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ARTICLES

THE POSTHUMOUS GIFT OF LIFE: THE WORLD ACCORDING TO KANE

Evelyne Shuster

INTRODUCTION

In John Irving's novel, *The World According to Garp*, nurse Jenny Fields wants a child but does not want to be involved with a man. Her ideal situation is "a mother alone with a new baby, and a life ahead of them, just the two of them. A baby with no strings attached. An almost virgin birth!" She decides she needs a man "who would only need to try once to make her pregnant - just that, and nothing more." Jenny Fields finds that the dying, semi-comatose patient of hers, Technical Sergeant (T.S.) Garp, is suitable. She arouses him until he has an erection, and gets "his last shot" before he dies. In her fictional auto-biography she explained:

Of course I felt something when he died. But the best of him was inside me. That was the best thing for both of us, the only way he could go on living, the only way I wanted to have a child. That the rest of the world finds this an immoral act only shows me that the rest of the world doesn't respect the rights of an individual.

Jenny Fields did not find it immoral "to steal" the dying man's sperm to have a child. What difference should it make to her or to the resulting child that she conceived in that matter? Jenny Fields did not force the dying man to have sexual intercourse with her, she only facilitated the act which the man clearly enjoyed as he died. The man's sperm should be considered a "gift" to her. Why should this be wrong? Is it not sufficient that a child might be born? Should limits on pro-creative rights be justified? While the technology involved in the cryopreservation of

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2. *Id.* at 6.
4. *Id.* at 29.
gametes and embryos is almost commonly accepted, the ethical and social issues raised are complex and controversial. At stake are the rights and obligations of gamete providers, the consequences to the living participants in the pregnancy, and possible effects of posthumous reproductive practices on the children they produce.\(^5\)

This Article addresses these questions in the spirit and humanist philosophy of George J. Annas by adopting his positions on fairness, justice, human dignity, and human rights. Additionally, this Article examines cases of posthumous reproduction with sperm, eggs, and embryos, including posthumous pregnancy. Further, this Article explains why posthumous reproduction is problematic. Finally, this Article concludes with public policy recommendations for the regulation of posthumous reproduction.

I. POSTHUMOUS REPRODUCTION

Posthumous births regularly occur when the husband or male partner has died from illness or accident during the pregnancy but before the child is born. In these tragic circumstances, prospective parents do not anticipate having a posthumous child. On the contrary, they expect to live long enough to rear their children and fulfill their parental obligations. However, posthumous births are acts of fate. As an act of fate, these births raise unique ethical and legal questions because the child born is a rightful heir of the deceased father.

Posthumous reproduction, on the other hand, is a deliberate decision to produce a child after one, or both, would-be parents die. The feasibility of reproducing after death emerged in 1954 when Bunge and Sherman demonstrated that human spermatozoa, when frozen and thawed, could be used for insemination to produce a normal child.\(^6\) In the 1970s, private sperm banks were established to enable men who anticipated either a vasectomy or cancer treatment to cryopreserve their sperm with the intention of using it later. This cryopreservation of sperm rapidly became acceptable for reasons other than those related to the medical field. Now, virtually any man who can afford it may have his sperm frozen and stored for later use. Likewise, virtually any woman, for almost any reason, can use donated sperm for insemination. As a


result, these commercial gamete banks have become a source of sperm, ova, and embryos for any consumer's use.

Embryos produced in vitro, while both members of a couple are alive, may be frozen for later use by the couple. This ability to cryopreserve sperm makes it possible for children to be conceived long after their genetic father dies. However, problems arise in two separate situations: when one partner, or both, die before using the embryos, or when the surviving partner wants to establish a pregnancy against the previously expressed wishes of the dead partner. These problems arise because the parents fail to leave instructions about what to do with the embryos in the event one, or both, of the parents die. Who should decide on the disposition of these “orphaned” or “abandoned” embryos? Should the embryos be kept in storage, used for research, anonymously donated to infertile couples, or discarded?

Gamete banks are generally not notified when a gamete depositor dies. In the event that they are, the specimens are not withdrawn from

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7. See John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994). The author suggests that a surviving partner's right to use a deceased's sperm should depend on whether she is considered the legal owner of the sperm under state property and inheritance law, not on whether the decedent specifically authorized the use of his sperm after death. See id. at 1045. Robertson argues that the surviving partner might have a right to use the sperm even if the decedent left specific instructions opposing posthumous reproduction. See id. at 1040-45. See also N.Y. STATE TASK FORCE, ASSISTED REPRODUCTIVE TECHNOLOGIES 295, 295-98 (1998).


9. See George P. Smith, *Australia's Frozen 'Orphan' Embryos: A Medical, Legal, and Ethical Dilemma*, 24 J. FAM. L. 27, 28 (1995). This case involved a wealthy American couple, the Rios, who died in an airplane crash after leaving two embryos frozen in an Australian gamete bank. See id. at 27-28. The bank was unsure whether it was appropriate to destroy the embryos, donate them to another couple, or give them to the Rios’ family. See N.Y. STATE TASK FORCE, supra note 7, at 310-11; see also SHERMAN ELLIAS & GEORGE J. ANNAS, *REPRODUCTIVE GENETICS AND THE LAW* 234 (1987). In California, the parents of a single woman who died from leukemia after freezing her embryos created with her eggs and donor sperm, searched for a surrogate to gestate the embryos. See Evelyne Shuster, *Dead Parent Cannot Parent*, CHICAGO TRIB., Jan. 1, 1998, at 21. The parents claimed they had a right to be grandparents, and their deceased daughter the right to be a mother. See id. The parents reported that they found a surrogate who became pregnant after an embryo transfer, but later miscarried. See id.
If a sperm donation is anonymous, it is generally assumed that it makes no difference to the person requesting the sperm, or to the child conceived with the sperm, that the depositor is deceased. However, when men store their sperm for use by an intimate partner, and die before the sperm is used, questions about the disposition of the sperm arise. These disputes arise when a sperm bank refuses to release the sperm according to the sperm depositor's directive, or when family members disagree with a directive. Therefore, the dispute focuses on whether specific instructions by the sperm depositor are sufficient to justify the posthumous use of sperm. Should the sperm be discarded, released to a widow, a girlfriend, a parent, or other significant person, or should it be anonymously donated?

II. POSTHUMOUS REPRODUCTION WITH SPERM: CASES IN FRANCE AND IN THE UNITED STATES

Procreative decisions are private and a fundamental right of adults. Yet, whether these decisions survive death remains unclear in light of recent court decisions.

10. See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 7, at 295.
11. See id. at 295-96. Some people choosing donor insemination might actually prefer a deceased donor to avoid the risk that the donor might someday attempt to assert parental rights. See id.
12. Many gamete banks' policies require that the semen be destroyed after the donor dies, if he left no instructions authorizing the posthumous use of his sperm. See Donald E. Shapiro & Benedene Sonnenblick, The Widow and the Sperm: The Law of Post-Mortem Insemination, 1 J. L. & HEALTH 229, 243-44 (1986); see also Timothy F. Murphy, Sperm Harvesting and Postmortem Fatherhood, 9 BIOETHICS 380, 381-98 (1995).
14. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that a state cannot prohibit married couples from using contraception); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). But see Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding a Georgia statute criminalizing sodomy, more specifically, sexual relations between persons of the same sex).
15. See Shuster, supra note 9, at 21.
In France, a dispute surrounding the embryos of Alain Parpalaix and his wife Corinne illustrated the difficulty of this ethical decision. Fearing the loss of his reproductive capacity, Parpalaix deposited his sperm at the Centre d'Etude et de Conservation du Sperme Humain (CECOS), a government funded research center and sperm bank, before undergoing treatment for testicular cancer. After Parpalaix's death, Corinne requested that CECOS release the sperm so that she could use it for artificial insemination. CECOS refused. CECOS argued that while Parpalaix wanted to preserve his sperm in case of infertility, it was unclear whether he would have consented to the use of his sperm after death. In the absence of clear authorization from Parpalaix, CECOS claimed that there was no obligation to release the sperm to Corinne. According to CECOS, sperm is both "genetic material" and "an indivisible part of the body" that cannot be distributed without explicit instruction from the sperm depositor. Corinne argued that her husband's intention in storing his sperm could only have been to make her the mother of his child and that no other reason could explain the storage of his sperm. By denying her the use of the sperm, Corinne argued, CECOS violated not only her husband's implicit wishes, but also her protected right to procreate.

The Tribunal de Grande Instance de Creteil, while ignoring the potential inheritance and property issues also present in the case, focused its attention on the sperm and what it represented to Parpalaix. The court characterized the sperm as "the seed of life tied to a fundamental liberty of a person to procreate or to avoid procreation." The court insisted that "this fundamental right must be protected and cannot be subject to the rules of a mere contract," and therefore, "the fate of the sperm must

17. See id. at 561.
18. See id.
19. See id.
20. See id.
21. See Parpalaiz at 561.
22. See id.
23. See id.
24. See id.
26. Id.
be decided by the person from whom it came."\textsuperscript{27} Thus, the court determined that Parpalaix's intent and "deep desire" to make his wife "the mother of a common child" was "unequivocal, if not absolute."\textsuperscript{28}

In reaching this conclusion, the court also recognized that sperm banks can refuse to release the sperm of a depositor after his death if the sperm bank informs its client in advance of that policy. Had CECOS told Parpalaix that it would not release the sperm for posthumous insemination, CECOS would have been justified in its refusal to release the sperm. Because it failed to do so, however, the court ruled that CECOS must release the sperm to Corinne.\textsuperscript{29}

As a result of this opinion, CECOS adopted gamete policy guidelines. When another cancer patient, Michel G., also deposited his sperm with CECOS, he signed a written agreement which stated that "his sperm will only be used in his presence and with his explicit consent."\textsuperscript{30} Upon his death, Michel’s wife Claire requested that CECOS release the sperm to her. In denying her the use of Michel’s sperm, Claire claimed that CECOS deprived her of her fundamental right to procreate. She contended that her husband’s act of storing sperm implicitly recognized his private decision to have a child by her.

The \textit{Tribunal de Grande Instance de Toulouse} rejected those arguments, saying that "a right to procreate is not a right to a child."\textsuperscript{31} No one is obligated to do "all that is technologically feasible to establish a pregnancy."\textsuperscript{32} Because CECOS informed its client in advance that it would not release the stored sperm to a widow, CECOS had no obligation to honor the request.\textsuperscript{33} Posthumous reproduction, the court stated, tends to devalue children and undercut their moral agency by treating them only as a means to someone else’s end.\textsuperscript{34} The court, while refusing to be a party to the making of "souvenir babies," ruled that CECOS was justified in its policy decision not to engage in the posthumous transfer of gametes.\textsuperscript{35} Accordingly, it denied Claire G.'s request to use her dead

\textsuperscript{27.} \textit{Id.}
\textsuperscript{28.} \textit{Id.}
\textsuperscript{29.} \textit{See id.}
\textsuperscript{30.} \textit{Mme. Claire G.} at 62.
\textsuperscript{31.} \textit{Id.}
\textsuperscript{32.} \textit{Id.}
\textsuperscript{33.} \textit{See id.}
\textsuperscript{34.} \textit{See id.}
\textsuperscript{35.} \textit{See Mme. Claire G.} at 62.
husband's sperm for insemination.\textsuperscript{36}

In the United States, the only reported case of posthumous insemination involved William Everett Kane.\textsuperscript{37} Kane was a prominent California attorney who, before committing suicide at the age of forty-eight, deposited his sperm at a Cryobank in Los Angeles. Before his death, Kane left the instruction that his sperm should be used by his girlfriend of five years, Deborah Ellen Hecht.\textsuperscript{38} In addition, Kane had two college-aged children with his former wife but was living with Deborah.\textsuperscript{39} Unlike Parpalaix, Kane explained that his decision to commit suicide was the reason for the storage of his sperm. He signed an agreement with Cryobank that read, "Cryobank shall release the semen to Deborah Hecht and her physician."\textsuperscript{40} In an unusual letter to his existing children and to any posthumous offspring he might have, Kane wrote:

I address this letter to my children, although I have only two, it may be that Deborah will decide, as I hope she will, to have a child by me after my death. I have assiduously generated frozen sperm samples for that eventuality. If she does, then, this letter is also for my posthumous offspring as well with the thought that I loved you in my dreams, even though I never got to see you born.\textsuperscript{41}

Branding the desire to father a child after death as selfish, "egotistic and irresponsible," Kane's children requested the destruction of all of Kane's cryogenically preserved spermatozoa to prevent not only the birth of children who will never know their father and never even have the slightest hope of being raised in a traditional family, but also the disruption of existing families by after-born children, and the additional emotional, psychological and financial stress on those family members already in existence.\textsuperscript{42}

A trial court granted the request, and ordered the sperm destroyed.\textsuperscript{43} Hecht appealed, claiming that Kane's will clearly stated his intent that she be the mother of his posthumous children. The will read, "I bequeath

\textsuperscript{36} See \textit{id.}
\textsuperscript{38} See \textit{id.} at 840.
\textsuperscript{39} See \textit{id.} at 841.
\textsuperscript{40} \textit{Id.} at 840.
\textsuperscript{41} \textit{Id.} at 841.
\textsuperscript{42} \textit{Hecht}, 16 Cal. App. 4th at 844.
\textsuperscript{43} See \textit{id.}
all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht. Based on this clause, Ms. Hecht maintained that the sperm was a special “gift” from Kane to her before his death. Hecht claimed that not recognizing this “gift” is a violation of her right to privacy and Kane’s right to direct the way he wanted his sperm used.

Relying almost exclusively on the Parpalaix case, the appellate court characterized the sperm as “reproductive material, a unique type of property because of [its] potential for human life.” The court believed that Kane’s intention was clearly to have posthumous offspring. Since Deborah Hecht consented to conceive a child using the deceased’s sperm, the court decided it could not interfere with a family-making decision about whether, when, and with whom to have children. In reversing the trial court’s decision, the appellate court ruled that sperm depositors may determine the disposition of their gametes after death.

This court deemed it appropriate to honor Kane’s wishes to have posthumous offspring because the Cryobank obtained the voluntary consent of both gamete providers. Thus, the court found that using the sperm of a dead man to reproduce makes no difference to the person receiving the sperm, and has no serious adverse consequences to the existing family, the living participants in the pregnancy, or to the potential child. Is the Kane court right?

A. Values in Reproduction

Sperm are not like vital organs. They are renewable, and can be bought, sold, donated, stored, or simply wasted. Most Americans do not view commerce in sperm as particularly wrong, and would agree that gametes, both sperm and ova, have less value than embryos. Sperm belong to men. Men have a right to donate or sell their sperm during their lifetime because the right to avoid reproduction, and implicitly the right to reproduce, are fundamental rights. Denial of either right creates significant burdens on individuals and affects their lives in ways that they alone best appreciate. But the right to reproduce is fundamentally a negative, not a positive right. It creates no reproductive obligation on others. A man can give specific instructions concerning the disposition of his sperm after his death, but no one is actually obligated to honor his

44. Id.
45. Id. at 855.
46. See id. at 836.
wishes. To say otherwise would be the equivalent of saying that a man has a right to a fertile woman. Further, this would require the state to provide a fertile wife to a man so that he could exercise his "reproductive right." However, no such right exists.

The state can prohibit specific reproductive arrangements, such as commercial surrogacy, as a matter of public policy, if it finds that the arrangement destroys moral values and societal interests. The rationale a state uses to interfere in these arrangements is to protect the values and interests living people have in reproduction and the possible unintended effects these arrangements may have on a pregnancy. Accordingly, we must identify the values and interests individuals have in reproduction before reaching a conclusion about the propriety of posthumous reproduction.

People value reproduction for the experience it entails, including birth and rearing offspring. Reproductive decisions are ordinarily made because of individuals' desire to have genetic offspring and to form a family that they may enjoy. But Kane will never know of "his" child's existence, or whether he even had another child. He will never assume any of the most basic responsibilities of fatherhood, nor will he face personal or financial demands made by his genetic offspring. At best, he might have felt some happiness, while alive, in thinking he could become a "father" after death. Although most people identify happiness as the highest good in life, Kane's pre-suicidal appreciation of happiness is so far removed from what people ordinarily experience when they decide to become parents that it cannot warrant serious consideration. Therefore, the interests of a suicidal person cannot be equated with the interests of persons who intend to rear their children.

Kane offered his girlfriend the gift of his sperm in contemplation of his death. This offering — gift mortis causa — may be seen as both a loving expression and also as Kane's hope of maintaining a relationship with Deborah Hecht from the grave. Her acceptance of the gift shows her devotion to Kane's memory. But the child that may result from the gift-exchange would have no such memory to honor, no existing relationship to maintain and no new relationship to establish with a genetic father. It seems unfair from the child's perspective to be conceived as a

“loving memorial” or a product of a gift-exchange.49

Kane could argue, nonetheless, that his interest in posthumous insemination through this gift of sperm was to ensure his genetic survival. This genetic interest is highly valued by individuals, who suffer, anguish, and endure lengthy and costly infertility treatment, to have a child genetically related to one parent. It has even been suggested that genetic survival is the only valued reproductive goal: “[Y]oung men [should] agree to vasectomy as a new form of male contraception. . . . The ‘normal’ reproductive state of an adult [would then] be infertility, a subsequent deliberate step being needed for fertilization.”50 Men could decide in advance what use would be made of their frozen sperm. Posthumous insemination could be an attractive option for those who wish to ensure the survival of their genes. In fact, posthumous insemination is valued by many people as a way to transcend death itself. Based on this rationale, interest in genetic survival cannot be easily dismissed.

Transcending death may have been Pamela Maresca’s only true comfort after her husband died in a car accident at the age of twenty-two.51 Pam decided to retrieve his sperm in order to have his child.52 The day of the funeral, she gathered her in-laws and friends into the very living room where she was married and told them, “[W]e’ve got a chance for Manny to live on, to make him live again. It’s going to happen and it’s

49. The French anthropologist, Marcel Mauss explores the idea of the “gift-exchange” in archaic societies, extended to social life. Mauss stresses the social obligation of the gift-exchange, and the demand for reciprocity, under the appearance of generosity, and the freedom of accepting, refusing, and returning a gift. See generally MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAI S OCIETIES (Ian Cunninson, trans., 1954).


51. See S. Fishman, Inconceivable, VOGUE, Dec. 1994, at 306. A recent study surveyed the prevalence of postmortem sperm retrieval in the United States and Canada. The authors noted that although requests for postmortem retrieval are still relatively small in number, they are still “greater than anticipated” and are increasing in the United States. No requests were reported in Canada. American requests came from spouses, family members, significant others, and friends. It is not known whether any of these requests resulted in the actual use of the sperm for insemination. None of the facilities surveyed had policies or guidelines to deal with requests for postmortem sperm retrieval. See Susan M. Kerr, Postmortem Sperm Procurement, 152 J. UROLOGY 2154, 2154-56 (1997).

52. See Kerr, supra note 51, at 2154.
going to work." Everyone cheered and clapped. The sperm bank director, Dwight Brunoehler, had no ambivalence about taking the sperm from a dead man for reproduction without his consent. He believed that [s]perm is a piece of real property, like a car or a house. Pam, as far as I am concerned is the owner. Single women already qualify for fertility treatment programs. The way I look at Pam’s request is a case of a single woman with an unusual source of sperm.

Pamela’s husband will not go on living. His genes, however, may survive if there is a successful pregnancy. Although individuals are not reducible to their genes, they, just as animals, use all sorts of reproductive strategies to maximize the spread of their genes. As Richard Dawkins writes in *The Selfish Gene*:

> Ideally, what an individual would like is to copulate with as many members of the opposite sex as possible, leaving the partner in each case to bring up the children. We, and all other animals, are machines created by our genes. [Our] genes have survived in a highly competitive world. This entitles us to expect certain qualities in our genes. [A] predominant quality to be expected in a successful gene is ruthless selfishness. This gene selfishness will usually give rise to selfishness in individual behavior.

Is ensuring genetic survival wrong? Surely, individuals procreate for a variety of reasons. Some have children with the intention of using them as gifts to another child by using the new child as a donor for a sick sibling. Others conceive to save a marriage, or in an attempt to experience love unconditionally. Still others have children to feel needed, or to fulfill expected social behaviors. Yet, while society tolerates selfish and potentially abusive parental behaviors, it does not prohibit irresponsible individuals from having children. Is the reason for having a child posthumously really so different from other reasons people have for deciding to procreate? Are there values being ignored or swept aside? Is there harm being done to children when people are taken in by the ruthless game of genetic survival? Is there really any harm in honoring Kane’s

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53. See id.
54. Id.
56. In 1990, the Ayala family in California deliberately conceived, and carried to term, a child so that they could obtain bone marrow for an existing child with leukemia. See Girl is Born: Conceived to Save her Sister’s Life, PHILA. INQ., Nov. 22, 1994, at A16.
intent to have posthumous offspring?

B. Harming and Wronging

Society may forbid a person from using a specific procreative strategy to prevent harm to others. This is a particular application of John Stuart Mill's "Liberty Principle":

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant . . . . The only part of the conduct of anyone for which an individual is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.\(^{57}\)

However, there are conceptual problems in applying the "harm principle" to posthumous reproduction. This is because it is difficult to speak of causing harm to a child who is not yet conceived. The not-yet-conceived cannot be the bearer of moral rights or a proper object of moral concern. Arguably, prior to actual conception and birth, any discussion about harm to the expected child can only be in terms of counterfactual hypotheticals and is thus, inconclusive.\(^{58}\)

In the *Kane* case, Deborah Hecht has only two options: go forward with the insemination, which could lead to a child being born, or not use the sperm, which meant that a genetic child of Kane's would never be conceived. She may act selfishly, or selflessly, when she decides to carry out Kane's posthumous parental project. She may be captivated by the ruthless game of genetic survival as a gift to her lover. But she cannot harm a child who is yet to be conceived. The not-yet-conceived has no interest in the existence to protect. To say otherwise would be the equivalent of saying that Deborah Hecht harmed a not-yet-conceived child by using the sperm. If, however, she does not use the sperm, Kane's child would have no possibility of being conceived. The conceptual and real difficulty in assessing harm to the not-yet-conceived is that the act that could harm a child is the very act that causes the child to

58. See Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* 3-36 (1992). This essay examines John Stuart Mill's often cited "harm principle," and its implication for civil and liability. See *id*. He tests it on conceptually hard cases when the wrongful causative conduct occurs before birth, and the harmed state that is its upshot consists in being born in an impaired condition. See *id*. 
be born.

Once the child is born, he or she may claim that conception and birth in this way is so wrong that she or he would have preferred not to be born. But this seems very unlikely. The child is not likely to regret being born, although she or he may regret the circumstances surrounding the birth. A healthy child is always better off being born than not being born at all. If this is true, any reproductive strategy that causes a child to be born, or any option that maximizes the number of healthy children being born, can be justified from the perspective of the children.

Kane wanted his girlfriend to be impregnated with his sperm, a desire that most people today would find acceptable. But what if he had left instructions that his sperm be used to impregnate a thousand women for the next ten generations? This would certainly maximize the spread of his sperm, and may result in the birth of more children. Additionally, suppose that Kane left instruction that his sperm be used to impregnate his daughter or a gorilla. Everyone would agree that such a directive should not be honored because the birth of a child is neither an unconditional good, nor an unconditional goal. Wanting a child is not sufficient to justify all feasible reproductive strategies. Some reproductive options are so morally and socially offensive that most people would find them unacceptable.

Both nature and society impose limits on the number of

59. See Robertson supra note 48, at 75. John Robertson points to "the major [problem] with finding harm to offspring in these circumstances, and hence, with claiming that the reproduction is irresponsible." Id. The problem, he argues, is that in many cases the alleged harm to offspring occurs from birth itself.

Either the harm is congenital and unavoidable if birth is to occur, or the harm is avoidable after birth occurs . . . Preventing harm would mean preventing the birth of the child whose interests one is trying to protect. Yet a child’s interests are hardly protected by preventing the child’s existence. If the child has no way to be born or raised free of that harm, a person is not injuring the child by enabling her to be born in the circumstances of concern.

ROBERTSON, supra note 48, at 75-76 (emphasis added). This commentator stresses that a child is always better off born than not, and thus nothing can harm the child who would not be born but for what is a matter of concern. See id. Protecting offspring by preventing their births, “prevents the birth of offspring whose life is a net benefit to them, and is not always necessary to protect them in cases where their life is truly wrongful.” Id. This author adopts the same rationale toward human cloning. See John A. Robertson, Human Cloning and the Challenge of Regulation, 339 NEW ENG. J. MED. 119, 119-22 (1998).

60. The news in 1997 that embryologist Ian Wilmut had cloned a sheep by reprogramming one of its somatic cells to act as the nucleus of an egg was almost universally greeted with horror. See GEORGE J. ANNAS, SOME CHOICE 3 (1998).
children born from a single sperm specimen. As a limitation on this reproductive capacity, society has rejected multiple simultaneous marriages and recognizes no social value in certain other reproductive practices.

Posthumous reproduction cannot harm children. Yet, it can wrong them by making genetic parent-child relationships impossible. Further, it denies children the right to be born with two living parents. Posthumous reproduction may also wrong women by promoting a view that women are reducible to their reproductive functions. In a society where women have a mandate for motherhood, the gift of sperm could create "a strong obligation on [them] to use such a gift, no matter how deliberate, spontaneous and expressive the 'gift' appears to be." Because women are subjected to all sorts of psychological, cultural, and societal pressure to be mothers, the gift-exchange of sperm creates a strong moral, psychological, and social imperative on some women to want, or at least appear to want, the ability to bear children.

Such pressure was real in the Maresca case. Pam’s mother-in-law said that “she [would] be devastated if Pam decided not to be impregnated with her son’s sperm: [W]e want this baby born at all costs, and we are hoping she will have his baby.” Women are sometimes perceived as eternal mothers, and thus available for reproductive function. If Pam decided “not to help her dead husband live on,” her mother-in-law says she will “use donor eggs and would carry her son’s child.”

The prospect of producing human clones with the same technique entails a call for a ban on cloning by leaders around the world, including Ian Wilmut himself. See id. Many see human cloning as a technique so perverse that it could destroy the very fabric of what makes us human. See id. Further, human cloning is an insult to the uniqueness of the human person, her identity, individuality, and freedom to become all that she can. Id. See also George J. Annas, Why Should We Ban Human Cloning?, 339 NEW ENG. J. MED. 122, 122-25 (1998). Similarly, the news that scientists from Worcester, Massachusetts used cloning techniques to create a human embryo by placing DNA from a scientist’s cheek and leg cells into a donor cow egg was greeted with horror and repulsion. See Usha L. McFarling, Experts Skeptical Cloning of Humans Could Be Prevented As Ethical Questions About it Are Being Pondered, Scientists Are Racing Ahead Unrestricted, PHILA. INQ., Nov. 18, 1998, at A3.

61. MAUSS, supra note 49, at 7.


63. See Kerr, supra note 51, at 2154.
Additionally, some women may not want to share their lives with a man, but nonetheless want their sperm to procreate. This would wrong men when they are reduced to biological necessities and valued only for their sperm. To Jenny Fields, the dying man was only as good as his sperm.

It thus seems reasonable to conclude that posthumous reproduction is less about reproduction than about power and control. Men may try to control reproductive events by providing directives on the disposition of their sperm after they die. Refusal to receive or return the gift of sperm may cause social disapproval, and be seen as a refusal of social relations. Some women may want to have complete reproductive control and rearing responsibilities. They could play various unfair games with men to achieve conception. In this game of power and control, children tend to be treated as mere commodities.

III. WOMEN IN POSTHUMOUS PREGNANCY AND REPRODUCTION: A UNIQUE REPRODUCTIVE MODEL

Arguably, for gender equality, if men are permitted to reproduce posthumously, women should also be able to have genetic children after they die. The use of ova for posthumous reproduction raises problems comparable to the posthumous use of sperm. Should ova be used at all? There is, however, an unique difference - the requirement of a woman to achieve pregnancy. What should be done if the deceased woman left instructions that a specific woman gestate her fertilized eggs, and the man who contributed the sperm wants somebody else? Should her directive be followed? The male model provides no answer.

Pregnancy and childbirth are unique. Fathering a child cannot be equated with the work involved in pregnancy and childbirth. Nor can one reasonably equate the characteristics of freezing sperm for later use

64. See MAUSS, supra note 49, at 37-41.
65. Recently, in New Mexico, Peter Wallis sued his girlfriend, Kellie Smith, for becoming pregnant by robbing him of his sperm when they had sexual intercourse. Wallis argued that he did not give his sperm to her for the purpose of reproduction, and claimed that Smith “stole” the sperm from him to become pregnant against his will. She argued that she could not have stolen his sperm. Rather, he transferred it to her during voluntary sexual intercourse. This should be considered a “gift” she said. See Barbara Vobejda, Court to Decide if a Man has a Right to Choose Fatherhood, WASH. POST, Nov. 23, 1998, at A1.
with the characteristics of egg impregnation, which requires an invasive, painful and risky, medical procedure. These reasons make it impossible to apply the male reproductive model to women, either in posthumous pregnancy, or in the use of ova from aborted fetuses. These instances must have their own model and justification.

A. Posthumous Pregnancy: The Female Corpse as Fetal Incubator

Posthumous pregnancy involves a deceased brain-dead pregnant woman whose artificially maintained body is used to support her fetus. Problems arise in this scenario when the pregnant woman makes her wishes known in advance of death and her husband or partner, family, and physicians disagree with the woman's directive. Furthermore, it may be problematic when the woman has no such directive, and there is disagreement over what should be done. Should the woman's vital functions be maintained to ensure a safe delivery?

One such case involved a twenty-seven-year-old woman who, at twenty-two weeks of gestation, delivered a surviving infant sixty-three days after the diagnosis of brain death. This case creates a true dilemma. On the one hand, there is an existing fetus whose interest in survival must be considered; on the other hand, there is the woman whose entire body is needed to ensure the fetus' survival. In posthumous insemination there is no object of moral concern other than the sperm. This is not the case in posthumous pregnancy where the fetal-maternal unit is such that it is impossible to consider the interests of the fetus separately from those of the woman.

Decisions to sustain a dead pregnant woman for the sake of her fetus have been ethically justified on utilitarian grounds. According to the utility principle:

[M]aternal autonomy ceases with the mother's death, and thus treatment that benefits the fetus can no longer violate her autonomy. The woman's explicit refusal to be maintained as a fetal incubator, expressed before her death, does not in itself carry moral weight against the possibility of fetal survival. The mother

68. See Field et al., supra note 67, at 44.
is not harmed; no right of hers is violated and great good can be done for another.\textsuperscript{69}

Arguably, this is an instance of "the medical rescue of the fetus from death, a long tradition in Western society."\textsuperscript{70}

But should the lack of evidence of a pregnant woman's intention be automatically construed as a willingness to want the pregnancy now that she is dead?\textsuperscript{71} What is the justification for the "medical rescue" of the fetus? It is argued that

[t]he conditions for beneficence-based duties of fetal rescue will often be unmet, both because sustaining the pregnancy is not always a clear gain to the born child and because it may impose a substantial burden on the woman.\textsuperscript{72}

There are difficulties in identifying what exactly are the special relationship duties that would require a woman to have her body used as a fetal incubator without her consent. As of yet, no one has been required to give up a vital organ to save the life of a close family member because of special family relationships. Physicians are not permitted to harvest vital organs from a dead person without explicit consent from that person, or the next-of-kin, to save lives. To use a woman's corpse as a fetal incubator without the woman's prior consent would be analogous to saying that a woman loses her right to refuse to donate organs upon her death by becoming pregnant. Women do not lose their constitutional or common law rights by becoming pregnant.\textsuperscript{73}

Using a woman's corpse as a fetal incubator creates a dangerous precedent that could be used to justify using female somatic support in other related cases, for example, when the pregnant woman is comatose or in a permanent vegetative state (PVS). The female body in these cases may become the most suitable somatic support for a fetus at any stage of its development, especially because comatose or PVS pregnant women can no longer complain, insist that treatment be terminated, or refuse procedures that may benefit their fetuses. Moreover, ignoring the pregnant woman's personhood and using her body as an inert receptacle of fetal life reduces her gestational work to services that she is expected to

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{72} See generally id.
\textsuperscript{73} See George J. Annas, Death With Dignity, in HEALTH CARE CHOICES FOR TODAY'S CONSUMER 297-308 (M.S. Miller ed. 1995).
provide. This lack of self-awareness transforms the pregnancy into an “imitation of pregnancy”\textsuperscript{74} and destroys the unique human element that makes pregnancy a valued and worthwhile experience.

Posthumous pregnancy is most problematic when the woman dies late in pregnancy and the fetus needs one or two more weeks of gestation for a greater chance of survival. But even in this case, it would be wrong, as a routine procedure, to sustain the woman’s body for the fetus’ benefit in the absence of the woman’s written or oral consent.

B. Aborted Fetuses as Genetic Mothers

It has been suggested that aborted female fetuses might eventually be used as a source for oocytes in oocyte donation programs.\textsuperscript{75} One possibility is to remove oocytes from ovaries of aborted fetuses, mature them in vitro, and use them as donor oocytes for couples who need eggs as part of their in vitro fertilization effort. Another possibility is to remove ovaries from aborted fetuses and transplant them into women who lack ovarian functions so the transplanted tissue could contribute to the woman’s normal reproductive cycle. At present, the use of fetal eggs for conception is hypothetical and speculative at best.\textsuperscript{76} Its rationale has been that, if sperm from a dead man can be used for posthumous insemination, so too should eggs from aborted fetuses.

However, the male reproductive model cannot apply to women. The “donation” of fetal eggs cannot be equated with the “donation” of sperm by an adult male who willingly provided the sperm and at the very least consented to procreate and to have genetic offspring.\textsuperscript{77} A child produced with a dead man’s sperm may never have the opportunity to meet the genetic father, but may have the possibility of knowing who he was,

\textsuperscript{74} See Nelson, supra note 71, at 259.
\textsuperscript{76} See ETHICS COMM. OF THE AMER. SOC. FOR REPROD. MED., ETHICAL CONSIDERATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES 67 (1997).
\textsuperscript{77} This Article’s comments on the use of eggs from aborted fetuses closely reflect a draft proposal by George J. Annas which he presented in March 1994, at the regular meeting of the Ethics Committee of the American Society for Reproductive Medicine, March 1994. The final statement on the “use of fetal oocytes in assisted reproduction” was developed by the American Society for Reproductive Medicine’s Ethics Committee and accepted by the Board of Directors on January 10, 1997.
how he lived, and what was he like. But dead fetuses will never be independent living persons. They are, in a sense, “unknowable.” They can never make a procreative decision. To use their eggs would be wrong because it undermines the moral precept of procreation as a voluntary choice. Moreover, it is problematic that the woman, who has an abortion, may also have the ability to make procreative decision for her aborted fetus.

By consenting to the use of fetal eggs for infertility treatment, a woman can terminate her pregnancy and still procreate by having genetic grandchildren. This puts the woman in an impossibly paradoxical position regarding her procreative decision: She must agree not to have a genetic child, and at the same time to have genetic grandchildren. Since the “father” of the fetus may also have genetic grandchildren as the result of the egg donation, his permission must also be sought. The child that results will have a dead fetus as a genetic parent. Under no circumstances will the child ever be able to learn more about its genetic mother other than she was a dead fetus. Whether a child’s interest is served by having an aborted fetus as a mother is highly problematic. It would be shortsighted to view the harvesting of dead fetuses’ bodies in isolation from our moral attitude towards ourselves and our notion of human dignity. The fact that the child would not be born, but for the use of fetal eggs, does not justify their use, any more than it would justify using cloning, animals as gestators of human fetuses, or the creation of human-animal hybrids that would not otherwise be born.78

IV. PUBLIC POLICY RECOMMENDATIONS

Unlike Great Britain, Canada, Australia, or France, the United States has yet to adopt uniform rules for assisted reproduction. Americans fundamentally believe that procreative choice should be left to individuals, couples, and their physicians, with no government interference.79

The first comprehensive legislative report on assisted reproductive technologies was issued this year by the New York State Task Force on Life and The Law.80 Particularly, the Task Force recommends that the retrieval of gametes from deceased persons should not be permitted without the written consent of the gamete providers. An exception to

78. See Annas, supra note 60, at 124.
80. See N.Y. STATE TASK FORCE, supra note 7, at 295.
this rule is made when the person seeks to retrieve the gametes, through judicial proceedings, and demonstrates extraordinary circumstances that would justify gamete retrieval without consent. The Task Force emphasizes the importance of mutual informed consent over the fate of embryos produced by both partners’ gametes, and establishes guidelines to determine degrees of control over embryos after the death of one or both partners. For example, the Task Force said that if the partner whose gametes were used to create the embryos dies, the surviving partner should have control over the embryos, subject to any instructions the deceased partner left at the time the embryos were created. But if the partner who did not contribute gametes to the embryos dies, the surviving partner should be given full control over the embryos. In the case of embryos created entirely with donor gametes, both partners should retain joint decision making authority over the embryos. If one partner dies, the surviving partner may use the embryos only according to the instruction the deceased partner left. If both partners die leaving no instructions, the embryos should be discarded. Gamete banks should have guidelines in place to address situations of divorce, disagreement or death of gamete providers, and consult professional organizations, such as the American Society for Reproductive Medicine, for advise. In case of orphan or abandoned embryos, gamete bank policy should specify how the facility determines when embryos are abandoned, and the procedure the facility follows for their disposition.

Essentially, posthumous reproduction with sperm, eggs, or embryos is permissible, subject to written consent by one or both gamete providers. These recommendations follow the American Society for Reproductive Medicine’s guidelines,81 which stress the importance of informed consent of gamete providers, and guidelines in other countries such as Great Britain82 and Australia.83

81. See ETHICS COMM., supra note 76, at Supp. 1S-9S.
82. The Human Fertilization and Embryology Act of 1990 (HFEA) requires that “[c]onsent to the storage of gametes or embryos must . . . state what is to be done with the gametes if the person who gave the consent dies.” John Aston, et al., Widow Has no Legal Right to Family – Court Told, PRESS ASSOC. NEWSFILE, Oct. 3, 1996. Although this requirement permits posthumous transfer of gametes, it does not mandate such transfer at the request of the surviving partner. See id. The Act also requires that fertility treatment centers take into account “the welfare of any child who may be born as the result of fertility treatment, including the need of that child or father.” See id. The findings of the government-sponsored Warnock Commission upon which the 1990 Act was based, stated that posthumous repro-
In Canada, the Royal Commission on New Reproductive Technologies recommends that embryos stored for a couple's own use should not be used to create a pregnancy after the death of either partner, regardless of the couple's stated intent. The Commission expresses concern about inheritance and the well-being of children born after one or both of their parents have died. "[T]he death of either partner is a clear and practical limit." Couples who do not use assisted reproduction cannot procreate after one partner dies, therefore neither should couples who have used assisted reproduction. This would also prohibit the use of gametes for reproduction after the gamete providers have died.

This basic position was also adopted in France. The 1994 Bioethics Law, for example, explicitly forbids the use of gametes for posthumous reproduction. The law states that assisted reproduction is only permitted when "the request is made by a couple in reproductive age, married or living together for at least two years." Both would-be parents must agree to the reproductive treatment. The reason is that reproductive choices by individuals and their physicians, if left unregulated, would likely result in destructive social behaviors and procreative habits, and foster a greater cultural tolerance for all that is "unnatural" in human reproduction. It would encourage "a radical genetic and technological control over life itself and the making of human beings." Although it took more than ten years for the French Government to address the issue, the law should be "actively discouraged," but fell short of suggesting that it be outlawed. See id. More recently a British court addressed a case involving a widow who sought to use the sperm retrieved from her husband after he had become comatose. See id. The HEFA concluded that "no legal authority we are aware of supports the proposition that there is a right to found a family with one's deceased husband," and would not authorize the gamete bank to release the sperm. See id. The British High Court agreed with the HFEA, but held that the wife could not be permitted to use the sperm because her husband had never given his written consent to the retrieval, storage, or use of his gametes. See id. The British statute that governs assisted reproduction clearly requires a man's written consent to the use of his sperm. See id.

83. See generally COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL & LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION (1984).
84. See MINISTER OF GOV'T SERV., ROYAL COMM'N ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT 598-99 (1993).
85. Id.
87. Id.
sues of medically assisted reproduction, this legislation, which includes criminal penalties, may have been possible because the French health care system is centralized and relatively closed. 88

Human reproduction is not about sperm, eggs, or even embryos. It is about people, their hopes and dreams in fulfilling their lives by having a child. Informed consent in reproductive decision is crucial. But it is not sufficient to justify any reproductive arrangement. This is particularly true in posthumous reproduction where consent to reproduce is only the beginning, not the end of procreative rights, where considerations of the possible effects on the living participants in reproduction, and the welfare and interests of children must be addressed. The making of babies should not be reduced to the possibility of using sperm or eggs. Babies are not products. It should be assumed that a decision to bring a child into the world implies a willingness to raise and care for the child. It would be naive to think that the relationship established by the "gift of life" between individuals and their infants is unimportant or irrelevant to the interests of children, and that children's interests could be considered separately from parental interests.

Children are not born in a social vacuum. Their interests are so inextricably intertwined with those of their parents that they cannot be considered separately. Even the strongest defenders of reproductive rights would likely find it ethically and socially unacceptable to use the eggs of the recently discovered 500 year-old Peruvian mummy, a fifteen year-old Inca girl sacrificed to appease the volcano gods. 89 This is because almost no one really thinks that babies are like products fabricated in factories. Posthumous reproduction that separates children from their genetic parents is a destructive practice that subverts the very notion of parenthood. It is unfair to children and undermines the value and meaning of human reproduction. If the welfare of children is taken seriously, uniform state legislation should forbid the use of gametes for posthumous reproduction, including the use of eggs from aborted fetuses for reproduction. This may require criminal penalties to be effective.

The United States, like most Western countries, has experienced an increase in the use of reproductive technologies, including requests for

sperm retrieval from dead men. 90 In a time of "epidemic infertility,"
91 cultural changes, more perhaps than technological advances, have
caused some individuals to find it acceptable to want children after
death. But the values in human reproduction cannot be reduced simply
to utility. They are values of family relationship, parental responsibili-
ties, and human dignity. However, in the posthumous gift of life, these
values are lacking.

The French court in Claire G. was correct when it stated that the so-
cial and moral issues raised by posthumous reproduction extend beyond
the interests of progenitors to considerations of the interests and welfare
of children that result from the practice. By contrast, the American court
in Kane, was mistaken when it upheld Kane’s intent to procreate after
his death, and ruled that gamete provider’s consent was sufficient to
justify the posthumous use of sperm for reproduction.

Despite all her efforts to compensate for her son’s lack of father,
Jenny Fields realized that she badly failed. To everyone, her son re-
mained “an illegitimate child.” Although Garp grew up to become a re-
spected writer, it did not change the “original insult” of his conception
and birth. To many, he was forever “suspect.” As with posthumous re-
production, it is not the resulting child who is a suspect, but the adults
who engage in this highly questionable practice, and the society that
permits it.

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90. See Fishman, supra note 51, at 306.
91. See Nelson, supra note 71, at 166.