

Posthumous Reproduction

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INTRODUCTION

Posthumous reproduction occurs when a child is born after one or both genetic parents has died. It has always existed as an artifact of accident or fate: Women have died in childbirth, and fathers have died before birth of offspring. Now cryopreservation of sperm and embryos, and maintenance of brain-dead pregnant women make posthumous reproduction a foreseen and intended event.

Conflicts about posthumous reproduction are hardly the most important issue of bioethics, but they occasionally arise. Custodians of frozen sperm and embryos must decide whether to follow the deceased's directives to discard or release these reproductive factors, or defer to the wishes of the surviving spouse or family members. Doctors face decisions about whether to maintain the bodily functions of brain-dead or comatose pregnant women for weeks or even months so that a viable child can be born. Such situations often have an esoteric if not bizarre and even gruesome quality to them, which both fascinates and repels.

Although questions of posthumous reproduction lack the societal importance of issues such as assisting suicide, allocating scarce resources, and providing universal health care, they nevertheless have something to teach about the role of personal autonomy in resolving bioethical debates. Bioethics has traditionally assigned normative preeminence to the concept of autonomy¹ Yet autonomy has come under increasing attack as too individualistic, too isolationist, and too deaf to the demands of context, class, race, and gender to deserve the preeminence it usually has received.² Some critics have called for a more communitarian ethic to replace autonomy as the dominant

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1. There is no explicit ranking of principles in the standard bioethics litany of autonomy, beneficence, nonmaleficence, and justice. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (2d ed. 1983). However, in cases of conflict, autonomy ordinarily has trumped competing principles.

2. For a general critique of rights, including the rights of autonomy in the abortion context, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). For a critique of rights, including rights of autonomy, in the bioethical context, see SUSAN SHERWIN, *NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE* (1992). Carried to logical limits, autonomy would, for example, lead to a regime of physician-assisted suicide and active euthanasia, which overlooks important constitutive values in physician roles and societal commitments to caring for the vulnerable. Total deference to autonomy would also lead to a contract-based system of assisted reproduction in which women are bound by paid preconception contracts to gestate the children of wealthier couples. Such results have led bioethicists, policymakers, and others to search for ways to move beyond autonomy to some other authoritative basis for resolving bioethical conflicts.

paradigm for resolving bioethical conflict.³ Nevertheless, autonomy is too central a value to be blithely discarded without a closer look at its shortcomings. In my view, the problem is less in the substantive interests that autonomy protects than in the mechanical and often procrustean way that the concept has been perceived.⁴

An examination of conflicts in posthumous reproduction could lead to a better understanding of both the excesses and the limits of autonomy as a bioethical principle, for posthumous reproduction, as much as any issue, cautions against granting automatic or determinative priority to autonomy. Posthumous reproduction nicely illustrates how the importance of autonomy in resolving conflicts about new technology must be demonstrated and earned anew with each application and should not automatically control simply because an individual has expressed a wish.

To illustrate this point, this Article explores the role of autonomy as a decisional concept to resolve questions about posthumous reproduction. This inquiry will help resolve conflicts about posthumous reproduction when they arise. It will also test one kind of limit on the role of autonomy as a determinative structure in bioethical debate. By showing how the paradigm of personal autonomy must be refined and modulated if it is to deal effectively with new biomedical technologies, esoteric conflicts about posthumous reproduction might illuminate issues that will influence bioethical debates in years to come.

I. THE PRIMACY OF PROCREATIVE LIBERTY

To understand the legal and ethical issues raised by posthumous reproduction, we should first recall the primacy traditionally accorded procreative liberty in moral, legal, and social discourse. Although many reproductive issues are sharply contested, most people think that personal choice in procreative matters should be strongly respected.⁵ The law generally reflects this consensus by giving wide protection to procreative freedom.⁶

"Procreative liberty," however, is a broad term, and potentially covers a multitude of activities. At a minimum, it includes both the freedom to reproduce and the freedom to avoid reproduction. In recent years the main controversies over procreative freedom have concerned the right through abortion to avoid reproduction after conception has occurred. However, the development of assisted and collaborative reproductive techniques—such as

3. See sources cited *supra* note 2.

4. For example, feminist critics of autonomy with regard to new reproductive technologies have wrongly assumed that claims of procreative autonomy are absolute and without limitation, even though the proponents of autonomy hold a more nuanced view. Maura A. Ryan, *The Argument for Unlimited Procreative Liberty*, HASTINGS CENTER REP., July-Aug. 1990, at 6.

5. This is evident in the great respect that procreative autonomy commands in legal and ethical discourse. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22-42 (1994).

6. John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 SO. CAL. L. REV. 939, 957-76 (1986); see also ROBERTSON, *supra* note 5, at 26-42.

in vitro fertilization, frozen embryos, sperm and egg donation, and surrogate motherhood—have also put the right to reproduce on the public agenda. While issues of avoidance of reproduction arise in conflicts about posthumous reproduction, many of the questions raised concern the nature and scope of the right to reproduce—an issue that has received much less ethical and legal attention than has abortion.

A person's interest in engaging in reproduction is as important as her interest in avoiding reproduction. Denial of either imposes great burdens on individuals and affects their identity, their dignity, and the shape of their lives in ways that they alone can best appreciate.⁷ As a result, most people and courts would agree that married persons (and arguably unmarried persons as well) have presumptive moral and legal rights to reproduce by sexual intercourse.⁸ Because infertile couples have the same interest in reproducing as fertile couples, they should also have a right to use noncoital, assisted means of reproduction.⁹

Of course, no right is absolute. The right to reproduce coitally or noncoitally can be limited upon a sufficient showing of substantial harm to others.¹⁰ Some would argue that reproduction should be limited when it appears likely to hurt offspring or impose high costs on the medical and welfare systems.¹¹ Others find that assisted reproduction involving gamete donors and surrogates raises problems about the shape of families, the welfare of children, and the role of collaborators that justifies limiting their use.¹² Yet the protected status of reproductive freedom should mean coital, noncoital, and collaborative reproduction should be limited only when its opponents can show such great harm that the fundamental interest¹³ in having offspring is justifiably limited.¹⁴

The most difficult—and hence revealing—questions about procreative autonomy and the right to reproduce arise as we move away from the dominant cultural paradigm of a married couple conceiving offspring by coital reproduction. When reproduction occurs noncoitally through in vitro fertilization or with the aid of donors and surrogates, an initial question is whether the interests and values that make coital reproduction a valued activity apply at all. If the same procreative interests are implicated, then noncoital, collaborative reproduction should be protected to the same extent as coital reproduction. Because each noncoital situation differs in some respect from the married coital model, however, a separate normative judgment must be made about the relative importance of the variation. The prevailing paradigm of procreative autonomy should control only after the

7. ROBERTSON, *supra* note 5, at 35-40.

8. *See, e.g., id.* at 24.

9. *Id.* at 24, 38-39.

10. *Id.* at 37.

11. *Id.*

12. *Id.* at 39-42.

13. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

14. ROBERTSON, *supra* note 5, at 24.

interests and values at stake in coital reproduction are identified, and the extent to which they exist in the disputed noncoital situation is determined.¹⁵ Unless we are prepared to protect every exercise of procreative autonomy regardless of the precise choice being made, a prior normative judgment about the importance of the interests at stake must first be made. Autonomy cannot be the sole guide in answering this question, as the case of posthumous reproduction will show

II. POSTHUMOUS REPRODUCTION

Posthumous reproduction is not necessarily dependent on technology, but the ethical and legal questions of most concern in this area arise because of novel reproductive technologies. For centuries, fathers have died before their children were born, or women have died in childbirth or shortly thereafter.¹⁶ In such cases, the deceased will have reproduced posthumously usually without contemplating or intending that result. Cases also exist of persons who reproduce knowing that they will die during their child's infancy or early childhood—an increasing phenomena with the AIDS epidemic. However, reproduction in contemplation of early parental death is not posthumous reproduction *per se* because the birth of offspring occurs before the person reproducing has died.

Most current conflicts about posthumous reproduction arise from the ability to freeze and thaw gametes and embryos, and to maintain vital functions of brain-dead or comatose pregnant women.¹⁷ In each case, the question is whether the freezing, thawing, inseminating, implanting, and other activities that lead to posthumous offspring should occur or continue. This question might arise if the state passes a law against posthumous reproduction, or if the bank, clinic, or person with custody of the frozen gametes or embryos refuses to release them for reproduction. It might also arise when disease or trauma cause a pregnant woman to become brain-dead or comatose, and physicians and family members must decide whether to maintain her on a life-support system. Husband, family, physicians, and others might have conflicting views about whether efforts should be made to enable the fetus to survive.

Conflicts over posthumous reproduction force society to consider the scope of autonomy as a principle of bioethical decision-making. The first question to be considered is whether the deceased had given explicit directions about what should be done with sperm, embryos, or fetuses after his or her death. If the individual had given directions, one could argue that the deceased's procreative liberty entitles him or her to have sperm or embryos used or not

15. This point is amplified in *id.* at 22-42.

16. The law of inheritance has recognized the possibility of posthumous reproduction by men. As long as pregnancy has occurred before death, the child can take under the will as a child or heir of the deceased. *E.g.*, *LaBlue v. Specker*, 100 N.W.2d 445, 447-48 (Mich. 1960).

17. Strictly speaking, the birth of a child to a woman in a persistent vegetative state is not an example of posthumous reproduction. Because it shares many features with posthumous reproduction, however, this Article discusses such births.

used posthumously, despite the objections of other parties. If the individual had given no such directions, a person's procreative liberty might not be directly involved, and the reproductive interests of female recipients, fathers, family, or the state in preserving fetal life or in conserving resources could be considered without concern for the reproductive intentions of the deceased.

In situations in which the individual had given explicit directions concerning posthumous reproduction, one might think that the principle of reproductive autonomy should control. But the right to control posthumous reproduction follows from the principle of procreative autonomy only if posthumous reproduction implicates the same interests, values, and concerns that reproduction ordinarily entails. Thus, deciding whether directions for or against posthumous reproduction should control requires that society come to terms with the meaning or importance of posthumous reproduction to individuals. A general commitment to the value of autonomy cannot resolve this question, for not every choice is protected, and autonomy itself cannot explain which exercises of autonomy are of critical importance.

Because a person reproducing posthumously is by definition dead, the meaning or value of posthumous reproduction lies in the importance that individuals place on being able to determine the fate of their gametes, embryos, and fetuses after they have died.¹⁸ The key normative issue is the reproductive importance or significance of advance directives for or against posthumous reproduction. Are they as central and significant to personal identity and meaning as other reproductive experiences are? If not, should they be protected on some other basis? These questions require normative assessments about the premortem importance to living persons of the possibility of postmortem reproduction¹⁹—an assessment that the principle of autonomy itself cannot answer.

With posthumous reproduction, the most important question is whether it is a meaningful reproductive experience to know in advance that one's genes might (or might not) be used to produce offspring after one's death. Ordinarily, reproduction is valued because of the genetic, gestational, and rearing experiences involved. Reproduction connects individuals with future generations and provides personal experiences of great moment in large part because persons reproducing see and have contact with offspring, or are at least aware that they exist.

Posthumous reproduction, however, will share only a few features of what is valued about reproductive experiences. The individual will not gestate. She will not rear. While alive, she will not even know she has reproduced genetically. At most, the person has the present satisfaction of knowing that

18. I put aside questions of whether a dead person has interests that survive her death, such that society is obligated to enforce premortem contracts and understandings to protect her postmortem interests. For a discussion of this issue, see Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341 (1987); Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375 (1988).

19. For the sake of simplicity I often refer only to the premortem interest in having postmortem reproduction occur, although the premortem importance of avoiding postmortem reproduction is also at issue.

genetic reproduction might occur after she has died. This 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.

By the same token, the desire to make and have directives against posthumous reproduction enforced would not appear to implicate significantly the values accorded the desire to avoid reproduction. No unwanted gestation or childrearing will occur. Individuals will never know that they have had offspring, and thus will not experience anxiety about the welfare of their offspring or the fear that a person will knock on their door claiming to be their child. At most, they will have the certainty that no children will be born after they die and they are no longer around to see, rear, or worry about them.

Again, this attenuated interest in avoiding reproduction does not appear to implicate the core interests involved in most situations of avoiding reproduction, and arguably should not be valued to the same extent that interest is valued for living persons. In either case, a normative judgment about the relative importance of certainty about a posthumous reproductive outcome must be made to determine whether the autonomy usually accorded reproductive choice should be accorded a choice for posthumous reproduction. Even if an essential or core reproductive interest is not present, some other basis for protecting those choices might exist. For example, society allows competent persons to make binding dispositions of their property that will not take effect until after their death. Through writing legally enforceable wills, persons derive satisfaction from knowing to whom their property will go. Their premortem disposition is followed, even though they will be dead when their property is distributed. This gives people incentive to amass property through hard work. It also comports with a sense of autonomy in controlling "their" property

Similarly, society allows people through living wills and appointment of health care proxies to give advance directions about what medical care they will receive should they become incompetent.²⁰ At that point they will have no conception of their current interests. Indeed, they might have a set of interests that are very different than they envisaged at the time they issued the directive.²¹ Nevertheless, this policy serves societal goals in limiting the use of medical resources, and spares others from making explicit quality-of-life judgments for patients at the end of life. The ability to make such directives also gives competent persons a sense of control over their own lives by recognizing their right to give directions for control of their future.

20. See, e.g., *In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Westchester County Med. Center*, 531 N.E.2d 607 (N.Y. 1988).

21. John A. Robertson, *Second Thoughts on Living Wills*, HASTINGS CENTER REP., Nov.-Dec. 1991, at 6.

Directives about posthumous reproduction, however, share only a few of the features of living and dying wills. All three practices involve the exercise of autonomy concerning events that occur when the person is dead or incompetent. But choice for choice's sake is not a compelling principle for ethical, legal, or social decision-making. A qualitative assessment of the importance of the choice must also be made. An important difference between living and dying wills and directions for posthumous reproduction is that such wills serve societal purposes other than a pure interest in autonomy. For example, dying wills provide incentives to work and acquire property. Moreover, they 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 at the end of life. Social goals of equivalent importance are not present in directions for posthumous reproduction.²²

Determining the particular importance of a person's interest in posthumous reproduction is key to resolving the dilemmas and conflicts that posthumous reproduction presents, because that importance will determine how strong competing interests must be to outweigh the claimed interest in autonomy. If the interest in posthumous reproduction has special importance, correspondingly stronger interests or reasons must be shown to justify limiting it. For example, concerns about the unnatural and dehumanizing effect of allowing a brain-dead woman to serve as an incubator for a fetus might not be adequate to override an important reproductive or autonomy interest. But those concerns might be sufficient if the reproductive interest has no special standing.

Similarly, concerns about the interests of survivors in not having another sibling or half-sibling to alter their sense of family or share in an estate will hardly be sufficient to trump an important liberty interest, though they may otherwise be acceptable grounds for state action.²³ By the same token, concerns about the welfare of offspring who are born with no live genetic parents and who later discover they were not conceived or implanted until after their parents' deaths by suicide or trauma, might support state policies restricting posthumous reproduction unless a fundamental interest in posthumous reproduction is at stake.

The question of how to value the interests in posthumous reproduction is thus key to resolving many of these dilemmas. A person's interest in posthumous reproduction exists only if she focused on the possibility and found sufficient meaning in reproducing after death to make a directive about it. Even then, one can ask whether such directives should trump other interests that ordinarily would support state action. Many questions can be raised about how central a role that directive played in the person's social, psychological,

22. At most, directives for posthumous reproduction fulfill the social goal of allowing people to say what happens to their "property"—gametes and embryos—after they die. This property interest, however, is different than property that results from work.

23. The inheritance questions that arise with posthumous reproduction are beyond the scope of this Article.

and emotional life. For example, did the person often think of, or refer to, the possibility of posthumous reproduction? Did it play a significant role in her life? Without an explicit prior oral or written directive, the predeath interest of the deceased is not directly involved, and other interests or concerns may be given priority.

In addition to the state interests discussed above, the reproductive interests of other persons might be involved: a spouse, partner, or lover who wants to use or avoid using the gametes, embryos, or body of the deceased. In the absence of the deceased's directions for or against posthumous reproduction, the interests of a spouse or a partner in reproducing with the deceased's gametes or embryos, or in using her brain-dead or comatose body, must then be considered. If such a person has a property or quasi-property dispositional right over those factors, that person's own rights to procreate or not will be directly implicated.²⁴ The competing interests of existing offspring and heirs, notions of morality, respect for the dead, respect for fetuses and embryos, and even the prior wishes of the deceased about posthumous reproduction may all have to yield to the claims of the person who wants to use those factors to reproduce. Questions of posthumous reproduction thus give way to the present reproductive interests of living persons.

A state policy in favor of utmost protection for embryos and fetuses argues for posthumous reproduction. Such a policy would support recognition of explicit directives in favor of posthumous reproduction, and would permit or even require it without a directive. However, protecting prenatal life by posthumous reproduction could infringe on the interests of living persons—spouses or partners—in not reproducing. The question to be addressed then is whether the right of a spouse or a partner to avoid reproduction will trump the state or the deceased's interest in posthumous reproduction when there will be no bodily intrusions on the person opposing reproduction. Resolution of that question will require a close analysis of the competing reproductive interests.

This brief account shows several ways in which posthumous reproduction pushes the meaning of reproductive autonomy and autonomy generally. In coming to terms with the value conflicts posthumous reproduction presents, we will have to assess the meaning of reproduction to individuals in several different circumstances and weigh the value of those interests against competing individual, family, and collective interests in reproducing or not reproducing after death.

The following discussion will show how the existing paradigm of autonomy provides a starting point for analysis but leads to no final answers. While a commitment to autonomy might launch the inquiry, it cannot direct how to rank different uses or expressions of autonomy. But it is such a ranking that

24. See *infra* notes 102-03, 108-10 and accompanying text for a discussion of why a person must have a property right in the sperm, embryo, or pregnant woman's brain-dead body in order to exercise his right to procreate with those materials.

is needed to resolve the dilemmas that posthumous reproduction and other claims of autonomy present.

A close look at several situations of posthumous reproduction may thus shed light on how conceptions of autonomy need revision and modulation if they are to continue to serve as a beacon for bioethical discussions.²⁵ What we find may also help in devising policies for posthumous reproduction and for understanding the scope of advance directives generally

III. POSTHUMOUS USE OF SPERM

Freezing sperm is now a routine part of the artificial insemination business. The need to screen for infectious disease by retesting sperm samples and the logistics of commercial sperm banking require freezing.²⁶ The existence of this technology also offers an option for men concerned about the effect of medical treatment or environmental exposure on the viability of their sperm. Some men who are contemplating radiation treatments or hazardous occupations freeze their sperm so that they may later reproduce with healthy sperm. Sometimes these men die, and someone must decide what to do with their sperm. Should it be destroyed? Can it be released to widows or other persons? May it be thawed and used for insemination in the hope of producing offspring?

These questions are usually answered by the directions the men gave at the time of storage. A standard form asks the depositor to designate what disposition he wishes to make in case of death, and that designation will usually be followed.²⁷ Disputes could arise if the man has not indicated what should be done with the sperm, or if more than one person claims the semen. Disputes could also arise if the state or other actors discourage or ban the posthumous use of stored semen.

The only reported cases of disputes involving posthumous use of stored semen involve the first two kinds of disputes. In a 1984 French case, the widow of a man who had died of cancer requested that semen he had stored in a French sperm bank before treatment be released to her.²⁸ Because he had not given the bank specific instructions for disposition of the stored semen in case of death, the bank refused. A French court eventually ruled that his widow had a right to the sperm and could use it to try to have offspring by her deceased husband because it found evidence of his "deep desire" to make his wife "the mother of a common child."²⁹

25. The current conception of autonomy needs to be revised because when it confronts multi-faceted problems such as arise in posthumous reproduction, the old idea that an individual's choice should always triumph no longer satisfies. Instead of simply asking whether a choice has been made, society must ask whether that autonomous choice deserves protection.

26. Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY AND STERILITY app. C, supp. 2 (June 1990).

27. California Cryobank, Inc., Specimen Storage Agreement at 3 (copy on file with the *Indiana Law Journal*) [hereinafter California Cryobank].

28. IAN KENNEDY & ANDREW GRUBB, *MEDICAL LAW* 622 (1989) (quoting *Paraplaix v. CECOS*).

29. *Id.*

In a 1993 California case, a dead man's children opposed the efforts of his lover to have fifteen vials of his stored semen released to her for purposes of posthumous reproduction.³⁰ Deborah Hecht and William Kane lived together for five years. She accompanied him to the sperm bank when he made his deposits on September 24, 1991. About a month before he committed suicide in a hotel room in Las Vegas on October 30, 1991, he executed a will that left his residual estate to Hecht.

In depositing the sperm, Kane executed an agreement with California Cryobank, Inc., which stated that "Cryobank shall release client's semen specimens only to client or client's designee at the express written authorization of client."³¹ At the time he made the deposit, the deceased executed a written "Authorization to Release Specimens" to Hecht and her physician. However, the original agreement with California Cryobank also contained a clause that stated, "In the event of death of the client, the client instructs the Cryobank to [r]elease the specimens to the executor of the estate."³² Because Hecht never presented the "Authorization to Release Specimens" to Cryobank while Kane was alive, it appears that the clause concerning release to the executor of the estate in case of death controlled. If the frozen sperm is considered an asset of the estate and the will making Hecht the residual legatee is valid, then Hecht will become the owner of Kane's frozen sperm, and presumably she can use it to have his posthumous children. If the will is not deemed valid, the sperm could under previous valid wills pass to other residual legatees, who then could destroy it.

The case arose when Kane's two children by a previous marriage (one of whom was represented by her mother, the deceased's former spouse) contested the will. They argued that if the September 27, 1991, will is invalid they are entitled to one hundred percent of Kane's frozen sperm.³³ Under an alternative theory of distribution based on an alleged settlement agreement with Hecht, they argued that they are entitled to eighty percent of the frozen sperm.³⁴ They planned to destroy any frozen sperm they received because they did not want any half-siblings to be born who would destroy the integrity of their family as they knew it at the time of their father's death.³⁵ They also requested that the sperm be destroyed on public policy grounds to prevent the birth of children who will not know their deceased father.

On the other hand, Deborah Hecht asserted that the deceased's clear intention, expressed in his sperm banking directive and in his will, was that the sperm bank release the semen to her for posthumous reproduction. She argued that denying her access to Kane's sperm would interfere with her

30. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

31. California Cryobank, *supra* note 27, at 2.

32. *Hecht*, 20 Cal. Rptr. 2d at 276.

33. Statement of Interested Parties Regarding Administrator's Petition for Alternative Relief at 2, Estate of William E. Kane, (Super. Ct. of Cal., Ct. of Los Angeles filed Dec. 9, 1992) (No. BP012006) (copy on file with the *Indiana Law Journal*).

34. *Id.* at 2-3.

35. *Id.* at 19.

constitutional right to procreate as well as Kane's right to direct how his sperm shall be used.³⁶

A probate court granted the children's petition to have the sperm destroyed. The court of appeals vacated the lower court's order, holding that the disposition of the sperm should turn on the decedent's intent as reflected in the depositing document and any valid will that pertains.³⁷ The court first held that "at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction," which entitled him to dispose of the sperm by will.³⁸ Relying on a California law that recognizes the legality of donor insemination of unmarried women, the court also found no public policy against Hecht using Kane's sperm to have a child.³⁹ Single women could be inseminated, and concerns about protection of offspring and effects on existing children were insufficient to ban posthumous reproduction.⁴⁰ The case was remanded to the trial court, which must now decide the decedent's true intent regarding disposition of the sperm.⁴¹ As the following discussion will show, the appellate court's ruling was correct. The ultimate disposition of these cases should turn on the ownership of the sperm, which in this case depends on the intentions of the depositor of the sperm at the time of deposit and execution of a valid will. No compelling policy reasons prevent directions for posthumous use of stored semen from being followed, though a state's failure to do so would probably not violate the deceased's constitutional right to procreate.⁴²

In a third type of frozen sperm case, death row inmates in California and Virginia have sued for the right to store their sperm so that it may be used posthumously to conceive their children.⁴³ The courts have rejected this claim on the ground that condemned men have no right to reproduce.⁴⁴ Because other courts have rejected the claim of federal prisoners to provide semen for artificial insemination of their spouses while living, the claim of condemned men to reproduce posthumously has even less standing.⁴⁵

36. *Hecht*, 20 Cal. Rptr. 2d at 279.

37. *Id.* at 291.

38. *Id.* at 283.

39. *Id.* at 287.

40. *Id.* at 290.

41. *Id.* at 291.

42. See *supra* notes 22-28 and accompanying text (discussing that a person has no constitutional right to reproduce after his or her death).

43. Katherine Bishop, *Prisoners Sue to Be Allowed to Be Fathers*, N.Y. TIMES, Jan. 5, 1992, § 1, at 14.

44. *Id.*

45. *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990).

A. Is Stored Semen Property?

Parpalax and *Hecht v. Superior Court* initially raise questions about who has the greater property interest in stored semen. This formulation of the issue assumes that bodily fluids and gametes can be considered property and treated as any other asset of an estate. Some persons, however, object to treating body parts as property, especially if a monetary value is to be assigned and market transactions involving them are to occur.⁴⁶ Some courts have also taken this position. In *Moore v. Regents of the University of California*,⁴⁷ the California Supreme Court rejected the claim that excised cells and tissues were property that could be the subject of a conversion action.⁴⁸

Yet a property interest in gametes must exist, regardless of whether an action for conversion will lie. The term "property" merely designates the locus of dispositional control over the object or matter in question.⁴⁹ The scope of that control is a separate issue and will depend upon what bundle of dispositional rights exist with regard to that object. Unless a law requires that stored semen be destroyed upon death, someone has the right to decide what happens to it.⁵⁰ In this sense, someone "owns" or has a "property" interest in stored semen.

The logical and best candidate is, of course, the person who provides the semen for storage. It is "his" semen both in a biological and property sense, and thus he has the right to decide what happens to it. The California Supreme Court recognized this fact in *Moore* when it held that the researcher must obtain the informed consent of the source before removing his cells, even if no damage remedy for conversion exists. Only Moore could consent to the removal of the cells. The court rejected Moore's right to control what happened after removal, presumably because such removed parts were usually discarded. But that assumption should not be a barrier to finding a property interest in removed gametes when they are not destroyed and still have great significance to the person providing them.⁵¹

Recognition of the source's dispositional control of removed semen is all the more compelling because disposition of semen, unlike disposition of other excised cells and tissue, has ongoing social and psychological significance for the source and usually occurs to implement his personal reproductive desires.⁵²

46. See GEORGE J. ANNAS, *STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS* 64-69, 172-77 (1993); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1888-1903 (1987).

47. *Moore*, 793 P.2d 479 (Cal. 1990).

48. *Id.* Nevertheless, the court recognized that the patient had a right to informed consent that could be violated by a physician who planned to use the tissue for research or profit. *Id.*

49. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990).

50. The semen would only become the property of the sperm bank if the depositor had agreed to such a post-death disposition.

51. *Moore*, 793 P.2d at 485.

52. Thus the court in *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 281-84 (Ct. App. 1993), held that *Moore* did not bar ownership in sperm by the sperm source, and presumably by persons to whom he had transferred his rights.

If the source of the semen is the "owner," in the sense of being the one who decides what will happen to removed sperm, what is the scope of his control? May he donate it to others, store it, sell it, or give directions for its use after he dies? There is no apparent reason why these usual attributes of ownership should not apply to frozen semen that remains in storage at the time of the source's death. If he has not made a specific designation concerning the semen, it arguably should be part of his estate because its reproductive potential is significant to him when he is alive and to those who share in his estate when he is dead.

With this view of semen as "property," over which the source has the right of disposition until he transfers it to another, the source's directives for inter vivos or posthumous disposition of the semen should presumptively control, subject to any constitutionally permissible state restrictions that might be imposed. If he directs that upon his death, stored semen should be released to his spouse, his lover, or some other party, that direction should be followed as a matter of property or inheritance law. The sperm bank should be obligated to follow it, and should incur no legal liability if it does. The same rule should apply if he directs that the sperm be released to the administrator of his estate, or that it otherwise be treated as an asset of his estate.

On this understanding of property rights in stored semen, *Parpalax* was properly decided. If the deceased gave no explicit directive for disposition of the semen, it should then become an asset of his estate, which his widow had the right to use. In cases where the deceased has given an explicit directive, as in *Hecht*, that directive should also be followed. Resolution of cases like *Hecht* should thus turn on which directive is controlling—the one given in case of death, or the inter vivos one that named the lover as the recipient.

B. Countervailing State Interests and Procreative Liberty

For public policy reasons, a state could decide that semen should not be subject to posthumous transfer or use. If such a policy exists, stored semen would then not be an asset of the deceased's estate and could not be transferred by will or other means for posthumous use. Whether such a policy would be constitutional depends upon the effects of posthumous reproduction and the status of one's interest in deciding that posthumous reproduction should occur.

Questions of procreative liberty and posthumous reproduction would arise, however, only if a state refused to recognize a prior directive for posthumous disposition of stored semen. In *Parpalax*, for example, the procreative liberty of the deceased ultimately was found to be involved because the donor had explicitly stated that he wanted his sperm used for reproduction after his death. Similarly, in *Hecht*, the question of the donor's right to reproduce posthumously arises only if he had issued instructions that contemplated posthumous use of his sperm. If he had merely instructed that the sperm be turned over to his estate, with final disposition to be determined by the executor of his estate or his beneficiaries, his orders might not implicate the

right to reproduce after death because he had not directed that the sperm should be used for reproduction. By the same token, unless he had issued a directive that the stored semen be destroyed, his right to avoid posthumous reproduction would not be involved.⁵³

Suppose, however, that a man who had banked sperm before undergoing radiation treatment had given explicit instructions that the sperm be used by his wife or designated other if he died.⁵⁴ Would his procreative liberty protect his right to posthumous reproduction? Or suppose he had explicitly directed that the sperm bank destroy all of his stored semen. Would his right to avoid reproduction be violated if this order were not followed?

Such questions would arise only if the state or another party asserts that interests other than the deceased's directions for disposition of stored sperm should control. The state might wish to prevent children from being born without a father. It might also wish to protect existing offspring from the turmoil of having a new sibling or half-sibling, or to protect existing patterns of inheritance that posthumous offspring would disrupt. In some cases, the sperm bank might be concerned about its possible liability if children were born without a father, or if it should give the sperm to an unauthorized person. Such interests all are rational in some sense, and would satisfy a deferential rational basis standard of scrutiny of state action.⁵⁵ If posthumous reproduction is found to be a fundamental right, however, the state will need a compelling interest to interfere with that right.⁵⁶ The interests mentioned above probably would not satisfy this higher standard of scrutiny because the potential harm is not great enough to justify interference with fundamental rights.

For example, the state's policy interest in protecting children who would be born without a living father is not compelling because that child cannot be born any other way. Protecting the child's welfare by banning the posthumous use of sperm would protect the child by preventing it from being born. This hardly protects the welfare of children who have no other way of being born. Surely being born to a single parent or when one or both progenitors are dead does not make a child's life so painful or stressful that being born amounts to wrongful life.⁵⁷ Thus, protecting the child by preventing its birth would

53. Regardless of whether the donor had given explicit instructions, the reproductive rights of survivors or potential recipients might be involved.

54. The following analysis also applies when sperm is stored in contemplation of suicide, as allegedly occurred in *Hecht*, 20 Cal. Rptr. 2d 275, and the direction for posthumous use has been competently made.

55. See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court required that the state show a compelling state interest, which the law was necessary to advance, in assessing a state law that impinged upon a fundamental right. The dissenting justices, who disagreed that there was a fundamental right asserted, would have applied a deferential rational basis standard of scrutiny and upheld Connecticut's anticontraception law.

56. See, e.g., *Roe v. Wade*, 410 U.S. 479 (1973); *Griswold*, 381 U.S. 479.

57. Although most states have rejected damages for wrongful life, three states have permitted actions for wrongful life limited to recovery of special damages for extraordinary medical expenses incurred as a result of an unavoidable congenital condition. *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis*, 656 P.2d 483 (Wash. 1983).

not satisfy a compelling interest standard for restricting procreative choice.⁵⁸ It might, however, satisfy a rational basis standard if the state is concerned about the costs that could result from children being born without fathers or the effects on other persons of having children born posthumously

Whether a state may restrict posthumous reproduction with stored semen thus will depend upon whether strict scrutiny of state interests is required because a fundamental procreative right is at stake.⁵⁹ That is, does a person's fundamental constitutional right of procreative choice include the right to make decisions about posthumous reproduction? As noted above, the fact that a choice about reproduction has been made—that autonomy has been exercised—is not determinative. The importance of the reproductive choice must be evaluated. In this case, it is a choice about the possibility of reproduction that will not occur until after the man is dead. He will never know whether posthumously produced offspring are born, much less be able to participate in their rearing.

Having some control over the ability to reproduce after death might be of great emotional importance for some individuals. It might give them satisfaction, certainty, and purpose in the same way that executing a living will or a testamentary disposition of property gives them purpose. But decisions about posthumous reproduction seem much less central to personal identity, dignity, and meaning than reproductive decisions that affect persons while alive. Just as the right to make a living will is much less important than the right to refuse immediate medical care, the right to reproduce after death is less central an interest than the right to reproduce during life.

As a matter of constitutional law, a state might have the power to restrict posthumous use of frozen sperm. Given a general reluctance to recognize unenumerated rights as part of Fourteenth Amendment substantive due process,⁶⁰ the Supreme Court will be hesitant to find that any noncoital reproduction, particularly reproduction involving donors and surrogates, is protected as a fundamental right.⁶¹ Nevertheless, one can make a strong argument that noncoital reproduction involves the same values and interests that underlie coital reproduction and therefore deserve the same protection. Thus, it is likely that the Supreme Court would ratify the use of artificial insemination or in vitro fertilization with a married couple's gametes as part of their right of marital reproduction.⁶²

Even if the Court found that noncoital reproduction was protected, decisions about posthumous reproduction are so far removed from those interests that

58. Prohibiting use of sperm after the donor's death to prevent a child from being born without a father might satisfy a rational basis standard if the state's interest is seen as one of preventing gratuitous suffering. This is not a concern for the child. Rather, it is a concern for the feelings or perceptions of those who have contact with posthumously born offspring.

59. A state might unconstitutionally violate that fundamental right through a direct restriction or by a narrow definition of a person's property or assets.

60. U.S. CONST. amend. XIV

61. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986) (declining to hold that all sexual conduct is protected as a fundamental right).

62. *See ROBERTSON, supra* note 5, at 38-40.

it is highly unlikely that a fundamental constitutional right would be found. The interest in controlling reproductive events that will not occur until after one is dead is simply too attenuated a version of the important interests that one has in controlling reproduction while alive to warrant constitutional protection. This is true both for engaging in posthumous reproduction and for avoiding posthumous reproduction.

The counterargument would stress the present reproductive importance to individuals who give posthumous directions about whether they wish to have offspring.⁶³ This argument would assert that the certainty of the possibility of posthumous reproduction (or its avoidance) has an important impact on the sense of self and personal identity of the person who gives such directions. For persons concerned about posthumous reproduction, the possibility of reproduction after their death could closely approximate the meaning which reproduction ordinarily has for individuals—the sense that they have contributed to the ongoing stream of life and that some part of themselves will survive death. The psychological effect might be akin to the satisfaction experienced by a writer who knows that his novels will survive his death, or by a philanthropist who contemplates her name on a university building after she is deceased. This argument would be more forceful if its proponents could show that the certainty sought about posthumous reproduction played a central role in the individual's emotional or psychological life.

Proponents of this view no doubt would attempt to draw support from Justice O'Connor's concurring opinion in *Cruzan v. Director, Missouri Department of Health*.⁶⁴ O'Connor stated that Fourteenth Amendment liberty includes the right to make advance directives about what health care a person wishes to receive if she becomes incompetent.⁶⁵ Although she wrote only about the right to appoint a health care proxy, the logic of her position should extend to living wills that provide for the withholding of necessary medical care and to prior directives for the exercise of other protected liberty interests. Given that at least four other Justices appeared to share her views, one could argue that *Cruzan* is authority for finding a Fourteenth Amendment right to make directives when competent for the provision or rejection of medical care when incompetent.⁶⁶ State restrictions on the use of prior directives for withholding medical treatment would then have to meet a compelling interest standard, and in most cases would be unconstitutional.

63. Note that the claim is not simply that the gametes are the donors' property and that they may do with them as they wish. A pure property claim, without a showing that the property implicates another protected interest, will not support the use of a compelling interest standard. Property rights are dependent on state definitions. *Board of Regents of St. Colleges v. Roth*, 408 U.S. 564 (1972). Thus the state might choose to limit the definition of property rights in semen to restrict the reproductive use of sperm.

64. *Cruzan*, 497 U.S. 261, 290 (1990).

65. *Id.*

66. The Court's opinion used the term "liberty interest." *Id.* at 271. Justice O'Connor referred to it as a "protected liberty interest." *Id.* at 287. Presumably, such an interest would have the same status as a fundamental right, as Justice Brennan points out in his dissent. *Id.* at 304-09.

Proponents of a right to posthumous reproduction would then argue that if the Constitution protects a right to make advance decisions about medical treatment, then the Constitution should also protect the right to make advance decisions about other fundamental rights, including rights to engage in or avoid reproduction. The need for advance certainty and control over one's reproductive future could be as important as control over future medical care. Thus, a right to make advance disposition of stored gametes and embryos, including their posthumous use, would follow

Further reflection, however, suggests that Justice O'Connor's *Cruzan* concurrence offers only weak support for recognizing a constitutional right to posthumous reproduction. Her statements were dicta, and two members of the Court likely to agree with her have retired.⁶⁷ Also, the ability to direct medical care in advance arguably has much greater personal significance than the ability to make decisions about posthumous reproduction, because of the personal indignities and burdens of excessive life support on persons with terminal or severely debilitated conditions.

Finally, recognition of a constitutional right to have advance directives against medical care enforced is itself difficult to justify. Whatever the policy arguments in favor of living wills, the basis for finding a Fourteenth Amendment right to make such wills is dubious. The right to refuse medical treatment when competent implicates immediate interests in avoiding bodily intrusions and burdensome diseases. Refusing medical treatment in advance implicates only the interest in preventing medical treatments from occurring when one is no longer competent. The autonomy interests are not nearly as strong and would limit state efforts to protect incompetent patients who in fact have continued interests in treatment. The right to have such advance certainty should not be endowed with fundamental right status, and the Court, if ever confronted directly with this question, is likely to agree and not follow Justice O'Connor's concurring opinion in *Cruzan*.⁶⁸

Even if the Court explicitly recognized the right to make advance directives about medical care, decisions about posthumous reproduction could still be distinguished. Living wills prevent intrusions on the body while the person is alive and still has interests. Except when a brain-dead pregnant woman is kept alive so that her child might be born, posthumous reproduction involves no bodily intrusions. But in that case, the individual is dead and no longer can be said to have interests. Advance directives for when the person is dead and ceases to have any interests at all are entirely different than living wills, and less deserving of protection even if directives that operate when one is incompetent are recognized. *Cruzan* did not implicate the right to make posthumous gifts of the body or other property, and thus should not be applied to questions of posthumous reproduction.⁶⁹ Constitutional recognition of one

67. These two members are Justices Brennan and Marshall.

68. This argument is presented in greater detail in John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139 (1991).

69. The Court has also never suggested that state probate and inheritance laws have constitutional limits.

somewhat attenuated interest does not require that an even more attenuated interest also be recognized as a constitutional right. If this analysis is correct, then the Supreme Court is unlikely to recognize a constitutional right to make decisions about posthumous reproduction. Because the personal interests at stake are too attenuated and distant from core reproductive interests to be deemed fundamental rights, the state will be free to restrict the enforceability of explicit directives for or against posthumous reproduction.

Concerns about the ill-effects of posthumous use of frozen sperm might be exaggerated, and perhaps they should not inform public policy. But if the state chooses to discourage or prohibit posthumous use of stored semen in order to prevent the perceived personal and social problems associated with children born without a father, it probably has the authority to do so.⁷⁰ Whether directives for or against posthumous reproduction should be honored will thus depend on policy judgments about the significance to individuals of knowing that they might or might not have offspring after death, balanced against the competing concerns about the effects of posthumous reproduction.

Nevertheless, even if the deceased, while alive, did not have a core reproductive interest in giving directions for posthumous reproduction, the widow or other recipient of frozen sperm might have her own core reproductive interests at stake in using the stored semen of the deceased. In that case she would be asserting her own reproductive interests in wanting to use her deceased husband's sperm when she has a property right or ownership interest in the sperm. The fact that she might obtain sperm for reproduction from alternative sources does not negate her procreative interest, for the right to reproduce includes the right to choose with whom one will reproduce.⁷¹ The state can no more stop X from reproducing with Y because Z is available, than it can prohibit X from reading book Y because book Z is available. If one can pick one's mate or the characteristics of a sperm donor, one surely should be free to choose to reproduce only with the sperm of a deceased spouse or lover. Overriding that choice would override the recipient's present interest in reproduction and thus would require a compelling state interest to be justified. As discussed earlier,⁷² concern for the welfare of posthumously born offspring will not satisfy that standard.

The main argument that the widow or designee does not have a right to reproduce with the semen of the deceased source would be that single persons do not have the same right to reproduce—coitally or noncoitally—that married couples do. If the right of single persons to reproduce is recognized, however,

70. The case is distinguished from that of a single woman who wishes to reproduce without a male rearing partner. Her own reproductive interest is directly involved. Also, a father might be present or ultimately known by the child.

71. Note that the right to select the genes or gametes of one's reproductive partner exists only to the extent that that partner is willing, or that one otherwise has a property or dispositional right to the gametes in question. The right to select one's reproductive partner is a right against state interference, not a right to have the state provide one with the partner of choice. If the other is unwilling, or if another owns or has dispositional control over the needed reproductive factor, then one has no right to have those gametes for one's reproduction. See ROBERTSON, *supra* note 5, chs. 2 & 7.

72. See *supra* notes 59-60 and accompanying text.

it would necessarily include the right to select a mate or sperm source, including sperm from a deceased individual. Denying the right to use that semen, when the woman otherwise has a legal right to control disposition of it, could not be justified without also denying single persons generally the right to reproduce. Her claim is to reproduce now, not posthumously, and that right should receive presumptive respect, as the court in *Hecht v. Superior Court*⁷³ recognized.

In cases in which no explicit directions about use of stored sperm have been given, the deceased's right to posthumous reproduction is not directly involved. Whether a widow or another has a right to use that sperm would depend upon state property and inheritance law. Because a right to reproduce posthumously has doubtful constitutional status, restrictions on explicit postmortem transfer of sperm would not violate the deceased's reproductive rights. Could such restrictions violate a widow's right to procreate because they deny her access to her reproductive partner of choice? She has that right only if she otherwise has legal access to the semen she wishes to use. Whether she has that access depends on whether under state law she is the owner of her deceased partner's sperm.⁷⁴

IV. POSTHUMOUS USE OF FROZEN EMBRYOS

Posthumous reproduction with frozen embryos raises issues similar to those arising with frozen sperm, but with some important differences. Because an embryo consists of gametes provided by two separate individuals, the reproductive interests of two persons are always involved. Several combinations of posthumous reproduction by one or two persons, with differences in the survivor's preferences, are possible. For example, if one gamete source reproduces posthumously with a frozen embryo, the other gamete source will necessarily also reproduce. In addition, many people view the embryo as having inherent or symbolic moral status. Persons with such views may exert pressure to prevent destruction of frozen embryos, thus increasing the chance that posthumous reproduction will occur.

Questions of posthumous reproduction with frozen embryos will usually arise as a by-product of efforts to achieve pregnancy while living. An infertile couple undergoes in vitro fertilization ("IVF") treatment in an attempt to become pregnant. The woman's ovaries are hyperstimulated, and multiple eggs are harvested and fertilized. Resulting embryos that cannot safely be put in the uterus at that time (three or four is the safest number)⁷⁵ are frozen for possible use in a later cycle. Before freezing embryos, most IVF programs now ask couples to state what should be done with the embryos in case of

73. *Hecht*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

74. The question of a spouse's ownership or dispositional control of the body of a deceased spouse is discussed more fully in connection with maintenance of brain-dead pregnant women, *infra* notes 102-04, 108-10.

75. Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY 1S, 32S (Supp. 86).

death, divorce, unavailability, dispute, and inability to decide.⁷⁶ The question of posthumous reproduction arises if one or both of the partners dies before the embryos are used or destroyed, and the couple issued directives for or against posthumous use.⁷⁷

Unquestionably, the couple "owns"—has dispositional control over—the embryos created from their gametes.⁷⁸ They have the right to make any disposition of embryos that is legally available in the jurisdiction and that the IVF program, in setting conditions for freezing, agreed to make available.⁷⁹ The next section considers questions that arise when the jurisdiction has no restrictions on posthumous reproduction or on embryo discard. The second section looks at issues that are implicated when a state restricts embryo discard, and the final section considers state prohibitions on the posthumous use of embryos.

A. No Restrictions on Posthumous Use or on Embryo Discard

If the state has no restrictions on what may be done with embryos, the couple's directives for use or nonuse of frozen embryos should control. IVF programs may legally follow those instructions, and arguably have a contractual duty to do so.

Consider first the situation in which one of the prospective parents dies and the prior directive states that in such a situation the embryos may be used by the other to reproduce, may be donated to others for reproduction, or may be discarded. In that case, following the directive should pose no problem as long as the surviving partner (who also has a reproductive and ownership interest in the embryos) agrees. That partner's interest in reproducing with the stored embryos, which will then cause the posthumous reproduction of her deceased partner, would be independently significant and would be controlling in these circumstances.⁸⁰ Likewise, if the survivor directs that the embryos be discarded in accordance with the directive, that too should be followed. Only if the IVF program has set limits on what the couple may have done with frozen embryos in the case of death or other contingency could the directive and the current wishes of the survivor be overridden.

What if the survivor selects an outcome that conflicts with the prior directive for disposition of embryos which the deceased had given? Now that her partner has died, she might decide against reproduction with their embryo, despite a prior commitment to use it. Or she might wish to use it in memory of him, despite a prior agreement to destroy all embryos frozen at his death.

76. *Id.* at 31S.

77. Posthumous reproduction could also occur without a prior directive, but it would not involve a person's premortem interest in posthumous reproduction because the individual would have issued no directive to that effect. See *supra* notes 19-20 and accompanying text.

78. They have this dispositional control for the same reasons a man has such control over his sperm. Robertson, *supra* note 49, at 455-60.

79. *Id.*

80. The survivor could reproduce with them by having them placed in her uterus, in the uterus of a surrogate gestator, or by donating them to another couple.

The conflict here is between the survivor's current reproductive interests and the deceased's previous interest in controlling posthumous reproduction. Because the survivor's current reproductive interests could reasonably be deemed more important than the right to control posthumous reproduction, a state might wish to allow the survivor's reproductive choice to control, despite her prior agreement with the deceased. Such a policy would be constitutional because the right to control reproduction posthumously is most likely not constitutionally protected.⁸¹ Because the right to control posthumous reproduction is not a protected interest, the state would not have to show a compelling interest to hold the survivor to her previous commitment and force her to reproduce or avoid reproduction despite her current wishes.⁸²

The survivor's wishes would also control in the case where the deceased made no prior agreement or directive. The survivor would then have complete discretion over the embryos, and could use them, donate them, or have them discarded. If the state or program does not prohibit posthumous use or disposal, her wishes should control.

If both partners die, the advance directive of both could be followed on policy grounds to give them maximum reproductive control. Such a policy would make embryos available to infertile couples and provide clear rules for those administering embryo banks. It would not harm offspring born as a result, because they have no other way to be born. The state, however, could choose a policy that required destruction of embryos when both parties died, despite their instructions. Such a policy would not infringe their constitutional rights because, as argued above, individuals have no fundamental right to procreate posthumously.⁸³

In the absence of a directive, the embryos should be treated as part of their progenitors' estates, to be discarded or donated for use by an infertile couple or for research, as the residual or designated beneficiary of the estates agree. The state, however, would be free to adopt a different policy if it chooses, for no reproductive or property rights would be directly involved.

B. State Restrictions on Embryo Discard

A few states have enacted laws that ban embryo discard,⁸⁴ and more might be passed. Under such laws, no one would have the authority to discard embryos, whether the prospective parents were alive or dead. If such a law were in effect (or if the IVF program had set such a condition of participation), then directives that embryos be destroyed if one or both partners die or directions by the surviving partner for destruction in accordance with or

81. See *supra* notes 23-24 and accompanying text.

82. The higher standard of scrutiny would have to be met because the state would be interfering with the survivor's current choice to engage in or avoid reproduction with the frozen embryos.

83. A separate question is whether such a state policy would violate the couple's property rights.

84. ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 9:129 (West Supp. 1990); MINN. STAT. ANN. §§ 609.2661-5 (West 1987 & Supp. 1990).

regardless of a directive could not be followed. Similarly, the executor or beneficiary of the estate could not order the embryos destroyed.

Would a state law restricting the right to discard embryos posthumously be constitutional? Because such a law does not require that women be pregnant and does not prevent abortion, its status would not be controlled by *Roe v. Wade*.⁸⁵ Such a statute would raise the question of whether avoidance of reproduction *tout court* is a fundamental constitutional right. Because the right claimed here is to avoid the uncertainty of unknown or unwanted biological offspring, it is unlikely, though not impossible, that the Supreme Court would recognize such a right.⁸⁶ If such a right were not recognized for people while alive, it would a fortiori not be recognized in the case of persons who have died.

However, even if such a right were recognized for people while alive, at most it would protect surviving partners who wish to discard embryos created with the gametes of a partner who is now dead. If both partners have died without giving directions to discard the embryos, there would be no reasonable basis for claiming that their right to avoid reproduction posthumously were at issue. Such a question would arise only if they had specified that the embryos be discarded if both partners died, or if the beneficiary of their estate desired that the embryos be discarded. Would a prohibition on discard violate a constitutional right to avoid reproduction posthumously, even though discarding while alive was permitted? The answer depends upon whether the same interests in wanting to avoid reproduction *tout court*, while alive, existed. Although recognition of that right would be based on protecting a psychological interest, that interest would lie in the security of knowing that certain things would not happen to a person while alive. That certainty is important to live persons who might suffer negative psychological effects from knowing that they might have offspring whose welfare is in jeopardy, or from fearing that unknown offspring might seek them out and demand support or recognition.

But the interest of persons in being sure that they will not have biological offspring after they die seems less central or important than the interest in avoiding reproduction *tout court* while alive. Even though both are interests in knowing that certain possibilities will not occur, the psychological interest in each case is different. The interest in knowing that reproduction will not occur after one's death seems much less compelling than the interest in knowing that reproduction will not occur during one's life. Thus even if the latter right—the right to avoid the possibility of reproduction *tout court* while alive—were recognized, it would not follow that a right to avoid reproduction posthumously would also be constitutionally protected. A state's policy against discard of embryos when their progenitors are dead would probably be constitutional even if the prospective parents had made an explicit directive for posthumous discard.

85. *Roe*, 410 U.S. 113 (1973).

86. See Robertson, *supra* note 49, at 499-501.

C. State Prohibition on Posthumous Use of Embryos

Although few states are likely to pass laws that require the destruction of embryos, suppose a state passed a law saying that all embryos existing at the time of death of either or both partners shall be discarded, thus banning posthumous reproduction with frozen embryos. The ostensible purpose of the law is to protect the welfare of offspring, who would be born with one or both genetic parents dead. A secondary purpose of the law could be to prevent disputes about inheritance.⁸⁷

Such a law would be unconstitutional if it prohibited use of frozen embryos when only one of the partners has died, for it would interfere with the right of the survivor to reproduce. The survivor's interest in reproducing with her embryo should not depend on whether her partner is alive or dead, any more than it should if pregnancy has already started. Her reproductive interest is independent of her partner's, and would have the same status that the interest of any single person has in reproducing. It would have at least the same status that a widow has in using her deceased husband's sperm to reproduce. The state's goal of protecting offspring who would not have both genetic parents available at birth would not constitute a compelling state interest, because offspring welfare is not, in most cases, rationally advanced by preventing their birth altogether. Such an interest would not be sufficiently compelling to override the surviving partner's interest in reproducing with her embryo.

If both partners have died after directing that their embryos be donated to infertile couples or others so that they may posthumously have offspring, the question of the right to reproduce posthumously would be directly joined. The question of their right to reproduce posthumously with frozen embryos would track earlier analysis of the right to give explicit directions for use of stored sperm after death. Resolution of the issue would depend upon whether knowing that advance directions to have frozen embryos thawed and implanted after the genetic parents' deaths were deemed so central to personal identity and meaning that it should be granted the same respect accorded decisions to reproduce while alive. As argued in the case of stored sperm, this reproductive interest is too attenuated and too distant from core reproductive interests to have independent constitutional significance.

Nevertheless, one could argue that people are much more invested in embryos than in gametes. Because embryos are the product of fertilization and have a new, unique genome, some persons might view them as "in vitro children" or moral subjects with the same rights that persons have.⁸⁸ If so, their interest in assuring the survival of their embryos after their death might well loom as large as their interest in assuring the protection of their embryos while alive. Despite this stronger argument for controlling the posthumous

87. Inheritance problems could be eliminated, however, without banning all posthumous reproduction simply by specifying that in the case of the death of both members of the couple, no later implanted embryos shall qualify for testamentary or intestate inheritance.

88. In *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), the wife, who wished to preserve frozen embryos despite a divorce, took precisely that position.

fate of stored embryos, it is likely that the asserted reproductive interest would still be found to be too attenuated to deserve constitutional protection.⁸⁹ If so, a state law banning posthumous reproduction with frozen embryos when both partners have died would probably be constitutional.

Analysis of these issues shows once again that the right to posthumous reproduction depends not only on the fact that a person has made a choice about posthumous reproduction. An evaluation of the substance of that choice is also needed. Is the exercise of autonomy involved in giving this direction so central to identity and personal meaning that it deserves presumptive protection? This question cannot be answered by autonomy alone. Rather, it requires an evaluation of the importance of future possible genetic reproduction in its own right when conception has occurred and embryos exist, and how this differs from the interests involved in the use of frozen sperm. Answers to these questions should determine the advisability and the constitutionality of state policies about posthumous reproduction with frozen embryos.

V MAINTAINING PREGNANCY IN BRAIN-DEAD OR COMATOSE WOMEN

The third area in which questions of posthumous reproduction arise is with the maintenance of brain-dead or comatose pregnant women on life-support systems to enable the fetus to develop more fully until delivery.⁹⁰ In the cases considered here, the fetus is not yet viable or not as advanced in development as a healthy birth requires. If a child is to be born alive and healthy, the fetus must stay *in utero* for a longer period of time. With medical technology now providing the means to maintain brain-dead or comatose pregnant women for increasingly longer periods, the questions of whether, when, and how long such maintenance should occur must be considered.

These cases involve several competing interests. If the woman has previously expressed wishes about posthumous reproduction, protection of her own prior reproductive choice is at stake. Her prior wishes might, however, conflict with the father's desire to avoid reproduction or her family's desire to bury her promptly. Even if they agree with her wishes, maintenance of the heart-beating cadaver might require more medical efforts and expenditures than the medical care system is willing to make. In other situations, the father, family, doctors, or state may wish to make use of the brain-dead body to serve their own interests, or to demonstrate respect for prenatal life. In those cases, the current interests of others, rather than the woman's prior decision about postmortem reproduction, should be determinative.

89. The opposite result would not be unreasonable. I am simply speculating about which outcome strikes me as most likely to gain recognition.

90. See generally David R. Field et al., *Maternal Brain Death During Pregnancy: Medical and Ethical Issues*, 260 JAMA 816 (1988).

Such uses of a person's body are troublesome because they upset traditional rituals for prompt burial or cremation. Some delay in burial rituals already occurs as a result of autopsies and maintenance of brain-dead, heart-beating cadavers to procure organs for transplant.⁹¹ But maintaining a brain-dead pregnant woman to save the fetus could extend the time between death and interment for days, weeks, or even months, thus raising questions about what degree of deviation from postmortem burial rituals should be tolerated.⁹² In addition, maintenance efforts often entail great cost⁹³ and often fail to deliver a live, healthy child.⁹⁴

A. Maintaining Brain-Dead Pregnant Women

Maintaining a brain-dead pregnant woman to save the fetus involves posthumous reproduction for the brain-dead woman, and present reproduction for the father. If the mother has not given instructions or otherwise indicated the present importance to her of having (or not having) posthumous offspring, no question concerning her own interest in posthumous reproduction will arise.⁹⁵ If her posthumous reproduction nevertheless occurs, it will be designed to serve the interests of the husband, family, or state, and not her own interest in posthumous reproduction. On the other hand, if she has expressed a desire for or against posthumous reproduction, the question discussed earlier about the importance of advance directives for posthumous reproduction arises.

If such an interest were deemed strong enough to deserve presumptive protection with regard to stored semen and embryos, the interest would be even stronger in a situation where the woman is pregnant and has explicitly addressed the issue of posthumous reproduction. On the other hand, if those interests are too attenuated to merit constitutional protection for decisions about gametes and embryos, they are unlikely to be recognized for decisions about fetuses even though her reproductive interest is arguably stronger when she is pregnant. In reality, such directives are unlikely, because most women do not expect to die in the middle of pregnancy and thus are unlikely to make

91. While maintaining a brain-dead, pregnant woman's body until a fetus is viable is similar to maintaining a body for organ donation, the maintenance is likely to last much longer than the brief period that occurs with organ transplantation.

92. The maintenance period is shortest when a postmortem cesarean section is performed immediately after death, but longer periods are likely. Cases involving maintenance for three months have been reported. In 1992, an attempt to maintain the cadaver of a woman who was 15 weeks pregnant was carried out, although it ultimately failed. For an account of several cases, see Hilda Nelson, *The Architect and the Bee: Some Reflections on Postmortem Pregnancy*, *BIOETHICS* (forthcoming 1994).

93. *Id.* (citing a cost of \$3500 per day at county hospitals in California).

94. *Id.* (citing cases of babies born at 26 and 27 weeks of gestation to brain-dead pregnant women).

95. Because she has expressed no wish on the matter, there is no need to try to protect her autonomy by attempting to surmise through a process of substituted judgment what she would have chosen. If she has not made a choice, no autonomous choice exists to be protected.

provision for or otherwise address such contingencies to the same extent that persons storing gametes and embryos might.⁹⁶

As with frozen embryos, however, the father's reproductive interest must also be considered. If he is alive, his interest is a present one. If the brain-dead mother is maintained, his child as well as hers will be born. If she is not maintained, he will avoid reproduction. The situation is significantly different from frozen embryos, however, because the fetus is inside a heart-beating cadaver over which the father has no independent property or ownership interest apart from any rights to control disposition of the remains that the state chooses to give him.⁹⁷ A state arguably could choose to limit his rights to control postmortem disposition without violating his reproductive rights; thus the state would have more room to determine the outcome than it does in the case of frozen embryos.⁹⁸ Several combinations of her posthumous reproductive interests, his current reproductive interests, and state acceptance of or disapproval of posthumous reproduction are possible. I first examine the situation in which the woman's wishes are unknown or unexpressed and then look at situations in which she has issued a directive first in favor of and then against posthumous reproduction.

1. No Wishes Expressed About Posthumous Reproduction

In the most common situation the woman will not have expressed any wishes either for or against posthumous reproduction. Five months pregnant, she is brought to the emergency room with severe brain trauma. Brain death is imminent or has already been pronounced. The doctors inform the husband of the situation and ask him whether he would like them to maintain the brain-dead body for a few weeks so that a viable fetus might be delivered, or they inform him that they plan to maintain the body for that period. Alternatively, they inform him that they shortly will turn off the life support systems, but he insists that life support be continued so that his child might be born.

Hospitals and courts faced with this situation would most likely give great deference to the husband's wishes.⁹⁹ In most states, the husband as next of kin at the time of death has the legal right to determine whether an organ donation or autopsy will occur and to have the deceased's body promptly

96. It is conceivable, however, that a pregnant woman might make oral statements such as: "If anything happens to me, I want everything possible done to save my baby," or "I could not bear to have my baby born if I were not also there." Such statements are particularly likely if the woman is sick or in circumstances that make her demise during pregnancy a greater possibility.

97. Traditionally, these rights have included the right to make arrangements for burial or cremation and to consent or veto autopsy. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 43-44 (2d ed. 1955); Alfred M. Sadler, Jr. & Blair L. Sadler, *Transplantation and the Law: The Need for Organized Sensitivity*, 57 *GEO. L.J.* 5 (1968).

98. The validity of this claim is treated in greater detail at *infra* notes 113-14 and accompanying text.

99. For the sake of simplicity, I deal here only with situations involving the husband, who I will also assume is the father. If there is no husband/father available, other family members would have decisional authority, but they would lack direct reproductive interests in their own right.

delivered for burial or cremation.¹⁰⁰ This right is personal to him and exists regardless of the deceased's pregnancy. The state is free to grant or limit it as it chooses, for the next of kin have no fundamental constitutional right to control the remains of the dead, as is evident in state laws that limit the family's right to control organ donation.¹⁰¹

a. Husband Opposes Maintenance

In the usual situation, then, the husband's decision about his wife's posthumous and his own present reproduction would control, for the brain-dead wife has no right or interest in posthumous reproduction.¹⁰² Because no constitutional right to control cadaveric remains exists, however, the state would be free to adopt its own policies concerning the maintenance of brain-dead pregnant women. For example, state law could authorize the physician and hospital to maintain the brain-dead pregnant woman in order to save the near viable fetus regardless of the husband's wishes. Such a law would not violate the deceased's interest in avoiding posthumous reproduction because she has expressed no wishes on the subject. Would it violate the husband's right not to reproduce?

The case is close, but the state probably would not be required to respect his wishes to terminate life support in order to avoid reproduction. Because his power to control the disposition of human remains is not a fundamental right, he has no inherent right to make those decisions. Although limiting his right to make postmortem decisions could result in his own reproduction, he does not experience the kind of physical burden that women who are denied abortions bear. If the man loses the right to avoid reproduction once pregnancy occurs when the woman is alive,¹⁰³ he should not automatically regain it because she dies. If this argument is correct, the state's interest in prenatal life would be a sufficient reason to overcome his interest in terminating maintenance once she is dead, for he has no inherent right to control what uses are made of his deceased spouse's cadaver.¹⁰⁴

100. See, e.g., Texas Anatomical Gift Act, TEX. HEALTH & SAFETY CODE ANN. §§ 692.001-.016 (West 1992).

101. Thus, some states condition decisions about organ donation on the absence of the deceased's prior written directive for or against it. Sadler & Sadler, *supra* note 97, at 20, 21. Other states allow corpses to be taken or autopsies to occur without family consent. See *State v. Powell*, 497 So. 2d 1188 (Fla. 1986); *Georgia Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127 (Ga. 1985). But see *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

102. If she has expressed no wishes concerning what should happen to her child if she were rendered brain-dead, no question of her right to reproduce posthumously arises.

103. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (holding that consent of the husband cannot be required before a woman obtains an abortion).

104. A strong counterargument, however, does exist. Permitting him to avoid reproduction by terminating maintenance of his brain-dead wife would not require intruding on the bodily or reproductive interests of others, as would arise if the father's interest in avoiding reproduction could trump the pregnant woman's interest in going to term. Given that the state's interest is in protecting a preivable fetus, an entity that does not have the same constitutional standing as the father's interest in avoiding reproduction, perhaps the father's interest in avoiding reproduction should take precedence. Although this position is not unreasonable, the correct decision of the case should turn on whether the

b. Husband Requests Maintenance

Suppose, however, that the husband/father insists on maintenance so that his child might be born and the hospital and doctors refuse, citing a state statute that authorizes them to terminate life support on all brain-dead cadavers after seven days. They oppose maintenance on life support because of its great cost, because they think it will be futile, or because they doubt whether a healthy child will result. If the deceased had issued no prior directive about maintenance, then only the father's interest in reproducing is at issue. If a husband or other family member has no independent constitutional right to determine whether life support shall continue for a brain-dead person, then the state is free to give or take away any rights that families have to make decisions about life support. If it does so here for reasons of economy or in the interests of the offspring, it would violate no right of the husband to determine when life support should be stopped.

Nor would it violate the father's right to procreate, for he has no inherent right to the resources he needs to procreate, whether financial or physical in the form of a heart-beating cadaver. He has no greater claim here to use his deceased wife's body to incubate his offspring than he would have a right to commandeer her body to bring his fetus to term when she insisted on abortion. Of course, in that case her own interest in avoiding reproduction would be at stake. But even if her interests are not burdened by his request, he has no right to have the state or others bear costs so that he may reproduce.¹⁰⁵ Nor would he have the right to demand that they grant him the use of a heart-beating cadaver over which he has no independent right to decisional authority.¹⁰⁶ Thus, if the state finds that postmortem maintenance is too costly or undesirable, it probably could prevent him from insisting on maintenance to enable him to reproduce.

2. Explicit Prior Directive for Maintenance

The outcomes just described would not change if the deceased when alive had issued an explicit oral or written directive in favor of or against maintenance. The next section considers the situation in which the woman has explicitly directed that her brain-dead body be maintained so that reproduction could occur posthumously and the husband agrees with that outcome and insists that the doctors treat her for that purpose. The succeeding section

father has any independent right to control disposition of the remains, because one ordinarily has no right to have resources provided that are necessary to exercise reproductive choice. If he has no such rights, the state should be found to have the right to protect prenatal life against his wishes.

105. Of course, he would have no right to have the state or insurance carriers pay the cost of postmortem maintenance unless it otherwise fell within the terms of existing insurance policies.

106. The counterargument is that he is not requesting the use of just any cadaver, but the one in which his future child is already lodged. Nevertheless, if he has no independent right over that cadaver, it would not follow that he should be granted that right just because he has an interest in what it contains. Although the woman no longer has interests in excluding his control in this case, the state does.

examines the situation where the husband objects to maintenance despite the wife's prior directive.

a. Husband Agrees with Maintenance

If the husband agrees with maintenance to enable a child to be born and has the resources to pay the costs, the case is easy. If the doctors agree, they simply proceed and hope for a good outcome.

Suppose, however, that the doctors disagree and invoke state law that permits termination of life support on a brain-dead cadaver after seven days. As just discussed, such a law would not violate the father's right to reproduce, because he has no fundamental right to have the body or resources of others provided so that he might reproduce. Nor would it violate the deceased's fundamental right to reproduce posthumously if, as I have argued, no such right exists because of its thin and attenuated connection with the core experiences of reproduction.

A different outcome would, of course, result if her right to posthumous reproduction were, contrary to my argument, recognized. Indeed, if a right to posthumous reproduction is ever recognized, this would be the strongest case for it. Even if courts do not accept the right to posthumous reproduction with frozen sperm and embryos, they could distinguish an actual pregnancy by the woman's greater investment or interest in the fetus, and thus the greater importance to her of knowing that if she dies her child will survive.

In that case, the state law would infringe on her right when competent to give directions for posthumous reproduction when brain-dead. Of course, it would not follow that the state had to provide the resources necessary to enable the fetus to be born. But if the resources are otherwise available, concerns about dehumanization or disrespect of the dead by treating them as fetal incubators, or the impact on offspring of being born without a mother would not justify interfering with her right to posthumous reproduction.

b. Husband Objects to Maintenance

The second situation to be considered is when the husband/father objects to maintenance of the brain-dead body, despite his wife's previously expressed wishes for maintenance. If a right to posthumous reproduction is not recognized, the state would be free to permit the father's wishes to control. The state could preserve his right under state law to control disposition of the woman's brain-dead body.

If the woman's right to posthumous reproduction is recognized, however, then a state's desire to protect the father from present reproduction would probably not qualify as a compelling interest that justifies overriding the

woman's right—the father has no right to override another's interest in reproduction to avoid his own reproduction.¹⁰⁷

The counterargument to this last point has a certain appeal. Given that posthumous reproduction is itself an attenuated version of reproduction while alive, if it is protected at all, it should be protected only when doing so does not directly affect the interest of a living person in avoiding reproduction. Because the father will have to live with the consequences of enforcing her premortem desire for postmortem maintenance, the courts could find that his present interest in avoiding reproduction is more weighty than a competent person's interest in issuing advance directives for posthumous reproduction, even if that interest has constitutional priority against nonreproductive interests. Given the possible arguments in rebuttal and the subtlety of these distinctions, however, a court might reasonably rule either way on the question of whether a right of posthumous reproduction trumps the right to avoid present reproduction.¹⁰⁸

If the assumption that there is a constitutional obligation to follow such directives is rejected, could the state nevertheless side with the deceased and order maintenance against the father's wishes? This position would both limit the husband's right to control postmortem disposition of his brain-dead wife and cause him to reproduce against his wishes. Would depriving the father of the right to control disposition of his wife's body in this case violate his constitutional rights?

Although the state may not be constitutionally obligated to follow her wishes, it seems clear that it may nevertheless choose to do so, either to serve her premortem interests or to serve its own interests in protecting prenatal life. A policy authorizing postmortem maintenance without spousal consent would not infringe on a fundamental right of the family to control the disposition of the remains, because there is no such right. Nor would it infringe upon his right not to procreate, because the state is not forcing procreation on him by bodily intrusions or burdens, as it does to women when it bans abortion.

107. The conflict in reproductive interests is similar to the dispute over disposition of frozen embryos in the *Davis v. Davis* divorce case: One party's interest/right to procreate conflicts with the other's interest/right to avoid procreation. The *Davis* court favored the party who wanted to have the embryos destroyed because the party who wanted to save them could achieve reproduction by means that would not burden the unwilling spouse's interest in avoiding reproduction. *Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). In this case, however, the deceased will have no other chance to reproduce posthumously, and thus arguably her interest should be granted priority. The court in *Davis* would have given the wife's interest greater priority if the embryos in dispute presented the last chance for her to reproduce. *Id.*

108. The father's claim here still assumes that he has a fundamental right to control the disposition of the woman's body after death. Because that right is a creature of state law and is not constitutionally based, the father might have no right to insist that treatment stop so that he may avoid reproducing because he has no constitutional right to control the postmortem disposition of his deceased spouse. A court could thus find that, despite his present interest in avoiding reproduction, this interest would not meet the requirements for overriding the deceased wife's constitutionally protected interest in posthumous reproduction.

Such a conclusion is consistent with the limits on a man's right to avoid procreation in other situations. Once conception *in utero* has occurred, the father loses all rights to avoid reproduction when the woman is alive and she rejects his request for abortion.¹⁰⁹ The same result should be reached even if she is brain-dead and the state seeks to maintain her body out of respect for her prior expressed wishes or to protect prenatal life.

This argument, however, overlooks the fact that allowing the husband to terminate maintenance against her prior wishes will impose no bodily burdens on her. The imposition of a bodily intrusion and obstruction of reproduction explains why a man cannot force a woman to have an abortion when she is alive. But that reason is not applicable here because termination imposes no physical or other burdens on her. Nor does it limit her ability to issue advance directives for posthumous reproduction, if the assumption that states have no constitutional obligation to protect that interest applies. Because the state has no constitutional obligation to protect viable fetuses or enforce her directives, it should not be free to do so when it trumps the father's constitutional right to avoid reproduction.

As noted previously, however, this argument still rests on an assumption that the father has some independent right to control the disposition of his wife's remains. If he lacks that right, the state should be free to direct how the remains are disposed, even if it will lead to reproduction that he wishes would not occur. Although a court might find the father's arguments persuasive, the most logical decision would be to uphold the state's interests over his wishes not to procreate.

3. Explicit Directive Against Posthumous Reproduction

The final situation to be discussed is where the woman has previously issued an explicit directive against posthumous reproduction: If she is brain-dead and pregnant, she wants no actions taken to enable her fetus to be born alive. Again, the husband/father's wishes as next of kin ordinarily will be determinative. Problems arise when the state attempts to override their joint wishes, or when the husband disagrees and wants the body maintained so that reproduction can occur.

a. Husband Objects to Maintenance

In most cases, the husband's wishes will control. If he agrees with the wife's prior directive and requests that all maintenance cease, the doctor and hospital usually will comply.¹¹⁰ No maintenance will occur, and no offspring will be born posthumously

109. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

110. The hospital is unlikely to override both the woman's prior directive and the husband's existing directive against maintenance.

Suppose, however, that the state disagrees with the husband, chooses to protect preivable fetuses at all costs, and removes the father's power to control postmortem disposition of his wife's remains. As just discussed, such action would not infringe or violate his right to avoid reproduction, because no intrusion on his body would be made, and he has no independent constitutional right to control the disposition of his wife's remains. Nor would such action violate her right to avoid posthumous reproduction, for no such right exists. Of course, if courts should recognize that the husband's right to avoid reproduction is burdened, or if they should recognize her right to avoid posthumous reproduction, then the state's interest in protecting preivable prenatal life would be an inadequate ground for action.¹¹¹ However, if the fetus has reached viability but still needs maintenance to improve its chances, the state would have adequate grounds for interfering with those rights.¹¹²

b. Husband Insists on Maintenance

Suppose the woman has issued an explicit directive against postmortem maintenance and the husband insists on maintaining life support so that his child can be born alive. Again, if the state chooses to allow him to control disposition of her cadaver, maintenance would not violate her constitutional rights because she has no right to avoid posthumous reproduction. Even if such a right were recognized, the state could reasonably prefer his current interest in reproducing as well as its own interest in protecting prenatal life over her interest in avoiding reproduction. When no bodily burdens would be imposed, arguably more leeway should be allowed to override desires not to reproduce.¹¹³

Suppose, however, that the state chooses to follow her directive and insists that brain-dead cadavers shall not be maintained after seven days, thus preventing the fetus from reaching viability. As discussed previously, this position would not burden his right to procreate because he has no independent right to control disposition of cadavers and no independent right to have the resources essential for him to reproduce. Granting him that right and those resources might not infringe on the deceased's right to avoid posthumous reproduction, but the state has no obligation to make such reproduction possible.¹¹⁴

The counterargument would be that the state cannot stop him from reproducing when he can pay the costs and he would not require that an unwilling competent person provide physical or gestational services. Because

111. See *Roe v. Wade*, 410 U.S. 113 (1973).

112. Under *Roe v. Wade*, the state may prohibit abortion at viability in order to protect prenatal human life. *Id.* at 163-64.

113. A court could reasonably take such a position. See *supra* note 69 and accompanying text.

114. For the purposes of this Article, the assumption is that the father has no right to require the state to make resources available for him to reproduce. Since there is no right to have the state provide the resources necessary for abortion, there would be no right to have resources provided in order to reproduce. See *Harris v. McCrae*, 448 U.S. 297, 311 (1980); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (*per curiam*); *Maher v. Roe*, 432 U.S. 464, 479-80 (1977).

she is brain-dead, permitting him to have her body maintained despite her prior wishes would not subject her to the physical burdens that would occur if a father could veto abortions to protect his interest in reproducing. Her loss is the loss of advance certainty that if she is pregnant and brain-dead that her wishes not to have posthumous offspring will be honored. Because of the highly attenuated nature of posthumous reproductive interests, the state's interest in protecting prenatal life, as well as the father's interest in reproducing, would be sufficient reasons to override her directive against posthumous reproduction. Although the state may choose to protect her interest, it is not constitutionally obligated to do so. A nonconstitutional interest should therefore not be sufficient to trump his constitutional interest in reproducing, if the state chooses to protect his interest.

This counterargument assumes that the husband has an inherent or independent right to control what happens to his wife's remains, at least when his fetus is inside the body. But if he has no such independent right, then he has no right to command that use, even if no physical burdens are placed on her and her interests in avoiding posthumous reproduction seem less weighty than his interest in reproduction while alive.

B. Terminating Treatment of Comatose Pregnant Women

Cases occasionally arise about whether pregnant women in persistent vegetative states should be kept on life support to maximize the chances of a viable, healthy birth. Such cases do not directly involve posthumous reproduction, because birth will occur before the woman is dead.¹¹⁵ Nevertheless, these cases raise issues closely enough linked to posthumous reproduction by brain-dead women to justify discussion.

When a comatose woman is pregnant she might be maintained longer than normal so that a healthy child might be born. Alternatively, doctors might terminate treatment or perform an abortion to prevent such a birth. As with the previous issues discussed, the woman's interest in making prior directives for or against treatment or reproduction must be evaluated, as must the husband's reproductive interests and his interests in protecting his comatose wife's prior wishes or best interests. Overlying each set of questions is the state's interest in protecting both prenatal life and the life of an irreversibly comatose but not yet dead person. Rather than canvass all possible combinations and permutations, I briefly address two issues.

115. Persons in persistent vegetative states have no cortical function, but still have brain stem function, and thus are not dead under the standard definition of brain death in the United States, which requires total cessation of all brain activity, including brain stem activity. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 1992).

1. Prior Directive Against Treatment if Comatose

The first issue is whether the comatose woman's prior directive against all treatment when she is in a persistent vegetative state is controlling if she is pregnant. A state could honor that directive, if it chose. But what if the state living will law has a provision, as some thirty states do, that says directives against treatment will not be enforced in the case of pregnancy?¹¹⁶ Are they constitutional?

The *Cruzan*¹¹⁷ decision suggests in dicta that such a limitation would not be constitutional. As noted earlier, Justice O'Connor in a concurring opinion asserted that a competent person's right to refuse treatment included the right to make advance directives for refusal by appointing a health care proxy and thus, presumably, by making a living will as well.¹¹⁸ Although Justice O'Connor's reasoning can be questioned, if her conclusion is legally controlling, state restrictions on such directives would have to satisfy a compelling interest standard.¹¹⁹ Unless the fetus were viable, protecting prenatal life would not be compelling, and thus provisions against enforcing living wills in the case of pregnancy would be invalid.¹²⁰ A state would thus be obligated to give effect to such a directive, regardless of its own interest or even the husband's interest in maintaining the woman until a viable infant could be born.

2. No Directive and Husband Requests Termination

A second set of issues arises when the woman has issued no prior directive and the husband or next of kin wants the respirator disconnected or an abortion performed. Termination of life support will cause the deaths of the woman and the fetus. This situation raises the question of who has the right to control termination of life support of a comatose patient, and whether that right exists when the patient is pregnant. The complicated history of termination of treatment of patients in persistent vegetative states has focused on the wishes the patient expressed while competent.¹²¹ If she has not made

116. Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737.

117. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

118. *Id.* at 291-92 (O'Connor, J., concurring).

119. Justice O'Connor's position is open to criticism. Because the interest being protected is advance certainty about what will happen if one is later incompetent, that interest might not deserve as much protection as a decision against medical treatment when competent. Even though such a decision would clearly trump a state's interest in protecting prenatal life, at least before viability, the interest in giving advance directives for future contingencies is much more attenuated and arguably less deserving of protection. If so, the state's interest in protecting prenatal life, as well as the father's interest in reproducing by having the fetus born alive and healthy, would take precedence over the interest in making an advance directive against treatment that applies in the case of pregnancy.

120. Although maintenance to save the fetus when she is comatose does not harm her at that point, it does interfere with the prior right to make advance directives for termination of treatment. If a woman does not have the certainty that her directive will be followed when she is pregnant, that prior right is infringed.

121. *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *In re Storar*, 420 N.E.2d 64 (N.Y. 1981).

a written directive, most courts will permit the family to terminate treatment on the basis of substituted judgment—their judgment of what the patient would have chosen if competent.¹²² A few states require clear and convincing evidence that the patient had in fact expressed a competent wish against maintenance,¹²³ but many states simply defer to the family's view of what she would have wanted.¹²⁴

In a more restrictive state, clear and convincing evidence of what the woman had previously stated concerning life support when irreversibly comatose would be needed to terminate treatment when she is pregnant. A court applying strict standards for this decision might find that even explicit oral or written statements against treatment when comatose are not specific enough if they do not also address what should happen if the woman is pregnant.¹²⁵ If the prior directive were that specific, then under *Cruzan's* implied right to have treatment withheld on the basis of an advance directive, treatment could be withheld.

In a less restrictive state, the family—in this case the husband—could have treatment withheld because he believes this is what the patient would have chosen if she were competent, or because it is otherwise in the best interests of the patient. If the proxy decisionmaker has such broad discretion, the husband would be able to stop treatment even if the woman were pregnant. The state, however, would probably have the power to restrict the family's discretion when a pregnancy is involved. A fundamental right of the patient would not be violated if the patient had not issued a prior directive against treatment when comatose, and maintenance of the patient against the proxy's consent would not otherwise harm the patient.¹²⁶ Nor would the proxy's fundamental rights be violated, because *Cruzan* rejected the claim that next of kin have a fundamental right to make medical care decisions for family members.¹²⁷

As with required maintenance of pregnant brain-dead women, state requirements that the comatose pregnant woman be kept alive to enable the fetus to survive would conflict with the father's desire to avoid procreation. He could argue that his interest in avoiding reproduction entitles him to have treatment withheld from his comatose pregnant spouse because termination of treatment cannot harm permanently comatose patients, because they no longer

122. See Robertson, *supra* note 68, at 1140-41.

123. See *In re Westchester County Med. Ctr.*, 531 N.E.2d 607 (N.Y. 1988).

124. Massachusetts is a leading example. See *In re Spring*, 405 N.E.2d 115 (Mass. 1980).

125. See *Westchester County*, 531 N.E.2d 607 (holding that a directive against treatment when dying was not specific enough to cover cessation of nutrition and hydration because those procedures were not specifically mentioned).

126. This is clear when the patient is in an irreversible coma, because he or she has no interests that can be harmed. Maintenance of a patient against the proxy's wishes in non-comatose conditions could harm the patient, if her condition were such that her best interests would be served by non-treatment. State action requiring that result might then be unconstitutional. See Robertson, *supra* note 68, at 1190-97.

127. The Supreme Court rejected the claim of Nancy Cruzan's parents that they had an independent constitutional right to determine their daughter's medical care. See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 285-86 (1990); Robertson, *supra* note 68, at 1169-71.

have interests to be protected. Alternatively, even if she is to be maintained, he could argue that this right entitles him to have the fetus aborted. His claim could survive only if he can independently establish a right to control whether treatment is or is not provided to his comatose spouse—a claim that the majority in *Cruzan* rejected.

As gruesome as it sounds, his claim has some plausibility. Protecting the comatose patient's interests in continued life would not constitute a compelling state interest if one agrees that comatose patients no longer have interests to be protected. Moreover, the state's interest in preserving life, which does not outweigh a competent person's current or prior directives against life-saving treatment, should not outweigh the husband's constitutional interest in avoiding reproduction. Still, it would not be surprising if a court ruled against the husband on this claim. He has no independent right to control whether his comatose wife is treated or terminated. If the state chooses to deprive him of that choice, it would violate no right of his to make such decisions, even if it leads to a child whom he wishes had not been born.

Nor would the outcome be different if the husband merely claimed the right to have an abortion performed on his comatose pregnant wife, rather than a right to have all treatment terminated. Assuming that this procedure would not otherwise impair her condition, his interest in avoiding reproduction would then conflict with the state's interest in protecting viable fetuses. Overriding his wishes, however, would impose none of the bodily gestational burdens that bans on abortion impose on women, thus suggesting that the state's interest in protecting a non-viable fetus could override his interests in avoiding reproduction.

The counterargument is that permitting the father to order the abortion of a comatose woman's fetus violates no right or interest of the woman as would otherwise occur with forced abortion, and thus should be within his discretion. The state's justification is the protection of prenatal life, but if this protection is not constitutionally compelled, it should not count as a sufficient ground for interfering with the father's interest in avoiding reproduction.

As previously noted, however, this argument suffers from the husband's lack of an independent right to control what is done to his comatose wife. Thus, prohibiting him from ordering an abortion does not interfere with his right to avoid procreation because he has no independent right to have an abortion performed on another, even if she is comatose and cannot be harmed by the abortion. If this argument is correct, it once again shows that a man's right to avoid reproduction ends once an embryo or fetus created with his sperm is in the uterus of a woman. At that point her wishes, or the wishes of those who have decisional power over her, trump his interest in having pregnancy terminated.¹²⁸

128. When the woman is no longer competent and her interests are no longer at stake, the authority to decide if life support should be terminated lies with the state, which is then free to limit what is done to her body. In effect, this argument permits the state to use her body as a container to protect the fetus.

If abortion were necessary to enhance the comatose woman's chance of recovery, it could be performed regardless of the stage of pregnancy. *Roe v. Wade* makes clear that fetal interests can be sacrificed to protect a woman's life or health. If the abortion were clearly in her interest but the husband opposed it because he wanted to save the fetus, her interests would still control.

3. In re *A.C.*

In re *A.C.*¹²⁹ involved a terminally ill woman who had a cesarean section performed on her when she was twenty-six weeks pregnant in an attempt to save her fetus. Both the mother and the fetus expired soon after the procedure. Evidence showed that the patient, who had first appeared to have consented to the operation, later withdrew her consent. A judge nevertheless ordered the procedure.¹³⁰

A.C. has been a controversial case because of the perception that it involved a cesarean section imposed on a dying woman against her will to save a fetus. Critics viewed the procedure as both violating consent and causing her great pain and suffering, if not also accelerating her demise. Although the question of whether she gave or withdrew consent can never be answered definitively, the case shows the need for strict limits on mandatory cesarean sections. Even if mandatory cesarean sections could be justified in some circumstances, they are too few and too subject to abuse to be routinely sought. Also, clear statutory authority should be required before doctors or courts proceed.

A.C. is relevant to a discussion of posthumous reproduction because it shows how the line between premortem and postmortem reproduction can easily be blurred. In reversing the lower court order for the procedure, the appellate court in *A.C.* found that the wishes of the patient when competent should control how such borderline cases should be handled.¹³¹ Because of the importance of maternal autonomy, women should not be subject to unwanted medical procedures to protect prenatal life. This position has even greater force when the pregnant woman will die soon after birth, for she will have experienced none of the pleasures and satisfactions that make reproduction a valued experience and will have had her dying burdened in order to serve the state's interest in protecting prenatal life.

The *A.C.* court's emphasis on substituted judgment—based on the prior wishes of the now incompetent pregnant woman—might also lead it to enforce both prior directives and inferred wishes of a brain-dead pregnant woman concerning posthumous reproduction. Perhaps the fact that *A.C.* was still alive, and thus had interests that a dead woman lacks, influenced the *A.C.* court's finding that a person's ability to make advance directives to control what happens to her if she becomes incompetent has great personal

129. *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc).

130. *Id.* at 1238.

131. *Id.* at 1249-51.

importance. Such a position, however, would lead the court to privilege a woman's explicit or inferred wishes concerning reproduction when she is brain-dead and pregnant—a position at odds with my argument that such an interest is too attenuated to be granted the respect due other reproductive decisions.

If my argument is rejected, a requirement that a court infer what the patient would have chosen if competent does not follow. As the Court recognized in *Cruzan*, a person has no fundamental right to be treated according to loose substituted judgment—how a proxy now surmises she would have chosen when previously competent.¹³² The right of a person to act autonomously regarding what happens to her when she becomes incompetent requires that she first make an autonomous choice. Inferring what a person would previously have chosen serves no interest in promoting autonomy, and thus is not required to protect the autonomy of a person seeking through prior directives to control what happens to her when she is brain-dead or otherwise incompetent.

CONCLUSION

Autonomy—the right to make personal decisions about one's life—is a central value in bioethical analysis. As this exploration of issues in posthumous reproduction has shown, however, respect for autonomy alone cannot determine the importance of posthumous reproduction with frozen sperm, frozen embryos, or maintenance of brain-dead or comatose pregnant women.

Whether there is a strong 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. We must grapple with the underlying personal and moral significance of posthumous reproduction itself to answer that question. Appeals to a claim of autonomy alone—that a choice was made or a preference expressed—will not resolve the matter.

How should we evaluate the personal importance of directions given before death about posthumous reproduction? Such directives might give some persons the satisfaction or meaning that others find in present reproduction, yet posthumous reproduction seems a pale version of the reproductive experience. It gives only a thin sense of connection with future generations because one will never know whether that connection has been made.¹³³ Nor will it provide the birthing and rearing experiences that are usually so central to reproductive meaning. One might reasonably conclude, as I have, that directions for or against posthumous reproduction deserve much less respect than decisions about reproduction when one is alive.

132. See Robertson, *supra* note 68, at 1166-69.

133. Reproduction has many meanings for people, but for man it is a way to deal with mortality. As Shakespeare noted, there is "no defence against Time's scythe/save breed." Sonnet 12.

Whatever one's ultimate conclusion on this issue, however, the point about the limitations of autonomy per se should be clear. With posthumous reproduction, as with many bioethical debates, a claim of autonomy marks the beginning not the end of the inquiry. It is not enough to say that a person has an interest in acting autonomously; the dispositive question is whether the particular autonomous act deserves protection. That inquiry requires confronting a different set of normative questions. In answering such questions, we will devise better approaches to the value dilemmas that medical technology presents, as well as resolve the ethical and legal conundrums created by the technical ability to reproduce after we are dead.