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Posthumous Conception: A Private or Public Matter?

Laurence C. Nolan

The earth belongs in usufruct to the living ... the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when he ceases to be, and reverts to society.

The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility—to bestow a life which may be either a curse or a blessing—unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, it is a crime against that being.

I. INTRODUCTION

American law and culture have long recognized the value of individual rights and the need to protect these rights from governmental interference. Over the past thirty years, the United States Supreme Court has repeatedly attempted to protect individual rights from governmental interference. Because the American tradition of valuing these rights continues, the need to adequately recognize and protect existing or developing individual rights grows, particularly with modern advancements in

* Copyright © 1997 by Laurence C. Nolan, Professor of Law Howard University School of Law. B.S. Howard University, 1961; J.D., University of Michigan School of Law, 1974. My appreciation goes to Amanda Castro, my research assistant, to Professor E. Christi Cunningham, Professor Michael D. Newsom, and George H. Nolan for their comments, to Felicia Ayanbiola, Valerie Railey, and Iris Lee of the law library, and to the Howard University School of Law for its financial support. This article is developed from a paper presented at the International Society of Family Law Conference on Parent and Child in North American Family Law, co-hosted by the Faculty of Law of Laval University, held in Quebec City, Quebec, June 13-15, 1996.

science and technology. Among those individual rights significantly impacted by scientific progress is the right of procreation. Perpetuating one's bloodline and contributing to the perpetuation of the human race is fundamental to most Americans. Modern science has given us more control and greater opportunity with respect to procreation, but it has also complicated the intersection where individual rights and governmental interference meet. Technology has enabled us to have sex without conception and conception without sex. This technology has allowed infertile couples to enjoy conceiving, bearing, and parenting genetically-related offspring in far greater numbers than was possible even fifty years ago. Procreation now can be accomplished after death.

This article explores the issue of posthumous conception, and addresses whether it should be treated as a private or a public matter. The article begins by examining the current approach to artificial reproduction and concludes that law and ethics have both viewed it as a private matter, because of the theories of personal autonomy and the intent of the users—theories that generally limit state interference. The article then proposes that posthumous conception should be treated more as a novel societal concept. As such, the law should develop its own legal doctrine and not rely on analogies to contract, probate, or gift law. In determining how the law should approach this concept, this article will argue that posthumous conception is not protected by the Constitution as a fundamental right or interest. Therefore, the state is not required to show a compelling interest before interfering. If there is no protected fundamental right, then the state has greater freedom to develop legal doctrine. Thus, the state can take a more comprehensive and balanced approach than simply following the individual rights polestar. The article next examines the various personal interests and public policies involved in posthumous conception. Finally, the article concludes that although there is a

5. Some commentators use the term "procreative liberty," especially in connection with the new reproductive technologies. See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22 (paperback ed. 1994) [hereinafter CHILDREN OF CHOICE] (where he defines procreative liberty at its most general level as "the freedom either to have children or to avoid having them").

6. Id.

7. See, e.g., Hart v. Shalala, No. 94-3944 (E.D. La. Dec. 12, 1993). In this case, a widow filed suit to obtain social security survivor's benefits for her daughter who was posthumously conceived, using the sperm of her deceased husband. The Social Security Administration denied survivorship benefits because under Louisiana law the daughter was not a "child" of the decedent. Later, the Social Security Administration settled the case and awarded survivorship benefits. See also, Benefits Awarded to In-Vitro Child, NAT'L L.J., Mar. 25, 1996, at 28; Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (1993) (donee of sperm requested release of deceased donor's sperm which donor had willed to her so that she could be artificially inseminated).

state interest in respecting the interests of its citizens in using this technology, the state has greater interests that justify tighter regulation. The article ultimately proposes that posthumous conception doctrine be shaped by the principle of providing the would-be child with at least a minimum quality of life.

II. PRESENT APPROACH TO ARTIFICIAL REPRODUCTION

A. Artificial Reproduction Methods

The main purpose of artificial reproduction is to help infertile couples reproduce through noncoital reproduction. The following discussion describes the most prominent of the noncoital reproduction methods. The oldest of these methods, artificial insemination,9 has been practiced since the 1950s 10 in large numbers in the United States.11 The process allows sperm12 to be artificially inserted into the woman’s body to fertilize her egg.13 Artificial insemination allows an infertile or impotent husband to conceive genetically-related children with his wife.14 On the other hand, artificial insemination by donor 15 allows the wife to have a genetically-related offspring, with the husband sharing the responsibility of rearing the child.

The traditional surrogacy contract arrangement 16 developed as another method of artificial assisted reproduction. Traditional surrogacy allows a husband to have genetically-related offspring when his wife cannot conceive or give birth to a child.17 In this method, another woman, 


11. The Royal Society of London first reported a case of artificial insemination done in humans in 1799 and attributed the case to physician, John Hunter. See Jacobs, supra note 9, at 860.

12. Throughout this article the terms sperm, egg, ovum, ova and gametes will be used. Egg and ovum are interchangeable terms. A gamete is either a sperm or an egg.

13. The process of inserting the sperm into the cervix can be done without medical assistance although it is done in most instances by a licensed physician. See Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986).

14. This process is called Artificial Insemination, Husband (AIH). Jacobs, supra note 9, at 859.

15. This method is called Artificial Insemination, Donor (AID). The donor is a man other than the woman’s husband. The donor usually remains anonymous. This method is also widely used by lesbian couples.

16. The traditional surrogacy contract arrangement is not the same as the gestational surrogacy contract. See infra note 28 and accompanying text.

17. An unnamed man, as well as an unmarried couple, could also enter into a surrogacy
also known as the surrogate,\textsuperscript{18} is artificially inseminated by the husband's sperm. After giving birth to the child, the woman releases the child to the husband and his wife.\textsuperscript{19}

The explosion in the development of new methods of conception as well as the tremendous public interest in artificial assisted reproduction resulted from the development of in-vitro fertilization.\textsuperscript{20} This method allows the fertilization of the egg and sperm to occur outside of the woman's body.\textsuperscript{21} The ovum is removed from the woman's body (extracted from her ovarian follicle) and is fertilized by a single sperm in a laboratory petrie dish.\textsuperscript{22} The fertilized egg,\textsuperscript{23} after it develops for several days, is implanted into a woman's uterus to initiate pregnancy.\textsuperscript{24} This technology allows an infertile couple to have genetically-related offspring. Hence, the husband's sperm fertilizes the wife's egg, extracorporeally in the laboratory. The fertilized egg is implanted in the woman's uterus. Users of this method also include unmarried and homosexual couples.

In-vitro fertilization makes possible the separation of genetic motherhood from gestational motherhood so that the birth mother may not be genetically related to the child. This remarkable process has created the "donor egg" and the "donor embryo" methods. In either method, a woman allows her eggs to be removed from her body and donated to someone else.\textsuperscript{25} When a couple uses the donor egg method, the husband's sperm and the donor's egg are extracorporeally fertilized and implanted in the wife's uterus to initiate pregnancy.\textsuperscript{26} The wife gives birth to a child, who is genetically unrelated to her. The wife is the gestational mother. The egg donor is the genetic mother. Similarly, in the donor embryo

\begin{itemize}
\item 18. The term "surrogacy mother" is really a misnomer since the woman being artificially inseminated is the child's biological parent. See infra note 28 and accompanying text for the true surrogacy arrangement.
\item 19. The wife usually adopts the child.
\item 20. Robertson, supra note 10, at 940.
\item 22. Robertson, supra note 10, at 940.
\item 24. Robertson, supra note 10, at 948.
\item 25. Egg and sperm donation are often commercial enterprises where the donors are paid for their eggs or sperm. Maggie Jones, Donating Your Eggs, GLAMOUR MAGAZINE, July 1996 at 168 (discussing the process).
\item 26. Similarly, the wife's egg could be extracorporeally fertilized by sperm from a donor.
\end{itemize}
method, an embryo created by the sperm and egg of one couple is donated to another couple.\textsuperscript{27}

Gestational surrogacy\textsuperscript{28} is another method of artificial insemination utilizing in-vitro fertilization. However, unlike the donor egg or donor embryo methods, the providers of the genetic materials must find a woman to gestate and give birth to their child and then release that child to them. The couple’s egg and sperm are extracorporeally fertilized. The fertilized egg is implanted in the woman’s uterus. The couple and the woman usually enter into an agreement providing for gestational surrogacy.\textsuperscript{29}

Gamete intrafallopian transfer (GIFT) and zygote intrafallopian transfer (ZIFT) are two additional methods of assisted reproduction. In the GIFT method, the sperm and egg are injected directly into the fimbriated ends of the fallopian tubes and fertilization occurs in the woman’s body.\textsuperscript{30} In the ZIFT method, the fertilized egg is injected directly into the fallopian tubes.\textsuperscript{31}

In conjunction with in-vitro fertilization, the process of freezing (cryopreservation)\textsuperscript{32} sperm,\textsuperscript{33} eggs and fertilized eggs (preembryos) has continued to expand and has further complicated the methods of artificial assisted reproduction. Gametes and embryos can be frozen and later

\textsuperscript{27} CHILDREN OF CHOICE, supra note 5, at 9.

\textsuperscript{28} The surrogate in this arrangement is the “true” surrogate.

\textsuperscript{29} CHILDREN OF CHOICE, supra note 5, at 9; Johnson v. Calvert, 851 P.2d 776 (Cal 1993), cert. denied, 114 S. Ct. 206 (1993). In this case a married couple and a woman entered into an agreement providing for the couple’s extracorporeally fertilized egg to be implanted in the woman’s uterus for gestation. When the woman gave birth to the child, she was to release the child to the couple, the genetic parents. The gestational mother refused to release the child and litigation, the first of its kind, ensued.

\textsuperscript{30} CHILDREN OF CHOICE, supra note 5, at 99-100.

\textsuperscript{31} \textit{Id.} at 101.

\textsuperscript{32} This process of freezing suspends further development of the gamete or embryo. The freezing takes place in liquid nitrogen. After freezing, the frozen gametes and embryos are stored. G. David Ball, \textit{Cryopreservation of Embryos}, 32 CLINICAL OBSTET. & GYN 508 (1989)(providing a scientific discussion of the process).

\textsuperscript{33} The use of frozen sperm in artificial insemination has been available for a long time. In 1961, the astronauts were able to store semen in case space travel harmed their reproductive systems. Shapiro, supra note 8, at 234; Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 285 (1993).
thawed for fertilization or for embryo implantation. 34 Thus, posthumous reproduction is possible. 35

B. Rights Based Approach: the Concept of Autonomy

Artificial assisted reproduction has developed rapidly, leaving the law to play catch-up so far as legal issues are concerned. Such legal issues include: the parental status of the husband and the donor in artificial insemination, 36 the validity and regulation of surrogacy contracts, 37 and in-vitro fertilization issues. 38

34 The combination of the types of births that may result seems endless. For example, births may take place years after the genetic parents are dead. Identical twins may be born years apart. Different gestational mothers may give birth to identical twins. Grandmothers may gestate their grandchild. These technological advances both in assisted reproduction and in contraceptives and the legalization of abortion have led Professor Robertson boldly to write: "The decision to have or not have children is, at some important level, no longer a matter of God or nature, but has been made subject to human will and technological expertise. It has become a choice whether persons reproduce now or later, whether they overcome infertility, whether their children have certain genetic characteristics, or whether they use their reproductive capacity to produce tissue for transplant or embryos and fetuses for research." CHILDREN OF CHOICE, supra note 5, at 5.

35 Posthumous reproduction includes the birth of a child conceived after the death of one or both of his or her genetic parents or from the implanting and gestating of an embryo after the death of one or both of the child's genetic parents. Professor Robertson would include a brain-dead or comatose pregnant woman, who is kept on life support to allow the fetus to develop. John A. Robertson, Posthumous Reproduction, 69 IND. L.J. 1027, 1050-51 (1994).

36 Legislation has been enacted in many states to clarify that the husband of the wife who has been artificially inseminated by a sperm donor other than her husband (AID) is treated as the legal father of the child if he has consented. See, e.g., ALA. CODE § 26-17-21(a) (1996); CAL. CIV. CODE §§ 7005(a), 7613(a) (West 1995); COLO. REV. STAT. ANN. § 19-4-106(1) (West 1996); IDAHO CODE § 39-5405(3) (West 1996); ILL. ANN. STAT. ch. 750, para. 40/3, § 3(a) (Smith-Hurd 1996); N.J. STAT. ANN. § 9:17-44(a) (West 1996); TEX. FAM. CODE ANN. § 151.101(a) (West 1996).

37 States are beginning to enact legislation to regulate surrogate contracts. See, e.g., ARIZ. REV. STAT. ANN. § 25-218(A) (1996) (no person may enter into the formation of a surrogate parentage contract); D.C. CODE ANN. § 16-401(4)(A)-(B) (1996) (definition of a surrogate parenting contract); FLA. STAT. ANN. § 742.13(5)-(7)(1996) (defines the terms associated with a gestational surrogacy contract); KY. REV. STAT. ANN. § 199.590(4) (1996) ("A person . . . shall not be a party to a contract . . . which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination"); N.H. REV. STAT. ANN. § 168-B:19(II) (1995) (a surrogate and the intended parents must receive genetic counseling); N.H. REV. STAT. ANN. § 168-B:21 (1995) (the parties to a surrogacy contract must petition the court for a judicial preauthorization of the surrogacy arrangement); N.Y. DOM. REL. LAW § 122 (West 1996) (surrogacy contracts are void because they are contrary to public policy); VA. CODE ANN. § 20-156 (Michie 1996) (regardless of the genetic relationships of all parties in a surrogacy contract, intended parents will be the parents of a child born to the surrogate).

Many have argued that artificial assisted reproduction law should be approached from a rights-based perspective. The concept of autonomy and self-determination should gird artificial reproduction law. These advocates contend that contract law should govern the parties involved in artificial reproduction. They further assert that artificial reproduction should be considered the equivalent of procreation—that it is part of procreation, protected by the liberty clause of the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution. These advocates contend that the government should not intervene unless there is harm. However, these advocates’ definition of harm is so narrowly defined that it would seldom be found. Their definition of harm relies on the principle that existence is better than nonexistence. Therefore, there is no harm unless one can show that the child would be better off having not been born. As a result, few circumstances constitute harm—life is better than nonexistence. However, this approach overshadows both the welfare of children who are deliberately created and the bargaining strength of the parties.

III. POSTHUMOUS CONCEPTION—A NOVEL SOCIETAL CONCEPT

Among legal scholars addressing the issue of surrogate motherhood contracts, Professor Richard Barnes has argued that the best approach is
to abandon analogies to existing doctrines, such as contract, probate, or gift law. Rather, the law of surrogate motherhood contracts should develop as a novel question. This allows proper consideration of the numerous moral, ethical, and public policy concerns it presents. His idea is appealing when approaching the issue of posthumous conception. Furthermore, when considering that posthumous conception exists only because of modern advancements in science and technology, one better appreciates Barnes’ argument that analogies to historical areas of the law may result in the development of an inadequate doctrine.

On the other hand, the fundamental element of posthumous conception, that a child may be born after the death of a parent, traditionally the father, is not new and has largely been accommodated in the law to that extent. Through coital reproduction, children may be conceived (or at least the sperm is in the mother’s body even if conception has not literally occurred prior to death) and gestate prior to the death of the father. However, in posthumous reproduction, the fertilization occurs after the death of one or both of the genetic parents. This concept is novel and has not been adequately accommodated in the law.

Posthumous conception is more novel than allowing the implanting and gestating of thawed embryos after the death of the genetic parent or parents. Posthumous conception allows a child to be conceived after the death of either or both of the gamete providers. The gametes may be frozen for long periods of time, and then thawed when ready to be used for conception. While cryopreservation has not developed to accommodate the ready use of frozen ova over any extended time, the freezing of sperm is quite common in almost all instances of artificial insemination by donor.

Posthumous reproduction, therefore, raises fundamental societal questions that are novel in the law. May dead people reproduce offspring


44. Common law recognizes posthumously-born children if they are born within 300 days of the death of the parent. This child is referred to as being "en ventre sa mere". If a child is born within this time period, the common law considers the child as the child of the deceased parent and with all the protection that this child would have had if he or she had not been born posthumously. In almost all of these cases the deceased parent is the father. Mothers have died prior to the child’s birth, but the death of the mother and the birth of the child are almost simultaneous occurrences. For purposes of this article, the case of a brain-dead woman, who gives birth in that condition, is excluded and not counted as a posthumous conception case.

45. See, supra notes 32 and 34.


47. See, Robertson, supra note 35, at 1035.
through artificial reproduction? What is reproductive value to the dead person? Should families be purposely formed in this manner? Do the would-be children have any interests? If so, do their interests conflict with those of their genetic parents? Does posthumous reproduction inherently generate social and economic issues beyond the private interests of those who are reproducing? For example, what are society’s interests in the welfare of the after-born child? What is the status of the embryo, the sperm or ova? Who controls the embryo or the gamete? And finally, who should decide these questions?

Posthumous conception complicates the issue and presents additional questions. What, for instance, are the interests of a dead person in posthumous conception when that person will not participate in the procreative experience, except to donate genetic material? Experiences of conception, gestation, and child rearing are all absent. Unlike posthumous gestation of the embryo, not all of the genetic material of the would-be child is present when the person dies as conception has not yet taken place. There is no developing human life as there would be if the decedent had, instead, left an embryo. Rather, there is only the potential for human life.

The legal issues raised in these instances—the nature and scope of posthumous conception—are beyond the scope of contract, probate and personal property law. They are unhelpful in identifying the values and meaning derived from conception, gestation, rearing, and the genetic tie. Moreover, reproductive values such as the sanctity of life, respect for life, and the protection of life, are not the underlying values of contract, probate, and personal property law.

For instance, even if gametes and embryos are considered to be property, the issue of posthumous reproduction involves values that are different from those underlying the values of property law. The underlying value of posthumous reproduction concerns the creation of human life, while the purpose of property law is the allocation and protection of property rights. In connection with probate law, there is more to posthumous reproduction than just putting one’s current affairs in order. Posthumous reproduction is the opposite—affairs are not put in order and consequences are created for others. Essentially, this is not an issue easily answered by analogies to traditional areas of the law; however, these same areas of the law may provide a framework to develop posthumous reproduction and posthumous conception doctrine.

Some of this framework is provided by three cases dealing with the issue of the use of frozen sperm for posthumous conception. All of these cases are instructive as to the utility of analogy to contract, probate, and
personal property law. The first case, *Parpalaix v. CECOS*, was decided by a French court in 1984. A widow, who wanted to be artificially inseminated with her deceased husband’s sperm, requested the sperm bank to release the sperm to her. Mr. Parpalaix, the husband, had made a single deposit of his sperm at the bank in 1981. He made the deposit with the understanding that his impending cancer treatment would cause his sterility. The sperm bank refused to release the sperm to the widow because Mr. Parpalaix had left no instruction for the use of the sperm.

The widow and her in-laws eventually filed a lawsuit for the release of the sperm in the Tribunal de grande instance (the French court of original jurisdiction). They alleged that as the natural heirs of Mr. Parpalaix, they became the owners of the sperm and that the sperm bank had breached its contract by refusing to turn over the sperm. The sperm bank argued that it was only obligated to the donor since sperm is the indivisible part of the body and thereby cannot be inherited absent express intent.

The court found contract and property theory inapplicable. Rather, 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.” Based on this rationale, the court held that the disposition of the sperm must be decided by the person from whom it was drawn. The court ultimately found that Mr. Parpalaix intended to give the sperm to his wife so she could conceive their child.

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48. There are cases dealing with the issue of prisoner rights and posthumous conception. Courts in California and Virginia held that prisoners on death row, who wanted to store their sperm so that it might be used for posthumous conception, had no right to reproduce. See Katherine Bishop, *Prisoners Sue To Be Allowed to Be Fathers*, N.Y. Times, Jan 5, 1992, at 14. Similarly, courts have held that prisoners had no right to provide sperm to artificially inseminate their wives while living. See Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (an inmate was denied habeas corpus relief to artificially inseminate his wife because the Bureau of Prisons’ restriction of inmate procreation was related to the furthering of penological interest of gender equality).


50. Shapiro, supra note 8, at 229-30.

51. Id. at 229.

52. Id. at 230.

53. The bank also argued (1) that its only legal obligation was to the husband under the deposit agreement, and (2) that depositing sperm was for therapeutic purposes to overcome male sterility, but giving birth was not a therapeutic matter. Id. at 231.

54. Id.

55. Id. at 232.

56. Id.
The second case is *Hecht v. Superior Court*, a 1993 California case. Prior to his death, William Kane stored sperm deposits at a California sperm bank. He executed an agreement with the bank to release the sperm only to him or his designee upon express written authorization. The agreement further provided that if he died, the bank was to release the sperm deposits to the executor of his estate. In a will executed shortly before his death, Kane named Deborah Hecht, his live-in girl friend of five years, as executor and residuary legatee. Kane also made sperm deposits, and signed a release form, authorizing release of the sperm to Deborah Hecht and her physician. However, since Kane never presented the release form to the sperm bank, the will controlled his probate property.

Kane's children by a previous marriage contested the will. At the children's request, the administrator filed a petition before the probate court claiming ownership of the sperm deposits. The petition presented three arguments. First, the will was invalid and they, as his sole heirs under the California intestate succession law, were entitled to all of the sperm. Second, if their settlement agreement with Hecht was valid, they were entitled to eighty-per-cent of the sperm. Finally, they also argued that the court should order the sperm destroyed on public policy grounds. Hecht responded by arguing that the sperm was not an estate asset because it had been gifted to her at the time of its deposit at the sperm bank. In the alternative, she argued that if it were an estate asset, either the will or the settlement agreement gave her the sperm. In essence, the destruction of the sperm against her wishes would violate her rights of privacy and procreation under the federal and state constitutions.

Hecht appealed the probate court's order to destroy the sperm. The appellate court first determined whether the probate court had jurisdiction to enter such an order since the "power of the probate court extends only to the property of the decedent" as established by the legislature. The court determined that the California Probate Code defined probate property as "anything that may be subject of ownership and includes both real and personal property and any interest therein." The court held that the donor of sperm has "an interest, in the nature of ownership, to the extent

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57. 20 Cal. Rptr. 2d 275 (1993).
58. The record is unclear as to why she did not serve as the executor and a special administrator was appointed. Id. at 277.
59. See id. at 276.
60. Id. at 278.
61. Id. at 279.
62. Id.
63. Id. at 280.
64. Id. at 281.
that he had decision-making authority as to the use of his sperm for reproduction. Such an interest is sufficient to constitute 'property' within the meaning of Probate Code § 62. The court held that Deborah Hecht would be entitled to the sperm if Kane's will was valid at trial. The court further held that because sperm is reproductive material, and thus, a unique type of 'property,' it declined to apply general personal property law.

The third case is Hall v. Fertility Institute of New Orleans, a 1994 Louisiana case. Barry Hall began making deposits of his sperm in a sperm bank for preservation on advice from his physician about the effects that his pending chemotherapy would have on his fertility. These deposits were to be used at a later date to artificially inseminate Christine St. John. St. John began and then discontinued preparations for artificial insemination during the period in which deposits were being made. Prior to his death, Hall executed a formal written act of donation of the frozen sperm to St. John, pursuant to Louisiana law.

The executrix of his will, his mother, sued the sperm bank for a declaratory judgment declaring either that Hall's sperm was probate property or that the sperm should be destroyed. She also sued for injunctive relief to prevent the release of the sperm absent a court order. St. John intervened, claiming the sperm had already been gifted to her. The trial court eventually granted the executrix's motion and enjoined the release of the sperm to St. John or any attempt at fertilization pending further court orders.

The court of appeals found that an inter-vivos gift of frozen sperm to a donee for the purpose of being artificially inseminated either during the donor's life or posthumously was not against public policy. However, the issue before the court was the appropriateness of the trial court's injunction. The court held that the injunction was proper because the trial court could reasonably conclude that the executrix had made out a prima facie case that the inter-vivos donation was invalid. If the decedent-donor was "competent and not under undue influence at the time the act was passed, the frozen semen is St. John's property, and she has full rights to its disposition." If he was incompetent, then the gift failed and the sperm would be probate property.

Although the Hecht Court found that the probate court had jurisdiction because of the property interest in Kane's frozen sperm, its rationale

65. Id. at 283.
66. Id.
67. 647 So. 2d 1348 (La. App. 4th Cir. 1994).
68. Hall, 647 So. 2d at 1351.
69. Hecht, 20 Cal. Rptr. 2d 275.
was similar to that of the French court in Parpalaix. Both courts tied the sperm donor's interest to the unique nature of sperm. The interest, which the California court 70 called "property," was the donor's decision-making authority over the use of the sperm for procreative purposes. In Parpalaix, 71 the Court did not strain to find an analogy to property law 72 but, nevertheless, reached the same conclusion—that the issue was about posthumous procreative liberty. Both courts emphasized that general property law did not accommodate issues of procreative decision-making.

In Hall, the Louisiana Court 73 used the term "property" in reference to frozen sperm 74 and held that the case would be decided by Louisiana gift law. The court did not note the uniqueness of sperm as did the courts in Hecht and Parpalaix. Rather, the Court simply accepted the notion that sperm was property and thus subject to gift law. In delineating the factors of donative intent, the Court focused on the purpose of sperm, though it had already stated that the issue of the constitutionality of artificial reproduction and the issue of posthumous reproduction were not present. 75 Rather, the validity of the gift depended upon the donor's decision-making authority over the use of the sperm for procreative purposes.

As these three cases illustrate, contract, probate, or gift doctrines do not allow the judiciary to grapple with the fundamental issues of posthumous conception. The courts only do what these doctrines allow them to do—to engage in a discussion about who has the right to make the decision about the use of the gamete and about the validity of the forum used for conveying the decision. A will, a contract, or an act of donation may be used as the instrument to make known the decision, but the substantive law is unhelpful in determining posthumous conception doctrine even if gametes are treated as property. The fundamental issues of posthumous conception concern human creation and its attending consequences. These consequences include those for the would-be child. 76 Therefore,

70. Id.
71. Shapiro, supra note 8.
72. A more natural analogy would be to testamentary guardianship, especially since the court's rationale for its decision was based on its finding that the uniqueness of sperm is its potential for human life. A will is often used to nominate a guardian for the decedent's children, that is, to provide a forum for this nomination.
73. Hall, 647 So. 2d 1348.
74. There are others, advocating that gametes should be perceived as property. See, e.g., William Boulter, Note, Sperm, Spleens, And Other Valuables: The Need To Recognize Property Rights In Human Body Parts, 23 Hofstra L. Rev. 693 (1995); Michelle Bourinoff Bray, Note, Personalizing Personality: Toward A Property Right In Human Bodies, 69 Tex. L. Rev. 209 (1990).
75. Hall, 647 So. 2d at 1351.
76. See Part III, Section B (1) for a discussion of the principles and policies underlying the concept of posthumous conception.
posthumous conception should be approached as a novel societal concept: a concept which requires formation of its own doctrine rather than a reliance on analogies to doctrines of property and contract law.

IV. POSTHUMOUS CONCEPTION—PRIVATE\textsuperscript{77} OR PUBLIC MATTER?

How should society deal with posthumous conception? Should the issue of posthumous conception be left to the individual to decide without state interference? If the benchmark for the need to set legal norms is when a personal decision raises troublesome moral and ethical issues which become a matter of public morality and ethics, then in the case of posthumous conception that time has come.\textsuperscript{78}

If posthumous conception requires its own legal doctrine,\textsuperscript{79} then the framework for the doctrine should begin with the United States Constitution. The Constitution restricts government interference with an individual's fundamental rights unless there is a compelling interest to do so. Such interference must be closely tailored to accomplish that interest.\textsuperscript{80}

Thus, built into the concept of fundamental rights is the normative value of government neutrality unless there is a compelling interest because these matters are private. Society must tolerate the individual's practice of a fundamental right even if such practice is offensive to the majority. If it is not a fundamental right, however, the government has greater discretion in deciding whether or not to interfere.

A. \textit{The Constitution and The Right to Procreate}

The Supreme Court has addressed few cases directly dealing with the affirmative right to procreate as compared with the right \textit{not} to procreate. However, that right to procreate is arguably a fundamental right

\textsuperscript{77} The regulation of artificial assisted reproduction has largely been left to the private sector. For example, the artificial insemination statutes usually focus on the status of the child and on the biological or legal father, not on regulation. See \textit{supra} note 36. Only after surrogate motherhood became quite controversial (especially after several high profile media cases) have some states enacted statutes banning or condoning certain surrogate contracts. See \textit{supra} note 37. The private sector is the principal regulator of the various aspects of in-vitro fertilization. Peters, \textit{supra} note 2, at n.19.

\textsuperscript{78} The law should determine the legality and clarify the procedures for posthumous conception, especially if one defines moral issues as "those in which different values and duties of persons directly involved in the decision conflict" and defines ethical issues as "those that extend beyond the immediate situation to include implications of an individual's choice on a larger group of people." John C. Fletcher, \textit{Moral Problems And Ethical Issues In Prospective Human Gene Therapy}, 69 VA. L. REV. 515, 515 (1983).

\textsuperscript{79} Religion, morality, and ethics may be the underpinnings of legal doctrine, but they have no legally-binding force unless they become law.

\textsuperscript{80} Griswold v. Connecticut, 381 U.S. 479 (1965).
after examining two groups of cases. In the group concerning the right not to procreate, the affirmative right to procreate is implied. In *Griswold v. Connecticut*, the Court identified a right of privacy protecting a married couple’s access to contraceptives. In *Eisenstadt v. Baird*, the Court extended that right to unmarried people, stating that “If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” In *Carey v. Population Services International*, the Court upheld a minor’s right of access to contraceptives and affirmed that such access was essential to the decision as to whether to conceive a child.

In *Roe v. Wade*, the Court extended the right of privacy to include a woman’s right to abortion. In *Planned Parenthood v. Casey*, the Court reaffirmed a woman’s right to abortion prior to viability (although the three majority justices in this plurality opinion used an undue burden standard instead of *Roe*’s trimester framework). *Casey* recognized again that the “law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.”

In addition to Supreme Court cases directly addressing the issues surrounding reproductive rights, there have been a number of cases indirectly or implicitly addressing procreative liberty. Beginning in the early 1920s, the Supreme Court recognized the right “to marry, establish a home, and bring up children.” Later, in *Skinner v. Oklahoma*, the Court described the right to marry and procreate as basic civil rights

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81. *Id.*
82. *Id.* The Supreme Court identified the right of privacy in *Griswold* as a constitutionally protected right even though this right is not explicitly found in the Constitution. The majority and concurring opinions relied on the First, Third, Fifth, Ninth, and Fourteenth Amendments in order to find a general right of privacy applicable to the federal and state governments. Later cases developing the scope of the right of privacy have relied on the liberty provision of the due process clause of the Fourteenth and Fifth Amendments. Such rights as access to contraceptives, parenting, procreating have been identified as being under this privacy umbrella. *See supra* note 4
84. *Id.* at 453.
86. *Id.* at 685-688.
88. *Id.* The court held the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 183.
90. *Id.* at 851.
92. 316 U.S. 535 (1942).
"fundamental to the very survival of the race." In Stanley v. Illinois, the Court held that the right to conceive and raise one's children is an essential civil right, basic to humankind. According to the Court, this right is more important than property rights. The Court has also directly affirmed that the right to marry is a fundamental right. Based upon cases such as these, one may reasonably conclude that the law views procreation as a fundamental right.

The Supreme Court, however, has not decided a case directly determining whether artificially assisted reproduction is an aspect of the fundamental right to procreate. Is artificial reproduction, therefore, constitutionally equivalent to coital procreation? There are a number of similarities. The object of both is usually to produce genetically-related offspring. Professor John A. Robertson has found support in the Supreme Court's decisions for the proposition that the desire to make reproductive choices is to find self-fulfillment. Producing genetically-related offspring generally helps people define themselves. It creates an enduring bond with the next generation. There is often great satisfaction in creating children who resemble themselves.

Nevertheless, traditional procreation differs fundamentally from artificially-assisted procreation. The affirmative aspect of procreation includes conception, gestation, birth, and rearing offspring. In coital procreation the persons providing the gametes are involved in conception, gestation, and giving birth, with the female exclusively involved in gestation and giving birth. The gamete providers usually rear the offspring. Assisted reproduction has, however, changed the exclusivity of the gamete providers in conception, gestation, and giving birth. With this development, procreation can now be broken down into its various parts. Furthermore, persons, besides the gamete providers, may be used to collaborate in the process of procreation.

In artificial assisted reproduction, the intimate decision of choosing to procreate necessarily involves others. This involvement and the issues

93. Id. at 541.
94. 405 U.S. 645 (1972).
95. Id. at 651.
97. As already discussed in Part III, Section A, the right not to procreate is a fundamental right and falls within the umbrella of the right of privacy. It includes the right to use contraceptives and the right to abortion.
98. See Massie, supra note 42 (concluding that assisted reproduction is not equivalent to coital reproduction).
99. See, e.g., CHILDREN OF CHOICE, supra note 5, at 24.
101. Id. at 215.
102. This definition implicitly includes the voluntary choosing of a mate and the mate's consent.
relating to their involvement critically distinguish coital and assisted reproduction. In fact, everyone involved may have conflicting values, interests, and duties. Accordingly, the state has legitimate interests in defining the various relationships between the participants, in defining their rights and duties, and most importantly, in defining their relationship to the resulting child.

Artificial reproduction involving a couple providing its own gametes, gestation, and child rearing is probably equivalent to traditional procreation. The only intrusion by third parties are the technology providers. In the case of in-vitro fertilization, if the couple is married, the right of privacy in the context of marital intimacy would likely apply under the holding of Griswold. If the couple is unmarried, the cases of Eisenstadt and Carey would most likely be construed to extend artificial conception to them. Justice Brennan’s strong dicta in Eisenstadt, arguing that access to contraceptives went beyond the importance of the marital relationship to the individual, was directly affirmed in Carey. These decisions, however, were in the context of preventing conception.

Although there are similarities between traditional and assisted reproduction, assisted reproduction does not have the same heightened constitutional protection as does procreation. By definition, assisted reproduction requires collaborators. It removes reproduction from the private realm of the progenitors, and includes others who may have competing interests. Thus, artificially assisted reproduction, like adoption, requires greater state involvement.

Even if the Supreme Court upholds assisted reproduction as an aspect of the fundamental right to procreate, would it extend to posthumous reproduction, and specifically to posthumous conception? Several issues must be examined when considering this question. First, do the dead have any rights, constitutional or otherwise? Historically, the law has recognized freedom of testation, limited usually by the Rule Against Perpetuities as to how long the decedent may control the property after death.

104. The Supreme Court has protected the traditional view of family under the prevailing standard of determining fundamental rights: deeply rooted in history and tradition. In Michael H. v. Gerald D., 491 U.S. 110 (1989), the married couple was protected from intrusion by the biological father who wanted to assert parental rights of his biological child born to the wife during her marriage. Under this standard the right of an unmarried couple to procreate is not deeply rooted in this country's history and tradition.
107. See supra note 84 and accompanying text.
109. There is always the slight possibility that in traditional procreation that conception may occur after the death of the male, but the sperm would have already been deposited through the sexual act while the decedent was alive.
Contracts and trusts executed while living will be enforced after death. The decedent has decision-making authority regarding the guardianship of his or her child if there is no one else with legal parental responsibility. Decisions as to what should be done with one's property and guardianship of children after death are certainly foreseeable as a freedom that a decedent might have and use while living, and which the state will implement.

As a general rule, the scope of testamentary freedom is within the state's domain, and is not a fundamental right.\(^{110}\) If one follows the rationale in *Hecht*\(^{111}\) that posthumous conception is a property interest within the jurisdiction of the probate court, then the right to make the decision is not a fundamental right, requiring heightened scrutiny. Such a rationale allows the state greater discretion to regulate the decision.

A second issue to consider is whether technology creates rights? Where technology makes possible what was impossible in the past, does this give rights to the dead, by changing the definition of a right that was once only for the living? In other words, is posthumous conception an aspect of procreation, even when we know that posthumous conception presents only the potential for conception?

A final issue to consider is whether posthumous conception is as important to the donor as reproduction is to the living. Is the value of reproduction such that it should be constitutionally protected, with little interference by the state? Arguably, posthumous conception would give meaning, identity, and value to the decedent by giving the autonomy to decide and in the genetic tie. The decedent experiences none of the meaning obtained from conception, gestation, and parenting except for providing the gamete. If the gamete is an ovum, the woman gestating may have equal interests in parenting the child as the living sperm provider would have.

An argument for heightened constitutional protection for posthumous conception is, therefore, less warranted than one for posthumous reproduction where fertilization takes place prior to the death of a parent. At the least, the embryo represents a stage in the development of human life — even if there is disagreement about what an embryo is. All genetic make-up is present in the embryo. Conversely, in posthumous conception, there is a mere isolated gamete with the potential for human life. The decedent dies without knowing if conception will ever occur. In

\(^{110}\) See, e.g., *Hodel v. Irving*, 481 U.S. 705 (1987) (the U.S. Supreme Court, while interpreting the escheat provision of the Indian Land Consolidation Act of 1983, hinted that the complete abolition of descent and devise may be a taking under the Constitution).

\(^{111}\) 20 Cal. Rptr. 2d 275 (1993).
posthumous conception, the ultimate value for the decedent must be the genetic tie.

The desire to have offspring is often a very powerful force. The genetic tie is a form of immortality and connects the generations. For the living, the genetic tie also brings the opportunity to know and rear the child. "It may inspire an intimate bond between a parent and child." The dead will never be able effectively to cultivate such a bond. The genetic tie for the decedent is solely bound in the possibility of leaving a "piece of yourself in the world" through the would-be child. That possibility does not rise to the level of procreation when there is only a lone gamete.

After having considered these issues, it seems clear that posthumous conception is not a fundamental right. The rights of the dead have, historically, been limited to settling their estates. Extending the right to conceive posthumously would be constitutionally unsound because posthumous conception is not procreation in any meaningful way. The only real value of posthumous conception to the decedent is the genetic tie. No constitutional right should be afforded the genetic tie unless there is meaningful procreation. Leaving a gamete behind, which may or may not be used posthumously, is not procreation.

B. Developing Posthumous Conception Doctrine

1. Principles and Policies Underlying Posthumous Conception Doctrine

A community-oriented approach may be taken to develop posthumous conception doctrine if posthumous conception is not limited by a fundamental rights doctrine. This section examines important princi-
ple and policies that should be considered in developing posthumous conception doctrine.

The rights\textsuperscript{119} and protection of the would-be child are compelling public and social policy interests which should be considered when developing posthumous conception doctrine. Although no child has a right to be conceived,\textsuperscript{120} once born, a child does have a right to a minimum quality of life.\textsuperscript{121} Parents have both a moral and a legal obligation\textsuperscript{122} to provide a minimum quality of life for the child since they are the child’s natural guardians.\textsuperscript{123} If parents do not provide for the child’s welfare, the state has a duty of care to protect the child under its \textit{parens patriae} authority.\textsuperscript{124} If the parents are already dead, then the state has a greater duty to care for that child. In the case of posthumous conception, the child is either partially orphaned or orphaned at birth. Even a parent of a partially orphaned child, who was not posthumously conceived, may not be in a position to provide for the child without the state’s assistance.

Furthermore, the state has made certain policy decisions that promote a child’s opportunity to achieve a minimum quality of life. For example, one of the purposes for the social security system is to provide survivorship benefits for the dependent children of a deceased parent because the child still needs to be maintained. Such laws may not protect children who are conceived posthumously. Accordingly, the state does have a legitimate state interest to regulate posthumous conception to ensure the would-be child’s right to a minimum quality of life.

Moreover, the community has an interest in protecting the would-be child from being treated as an object or a chattel if traditional gift, probate or contract law is applied to the decedent’s gamete.\textsuperscript{125} If the donee (such as Ms. Hecht) dies after having received the gamete but prior to conception, then the gamete would be part of the donee’s estate and pass

\textsuperscript{119} The unconceived child’s rights are contingent upon his or her birth. See Peters, supra note 2, at 500-501 (discussing rights of the unconceived in connection with the common law’s recognition of some prenatal injuries).

\textsuperscript{120} A child does not have a right to be conceived. That decision is within the control of parents. The Supreme Court held in Roe v. Wade, 410 U.S. 113 (1973), that there was no right to be born within the first trimester after conception.

\textsuperscript{121} Peters, supra note 2, at 521, gives a comprehensive discussion of the right to a minimum quality of life and the right to nonexistence; Massie, supra note 42, at 145 raises a similar concern that more weight should be placed on the interests of the would-be child.

\textsuperscript{122} This moral and legal obligation is an established principle of Anglo-American law. I WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND *434-37.

\textsuperscript{123} All states appoint the parents as the natural guardians of their children and impose a duty of support.


\textsuperscript{125} Several commentators raise concerns about artificial reproduction because of the fear that it will lead to the commodification of children. See, e.g., Maura A. Ryan, The Argument For Unlimited Procreative Liberty: a Feminist Critique, 20 HASTINGS CENTER REP. 6 (Jul/Aug 1990).
to the donee’s heirs or devisees. Such transmission would undermine our society’s deeply rooted tradition of the respect for the sanctity of life. Consequently, the gamete may lose its symbolism of human life, and merely become fungible personal property. The donee’s successor may use the gamete for reproduction with a gamete from any other person, a consequence never intended by the donor.

An aspect of commodification may be part of traditional procreation because persons, more often than not, want offspring as a means to their own ends of happiness and self-fulfillment. It is important, however, to differentiate between the living and the dead. The child is not just an object created from the parents’ genetic material. Implicit in the right to procreate is the duty of responsibility to the child. The child needs a living parent to nurture him or her. The dead cannot nurture.

Although posthumous conception is not a fundamental right, the autonomy of the individual to make posthumous decisions may be of great value to the decedent. The public policy of promoting self-determination and self-happiness is an important and vibrant one in our law. However, it is only one of the many important, sometimes competing, policies. Professor Robertson has argued that procreative liberty is central to personal meaning, dignity, and identity. This argument may be true for the living, but it is surely not the same for the dead. Posthumous conception will give personal meaning, dignity, and identity to the decedent only to the extent that the decedent, while living, may experience personal meaning, dignity, and identity from knowing that posthumous conception may occur. The state’s interest in the well-being of this would-be child should tip the scales in favor of considering posthumous conception as a public matter.

It is an important public policy to enable infertile couples to have the choice to procreate if it gives them personal meaning, dignity, and identity. There is no similar compelling reason for posthumous conception, however, unless infertility or the possibility of infertility prevented conception during life. In Hecht, and possibly in Hall, there seems to be no reason why conception could not have occurred during Mr. Kane’s life. His desire to have a child conceived posthumously appeared to be motivated by his own personal folly.

126. Robertson, supra note 35, at 1041.
127. 20 Cal. Rptr. 2d 275 (1993).
128. 647 So. 2d 1348.
129. On October 21, 1991, he writes to his unconceived children: “I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide — as I hope she will — to have a child by me after my death. I’ve been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born.” 20 Cal. Rptr.2d 275, 277.
The living have more rights than the dead for the reason that the living make and enforce the rules for the dead. Limiting the dead hand is usually discussed in connection with how much power society should allow the dead to exert over property after death. This limitation has been justified on the basis that "[t]he welfare of society demands that the law should set limits to the power of the hand of the dead to control human affairs." This justification applies to how much control the living should allow the dead over posthumous conception. The purpose of posthumous conception is to produce offspring whom the living—not the dead—will gestate and rear. Society has an interest in controlling the dead hand when an individual's decision will affect the living to the same extent as posthumous conception. Furthermore, decisions that may seem to be irresponsible if made by the living are often protected from state interference. If they are requested in a will, the law will not enforce them. It is impossible to hold the dead accountable for their actions. They are, therefore, not deterred by their own self-interest.

The state has an interest in family formation although the policy of family autonomy and the constitutional right of privacy in the context of family formation deter state involvement. On the other hand, that deterrence is decreased in the area of posthumous conception since a fundamental right is not involved. Even if posthumous conception were a fundamental right, the state's interest is compelling because this novel technology may fundamentally change the family, a basic unit of society. Although alternative families may become the norm as opposed to the traditional intact family in the very near future, these families were not purposefully created with conception occurring after the death of at least one of the parents. Therefore, determining whether society should sanction the intentional creation of partially orphaned or fully

130. Austin Wakeman Scott, Control of Property By the Dead, 65 U. PA. L. REV. 527, 527 (1917).
132. See discussion supra Part III, Section A.
134. E.g., communes, unmarried couples, single parent families, stepfamilies, gay and lesbian families.
135. Joan D. Atwood and Renee Zebersky, Using Social Construction Therapy with the REM Family, 24 J. OF DIV. & REMARR. 133 (1995) (remarried (REM) families will outnumber all other forms by 2000); Shoshana Grinwald, Communication-Family Characteristics: A Comparison Between Stepfamilies (Formed After Death or Divorce) and Biological Families, 24 J. OF DIV. & REMARR. 183 (1995)(the stepfamily will be the dominant family structure by 2000).
orphaned children is not a decision that should be left as private when conception has not occurred.

The courts, both in Hecht\(^{136}\) and in Hall,\(^{137}\) found no merit in the objections of the siblings of the would-be child who wanted no other siblings to be posthumously conceived. Mr. Hall’s only child declared that the prospect of a posthumous blood relative made him emotionally upset, embarrassed, and angered.\(^{138}\) Mr. Kane’s two children raised similar objections.\(^{139}\) Both courts may have ignored these concerns based on the notion that parents do not consult with their children about procreation anyway. In the case of posthumous conception, however, the state’s usual strong interest in family harmony should not be so easily cast aside. The family has already been disrupted with the decedent’s death. Now, the decedent is deliberately conceiving a child and will never experience any of the interactions, good or bad, between the two sets of children and will never be in a position to help the older children adjust to the arrival of a new sibling. It is doubtful that such a disruption to family harmony is justified as a matter of policy if the decedent could have procreated during life.

The donee’s procreative rights to use the decedent’s gamete is also an important part of the discourse on developing posthumous conception doctrine. It raises the question of whether the procreative rights of the living extend to procreating with the dead. Procreative rights of the living, even as a constitutionally protected right, are not always a private matter. The law prohibits, for example, rape and incest.\(^{140}\) A donee’s right to procreate with the dead raises the same public policy concerns as when evaluating this issue from the perspective of the donor, except that the donee would experience most of the meaning of procreation. The fundamental issue of the welfare of the would-be child, however, prevents the donee’s interest from remaining a private matter.

On the other hand, the autonomy of the donee in choosing to procreate is important for self-determination and self-happiness and the fulfillment of the desire to have genetically-related children. For the donee, to have a child who is genetically-related to the donor may ease the grieving process and aid in the donee’s adjustment to life without the donor. The child may continue the “presence” of the donor in the life of the donee. The living parent may still achieve self-happiness and self-fulfillment with the decedent despite death. Without posthumous conception, a

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137. 647 So. 2d 1348 (1994).
138. Id. at 1350.
139. Hecht, 20 Cal. Rptr. 2d at 279 (“prevent additional emotional, psychological and financial stress on those family members already in existence”).
140. Peters, supra note 2, at 489.
widow would not have had a child. Posthumous conception viewed in
this way may appear as a gift from the dead to the living.

The autonomy of the donee in choosing with whom to procreate is
also an important interest with respect to limiting government regulations
as to who may procreate. Posthumous conception doctrine may balance
these interests, but the welfare of the would-be child is the most impor­
tant of the interests. In order to ensure the welfare of the child, the donor
and donee must be intimately known to one another and would have con­
ceived the child while the donor lived. Similarly, then, the donor must
have intended to procreate posthumously and must have conveyed that
intent while living.

In both Parpalaix and in Hall, the courts held that the donor’s
intent was a necessary requirement for posthumous conception. Accord­
ingly, the harvesting of gametes from dead bodies at the request of an­
other must be abandoned. Such harvesting without the decedent’s con­
sent violates the decedent’s right, while living, to choose not to have chil­
dren.

In summary, when considering the various principles and policies underlying posthumous conception, providing a minimum quality of life
for the child emerges as the primary concern. This concern outweighs the
interest of self-determination and happiness of the decedent or the donee.
At a minimum, society has an interest in ensuring that the would-be child has at least an adult to parent the child and that existing law does not hin­

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141. See, e.g., supra note 7. Ms. Hart is quoted, “I have always thought death was so
final . . . there are deals to be made, you can’t fix it. This time I thought, well, death scored one
point and we scored one, too.” Ellen Goodman, The Law vs. New Fact of Life, BOSTON GLOBE,

142. See, e.g., Id.

143. A renowned historian writes the following in her memoir about having a child with her
husband as opposed to adopting a child. “I wasn’t interested in adopting children. It wasn’t the
experience of caring for adorable infants and toddlers I wanted. It was a much more primitive
desire to produce the combination of my genetic material and John’s.” JILL KER CONWAY, TRUE
NORTH 133 (Vintage Books ed. 1994).

144. Posthumous conception as explored in this article does not include the issue of
anonymous donors whose gametes are stored in gamete banks. Anonymous donors do not intend
to procreate posthumously. They have no intent to have a genetic tie with the child or be
responsible for the child.

145. Shapiro, supra note 8.

146. 647 So. 2d 1348.

147. There are a few reported instances in which fresh sperm has been harvested from the
body of a dead person at the request of his widow. Maggie Gallagher, About Sperm: The Ultimate

148. See Part III, Section A (discussing Supreme Court cases dealing with the right not to
procreate).

149. In his comments to this author, Professor Michael Newsom has suggested that
posthumous conception doctrine should be examined from an analysis of relationships. Does the
living still have a protected right in the relationship despite the death of the other partner so that
posthumous conception is an aspect of that right?
der, but for the sake of the child's birth, his or her chances to a minimum quality of life.

2. Shaping Posthumous Conception Doctrine: Using the Principle Of A Minimum Quality of Life

The overriding principle that should shape posthumous conception doctrine is the protection of this class of children by providing them with at least a minimum quality of life at birth. This principle is equivalent to the minimum traditional best interests of the child standard, which courts have used in protecting parental rights from state interference. The minimum standard requires that the child not be harmed. This principle requires that the class of posthumously-conceived children be provided with a quality of life close to that of the traditional posthumously-born class of children. Unlike the traditional class, however, the threshold for harm is more acute because conception itself may be harmful unless the state has intervened and has already established rules governing the entire concept of posthumous conception. At a minimum, this standard requires that at the child's birth, a responsible parent be in place, ready to care for the child.

The child's birth would be comparable to the traditional posthumously-born child where the father has died. The mother would be in place to care for the child. The issue is more complicated with posthumous conception with a donated ovum because the gestating mother is not the biological mother. Whether the gestating mother has parental rights is another issue. Nevertheless, there is at least one adult, either the father or the gestating mother, who would be in place at birth to rear the child.

The selection of the child's other biological parent should not be left entirely at the decedent's discretion, though it may be given much deference. If posthumous conception can be aligned with traditional posthumous birth, the collective welfare of such children is better assured. The decedent's widow or widower would be the most desirable donee. In Hecht, the court upheld the decedent's choice of his live-in girlfriend. The court found that it was not against the public policy of California for an unmarried person to be artificially inseminated since the law already

151. Establishing posthumous conception doctrine may be better approached from the legislature enacting a comprehensive statute rather than by the judiciary on a case-by-case basis.
152. The Hecht court rejected the argument that California had a state policy against the formation of single-parent families. 20 Cal. Rptr. 2d 275, 286.
allowed it. Similarly, in *Hall*, the court found it was not against the public policy of Louisiana for an unmarried person to be artificially inseminated. The culture and morals of society have changed to the extent that unmarried couples are usually not completely stigmatized. More importantly, in today's society, legal discrimination against children of unmarried parents is greatly reduced.

Furthermore, the Supreme Court would probably construe *Eisenstadt* and *Carey* as extending the Equal Protection Clause to protect unmarried persons, such as Deborah Hecht, to participate in posthumous conception if a surviving spouse is allowed such participation. This approach is strengthened by the fact that single people are not excluded from the adoption process. Therefore, in the case of the unmarried couple, posthumous conception doctrine should require that during their lives they would have established more than a casual relationship.

Ideally, the selection of the child's other biological parent should not be extended beyond the choices set forth in *Parpalaix* and *Hecht*. First, the use of collaborators should occur only in the case where an ovum is the gamete in question. This limitation will minimize interests that other collaborators might assert. Second, these selections should approximate the conception choices that the decedent would have made while living. The would-be child should also be born approximately in the appropriate generation. Finally, limiting the choice of the designee, as in *Hecht* and *Parpalaix*, helps ensure that the child will have an opportunity to learn about the deceased parent. The quest for knowledge about one's biological link has been illustrated by the experiences of some adult adoptees. The posthumously-conceived child may have a similar desire.

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154. 647 So.2d 1348 (1994).
155. Since 1968, more than thirty United States Supreme Court cases have dealt with the issue of the status of illegitimacy. Illegitimacy is a suspect classification, requiring a heightened standard of review.
156. 405 U.S. 438 (1972).
159. Shapiro, supra note 8.
161. Even if the decedent is married, the selection should not be extended beyond the surviving spouse, including an infertile spouse, because of the interests that the collaborators might assert.
162. 20 Cal. Rptr. 2d 275 (1993).
163. Shapiro, supra note 8.
The issues of the selection and the donee's fitness were not seriously considered in either Parpalais or Hecht. The donees in the respective cases were a widow and a single person who had established a five-year committed relationship. The law assumes that cases such as these are appropriate for the collective welfare of the living. It seems the Hecht court did not realize the ramifications of its decision giving the probate court jurisdiction over the decedent's decision-making authority regarding the disposition of the sperm. Suppose, for example, Ms. Hecht had died before she had used the sperm. Would her estate be entitled to the sperm? Similarly, if the will had been found to be invalid, would the sperm have passed intestate? Could Ms. Hecht's or Mr. Kane's successors use the sperm for reproduction? These problems reveal that only the donee should be able to use the donor's gamete for the purpose of reproduction. The gamete would not become part of the donee's estate for contract, probate, or gift purposes. Furthermore, posthumous conception doctrine should clarify the method by which the donor conveys that he or she intends the gametes in question be used for reproduction. Such clarification will not, however, eliminate all delays because the validity of the method used to convey intent may become an issue.

The fitness of the designee is also a consideration. Such consideration of a future parent is not unprecedented when adoption is at issue. Because conception has not occurred, the would-be child's right to a minimum quality of life is analogous to the state's concern for an adopted child to have a minimum quality of life. If the designee is not fit to parent, an unconceived child is not harmed if he or she is not born. In determining the harm at issue, some have argued that the test of never being born for the unconceived is not comparable to the test of never being born for a living child. When courts have had to determine if being born is an injury in wrongful life cases, or how to determine damages in such cases, the courts have used the comparison between life and never having been born. No harm is usually found because life is better than nonexistence. The nonexistence test is off-point when applied to uncon

165. Shapiro, supra note 8.
166. 20 Cal. Rptr. 2d 275 (1993).
167. See, e.g., Hall, 647 So. 2d 1348 (La. App. 4th Cir. 1994)(raising the issue as to whether the act of donation of the frozen sperm was valid).
168. At a minimum the decedent and the donee should not be related so that the child would be born from an incestuous relationship. The donee should be emotionally and psychologically fit for parenthood.
169. Peters, supra note 2, at 536-547.
170. These cases are negligence cases. The child's conception or birth could have been prevented, but for the doctor's negligence. See Peters, supra note 2, at 497-506 (1989).
ceived children. For the living child, death is the alternative to never being born; but, death is not the alternative for the unconceived. 171

After considering the above discussion about the donee and the principle of providing the minimum quality of life for the would-be child, there seems to be no important argument for posthumous conception if the potential living biological parent refuses to parent or will not properly parent the child. Producing children for the sake of the genetic tie is an irresponsible decision. The decedent should also be limited to a single donee and a maximum number of children. Some may argue that since there is no regulation over anonymous donors in artificial insemination as to the number of donees and to the number of children they may conceive, why should there be a limit to the number of children that one may posthumously conceive? Unfortunately, artificial insemination has developed without state guidance in connection with the number of children any one donor may create. Such regulation may be inherently difficult to manage with the living. This is not the case when using frozen gametes of the dead. The banks can be regulated as to the disposition of the decedent’s gametes. Additionally, there is no reason not to regulate simply because it has not been done before. 172 At this point, the law is providing for the welfare of the would-be child by tailoring this child’s birth closely to that of the traditional posthumous child and is simultaneously limiting the dangers of state involvement in determining who should procreate. A traditional purpose behind procreation is the desire to have a genetically-related child to rear. The decedent will never experience the rearing of the genetically-related child. Society’s interest in not deliberately creating orphans and in the foreseeable ramifications of how the living will care for posthumously-conceived children justify limiting the number of posthumously-conceived children for a decedent. 173

If posthumous conception is allowed, the law must provide the same benefits for the would-be child as it does for the posthumously-born child of traditional procreation. Current paternity and maternity laws do not protect posthumously-conceived children. The vast majority of the children are not legally legitimate regardless of their parent’s marital status.

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171. The court in Hall, 647 So. 2d at 1351, similarly analyzed that allowing posthumous conception to occur prior to determining whether the donation of the frozen sperm to the donee was valid would cause irreparable harm to the living, not that an unconceived child would be harmed by never having been born.

172. In one high profile case, a physician had fraudulently used his own sperm to impregnate as many as 70 different women. Deborah Sharp, Fio. Suit Highlights In-vitro Industry's Controversies, USA TODAY. Nov. 15, 1996, at 3A.

173. Typically, births to unwed teenagers, welfare recipients, and other single women are considered to be examples of irresponsible procreation. See Linda C. McClain, “Irresponsible Reproduction,” 47 HASTINGS L.J. 339 (1996). Should not unrestricted posthumous conception also fall into this category?
because birth occurs more than 300 days after the death of one parent. Moreover, children conceived posthumously are in a different class than are children conceived by living, unwed parents because they are unable to establish the parent-child relationship with their deceased parent under present law. For example, they will not be automatically eligible, as are the traditional posthumous children, for such benefits as social security survivor benefits, worker's compensation benefits, and pension benefits.


175. They might be if the statute provides a longer period than the traditional 300 days for the child to be born after the death of the parent. See, e.g., R.J. GEN. LAWS § 44-30-25(2)(h) (1995) (when a taxpayer creates a family education account a taxpayer's posthumous child becomes the qualified beneficiary if delivered alive within 11 months from the date of death).

176. The Social Security Act provides survivorship benefits for children of deceased parents. The present social security law on paternal survivor benefits distinguishes on the basis of status at birth. If the status is legitimate, the child receives full social security benefits. If the status is illegitimate, the law imposes more qualification requirements. See, Kelly Wall Schemenauer, Comment, Adams v. Weinberger and Dubinski v. Bowen: Posthumous Illegitimate Children and the Social Security System, 73 IOWA L. REV. 1213 (1988).


A will is revoked in Georgia if a testator does not contemplate and does not provide for the traditional posthumous child. Ga. Code Ann. § 53-4-48(a) (1996).


181. A number of commentators have suggested reform to provide benefits for posthumously
The approach to reforming the law should be guided by the principle of providing a minimum quality of life for the child. Accordingly, the benefits for this class of children should be aligned closely to those benefits received by the traditional class of children born posthumously. The present laws should at least be reformed so that these children may have a longer time period to establish parenthood with the deceased parent. Despite the need, a close alignment between benefits for traditional posthumous children and posthumously-conceived children may be impossible because of other competing policy concerns. For example, the state’s interests in decedents’ estates for the orderly disposition of property and stable land titles may require a minimum time period in which posthumously-conceived children may be born and be eligible for inheritance from the deceased parent.

Whether it would be too onerous to require the decedent to make special financial arrangements for such children is also an important consideration. The principle of a minimum quality of life does not equate to the financial circumstances of the progenitors; thus, the poor will not suffer discrimination. However, this principle does require a consideration of the decedent’s ability to provide economically for the child. For example, in Hecht, Mr. Kane made some provision in his will for the would-be child. In Hall, the court, in determining whether Mr. Hall had intended that his frozen sperm be used for posthumous conception, considered the fact that he had made no provision for the child in his will nor had made inter-vivos arrangements. The concern for the economic welfare of the child may be a clue as to how society may judge responsibility and the dead hand. The philosophical concept of leaving part of one’s self behind is largely an element of narcissism. The emphasis should not be conceived or gestated embryos. See, e.g., Theis, supra note 174, at 922-23 (proposing topics to be covered in an uniform statute to provide rights for the posthumously-conceived child); Ellen J. Garside, Comment, Posthumous Progeny: A Proposed Resolution To The Dilemma Of The Posthumously Conceived Child, 41 LOY. L. REV. 713 (1996) (suggesting amendments to Louisiana law); Lisa M. Burkdall, Note, A Dead Man’s Tale: Regulating The Right To Bequeath Sperm In California, 46 HASTINGS L. J. 875, 903-07 (1995) (suggesting amendments to California law); Djalota, supra note 46, at 367-70 (proposing changes to the Uniform Probate Code).

182. The Uniform Status of Children of Assisted Conception Act, 98 U.L.A. § 4 (Supp. 1994), focuses on the public policies of finality and of the interests of children of assisted reproduction who are born prior to the death of the parent. Garside, supra note 181, at 726-27. This Act provides that children who are posthumously conceived or gestated have no parent-child relationship with the gamete providers. Only two states have enacted statutes modeled on this Act. Virginia allows the posthumously conceived child to be treated as a traditional posthumously born child as long as the child is born within ten months of the decedent’s death. VA. CODE ANN. § 20.154 (Michie Supp. 1994). North Dakota follows the USCACA and the posthumously conceived child must be in utero at the decedent’s death. N.D. CENT. CODE § 14-18-04 (1991).

183. See Garside, supra note 181, at 731.

184. 20 Cal. Rptr. 2d 275 (1993).

185. 20 Cal. Rptr. 2d 275.

186. 647 So. 2d 1348 (1994).
on the rights of a parent to conceive posthumously, but rather, on the 
parent’s responsibility for the posthumously-conceived child.

V. CONCLUSION

Posthumous conception puts the welfare of the would-be child 
squarely on the table as a societal issue, necessitating government in-
volvement. Although the autonomy of the individual in making personal, 
intimate decisions is a fundamental concept in our society, the decision to 
conceive posthumously as a personal decision extends the dead hand too 
far into the affairs of the living. Accordingly, this article suggests that the 
法律 take a more interventionalist approach toward this novel aspect of 
conception. The state does have an interest in regulating posthumous con-
ception to protect the would-be child’s interest in a minimum quality of 
life. This interest outweighs the interests of the decedent from having 
complete autonomy in making the decision to conceive posthumously.