads of rural Minnesotans, who chose to sell their blood to buy a new church organ . . . . For some, blood selling was seen as preferable and more protective of a sense of dignity and self-worth than panhandling for survival.” SWANSON, *supra* note 3, at 246. What the reader interested in these debates really wants to know is not that there were many kinds of sellers, but which kinds predominated—i.e., were most sellers poor men whose other choice was panhandling or not?

253. *Id.* at 42–43.

254. See *supra* note 99 and accompanying text. My own view is that the notion that we are paying individuals too much is the weakest critique of selling body parts. I would much rather pay them too much and let them reap a windfall that they can use to self-insure against future psychological and health consequences than pay them nothing, as is often the case in the soft forms of “coercion” or “exploitation” that occur based on the demands of family members. This latter form leaves the donor to bear all the risk themselves. For more of my thoughts on this, see generally Cohen, *Organ Market*, *supra* note 229, at 88–91.

255. SWANSON, *supra* note 3, at 21.

resulted in a seller of much higher SES. Instead of poor immigrants as wet nurses, the history shows sellers of milk to the banks were married women living relatively comfortably and using the sale of their milk as a way to get extra side money for niceties just beyond their financial grasp. Again, if there is a concern it appears to be undue inducement and not exploitation—recall the Detroit woman who reportedly earned \$3,500 during fourteen months of lactating and used it to purchase a home,<sup>256</sup> well above the average annual earning of all employees (male or female) at the time.<sup>257</sup> The 1950s milk-banking period far from demonized the women who demanded payment or considered them victims of exploitation; rather, the milk-banking industry refused to allow women to go without payment and paid even those who “disavowed a monetary motivation,” noting that “rather than spending their milk payments on necessities, these mothers were investing their earnings in savings bonds for their children.”<sup>258</sup> It is only starting in the 1990s that the concern for undue inducement or justified paternalism really appears in force: the view being that we ought not to pay women for their milk, for fear that “infants whose mothers would sell their milk might be deprived of their own birthright to that milk.”<sup>259</sup> In the hands of commercial players in the market like Prolacta, this appears to be a relatively strategic deployment of the argument: far from the paying for milk being exploitative of women, the industry is exploiting gendered narratives of female altruism to get women to donate their milk, on which it then makes profit.

Swanson has less to say about the SES of sperm donors at the dawn of sperm banking or during its development. What I know from other work is that the eugenic impulses of those who want to buy sperm often push against recruiting sperm donors from the dregs of society; instead, for much of the history of the practice, the predominant American donors were college and medical-school students looking to make extra money in some of the United States’s most prestigious university towns, where banks often locate themselves.<sup>260</sup>

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256. See *supra* note 138 and accompanying text.

257. SWANSON, *supra* note 3, at 37.

258. *Id.* at 171.

259. *Id.* at 193–94 (quoting Lois D.W. Arnold & Laraine Lockhart Borman, *What Are the Characteristics of the Ideal Human Milk Donor?*, 12 J. HUM. LACTATION 143, 144 (1996)).

260. See, e.g., Pino D’Orazio, *Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination*, 2 J. HEALTH & BIOMEDICAL L. 249, 265 n.69 (2006) (acknowledging the “common use of medical students” in sperm donation); Anetta Pietrzak, *The Price of Sperm: An Economic Analysis of the Current Regulations Surrounding the Gamete Donation Industry*, 14 J.L. & FAM. STUD. 121, 132 (2012) (recognizing the impulse to “forum-shop” for sperm banks “near prestigious four-year universities to have a better likelihood of obtaining sperm from dedicated and intelligent donors”).

*d. Unfair Distribution.*—

A final set of arguments concerns “unfair . . . distribution” [of the good to those who would have received the good in a counterfactual state of the world where sales are not permitted. There is some relationship between this and the crowding-out arguments discussed above, but the two are independent in that the *supply* of the [good] could *increase* due to permitting sale and yet the *distribution* of [the good] could change in a way that makes the distribution *less just*. . . . [T]hose who would have received the [good] if the system did not permit compensated sale [(i.e., only allowed donation) have lost out and] have been made worse off, even if many more now receive [the good] because of the system change that permits compensation.<sup>261</sup>

Here again I think Swanson has missed an opportunity to make some interesting points about the role of this concern and the history of these types of banks. In sperm banking it appears entirely invisible, as no one laments all those who cannot afford purchased sperm but might receive it in an altruistic market—again this may be because all things being equal, sperm is relatively cheap, at least as compared to buying eggs.<sup>262</sup>

In milk there is a social transformation from a largely private fee-for-service or good form of distribution in wet nursing and early milk banking to a much more distributive-justice-focused approach, wherein both the donating of milk and the management of that donated milk are very self-consciously aimed at helping women of all socioeconomic strata. As milk banking became a high society charitable occupation in the 1940s,<sup>263</sup> I think Swanson is spot on that there was a real transformation from notions of private to civic property. As she points out in the conclusion to the book, the industry on occasion actually used price discrimination as a tool of redistribution in that it charged “some patients over market rates in order to charge others under market rates,”<sup>264</sup> though without more details one wonders how the industry managed to maintain this given how one would usually expect economics to work.

In blood, the pendulum has swung back and forth as to the distribution concern. In Swanson’s account blood banking was born of true in-kind exchange, gave rise to cash-for-blood exchange, became much more of a civic property in the Second World War, then ultimately rebounded towards more private property with the country’s skepticism of communism, until

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261. Cohen, *Organ Market*, *supra* note 229, at 79, 95.

262. For discussion of pricing on sperm, see, for example, Cohen & Coan, *supra* note 200, at 717.

263. See *supra* note 156 and accompanying text.

264. SWANSON, *supra* note 3, at 250.

safety concerns and fear of the other ultimately moved us against blood sale.

Swanson does a terrific job of charting these back and forths, but I think she obscures an important point—the distributional concern (or in her words the conceptions of private versus civic property) have as much to do with the for-profit versus not-for-profit nature of the blood-banking industry over time as they do with the buying of blood from sellers by that industry. That is, you could (and did) have purchased blood that was distributed without payment according to need, and you could have donated blood that was sold to those who could pay. This echoes a point I have made in other work on buying and selling organs—you can have mixed systems where organs are sold to a centralized buyer, but the allocation criteria are based on principles of justice and not ability to pay. Iran is (at least in theory) an instance of such a system; the government buys organs monopolistically and then distributes them according to principles of just allocation instead of selling them.<sup>265</sup>

To put the point another way: if one of Swanson's main theoretical fulcrums is private versus civic property in the body, might the selling versus donating by individuals to the banks be orthogonal, or at least something of a red herring to the issue? What appears to really matter is the internal organization of the bank and its system of distribution, which is separate from how it acquires the body property to begin with.

All this is to give, in some ways, this book a backhanded compliment in terms of the commodification/taboo trades debates: Swanson's book and the histories she uncovers have a lot to say about this debate. In particular, the book potentially problematizes some of these debates' stock figures and stock arguments as ahistorical fictions or at least oversimplifications of more complex truths. But because the book takes an overly narrow view of what that debate is about, one has to do a fair amount of excavating to bring these histories into dialogue with the book, which is something I have tried to do here.

#### *D. Gender*

In many parts of the book Swanson does a terrific job of discussing the way in which racial narratives and fears of mixing affect the way in which blood banks are constructed and organized differently in different parts of the United States and across time. She has comparatively rich material on gender (and perhaps even intersectionality between race and gender in her historical research, though less of it is marshalled) scattered throughout the

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265. *E.g.*, Cohen, *Organ Market*, *supra* note 229, at 82.

book, but she misses an opportunity to more deeply examine the ways in which various body banks reinforce but also subvert gender narratives over time.

The professional “donor” of blood of the 1920s and 1930s was really the professional “man,” and blood sale was associated with masculinity (he could suffer the perpetually poor arm), virility, and providing for one’s family.<sup>266</sup> As Swanson herself points out, though, at the same time women *were* selling body parts in significant numbers, only it was milk and not blood.<sup>267</sup> Why did the early banking industry eschew women’s blood when it sought their milk? By contrast, when we get to the war years these narratives of virility drop out and instead it is the duty of every patriotic man and *woman* to become a blood donor; no less an authority than *Vogue* magazine runs a story of a woman giving blood as her husband is drafted to fight so they could both do their part.<sup>268</sup> Was it mere necessity, changing views of women’s work (such as female entry into the work force), or changing views about what blood donation was really about that opened up these possibilities for women? Or was it the fact that the World War II form of blood banking, with its emphasis on altruism rather than selling, conflicted less strongly with a meta-narrative of women as altruistic—but if so, why did that narrative not win out in the early days of milk selling? How did women’s role as blood providers on equal footing with men mesh with their other more gendered role in the war years, that of the “Gray Ladies” who volunteered with the Red Cross and acted like hostesses for the men who would donate to add a “feminine touch”?<sup>269</sup> What are we to make of Swanson’s nods to attempts to “add a little sexual spice” to blood donation, such as the newspaper story about the women working at the Jacksonville blood bank titled “They Call Themselves Lady Draculas,” and the American Blood Bank’s attempts to publicize their business as “thousands of women out for your blood”?<sup>270</sup>

On the milk side, the gender story is equally complex. It begins with immigrant wet nurses who are on the one hand depicted as victims of financial circumstances at the lowest rung of society but on the other hand are also clearly viewed as workers for whom it would be unthinkable to expect pure altruistic milk provision. Milk banking then becomes a way for married women and others of higher SES to make a little extra money on the side, increasingly in the comfort of their own home, but again with a

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266. SWANSON, *supra* note 3, at 39, 43–44.

267. *Id.* at 39.

268. *Id.* at 75.

269. *Id.* at 78.

270. *Id.* at 115 (quoting Patricia McCormack, *Women Are Out for Your Blood*, CHI. DAILY DEFENDER, Mar. 22, 1965, at 18).

strong expectation of payment. It is only later in its history that the assumption of altruism seeps in, when the industry is transformed into a charitable undertaking by society women. Intriguingly, in Swanson's account it was the feminist movement that nurtured the milk-banking industry just as it seemed poised to fade away, but it was the same movement that pushed the absence of payment as being the liberating aspect. Lois Arnold pushed women into milk donation at her Honolulu bank by describing breast-feeding as giving women a feeling "of triumph and enormous power" of "expressing our femininity in the most elemental of ways" but also suggesting that the same power could be had by *donation*, which "allowed her to multiply this 'triumphant feeling as a reward when there are no monetary rewards to be had.'"<sup>271</sup> Was this a true expression of a major strand of feminist thinking at the time or a crass attempt to manipulate a narrative to better sustain a business model if the input was free? Was this an attempt to liberate women or instill a false consciousness that united motherhood, altruism, and feminism? Certainly towards the end of Swanson's account Big Milk seems to glom on to this strategy, depicting the women who would seek to sell their milk as "bad mothers," selling away their child's birthright, adulterating and cheating for a profit unlike the noble good mothers who are willing to quietly donate—and in the case of the for-profit Prolacta, help the industry to ever more profits.

When it comes to sperm and egg, Swanson's account on the egg side is far too short to really say anything meaningful about the role of gender in this market, though others have provided more to chew on.<sup>272</sup>

In these last few paragraphs I have tried to do what Swanson did not: draw together the scattered threads of the role of gender in her stories, juxtapose them, and press on hard questions of exactly what was going on and why. I have a lot of questions. I wish Swanson had drawn more on her rich and detailed historical knowledge to say more about the way in which the story of body banking in America is or is not a story of gender or perhaps parallel stories of the banking of different genders.

#### IV. Conclusion

All those critiques said, I want to end this Review where I started: This book is an important, well-written, extremely well-researched volume. It is

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271. *Id.* at 185 (quoting Lois Dimon Williams Arnold, Donor Human Milk Banking: Creating Public Health Policy in the 21st Century (Feb. 28, 2005) (unpublished Ph.D dissertation, Union Institute and University)).

272. For example, see ALMELING, *supra* note 153.

a must read for anyone seriously interested in the debates about taboo trades and commodification. While admittedly it does not always go where I would want it to go in terms of coverage of kinds of banks and in terms of engagement with theory, what it does do it does exceedingly well, and Swanson is to be commended for providing us with this important work.