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ARISING FROM THE DEAD: CHALLENGES OF POSTHUMOUS PROCREATION

ANNE REICHMAN SCHIFF*

The medical capabilities derived from modern reproductive technology, such as in vitro fertilization and cryopreservation, have enabled physicians and scientists to intervene in the procreative process in innumerable ways. However, this intervention in the natural reproductive process raises both moral and legal concerns. In this Article, Professor Schiff explores some of the conflicts that may result when an individual or couple elects to cryopreserve gametes or embryos and subsequently, one or both of the contributors dies, or when gametes are harvested from a dead body. This Article will specifically address the moral and legal responses to circumstances where the decedent has either clearly expressed opposition to posthumous use of the reproductive material or else the decedent's intent regarding posthumous use of the material is ambiguous. By discussing philosophical and moral positions relating to personhood and the body and analyzing legal issues such as reproductive choice and organ donation, Professor Schiff creates the necessary format to examine and recommend the proper legal treatment of this controversial aspect of posthumous procreation.

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INTRODUCTION

Throughout human history, death has always signified an awesome finality. The conclusive demise of the body necessarily led to the concomitant extinguishing of the procreative process. Notions of an afterlife or reincarnation aside, the grave signified the end of all human endeavors, and procreation constituted no exception. While posthumous reproduction has often occurred in circumstances where one or both parents died before a child was born,[1] conception after death, until recently, was unimaginable. Today, the ability to freeze and store reproductive material[2] and to harvest gametes[3] from dead

1. The father may die during the mother's pregnancy, or the mother may die during childbirth. *See* John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994). In addition, brain-dead pregnant women may be maintained on life-support systems long enough to deliver a viable fetus. *See id.* at 1051-64. However, this Article is confined to issues arising when conception, or implantation of an embryo, takes place after death.

2. Sperm and embryos can be cryopreserved in liquid nitrogen and subsequently thawed. While the freeze-thaw process presents more of a challenge with eggs due to the relatively large size of the egg and its delicate chromosomal structure, some success has been reported. *See* Steve Dow, *World First as Melbourne Egg Bank is Opened*, THE AGE, Feb. 6, 1996, at A4 ("Researchers . . . say their technology is the first shown to be

bodies[4] has made posthumous conception a reality.[5]

Posthumous procreation may come about in a number of different circumstances. In some cases, reproduction after death may have been specifically desired by the decedent. For example, in *Hecht v. Superior Court (Kane),*[6] William Kane's intention to procreate posthumously was absolutely clear. In preparation for his suicide, Kane deposited fifteen vials of his sperm at a sperm bank.[7] He expressed a wish, in both a "Specimen Storage Agreement" and in his will, that after his death the sperm should be released to Deborah Hecht, a

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safe.... [The technique] has also shown that freezing does not affect the eggs' cellular integrity—indicating that healthy IVF embryos should develop."). *See generally* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 127-28 (1988) (describing techniques for gamete and embryo cryopreservation) [hereinafter INFERTILITY].

3. A "gamete" is defined as "either the male sex or reproductive cell (i.e., the spermatozoon) or the female sex or reproductive cell (the ovum) which, upon uniting with the cell of the opposite sex, is capable of forming a new organism." J.E. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER G-9 (1996).

4. *See infra* notes 258-69 and accompanying text.

5. Although the following is not intended to be an exhaustive list, scholarly literature in the area includes: Rosalind F. Atherton, *Artificially Conceived Children and Inheritance in New South Wales*, 60 AUSTL. L.J. 374 (1986); Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73 (1995); Lisa M. Burkdall, *A Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875 (1995); Fred H. Cate, *Emerging Paradigms in Bioethics: Posthumous Autonomy Revisited*, 69 IND. L.J. 1067 (1994); Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Paul Coelus, *Inheritance Problems of Frozen Embryos (The Child En Ventre Sa Frigidaire)*, 7 PROB. L.J. 119 (1986); 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 (1994); Ellen J. Garside, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713 (1996); Sheri Gilbert, *Fatherhood From the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521 (1993); Derek J. Jones, *Artificial Procreation, Societal Reconceptions: Legal Insight From France*, 36 AM. J. COMP. L. 525 (1988); Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27 (1996); W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942 (1962); David A. Rameden, *Frozen Semen as Property in* Hecht v. Superior Court: *One Step Forward, Two Steps Backward*, 62 UMKC L. REV. 377 (1994); Robertson, *supra* note 1; *Live Sperm, Dead Bodies*, HASTINGS CENTER REP., Jan.-Feb. 1990, at 33 (commentaries by Cappy Miles Rothman and Judith Wilson Ross); Carolyn Sappideen, *Life After Death: Sperm Banks, Wills and Perpetuities*, 53 AUSTL. L.J. 311 (1979); E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Postmortem Insemination*, 1 J. L. & HEALTH 229 (1986-87); Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1127-34 (1996); Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57 (1995).

6. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

7. *See id.* at 276.

woman with whom he had been living for about five years, so that she could impregnate herself if she so desired.[8] Kane's existing children brought suit for the destruction of the sperm.[9] The California Court of Appeal held that a decedent's interest in his frozen sperm was "property" over which the probate court had jurisdiction, and that "at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction."[10] The court considered whether the bequest of this property to the deceased's lover for her impregnation contravened public policy because of her status as an unmarried woman and concluded that it did not.[11] A California superior court probate judge awarded Hecht three of the fifteen vials of sperm in accordance with a settlement agreement which provided that Hecht was to receive twenty percent of the estate's residual "assets." On appeal, the California Court of Appeal held that the sperm was not an "asset" of the estate which could be distributed in a manner inconsistent with the testator's intent, and that Kane's clear intent was that Hecht should be artificially inseminated with his sperm.[12]

Many legal and social policy questions are raised by situations such as that in *Hecht*, where a person explicitly authorizes posthumous procreation. For example, various 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. The applicability of current laws relating to survivors' benefits,[13] in-

8. *See id.* at 276-77.

9. *See id.* at 279.

10. *Id.* at 283.

11. *See id.* at 284-87. For an account of the extraordinary life (and death) of William Kane, see Burkdall, *supra* note 5, at 875-77; *see also* Hall v. Fertility Inst., 647 So. 2d 1348, 1351 (La. 1994) (holding that the validity of an act of donation executed by the deceased eleven months before his death, purporting to convey his interest in frozen sperm samples to a female friend in consideration of his "love and affection" for her, depended upon the deceased's competency and intention at the time of execution).

12. *See* Hecht v. Superior Court, 50 Cal. App. 4th 1289, 1295-97 (Ct. App. 1996).

13. *See* Chester, *supra* note 5, at 988-90. Professor Chester discusses the details of a recent Louisiana case, Hart v. Shalala, No. 94-3944 (E.D. La. Dec. 12, 1994), which addressed the issue of whether a child, Judith Hart, conceived through the process of *in vitro* fertilization after her father's death, was entitled to Social Security survivor's benefits. *See* Chester, *supra* note 5, at 988. Under the state intestacy laws, Judith would be required to show that she was in existence at the time of her father's death. *See id.* at 990. After extensive litigation, however, the case was settled and the Social Security Administration granted her survivor's benefits. *See id.* at 988-89; *see also Benefits Awarded to In Vitro Child*, NAT'L L.J., Mar. 25, 1996, at A8; *Social Security Case on Date of Girl's Con-*

heritance and support[14] must be examined. Furthermore, consideration of the appropriate limits of "dead hand" control in matters of procreation leads to questions concerning whether and how the Rule Against Perpetuities might apply in this context.[15]

This Article, however, is concerned not with the right to procreate posthumously, but with the right to avoid posthumous procreation. It focuses on situations where a surviving family member wishes to procreate using the deceased's gametes or embryos, under circumstances where the deceased, while alive, did not give express authorization for this course of action. In some cases, the deceased may have made very clear his or her objection to posthumous reproduction, and a surviving family member may nevertheless wish to use the deceased's reproductive material for procreation despite the deceased's known objection. In other situations, evidence regarding the deceased's wishes for, or objections to, posthumous procreation may be either wholly or partially lacking. A person's intentions concerning posthumous procreation may in many—if not most—cases be far less explicit than those of William Kane. For example, uncertainty as to intentions can arise when individuals or couples decide to store their gametes or embryos not for another's use after their death, but rather for their own use at some future point. They may, for instance, decide to freeze their reproductive material in anticipation of an event which they know or fear will have an adverse effect upon their procreative potential, such as exposure to radiation or to hazardous chemicals.[16] If the individual or couple

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ception is Settled, N.Y. TIMES, Mar. 12, 1996, at A13.

14. For a discussion of inheritance and support claims in posthumous reproduction, see Burkdall, *supra* note 5, at 889-97; Chester, *supra* note 5, at 1012-19; Coelus, *supra* note 5, at 130-43; Djalleta, *supra* note 5, at 364-70; Garside, *supra* note 5, *passim*; Gilbert, *supra* note 5, at 555-58; and Lorio, *supra* note 5, at 45-53.

15. *See* Leach, *supra* note 5, at 944. Leach suggests that the law should be flexible enough to adapt itself to the changing circumstances brought about by sperm banks, and that "the duration of a male 'life in being' under the Rule Against Perpetuities should be defined as the period of his reproductive capacity, including any post-mortem period during which his sperm remains fertile." *Id. See generally* Sappideen, *supra* note 5, at 314-16 (offering examples of how posthumous procreation complicates Rule Against Perpetuities issues).

16. *See* Leach, *supra* note 5, at 943 (stating that the original impetus for sperm cryopreservation in the 1960s was "to protect the issue of the astronauts from mutations resulting from ionizing radiation in space"); Elizabeth Kurylo, *Some GIs Hedging Their Future—Firms Get New Customers as Troops March Off to War*, ATLANTA J., Feb. 6, 1991, at A7 (noting that while a number of soldiers who are reported to have deposited sperm samples with sperm banks before departing for the Gulf War did so because they feared death, the motivation for others was a concern that chemical warfare would leave them unable to conceive healthy children); *GI's Told: We Want You For Birth Control—Father of "the Pill" Proposes Use of Military Volunteers for Long-Term Test of Frozen*

dies, leaving behind frozen gametes or embryos, and a family member or lover requests access to this material for posthumous procreation,[17] should the fact of cryopreservation by itself constitute evidence as to whether the deceased desired or even contemplated reproduction after death?

Furthermore, medical advances that enable physicians to harvest gametes from dead bodies raise issues concerning the rights and interests of a decedent's family members. For example, should a surviving family member be permitted to have a deceased's gametes removed for reproductive purposes when there is no evidence that the deceased would have authorized this procedure? In several reported instances this request has been made and granted, following the unexpected death of a male family member or lover.[18] It may also

Sperm, S.F. EXAMINER, July 7, 1994, at A4 (suggesting that the military should supply volunteers for an experiment using cryopreservation of sperm as a form of birth control, whereby men could store sperm for later use before undergoing vasectomies); Craig A. Winkel & Gregory T. Fossum, *Current Reproductive Technology: Considerations for the Oncologist*, 7 ONCOLOGY 40, 40 (1993) (describing techniques for sperm and embryo cryopreservation and suggesting that these options may benefit cancer patients undergoing treatment likely to destroy testicular or ovarian function).

17. *See, e.g.*, Shapiro & Sonnenblick, *supra* note 5, at 229-33. Shapiro and Sonnenblick discuss a prominent French case, Parpalaix v. CECOS, T.G.I. Creteil, Aug. 1, 1984, Gazette du Palais [G.P.], Sept. 15, 1984, at 11, in which the decedent deposited sperm in a sperm bank in anticipation of chemotherapy treatment. *See* Shapiro & Sonnenblick, *supra* note 5, at 229. The tribunal ordered the deposited sperm to be released to the widow upon her request despite the lack of a written declaration as to the decedent's intent, on the basis of testimony by the decedent's parents and wife that the decedent had wished "to make his wife the mother of a common child," and that his marriage two days before his death was evidence of this desire. *See id.* at 232; *see also Widow Loses Court Fight to Obtain Frozen Embryo*, BUFF. NEWS, May 12, 1993, at 2 (discussing how a French court refused a widow's request for the release of two frozen embryos which she wished to have implanted, reasoning that the contract signed by the husband and wife prior to his death stated that the embryos were to be destroyed if the marriage ended for any reason); Ann Pepper, *Man Wants Surrogate to Carry Grandchild: He's Determined to Hold Dead Daughter's Baby*, MORNING NEWS (Dallas), Dec. 20, 1996, at A37 (describing couple's quest to find a surrogate mother to bear the child of their deceased daughter, whose eggs had been fertilized with donor sperm and frozen prior to her treatment for leukemia); Patricia Reaney, *British Widow Wins Fight to Have Husband's Baby,* REUTER'S WORLD SERVICE, Feb. 6, 1997 (describing a British court of appeals decision allowing a widow access to her deceased husband's sperm despite the absence of his written consent to her use of the sperm; the court ruled that the widow could not have the procedure performed in Britain, but would have to go to Belgium for that purpose).

18. *See, e.g.*, Ivor Davis, *Posterity Insurance, AIDS, Infertility and Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets*, CHI. TRIB., Apr. 26, 1988, at 5-1 (discussing case in which a 15-year-old Los Angeles youth's sperm was extracted at his family's request as he lay in a coma after being shot in a gang-related incident); Ike Flores, *Newlywed Dies in Crash, But Hopes for Children Live in Extracted Sperm*, L.A. TIMES, July 3, 1994, at A10 (reporting sperm extraction procedure performed on 22-year-old Emanuele Maresca at his widow's request, after he was killed in a car accident 16 days after their marriage); Maggie Gallagher, *The Ultimate Deadbeat Dads*, NEWSDAY, Feb. 1,

be possible for egg-bearing ovarian tissue to be transplanted from a dead woman to an infertile woman.[19] Should the procreative wishes of the living be fulfilled despite the absence of prior authorization by the deceased?

This Article examines the competing interests at stake when a surviving family member wishes to reproduce using the deceased's gametes or embryos, in the face of the deceased's known objections or unknown wishes.[20] Part I examines the moral relationship between personhood and the body.[21] It explores views relating to the nature of a person's interest in his or her gametes, or in an embryo created from those gametes, and suggests that the characterization of this interest is not self-evident, but rather is determined in large measure by the desired legal consequence. Part II discusses the law's approach to allocating decision-making authority between the individual, the family and the state with respect to the disposition of corpses and the donation of cadaveric organs, in order to examine whether the models that apply in those contexts are appropriate for posthumous procreation.[22] Part III analyzes the concept of posthumous harm, and maintains that an individual has interests which survive his or her

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1995, at A28 (discussing sperm extraction from the body of 29-year-old Anthony Baez, at his widow's request, after Baez died in police custody); *Sperm Taken From Another Dead Man*, S.F. CHRON., Jan. 25, 1995, at A5 (reporting sperm harvested at widow's request from a 34-year-old man killed in a car accident). *See generally Live Sperm, Dead Bodies*, *supra* note 5, at 33-34 (presenting ethical positions for and against posthumous sperm harvesting in circumstances where the deceased's wishes in this regard are unknown).

19. *See* Eugene Robinson, *Furor Over Fertility Options: Should Eggs from Fetuses or Cadavers be Used to Help Women Become Pregnant?*, WASH. POST, Jan. 11, 1994, at Z6; *see also* Gail Vines, *Growing Human Eggs is "Tougher Than They Think,"* NEW SCIENTIST, Jan. 15, 1994, at 7 (describing some practical difficulties associated with egg removal after death). Moreover, since females are born with a lifetime supply of eggs, egg retrieval may be feasible even from very young girls, whether alive or dead. *See They Are The Egg Men*, THE ECONOMIST, Sept. 3, 1994, at 79, 80; *see also Donor Cards Expanded to Human Eggs*, ST. PETERSBURG TIMES, July 7, 1994, at 1A (describing debate in Britain regarding the suggestion by British doctors that eggs may be taken after death from girls as young as 12, when a donor card is signed before death).

Even more controversial is the specter of ovarian grafts from aborted fetuses to generate eggs for infertile women who have no viable eggs of their own. Since a ten-week-old female fetus *in utero* already has a full complement of eggs, it may be possible to implant a fetal ovary into an infertile woman. The ovary would then grow to adult size, and the eggs would mature naturally. *See* Gina Kolata, *Fetal Ovary Transplant is Envisioned*, N.Y. TIMES, Jan. 6, 1994, at A16. While the prospect of a genetic "parent" who has never itself experienced independent existence raises fascinating legal and ethical questions, this Article will deal only with issues involved in procreation beyond the grave.

20. For extensive treatment of this issue, see Robertson, *supra* note 1. Robertson's views regarding the autonomy interests involved in posthumous reproduction are discussed and critiqued *infra* notes 248-78 and accompanying text.

21. *See infra* notes 26-115 and accompanying text.

22. *See infra* notes 116-199 and accompanying text.

death, and that these interests can be either harmed or promoted post-mortem.[23] Part IV addresses circumstances where a surviving family member wishes to harvest gametes from the deceased's body or wishes to use the deceased's cryopreserved gametes, contrary to the deceased's express wishes or in situations where little or no evidence exists as to the deceased's wishes in this regard.[24] Part V concerns the disposition of extracorporeal embryos in circumstances where one of the gamete providers dies, and the surviving partner wishes to use the embryos for reproduction either knowing of the deceased's explicit objection to such use or without clear evidence as to the deceased's wishes.[25] The main contention of this Article is that the right to avoid becoming a biological parent should generally be respected after death as it is in life, and that infringing upon this interest constitutes a serious violation of an individual's procreative liberty.

I. THE NATURE OF REPRODUCTIVE MATERIAL

A. *Perspectives on the Moral Significance of the Body and Its Parts*

What is the nature of a person's interest in his or her reproductive material? This is the primary question to be considered in evaluating the appropriateness of transmitting such material after death. How we regard the essential connection of gametes and embryos to the individual who generated them will significantly influence our views as to the suitable handling and disposition of these materials.

Modern medicine's ability to utilize body parts for a variety of purposes has highlighted the potential value of these "spare parts."[26] Blood can be used in transfusions,[27] many organs and tissues can be transplanted from living or dead donors to save or enhance the quality of another's life,[28] cells can be extracted to form patentable cell-

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23. *See infra* notes 200-47 and accompanying text.

24. *See infra* notes 248-84 and accompanying text.

25. *See infra* notes 285-329 and accompanying text.

26. *See* RUSSELL SCOTT, THE BODY AS PROPERTY 29-57 (1981) (describing the demand for body parts in medical and economic terms).

27. *See generally* RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 15-30 (1971) (describing scientific advances and technical problems in the field of blood transfusions).

28. *See generally* ROBERTA G. SIMMONS ET AL., GIFT OF LIFE: THE EFFECT OF ORGAN TRANSPLANTATION ON INDIVIDUAL, FAMILY, AND SOCIETAL DYNAMICS 83-84 (1987) (discussing the results of a survey indicating positive psychological responses of transplant recipients).

lines,[29] and gametes can be fertilized outside the body to create potential human life.[30] The recognition that body parts constitute a medically useful resource leads us to reconsider how we ought to regard these component parts. Are the products of our bodies essentially tied to our personhood, or is our relationship to these products in the nature of a somewhat more detached property interest? If it is the latter, who has dominion over this property, and for what purposes can the property be used?[31]

Contemporary philosophers and bioethicists portray a range of views concerning the interconnectedness of the body and its parts.[32] Two contrasting positions are represented by Paul Ramsey and John Fletcher. Ramsey, a Methodist theologian, regards bodily life as sacred.[33] In his view, respect for the sanctity of life implies respect for the body,[34] and this respect is undermined when the body is mechanistically reduced to its parts.[35] Ramsey's concern for the integrity of the human body leads him to state that "we ought not to begin to think of our bodies as an ensemble of parts left behind, like old clothes, to be given away or taken or—worst of all sold. We are the bodies we live."[36] In Ramsey's view, "a human being *has* (or better, *is*) a bodily integrity,"[37] and the respect owed to this physical integrity means that "there are some actions that must be judged wrong—even when they are embraced by a free and informed con-

29. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 481 n.2 (Cal. 1990); *see also infra* note 63 and accompanying text (discussing the *Moore* court's differentiation of property rights in one's own body and property rights in the body of another).

30. *See* ANDREA BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 147-51 (1989) (describing the *in vitro* fertilization technique).

31. These questions are well articulated by Leon Kass in the following passage:

> What kind of *property* is my body? Is it mine or is it *me*? Can it be alienated, like my other property, like my car or even my dog? And on what basis do I claim property *rights* in my body? Have I labored to produce it? Less than did my mother, and yet it is not hers. Do I claim it on merit? Doubtful: I had it even before I could be said to be deserving. Do I hold it as a gift—whether or not there be a giver? How does one possess and use a gift? Is it mine to dispose of as I wish—especially if I do not know the answer to these questions?

LEON R. KASS, TOWARD A MORE NATURAL SCIENCE 283 (1985).

32. *See* Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 MICH. J.L. REFORM 1055, 1060-75 (1987) (describing legal and philosophical views on the moral significance of the body).

33. *See* PAUL RAMSEY, THE PATIENT AS PERSON xiii (1970).

34. *See id.* at 208.

35. *See id.*

36. *Id.* at 207-08.

37. *Id.* at 190.

sent. . . ."[38] For example, Ramsey notes that a live individual donating his heart to save his child's life could still be a wrong act, even though the donation is made with free and informed consent.[39] As regards cadaveric organ donation, Ramsey favors a system where individuals make an affirmative choice to donate their organs, rather than a system where organs are routinely salvaged.[40] Expressing strenuous opposition to monetary remuneration for cadaver organ donation,[41] Ramsey points to "the potentially dehumanizing abuses of a market in human flesh."[42] His views as to the sacredness of the body lead him to criticize those who see the body as "only a thing-in-the-world to be subjected to limitless control,"[43] and who consequently celebrate every intervention which displays man's mastery over the body.[44]

In contrast to the position taken by Ramsey is that adopted by the Episcopalian theologian, Joseph Fletcher. According to Fletcher, the body is relatively insignificant in defining personhood.[45] Rather, our moral stature lies in our capacity to exercise freedom and make decisions regarding the terms of our health, life, and death.[46] Discussing organ donation, Fletcher is critical of "[t]he popular tendency . . . to combine vitalistic and organismic notions in the feeling that *life* somehow depends on organic unity and integrity, and that therefore personal identity or the *soul* does too"[47]—a tendency which he sees as partially responsible for what he terms "our shameful waste of human tissue."[48] Fletcher is far more receptive to a social policy of

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38. *Id.*

39. *See id.*

40. *See id.* at 208-11.

41. *See id.* at 211-15.

42. *Id.* at 215 (citing Joshua Ledenberg, *Biological Future of Man*, *in* MAN AND HIS FUTURE 263, 268 (G.E.W. Wolstenholme ed., 1963)).

43. *Id.* at 209.

44. *See id.*

45. Fletcher states: "To be a person, to have moral being, is to have the capacity for intelligent causal action. It means to be free of physiology! It means to have selfness or self-awareness. This is something that is not found in the body or in any of its organs." JOSEPH F. FLETCHER, MORALS AND MEDICINE 218 (1972) [hereinafter FLETCHER, MORALS]. Fletcher further developed his criteria for personhood in two of his articles. *See* Joseph F. Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, HASTINGS CENTER REP., Nov. 1972, at 1; Joseph F. Fletcher, *Four Indicators of Humanhood—the Enquiry Matures*, HASTINGS CENTER REP., Dec. 1974, at 4.

46. See FLETCHER, MORALS, *supra* note 45, at 9-10.

47. Joseph Fletcher, *Our Shameful Waste of Human Tissue: An Ethical Problem for the Living and the Dead*, *in* UPDATING LIFE AND DEATH 1, 4 (Donald R. Cutler ed., 1969) [hereinafter Fletcher, *Our Shameful Waste*].

48. *Id.* at 27.

organized organ giving than is Ramsey,[49] emphasizing social consequences as being more important than notions of individual freedoms in life and death matters.[50]

Throughout his examination of contraception, sterilization, artificial insemination, and euthanasia, Fletcher celebrates choice, knowledge of available courses of action, control, and responsibility as essential qualities of moral being:

> Choice and responsibility are the very heart of ethics, and the *sine qua non* of a man's moral status. While it is true that we have no responsibility for our own birth, and therefore no moral stake in it, we *do* have a moral stake in the conception and birth of others, of those whom we bring into this world as we ourselves were brought. Life, health, and death are therefore moral issues.[51]

Discussing the term "responsibility," Fletcher rejects the "common notion" of the term as meaning "answerability—the willingness or ability to be called to account."[52] Instead he proffers an alternative interpretation: "The ability and willingness to respond to human need, to answer a call for help in a concrete and particular situation."[53] He concludes that "the phrase 'moral responsibility' is essentially redundant, since to be moral or act morally is to be responsive to people."[54] In Fletcher's view, the essence of our humanness lies not in our corporeal selves, but in our ability to take responsibility for choices that may transcend the natural limitations of our bodies. To disregard the possibilities made available by technology and instead to succumb to a fatalistic attitude which sees "natural" biological consequences as preordained is thus to compromise the ethic of freedom within responsibility.[55]

Clearly, a range of perspectives exists concerning how the body

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49. *See id.* Quoting Edwin Diamond with approval, Fletcher writes: " 'Change seems to come only when some determined health group publicizes its advantages and orchestrates consent.' " *Id.*; *cf.* RAMSEY, *supra* note 33, at 209 (stating that "there is a real danger that the organized giving of organs will only erode still more our apprehension that man is a sacredness in the biological order . . . .").

50. *See* Fletcher, *Our Shameful Waste*, *supra* note 47, at 27 ("We might choose death for ourselves more rightly than we can choose it for others. This is exactly what a refusal or failure to be a donor, in one way or another, amounts to—choosing death for somebody else.").

51. FLETCHER, MORALS, *supra* note 45, at 10.

52. Fletcher, *Our Shameful Waste*, *supra* note 47, at 12.

53. *Id.*

54. *Id.*

55. *See id.* at 11-14.

and its parts are regarded.[56] The location of an individual's views on this spectrum may determine, to a large extent, that person's responses to many important ethical questions relating to treatment of the body, not only in life, but also after death. As is evident from contrasting the views of Ramsey and Fletcher, the conceptual lens through which one views the body profoundly influences one's responses to questions such as whether the harvesting of bodily materials from cadavers is consistent with the respect owed to the dead, whether pre-mortem consent for the donation of organs and tissues is required or should be presumed, and whether the legal regime that governs such transfers should be one of gift or sale. Many of these questions are pertinent not only to organ donation, but also to posthumous procreation.

However, the position that a person holds with regard to these issues in organ donation is not necessarily predictive of a person's views regarding posthumous procreation. Although there are some obvious analogies between cadaveric organ donation and posthumous reproduction, there are also powerful distinctions, because unlike other tissues and organs, reproductive material has the potential to produce human life. Indeed, because of the special quality of reproductive material, it is unclear precisely how Ramsey or Fletcher would view posthumous reproduction. While, according to Ramsey's perspective, the harvesting of gametes from dead bodies would most likely violate human dignity, it is not totally clear that Ramsey would be opposed to posthumous procreation. On the one hand, he might regard the use of gametes for procreation after death as destructive of the fundamental identification of a person with his or her body. On the other hand, he might celebrate this practice as essentially life-affirming in its potential to create new human beings.

Similarly, Fletcher's position on posthumous procreation is not altogether predictable. Under one interpretation, Fletcher might welcome reproduction after death as an instance of technological mastery which broadens the scope of available human choice over the natural limitations that death otherwise imposes over procreative plans. Moreover, he might view a system which inhibits the donation of cadaveric reproductive material as unjustifiable wastage. On the other hand, he might regard the donation of gametes to create a per-

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56. For a review of some of these perspectives, see H. TRISTAM ENGELHARDT, THE FOUNDATIONS OF BIOETHICS 104-47 (1986); KASS, *supra* note 31, at 276-98; Courtney S. Campbell, *Body, Self, and the Property Paradigm*, HASTINGS CENTER REP., Sept.-Oct. 1992, at 34, 34-40; William F. May, *Religious Justifications for Donating Body Parts*, HASTINGS CENTER REP., Feb. 1985, at 38, 38-39; and Murray, *supra* note 32, at 1060-75.

son as morally far less compelling than the donation of organs to save the life of an already existing person. Furthermore, given Fletcher's emphasis on moral responsibility, it is not clear that he would necessarily confirm the wisdom of allowing procreation when there is no possibility of the progenitor ever being held accountable for his procreative decision.

Thus, while analysis of differing perspectives on the relationship between the body and its parts provides some general guidance, it is not dispositive of the issue as it relates to posthumous procreation. In order to examine posthumous procreation, some of the general principles that have influenced the thinking of writers such as Ramsey and Fletcher need to be applied. Most importantly, the fundamental connection between our sense of self-identity, our "humanness," and the posthumous use of our gametes and embryos must be explored. To do so, we first need to focus on the nature of reproductive material and its meaning to us. Thus, the next section discusses how we view reproductive material and the uses to which such material may be put. The specific question to be addressed is whether sperm, eggs and embryos available after death should be categorized as "property" or alternatively, whether they share attributes of "personhood," and what implications for posthumous procreation flow from either of these characterizations.

B. Characterization of Interests in Gametes and Embryos

Analysis of the essential characteristics of reproductive material is necessary in order to consider whether an individual has a right to control the disposition of his or her gametes or embryos after death. If reproductive material constitutes "property" forming part of the deceased's estate, it may be bequeathed in the same way as other personal property. However, if it is not characterized as "property," different rules may apply.

The legal concept of "property" is expansive, and includes far more than the ownership of objects. A "property" interest is commonly said to signify a "bundle of legal rights"[57] that includes rights of

57. This metaphor has its origins in the writings of Wesley Hohfeld. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Although the term "bundle" was not used by Hohfeld, the metaphor of a "bundle of rights" or a "bundle of sticks" has featured prominently in the law. *See, e.g.*, BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928) ("The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.").

possession, use, control, and disposition.[58] As regards reproductive material, a property right gives broad decision-making authority to the individuals from whom the material originates, including the right to "create, store, thaw, discard and donate [gametes and] embryos as they feel best."[59] Thus, if reproductive material is viewed as "property," the "owner" may have extensive authority to control its disposition, to the exclusion of third parties.[60] Conversely, if embryos are characterized as "persons," [61] or if gametes are viewed as part of the "person" of the individual from whom they derive, greater restrictions may be imposed as to their disposition.[62]

Whether a property right exists in the body and its parts is a question that receives different responses, depending upon the context in which it arises. For example, although abhorrence at the enforced appropriation of the body in slavery compels negation of the notion of a property right in another's body, concern for individual dignity and self-determination may lead to a willingness to recognize a property interest in one's *own* body.[63] Furthermore, while laws relating to assault and battery protect an individual's dig-

58. *See* 63A AM. JUR. 2D *Property* § 1 (1984) (explaining that " 'property' signifies that dominion or indefinite right of use, control, and disposition which one may lawfully exercise over particular things or objects; thus 'property' is nothing more than a collection of rights").

59. John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 299 (1988).

60. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 455-56 (1990).

61. *See infra* notes 86-95 and accompanying text.

62. Of course, individuals may have broad decision-making authority with respect to a person, although their rights in this context will not be nearly as extensive as for property. For example, parents have decision-making authority regarding many areas of their child's upbringing including education, medical care, religious teachings, and discipline. This is the case even though they do not "own" their children. *See* Robertson, *supra* note 60, at 455 n.48. Parenthetically, it is interesting to note that in the nineteenth century, children were often treated as "property," in the sense that their capacity for labor was exploited for economic gain. *See* Viviana A. Zelizer, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 169-207 (1985).

63. As the California Court of Appeal has noted, slavery presents an entirely different context for applying property concepts than does biomedicine:

> The evolution of civilization from slavery to freedom, from regarding people as chattels to recognition of the individual dignity of each person, necessitates prudence in attributing the qualities of property to human tissue. There is, however, a dramatic difference between having property rights in one's own body and being the property of another.

Moore v. Regents of Univ. of Cal., 249 Cal. Rptr. 494, 504 (Ct. App. 1988), *aff'd in part, rev'd in part*, 793 P.2d 479 (Cal. 1990); *accord* SCOTT, *supra* note 26, at 26 ("Slavery is inspired by man's greed and cruelty, while transplantation and other therapies that employ human tissues are designed for man's benefit.").

nitary interest, they may also be seen as protecting a property right.[64]

Case law relating to the nature of a person's interest in his or her body reveals no consistent underlying philosophy or approach.[65] The decision to label an interest as "property" represents a conclusion, based upon public policy considerations, that the relevant interest is entitled to certain legal protections.[66] Given the range of positions that exists regarding the moral significance of the body and its parts[67] and the fact that different ethical and societal questions are raised depending upon which body part is in question, the nature and extent of the interest an individual has in his or her body and its parts are far from clear.[68] The fact that a person, while alive, can make a post-mortem anatomical gift may be interpreted as some evidence that an individual has a recognized ownership interest in his or her body.[69] However, views differ on whether the traditional rights associated with ownership, such as the right to dispose of one's property by sale, ought to apply to any or all human body parts, or whether a "property" classification is inappropriate.[70] For example, in most states individuals either may sell or donate their blood, sperm, ova, cells, and hair,[71] but are prohibited from selling nonregenerative or-

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64. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982). Radin, in her explication of a personalty theory of property, notes:

> If it makes sense to say that one owns one's body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one's personhood. If the body is property, then objectively it is property for personhood. This line of thinking leads to a property theory for the tort of assault and battery: Interference with my body is interference with my personal property.

Id.

65. *See* Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 220 (1990).

66. *See* Steinbock, *supra* note 5, at 57-58 ("[I]t is only after we determine the moral question of what may permissibly be done with something that we can determine if it is properly treated as property. The normative question logically precedes the conceptual legal analysis.").

67. *See supra* notes 32-56 and accompanying text.

68. *See* Thomas H. Murray, *Who Owns the Body? On the Ethics of Using Human Tissue for Commercial Purposes*, IRB, Jan.-Feb. 1986, at 1 (noting that "[t]here are three general models of our relationship with parts of our body that become separated from it: commercial property; surplus; or gifts").

69. *See In re* Moyer, 577 P.2d 108, 110 n.4 (Utah 1978) (stating that the Utah Anatomical Gift Act constitutes evidence that the state "legislature has recognized that a person has property rights in his body and can so dispose of his organs").

70. *See* Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 65-66 (1995).

71. *See id.* at 73.

gans and tissue.[72]

The recognition that "surplus" organs, tissues, blood or cells may have commercial value has focused attention in recent years on the nature of a person's interest in these materials once they have been removed from that individual's body. In *Moore v. Regents of the University of California*,[73] the plaintiff brought actions based on conversion and lack of informed consent after doctors obtained blood samples from him and took cells from his removed spleen without informing him that their purpose in so doing was to develop a cell-line.[74] After the plaintiff became aware that the defendants had developed and patented the cell-line and that they had entered into a number of highly lucrative contracts with biotechnology companies for rights to the cell-line and its profits, he sued for his share of the profits.[75] The California Supreme Court allowed the claim based on lack of informed consent.[76] However, it denied the conversion claim for a share of the profits on the ground that the plaintiff had no property right in his removed cells.[77]

With respect to sperm, eggs, and embryos, little judicial guidance exists regarding the characterization of these materials. The California Court of Appeal's conclusion in *Hecht v. Superior Court*[78] that sperm is a "unique type of 'property' "[79] due to its potential to create a child, was based heavily on the reasoning of the Tennessee Su-

72. *See* UNIF. ANATOMICAL GIFT ACT § 10 (amended 1987), 8A U.L.A. 58 (1993). At the federal level, the National Organ Transplant Act of 1984, Pub. L. No. 98-507, 98 Stat. 2339 (codified as amended at 42 U.S.C. §§ 273-74 (1988)), makes it a federal crime "for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." *Id.* § 301(a). Several state statutes supplement this Act by prohibiting the sale of human organs and nonregenerative human tissues. *See* Banks, *supra* note 70, at 73 n.220 (listing state statutes).

73. 793 P.2d 479 (Cal. 1990).

74. *See id.* at 480-82.

75. *See id.* at 482.

76. *See id.* at 496-97.

77. *See id.* at 488-93.

78. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

79. *See id.* at 283. In the 1996 involving an appeal from an order by a probate judge, the court of appeal again emphasized the distinction between genetic material and other forms of property. *See* Hecht v. Superior Court, 50 Cal. App. 4th 1289, 1295 (Ct. App. 1996). The court held that where there is clear evidence of the decedent's intent to bequeath his sperm in order to reproduce posthumously with a chosen donee, the decedent's right to procreate cannot be defeated by a contract between the donee and third parties. *See id.* at 1296. The court stated that "to the extent this sperm is 'property' it is only 'property' for that one person. As such it is not an 'asset' of the estate subject to allocation . . . to any other person whether through agreement or otherwise." *Id.*

preme Court in *Davis v. Davis*.[80] In *Davis*, the issue involved the status of frozen embryos in a divorce proceeding. The Tennessee court was faced with the question of who had dispositional authority, in the absence of any prior agreement by the couple, over seven cryopreserved embryos which had been created from Mr. and Mrs. Davis's gametes during their marriage—Mr. Davis, who wanted the embryos destroyed, or Mrs. Davis, who wished to donate the embryos to another woman for implantation.[81] Rejecting both the trial court's holding that embryos are "persons,"[82] and the Court of Appeals's implicit adoption of a "property" model,[83] the Tennessee Supreme Court, holding for Mr. Davis, concluded that embryos[84] "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."[85]

As noted by the court, three major ethical positions emerge in debates concerning the status of the embryo.[86] At one end of the continuum is a position which views the embryo as a person from the moment of conception, and accords the embryo all concomitant rights.[87] According to this stance, the zygote[88] "demands the unconditional respect that is morally due to the human being in his bodily

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80. 842 S.W.2d 588 (Tenn. 1992).

81. *See id.* at 589-90. Initially, Mrs. Davis wished to attempt to become pregnant with the embryos. *See* Davis v. Davis, No. 180, 1990 WL 130807, at *1 (Tenn. Ct. App. Sept. 13, 1990). However, by the time of the appellate decision, both the Davises had remarried, *see id.*, and Mrs. Davis, now Mrs. Stowe, wished to donate the embryos to an infertile couple. *See id.* at *1 n.1.

82. *See* Davis v. Davis, No. E-14496, 1989 WL 140495, **9-11 (Tenn. Cir. Ct. Sept. 21, 1989) (holding that human life begins at conception, that the doctrine of *parens patriae* controls "children" *in vitro*, and that consequently, custody of the embryos should be awarded to Mrs. Davis who could bring them to term). For critical comment on the trial court's opinion, see George J. Annas, *A French Homunculus in a Tennessee Court*, HASTINGS CENTER REP., Nov.-Dec. 1989, at 20.

83. *See Davis*, 1990 WL 130807, at *3 (noting that "[j]ointly, the parties share an interest" in the embryos, the court of appeals held that the Davises should have "joint control of the fertilized ova . . . with equal voice over their disposition").

84. The Tennessee Supreme Court used the term "preembryo," rather than "embryo," to denote the zygote at the stage immediately after division and up until 14 days after fertilization. *See Davis*, 842 S.W.2d at 593-94. This Article, however, follows common usage in referring to the early developing entity as an "embryo."

85. *Id.* at 597.

86. *See id.* at 596 (citing *Report of the Ethics Committee of The American Fertility Society*, 53 FERTILITY AND STERILITY 1S, 34S-36S (1990)).

87. *See id.* (citing *Report of the Ethics Committee of The American Fertility Society*, 53 FERTILITY AND STERILITY 1S, 34S-36S (1990)).

88. "Zygote" is defined as "the diploid cell resulting from union of a sperm and an ovum." ILLUSTRATED STEDMAN'S MEDICAL DICTIONARY 1590 (24th ed. 1982).

and spiritual totality."[89] Adoption of this view would compel implantation of the embryo and prohibit any action which might cause harm to it. Since many embryos may not survive the freeze-thaw process, cryopreservation might be considered harmful[90] and, therefore, could be prohibited. While fierce controversy continues over the moral status of the embryo,[91] the "embryo as person" view is not a position that is reflected either in American common law or current constitutional law. In the landmark abortion case of *Roe v. Wade*,[92] the United States Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[93] While a minority of states have enacted statutes that appear to prohibit the discarding of frozen embryos,[94] homicide laws and wrongful death statutes do not apply to harm caused to an embryo because an embryo is not considered a "person."[95]

At the other end of the continuum is the view that the embryo is "property" in the same way that household goods, for example, are property. According to this position, embryos are "mere tissue," and their owners have the sole right to determine their disposition. The problem with this point of view, however, is that it fails to acknowledge that the embryo should be accorded greater respect than other tissue due to its potential for human life.[96] As the New York Supreme Court noted in *Kass v. Kass*,[97] a case which, like *Davis*, involved a dispute between a divorced couple as to possession of their frozen embryos:

89. Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day* 13-14 (Vatican City 1987) (on file with author).

90. *See Davis*, 842 S.W.2d at 596; Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 399 (1986).

91. The scholarly literature on this subject is vast. *See, e.g.*, BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES (1992) (collecting sources and reviewing a range of conceptual views regarding the moral significance of embryos and fetuses).

92. 410 U.S. 113 (1973) (establishing trimester framework for state regulation of abortion).

93. *Id.* at 158.

94. *See* LA. REV. STAT. ANN. §§ 9:121-133 (West 1991); MINN. STAT. ANN. § 609.266(a) (West 1995); MO. REV. STAT. § 1.205.1(1)-(2) (1986); N.M. STAT. ANN. § 24-9A-3 (Michie 1994).

95. For analysis of the legal status of the embryo, see Robertson, *supra* note 60; and Andrews, *supra* note 90.

96. *See* Robertson, *supra* note 60, at 448 n.35 ("[W]e might wonder about a person who thought that the early embryo deserved no respect at all, and could be treated like dandruff, urine, or excrement.").

97. No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan 18, 1995).

> The fact that zygotes are not persons from a legal standpoint does not establish they are property within the ordinary sense of that term. They most assuredly are not. As life inchoate they represent the ultimate in nascency and potentiality. Equating zygotes with washing machines and jewelry for purposes of a marital distribution borders on the absurd. The issues involved transcend such a context. To paraphrase Shakespeare, they are the "stuff" of procreation.[98]

The failure to distinguish between embryos and other "property" by allowing the "owners" of the embryo unlimited discretion in their treatment of the embryo risks the devaluation of human life.[99]

The intermediate position, and the one adopted by the court in *Davis*, recognizes that the embryo is more than human tissue but at the same time is not a person. Thus, while the embryo is not accorded the status of a person, it deserves "special respect"[100] due to its potential to become a person and its powerful symbolic meaning.[101] Consequently, those who have created embryos "have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."[102] This view of reproductive material as comprising "quasi property,"[103] or property in which the donors retain an ownership interest with extensive dispositional authority, is one that has been adopted by existing case law,[104] by the American Fertility

98. *Id.* at *2; *see also* Hecht v. Superior Court, 50 Cal. App. 4th 1289, 1298 (Ct. App. 1996) ("A man's sperm or a woman's ova or a couple's embryos are not the same as a quarter of land, a cache of cash, or a favorite limousine. Rules appropriate to the disposition of the latter are not necessarily appropriate for the former.").

99. *Cf.* Rameden, *supra* note 5, at 397 (arguing that "[i]t is equally, if not more, persuasive . . . to appeal to the property theories espoused by Locke and Hegel that accord a very high respect for private property precisely *because* of one's labor and free will being intermingled with something").

100. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

101. *See id.* at 596; *see also* Andrews, *supra* note 90, at 362-63 (describing the view held by some that the embryo "is symbolic of human life or represents life in a way which makes its destruction symbolic of the destruction of persons"). The notion that an embryo is "potential human life" that the state has an interest in protecting, is integral to current constitutional doctrine on abortion. *See* Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992); Webster v. Reproductive Health Serv., 492 U.S. 490, 519 (1989); Roe v. Wade, 410 U.S. 113, 150 (1973).

102. *Davis*, 842 S.W.2d at 597.

103. Although the term "quasi property" is used here to include both gametes and embryos, it may be argued that the term "quasi person" is more accurate with regard to embryos, whose more developed potential for human life situates them closer to the "person" end of the "person/property" continuum than gametes.

104. *See, e.g.*, *Davis*, 842 S.W.2d at 597. In *York v. Jones*, 717 F. Supp. 421 (E.D. Va.

Society,[105] and by current practice.[106] In addition, the "quasi property" view is consistent with the recognition that choices relating to procreation and child rearing are "central to personal dignity and autonomy."[107]

The *Hecht* court, in its reliance upon the reasoning in *Davis*, implicitly assumed that the legal framework set forth in *Davis* regarding embryos should apply similarly to sperm. However, the moral status of embryos and the moral status of gametes seem clearly distinguishable. While the question of whether an embryo meets the criteria of "personhood" has aroused considerable controversy,[108] only the most extreme view would characterize sperm or unfertilized eggs as "persons."[109] In fact, in the case of gametes, the relevant distinction is

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1989), a district court seemed to adopt implicitly a view of frozen embryos as property. A married couple who had undergone IVF at a fertility clinic in Virginia brought suit against the clinic for refusing to release their frozen embryo, which the couple wished to have transferred to a fertility clinic in California. *See id.* at 422-24. The district court held that a bailment relationship existed between the parties, and that the plaintiffs had an action *in detinue* based on the defendant's refusal to return the property upon demand. *See id.* at 427. In *Del Zio v. Presbyterian Hospital*, No. 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (LEXIS, NY Library, NYMEGA File), a couple sued for intentional infliction of emotional distress and conversion when their extracorporeal embryo was intentionally destroyed by a doctor. The jury found for the couple on the emotional distress claim, but held for the defendants on the conversion claim. *See id.* The district court's statement that "the jury could reasonably have ... rendered a verdict for the defendants on the basis that the amount of damages for conversion was too speculative to be determinable" could be interpreted as supporting a view of the frozen embryo as property. *See id.* However, the jury's decision could also be understood as an unwillingness to treat human life as property.

105. *See Report of the Ethics Committee of The American Fertility Society*, 53 FERTILITY AND STERILITY 1S, 34S-36S (1990); *see also Report of the Ethics Committee of The American Fertility Society*, 46 FERTILITY AND STERILITY 1S app. E at 89S (1986) ("It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines . . . .").

106. Current sperm bank practice allows an individual who deposits sperm for his own future use (a "client depositor") to have primary decision-making authority as to the disposition of his sperm. *See* Gilbert, *supra* note 5, at 548. Individuals who deposit sperm for donation are required to sign a form waiving their rights to the sperm. *See id.* at 548 n.139. This requirement may be interpreted as an acknowledgment of the donor's ownership interest in his sperm. *See id.* at 548.

107. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

108. *See supra* note 91 and accompanying text.

109. As Peter Singer and Deane Wells state:

> We do not know of anyone who seriously asserts that the moral status of the egg and sperm before fertilization is such that it is wrong to destroy them. . . . [A]fter all, in our normal lives eggs and sperm are constantly being wasted. Every normal female between puberty and menopause wastes an egg each month that she does not become pregnant; and after puberty every normal male wastes millions of sperm in sexual intercourse in which contraceptives are used or in which the woman is not fertile . . . .

not between "persons" and "property," but rather between "ordinary property" and "unique property."[110] While gametes are properly characterized as "property" rather than "persons," they are nevertheless distinguishable from "ordinary property" because of the close relationship they bear to the personhood of the donor. Due to their life-creating potential and the fact that they carry nonreplicable characteristics, gametes are intrinsically and vitally connected to the personhood of the individual from whom they originate. Understood in this way, the *Davis* court's reasoning, although referring only to embryos, applies equally to gametes. Although sperm and eggs are not as powerfully symbolic of human life as is the embryo, they too "are the 'stuff' of procreation"[111] and, as such, can be viewed as belonging to an interim category of "quasi property," which is *sui generis*, comprising neither "persons" nor "ordinary property."

The rejection of the "person" or "property" characterizations and the carving out of an interim category has much appeal, in that it reflects a sense that the "person/property" dichotomy is too stark to adequately capture the essence of a person's interest in his or her bodily parts. Professor Wex Malone, in discussing relational interests in tort law, points out that the traditional classification of rights as belonging to the categories of either "person" or "property" impedes analysis of policy questions in a great many areas.[112] Malone observes that because the common law recognized only these two categories, many interests have been "awkwardly translated into incidents of

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PETER SINGER & DEANE WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION 71 (1985).

110. *See* Radin, *supra* note 64, at 959-60 (distinguishing "fungible property" from "personal property"). Professor Radin states that personal property comprises property which is so closely connected to us as individuals that it is "part of the way we constitute ourselves as continuing personal entities in the world," such as a wedding ring, a portrait, an heirloom, or a house. *Id.* at 959. She argues that objects or resources can be so closely bound up with personhood that "the person should be accorded broad liberty with respect to control over that 'thing.' " *Id.* at 960. Fungible property, on the other hand, comprises property that is interchangeable with money, such as "the wedding ring in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord." *Id.* Radin views the relationship between persons and things as a continuum from fungible to personal, *see id.* at 987, with a hierarchy of entitlements: "[t]he more closely connected with personhood, the stronger the entitlement." *Id.* at 986. Radin notes that some bodily parts, such as blood, may become fungible commodities, but that some "bodily parts may be too 'personal' to be property at all." *Id.* at 966. She concludes that it may be "appropriate to call parts of the body property only after they have been removed from the system." *Id.*

111. *See* Kass v. Kass, No. 19658/93, 1995 WL 110368, at *2 (N.Y. Sup. Ct. Jan. 18, 1995).

112. *See* WEX S. MALONE, TORTS IN A NUTSHELL: INJURIES TO FAMILY, SOCIAL AND TRADE RELATIONS 4-6 (1979).

ownership"—for example, a person's name, reputation, goodwill, literary property, and trademarks.[113] In arguing for a third category of rights, namely rights in human relationships, Malone states:

> The artificiality of this archaic twofold classification is patent, and a scheme of law whose protective scope was limited to so narrow a range of human needs must prove eventually to fall woefully short of the mark. In truth, the most important and vital claims to legal protection are far more complex than demands arising from harms to one's body or belongings. They are claims that originate in our social environment....[114]

Malone's point seems particularly apposite in considering the relationship of a person to his or her reproductive material. It is intuitively more satisfying to regard the interest of a progenitor in his or her gametes and embryos as relational, rather than as an interest in ownership or in personalty. But the difficult question raised by Malone remains: If the interest is not viewed as being governed by traditional laws applying to property or to persons, what legal principles should apply? This Article contends that the precise delineation of rights and interests falling within this interim category, as it pertains to posthumous reproduction, should be shaped by specific ethical and social policy considerations discussed below.[115]

II. THE LAW RELATING TO DEAD BODIES AND ORGAN DONATION

If reproductive material is viewed as a unique type of "property," whose property is it? Specifically, when an individual dies without explicitly authorizing posthumous procreation, or with an express wish that posthumous procreation not take place, can his or her reproductive material nevertheless be utilized after death for procreative purposes? Analysis of this question involves weighing the competing interests at stake: the interest of the surviving party in pursuing his or her procreative plans,[116] and the interest of the de-

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113. *See id.* at 5.

114. *Id.* at 3.

115. *See infra* notes 200-329 and accompanying text.

116. While this person is most likely to be the deceased's spouse or intimate partner, there are other parties who may claim an interest in the deceased's gametes. For example, when a 15 year-old boy was shot and killed in Los Angeles, his family requested the extraction of his sperm because "[he] had been their only son, and they had wanted the possibility of ensuring the family's male line." Davis, *supra* note 18, at 5-5. Furthermore, a family member who is infertile may wish to utilize the deceased's gametes, rather than using donor sperm or donor eggs or pursuing adoption. Even persons who never had an association with the deceased may attempt to establish a claim: "[I]f Elvis Presley had

ceased in controlling his or her procreative lineage.

Since no laws currently exist specifying who has the authority to make decisions regarding posthumous procreation, a useful starting point is to consider the law's approach in other relevant contexts involving dead bodies, namely, the disposition of corpses and the donation of cadaveric organs. As reproductive material constitutes a special type of "property," posthumous procreation raises important issues not present in these other two contexts. Nevertheless, all three circumstances involve potential conflicts between the individual now deceased and surviving family members in matters concerning the deceased's bodily integrity. Thus, the approach of the law in allocating decision-making authority between individuals, their families, and the state, both in organ donation and in the disposition of corpses, is relevant in considering how the competing interests should be weighed in posthumous reproduction.

A. *Decision-Making Authority with Respect to Corpses*

Under early English law, the ecclesiastical courts had sole jurisdiction over the mode and place of burial of dead bodies.[117] The church's claim to exclusive control in these matters was based on its recognized authority in matters of life and death, related to the notion that "[t]he spirit departed to the realms of the supernatural; the body was held by the divine agent to await resurrection."[118] Ecclesiastical control may also have stemmed from the church's ownership of burial grounds and the fact that it exercised probate jurisdiction.[119] Ecclesiastical control in this area was so extensive that the common-law courts were powerless,[120] and it was frequently asserted that "a dead body by law belongs to no one."[121] Authority for the proposition that there can be no property right in a dead body was based in part on dictum by Sir Edward Coke, who stated that "[t]he *buriall* of the *cadaver*, (that is, *caro data vermibus* [flesh given to worms]), is *nullius in bonis*, and belongs to ecclesiastical cognizance."[122] Coke's statement has been criticized as being without historical and legal

deposited sperm prior to his death, thousands of his fans would have tried to claim the rights to his sperm to bear Elvis' child." Gilbert, *supra* note 5, at 554.

117. *See* Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1241 (1974).

118. PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 126 (1950).

119. *See* Walter F. Kuzenski, *Property in Dead Bodies*, 9 MARQ. L. REV. 17, 18 (1924).

120. *See* JACKSON, *supra* note 118, at 126-27.

121. *Id.* at 127 (citing Foster v. Dodd, 3 L.R.-Q.B. 67 (1867)).

122. EDWARD COKE, INSTITUTES, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *203, *cited in* JACKSON, *supra* note 118, at 127.

foundation,[123] as has its interpretation that there is no property interest in a dead body.[124] It has also been suggested that the asserted lack of property rights in a corpse appears to be inconsistent with the practice, which continued in England until 1804, whereby creditors could arrest a corpse for a debt owed by the deceased.[125] Nevertheless, the proposition that no one has property rights in a corpse was consistently reiterated in the case law.[126]

The absence of a legally recognized property interest in a corpse and the total authority of ecclesiastical courts in matters pertaining to the dead had far-reaching implications. First, it meant that English courts could refuse to give effect to an individual's wishes regarding the disposition of his or her body after death.[127] Moreover, although the rule that no property rights existed in a dead body was based on reverence for the dead and sympathy for the relatives,[128] it ironically deprived the deceased's relatives of a private cause of action against unlawful interference with the body of the deceased.[129] While relatives had both the right and the duty to bury their kin, the absence of a property right in a corpse presented a legal obstacle in the efforts of family members to recover possession of the corpse from an interloper.[130] Interlopers were not uncommon, since the "no property"

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123. *See, e.g.*, Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193, 198 (1983).

124. *See Law of Burial*, 4 Brad. Surr. app. 503, 521 (note taken from the report of Samuel B. Ruggles, Referee, in the matter of the widening of Beekman Street in the New York Supreme Court in 1856) ("But even the dictum itself, if closely examined, will not be found to assert, that no individual can have any legal interest in a corpse. It does not at all assert that the corpse, but only that the '*buriall*,' is '*nullius in bonis*'. . . .").

125. *See* Kuzenski, *supra* note 119, at 18; *cf.* Note, *supra* note 117, at 1243-44 (citing the proposition that there was no support in Roman law for the arrest of corpses, and that the practice may have arisen from a misinterpretation of the technical language of the writ, which directed the sheriff to have the "body of the debtor" at Westminster on the day payment was due, without specifying whether the body be alive or dead).

126. *See, e.g.*, Williams v. Williams, 20 Ch. D. 659, 662-63 (1882) ("It is quite clearly the law of this country that there can be no property in the dead body of a human being."). In *Williams*, the court noted that "[i]t follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of." *Id.* at 665.

127. *See* Jesse Dukeminier, Jr. & David Sanders, *Organ Transplantation: A Proposal for Routine Salvaging of Cadaver Organs*, 279 NEW ENG. J. MED. 413, 414 (1968).

128. *See* Michael H. Scarmon, Note, Brotherton v. Cleveland: *Property Rights in the Human Body—Are the Goods Oft Interred With Their Bones?*, 37 S.D. L. REV. 429, 437 (1992).

129. *See* Kuzenski, *supra* note 119, at 18; 2 WILLIAM BLACKSTONE, COMMENTARIES *429 (1766) ("[T]hough the heir has property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes.").

130. Kuzenski, *supra* note 119, at 18-19.

rule contributed to a thriving trade of "body snatching" where "resurrectionists" would unearth newly buried corpses, remove them from their burial ground, and sell them to anatomy schools.[131] Although by the late eighteenth century courts did impose criminal sanctions for the unlawful disinterment of dead bodies,[132] relatives could neither maintain a private action in trespass for any unauthorized mutilation or dissection of the corpse, nor claim a right of replevin for a body unlawfully taken or withheld.[133]

Ecclesiastical law controlled burials and cemeteries in England until the adoption of the English Burial Acts of 1855.[134] In America, the system of ecclesiastical law was unknown.[135] Today, both American and English courts of equity adjudicate claims to corpses,[136] exercising " 'a benevolent discretion.' "[137] Although American courts followed the English "no property" rule,[138] the recognition that relatives have an interest in burying their dead without unlawful interference led courts in America to create a special category of "quasi property rights" in dead bodies:

> Although . . . the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.[139]

The right is "quasi" in the sense that the corpse could not be sold, but operates as a qualified form of "property" in that

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131. *See* SCOTT, *supra* note 26, at 5. The trade in dead bodies, which continued until the Anatomy Act of 1832 imposed licensing and strict reporting requirements upon anatomy schools, culminated in some infamous trials of "body snatchers" who committed murder in order to sell the corpses. *See id.* at 9-12. *See generally* RUTH RICHARDSON, DEATH, DISSECTION AND THE DESTITUTE 52-72 (1987) (providing an historical accounting of corpses being treated as commodities).

132. *See* The King v. Lynn, 100 Eng. Rep. 394, 394-95 (K.B. 1788); SCOTT, *supra* note 26, at 7 (noting that these criminal offenses "initially applied more to the body snatchers than to their customers, with the absurd result that once a corpse left a body snatcher's hands its return could not be ensured").

133. *See* Note, *supra* note 117, at 1242-43.

134. *See* JACKSON, *supra* note 118, at 22.

135. *See id.* at 27.

136. *See* Dukeminier & Sanders, *supra* note 127, at 414.

137. *See id.* (citing Yome v. Gorman, 152 N.E. 126, 128 (N.Y. 1926)).

138. *See, e.g.*, Enos v. Snyder, 63 P. 170 (Cal. 1900).

139. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 242-43 (1872).

"possession for a certain human and familial purpose [is] assigned and legally protected."[140] It is likely that this "quasi property" interest, however, has little to do with the concept of "ownership" of a dead body. Rather, it constitutes a recognition that indignities to a dead body may violate the mental and emotional well-being of the deceased's kin, and that the interest in psychological and emotional integrity is worthy of legal protection.[141] As Prosser states, "[i]t seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer."[142] By invoking the notion of a "quasi property" interest, courts granted the family a right to sue for any unauthorized mutilation of the corpse rendering the body unfit for proper burial—including any unauthorized autopsy[143]—and a right to control the disposition of the deceased's remains when the deceased did not issue any directives.[144] In cases where the deceased's wishes concerning the mode or place of burial are known, courts usually have attempted to take these into account,[145] while also considering the sensibilities of the deceased's living family members and the interests of the public. As Justice Cardozo stated:

> The wishes of wife and next of kin are not always supreme and final though the body is yet unburied. Still less are they supreme and final when the body has been laid at rest and

140. RAMSEY, *supra* note 33, at 204.

141. *Cf.* DAN B. DOBBS, TORTS AND COMPENSATION 59 (2d ed. 1993). Families have sometimes asserted that their "quasi property" interest in the remains of the deceased amounts to a property right for the purposes of bringing an action under 42 U.S.C. § 1983 (1994). *See* Scarmon, *supra* note 128, at 438-40. However, courts have generally held that unauthorized interference by the state with a corpse does not take on constitutional dimensions, and that the relatives do not have a claim based on the deprivation of a property right without due process. *See id.*

142. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 63 (5th ed. 1984).

143. *See* Carl E. Wasmuth & Bruce H. Stewart, *Medical and Legal Aspects of Human Organ Transplantation*, 14 CLEV.-MARSHALL L. REV. 442, 463 (1965) (stating that when an unauthorized autopsy occurred, the next of kin could bring a common-law action for interference with their personal right to give the body a proper burial, and could recover damages for mental distress). Under statutory law, a coroner may examine and dissect a body if justified by the circumstances, regardless of the wishes of the deceased or next of kin. *See* Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 691 (1988).

144. *See* JACKSON, *supra* note 118, at 48-61.

145. *See* Yome v. Gorman, 152 N.E. 126, 128 (N.Y. 1926) (stating that "[t]he wish of the deceased, even though legal compulsion may not attach to it, has at least a large significance. Especially is this so when the wish has its origin in intense religious feeling" (citations omitted)).

> the aid of equity is invoked to disturb the quiet of the grave. There will then be due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.[146]

Although the autonomy interest of the deceased in directing the manner of disposition of his or her body is accorded considerable weight,[147] it is not necessarily dispositive.[148] While some courts have held that directions in a will regarding the deceased's remains are "usually paramount to all other considerations, including the objections of the next of kin,"[149] courts have sometimes allowed the family's wishes to override the express wishes of the deceased.[150] In general, courts will give substantial weight to the deceased's expressed desires, whether oral or written, and will take into account all surrounding circumstances in deciding whether those desires should prevail if they conflict with the wishes of surviving family members.[151]

Thus, the law relating to the disposition of dead bodies reveals that while the individual's wishes were not regarded as conclusive, the family's decision-making role was a limited one, intended to protect the family's sensibilities and ensure a proper burial for the deceased. However, in the context of organ donation, current law

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146. *Id.* (internal quotation omitted).

147. *See In re* Moyer, 577 P.2d 108 (Utah 1978). In *Moyer*, the court describes an individual's interest in directing the disposition of his or her body after death as a "property right of a special nature" enabling the individual to make a disposition "which should be recognized and held to be binding after his [or her] death, so long as that is done within the limits of reason and decency as related to the accepted customs of mankind." *Id.* at 110.

148. *See* Chad D. Naylor, *The Role of the Family in Cadaveric Organ Procurement*, 65 IND. L.J. 167, 172 (1989).

149. Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc., 606 N.Y.S.2d 965, 968 (Sup. Ct. 1993) (dictum); *see also In re* Estate of Eichner, 18 N.Y.S.2d 573, 573 (Surr. Ct. 1940) (stating that "the wishes of a decedent in respect of the disposition of his remains are paramount to all other considerations").

150. For example, in *Holland v. Metalious*, 198 A.2d 654 (N.H. 1964), the deceased's will directed that no funeral services be held and that her body be donated to a university for experimentation. *See id.* at 655. After the university refused to accept the body, a dispute arose between the family, who wanted a funeral, and the executor who sought an injunction to prevent funeral services. *See id.* The lower court denied the injunction, and its decision was affirmed on appeal. *See id.* at 656. While the state supreme court attempted to harmonize its decision with the directive in the will by stating that the deceased's wish that funeral services not be held was contingent upon the donation of her body to the university, *see id.*, the case can equally be interpreted as granting priority to the wishes of the family over those of the deceased.

151. *See, e.g.*, Rosenblum v. New Mt. Sinai Cemetery Assoc., 481 S.W.2d 593, 595 (Mo. 1972).

has expanded considerably the decision-making authority vested in the deceased's family.

B. Decision-Making Authority with Respect to Cadaveric Organs

The common-law principle that there is no property in a dead body meant that a person had no legal power to authorize the donation of his or her organs or tissues after death.[152] Moreover, when cadaveric organ donation became a reality in the 1960s, the notion that the deceased's next of kin were entitled to receive the body in the same condition as when death occurred so that they could provide a proper burial[153] resulted in a reluctance by physicians to remove organs from the deceased without the family's consent.[154] In response to the resulting uncertainty, and the consequent shortage of acquired organs, the National Conference of Commissioners on Uniform State Laws (NCCUSL) endorsed the Uniform Anatomical Gift Act (UAGA) in 1968.[155] By 1973, all fifty states and the District of Columbia had adopted a version of the UAGA.[156] In 1987, in an effort to increase organ donations, the NCCUSL approved an amended version of the UAGA.[157] Although the UAGA's definition of human body "parts" that can be donated is broad enough to include sperm and eggs,[158] the Act does not apply to posthumous procreation since the stated purposes for donation are for "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science."[159]

The UAGA outlines the process for making and receiving donations,[160] prohibits the sale of organs,[161] and sets forth, *inter alia*, who may authorize donations,[162] what bodily parts may be donated,[163] and who may be a donee.[164] The Act highlights the autonomy interest of

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152. *See* Dukeminier & Sanders, *supra* note 127, at 414.

153. *See* Foley v. Phelps, 37 N.Y.S. 471, 473-74 (App. Div. 1896).

154. *See* Naylor, *supra* note 148, at 173.

155. UNIF. ANATOMICAL GIFT ACT (1968) (amended 1987), 8A U.L.A. 94-132 (1993).

156. *See Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1617 (1990).

157. UNIF. ANATOMICAL GIFT ACT (amended 1987), 8A U.L.A. 29-62 (1993).

158. The Act defines "part" as "an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body." *Id.* § 1(7), 8A U.L.A. 30.

159. *Id.* § 6, 8A U.L.A. 53.

160. *Id.* §§ 2-7, 8A U.L.A. 33-55.

161. *Id.* § 10, 8A U.L.A. 58.

162. *See id.* §§ 2-3, 8A U.L.A. 33-43.

163. *See id.* § 1, 8A U.L.A. 29.

164. *See id.* § 6, 8A U.L.A. 53.

the decedent by making it clear that the decedent's expressed wishes regarding organ donation prevail over the wishes of any other party. An anatomical gift may not be made by a person who knows of a refusal or a contrary indication by the decedent.[165] Moreover, an anatomical gift that has not been revoked by the donor before death "is irrevocable and does not require the consent or concurrence of any person after the donor's death."[166] Although in practice physicians, hospitals and organ procurement agencies in the vast majority of cases seek the consent of the deceased's family before accepting a valid anatomical gift,[167] the language of the UAGA is unequivocal in vesting independent legal authority in the individual to determine the disposition of his or her own body parts.

However, when the individual has not expressed his or her desire for, or objection to, organ donation, the UAGA vests primary decision-making authority in the individual's family. The Act sets forth a hierarchy of relationships, prioritized as follows: (1) the spouse of the decedent; (2) an adult son or daughter of the decedent; (3) either parent of the decedent; (4) an adult brother or sister of the decedent; (5) a grandparent of the decedent; and (6) a guardian of the person of the decedent at the time of death.[168] A person designated in this list may authorize a gift only if no person in a prior class is available at the time of death to make a gift,[169] and if there is no known objection to donation by a member of the person's class or of a prior class[170] or

165. *See id.* § 3(b)(2), 8A U.L.A. 41.

166. *Id.* § 2(h), 8A U.L.A. 34.

167. As one writer has noted, "the UAGA's assumption that the decedent's wishes should prevail is inconsistent with cultural assumptions in the United States regarding the wishes of the next-of-kin." Orly Hazony, Note, *Increasing the Supply of Cadaver Organs for Transplantation: Recognizing that the Real Problem is Psychological Not Legal*, 3 HEALTH MATRIX 219, 230 (1993). Fear of litigation constitutes the primary reason why the medical profession seeks the consent of the deceased's family instead of acting pursuant to the would-be donor's wishes, even though the UAGA specifically grants an individual the right to make an anatomical gift without veto by others (section 2(h)), and provides a "good faith" defense (section 11(c)). *See* Daniel G. Jardine, Comment, *Liability Issues Arising Out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655, 1666. Other reasons for seeking consent from the next of kin include concern for the emotional well-being of the deceased's family at a time of shock and grief, and a fear that if organs are taken in accordance with the deceased's instructions but contrary to the family's wishes a backlash of public sentiment will ensue, resulting in a decrease in organ donation. *See id.* at 1666-67.

168. *See* UNIF. ANATOMICAL GIFT ACT § 3(a) (amended 1987), 8A U.L.A. 40 (1993).

169. *See id.* § 3(b)(1), 8A U.L.A. 41.

170. *See id.* § 3(b)(3), 8A U.L.A. 41.

by the decedent.[171]

The family's role also has been given prominence by the inclusion of a "Routine Inquiry and Required Request" provision in the 1987 amendments to the UAGA.[172] This section states that a person designated by the hospital must discuss with each patient over the age of eighteen or, if that is not possible, with the patient's family, the option of organ donation. Since, in many cases, the patient will not be in a condition to participate in such a discussion, the required request provision has the effect of significantly "elevat[ing] the family's role to that of primary agent of consent."[173]

A different model from that found in the UAGA relies upon "presumed consent."[174] In this regime, a presumption exists that cadaveric organs may be removed unless the medical personnel are notified of an objection by the deceased prior to the deceased's death, or possibly by the deceased's next of kin.[175] An important rationale for presumed consent is that shifting the onus from the physician to the person who does not want the organs removed produces a greater supply of organs for transplantation.[176] Moreover, some argue that presumed consent is more humane than a system of "encouraged voluntarism,"[177] in that it avoids burdening family members by asking them to make a difficult decision at a time of intense emotional stress.[178]

Although the presumed consent model operates in over a dozen countries,[179] it has not attracted a great deal of support in the United States,[180] where it exists only in a very limited form.[181] Some oppose

171. *See id.* § 3(b)(2), 8A U.L.A. 41.

172. *Id.* § 5, 8A U.L.A. 47.

173. Naylor, *supra* note 148, at 179.

174. *See* A.H. Barnett & David L. Kaserman, *The Shortage of Organs for Transplantation: Exploring the Alternatives*, 9 ISSUES LAW & MED. 117, 121 (1993).

175. There are numerous forms that such "opting out" policies can take, and variations exist regarding the stringency of the requirements for communicating an objection to organ donation. *See id.* at 122. Moreover, models differ as to whether the objection must be made by the individual, the individual's family, or both. *See id.*

176. *See* Dukeminier & Sanders, *supra* note 127, at 418.

177. *See* Silver, *supra* note 143, at 704.

178. Jesse Dukeminier, *Supplying Organs for Transplantation*, 68 MICH. L. REV. 811, 830-31 (1970); *cf.* Silver, *supra* note 143, at 705 (stating that a "presumed consent system might amplify the anguish by requiring the potential donor or family to protest donation . . . at a time when the hospital's good will is cherished").

179. *See* Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 83 n.113 (1994) (Austria, Belgium, Czechoslovakia, Denmark, Finland, Greece, Israel, Italy, Japan, Norway, Poland, Singapore, Spain, Sweden, and Switzerland).

180. For a listing of proponents of some version of a presumed consent model, see Erik S. Jaffe, *"She's Got Bette Davis[-s] Eyes:" Assessing the Nonconsensual Removal of*

presumed consent on the grounds that it "depend[s] for its success on the unhappy fact that most human beings are disinclined toward active protest of that which is customary and routine" and thereby "insidiously exploits the citizen's regrettable reluctance to dissent."[182] Paul Ramsey raises an additional concern, namely, the impact that a policy of presumed consent has on the moral values of the individual. Ramsey states that presumed consent "would deprive individuals of the exercise of the virtue of generosity" whereas affirmative consent encourages "real givers" and "meets the measure of authentic community."[183] Furthermore, presumed consent may deprive the deceased's family of an opportunity to object to the removal of organs, since in many cases the family will be unaware that organs are being removed.[184] As one commentator has noted, " 'presumed consent' laws attempt to reduce both the individual's and the family's roles in order to maximize the number of organs retrieved."[185]

As the above discussion illustrates, the UAGA and presumed consent models apportion controlling power differently among the various parties involved in the donation of cadaveric organs. Relevant distinctions between organ donation and posthumous reproduction need to be examined in order to assess whether either of these organ donation models should apply to procreation after death.

Cadaver Organs Under the Takings and Due Process Clauses, 90 COLUM. L. REV. 528, 528 n.2 (1990).

181. Some state statutes authorize a coroner, under certain conditions, to remove corneas or pituitary glands without taking affirmative steps to discover the attitudes of the deceased or the deceased's family towards donation, provided no objection by the deceased or the family is known to the coroner. *See id.* at 536. Constitutional challenges have been brought against some of these statutes. *See, e.g.*, Brotherton v. Cleveland, 923 F.2d 477, 479-82 (6th Cir. 1991) (recognizing the existence of a due process claim by a widow for removal of her deceased husband's corneas without her consent); State v. Powell, 497 So. 2d 1188, 1193 (Fla. 1986) (rejecting a constitutional challenge to a statute permitting removal of corneas without the consent of the family of the donor); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (same).

182. Silver, *supra* note 143, at 706 (arguing in favor of an organ draft, rather than a system of presumed consent).

183. RAMSEY, *supra* note 33, at 210.

184. *See id.* Some have suggested that when a family member has an objection to organ donation on religious grounds and is not immediately available to communicate his or her objection, "grave constitutional questions, such as the abridgement of religious freedom or the denial of due process, could invalidate the system." Alfred M. Sadler et al., *Transplantation—A Case for Consent*, 280 NEW ENG. J. MED. 862, 866 (1969).

185. Naylor, *supra* note 148, at 180.

C. Posthumous Procreation Distinguished

Gamete donation differs from organ donation in that it is life-creating rather than life-sustaining or life-enhancing. As a result, different interests are at stake for the individual, the family and the state, and the legal framework appropriate to resolving disputes involving cadaveric organs is not necessarily transferable to disputes concerning cadaveric gametes.

The current legal framework for organ donation is based on the premise that organ transplantation is a socially desirable practice. Modern medicine's ability to rescue a person by means of organ transplantation from an otherwise certain death gives dramatic expression to society's interest in preserving life. The discrepancy between the limited supply of organs and the relatively high demand for them is a source of ongoing societal concern.[186] The state's interest in maximizing the number of available organs is furthered by adopting either a presumed consent model, or a model such as the UAGA which, while acknowledging the family's historically prominent decision-making role, attempts to encourage the family to make a donation through the use of "required request" provisions. In contrast, a model of "presumed non-consent," which would prohibit the removal of organs in the absence of prior authorization by the deceased, would be inconsistent with the state's interest in increasing the supply of organs.[187]

Organ donation presents a morally compelling case largely because organs are a relatively scarce resource, and because the shortage of organs entails the hastening of death for existing individuals. In contrast, society's interest in acquiring gametes from dead persons is weak. Gamete donation does not save the life of an exist-

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186. This concern motivated the amendments to the UAGA in 1987. *See* UNIF. ANATOMICAL GIFT ACT, Prefatory Note (amended 1987), 8A U.L.A. 20-23 (1993). It has also inspired numerous proposals by scholars who believe that current law does not provide adequate incentives for donating organs. For examples of such proposals, see Barnett & Kaserman, *supra* note 174, at 119-27; Roger D. Blair & David L. Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 YALE J. ON REG. 403, 420-39 (1991); Cate, *supra* note 179, at 83-87; Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 32-51 (1989/1990); Dukeminier & Sanders, *supra* note 127, at 418-19; Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & LAW 57 *passim* (1989); Hazony, *supra* note 167, at 242-51; and Silver, *supra* note 143, at 694-728.

187. *But see* Paul M. Quay, *Utilizing the Bodies of the Dead*, 28 ST. LOUIS U. L.J. 889, 900 (1984) (arguing that UAGA should be amended so that no person other than the decedent can donate any part of a dead body).

ing person,[188] but rather creates the potential for a new person.[189] Furthermore, unlike many life-saving organs which can only be obtained from cadavers, gametes can be donated by living persons[190] and are not nearly as scarce as cadaveric organs.[191]

Moreover, the considerations that are relevant in evaluating the interests of the deceased individual and the family members in posthumous procreation differ from those in cadaveric organ donation. On the one hand, it could be argued that the family should assume a more central role in posthumous reproduction than in posthumous organ donation, since the decision to create a child using the deceased's gametes will have enduring emotional, psychological and financial implications for the family in a way that the donation of organs to anonymous individuals will not. On the other hand, precisely because the implications of posthumous procreation are so serious and permanent for the deceased's family, it is reasonable to claim that the family's decision-making role should be more limited here than in organ donation because the potential for a conflict of interest is greater.[192]

Additionally, after death the interests of the individual, who while alive may not have wished to become a parent, must be taken into account. Allowing a person to control the fate of his or her gametes is arguably even more significant than allowing a person to control the fate of his or her cadaveric organs, because procreation is

188. Circumstances may exist where gametes are donated in order to create a child who may be able to save the life of an existing human being. For example, Mary and Abe Ayala had a baby daughter, Marissa, with the hope that the baby's bone marrow could be transplanted to save the life of the couple's older daughter, Anissa. *See* Lance Morrow, *When One Body Can Save Another: A Family's Act of Lifesaving Conception Was on the Side of Angels, But Hovering In the Wings is the Devilish Ghost of Dr. Mengele*, TIME, June 17, 1991, at 54. There is some anecdotal evidence to suggest that conceiving a child to be a donor is not altogether rare. *See* Vicki G. Norton, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1602 (1994).

189. *See Live Sperm, Dead Bodies*, *supra* note 5, at 34 (arguing that "sperm harvesting creates new needs rather than fulfills existing ones").

190. Rare circumstances are imaginable, however, when there could be a societal preference for using cryopreserved gametes from dead people rather than from living persons—for example, in the event of a nuclear disaster in which radiation contaminates the gametes of the living.

191. Because a woman's eggs are not replenishable, they are a scarcer resource than sperm. Moreover, unlike sperm, which is easily accessible, egg retrieval constitutes an invasive medical process. *See* INFERTILITY, *supra* note 2, at 123. However, the practice of egg donation from live donors has grown considerably in recent years. *See* Andrea Mechanick Braverman, *Survey Results on the Current Practice of Ovum Donation*, 59 FERTILITY & STERILITY 1216, 1216 (1993).

192. *See infra* notes 264-69 and accompanying text.

central to an individual's identity in a way that organ donation is not.[193]

The nature of a person's interest in avoiding reproduction after death when he or she has not authorized posthumous procreation must be explored in order to decide how much weight that interest should be given, as compared with the interest of a surviving family member in procreating with the deceased's reproductive material. Resolution of the conflict between these two competing procreative liberties cannot be resolved with reference to autonomy alone. Despite the centrality of autonomy as a guiding principle in bioethics,[194] an appeal to autonomy is of limited utility here. As Professor John Robertson observes, "not every choice is protected, and autonomy itself cannot explain which exercises of autonomy are of critical importance."[195] Robertson aptly notes that "[w]hile a commitment to autonomy might launch the inquiry, it cannot direct how to rank different uses or expressions of autonomy."[196] The conflict can be resolved only by examining the interests at stake and by assessing the significance of the deceased's pre-mortem wish not to procreate.

Where an individual, while alive, expresses a wish to procreate posthumously, but, after his or her death the surviving partner is unwilling to reproduce using the deceased's gametes,[197] the conflict is easily resolved: just as a living person cannot force an unwilling partner to procreate, the deceased's prior wish to procreate cannot trump the surviving partner's objection to becoming a biological parent. The more contentious conflict arises when a surviving family member[198] wishes to procreate using the deceased's reproductive material contrary to objections expressed by the individual now deceased, or in the face of the unknown wishes of that individual.

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193. *See infra* notes 248-56 and accompanying text.

194. *See generally* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 120-81 (4th ed. 1994) (using the concept of autonomy to examine health care decisions).

195. Robertson, *supra* note 1, at 1031.

196. *Id.* at 1034.

197. The situation involving embryos, as opposed to gametes, is more complex. *See infra* notes 285-329 and accompanying text.

198. The traditional model of the family may be described as a married woman and man raising their offspring. However, given the many divergences from this model that exist today, many people function as "family members," even though those relationships may not be recognized by the law. In this Article, the terms "family member" and "next of kin" include cohabitating intimate partners. They do not, however, refer to would-be egg or sperm donors who, prior to death, may have indicated a desire to donate their reproductive material to a lesbian or gay couple. The issues involved in such a scenario lie beyond the scope of this Article.

While the law gives considerable protection to the right of living persons to avoid procreation,[199] it is not clear whether this protection continues after death. A key question, then, is whether a person's interest in avoiding procreation after death should be regarded as significantly less important than this interest during life.

III. THE CONCEPT OF POSTHUMOUS HARM

When analyzing the interest in avoiding posthumous procreation and weighing it against competing interests, the following question must be addressed: Can we sensibly speak of the dead as having "interests" which can be "harmed" by the conduct of surviving parties? Part III argues that while it is true that death brings a person's existence to an end, the dead nevertheless have interests which can be either promoted or harmed by posthumous events.

Whether an individual after death retains interests that can be harmed is an issue that has inspired considerable controversy among philosophers.[200] The concept of posthumous harm has been examined with particular thoroughness by two philosophers, Joel Feinberg and Ernest Partridge, in a debate that explores many of the complexities involved in the concept of "harming the dead."[201]

Feinberg maintains that, although after death a person ceases to exist, that individual's interests can still be affected post-mortem.[202] Thus, he claims, defaming the dead or breaking promises to the dead are acts which harm the dead. Partridge argues that while such acts may properly be said to be morally wrong, they do not harm the dead because "[t]he dead . . . have no interests and are beyond both harm

199. *See* Roe v. Wade, 410 U.S. 113, 152-56 (1973); Eisenstadt v. Baird, 405 U.S. 438, 452-53 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

200. *See* JOEL FEINBERG, HARM TO OTHERS, *in* 1 THE MORAL LIMITS OF THE CRIMINAL LAW 79-95 (1984) [hereinafter FEINBERG, HARM TO OTHERS]; Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341 *passim* (1987); Joel Feinberg, *Harm and Self-Interest*, *in* LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 285, 299-308 (P.M.S. Hacker & J. Raz eds., 1977) [hereinafter Feinberg, *Harm and Self-Interest*]; Joel Feinberg, *The Rights of Animals and Unborn Generations*, *in* PHILOSOPHY AND ENVIRONMENTAL CRISIS 43, 57-60 (William T. Blackstone ed., 1974) [hereinafter Feinberg, *Rights*]; Barbara Baum Levenbook, *Harming Someone After His Death*, 94 ETHICS 407 *passim* (1984); Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243 *passim* (1981); George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183 *passim* (1984).

201. *See* Partridge, *supra* note 200. Partridge's article critiques Feinberg's thesis as set forth in Feinberg, *Rights*, *supra* note 200, at 57-60; and Feinberg, *Harm and Self-Interest*, *supra* note 200, at 299-308. In FEINBERG, HARM TO OTHERS, *supra* note 200, at 79-95, Feinberg further refines his thesis in response to Partridge's challenge.

202. *See* FEINBERG, HARM TO OTHERS, *supra* note 200, at 79-95; Feinberg, *Harm and Self-Interest*, *supra* note 200, at 299-308; Feinberg, *Rights*, *supra* note 200, at 57-60.

or benefit."[203]

The basis of the debate between Feinberg and Partridge is grounded in three fundamental arguments posited by Feinberg.[204] First, Feinberg distinguishes "want-fulfillment" from "want-satisfaction."[205] The "fulfillment of a want" is "simply the coming into existence of that which is desired," whereas the "satisfaction of a want" is "the pleasant experience of contentment or gratification that normally occurs in the mind of the desirer when he believes that his desire has been fulfilled."[206] Feinberg argues that even though a dead person cannot experience satisfaction or contentment in a subjective sense (i.e., "want-satisfaction"), each individual has interests that survive beyond his or her existence, and may be promoted or hindered in an objective sense (i.e., "want-fulfillment").[207]

Second, Feinberg contends that posthumous interests must be understood relationally.[208] Using defamation as an example, he asserts that the reason a dead person's interest in maintaining a good reputation can be harmed by defamatory statements is because peoples' interests extend to "events that occur outside of [their] immediate experience and at some future time."[209] In other words, what is harmed is the "person's desires to stand in certain relations to other people."[210]

Finally, Feinberg argues that a person can be harmed even though he or she is unaware of the harm.[211] Once again invoking defamation as an example, he claims that a living person's reputational interest is injured when libelous statements are made even if the statements are made in a geographically remote place, and even though the subject of the libel is totally unaware and will always remain unaware of the statements.[212] He then extends this argument to the dead, reasoning that if awareness of libel is not necessary for the interests of live people to be harmed, neither is it necessary in the case of the dead.[213] While noting that the law of defamation in the

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203. Partridge, *supra* note 200, at 244.

204. *See id.* at 243-64.

205. Feinberg, *Harm and Self-Interest*, *supra* note 200, at 302. Feinberg attributes this distinction to W.D. Ross. *See* W. DAVID ROSS, FOUNDATIONS OF ETHICS 300 (1939).

206. Feinberg, *Harm and Self-Interest*, *supra* note 200, at 302.

207. *See id.* at 303.

208. *See id.* at 304-05.

209. *Id.* at 304.

210. *Id.* at 305.

211. *See id.* at 305-07.

212. *See id.* at 305-06.

213. *See id.* at 305-08.

United States does not protect the dead unless a living person's interests are adversely affected,[214] Feinberg suggests that this rule only makes sense on the assumption that reputation or other relevant interests do not survive death.[215] However, he claims, the "self-centered interest" a person has "in the continued high regard of [one's] fellows" is defeated if that person is defamed after death, and thus the dead person's interest is harmed despite the deceased's presumed inability to feel distressed or humiliated.[216]

Throughout his discussion, Feinberg acknowledges the paradox in ascribing rights to a "mere corpse"[217] and concedes that "[m]ere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights."[218] Nevertheless, he asserts that "if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving."[219] As a society, he argues, we recognize that what happens to a person's body, property, and reputation after death is important to that person while he or she is alive.[220] Consequently, we have developed procedures designed to effectuate individuals' desires to control certain matters after death, such as the transplantation of their organs, the transfer of their property, and the nomination of beneficiaries under life insurance policies.[221] Feinberg concludes that promises made while the promisee is alive impose on the promisor a duty which does "not suddenly become null and void" after the death of the promisee.[222]

Partridge challenges this thesis by claiming that the paradox inherent in Feinberg's view renders the argument "incoherent."[223] Partridge maintains that while it is morally wrong to defame the dead or to break promises to the dead, such acts cannot be characterized as

214. *See* Feinberg, *Rights*, *supra* note 200, at 59; *accord* KEETON ET AL., *supra* note 142, at 778-79. For critical commentary on the law pertaining to defamation of the dead, see Lisa Brown, Note, *Dead But Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1525-42 (1989). *See also* Florence Frances Cameron, Note, *Defamation Survivability and the Demise of the Antiquated "Actio Personalis" Doctrine*, 85 COLUM. L. REV. 1833, 1833-48 (1985) (criticizing the courts' refusal to allow survivor actions in defamation).

215. *See* Feinberg, *Rights*, *supra* note 200, at 59.

216. Feinberg, *Harm and Self-Interest*, *supra* note 200, at 306.

217. Feinberg, *Rights*, *supra* note 200, at 57.

218. *Id.*

219. *Id.*

220. *See id.*

221. *See id.*

222. *Id.* at 58.

223. Partridge, *supra* note 200, at 264.

"harming the dead" because the dead "have no interests and are beyond both harm or benefit."[224] He states that while we may talk " 'elliptically' or figuratively about the 'interests of the dead,' . . . such talk is senseless"[225] because interests cannot persist beyond the existence of the interest bearer.

Although agreeing with the premises of Feinberg's first two arguments, Partridge rejects the conclusions.[226] With respect to Feinberg's distinction between subjective satisfaction and objective fulfillment of desires, Partridge argues that "objective conditions are 'interests' only insofar as they matter to someone,"[227] and consequently "[d]eath cancels not only the possibility of satisfaction but also the very point of fulfillment."[228] Responding to Feinberg's argument concerning relational interests, Partridge points out that once a person no longer has the capacity to gain or lose from a relationship, he or she can no longer be affected.[229] Thus, the relational interest that connects a person's life to the lives of others who may be removed in time and place is extinguished upon death.[230]

Partridge finds Feinberg's third argument the most plausible, although he remains unpersuaded.[231] He agrees that there is no significant difference between wronging the dead and wronging live persons who are, and always will be, absolutely unaware of and unaffected by the wrong.[232] Seeing no grounds for distinguishing between these two groups, Partridge notes that one must either state that both groups are harmed or that neither is harmed.[233] On the basis of his previous arguments, Partridge concludes, somewhat reluctantly, that neither is harmed.[234] Partridge's hesitation in reaching this conclusion stems, in part, from his concern that failing to acknowledge that the unaffected live person is harmed may lead to a denial that such acts of libel are morally wrong.[235] He suggests that rather than invoking the paradoxical and problematic notion of causing "harm" to those who are unaware of the wrong, we should attempt to find other

224. *Id.* at 244.
225. *Id.* at 247.
226. *See id.* at 246-49.
227. *Id.* at 247.
228. *Id.* at 246.
229. *See id.* at 248-49.
230. *See id.*
231. *See id.* at 250-53.
232. *See id.* at 250-51.
233. *See id.* at 251.
234. *See id.*
235. *See id.* at 252.

grounds to explain why these acts may be said to be "wrong."[236]

In examining what other grounds may exist for protecting the reputation and honoring the wishes of the deceased, Partridge makes the important point that surviving parties have a personal interest in respecting the dead.[237] If wills can be violated with impunity on the rationalization that a dead person is unable to suffer harm, then nobody can have an expectation of security concerning their own posthumous wishes.[238] In the absence of assurances that their wishes will be respected there is little incentive for people to make wills at all. Under such circumstances, the living would be deprived of the satisfaction of providing for persons and institutions about which they care.[239] Partridge concludes that respecting the wishes of the deceased serves the interests of the living, because it enables the living to "support their own expectation that they may make plans of their own on this basis."[240] Without confidence that testimonial directions will be respected, he argues that there are significant costs, both to testators and their would-be beneficiaries.[241]

Under both Partridge's and Feinberg's approaches, the wishes of the deceased concerning posthumous procreation would be respected. Partridge's observation that the mental well-being of the living is promoted by a system that honors the wishes of and commitments to the dead finds support in the respect accorded by the law to wills and contracts intended to be carried out after death. By upholding these arrangements, the law acknowledges that most people find it important to attempt to control certain post-mortem events. Thus, although Partridge is unwilling to concede that the dead are harmed, he does accept the societal importance of protecting the stated interests of the living in matters occurring after death.

With regard to the concept of "harming the dead," this Article agrees with Feinberg that certain acts committed after a person's death can harm that individual's interests, despite the fact that the person no longer exists and is therefore unaware of the occurrence. Feinberg's contention seems intuitively correct. For example, if a person is murdered while asleep, that individual's interests have been harmed in the sense that the victim is deprived of future opportunities and experiences, despite the fact that he or she was never

236. *See id.*
237. *See id.* at 254-61.
238. *See id.* at 260-61.
239. *See id.* at 261.
240. *Id.*
241. *See id.* at 260-61.

conscious of his or her demise.[242] Furthermore, Feinberg's argument seems well supported by the example of defamation. A posthumous event that destroys a deceased person's reputation harms the deceased's interest because it affects adversely the way that individual is remembered after death, at which point the individual no longer has the opportunity to set the record straight. Conversely, it can also be said that a posthumous award that enhances an individual's reputation after death promotes the interests of the deceased. Even though the deceased is unaware of the accolades, as a society we believe it is important that achievements of a person we consider outstanding in life be appropriately remembered and honored in death. While it could be argued that posthumous awards serve a societal interest in promoting socially desirable behaviors, it could equally be maintained that the existence of posthumous awards constitutes an implicit recognition that certain interests survive the death of the interest holder.

Opponents of Feinberg's view may counter that the common-law's rejection of actions for defamation of the dead[243] and its refusal to entertain survivor actions in defamation[244] constitute an acknowledgment that the law does not recognize posthumous interests. However, the law in this area should not necessarily be interpreted as undermining Feinberg's point. It is clear that an interest can be affected negatively, even though no legal remedy exists. For example, in Feinberg's hypothetical concerning a person who is—and always will remain—unaware that he or she has been defamed in some remote part of the country, there is no legal remedy. Yet, it can be maintained that, despite the person's lack of awareness, his or her interests have been harmed because he or she is now held in lesser regard by certain people.[245] Furthermore, the rule against imposing

242. On the more general issue of murder as posthumous harm, see Levenbook, *supra* note 200, at 409-16 (arguing that when a person's interest in staying alive is invaded by an act of murder, the loss is one that occurs at the moment of death rather than the moment before death, even though at the moment of death the person no longer exists).

243. *See* KEETON ET AL., *supra* note 142, at 778-79 (describing the law relating to defamation of the dead).

244. Under this common-law rule, a defamation suit commenced while the plaintiff is alive but still unresolved at his or her death, cannot be continued by the deceased's estate or by any other person on behalf of the deceased. *See* Cameron, *supra* note 214, at 1834-35.

245. The same point can be made with reference to other torts protecting dignitary interests, such as battery. In battery, awareness by the plaintiff of a harmful or offensive bodily contact is not required at the time the contact is made. For example, a battery can occur even if an individual "is asleep or under an anaesthetic." *See* KEETON ET AL., *supra* note 142, at 40. If the individual never becomes aware of the nonconsensual contact, ob-

liability for defamation of the dead[246] is motivated by entirely different policy considerations than exist in posthumous procreation. The defamation rule is arguably justified by a concern that a contrary rule would unduly burden historians, and that there would be a consequent " 'chilling' effect of historical reporting."[247]

Given that different considerations obviously are implicated in posthumous procreation than in defamation, it would be somewhat disingenuous to attempt to argue against the existence of posthumous interests by using defamation as an analogy. Rather, we need to examine the policy concerns specific to posthumous reproduction in order to identify the relevant interests in this context, and determine how the law should protect these interests.

This Article, then, will explore the nature of the interests at stake when the deceased has previously expressed an objection to posthumous procreation or when the deceased's wishes are unknown. Since different issues are raised by the posthumous use of gametes than by the posthumous use of embryos, these two contexts will be considered separately in Parts IV and V respectively.

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viously no legal action will be brought since there is no plaintiff to bring suit. Yet, it could still be argued that the person's interests were harmed. The individual's dignity may have been violated, despite his or her lack of awareness of the contact.

246. The rule itself seems somewhat anomalous. Although one of the rationales for the refusal by courts to entertain defamation of the dead claims is that "a personal right of action dies with the person" (*"actio personalis moritur cum persona"*), the characterization of a person's interest in reputation as a "personal" rather than a "property" right is perhaps rather arbitrary, given that defamatory statements may have an adverse economic effect upon the deceased's estate. *See* Brown, *supra* note 214, at 1530 n.26, 1533-34.

Moreover, the common-law rule disallowing survivor actions in defamation may be criticized as doing little to advance the deterrent function of tort law. *See* Cameron, *supra* note 214, at 1842. In addition,

> [m]any jurisdictions, while not permitting defamation survivability, allow survival of such highly personal claims as privacy, breach of promise to marry, false imprisonment, and medical malpractice. As the *MacDonald* court wondered: "Why should a claim for a damaged leg survive one's death, where a claim for a damaged name does not?"

Id. at 1840 (footnotes omitted). The court in *MacDonald* went on to observe that "[a]fter death, the leg cannot be healed, but the reputation can." MacDonald v. Time, Inc., 554 F. Supp. 1053, 1054 (D.N.J. 1983)

247. Brown, *supra* note 214, at 1541 (noting that since historians often must rely upon "reasonable speculation, documents that no longer exist, or reports from witnesses who are no longer alive," the fear of litigation and high damage awards may inhibit historical writing, with consequent detriment to the public).

IV. THE RIGHT TO AVOID POSTHUMOUS PROCREATION USING THE DECEASED'S GAMETES

A. *When the Deceased's Objections Are Known*

When an individual has explicitly objected to posthumous procreation and a family member nevertheless wishes to use the deceased's gametes for reproductive purposes, whose interest should be granted priority? Some may argue that while the deceased's interests may indeed be harmed by using his or her gametes, not to allow use of this material harms the living person's interest in procreating, and further, that the living should take priority because they are the ones who will enjoy the benefits and endure the burdens of their decision.

Professor Robertson maintains that in deciding whether explicit directives in favor or against posthumous reproduction should be followed, we need to assess the meaning and importance that controlling procreation after death has for the living individual. He states:

> In situations in which the individual had given explicit directions concerning posthumous reproduction, one might think that the principle of reproductive autonomy should control. But the right to control posthumous reproduction follows from the principle of reproductive autonomy only if posthumous reproduction implicates the same interests, values, and concerns that reproduction ordinarily entails.[248]

He then makes the following observation about directives against posthumous procreation:

> [T]he desire to make and have directives against posthumous reproduction enforced would not appear to implicate significantly the values accorded the desire to avoid reproduction. No unwanted gestation or childrearing will occur. Individuals will never know that they have had offspring, and thus will not experience anxiety about the welfare of their offspring or the fear that a person will knock on their door claiming to be their child. At most, they will have the certainty that no children will be born after they die and they are no longer around to see, rear, or worry about them.[249]

Robertson then contends that "this attenuated interest in

248. Robertson, *supra* note 1, at 1031.
249. *Id.* at 1032.

avoiding reproduction does not appear to implicate the core interests involved in most situations of avoiding reproduction, and arguably should not be valued to the same extent that interest is valued for living persons."[250]

However, a comparison of the interest in avoiding posthumous procreation after death with the corresponding interest in the case of a live individual reveals that while the two interests are quite different in nature, both are weighty. Although a person who has a child posthumously obviously will have no rearing responsibilities and, consequently, will not have any ongoing emotional or social relationship with the child, the fact that a person will not be present to experience the manifold emotions and events associated with parenthood does not mean that he or she has no interest in preventing procreation. To foist parenthood upon an individual after death knowing that this contravenes the deceased's explicit wishes infringes upon the autonomy of the pre-mortem individual, by depriving him or her of control over a highly significant interest. Given that our present law in organ donation gives primacy to the deceased's known objections over the contrary wishes of the deceased's family,[251] *a fortiori* the law should honor the autonomy of the deceased who objects to becoming a biological parent after death. As noted earlier, the decision to avoid procreation would seem to affect the shape of a person's life—or how that life is remembered—more profoundly than does the decision to donate organs.[252] Moreover, it would be ironic indeed if the law were to protect pre-mortem wishes regarding the disposition of property, but ignore pre-mortem wishes concerning a matter as central to a person's identity as the desire not to create another human being. Disregarding an individual's objections to posthumous procreation can constitute a significant harm to the interests of that deceased person and cannot be justified by reference to the procreative interests of the living.

Partridge's and Feinberg's views can both be understood as sup-

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250. *Id.*; *see also* Gilbert, *supra* note 5, at 554-55. Gilbert, discussing circumstances where a woman wishes to procreate using the deceased's sperm and no evidence exists regarding the deceased's intent, states that

> the court should . . . balance her interest in having the decedent's child with the other party's interest in avoiding a posthumously conceived child. Since the woman wishing to exercise her right to procreate will usually be most directly affected by any consequences of the post-mortem insemination, her interest should be given more consideration.

Id. at 555.

251. *See supra* notes 165-67 and accompanying text.

252. *See supra* notes 186-99 and accompanying text.

porting the proposition that when an individual makes known a clear objection to posthumous procreation, this statement should be respected. As noted earlier, while the two philosophers clearly disagree as to whether the dead can be harmed, they agree that honoring commitments to the dead supports the interests of the living.[253] Partridge arrives at this conclusion by emphasizing the "self-regarding and egoistic"[254] motivation for respecting the dead—namely, that each of us would want to be similarly treated when we, in turn, die. Feinberg, on the other hand, perceives the issue more in terms of "keeping faith with the dead,"[255] arguing that violating a commitment to the dead constitutes a breach of a duty by the living that would trouble a "morally sensitive" person.[256]

Moreover, applying Feinberg's analytical structure, it is not only the living who suffer when the deceased's body is utilized by the family for procreation in violation of the deceased's wishes. The deceased's interests are also harmed. If one accepts Feinberg's thesis that interests survive the existence of the interest-bearer, to cause the deceased to become a biological parent without his or her consent arguably constitutes a harm to the deceased's interests because it violates an individual's right to control his or her reproductive legacy.

While posthumous defamation—the example used by both Feinberg and Partridge—can seriously affect the way in which a person's life is remembered, posthumous procreation carried out contrary to the progenitor's wishes recasts the content and contours of the deceased's life in a way that could have even greater impact than defamation. Feinberg's point concerning relational interests is particularly apposite in this context. The use of an individual's reproductive material for posthumous procreation significantly affects the way that individual's life is remembered and regarded by the decedent's community and family—not least by the resultant child. Posthumous reproduction can alter in ways emotional, psychological, and financial the relationship between the deceased and any offspring

253. *See supra* notes 217-22, 237-41 and accompanying text.

254. *See* Partridge, *supra* note 200, at 262.

255. *See* Feinberg, *Rights*, *supra* note 200, at 58; *cf.* Callahan, *supra* note 200, at 347 (claiming that compassion for or moral outrage on behalf of the dead because of an event that takes place post-mortem "are not genuine moral convictions at all," but rather are "sentiments which are to be accounted for psychologically"); Partridge, *supra* note 200, at 262-63 (arguing that this sense of duty to the dead is "the result of a complex structure of moral explication and justification" which may be relevant from the perspective of the "moral agent" but which is irrelevant from the perspective of the "moral spectator and legislator").

256. Feinberg, *Rights*, *supra* note 200, at 58.

already in existence. Since people, in a sense, do live on through their children, a legal system which allows others to override a person's express wish to avoid procreation takes away from the deceased the right to be the conclusive author of a highly significant chapter of his or her life. To disregard the deceased's prior objections is to obliterate interests that were critical to the person prior to death. Under such circumstances, posthumous procreation is coercive and, consequently, undesirable. As the dead are powerless to protect themselves, the law has a vital role in safeguarding interests that were important to them while they were living.

B. When the Deceased's Intent Is Ambiguous

The more complex case occurs when the deceased has neither specifically authorized nor objected to posthumous procreation. Under such circumstances, the UAGA model would vest decision-making authority regarding the donation of organs in the deceased's family members.[257] The question that needs to be addressed is whether the UAGA model should apply to situations where intent is unknown in posthumous procreation.

When a person has neither authorized nor objected to posthumous conception, the living may speculate as to what the deceased's wishes in this matter might have been, but they cannot declare these wishes with any certainty. In such circumstances, one might argue that a request to use the deceased's gametes for procreation should be granted, since there is a possibility that such use would have been consistent with the deceased's wishes had those wishes been expressed. Alternatively, one could claim that using the deceased's gametes without his or her authorization constitutes a societal harm, because it violates legitimate expectations held by the living as to the disposition of their bodies after death, and thereby harms all living persons. This argument needs to be separated into two parts, one addressing the concerns that arise when gametes are harvested from a dead person's body without the deceased's prior authorization, and the other addressing the issues involved when a family member wishes to use the deceased's cryopreserved gametes for procreation without prior consent.

1. Posthumously Harvested Gametes

If it is important to the mental well-being of the living that the

257. For criticism of the authority the UAGA vests in the deceased's family, see Quay, *supra* note 187, at 904-07.

wishes of the dead be honored, the deceased's gametes should not be harvested unless there is evidence establishing that this was the deceased's desire. Moreover, if it is important to individuals to be assured that their express wishes will be respected after death, it is surely also important to them that their bodies not be used in a manner that is inconsistent with their legitimate assumptions. Given that posthumous conception is not the usual procedure to which a dead body is subjected, it cannot be inferred that an individual's silence on the matter signifies consent.[258] As one philosopher, Professor Paul Quay, has stated in the context of organ donation, "[w]hen the deceased has given no indication to the contrary, the presumption should be that he wished his corpse to be treated as were those of his ancestors" and "[i]f... no evidence exists to show that the deceased has chosen to forego the treatment of his corpse customary to his religious and cultural background, there is no basis for any of his relatives attempting to take that decision to themselves."[259] The notion that others may utilize our bodies after our death in ways which we had not expressly authorized—or perhaps even contemplated—is likely to arouse considerable anxiety on the part of many living persons. Quay observes that "[t]he deepest roots of the unconscious are touched by what is done or permitted to be done with human remains."[260] He notes that "[t]hough a person's death is, of all that happens to him, that in which he is most alone, it always and everywhere arouses the strongest sort of social interest and initiates complex responses of communal activity...."[261] Consequently, a deep human need exists—evident across cultures and throughout the ages—to provide a "decent" burial and to treat the dead with respect and reverence.[262] Arguably, therefore, if the state allowed family members to utilize the gametes of the dead for procreation without the deceased's consent, the lack of assurance that individuals would have about the fate of their own body parts could be a source of apprehension to the living.[263]

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258. An analogy could be drawn here to contractual principles. In contract law, an offeree's silence is not generally to be construed as an acceptance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

259. Quay, *supra* note 187, at 920.

260. *Id.* at 904.

261. *Id.* at 900.

262. *See id.* at 900-04. *See generally* E. Sidney Hartland, *Death and Disposal of the Dead*, 4 ENCYCLOPAEDIA OF RELIGION AND ETHICS 411 (1911) (describing the customs and rituals associated with the disposition of dead bodies in a variety of cultures throughout history).

263. According to one report, Kathleen Nolan, a bioethicist, made the emotionally

Moreover, it is questionable whether allowing next of kin to make use of the deceased's body parts for their own procreative purposes without the deceased's consent accords proper respect to the dead. As discussed earlier, the "quasi property" rights that the law came to vest in the deceased's family are in the nature of a "sacred trust," imposing upon the family the obligation to provide a decent burial for the deceased.[264] In granting the family these limited rights, the law did not intend to provide the next of kin with a mandate to do with the cadaver whatever they wished. On the contrary, the family's rights were carefully circumscribed, as the label "quasi property"—rather than "property"—suggests. The family was selected as the obvious candidate because of the "natural bonds of familial piety, of fidelity to promises made to the deceased, and of reverence for him and his memory."[265]

The family's "quasi property" right was expanded by the UAGA with regard to organ donation because it vests authority in the family to make the donation decisions when the deceased's wishes are unknown.[266] This extension of the family's authority is arguably justified by the compelling societal interest that exists in organ donation, in saving lives and alleviating suffering.[267] However, as noted earlier, there is no corresponding compelling state interest in posthumous procreation.[268]

The family's role in posthumous procreation differs from its role in organ donation and in burial decisions. Most importantly, family members have a much greater personal stake in the outcome of procreative decisions than they do in decisions concerning organ donation or burial. While it is true that in the latter two contexts family members benefit psychologically if their wishes are satisfied,

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charged statement that " '[o]btaining sperm from the dead is almost like rape.' " Davis, *supra* note 18, at C1 (quoting Nolan). While rape arguably constitutes a far more serious invasion of a person's interests than posthumous conception without consent—and Nolan's statement therefore could be criticized as having the (doubtless unintended) effect of diminishing the seriousness of rape—the analogy nevertheless speaks to a sense of moral outrage when a person uses his or her position of superior power or authority to invade the bodily integrity of another. This is so even if, as in posthumous procreation, that "other" is no longer living.

264. *See* Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 242-43 (1872); *supra* notes 139-44 and accompanying text.

265. Quay, *supra* note 187, at 901.

266. *See supra* notes 168-71 and accompanying text.

267. The family may, of course, refuse to donate the deceased's organs. However, a system which vests decision-making authority in the family is likely to acquire a greater number of cadaveric organs than a system of "presumed non-consent," which vests decision-making authority exclusively in the individual now deceased.

268. *See supra* notes 186-91 and accompanying text.

their gain in these contexts is far more limited in its ramifications than in posthumous procreation, which carries enduring psychological, emotional and financial implications. Moreover, the family member who seeks access to the deceased's body parts for procreative purposes without the deceased's consent does so for reasons that are likely to be motivated by self-interest. Although, in some cases, the impetus for harvesting the deceased's gametes for procreation may be a sense of loyalty to and reverence for the deceased rather than the gratification of the living, in the majority of instances the motivation is likely to be the family member's—rather than the deceased's—wish to have a child. Thus, the initial rationale for granting family members "quasi property" rights—namely, to enable family members to treat the corpse in a manner consistent with their "intrafamilial obligations ... of piety, fidelity, and personal reverence"[269]—would give way to a right that would allow the next of kin to invade the deceased's bodily integrity for their own personal interest.

2. Posthumous Use of Cryopreserved Gametes

When gametes have been cryopreserved prior to the individual's death, using the gametes without the deceased's prior authorization does not implicate the deceased's right to bodily integrity. Nevertheless, the deceased's right to avoid procreation is involved here to the same extent as when gametes are harvested from a dead body. If there is a relevant difference between the two situations, it relates to the bearing that cryopreservation has upon the question of the deceased's intent. If no other evidence exists as to that person's wishes, can consent to posthumous conception be inferred from the fact that a person had gametes cryopreserved?

In most cases, this question has little practical significance, because it is usual practice for the fertility clinic storing the cryopreserved gametes to require that depositors specify at the outset their wishes regarding the disposition of their material in case of death.[270] However, if gametes are stored without such directions and a family member wishes to gain control of them for procreative purposes, the law must decide whether the family member's desire to procreate should take precedence over the unknown wishes of the deceased.[271]

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269. Quay, *supra* note 187, at 905.

270. *See* Robertson, *supra* note 1, at 1035.

271. *See, e.g.*, Parpalaix v. CECOS, T.G.I. Creteil, August 1, 1984, Gazette du Palais

In his examination of the competing interests in posthumous reproduction, Robertson states that "[a] person's interest in posthumous reproduction exists only if she focused on the possibility and found sufficient meaning in reproducing after death to make a directive about it."[272] Robertson goes on to say that "[w]ithout an explicit prior oral or written directive, the predeath interest of the deceased is not directly involved, and other interests or concerns may be given priority."[273] Robertson concludes:

> In the absence of the deceased's directions for or against posthumous reproduction, the interests of a spouse or a partner in reproducing with the deceased's gametes or embryos . . . must then be considered. If such a person has a property or quasi-property dispositional right over those factors, that person's own rights to procreate or not will be directly implicated. The competing interests of existing offspring and heirs, notions of morality, respect for the dead, respect for fetuses and embryos, and even the prior wishes of the deceased about posthumous reproduction may all have to yield to the claims of the person who wants to use those factors to reproduce. Questions of posthumous reproduction thus give way to the present reproductive interests of living persons.[274]

However, it is not clear why the absence of a written directive should be viewed as evidence that the deceased's interest in avoiding posthumous procreation is weak. Robertson seems to assume that the absence of a directive for or against posthumous reproduction signifies that the individual concerned did not feel strongly about the possibility of posthumous reproduction. However, this assumption is unwarranted. While it may be true that a person who desired posthumous reproduction probably would have made a written or oral directive to that effect, the same is not necessarily true of a person who wishes to avoid posthumous reproduction.

Since posthumous reproduction is not common in modern society, there is no reason to expect people opposed to the practice to make their objections known. Rather than placing the onus on the individual, a "default rule" should apply, whereby what is presumed is that which is usual, unless the individual has made an explicit choice to the contrary.[275] Until such time as posthumous reproduc-

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[G.P.], Sept. 15, 1984, at 11 (discussed in Shapiro & Sonnenblick, *supra* note 5, at 229-33).

272. *See* Robertson, *supra* note 1, at 1033.

273. *Id.* at 1034.

274. *Id.*

275. An analogy may be drawn to the principle of interpretation expressed in the Uni-

tion becomes the norm, it is fair to proceed upon the assumption that most people do not expect that their gametes will be used after their death. Thus, while persons should have the opportunity to indicate their wishes in favor of posthumous procreation by means of an oral or written directive, in the absence of such a directive the status quo should apply.

In considering the relevance of cryopreservation to the establishment of an intent to procreate posthumously, it might be asked why else an individual would cryopreserve gametes, if not with the intention of using them for procreative purposes at some future point.[276] It is reasonable to assert that people who cryopreserve their gametes constitute a subset of the population holding potentially different expectations than many who have not done so. At the very least, the decision to cryopreserve gametes indicates a willingness to intervene in the procreative process by utilizing technological assistance. Moreover, it signifies that the individual has considered the possibility of procreating in the future.

However, it cannot be assumed that a person who has cryopreserved his or her gametes has contemplated—let alone agreed to—posthumous procreation. In other words, while there may be a general intent to procreate in the future and to do so by employing technological means, the act of cryopreservation, by itself, does not provide evidence of an intent to procreate under all and any circumstances, including after death. For example, it is quite likely that a person may store gametes in anticipation of undergoing chemotherapy, with the aim of using those gametes if the treatment were successful in controlling the disease.[277] It cannot be concluded, however, that the individual has acquiesced to what is arguably an entirely different set of circumstances, namely that a child should be brought into existence when one of the biological parents is deceased.[278]

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form Commercial Code, which provides: "[A]ny usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." U.C.C. § 1-205(3) (1995). Thus, what is usual in the trade is considered in interpreting the meaning of the agreement the parties have made.

276. *See* Shapiro & Sonnenblick, *supra* note 5, at 246 (noting that "if the very act of depositing the sperm can be seen as an indication of intention, then the very failure of a man who knows he is dying to leave precise instructions should also be interpreted as an indication of posthumous intent").

277. *See* Winkel & Fossum, *supra* note 16, at 40.

278. It may be particularly difficult to establish an intent in favor of posthumous procreation when the deceased is a woman, because consent then must be inferred not only to the birth of a child after the woman's death, but also to the implantation of the

When an individual has left no instructions regarding the posthumous use of cryopreserved gametes for procreation, silence ought not to be construed as consent. Since the consequences of posthumous procreation are very serious in the way they affect core values that the individual held while alive, the onus should not be on the individual to state opposition to posthumous procreation. While it is possible that a decedent desiring posthumous reproduction may have left no evidence of his or her wishes, a presumption against posthumous procreation imparts a message that before a person's body parts can be used in a matter as significant as procreation, the individual must have provided an affirmative assent.

It may be contended that requiring positive evidence of consent to posthumous procreation is unfair, because such a requirement excludes those individuals who have no objection to posthumous conception but who simply did not authorize this procedure explicitly. However, it is difficult to see why it is any more fair to presume consent on the part of those who have contemplated posthumous conception but who decided against it while omitting to record their objections for posterity. A system that seeks clear consent would, at least, accurately represent the intentions of those in this latter group.

Respect for a person's autonomy requires that an individual's body or body parts not be utilized without that individual's prior consent, especially when the consequences of doing so have a profound effect upon that individual's interests. Therefore, even if common usage were to change so that posthumous procreation became a more frequent practice, a presumption against the unauthorized use of gametes after death nevertheless would represent a very important statement about the value of bodily integrity and self-determination.

C. Evidence of Intent When Gametes Are Harvested or Have Been Stored

If specific evidence of the deceased's intention to procreate posthumously is required, what form should this evidence take? Is a written directive necessary, or should other forms of evidence suffice, and if so, what kind of evidence is sufficient?

An analogy that may be helpful here is the law relating to living

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woman's reproductive material in another woman.

In this context, it should also be noted that when the surviving partner who wants to procreate is male, he will require the assistance of either a "surrogate," or, if he has formed a subsequent long-term relationship, his new partner, for gestation. Consideration of the legal and ethical issues involved in the practice of surrogacy lie beyond the scope of this Article.

wills authorizing or prohibiting the withdrawal of medical treatment for incompetent patients. Living wills and directives authorizing or prohibiting posthumous procreation share a common central issue: the nature and extent of decision-making authority vested in family members to make critical decisions on behalf of an individual who can no longer speak for him or herself. When an incompetent patient is terminally ill, courts have articulated a number of different tests for allowing a surrogate to make decisions on behalf of the patient concerning the withdrawal of treatment.[279] One of these tests is the "substituted judgment" standard, under which the decision regarding withdrawal of medical treatment must be based, as far as possible, on the patient's own subjective values and wishes.[280] To ascertain these wishes, the surrogate decision-maker must look at any and all available evidence, such as prior written or oral statements, evidence relating to the patient's philosophical and religious beliefs, and any prior consistent pattern of conduct by the patient regarding medical care. Although the standard purports to be based on the patient's actual subjective intent, in the absence of clear evidence as to this intent, courts have often "permitted surrogate decisionmakers to consider a variety of factors from which the incompetent patient's subjective intent can be inferred."[281]

A strict standard was applied by the Missouri Supreme Court in *Cruzan v. Harmon*,[282] a case involving a family's request for the withdrawal of treatment for a woman who had suffered permanent brain damage. The court held that prior statements by the individual expressed several years earlier were "unreliable for the purpose of determining her intent" and insufficient to support the claim of substituted judgment.[283] On appeal, the decision was affirmed by the United States Supreme Court, which held that a state may require continued treatment of an incompetent patient in the absence of "clear and convincing" evidence of the patient's prior, competent refusal of treatment.[284]

279. *See generally* ALAN MEISEL, THE RIGHT TO DIE 257-90 (1989) (discussing the best interests, substituted judgment, and tripartite standards for allowing surrogate decision-making).

280. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 429-31 (Mass. 1977); *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976), *rev'g* 348 A.2d 801 (N.J. Ch. 1975).

281. MEISEL, *supra* note 279, at 272.

282. 760 S.W.2d 408, 424 (Mo. 1988), *aff'd sub nom.* Cruzan v. Director of Mo. Dep't of Health, 497 U.S. 261 (1990).

283. *See id.*

284. *See Cruzan*, 497 U.S. at 280-85. The Supreme Court did not hold that states must

If the deceased's interests are to be safeguarded adequately in posthumous reproduction, a high standard of evidence of an intent to reproduce after death ought to be required. The risk exists in these cases, as in withdrawal of treatment cases, that a family member may apply his or her own values, rather than attempt to ascertain what the individual would have wanted. Just as family members may have a financial conflict of interest in withdrawal of treatment cases, in posthumous reproduction the family may have a strong procreative interest which may or may not coincide with the interest of the deceased. Thus, the temptation may be very great for family members to portray the deceased's values and desires regarding posthumous conception in ways that serve their own interests in procreation.

A serious and specific oral statement indicating an individual's desire to procreate posthumously should be sufficient to satisfy the evidentiary standard. Requiring a written statement may be unduly burdensome for many individuals—especially those whose socioeconomic position makes legal consultation less probable—and, consequently, the outcome may be inconsistent with the actual wishes of those individuals. In light of the potential that exists for a conflict of interests on the part of the family, a "clear and convincing" standard of evidence of the deceased's prior wishes—satisfied either by a written or oral statement—is preferable to a substituted judgment standard.

V. POSTHUMOUS PROCREATION USING CRYOPRESERVED EMBRYOS

In the course of undergoing *in vitro* fertilization (IVF),[285] couples often create more embryos than are immediately needed.[286] Typically, these "excess" embryos are cryopreserved, pending a decision as to whether they will be transferred to the woman's uterus, donated

adopt a "clear and convincing" standard, but merely ruled that it was constitutional for a state to do so. *See id.*

285. IVF is a process in which a woman's eggs are extracted from her ovaries, placed in a culture in a glass dish, and fertilized with semen. *See* INFERTILITY, *supra* note 2, at 123. When the resulting embryos reach the two to sixteen cell stage, they may be transferred to the woman's uterus. *See id. See generally* BONNICKSEN, *supra* note 30, at 147-51 (describing the *in vitro* fertilization technique).

286. "Excess" embryos result because, to increase the efficiency of the IVF process, the woman's ovary is hyperstimulated so that more eggs can be retrieved and thus, more embryos created. Several embryos may be transferred to the uterus in one cycle or, alternatively, the extra embryos may be frozen and used in a later cycle. This procedure avoids the necessity of the woman having to undergo egg retrieval on multiple occasions if implantation of the embryo is unsuccessful. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE 99 (1994).

to another individual or couple, used for scientific research, or destroyed by thawing. Most IVF programs require couples to sign a form stating their wishes concerning the disposition of their embryos in case of divorce, dispute, or death of one or both individuals.[287] However, if no evidence of an agreement exists, there may be considerable uncertainty regarding the wishes of the deceased gamete provider. Moreover, even if the couple has clearly stipulated that, in the event of the death of either partner, the remaining embryos should be destroyed, the surviving partner may feel differently about this matter once his or her partner has died.

The posthumous use of embryos for procreation presents a different set of concerns than does the posthumous use of gametes, for two major reasons. First, whereas one person produces gametes, two people combine their gametes to create embryos. Thus, one person's decision regarding procreation with an embryo created from his or her gametes directly affects the reproductive autonomy of the other gamete provider. Second, embryos represent a more fully developed form of potential life than gametes. As such, they have a powerful symbolic significance which inspires strong views regarding their posthumous use.[288]

As most fertility clinics routinely ask a couple at the outset to stipulate their wishes as to the disposition of their embryos in the event of the death of one or both of them, it is likely that the prior wishes of the deceased in this matter will be known. A conflict could arise when the parties had originally agreed that all remaining embryos be destroyed in the event of death, but the surviving partner no longer wishes to maintain that agreement. Alternatively, the parties may never have explicitly stated their desires regarding the fate of the embryos in the case of death. A further possibility is that no agreement exists because the parties may have been unable to resolve their different views about the disposition of the embryos in the event that one of the parties dies. It is critical, then, to consider the relevant criteria to be used in weighing the different interests in each of these scenarios, if the surviving partner now wishes to implant the embryo(s).[289]

287. *See* Robertson, *supra* note 1, at 1045-46.

288. *See* STEINBOCK, *supra* note 91.

289. It is also possible, of course, that both parties who created the embryo may die before the embryo is implanted. This situation occurred in 1983 when Mario and Elsa Rios from Los Angeles, were killed in a plane crash leaving their two frozen embryos in Melbourne, Australia. A controversy ensued over whether the embryos should be implanted, and whether any resulting children should be considered heirs to the sizable

A. When the Deceased's Wishes Are Known

With regard to gametes, this Article has maintained that allowing the surviving partner to reproduce by using the deceased's gametes contrary to the deceased's prior wishes constitutes a posthumous harm in that it deprives the deceased of an opportunity to control his or her procreative legacy. It was earlier argued that, when the right not to procreate is at issue, the fact that the partner who wishes to avoid procreation is dead does not significantly diminish the harm that is done to that individual's interests if his or her wishes are disregarded.[290] Similarly, when a surviving partner wishes to use an embryo for procreation contrary to the deceased's prior wishes, resolution of this conflict should not be achieved simply by concluding that the interests of the dead are less important than those of the living. Rather, the interests involved ought to be weighed with reference to the same principles that apply in a conflict over the use or non-use of IVF embryos when both progenitors are alive.

The United States Supreme Court, in a series of decisions concerning abortion and contraception, has clearly acknowledged the constitutional right of living persons to avoid procreation.[291] The Court has long recognized the central significance that bearing and rearing a child represents for individuals and couples, and has granted constitutional protection to the decision to become a parent through sexual intercourse.[292] However, the Court has not yet delineated the constitutional boundaries of the right to procreate when reproduction takes place by means of reproductive technologies.[293] Only two state courts thus far have considered how a conflict between the right to procreate and the right to avoid procreation might be resolved when a couple who has created embryos through IVF

estate left by the Rioses. The Victorian Legislature enacted a law prohibiting the destruction of the Rioses' embryos. *See* Cate, *supra* note 5, at 1067-68. The issues arising from such "orphan embryo" cases lie beyond the scope of this Article.

290. *See supra* notes 248-84 and accompanying text.

291. *See* Roe v. Wade, 410 U.S. 113, 152-56 (1973); Eisenstadt v. Baird, 405 U.S. 438, 452-53 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

292. *See* Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (declaring the law "settled . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that "deference" and "protection" should be given to a parent's interest in his children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating a law compelling the sterilization of criminals and holding that the right to procreate "is one of the basic civil rights of man"); Meyer v. Nebraska, 262 U.S. 390, 393 (1923) (holding that the concept of "liberty" in the Fourteenth Amendment includes "the right of the individual . . . to marry, establish a home and bring up children").

293. *See* ROBERTSON, *supra* note 286, at 29-30.

cannot agree upon the disposition of those embryos.

In *Davis v. Davis*,[294] which involved a dispute in a divorce proceeding regarding the disposition of seven frozen embryos,[295] there had been no discussion between the parties concerning the disposition of the embryos in the event of divorce.[296] Mrs. Davis testified that she was unaware that there were any problems in the marriage, whereas Mr. Davis testified that he had known that their marriage was "not very stable" but had hoped that it would be improved by the birth of a child.[297] After the Tennessee trial court granted custody of the embryos to Mrs. Davis,[298] and the court of appeals held that Mr. and Mrs. Davis should have joint control over the embryos,[299] the case reached the Tennessee Supreme Court.[300] In deciding that the embryos should be destroyed as requested by Mr. Davis, the supreme court offered an analytic framework to resolve disputes concerning the "custody" of frozen embryos created through IVF. The court suggested that the following guidelines should apply when no prior agreement between the parties exists:

> [T]he relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[301]

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294. 842 S.W.2d 588 (Tenn. 1992).

295. *See supra* notes 80-85 and accompanying text (discussing details of the case).

296. *See Davis*, 842 S.W.2d at 592.

297. *See id.* The court noted that Mrs. Davis's testimony was contradictory as to whether she would have proceeded with IVF had she known that the marriage was unstable. The court observed that

> [a]t one point she said if she had known they were getting divorced, she would not have gone ahead with it, but at another point she indicated that she was so committed to the idea of being a mother that she could not say she would not have gone ahead with cryopreservation.

Id. at 592 n.10.

298. *See* Davis v. Davis, No. E-14496, 1989 WL 140495, at *11 (Tenn. Cir. Ct. Sept. 21, 1989).

299. *See* Davis v. Davis, No. 180, 1990 WL 130807, at *3 (Tenn. Ct. App. Sept. 13, 1990).

300. *See Davis*, 842 S.W.2d at 588.

301. *Id.* at 604.

In concluding that Mr. Davis's interest in avoiding parenthood outweighed Mrs. Davis's interest in donating the embryos, the court placed great emphasis on Mr. Davis's testimony that he had suffered psychologically from his lack of opportunity to establish a close relationship with his parents and did not want his child to experience similar burdens.[302] While acknowledging Mrs. Davis's emotional and physical investment in the IVF process,[303] the court gave this factor relatively little weight as compared with Mr. Davis's psychological testimony. The court stated that if Mrs. Davis had been unable to pursue any other options for achieving parenthood, and if she had wished to have the embryos implanted in herself rather than donate them to another couple, "[t]he case would be closer."[304] The court did not, however, indicate how it might resolve this hypothetical situation.

In the case of *Kass v. Kass*,[305] also involving a dispute regarding extracorporeal embryos in a divorce proceeding, a New York trial court presented a significantly different analysis. Granting Mrs. Kass the right to have the embryos implanted in herself, the Supreme Court of Nassau County, New York reasoned that if a husband can neither compel his wife to have an abortion or prevent her from so doing, then neither can he have any control over the procreative process when the fertilization occurs *in vitro*.[306] In the court's view, there exists "no legal, ethical or logical reason why an *in vitro* fertilization should give rise to additional rights on the part of the husband."[307] Thus, the court concluded, "[t]o deny a husband rights while an embryo develops in the womb and grant a right to destroy while it is in a hospital freezer is to favor situs over substance."[308]

However, the claim by the court in *Kass* that the distinction be-

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302. *See id.* at 603-04.

303. The court had noted the extraordinary measures taken by Mrs. Davis in order to successfully complete the IVF procedure:

> Despite her fear of needles, at each IVF attempt Mary Sue [Davis] underwent the month of subcutaneous injections necessary to shut down her pituitary gland and the eight days of intermuscular injections necessary to stimulate her ovaries to produce ova. She was anesthetized five times for the aspiration procedures to be performed. Forty-eight to 72 hours after each aspiration, she returned for transfer back to her uterus, only to receive a negative pregnancy test result each time.

Id. at 591-92.

304. *See id.* at 604.

305. No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995).

306. *See id.* at *2-3.

307. *Id.* at *3.

308. *Id.*

tween *in vivo* and *in vitro* fertilization is merely one of "*situs*" rather than "substance" is open to challenge. Arguably, the distinction has an important impact both on the interests of the respective gamete providers and on the interests of the state. When the embryo is *in vivo*, the woman's right to bodily integrity is involved. As the United States Supreme Court stated in *Planned Parenthood v. Danforth*,[309] where it held unconstitutional a state law requiring the husband's consent before an abortion could be performed, "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[310] By contrast, when fertilization takes place outside the woman's body, no gestational interest is involved, and consequently, the male and female gamete providers stand on equal footing.

One response to this argument could be that although no gestational interest is involved when embryos are *in vitro*, the woman makes a very substantial physical and emotional investment, since she undergoes a far more invasive and painful experience in the IVF process than does the man. Some may criticize the court in *Davis* for giving insufficient weight to this difference in the physical experiences of men and women in IVF.[311] However, while the physical demands that IVF places upon women should by no means be discounted, it is not clear that this fact alone should result in automatic veto power for the woman,[312] regardless of whether she wishes to have the embryos implanted or destroyed. Other important interests must also be considered, namely, the interest of the state, and the interest of the other person who contributed to the creation of the embryo.

Although, as noted in Part I, embryos are not considered "persons" under current constitutional law, they constitute potential human life which the state has an interest in protecting.[313] Arguably

309. 428 U.S. 52 (1976).

310. *Id.* at 71.

311. One commentator argues that the physical burdens and risks to which a woman is subject in IVF "speak strongly for an argument recognizing IVF procedures as part of a woman's right to control her bodily integrity," and that this consideration, while not controlling, should add "weight to the argument of a female partner who wishes to implant embryos she helped to create." Tanya Feliciano, Note, Davis v. Davis: *What About Future Disputes?*, 26 CONN. L. REV. 305, 347-48 (1993); *see also supra* note 303 (describing the procedure undergone by Mrs. Davis).

312. *See* Robertson, *supra* note 60, at 476 n.95.

313. *See* Andrews, *supra* note 90, *passim* (analyzing the legal status of the embryo); Robertson, *supra* note 60, at 450-54 (same); *supra* notes 86-111 and accompanying text

the state's interest in protecting potential human life is different when fertilization takes place outside, rather than inside, the body. Views may vary, however, as to whether the state's interest in protecting an embryo is greater or less when the embryo is *in vitro* rather than *in vivo*. On the one hand, it may be argued that the state's interest in protecting extracorporeal embryos is relatively weak, because the embryo is at such an early developmental stage. In contrast, an embryo in the uterus embarks upon a developmental process which, if successful, culminates in a live birth. The state's interest in the growing fetus becomes compelling once the fetus has passed certain developmental milestones.[314] While an extracorporeal embryo does constitute a unique genetic identity, its development is so preliminary that the state's interest may be, as the court in *Davis* observed, "at best slight."[315]

On the other hand, however, it may be claimed that in the case of extracorporeal embryos, no competing interest exists to outweigh the state's interest in protecting potential life. In abortion cases, courts have recognized embryos *in vivo* as "potential life," but have concluded that, although the state has an interest in protecting potential life, this interest may be outweighed by the woman's interest in bodily integrity.[316] However, in the case of extracorporeal embryos, since no competing gestational interest is involved, the state's interest in protecting potential life may be viewed as strong. Although embryos do not have the status of "persons,"[317] they may still be regarded as having an intrinsic value which calls for the state's protection.[318]

(discussing the various ethical positions regarding the status of embryos).

314. *See* Roe v. Wade, 410 U.S. 113, 162-64 (1973).

315. *See Davis*, 842 S.W.2d at 602.

316. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 846-53 (1992); *Roe*, 410 U.S. at 150-56.

317. *See supra* notes 91-95 and accompanying text.

318. Professor Ronald Dworkin's insights into the abortion controversy may be illuminating here. In describing the "intellectual confusion" apparent in the public debate on abortion, Dworkin points out a "crucial distinction" which people on both sides of the abortion issue have failed to recognize. *See* RONALD DWORKIN, LIFE'S DOMINION 11 (1993). Dworkin distinguishes between the claim "that fetuses are creatures with interests of their own right from the start, including preeminently, an interest in remaining alive, and that therefore they have the rights that all human beings have to protect these basic interests, including a right not to be killed," and the claim that "human life has an intrinsic, innate value; that human life is sacred just in itself; and that the sacred nature of a human life begins when its biological life begins, even before the creature whose life it is has movement or sensation or interests or rights of its own." *Id.* Dworkin states that the confusion between these two claims has made the abortion debate more confrontational than necessary, and that "[t]he disagreement that actually divides people is a markedly

Even if the state has an interest in protecting extracorporeal embryos on the grounds that permitting the destruction of potential human life is a tragic waste, the autonomy interest of the individual who, while alive, objected to the use of the embryo for procreation must still be weighed against the state's interest. As discussed earlier,[319] forcing a person to become a biological parent against his or her will represents a serious violation of that person's procreative interests. Depriving an individual of control over a decision as central to a person's identity as that of becoming or not becoming a biological parent constitutes a major infringement upon that individual's autonomy which, it is reasonable to posit, outweighs the state's interest in protecting potential human life.

Yet, the question still remains as to the relative significance to be accorded to the deceased's right to avoid procreation after death as against the surviving party's desire to procreate. If the persons creating the embryo agreed when they participated in the IVF procedure that their cryopreserved embryos would not be used for procreation in the event of the death of either party, and the surviving partner has now changed his or her mind, a strong case can be made for enforcing the original agreement. Since the parties created the embryos with the expectation that these embryos would be used for procreation only under specified circumstances, and since they may not have participated in the process had their expectations been otherwise, it is unfair to allow the surviving partner to pursue a course of action which contradicts the original intentions of the parties.

When no agreement exists and the deceased's objections to the use of his or her embryos after death are known, the situation is analogous to that in *Davis*.[320] One possible approach is to follow the guidelines set forth by the Tennessee Supreme Court in *Davis*, whereby a presumption exists in favor of the party wishing to avoid procreation unless the other party has no alternative reproductive opportunities.[321] While this approach has the advantage of providing a somewhat flexible, case by case analysis, it is problematic because it sets forth a rather vague, uncertain standard, and entails a risk that the exception to the holding will undermine the holding itself.[322]

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less polar disagreement about how best to respect a fundamental idea we almost all share in some form: that individual human life is sacred." *Id.* at 13.

319. *See supra* notes 248-56 and accompanying text.

320. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)

321. *See id.* at 604.

322. *See* Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to an*

Moreover, there seems little justification for allowing one partner to use the embryos for reproduction when the other partner's objections are known, in circumstances of either divorce or death. Just as an individual's "right to procreate" with other living individuals is not unlimited in its scope but is contingent upon the consent of the other person involved, so too there should be no "right to procreate" by using an embryo created by a now deceased person who, while alive, expressed her objection to posthumous procreation.

The claim could be made, however, that a person who allows gametes to be used to create an embryo should be assumed to have consented to the use of that embryo for procreation, including procreation under changed circumstances. The court in *Kass* argued along these lines, stating that when Mr. Kass entered the IVF program he knew or should have known that "the possibility and probability of a delayed implantation [were] very real," and that his initial consent "should not be abolished nunc pro tunc merely because of a change in circumstances which could and should have been anticipated."[323] The court referred to "the obvious conclusion that a 'right to avoid procreation' cannot logically survive the initial act of procreation."[324] This conclusion is "obvious," however, only if one ignores—as the court in *Kass* did—the difference between *in vivo* and *in vitro* fertilization. While it is true that a man who engages in sexual intercourse is held legally responsible for a resultant child despite the fact that he may have had no intention to procreate,[325] the legal rules that govern procreation resulting from sexual intercourse should not necessarily apply to procreation achieved through the new reproductive technologies.[326] When an unintended pregnancy results from sexual intercourse, the law regards the man as having implicitly consented to this risk by consenting to sexual intercourse. In other words, the man's intent regarding the pregnancy is regarded as irrele-

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Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology, 43 DEPAUL L. REV. 523, 564-69 (1994).

323. Kass v. Kass, No. 19658/93, 1995 WL 110368, at *3 (N.Y. Sup. Ct. Jan. 18, 1995).

324. *Id.*

325. Courts have held a man in this situation financially liable for the resultant child, even when the woman intentionally misled him regarding her use of contraceptives. *See, e.g.*, Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 47-48 (Ark. 1993); Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. 1989); L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983); Hughes v. Hutt, 455 A.2d 623, 625 (Pa. 1983).

326. *Cf.* Gilbert, *supra* note 5, at 553 (claiming that since a man who impregnates a woman through sexual intercourse is liable for child support even when the woman gives birth against his wishes or without notifying him, a man's lack of willingness to father a child post-mortem should not override a woman's right to procreate posthumously since the man's interest in avoiding fatherhood is weaker after death than during life).

vant. However, a critical distinction between procreation achieved by sexual intercourse and procreation by means of reproductive technologies lies precisely in the fact that in the latter context, intent plays a critical role. Whereas in coital reproduction, the intention to parent is often formed *ex post facto* as a result of a biological reality, in reproductive technologies individuals are able to exercise considerable control in advance of any biological consequences.[327] When gametes or embryos have been frozen, the parties can suspend their decision concerning whether or not to proceed with procreation. To assert that once a person has embarked upon the reproductive process by creating extracorporeal embryos, he or she must proceed to bring those embryos to term is to fail to acknowledge the high degree of choice and control that current reproductive technologies offer.

Since intentions play such a critical role in reproductive technologies, the parties' intentions with regard to embryos resulting from the IVF process are highly relevant. A person who provides gametes to create an embryo has not irrevocably consented to the possibility of that embryo being brought to term under any and all circumstances. Although there was obviously consent by both parties to create an embryo, there was not necessarily consent to reproduce under specific circumstances, in this case, death. Thus, where no agreement exists and the deceased's objections to the use of the embryos are known, posthumous procreation using those embryos should not be permitted.

It could be argued that since the individual who objected to the use of the embryos is dead, his or her interests should be given less weight than those of the surviving partner. One might distinguish between circumstances of death on the one hand and divorce on the other, and claim that a stronger case exists for respecting the desire of the party wishing to avoid procreation in divorce, because that person will have to endure the psychological, emotional and financial consequences of having a child, whereas the deceased will not. However, as discussed in the context of gametes,[328] the fact that a person after death lacks awareness does not mean that his or her interests have not been harmed. This Article has argued consistently that a person's interest in avoiding biological parenthood should not be viewed as significantly diminished after death.[329]

327. *See* Marjorie M. Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 308-10.

328. *See supra* notes 251-56 and accompanying text.

329. *See supra* notes 248-84 and accompanying text.

B. When the Deceased's Wishes Are Unknown

When a person has contributed to the creation of an embryo, but has provided no indication as to his or her desires regarding the disposition of that embryo in the event of death, how should that person's silence be interpreted if he or she dies and the surviving partner wishes to use the embryo for reproduction? The fact that two live persons have taken the necessary steps to create an embryo is strong evidence that both persons had an intent to procreate. However, while creating an embryo more clearly evidences an intent to procreate than does the collection of gametes without fertilization, it does not necessarily establish an intent to procreate posthumously. It cannot be inferred that a deceased person who created an embryo without authorizing posthumous implantation would necessarily desire that the embryo be brought to term under such conditions.

However, given that two persons are involved in the creation of an embryo, the deceased's lack of intent to procreate is not necessarily determinative. Since the surviving partner has contributed genetically to the embryo in as significant a way as the deceased, his or her procreative desires also must be taken into account. At this point, it becomes relevant to consider whether the surviving partner wishes to rear the resultant child, or wishes to donate the embryo to another couple. A person's reproductive interest arguably should be given more weight in the former situation than in the latter, because the willingness to rear a child manifests a long term emotional, psychological, physical and financial commitment on the part of the biological parent.

In circumstances where the surviving partner wishes to raise the child, a far stronger case can be made for implanting and bringing the embryo to term than in the corresponding situation concerning gametes. Although the deceased's intentions regarding posthumous procreation are unknown—and thus may or may not denote acquiescence—the wishes of the other gamete provider who wants to procreate are clear. While this Article has argued that in the case of sperm or eggs, only the individual who provides the gametes should have the authority to decide whether posthumous procreation should take place, a different conclusion is appropriate where embryos are concerned and the deceased's wishes are unknown. In contrast to the situation where the deceased's objections to posthumous procreation using his or her embryos are known with substantial certainty, when the deceased's wishes are unknown there exists only a risk that the deceased may have been opposed to posthumous reproduction. If posthumous procreation is not allowed when the deceased's wishes

are unknown, the interests of the surviving partner who wishes to procreate will always be harmed, and the interests of the deceased will sometimes be harmed. On the other hand, if posthumous reproduction is permitted, only one person's interests will sometimes be harmed. Thus, given that there is a possibility that the deceased may have agreed to posthumous procreation using his or her embryos, combined with a certainty that the other gamete provider wants to proceed, the balance seems to tip in favor of allowing posthumous procreation.

CONCLUSION

Decisions concerning the use of reproductive material after a person's death focus attention on how we view our commitments not only to future generations, but also to those who have preceded us. To discharge faithfully our obligations to those who no longer exist, we need to honor express prior objections by the dead to the posthumous use of their gametes for reproduction. Even though, after death, a person presumably has no appreciation of the experience of parenthood, the contravention of stated instructions against posthumous procreation violates a very significant procreative right, namely, the right of an individual to control his or her genetic legacy.

When evidence as to a person's intentions regarding posthumous use of his or her gametes is lacking, posthumous procreation should not be permitted. Given that posthumous procreation by harvesting a deceased person's gametes is not the manner in which a dead body is usually treated, an individual's failure to make a directive against this outcome ought not to be construed as consent. Even when a person has cryopreserved his or her gametes, it cannot be inferred from this fact alone that he or she would have authorized posthumous reproduction. While cryopreservation may indicate a general intent to procreate at some future point, it says nothing about a decision to procreate under the very specific circumstance of death. A presumption against posthumous reproduction in the absence of clear evidence to the contrary constitutes an important statement about the value that should be placed upon an individual's right to bodily integrity and self-determination.

As in the case of gametes, the deceased's prior objection to the posthumous use of an embryo created with his or her gametes should be respected. However, when the deceased's wishes regarding posthumous reproduction with his or her embryo are unknown, a stronger case can be made for permitting the surviving partner to use the embryo for reproduction than in the corresponding case with

gametes. Since the surviving partner's genetic contribution to the creation of the embryo is as significant as the deceased's, his or her procreative intentions must also be heeded. The possibility that the deceased might have consented to use of the embryo, combined with the certainty of the other gamete provider's wishes, suggests that there may be more reason to allow posthumous procreation involving embryos under these circumstances than to disallow it.

Despite the finality of death, the relationship of the living to the dead does not altogether cease with the grave. To some extent, it continues on through the actions of the living as they carry out the last wishes of the dead. When these wishes regarding posthumous procreation are unknown, respect for individual autonomy and dignity requires that the deceased's body should not be used in a way that, in all probability, was not contemplated and certainly was not authorized by the deceased while alive. Acting to fulfill the wishes of the dead is a special relational trust placed into the hands of the living. In the area of procreation, fulfilling such wishes preserves the shape of the human legacy envisaged by the deceased in life. There is perhaps no greater way that the living can honor the dead than by safeguarding the pre-death intentions of those who are now deceased, in a matter as fundamental as procreation.