

Posthumous Autonomy Revisited[†]

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INTRODUCTION

George Annas characterized autonomy as “[t]he core legal and ethical principle that underlies all human interactions in medicine”¹ Under its rubric, Judge Cardozo in 1914 found the right of every competent person to consent to, or withhold consent for, medical treatment.² The United States Supreme Court gave new force to this right in *Cruzan v. Director, Missouri Department of Health*,³ in which the Court assumed that the right extended to refusing life-prolonging procedures and to directing their withdrawal.⁴

Professor John A. Robertson has gone even further by examining the force of autonomy as a principle for determining reproductive rights *after* an individual’s death.⁵ Professor Robertson considers the constitutionality of an array of regulations governing posthumous reproduction. He examines these governmental regulations in three contexts: (1) the use of frozen sperm after the death of the donor; (2) the use of frozen embryos after the death of one or both parents; and (3) the maintenance of a brain-dead or comatose pregnant woman to enable her fetus to develop more fully before delivery. For each context, Professor Robertson analyzes the operation of regulations in both the presence and the absence of directions from the deceased or incapacitated individuals.

These contexts are not as outré as they might first appear. Consider these real life examples:

- In 1983, a plane crash claimed the lives of Mario and Elsa Rios, a wealthy Los Angeles couple, leaving behind two frozen embryos at a Melbourne, Australia, clinic. United States and Australian legislators and regulators, together with dozens of professional organizations, battled over whether the fertilized eggs should be implanted, and whether any resulting offspring

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1. George Annas, *Life, Liberty and Death*, HEALTH MGMT. Q., vol. XII, no. 1, 5 (1990).

2. *Schoendorff v. Soc’y of New York Hosp.*, 105 N.E. 92, 93 (1914) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.”), *overruled by* *Bing v. Thunig*, 2 N.Y. 2d 656 (1957).

3. *Cruzan*, 497 U.S. 261 (1990). The Court held, however, that the Constitution does not forbid a state from requiring clear and convincing evidence of a person’s wishes before allowing the termination of life support. *Id.* at 281-87.

4. *Id.* at 270-74.

5. John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027 (1994).

should inherit the considerable estate left by the Rioses. The parliament of Victoria, Australia, passed a law forbidding destruction of the eggs, which medical experts believe are probably no longer viable.⁶

- In *York v. Jones*⁷ the U.S. District Court for the Eastern District of Virginia considered whether the Jones Institute of Reproductive Medicine in Norfolk, Virginia, could withhold a frozen fertilized embryo from the couple whose sperm and egg were combined to create it. Before the case was settled, the court issued a memorandum opinion and order indicating its determination to treat the frozen embryo as property.
- In the divorce proceeding of *Davis v. Davis*,⁸ Mary Sue Davis argued that seven frozen fertilized eggs should be treated as children, with custody being awarded to her. Junior Davis, her estranged husband, argued that the eggs were marital property. Judge W. Dale Young ruled, "[T]hose entities are human beings; they are not property."⁹ As a result, Judge Young reasoned that "the age-old common law doctrine of *parens patriae* controls these children, *in vitro*, as it has always supervised and controlled children of a marriage at live birth."¹⁰ Judge Young concluded, "[I]t is to the manifest best interests of the child, or children, *in vitro*, that they be made available for implantation."¹¹ The Tennessee Supreme Court reversed.¹²
- In 1990, the District of Columbia Court of Appeals decided a case in which doctors at George Washington University Hospital's high-risk pregnancy clinic performed a cesarean section on Angela Cardur, a twenty-seven year-old woman who was near death from cancer.¹³ In the absence of clear direction from the sometimes-conscious woman, the lower court ordered a cesarean section in an effort to save the fetus. The baby lived for only a few hours; the mother survived the procedure but died two days later.¹⁴ The appellate court held that the trial judge had erred, first, by not ascertaining whether the woman had the capacity to consent, and whether she did in fact consent to the procedure; and, second, if she lacked capacity, by not determining what *her* decision would have been had she had the capacity to decide.¹⁵
- Only this past summer, the California Court of Appeal overturned a lower court decision ordering the destruction of fifteen

6. See Thomas H. Maugh II, *Legacy of Dead L.A. Couple: OK Granted to Implant 2 Disputed Frozen Embryos*, L.A. TIMES, Dec. 4, 1987, pt. I, at 3.

7. *York*, 717 F. Supp. 421 (E.D. Va. 1989).

8. *Davis*, No. E-14496 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, 842 S.W.2d 588, (Tenn. 1992).

9. *Id.* at 2, 17.

10. *Id.* at 20.

11. *Id.*

12. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

13. *In re A.C.*, 573 A.2d 1235, 1238-40 (D.C. Ct. App. 1990).

14. *Id.* at 1241.

15. *Id.* at 1252.

vials of frozen sperm, despite the decedent donor's pre-death decision to leave the sperm to his girlfriend, Deborah Hecht.¹⁶ Before committing suicide in 1991, the decedent had indicated his desire that Hecht receive the vials of sperm in his contract with the California Cryobank, in his will, and in a letter to Hecht. Nonetheless, the decedent's two surviving children sued, arguing that a potential pregnancy would cause them emotional and psychological stress.

I. AUTONOMY AND VALUE

In the face of an escalating number of similar cases, questions arise about the role of autonomy—"the ability and the opportunity to *choose* one's course of action and to *act* to effectuate one's choice."¹⁷ Professor Robertson concludes that the autonomy interests of the deceased parent or parents have less value than the analogous interests of a living parent or parents:

[Posthumous reproduction] is an extremely attenuated version of the experiences that usually make reproduction valuable and important. Indeed, it is so attenuated that one could argue it is not an important reproductive experience at all, and should not receive the high respect ordinarily granted core reproductive experiences when they collide with the interests of others.¹⁸

Professor Robertson calls for a "normative judgment about the relative importance of certainty about a posthumous reproductive outcome."¹⁹ He concludes that the "right to engage in posthumous reproduction depends upon a judgment of the importance of the posthumous reproductive experience—a question that a commitment to autonomy itself cannot answer."²⁰

Professor Robertson's conclusion that the experience of bearing and raising children means more to living than to deceased parents seems intuitively correct. Whatever the scope of "procreative liberty" for the living, its value to any individual might diminish, if not disappear, with that individual's death. He is also correct that autonomy alone cannot resolve questions about the importance of reproductive experiences.

It is not clear, however, that normative judgments about the experience of child rearing and the legal right to bear children, or to avoid bearing children, have much to say about the importance of autonomy in the analysis of posthumous reproduction. On the contrary, autonomy might mean never having to ask qualitative questions about the value of the experience: The right to make certain personal decisions should not depend on a prior judgment about their importance or their outcome.

16. *Hecht v. Superior Court*, 16 Cal.App. 4th 836 (2d Dist. 1993).

17. Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 IND. L.J. 727, 727 (1993) (emphasis in original). Professor Robertson refers to autonomy as "the right to make personal decisions about one's life." Robertson, *supra* note 5, at 1064.

18. Robertson, *supra* note 5, at 1032.

19. *Id.*

20. *Id.* at 1064.

Consider, for example, individuals' interests in owning, using, and disposing of possessions. The realm in which most of us value "the ability and the opportunity to *choose* one's course of action and to *act* to effectuate one's choice"²¹ extends to choices concerning tangible property. The Constitution imposes significant limits on the government's ability to interfere with those choices.²² These constitutional limits are neither extinguished nor even substantially diminished by death. Instead, the law permits persons to write wills, and thus wield wide-ranging control over what happens to their property after they die.

Similarly, every state and the District of Columbia have either a statutory provision or case law permitting individuals to complete advance directives giving instructions as to their future health care, and to appoint competent adults to make those decisions in the event of incapacitation.²³ The Supreme Court recognized the constitutional dimension of this right in *Cruzan*.²⁴ In the Patient Self-Determination Act,²⁵ Congress required virtually all institutional health care providers to notify patients of their "right to self-determination in health care decisions" under applicable state law.

Professor Robertson notes the existence of both of these constitutionally protected rights—the right to control property after death and the right to make end-of-life decisions—but rejects them as models for analyzing the interests at stake in protecting the rights of individuals to give directions regarding posthumous reproduction. Wills and advance directives, Professor Robertson argues, serve socially important purposes: "[D]ying wills provide incentives to work and acquire property . . . [and] enable one to care for family and relatives. Living wills limit intrusive medical care, conserve medical resources, and spare doctors and families from making difficult quality of life judgments . . ."²⁶ But, Professor Robertson concludes, "[s]ocial goals of equivalent importance are not present in directions for posthumous reproduction."²⁷

Professor Robertson both overstates the socially important purposes of wills and advance directives and incorrectly believes that the constitutional protection for both property and end-of-life decision-making is based on social utility. While states provide for some statutory inheritance by spouses and minor children, these laws permit the testator otherwise to ignore the needs of surviving family,²⁸ as well as a broad range of other antisocial behavior. Similarly, advance directives may be used to require the provision of a wide

21. Dworkin, *supra* note 17, at 727 (emphasis in original).

22. "No person . . . [shall] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

23. See generally FRED H. CATE & BARBARA A. GILL, *THE PATIENT SELF-DETERMINATION ACT: IMPLEMENTATION ISSUES AND OPPORTUNITIES* (1991).

24. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

25. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388 (1990) (codified at 42 U.S.C. §§ 1395-1396 (Supp. 1991)).

26. Robertson, *supra* note 5, at 1033.

27. *Id.*

28. See UNIFORM PROBATE CODE §§ 2-301, 2-302 (1990).

variety of costly medical treatments, even where there is little hope of a successful outcome. In addition, they are commonly used to designate a physician or family member who is charged with the difficult and stressful task of making life-or-death judgments.

If society were to focus on social utility, it would abandon wills and advance directives and impose a rational, socially constructive scheme for inheritance and end-of-life decision-making. Instead, current law enhances the right of individuals to make absurd, idiosyncratic, expensive directions concerning things that will only take place when the decision-maker is incapacitated or dead. Wills and advanced directives enhance autonomy at the expense of the very rationality that Professor Robertson supports.

Similarly, autonomy supports the right of individuals to make decisions regarding posthumous reproduction, despite Professor Robertson's observations about their diminished social and personal importance. In its most simplistic form, autonomy is the right to make certain decisions, irrespective of how well or meaningfully those decisions are made.

II. TRANSPLANTATION AND AUTONOMY

One final example might make this point more clear. Every state and the District of Columbia permit individuals to donate organs and tissue for transplantation after death.²⁹ According to a 1990 Gallup poll, 94% of Americans report having heard or read about organ transplants; 84% believe transplants are successful in prolonging and improving the quality of life; and 89% said they were likely to honor the request of a loved one that his or her organs be donated after death.³⁰ Yet only 28% of those surveyed reported actually completing a donor card—less than a third of those who claimed they were willing to donate.³¹

Thus, as of July 31, 1993, 31,837 persons were registered to receive a kidney; 2,827 for a heart; 2,735 for a liver; 1,005 for a pancreas or combination kidney-pancreas; 1,124 for a lung; and 198 for a combination heart-lung.³² In the case of life-saving organs such as hearts, lungs, and livers, this means that one-third or more of those waiting will die before an organ is found.³³ Why does the law presume an unwillingness to donate in the face of overwhelming public support? Why does society tolerate the burying every year of the very organs and tissues that could save the lives of thousands of identified people on the transplant waiting lists?

The answer—at least in part—centers on the importance of autonomy, even the autonomy to make socially destructive decisions and to know that those

29. See generally Alexander M. Capron & Fred H. Cate, *Death and Organ Donation*, in 4 TREATISE ON HEALTH CARE LAW (Michael G. MacDonald et al. eds., 1993).

30. Gallup Organization, *The U.S. Public's Attitudes Toward Organ Transplants/Organ Donation* 3 (1990).

31. *Id.* at 6.

32. *Patients Waiting for Transplants*, UNOS Update, Sept. 1993, at 46.

33. 1993 Annual Report of the United States Scientific Registry of Transplant Recipients ES19-20.

decisions will be enforced after death, or the autonomy to make no decision at all. This is the common response to transplant advocates when they propose presuming consent to donate or conscripting organs without regard for consent.³⁴ We, along with Mr. Spock, have learned, at least in some areas, that the good of the many does not outweigh the good of the few, or of the one.³⁵

III. THE LIMITS OF AUTONOMY

Transplantation provides an example not only of the extraordinary force of autonomy—far beyond the normative value of the experience involved—but also of the dangers posed by a focus on autonomy that is too single-minded.³⁶ Because of the commitment to autonomy, society does not conscript organs from the dead, it does not presume the consent of the living to donate organs after death, it does not even force people to make the choice whether to donate. Instead, society discards the organs necessary to save lives. Similarly, it spends hundreds of thousands of dollars trying to save a single individual, while 39 million Americans have no health insurance.³⁷ Society focuses intensely on the “wishes”—even where none have been expressed—of the terminally ill, too often to the exclusion of the needs and the suffering of their families.

In short, autonomy and its focus on the distinctiveness and separateness of each individual have contributed to obscuring the intricate ways in which all individuals are linked. As a result, society frequently evaluates a potential action only in light of its effect on the individual most immediately involved, such as the patient, and ignores the interests of others who are intimately affected, such as the family.

The concept of autonomy might also divert us from searching for the proper role for the government in health care decision-making. While beyond Professor Robertson's task to explore the interests that the deceased might have in posthumous reproduction, I would like to know more about the government's interest in restricting or regulating such reproductive freedom. What business is it of the government anyway? Is the government acting to preserve order; protect the health and welfare of unborn or, in the case of frozen sperm, unconceived children; vindicate public sensibilities; or achieve some other purpose? The power of the question—what business is it of the government anyway?—is, of course, strongest when the parties involved offered direction as to what should happen in the event of one or more of them dying before all of the issues surrounding the use of a given medical

34. See Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 703 (1988); Note, *Compulsory Removal of Cadaver Organs*, 69 COLUM. L. REV. 693 (1969).

35. STAR TREK IV: THE VOYAGE HOME (Paramount Pictures 1986).

36. On the limits of autonomy generally in current law, see Dworkin, *supra* note 17.

37. Robert Pear, *Increase Found in Those Without Health Coverage*, N.Y. TIMES, Dec. 15, 1993, at A1.

technology were resolved. Providing such directions is a widely favored response to cases like those of Mario and Elsa Rios, Risa and Steven York, Mary Sue and Junior Davis, Angela Cardur, and Deborah Hecht. For example, after the death of the Rioses, the City of Victoria, Australia, passed a law "requir[ing] couples to declare in writing what will be done with their frozen embryos in the event of disagreement, death or divorce."³⁸ The directions may take the form of a written contract with a cryopreservation center or fertility clinic, an agreement between the parties, a will, or some other document. (The sperm donor in the case of Deborah Hecht, for example, employed a written contract, a will, and a letter.) The government should be required to demonstrate that an interest of the highest order is closely served before it is permitted to interfere with the expressed wishes of the individuals involved.

In designing the new paradigm for biomedical decision-making, as Professor Robertson notes, autonomy alone will not resolve the "value dilemmas" that changing medical technology presents. But we should recognize the extraordinary breadth and power of autonomy and frankly consider alternate values before concluding that autonomy is a value we can no longer afford.

38. Andrea Bonnicksen, *Whose Frozen Embryos?*, NEWSDAY, Oct. 1, 1989, at 1.