Health Matrix: The Journal of Law-Medicine

Volume 9 | Issue 1 Article 7

1999

Who is my Mother?: Why States Should Ban Posthumous Reproduction by Women

Kristin L. Antall

NOTE

WHO IS MY MOTHER?: WHY STATES SHOULD BAN POSTHUMOUS REPRODUCTION BY WOMEN

Kristin L. Antall[†]

I. INTRODUCTION

SINCE THE DAY ALEXANDRA CAN REMEMBER, she had dreamed of a life surrounded by children. While it was not her only goal in life, having children remained extremely important to her. Alexandra loved children. She babysat throughout her teen years, taught first grade, and could not wait to have children of her own. Shortly after Alexandra married, she and her husband began talking about having children. However, while Alexandra and her husband were discussing getting pregnant, Alexandra was diagnosed as having cancer. Afraid the cancer treatment would leave her sterile, Alexandra therefore decided to undergo fertility treatments to have her eggs extracted. The extracted eggs were fertilized with her husband's sperm. The embryos were then frozen for implantation in Alexandra after the cancer treatment. Unfortunately, Alexandra did not survive the cancer and did not leave any instructions regarding what should be done with the embryos in the event of her death. What will happen to the frozen embryos? Should Alexandra's husband, parents, or friends be given custody of the embryos in order to carry out Alexandra's wishes to have a child? What would be the consequences if Alexandra had signed a consent form leaving the embryos in the care of her husband, with explicit instructions for him to hire a surrogate to carry their child? Should Alexandra's wishes to posthumously reproduce be granted?

Posthumous reproduction occurs when a child is born after one or more of the biological parents have died.[1] This Note will

---

† J.D. Candidate, Case Western Reserve University School of Law, 1999.

argue in favor of legal prohibition of posthumous reproduction by women.[2] Posthumous reproduction by women involves the extracting egg from a woman while she is alive, fertilizing it with sperm, frozen, and subsequently implanting it in a surrogate after the genetic contributor's death.[3] Currently, there are no statutes prohibiting posthumous reproduction by women, partly because it is so new, but also because legislatures are reluctant to intrude into the private lives of individuals, particularly when it involves their reproductive choices.[4]

The law has difficulty keeping up with a rapidly advancing science such as medicine. "[T]he medical profession looks forward, while the legal profession gazes backward."[5] Legislatures draft laws responding to medical technologies, rather than predicting them.[6] However, most of science, and especially reproductive advances, are based on evolving technology, merely in the experimental stage.[7] With the legislatures often hesitant to draft laws relating to something so abstract or uncertain, the result is an attempt to squeeze new technologies into the confines of existing laws. "The problem is, we're at the forefront of technology . . . [p]roblems crop up that no one has thought of."[8] Advances in re-

---

[1] *See* John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994) (defining situations where posthumous reproduction can occur and giving an overview of the potential problems it may create).

[2] Posthumous reproduction by men is also possible, and in fact is more feasible because it involves the implantation of frozen sperm in the wife or girlfriend of the deceased. However, this Note is going to focus solely on posthumous reproduction by women. Although this Note proposes legally banning posthumous reproduction by women, it does not specifically address the issue of whether states should ban all posthumous reproduction.

[3] *See* Robertson, *supra* note 1, at 1030 (explaining the scientific technology enabling posthumous reproduction as well as some of the bioethical dilemmas arising out of the science).

[4] *See* Barry Brown, *Reconciling Property Law With Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 73 (1995) (discussing the reluctance of the legal system to engage in analysis of property rights with respect to human genetics and reproduction).

[5] Lori B. Andrews, *The Stork Market: Legal Regulation of the New Reproductive Technologies*, 6 WHITTIER L. REV. 789, 789 (1984) (discussing the chasm between reproductive technologies and the law).

[6] *See* Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 993 (1996) (arguing that because the law merely responds to medicine, more legal complexities arise than might have otherwise occurred with prompt legislative action).

[7] *See* Brown, *supra* note 4, at 73 (explaining the avoidance by legal theorists, legislatures, and courts of analyzing the impact of human reproductive advances on individual property rights).

[8] Lois M. Collins, *The Ethics of Creation*, DESERET NEWS, June 7, 1997, at E1 (quoting Dr. Matt Peterson, Director of the Division of Reproductive Endocrinology

productive medicine are being made every day and legislatures are now faced with issues previously thought inconceivable. It is difficult for a legislator to imagine creating legislation involving the rights of a child who is born after the death of his or her mother. These are issues a legislature has never before contemplated and therefore laws are non-existent. Laws are not currently equipped to deal with the fact that it has become "possible for a child to have up to five parents: an egg donor, sperm donor, surrogate mother who gestates the fetus, and the couple who raise the child."[9] The law must move forward to reflect the changing technologies of the medical world. Posthumous reproduction by women is medically possible today, and it is imperative the states take action now. Posthumous reproduction by women must be banned by state legislation in order to preserve interests and prevent harms.

This Note will explore the changes in reproductive technology that make posthumous reproduction possible, and the interests affected by those advances. First, Part II.A., includes the history of reproductive technology in order to explain how posthumous procreation is medically possible. Next, Part II.B., examines cases involving posthumous reproduction by men. It is necessary to compare posthumous reproduction by women with posthumous reproduction by men (i.e. the use of previously frozen sperm of deceased men), to determine how the courts might interpret a woman's right to posthumously procreate. Part III of this Note focuses on the advantages and the disadvantages of posthumous reproduction. There are valid arguments both for and against posthumous reproduction by women. Weighing and balancing of the various interests affected by posthumous reproduction by women are important in determining whether the states have the power to ban posthumous reproduction. The Note then discusses the constitutional interests at issue to determine if state prohibition is feasible. Procreative liberty and the right of privacy are important constitutional issues affected by a state ban on posthumous reproduction by women. It is important to weigh the state interests against the constitutional issues in examining the constitutionality of a state ban on posthumous reproduction by women.

However, in the case of posthumous reproduction, we must examine the issue further and determine if the constitutional rights of a woman extend after her death. Generally, states may not

---

and Fertility at the University of Utah hospitals, in response to the Garber case in California, regarding posthumous reproduction by a woman who died of leukemia).

[9] Andrews, *supra* note 5, at 791(discussing the medical advances available for infertile couples). *See also* Mika & Hurst, *supra* note 6, at 993 (arguing that the medical field has advanced technology and created concepts of birth faster than the law has responded).

regulate fundamental rights. However, if a state interest is found to be compelling by the Supreme Court, state regulation of the fundamental right is permitted. If posthumous reproduction is not deemed a fundamental right, state regulation is permitted if the state interest is important or legitimate. Part IV of this Note examines whether the fundamental right to procreate extends to reproduction by artificial means or posthumous reproduction. Last, in Part V, the policy reasons underlying a ban on posthumous reproduction are explored. The welfare of the existing children and the societal and financial interests of the state are considered in reaching the conclusion that posthumous reproduction by women should be legally prohibited.

This Note concludes that the fundamental right to procreate stated by the Supreme Court does not extend to a woman after her death. Therefore, the states can, and should, enact laws banning posthumous reproduction by women.[10] There are multiple arguments both for and against posthumous reproduction by women, but the detriments far outweigh the benefits, and posthumous reproduction by women should be banned through state legislation.

II. BACKGROUND

A. Overview of Modern Reproductive Technology

Although assisted reproduction has existed for over 200 years, it has not been addressed by the legal world until recently. The various processes involved in assisted reproduction have forced society to face legal issues regarding parental rights and the rights of children. Currently, however, society is faced with the possibility of children being brought into the world after the death of their genetic mother. Before dealing with posthumous reproduction, it is necessary to look at the different medical advances in assisted reproduction which make posthumous reproduction by women possible. Artificial insemination, surrogacy, the freezing of sperm, and *in vitro* fertilization are all medical advances currently assisting infertile couples to have children. Today, many people are choosing to wait until later in life to have children, and consequently, the greater percentage of people trying to get pregnant require the assistance of reproductive technologies.[11] Thousands of couples have produced children who otherwise would not have been suc-

---

[10] This Note will not comment on posthumous reproduction by men, except to the extent that it can be compared to posthumous reproduction by women. *See* Brown, *supra* note 4.

[11] *See* Rick Weiss, *Babies in Limbo: Laws Outpaced by Fertility Advances*, WASH. POST, Feb. 8, 1998, at A1.

cessful without the assistance of reproductive technologies. The possibility of combining these methods makes posthumous reproduction feasible. Without the advent of *in vitro* fertilization combined with surrogacy, posthumous reproduction by women would be impossible.

Artificial insemination is one of the "oldest and most common forms of alternative reproduction."[12] It has been performed on animals for centuries, with the first successful human case of artificial insemination being performed in England in 1770.[13] Artificial insemination involves placing the sperm of the husband or a donor into the woman without intercourse. Artificial insemination is quick and uncomplicated, as the sperm is injected into a woman's vagina near her uterus with a syringe.[14] Initially, religious and moral misgivings relating to such an "unnatural" means of reproduction halted medical research in this area.[15] Today, however, artificial insemination is widely accepted and hundreds of thousands of couples have successfully reproduced with the aid of artificial insemination. The courts have found children conceived through artificial insemination to be legitimate children, equal to a naturally conceived child, despite the fact that the husband of the woman may not be the biological father of the child.[16] When artificial insemination is used, both parents are living and the procedure is relatively simple and inexpensive.

Moreover, in the mid-20th century, an Italian scientist discovered sperm could be successfully frozen for future use.[17] Originally men going to war had their sperm frozen for future use by their

---

[12] Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 30 (1996).

[13] *See* E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 230, 234 (1986-87) (addressing the legal issues of post-mortem insemination).

[14] *See* Mika & Hurst, *supra* note 6, at 996 (citing to E. Donald Shapiro, *New Innovations in Conception and Their Effects Upon Our Law and Morality*, 31 N.Y.L. SCH. L. REV. 37, 41 (1986)).

[15] *See* Shapiro & Sonnenblick, *supra* note 13, at 234 (discussing the legal issues surrounding the rights and liabilities attaching to sperm ownership). *See also* Ellen J. Garside, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 717 (1996) (explaining the illigitimate status of children conceived after death in the state of Louisiana, equating them to children born outside of marriage).

[16] *See In re* Adoption of Anonymous, 345 N.Y.S.2d 430, 435 (1973) (holding that a child, conceived during marriage by consentual artificial insemination, is the legitimate child of both parents, and thus it is necessary for a father, following a divorce, to give consent for the child to be adopted).

[17] *See* Shapiro & Sonnenblick, *supra* note 13, at 234 (exploring the historical development of artificial insemination).

widows, if necessary.[18] In 1949, it was discovered that the addition of a small amount of glycerol before freezing would increase the survival rate of the sperm.[19] It is now a common procedure for a couple in which the man is infertile to go to a sperm bank to have the woman artificially inseminated with the sperm of an anonymous donor. Sperm banks have evolved to allow for couples in which the man is infertile to produce children. Sperm can be frozen for up to ten years and therefore, a couple desiring to have a child can go to a sperm bank any time to have sperm that had been previously frozen by the husband or a donor, implanted into the woman.

Furthermore, the freezing allows the donation and the receipt of the sperm to occur at different times. Without this technique, donors and recipients would have to be matched up at very specific times, and the procedure would not be as convenient. Furthermore, a lot of men donate their sperm because of the anonymity involved. A matching program might possibly take away the anonymity factor. Also, without the ability to freeze the sperm, it would have to be donated at the same time the woman's body is ovulating. This requirement may not be convenient for the sperm donor and therefore, he may choose to forego the process. Frozen sperm is currently used by both single women desiring to have a child, and couples in which the man is infertile.[20] Other reasons for freezing sperm include an insurance against future infertility because of radiation or chemotherapy and the desire of unmarried women to have children.[21]

Moreover, artificial insemination through the use of frozen sperm has provided the first means of posthumous reproduction. Women are now able to have a child using the sperm of a deceased man. The fact that sperm can be frozen allows for the possibility of implantation in the woman for up to ten years. Therefore, if a man's sperm is removed and frozen and he subsequently dies, it is still viable to fertilize an egg for approximately ten years. Without the technique of freezing sperm, posthumous reproduction by a man would only be possible for an extremely short period, immediately following his death. However, since the sperm can be fro-

---

[18] *See id.*

[19] *See id.*

[20] *See* Robertson, *supra* note 1, at 1035 (explaining the three main types of disputes that arise with regard to the posthumous use of frozen sperm and providing illustrative cases).

[21] *See* Mika & Hurst, *supra* note 6, at 996 (providing an historical overview of artificial insemination and the factors that have influenced its widespread acceptance).

zen, a man can make a conscious choice to preserve the sperm for his wife's use after his death.

Artificial insemination provides the pathway for women who are unable to gestate a child, to have a baby with the assistance of a surrogate mother. Surrogacy is another form of assisted reproduction. Technological advances now make it possible to separate genetic contribution and gestation, two functions traditionally thought to be bound together. Artificial insemination combined with the use of a surrogate makes posthumous reproduction possible.

> A woman who suffers from blocked or nonexistent fallopian tubes (the largest cause of female infertility) or who suffers from medical problems which make pregnancy extremely dangerous or undesirable can become a mother simply by contracting with another woman or surrogate mother to carry and give birth to a child.[22]

Surrogacy is either partial, in which the surrogate is artificially inseminated with the sperm of the husband, or full, where the egg and sperm of the couple desiring the baby are used.[23] In full surrogacy, the surrogate is not the genetic mother of the child. Full surrogacy is the method that must be used in posthumous reproduction. Surrogacy agreements are usually made through a contract, and therefore governed by contract law. When these contracts are breached by one side or the other, issues relating to who the mother is, what the best interests of the child are, and whether it is acceptable to contract for a baby, come about.[24]

Surrogacy is a necessary element of posthumous reproduction by a woman. Currently there are no medical advances which allow for gestation of a baby outside of a woman's body. Therefore, without the ability to legally have a child with the assistance of a surrogate, posthumous reproduction by a woman is impossible. Some states have held that surrogacy arrangements are permissible, but prohibited paying consideration in conjunction with the

---

[22] Shapiro & Sonnenblick, *supra* note 13, at 235 (explaining how technology has made artificial insemination increasingly available).

[23] *See* Garside, *supra* note 15, at 716 (describing full and partial surrogacy in detail). *See also* Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 338 (1994) (explaining the different methods of surrogacy in more technical terms).

[24] *See generally* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996) (discussing the ways in which differing types of surrogacy arrangements affect the legal definition of motherhood).

surrogate's services.[25] Further, due to the fear of children becoming commodities, some states, such as Michigan, have held that surrogacy arrangements involving a fee are completely null and void.[26] Moreover, a majority of the courts have decided *any* type of surrogacy contracts are void and unenforceable.[27] With the states leaning towards making surrogacy extremely difficult, if not impossible, the options to infertile couples are decreasing. Despite the medical advances that make posthumous reproduction by women feasible, without surrogacy, it is impossible.

Along with surrogacy arrangements come multiple legal issues, especially in the event of a breach by either party. Due to the fact that surrogacy is a necessary element of posthumous reproduction by a woman, these legal issues must be considered when determining whether posthumous reproduction by women should be legally permitted. Part V of this Note discusses various interests affected in reaching the conclusion that posthumous reproduction by women should be legally prohibited.

Another method of assisted reproduction is *in vitro* fertilization (IVF). Because posthumous reproduction involves the death of the genetic mother, IVF is a necessary element of posthumous reproduction by women. The theory behind posthumous reproduction is to have a child after the genetic mother has died, therefore "traditional" conception is not possible. IVF is a widely used technique and involves the fertilization of the woman's eggs outside the body.[28] IVF involves a doctor removing the ova from a woman, adding sperm, and implanting any resulting pre-embryos into the woman. Ova can be extracted from the woman through "a procedure called a laparoscopy or through a needle aspiration guided by an ultrasound."[29] The eggs can be from the woman who will gestate the embryos or from a donor, and the eggs can be mixed with

---

[25] *See* Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981) (holding state interference with contractual agreement for surrogacy was within constitutional limits when contract provided financial compensation to surrogate mother). *See also* Stephanie F. Schultz, Comment, *Surrogacy Arrangements: Who Are The "Parents" of a Child Born Through Artificial Reproductive Techniques?*, 22 OHIO N.U. L. REV. 273, 288-92 (1995) (discussing the advantages and disadvantages of surrogacy arrangements and the enforcability of surrogacy contracts).

[26] *See* Schultz, *supra* note 25, at 280-81 (outlining the reasons that Michigan's Surrogate Parenting Act holds surrogacy contracts for compensation void and unenforceable).

[27] *See id.* at 289-90 (describing the general enforceability of surrogacy contracts).

[28] *See* Garside, *supra* note 15, at 714 (explaining generally the process of artificial insemination). *See also* Schultz, *supra* note 25, at 274 (describing the technique of *in vitro* fertilization).

[29] Djalleta, *supra* note 23, at 337-38.

sperm from the husband or a sperm donor. Further, the sperm can be fresh or frozen.[30] After approximately forty-eight hours, after the embryos have developed into approximately eight cells, the pre-embryos are ready to be injected into the woman's uterus through the cervix, with the procedure taking two to three days.[31] Given all of the possible genetic contributors, there are many possible combinations of contributors that can be involved in IVF. Moreover, there are many circumstances under which IVF can be used, with the most relevant being posthumous reproduction.

Another advancement in reproductive technology is frozen embryos. When freezing embryos, it is not necessary for the same woman to participate in both the gestation and the genetic reproduction of the child. The process involves uniting the egg and sperm outside of the body and then freezing the pre-embryo.[32] These pre-embryos can be frozen for anywhere between two and six hundred years; and consequently a child can be born well after one or both of its parents' deaths.[33] As of today, no children have been born as a result of a dead mother leaving an egg behind.[34]

Currently the only case involving the use of frozen embryos is the case of Julie Garber. Ms. Garber was diagnosed with cancer and decided to have her eggs extracted, fertilized with an anonymous donor, and frozen for her future use.[35] Ms. Garber subsequently died and her parents have found a surrogate to carry their grandchild.[36] However, recently, the last attempt to posthumously conceive Ms. Garber's child failed when the surrogate miscarried in December 1997.[37] Therefore, currently there have been no children conceived through successful posthumous reproduction by a woman.

B. Current State of Law Relating to Reproductive Technologies

There are no statutes or cases to date which address posthumous reproduction by women. A few courts have, however, ex-

---

[30] *See id.* at 338.

[31] *See* Garside, *supra* note 15, at 714.

[32] *See* Mika & Hurst, *supra* note 6, at 996 (explaining the technology enabling pre-embryo creation and storage outside the body).

[33] *See id.* (noting that cryopreserved sperm of ten years has still produced healthy children).

[34] *See* Collins, *supra* note 8, at E1 (noting that if Julie Garber's parents were successful in having a surrogate carry Julie's biological child to birth, the child would be the first child born from the egg of a deceased mother).

[35] *See id.* (discussing the ethical issues surrounding modern reproductive technology as illustrated in the Garber situation).

[36] *See id.* (raising many ethical questions and comparing critics' viewpoints).

[37] *See* Weiss, *supra* note 11, at A1.

amined the issue of posthumous reproduction by men. These cases provide some indication of how courts might analyze a proposal for posthumous reproduction by women.

Due to the fact that sperm can be frozen, it is not necessary for a man to be alive at the time the sperm are implanted into a woman. In fact, a lot of men have frozen their sperm expressly for use after their deaths. The first case to deal with posthumous reproduction was a French case, *Parpalaix v. CECOS*.[38] In this case, Alain Parpalaix, after being diagnosed with testicular cancer and realizing it could leave him sterile, deposited his sperm at a sperm bank for use after his chemotherapy treatments were completed.[39] However, he gave no indication to the sperm bank regarding what should be done with the sperm in the event of his death.[40] After his death, Mr. Parpalaix's wife wanted to retrieve the sperm but her request was denied by the sperm bank, Centre d'Etude et de Conservation du Sperme (CECOS).[41] CECOS told Mrs. Parpalaix there was no law which said they must return the sperm to her, and consequently it belonged to them.[42] The French court found there was a fundamental right to procreate, and after unsuccessful appeals, CECOS was ordered to return the vials of sperm to the wife of the deceased.[43] The court described the sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive."[44] The wife of the deceased was unsuccessful in her attempt to get pregnant, but *Parpalaix* is credited with bringing the issues out in the open. This case, although not controlling and not dealing with posthumous reproduction by women, is relevant to the topic of this Note. Due to the fact that medicine is advancing rapidly, posthumous reproduction by women is technically possible and, therefore, the issues that are involved must be confronted. The holding of *Parpalaix* gives an indication of how the courts in the United States might decide posthumous reproduction issues,

---

[38] T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. 1984, 2, pan. jurispr., 560. *See also* Mika & Hurst, *supra* note 6, at 1008-10 (explaining the case of Corrine Parpalaix, who was not permitted to retrieve sperm her deceased husband stored before he underwent chemotherapy).

[39] *See* Shapiro & Sonnenblick, *supra* note 13, at 229 (explaining the first judicial pronouncement regarding post-mortem artificial insemination).

[40] *See id.* at 229-30 (leaving no instructions led the court to decide the issue by ascertaining the intent of the donor).

[41] *See id.* at 230.

[42] *See id.*

[43] *See id.* at 233 (noting that the court considered property rights irrelevant to its decision).

[44] *Id.* at 232 (quoting GAZETTE DU PALAIS, Sept. 15, 1984, at 12) (stating that sperm should not "be subjected to the rules of contracts").

including situations involving posthumous reproduction by women.

The first case in the United States to deal with posthumous reproduction by a man was *Hecht v. Superior Court.*[45] In *Hecht*, a California man left fifteen vials of his sperm in an account in a California sperm bank prior to committing suicide.[46] Upon donating the sperm, Mr. Kane signed a "Specimen Storage Agreement," providing for storage of the sperm in accordance with the request of the executor of his estate. The agreement also authorized the release of the sperm to his long-time girlfriend, Deborah Hecht.[47] Furthermore, in his will, Mr. Kane bequeathed all right, title, and interest that he had in the sperm to Ms. Hecht.[48] Mr. Kane also included a statement in his will stating that it was his intention to have children with Ms. Hecht and, if and when she wanted to get pregnant with his child, the sperm was waiting there for her.[49]

After the death of Mr. Kane, Ms. Hecht attempted to retrieve the sperm and was prohibited from doing so by Mr. Kane's existing adult children. The trial court issued an order to have the sperm destroyed, but the court of appeals held Kane had a limited property interest in the sperm, and could bequeath it by will.[50] Mr. Kane's will left Ms. Hecht twenty percent of all his property. The probate court considered vials of sperm to be a part of Mr. Kane's estate and therefore twenty percent of the vials were to be awarded to Ms. Hecht. Since there were a total of fifteen vials, the court ordered three vials, or twenty percent of them, be given to Ms. Hecht, in accordance with Mr. Kane's will. After an additional three years of battling over the remaining sperm, a court of appeals granted Ms. Hecht the right to the remaining twelve vials of Mr. Kane's sperm.[51] The appellate court based its decision on Mr. Kane's clear indication of his intent to give the sperm to Ms. Hecht to produce their child. Furthermore, the court concluded Ms. Hecht should have all the sperm rather than a portion of it. "A man's sperm or a woman's ova or a couple's embryos are not the

---

[45] 20 Cal. Rptr. 2d 275 (Cal.Ct. App. 1993) (considering whether a man can cryogenically deposit sperm at a sperm bank to be released to his girlfriend in the event of his death, and concluding the trial court's order to destroy the sperm constituted an abuse of discretion).

[46] *Id.* at 275.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See generally Hecht*, 20 Cal. Rptr.2d 275 (holding also that no public policy prohibits the artificial insemination of the girlfriend because of her status as an unmarried woman, and no policy prohibits conception by artificial insemination using the sperm of a deceased man).

[51] Hecht v. Superior Court, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996).

same as a quarter of land, a cache of cash, or a favorite limousine,"[52] and should not be divided. Based on the decedent's clear intent, together with the "uniqueness" of the sperm, the court concluded the remaining vials of sperm were to be distributed to Ms. Hecht.[53]

The sole case in the United States involving a posthumously created child is *Hart v. Chater*.[54] The legal issues in *Hart* are different from both *Parpalaix* and *Hecht* in that the means of conceiving the child is a moot point. The child in the *Hart* case has been conceived and the pertinent issues are post-birth concerns such as inheritance rights and legal recognition of the child's biological father. In *Hart*, Mr. Hart was diagnosed with non-Hodgkins lymphoma of the esophagus.[55] Fearing the chemotherapy would leave him sterile, Mr. Hart deposited sperm in a sperm bank for his future use,[56] while specifically asking that the sperm be frozen and for his wife to receive all rights to the sperm for her use or disposal.[57] After unsuccessful cancer treatments, Mr. Hart died, leaving his sperm with his wife as the sole donee.[58] Three months after his death, Mrs. Hart underwent successful artificial insemination using her deceased husband's sperm.[59] After her daughter's birth, Mrs. Hart sought survivor's benefits for herself and her daughter, Judith.[60] Originally Mrs. Hart was denied benefits for her daughter by the Social Security Administration based on the fact that Judith was not the "natural child" of Mr. Hart.[61] Furthermore, since Judith was not born within three hundred days of Mr. Hart's death, she was not recognized as his legitimate daughter.[62] After going through multiple affirmations and reversals, in March 1996, a settlement was reached and the Social Security Administration

---

[52] *Id.* at 226.

[53] *Id.* at 227.

[54] *See* Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, The Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213, 232 (1996) (describing the unique property and inheritance issues that may arise when children are conceived posthumously and discussing Hart v. Chater).

[55] *Id.* (discussing Mr. Hart's medical condition and treatment protocol).

[56] *Id.*

[57] *See* Lorio, *supra* note 12, at 46 (explaining the facts of Hart v. Shalala, No.94-3944 (E.D. La. Dec. 12, 1993) (original complaint of Nancy Hart)).

[58] *See* Kerekes, *supra* note 54, at 232.

[59] *Id.*

[60] *Id.*

[61] *See* Lorio, *supra* note 12, at 46. *See also* Garside, *supra* note 15, at 721 (describing the case of Judith Hart).

[62] *See* Lorio, *supra* note 12, at 47.

awarded payment of benefits to Judith.[63] Although the focus of this case is on property and inheritance issues, and therefore beyond the scope of this Note, it brings about the reality of posthumously conceived children. When enacting statutes regarding inheritance and property rights, states did not contemplate posthumously conceived children.[64] Furthermore, the Supreme Court has not commented on, nor given guidance relating to how the rights of posthumously conceived children should be treated.[65]

Hart represents concerns that may arise in future cases involving posthumous reproduction by women, in that the result is a child born without a parent. It is very important that the interests of the child are considered when legislating reproductive technology. Arthur Caplan, director of the Center of Bioethics at the University of Pennsylvania, recently stated, "If you are going to make babies in new and novel ways, you have to be sure it's in the interest of the baby."[66] The *Hart* case furthers the argument relating to the difficulty a legislature has in drafting laws regarding inheritance rights when children are born after the deaths of their parents. Are the laws supposed to allow for indefinite administration of an estate in case some children are born ten years later? The fundamental issues faced by the parties in the *Hart* case can be applied to a case involving posthumous reproduction by a woman. In addition to the interests of the children discussed below, the *Hart* case raises numerous social and financial issues that must be considered by legislatures when drafting laws regarding posthumous reproduction.

Hart is the only court case that has addressed the legal rights of an existing posthumously reproduced child. However, the court in *Hecht* commented on this matter: "[w]e also emphasize another set of issues we did not decide in this opinion. We do not have before us the many legal questions raised by the possible birth of a child to Hecht through the use of Kane's sperm."[67] Furthermore, in the *Hecht* case, the California Court of Appeals refused to comment on what the results would be if a child was created posthu-

---

[63] *See* Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 988, & n.120 (1996) (citing a statement by Shirley S. Chater, Commissioner at the Social Security Administration, explaining that the Administration decided to settle the *Hart* case, thus granting Judith Hart benefits).

[64] *See id.* at 992 (noting that the Louisiana statute applied in *Hart.*)

[65] *See generally* Robertson, *supra* note 1, at 1039-45 (discussing the interests the state might assert if "[f]or public policy reasons a state could decide that semen should not be subject to posthumous transfer or use").

[66] Weiss, *supra* note 11, at A16.

[67] Hecht v. Superior Ct., 59 Cal. Rptr. 2d 222, 228 (Cal. Ct. App. 1996).

mously. "[I]t is also entirely speculative as to whether any child born to Hecht using decedent's sperm will be a burden on society."[68] The courts appear reluctant to comment on these reproductive issues not yet confronted by legislatures. Society can not allow children to be brought into the world because of selfish adults. Although many critics believe reproduction is a private decision, the welfare of the children must also be considered. It is not fair to bring a child into the world without a mother. It is time the states got involved because, judging from *Parpalaix*, *Hecht*, and *Hart*, the courts are likely to allow posthumous reproduction in the absence of laws explicitly banning it.

III. ADVANTAGES AND DISADVANTAGES OF POSTHUMOUS REPRODUCTION

Posthumous reproduction occurs when a child is born after the death of one, or both, of his or her parents. Posthumous reproduction by men is technically simpler and more common than posthumous reproduction by women, yet it is now also possible for a child to be produced after his or her genetic mother has died. Posthumous reproduction by a woman requires the use of a surrogate, however, and surrogacy complicates the process for two reasons. The first is the complex state of the law governing surrogacy contracts. The second is that surrogacy involves the entry of a third person into the arrangement. Therefore, issues confronted by parties to a surrogacy agreement are also involved in posthumous reproduction by women.

A. Arguments in Favor of Permitting Posthumous Reproduction

Almost every individual desires to have children at some point in his or her life and through those children, wants his or her family to continue into the future. "Reproduction connects individuals with future generations and provides personal experiences of great moments in large part because persons reproducing see and have contact with offspring, or are at least aware that they exist."[69] People who have lost a wife or a girlfriend have the same desire and it can be argued they should not lose this opportunity because of an unexpected death. Some writers argue that posthumous reproduction is a legacy of a loved one and the only chance to have a child with the deceased.[70] As the attorney for Mrs. Par-

---

[68] Hecht v. Superior Ct., 16 Cal. Rptr. 2d 275, 290 (Cal. Ct. App. 1993).

[69] Robertson, *supra* note 1, at 1031.

[70] *See* Carla Hall, *A Legacy of Litigation: Can Sperm Be Bequeathed?*, L.A. TIMES, Nov. 10, 1994, at E1 (interviewing the surviving lover of an eccentric man who made sperm bank deposits before committing suicide).

palaix urged, "Let her give life to this child, the fruit of a love that she goes on expressing with quiet determination. It is her most sacred right."[71] Furthermore, it is argued that the desire to have a child with the woman you love does not die with that person. The man left behind still wants a child produced out of the love he shared with his wife.

Another argument for allowing posthumous reproduction by women is that it is not for the courts or legislatures to decide what people are allowed to make decisions about, especially when it comes to private decisions about procreation. The judge in the trial court of the *Hecht* case concluded there was no "authority establishing the propriety of this court, or any court, to make the value judgment as to whether it is better for such a potential child not to be born assuming that both . . . providers wish to conceive the child."[72] Moreover, in his dissent in *Bowers v. Hardwick*,[73] Justice Blackmun stated that a necessary part of giving individuals the freedom to choose is accepting that people will make different choices.[74] Further, "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[75] Simply because it is not the norm, does not mean something should be prohibited. It can be argued that a woman has a right to make reproductive decisions without the intrusion of the courts. Reproductive choices are extremely private and it is arguable that a couple should be able to make those decisions on their own. Furthermore, the decision to have a child, whether before or after a person's death, is included in the zone of privacy.

B. Arguments Against Permitting Posthumous Reproduction by Women

However, there are multiple valid arguments against posthumous reproduction by women. First, only a few features of what is

---

[71] Shapiro & Sonnenblick, *supra* note 13, at 231 (quoting *Woman Must Wait To Know If She Can Have Dead Husband's Baby*, Reuters N. Eur. Serv., June 28, 1984, at 7).

[72] Henry Weinstein, *Court Rules Sperm Can Be Bequeathed*, L.A. TIMES, June 19, 1993, at B1 (quoting Hecht v. Kane, 16 Cal. App. 4th 836, 858 (Cal.App. 2d 1993) (reporting on a California Court of Appeals ruling which allowed a man to bequeath his frozen sperm via his will).

[73] 478 U.S. 186 (1986) (upholding the constitutionality of Georgia's statute prohibiting sodomy).

[74] *See id.* at 205-06 (Blackmun, J. dissenting) (arguing that Georgia's sodomy statute should be ruled unconstitutional).

[75] *Id.* at 214.

valued about reproductive experiences remain when the reproduction is posthumous.[76] A large part of the decision to have a child involves the desire to rear and gestate a child. In the case of posthumous reproduction, a woman will be neither gestating nor rearing the child. Furthermore, at most, the woman will have a present satisfaction of what might occur in the future, after her death.[77]

There are also property arguments for banning posthumous reproduction.[78] Property rights are not limited to objects, and are "commonly said to signify 'a bundle of legal rights' that includes rights of possession, use, control and disposition."[79] Whether reproductive materials, including frozen embryos, fall under the category of property rights, is a subject of much debate.

Due to the fact that a person can decide while alive to donate his or her organs, that may imply a person's interest in his or her body could be considered one of "property."[80] However, with respect to posthumous reproduction, we are dealing with a part of the body that has the potential to create human life. The court in *Davis v. Davis*[81] refused to consider the embryos at issue to be property. Embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[82]

In accordance with the view that embryos are property is the theory that embryos are merely the tissue of two people and those people have sole discretion regarding the disposition of those embryos. If the reproductive material is deemed property, and if the person who dies leaves specific instructions regarding what he or

---

[76] *See* Lorio, *supra* note 12, at 44 (quoting Robertson, *supra* note 1, at 1031-32). *See also* Robertson, *supra* note 1, at 1030-32 (arguing that the essential reproductive interest is less in posthumous reproduction than it is for living people).

[77] *See* Robertson, *supra* note 1, at 1030-31 (weighing the benefits a woman might receive through posthumous reproduction, against the costs of reproducing without one or both of the biological parents).

[78] *See, e.g.*, Kerekes, *supra* note 54 (noting that it is not clear whether reproductive materials can be treated as property); Bonnie Steinbock, *Sperm As Property*, 6 STAN. L. & POL'Y REV. 57 (1995) (discussing whether extracorporeal gametes are property, and to whom they belong); Djalleta, *supra* note 23 (discussing the property issues faced by the Uniform Probate Code due to this new technology); Brown, *supra* note 4 (discussing the lack of legal analysis on the issue of human reproductive property rights).

[79] Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C.L. REV. 901, 913-14 (1997) (discussing the conflicts that may arise when individuals cryopreserve gametes or embryos, and subsequently die).

[80] *See id.* at 915 (discussing the concept of "property" as it relates to the human body).

[81] 842 S.W.2d 588, 596 (Tenn. 1992) (granting custody of pre-embryos to husband in divorce).

[82] *Id.* at 597.

she wants done with it, it can be argued those wishes should be followed based on the property rights. For example, in *Hecht*, Mr. Kane left a will explicitly stating his desires relating to the disposition of his sperm after his death. The will provided, "I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht."[83] Furthermore, Mr. Kane wrote a letter to his potential future children speaking of his desire that they be born to Ms. Hecht, and telling them that he loved them in his dreams.[84] But the issue remains whether frozen sperm can be considered property. Embryos can not be likened to jewelry or a house. As Professor Caplan noted, "[w]e ought not treat what are basically the blueprints of potential human beings as property on a par with a beachfront home or a beer can."[85] Considering embryos property devalues human life. "Parents have the right to control virtually every aspect of their children's lives, from the medical care they receive to where they will live to the kind of education they will get. Yet parents do not own their children, and children are not property."[86] Embryos are not property because they have the potential to create human life. Furthermore, property is traditionally thought of as something that can be bought and sold in the marketplace. Many people have a difficult time viewing reproductive materials as something that can be bought or sold.[87] According to Stephen Munzer,[88] property should be defined as a bundle of rights "with no single interest being indispensable to the definition."[89] Munzer does not extend ownership and hence, property rights, to human bodies.[90] "Restrictions on transfer and the absence of a liberty to consume or destroy, for example, indicate that persons do not own their bodies in the way that they own automobiles or desks."[91] Therefore, embryos should not be considered property

---

[83] Hecht v. Superior Ct., 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993).

[84] *See* Steinbock, *supra* note 78, at 59 (discussing Mr. Kane's letter to his future offspring).

[85] Weinstein, *supra* note 72, at B1 (arguing that a property framework is not necessarily appropriate for this sensitive topic).

[86] Steinbock, *supra* note 78, at 60.

[87] *See id.* at 61.

[88] *See id.* at 66 n. 42 (Munzer is a legal scholar who uses the "bundle" metaphor relating to property rights). *See also* STEPHEN MUNZER, A THEORY OF PROPERTY 56 (1990) (evaluating whether the concept of "property" can be justified by arguing that "property-talk" does not demean individuals by undercutting their autonomy and "property-talk" does not depict people as things or commodities).

[89] *Id.* at 61.

[90] *See id.*

and if a woman dies before using the embryos, they should not be treated as the property of the woman.

Second, the state has an interest in preventing the exploitation of children. It is possible that some people may want to have a child merely for the dramatic effect of it.[92] Moreover, the child is being intentionally brought into the world without its mother.[93] It is extremely important that the reasons for bringing the child into the world are explored. It is imperative to be certain that these children are not being conceived merely as a replacement for the deceased. If that is the case, the child could end up neglected or even resented.

Furthermore, posthumous reproduction, whether by women or men, may create confusion about heritage. "Time-honored restraints implicitly teach that clarity about who your parents are, clarity in lines of generation, clarity about who is whose, are the indispensable foundations of a sound family life, itself the sound foundation of civilized community."[94] Posthumous reproduction will blur the concepts of generations and identity for the posthumously created children.[95] Furthermore, it is crucial for a child's identity and self-perception that his or her origins are clear. Also, society does not want to overlook the right of a child to connect with forbearers.[96] It seems selfish for a couple of adults to take this right away from a child in a situation in which the child has no say in the matter.

Moreover, many people view posthumous reproduction as unnatural. The property of the decisional right to procreate should be taken away from a person after he or she dies. That right, "although biotechnologically feasible and an acceptable extension of estate planning and property rights, is simply wrong."[97] Barry

---

[91] MUNZER, *supra* note 88, at 43. *See also* Brown, *supra* note 4, at 73 (noting that little attention has been given by courts to "reconciling the effects of human reproductive advances with individual common law proprietary rights").

[92] *See* Hall, *supra* note 70, at E1 (describing Hecht's response to the accusation that she merely wants to have her eccentric, dead lover's child for dramatic effect).

[93] *See* Collins, *supra* note 8, at E1 (relating critics' arguments that it is wrong to purposely produce a parentless child).

[94] Chester, *supra* note 63, at 971 (quoting William J. Wagner, *The Contactual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 151 n. 665 (1990) (emphasizing the importance of self-identity to self-respect)).

[95] *See* Chester, *supra* note 63, at 971-72 (addressing the need for the law of wills and estates to remedy the inherent problems with contractual exchanges between generations).

[96] *See id.* at 994 (citing Elizabeth Bartholet, *Family Bonds: Adoption & the Politics of Parenting* 229 (1993)).

[97] Brown, *supra* note 4, at 80.

Brown, a professor of property, professional responsibility, and bio-medicine at Suffolk University Law School states, "[s]anctioning reproduction without biological parents may be considered socially disjunctive regardless of the resources available to the cryogenic orphans."[98]

Last, there are financial and inheritance reasons for disallowing posthumous reproduction. If a posthumously created child can claim a right to his or her deceased parent's estate, the administration of the estate could be delayed indefinitely. A state has an interest in administration of estates, stable land titles, and orderly distribution of property after death.[99] To allow posthumous reproduction would mean that estates could potentially be left open indefinitely. Based on the fact the root of reproductive rights is not present in posthumous reproduction, together with financial issues and the desire to prevent exploitation of children, this kind of reproduction should be banned by state law.

Property and surrogacy issues together with the interests of children demonstrate the vast array of reasons posthumous reproduction by women should be banned. The fact that posthumous reproduction allows some people the opportunity to have children who otherwise would not have been afforded that opportunity, is not enough to overcome the negative implications. Being born to only one parent is not the optimum situation for a child and the legal community should do everything to prevent it from happening.

IV. FUNDAMENTAL RIGHT UNDER THE CONSTITUTION

Before determining whether it is possible for a state to successfully draft a statute banning posthumous reproduction that would not be declared unconstitutional, it is necessary to explore what the Supreme Court has deemed to be a fundamental right. If the Supreme Court declares a right to be fundamental, the state may only regulate it if it has a compelling interest, and if there are no other possible means of achieving that end. The Supreme Court has established a bundle of rights which make up a zone of privacy which is considered fundamental. A strict scrutiny test is applied to cases involving fundamental rights. Therefore, when a state attempts to regulate conduct involving a fundamental right, the Supreme Court applies a strict scrutiny test to determine the consti-

---

[98] *Id.*

[99] *See, e.g.*, Mika & Hurst, *supra* note 6, at 1018 (arguing that the state has an incentive to proactively pass legislation limiting the possibility for post-mortem children to indefinitely delay the administration of the decedent's estate).

tutionality of the law. The Court, in *Carey v. Population Services International*[100] found, quoting *Roe v. Wade*, that a regulation may be "justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake."[101] The right to procreate has been included in the "right of privacy" declared fundamental by the Supreme Court. The Court has not explicitly described what it would consider a compelling state interest, but as of today, the Court has not held any state interest sufficiently compelling to uphold a restriction on the right to procreate. In considering a ban on posthumous reproduction by women, it is necessary to determine whether posthumous reproduction would be considered a fundamental right, and if so, whether a state has a compelling interest in banning it.

A. Procreation

Although the Supreme Court has held procreation to be a fundamental right under the Constitution, it is not clear whether posthumous reproduction is included within the framework of that fundamental right. In *Skinner v. Oklahoma*,[102] the Supreme Court held that "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race."[103] *Skinner* involved an Oklahoma statute which declared that if a person met the statutory definition of an habitual criminal, a judge or jury could authorize sterilization of that person.[104] The Oklahoma statute defined an habitual criminal as

> [A] person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude' either in an Oklahoma court or in a court of any other state, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.[105]

---

[100] 431 U.S. 678 (1977) (declaring a New York statute unconstitutional in its entirety, insofar as it applied to nonprescription contraceptives).

[101] *Id.* at 688 (discussing the inability of state interests to override the constitutionally protected right of decision in child-bearing matters).

[102] 316 U.S. 535 (1942).

[103] *Id.* at 541.

[104] *Id.* at 535. *See also* Mika & Hurst, *supra* note 6, at 1002 (summarizing the case of Skinner v. Oklahoma).

[105] *Skinner*, 316 U.S. at 536.

The Supreme Court found the Oklahoma statute violated a person's constitutional right to procreate.[106] "We are dealing here with legislation which involves one of the basic civil rights of man."[107]

In later decisions, the Supreme Court cited *Skinner* as the basis for striking down state laws which interfered with an individual's right to procreate. For example, in *Griswold v. Connecticut*,[108] the Court recognized a right of privacy for married individuals, specifically regarding their right to use contraceptives.[109] The Court recognized the existence of a zone of privacy surrounding individuals, and thereby invalidated a Connecticut statute which prohibited the use of any drug or device to prevent conception.[110] "[T]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[111] *Griswold* exemplified the Court's belief that the Constitution protects an individual's privacy decisions from intrusion by the states.[112]

The Supreme Court extended the right of privacy to unmarried individuals in *Eisenstadt v. Baird*.[113] "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[114] *Eisenstadt* involved a Massachusetts law forbidding the distribution of contraceptives to unmarried persons.[115] The Court concluded the state interest of deterring premarital sex was not compelling, and therefore could not impede the fundamental right to make decisions about procreation.

Further, in *Carey*,[116] the Court recognized the individual's right to make procreative decisions as fundamental.[117] The statute

---

[106] *Id.* at 541. *See also* Schultz, *supra* note 25, at 276 (providing a constitutional analysis of the right to procreate).

[107] *Skinner*, 316 U.S. at 541.

[108] 381 U.S. 479 (1965) (holding that a Connecticut law forbidding the use of contraceptive devices unconstitutionally intruded upon the right of marital privacy).

[109] *Id.*

[110] *See* Schultz, *supra* note 25, at 277 (stating that the decision to bear children is a fundamental privacy right protected by the Constitution, as announced in Griswold v. Connecticut).

[111] *Griswold*, 381 U.S. at 485.

[112] *See* Shapiro & Sonnenblick, *supra* note 13, at 244 (quoting G. GUNTHER, CONSTITUTIONAL LAW 515 (1985) (recognizing the right to "bear or beget a child based on the fundamental right of privacy")).

[113] 405 U.S. 438 (1972) (holding that a Massachusetts statute that granted married persons, but not single persons, the right to obtain contraceptives, violated the equal protection clause of the Fourteenth Amendment).

[114] *Id.* at 453.

[115] *Id.* at 441 (discussing MASS. GEN. LAWS ch. 272, § 21 (1990)).

[116] 431 U.S. 678 (1977).

challenged in *Carey* forbade the distribution of contraceptives to people under the age of sixteen, and prohibited the distribution to anyone over the age of sixteen, except by licensed pharmacists.[118] Essentially the Court held that if a person has a right to decide whether to bear or beget a child, as stated in *Eisenstadt*, then he or she has a right to decide whether to use contraceptives, thereby determining whether he or she will have children. Following this line of cases, according to the Supreme Court, there exists a fundamental right under the Constitution to make decisions relating to procreation, and this right extends to all individuals, whether married or single. Therefore, it could be argued that posthumous reproduction by a woman is included within this fundamental right to procreate. However, the issue must be further explored to determine whether reproduction by artificial means is protected, and then whether posthumous reproduction is protected as a fundamental right.

B. Procreation by Artificial Means

The Supreme Court decisions have not addressed whether the fundamental right to make decisions relating to procreation includes procreation by artificial means.[119] Although the fundamental right to reproduce has been explicitly established by the Court, which means or methods are permissible has not been decided.[120] It can be inferred by the Court's holding in *Carey* that since the ability to choose the means by which to have or not have children is included as a part of the fundamental right, artificial means of reproduction would also be included in that right. Methods of assisted reproduction are considered a means of reproduction and therefore, should be included in the fundamental right to procreate. The fact that a couple needs assistance when reproducing does not lessen their fundamental right in any way.

Although the Supreme Court has not commented on this issue, at least one district court has held reproductive assistance to be included under the umbrella of the fundamental right to procre-

---

[117] *Id.* at 685 (discussing the importance of the right to be free from government intrusions into matters as intimate as human relationships).

[118] *Id.* at 681.

[119] *See* Mika & Hurst, *supra* note 6, at 1001-07 (discussing cases in which the Supreme Court resisted determining that procreation by artificial means is a fundamental right, but noting that one federal court and three state courts have dealt with this issue).

[120] *See* Schultz, *supra* note 25, at 277 (commenting that although reproduction has been defined as a fundamental privacy right, the acceptable means and methods of reproduction have not yet been defined).

ate.[121] In *Lifchez v. Hartigan*, the U.S. District Court held an Illinois statute was unconstitutional because it restricted a woman's fundamental right to privacy, and "in particular, her right to make reproductive choices free of government interference with those choices."[122] The Illinois statute at issue prohibited testing of and experimentation with fetuses. However, the court declared these practices fall within a woman's zone of privacy.[123] "It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[124]

A California court has also extended the fundamental right to procreate to include assisted reproduction in both *Johnson v. Calvert*[125] and *Hecht. Johnson* involved a surrogacy contract and the court held it was not the role of the court to inhibit the use of reproductive technologies if the legislature had not yet chosen to do so. Furthermore, any effort to do so would inhibit "the fundamental nature of the rights of procreation and privacy."[126]

Further, the Tennessee Supreme Court also extended the fundamental right to procreate to include technologically assisted means of reproduction. *Davis* involved the question of who decides what to do with frozen embryos.[127] Mr. and Mrs. Davis used medically assisted methods of reproduction in attempts to get pregnant, and in the process had frozen some of their embryos for future use.[128] The Davis' later filed for divorce, and this case involved their dispute over what to do with the embryos.[129] Mrs. Davis decided she wanted the embryos donated to a childless couple, and Mr. Davis wanted them destroyed.[130] The court held the state's interest was not sufficient to infringe on the procreative autonomy of the embryo providers.[131] Therefore, it can be inferred the Tennessee court held the fundamental right to procreate in-

---

[121] *See* Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill 1990).

[122] *Id.* at 1376.

[123] *Id.* (noting that "[e]mbryo transfer is a procedure designed to enable an infertile woman to bear her own child").

[124] *Id.* at 1377.

[125] 851 P.2d 776 (Cal. 1993) (deciding the issue of parental rights to a child related genetically to the Calverts, but gestated by a surrogate, Johnson, in favor of the Calvert couple).

[126] *Id.* at 787.

[127] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[128] *Id.* at 591-92.

[129] *Id.*

[130] *Id.* at 590.

[131] *Id.* at 602.

cludes procreative choices involving noncoital (non-intercourse) reproduction.

Furthermore, some commentators argue that *Carey* can be extended to assisted reproduction, and that procreation is procreation no matter what the method. For example, bioethicist John Robertson believes natural reproduction has been valued and "it should be equally honored when reproduction requires technological assistance."[132] According to Robertson, what matters is the shared wish of both people to "replicate themselves, transmit genes, gestate, and rear children biologically related to them."[133] The Supreme Court has not specifically looked at the issue of reproduction by artificial means as a fundamental right,[134] but Robertson argues that the interests the Court is attempting to protect through privacy are the same whether the child is conceived naturally or with assistance.[135] "[T]he desire of infertile couples 'to have a family – to beget, bear, and rear offspring – is as strong as in fertile couples.'"[136] Therefore, Robertson believes it is likely the Court would extend the fundamental right to procreate to situations involving assisted reproduction.

According to Robertson, the interests of would-be parents in procreative choice are valuable and worthy of great respect when considering the use of reproductive technologies.[137] The reasons and the goals of infertile couples are the same as fertile couples and therefore, they should be accorded the same protection under the Constitution. If the Court recognizes that the fundamental right to procreate extends to situations involving assisted reproduction,

---

[132] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994) (exploring technological and bioethical issues surrounding reproduction). *See also* Anne MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH & LEE L. REV. 135 (1995) (describing Professor Robinson's position that procreative liberty should prevail whether or not reproductive technology questions are involved).

[133] ROBERTSON, *supra* note 132, at 32 (arguing that the moral right of coital reproduction extends to noncoital reproduction).

[134] *See* Gary N. Skoloff, *Introduction to Special Issues on Surrogacy*, 22 FAM. L.Q. 119 (1988) (discussing the Model Surrogacy Act and how it recognizes and deals with the competing conditional rights of the participants to the surrogacy arrangement).

[135] *See* Schultz, *supra* note 25, at 277-78 (arguing that family relationships, child birth, and child rearing are involved no matter how the child is conceived).

[136] Massie, *supra* note 132, at 147 (quoting ROBERTSON, *supra* note 132, at 39). *See also* Schultz, *supra* note 25 (arguing that the right to procreate should extend to surrogate births because the underlying values and interests the court is trying to protect are the same with both natural and artificial conception).

[137] *See* ROBERTSON, *supra* note 132, at 220-22 (arguing that reproductive technologies should be assessed from a standpoint of procreative liberty).

any restrictions on that right will be strictly scrutinized. Therefore, the restriction will be permitted only if it is necessary to achieve a compelling state interest and there are no other means available to achieve that state interest.[138]

It can be implied from the above-mentioned line of cases that the fundamental right to procreate encompasses all means and methods of reproduction. If the Court's purpose in proclaiming reproduction a fundamental right was to protect the privacy of marriage and family decisions, it is logical this right would also include assisted reproductive methods. A person does not have any less of a right to make procreative decisions because he or she is infertile. The same reasons exist for protecting the right to procreate in people who need assistance, as with those who do not. If the Court does not extend this right to include reproductive technologies, then the Court would be depriving infertile couples of the right to procreate, which has been declared fundamental.

C. Posthumous Reproduction

However, a much more complicated issue arises when determining whether this fundamental right to procreate extends to posthumous reproduction. The difficulty with this issue lies in the fact that the rights of two individuals are at stake. If a woman dies, her fundamental right to procreate may terminate, but her husband's does not. Therefore, it must be determined whose fundamental right we are concerned with and how far that right extends.

The fundamental right to procreate should not continue after death. There have been no Supreme Court cases explicitly stating whether fundamental rights extend after death, but it does not seem likely that the Court would extend such a right. There is at least one state case in which the court held a woman's right of privacy was extinguished upon her death. In *University Health Services v. Piazzi*,[139] a pregnant woman was declared brain dead, but the Superior Court of Richmond County, Georgia ordered life support was to be maintained, despite opposition by the woman's husband.[140] Looking at the reasons why the Supreme Court held procreative liberty to be a fundamental right, those same interests are not at issue in cases of posthumous reproduction by a woman.

---

[138] *See* Andrews, *supra* note 5, at 794 (discussing the legal standard that would be required to uphold restrictions on the use of reproductive technologies if courts recognize a fundamental right of couples to use such technologies).

[139] *See* Note, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative Brain-Dead Pregnant Women*, 22 GA. L. REV. 1103, 1108-11 (1988) (discussing University Health Services, Inc. v. Piazzi, No. CV 86-RCCV-464 (Super. Ct. of Richmond County, Ga., Aug. 4, 1986)).

[140] *Id.* at 1110-11 (footnote omitted).

Much of the decision to protect the right to reproduce rests on its relation to bodily integrity and marital intimacy. In *Carey*, the Court stated, "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage . . . .'"[141] Further, in *Eisenstadt*, the Court cited *Olmstead v. U.S.*,[142] "[t]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone . . . ."[143] However, the desire to be free from bodily intrusion is not at issue when the woman has died. Further, Robertson concludes, "[e]ven if the Court found that noncoital reproduction was protected, decisions about posthumous reproduction are so far removed from those interests that it is highly unlikely that a fundamental constitutional right would be found."[144]

Moreover, the Court in both *Carey* and *Griswold* found the fundamental right to procreate evolved from a right to privacy. Specifically, the Court held the state did not have a right to invade a person's body and tell her what to do or not to do with it. It is difficult to argue that a person who has died has the same privacy rights.

Also, when a woman is dead, she will not have the opportunity to gestate and rear a child, another important reason behind protecting the right to reproduce. Posthumous reproduction is very different from reproduction while living. As Robertson argues, "A person who chooses to reproduce chooses to accept the experiences and responsibilities entailed in reproduction and child rearing, unknown and vague as they may be at the time of choice."[145] The choice to raise a child is not there when a person is dead. "The individual will not gestate. She will not rear. While alive, she will not even know she has reproduced genetically."[146] However, Robertson argues, "the meaning or value of posthumous reproduction lies in the importance that individuals place on being able to de-

---

[141] Carey v. Population Services International, 431 U.S. 678, 684-85 (1977) (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that state miscegenation statutes violate equal protection and due process clauses of the Fourteenth Amendment)).

[142] 277 U.S. 438, 478 (1928) (explaining the broad scope of protection sought by the makers of the Constitution), *overruled by* Katz v. U.S., 389 U.S. 347, 352 (1967).

[143] Eisenstadt v. Baird, 405 U.S. 438, 454 n.10 (1972) (holding that a Massachusetts statute which only permitted married persons the right to obtain contraceptives violated the equal protection clause of the Constitution).

[144] Robertson, *supra* note 1, at 1041-42.

[145] John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 427 (1996).

[146] Lorio, *supra* note 12, at 44 (quoting Robertson, *supra* note 1, at 1031).

termine the fate of their gametes, embryos, and fetuses after they have died."[147] A present satisfaction of a possibility of children after one's death is not sufficient to uphold the argument of extension of a fundamental right. The Court is clear regarding why it has deemed procreation a fundamental right. When those reasons are applied to posthumous reproduction, they are not sufficient enough to uphold a fundamental right, when compared to the harms caused.[148]

The second aspect of the fundamental right to posthumously procreate involves the significance that should be assigned to the right of the father to procreate. The father is still alive, and it can be argued that his right to procreate is equal to that of any other living person. Therefore, he has a fundamental right to reproduce. But does that right extend to include the idea he has a right to reproduce with someone who has died? The only case to date that explicitly deals with this issue is *Parpalaix*. In *Parpalaix*, the court "found in the fundamental right to procreate, the basis for the first judicial or legislative pronouncement on post-mortem artificial insemination."[149] Moreover, if the courts declare frozen embryos to be property,[150] the father will have control of the embryos. But as stated earlier in this Note, posthumous reproduction by women requires the use of a surrogate. Therefore, a man would have to obtain the eggs on a property basis and legally hire a surrogate to carry his child. Furthermore, by making posthumous reproduction by women illegal, a man's fundamental right to procreate has not been completely inhibited. The man will continue to have a right to reproduce by many other means and methods. The state's interest in protecting these children and preventing posthumous reproduction is stronger than an interest a man may have in creating a child with a deceased woman. It is doubtful the Supreme Court would consider the *Parpalaix* argument a valid argument for upholding posthumous reproduction as a fundamental right. There are too many negatives to combat to allow for posthumous reproduction by women.

---

[147] Robertson, *supra* note 1, at 1031 (discussing how the principle of autonomy does not answer certain normative questions about the premortem importance to living people of knowing that they can reproduce posthumously).

[148] *See* discussion *infra* Part V.

[149] Shapiro & Sonnenblick, *supra* note 13, at 233 (discussing the court's holding that the sperm of Mrs. Parpalaix's deceased husband should be returned to her for artificial insemination).

[150] *See supra* text accompanying notes 78-91.

V. POLICY REASONS FOR PROHIBITING POSTHUMOUS REPRODUCTION BY WOMEN

The state's interest in the child's psychological and financial well-being plus the state's interest in its revenues, support a ban on posthumous reproduction.[151] The various state interests must be weighed against an individual's interest in reproducing after death. Assuming posthumous reproduction is not a fundamental right, the state's interest must be important or legitimate and therefore, a state ban should withstand constitutional challenge.

The first argument against posthumous reproduction by women is the state's interest in protecting the welfare of the resulting children. Public policy recommends children having two parents whenever possible, therefore the state has an interest in minimizing the number of children brought into the world with only one parent. Starting life with only one parent may be detrimental to a child. "The Court's order [in *Parpalaix*] is a victory for the widow and even for the father who can sire a child from the grave, but it may be detrimental to the child."[152] Furthermore, research indicates children of single parents are disadvantaged.[153] Moreover, studies of children reared without mothers suggest some disadvantages to the children. "Children of mother-only families are more likely to be poor, more likely to have difficulty in school and to drop out of high school, and [are] more likely to commit delinquent acts and to engage in drug and alcohol use than offspring from two-parent families."[154] It can be argued that a lot of children are raised by single parents and end up fine, however, posthumously conceived children are different. Single parents often have the other parent available to play a role in the child's upbringing, both emotionally and financially. But in the case of a posthumously created child, there is one bereaved parent bringing a child into the world without the option of assistance from the other parent.[155] Family law is principally based on an arrangement that favors a nuclear family unit as being in the best interest of the

---

[151] *See* Schiff, *supra* note 79, at 904 (discussing legal and social issues raised by posthumous reproduction).

[152] Shapiro & Sonnenblick, *supra* note 13, at 246-47 (arguing that the *Parpalaix* court failed to consider the best interests of the child).

[153] *See* Steinbock, *supra* note 78, at 62 (citing Sara McLanahan & Karen Booth, *Mother-Only Families: Problems, Prospects, and Politics*, 51 J. MARRIAGE & FAM. 557 (1989)).

[154] Steinbock, *supra* note 78, at 62.

[155] *See* Kathleen Murray, *Posthumous Conception is Ethical Trap*, STAR TRIB., Aug. 1, 1995, at 3E (noting that there is a difference between single parenting and posthumous conception).

child.[156] The *Parpalaix* court has been criticized for not considering the best interests of the child.[157]

Additionally, a state must be concerned with the psychological welfare of a child who learns he or she was born after the death of his or her mother, or that his or her mother committed suicide.[158] There are also going to be concerns about the psychological welfare of a child who learns he or she was paid for. The state has the need to prevent children from being treated as commodities.[159] Commercialization of children is not a good idea and is especially prevalent in surrogacy contracts when consideration is paid.[160] It is impossible to have posthumous reproduction by women without the assistance of a surrogate and therefore, the possibility of commercializing children is prevalent. A Michigan state court has found this interest to be compelling because babies simply can not be bought.[161] In many cases, surrogacy is based on money, rather than the child, and that is one of the reasons some states have declared surrogacy contracts null and void.

Last, it is in the best interests of a child for a state to prevent potential custody disputes. Surrogacy contracts can result in disputes as a result of a breach by either party. Often a woman changes her mind after carrying the baby for so long, or the father might decide he no longer wants the child for whatever reason. It is important public policy for the state to prevent custody disputes whenever possible.[162]

One opposing argument, as Robertson concludes, is that the only other option is death, so being born as a result of posthumous reproduction is better than not being born at all.[163] "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

---

[156] *See* Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking Aid in the Law*, 44 DUKE L.J. 524, 556 (1994).

[157] *See* Shapiro & Sonnenblick, *supra* note 13, at 246-47 (discussing criticism of the *Parpalaix* decision by doctors and lawyers).

[158] *See* Robertson, *supra* note 1, at 1033 (discussing various dilemmas that can arise from posthumous reproduction, including the welfare of the offspring).

[159] *See* Schultz, *supra* note 25, at 281 (enumerating the various state interests in regulating surrogate births, including the state interest in not treating children as commodities).

[160] *See id.* (arguing that there are many legitimate state interests for regulating surrogacy contracts for pay).

[161] *See id.* at 280-81 (stating that there is a compelling state interest in regulating surrogate contracts for compensation).

[162] *See In re* Baby M, 537 A.2d 1227 (N.J. 1988) (involving a custody battle over a child produced as a result of a surrogacy agreement).

[163] *See* Robertson, *supra* note 1, at 1040-41 (discussing the various state interests for allowing the posthumous use of semen).

amounts to wrongful life."[164] However, children who are not born do not know they could have been, and therefore, there is no harm in preventing their birth.

Included in the state's interest are financial and social concerns as well. The state has an interest in protecting the financial well-being of a child. There is an inherent burden on taxpayers of condoning children being born to single parents. When there is only one parent to make money and care for the child, there are fewer resources, both emotionally and financially. One person does not have the same ability to care for a child, and at the same time make as much money as two parents together can. "[V]arious state interests, such as the interest in protecting the psychological and financial well-being of the resulting child and the interest in protecting state revenues must be weighed against the individual's interest in reproducing after death."[165] A Michigan court has held that the best interests of a child is sufficiently compelling to permit governmental intervention.[166] Further, the state is concerned with potential title and estate disputes that might develop. The state has an interest in preventing estates that could go on indefinitely. It is prudent for a state to prevent existing patterns of inheritance that posthumous children would disrupt.[167]

However, it is not likely the Supreme Court would consider the right to reproduce posthumously a fundamental right, as explained above, therefore the state interest merely must be important or legitimate. Under intermediate scrutiny or mid-level scrutiny, the means chosen by the state must be substantially related to the important governmental interest. The Supreme Court has traditionally applied mid-level scrutiny to issues involving equal protection and gender-based discrimination claims. It is difficult to determine how the Court will treat posthumous reproduction, but it is unlikely it will be treated as a fundamental right, and therefore the state interest does not have to be compelling. The above-mentioned state interests should withstand mid-level scrutiny by the Supreme Court, and the ban on posthumous reproduction will likely be upheld.

---

[164] *Id.* at 1040.

[165] Schiff, *supra* note 79, at 904 (discussing legal and social policy questions raised by posthumous reproduction).

[166] *See* Schultz, *supra* note 25, at 280-81 (citing Doe v. Kelley, 307 N.W.2d 438 (Mich. Ct. App. 1981)).

[167] *See* Steinbock, *supra* note 78, at 62 (presenting reasons why posthumous offspring would disrupt existing patterns of inheritance).

VI. CONCLUSION

Both men and women have an interest in posthumous reproduction by women. However, neither interest is strong enough to outweigh child welfare interests in prohibiting the practice. There are multiple alternatives for men who desire children. They can adopt or they can remarry. The most important issue to keep in mind is the resulting child. "Are there other alternatives that would achieve the same goal of those who are alive that wouldn't raise concerns?"[168]

It is imperative that reproductive technologies are monitored in order to prevent crossing the line between assisting infertile couples in having a child and manipulating the traditional notion of reproduction. Originally, assisted reproductive techniques were used to help families who were not able to have children naturally.[169] But for better or worse, medical advances have expanded greatly beyond their original intention, and the legal issues must be dealt with and decisions made.

It must be determined what the Supreme Court meant by the right to bear and beget a child and whether that right extends to posthumous reproduction. It does not appear a fundamental right follows a person after his or her death. There are some issues that must be dealt with and hardships that must be faced in life. People die, and often they die before they are able to procreate. But posthumous procreation is not the answer to calming those sad feelings. If the states do not intervene, medical advances will take over and change society as we know it. Furthermore, the option of having written consent documents is not a valid solution.[170] Circumstances change, people change, and people are extremely emotional at the time of the death of a loved one. Also, with written intentions, it is impossible to predict all possible outcomes. A written document may omit what is to be done in the case of the death of one or both partners, and then everything reverts to the original issues presented in this Note.

---

[168] Collins, *supra* note 8, at E1 (discussing the repercussions of posthumous reproduction, including the production of parentless children and the possibility of emotionally driven attempts to replace deceased relatives).

[169] *See* Chester, *supra* note 63, at 971 (discussing societal values and assisted conception during the early years of assisted reproduction science).

[170] A lot of private clinics and hospitals have begun to have couples complete consent forms prior to undergoing any assisted reproductive measures. These forms include what the couple would like done with the reproductive materials in various circumstances, such as when one or more of the parties dies. However, the validity of these agreements has not yet been challenged in posthumous reproduction cases and this topic is not explored in depth in this Note.

Simply because a new technique is medically possible, it does not mean it should be used under all circumstances, whatever the consequences. According to Laurence H. Tribe, professor of constitutional law at Harvard University, "I certainly don't subscribe to the view that whatever technology permits us to do we ought to do. Nor do I subscribe to the view that the Constitution necessarily guarantees every individual the right to reproduce through whatever means become technically possible."[171] Although it is difficult to define the parameters and what should be banned and what should not, the negative results of posthumous reproduction seem to outweigh the benefits. Therefore, the only solution is a state-enacted ban on posthumous reproduction, specifically by women.

[171] Laurence H. Tribe, *Law Professor Reconsiders Cloning*, PLAIN DEALER, Dec. 9, 1997, at 9B (believing that more compelling reasons must be advanced to enforce the ban on cloning).