Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination

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WHO'S YOUR DADDY?: A CONSTITUTIONAL ANALYSIS OF POST-MORTEM INSEMINATION

I. INTRODUCTION

By 1980, Americans successfully used artificial insemination\(^1\) to conceive 250,000 offspring.\(^2\) In 1987, according to the United States Congressional Office of Technology’s assessment, “more than 172,000 women resorted to artificial insemination . . . , and about 65,000 babies that year were born from this technique.”\(^3\) With the advent and popularization of alternative reproductive technologies, the legal system has encountered a myriad of legal and ethical issues. For instance, are sperm and egg cells property?\(^4\) If they are, who owns them?\(^5\) If an unknown donor provides the sperm used in the artificial insemination, then who is the father?\(^6\) What rights and obligations do sperm donors have to the child?\(^7\) Do people have a constitutional right to use reproductive technology to assist in conception?\(^8\) If such a constitutional right exists, does the right extend equally to married and single individuals?\(^9\) Does the constitutional right to procreate encompass a right to determine paternity? Judicial determinations as to the legitimacy of using reproductive technologies center on the issue of whether the use of such technology falls within the purview of

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1. “Artificial insemination” generally describes numerous methods of reproductive technology, and is defined as: “[m]echanical injection of viable semen into the vagina.” Taber’s Cyclopedic Medical Dictionary, 147 (Clayton Thomas ed., 16th ed. 1989).


3. Id.

4. See generally Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993) (discussing a deceased sperm donor’s property interest in stored vials of sperm); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding that, although “preembryos 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 interest,” individuals still possess an ownership interest in preembryos.) Id. at 597.

5. See generally Hecht, 20 Cal. Rptr. 2d at 283-85 (discussing the distribution of cryogenically stored sperm samples); Davis, 842 S.W.2d 588.


8. See Hecht, 20 Cal. Rptr. at 287-91.

9. Id.
the constitutional right to procreate and to make procreative decisions.\textsuperscript{10}

The ability to store sperm, greatly enhanced by recent technology, adds new complexities to the issues raised by artificial insemination. One such complexity is the advent of the "posthumous child."\textsuperscript{11} A "posthumous child" is conceived by using the stored sperm of a deceased father. The process of storing sperm, called cryopreservation, consists of adding glycerol to the sperm and then storing the sample at minus 328 degrees Fahrenheit. Cryo-preserved sperm samples, stored for as long as ten years, have resulted in births of healthy children.\textsuperscript{12} The ability to store, retrieve, and use sperm years later presents women with the ability to conceive after sterility, or even death of the sperm donor. The ability to generate life with stored reproductive material presents moral and legal issues, which center on whether public policy should allow for the non-coital conception of a class of orphans,\textsuperscript{13} and whether a "posthumous child" should enjoy inheritance rights, as well as rights to social security survivor benefits of the deceased father.\textsuperscript{14} Illustrative of these issues is the situation where a "posthumous child" is entitled to inherit from the estate of the deceased father. In such an instance, the finality of probate judgments may be severely impaired.\textsuperscript{15} Furthermore, the extended period of time during which a "posthumous child" may be conceived increases the time in which the child may challenge the father's estate.

Such uncertainties may perplex administrators and result in anomalous distributions. If the father attempts to provide for potential offspring, issues may arise involving the construction of wills.\textsuperscript{16} As one commentator wryly observed "[i]f such children turn out to be measuring lives, the Rule against Perpetuities may apply in a manner that will put the case of

\textsuperscript{10} Id.; Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Lifchez v. Hartigan, 735 F.Supp. 1361 (N.D. Ill. 1990); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); see Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (noting the right to privacy encompasses a right to make procreative decisions).

\textsuperscript{11} For purposes of this Comment, the term "posthumous child" will refer to a child resulting from the use of stored sperm to artificially inseminate and impregnate a woman after the death of the sperm donor.


\textsuperscript{13} Real parties in 
Hecht argued that the "'court should adopt a state policy against posthumous conception,' because it is 'in truth, the creation of orphaned children by artificial means with state authorization. . . .'" Hecht, 20 Cal. Rptr. 2d at 288. The Court of Appeals rejected the real parties' policy argument. Id.

\textsuperscript{14} See id.

\textsuperscript{15} See Shapiro & Sonnenblick, supra note 12, at 244-46.

the Fertile Octogenarian to shame."17

This Comment focuses on the constitutional right to procreate and make procreative decisions, and the applicability of that right to the practice of “post-mortem insemination.”18 Section I discusses the history of artificial insemination and of modern artificial insemination procedures. Section II examines the constitutional right to procreate and the extent to which it encompasses a right to use reproductive technologies to aid in conception. Section III argues that the right to procreate does not encompass the right of a mother to have paternity judicially determined. Section IV focuses upon the dearth of current statutory law concerning the rights of “posthumous children,” and how this abundance of statutory law leaves the judiciary with little guidance to fairly arbitrate complex issues and weigh competing interests. Further, Section V examines the dynamic between the constitutional right to procreate and the current statutes affecting the “posthumous child.” Finally, this Comment concludes that in the face of legislative inaction, courts must fill the chasm within reproductive law, a job for which the courts are ill equipped.

II. ARTIFICIAL INSEMINATION

A. The History of Artificial Insemination

The concept of artificial insemination has provided topic for discussion since 222 A.D., when a rabbi, interpreting the Talmud, contemplated the hypothetical situation of a woman who unintentionally became impregnated by semen residue in her bathwater.19 The first documented intentional artificial insemination occurred in 1322 when an Arab tribe inseminated mares of an enemy tribe with semen from inferior stallions.20 In 1770, an English doctor, John Hunter, recorded the first successful human artificial insemination.21 Dr. Hunter continued and furthered the practice of artificial insemination through 1799.22

Seemingly averse to the concept of non-coital reproduction, the United States did not readily accept the practice of artificial insemination. In 1866, Dr. Marion Simms recorded the first successful artificial insemina-

17. Id.
19. FREEDMAN, supra note 2, at 23.
20. Id.
22. Id.
tion of a women in the United States. In that same year, the Italian scientist Montegazza discovered the medical breakthrough that human sperm could survive the freezing process. Thus, the philosophical discussion of the status of the "posthumous child" may have commenced as far back as 130 years ago.

The viability of using stored sperm to create offspring increased after the 1949 discovery that adding glycerol to sperm, prior to freezing, increased sperm survival rates. Sperm storage gained increased acceptance in 1961 when the astronauts deposited sperm, prior to spaceflight, in the event that radiation particles from space rendered them infertile. Later, soldiers participating in the Vietnam War stored sperm to ensure their ability to become fathers. As illustrated by the increased activity at sperm banks during the Gulf War, deposits at sperm banks increase during military conflicts. Reasons for storing sperm also include possible sterility caused by chemotherapy, expected suicide, and men undergoing a vasectomy who wish to maintain the ability to procreate.

B. Current Practice of Cryopreservation and Artificial Insemination

Cryopreservation is the modern method for preserving sperm samples. The process consists of mixing sperm with a small amount of glycerol and preserving the samples in liquid nitrogen at minus 328 degrees

23. Id.
24. Id.
25. Id.
28. Id. at 526.
29. Alain Paraplaix stored sperm after warnings from his physician that chemotherapy treatments, for his testicular cancer, could leave him sterile. Paraplaix c. CECOS T.G.I. Creteil, Aug. 1, 1984, Gazette du Palais, Sept. 15, 1984, as reported in Shapiro & Sonnenblick supra note 12, at 229; Edward William Hart Jr. had stored his sperm under recommendation from his physician while undergoing chemotherapy; Janet McConnaughey, Girl Conceived After Dad's Death is Eligible for his Benefits, Orange County Reg., May 31, 1995, at A13.
32. Cryopreservation is the "[p]reservation of biological materials, such as tissue, fluids, blood or plasma at very low temperatures. This enables the tissue to be used in another individual at a later time, as it remains viable after thawing. The technique is used to preserve human semen for artificial insemination." Taber's Cyclopedic Medical Dictionary 402 (15th ed. 1988).
Fahrenheit (minus 196.5 degrees Centigrade). The American Association of Tissue Banks ("AATB"), "composed of medical practitioners and scientists with experience in cell, tissue, and organ banking," establishes codes and procedures for the preservation of biological material. However, the AATB does not have mandatory power over cryopreservation banks, rather state regulations dominate this area. Therefore, the procedures required of a cryopreservation bank depend upon individual state regulations. Yet, legislatures have not vigorously codified or investigated the cryopreservation of sperm.

Cryopreserved sperm, once thawed, have two-thirds the fertilizing capacity of fresh sperm. Therefore, numerous samples of sperm are stored in the event that the initial insemination does not result in a fertilized embryo. These numerous samples provide the possibility for multiple inseminations.

Three delineations of sperm types are used for insemination. The delineations are based upon the status of the sperm donor and his relationship to the female recipient. These three delineations are homologous artificial insemination (AIH), combined artificial insemination (AIC), and artificial insemination by a husband, and involves using sperm donated by the husband to artificially inseminate the wife. For purposes of this Comment, AIH will include sperm donated by a husband or paramour. Further, AIH will be used to describe those situations where it is the intent of the donating party, and the recipient, that the donor be known as the father.

AIC employs a mixture of the husband's and an unknown donor's sperm, and typically is used when the husband has a low sperm count, or the sperm has low motility. This form of artificial insemination is generally referred to as artificial insemination by a husband, and involves using sperm donated by the husband to artificially inseminate the wife. For purposes of this Comment, AIH will include sperm donated by a husband or paramour. Further, AIH will be used to describe those situations where it is the intent of the donating party, and the recipient, that the donor be known as the father.


Andree, supra note 41, at 54.
and donor artificial insemination, or heterologous artificial insemination (AID).\textsuperscript{45}

Whichever type of insemination a female chooses, the physical act of insemination is generally similar in most cases.\textsuperscript{46} During ovulation, a physician uses a syringe to inject the sperm near the cervix.\textsuperscript{47} A comparable method of artificial insemination inserts sperm into a cervical cap and introduces the cap in the woman's vagina, where she wears it for the next four to six days.\textsuperscript{48} Cases have been reported where women have artificially inseminated themselves using procedures roughly equivalent to those described above.\textsuperscript{49}

C. The Post-Mortem Insemination Case

Since the early 1980s, the use of stored sperm and the possibility of "post-mortem insemination" have led to celebrated cases worldwide.\textsuperscript{50} As displayed by the long history of artificial insemination, the technology employed is not new.\textsuperscript{51} Nonetheless, legislatures have been slow to address issues associated with non-coital reproduction, leaving the courts to face challenges for which they are seemingly unprepared. Although artificial insemination may not be termed cutting edge, it is still more forward looking than the courts. Conventional wisdom states that "[t]he medical profession looks forward, while the legal profession gazes backward."\textsuperscript{52} The common law system of stare decisis, adhered to by the American judiciary, further exacerbates this situation.

In 1981, Alain Paraplaix stored a vial of sperm at the Centre d'Etude et de Conservation du Sperm ("CECOS")\textsuperscript{53} prior to undergoing chemotherapy, after his doctor warned that chemotherapy treatments could result in sterility.\textsuperscript{54} Alain intended to store sperm, which could be used to father a
child, if he in fact became sterile.\textsuperscript{55} At the time of the sperm deposit, Alain lived with Corrine Richard.\textsuperscript{56} Alain and Corrine married in a hospital ceremony, and Alain died two days later.\textsuperscript{57} Corrine Paraplaix petitioned CECOS to release Alain’s stored sperm to her.\textsuperscript{58} CECOS refused to award custody of the sperm to Corrine arguing that it only had obligations to Alain, thus presenting the world with a case of first impression on who had rights concerning the dispensation of a dead man’s sperm.\textsuperscript{59} The French courts decided in favor of Corrine, who was joined by Alain’s parents.\textsuperscript{60} This case seems to symbolize the beginning of the “post-mortem insemination era.”\textsuperscript{61}

An American counterpart to the Alain Paraplaix situation arose when William E. Kane deposited fifteen sperm samples at the California Cryobank in October, 1991.\textsuperscript{62} Days later, at the age of forty-eight, he committed suicide in a Las Vegas hotel.\textsuperscript{63} At the time of the sperm deposit, Mr. Kane lived with Deborah Hecht.\textsuperscript{64} In his will, Mr. Kane provided, “I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht.”\textsuperscript{65} Mr. Kane’s children, from a prior marriage, contested the dispensation of the vials of sperm to Ms. Hecht, arguing that it was contrary to public policy to allow an unmarried women to undergo artificial insemination.\textsuperscript{66} Further, the children argued that public policy forbade using a deceased man’s sperm in artificial insemination.\textsuperscript{67} The California Court of Appeals for the Second District rejected these arguments and ordered that the sperm be given to Ms. Hecht.\textsuperscript{68}

In 1990, Edward Hart, diagnosed with cancer of the esophagus, depos-
ited sperm in a New Orleans sperm bank. Mr. Hart wanted his stored sperm to be used by his wife to create a child of his lineage, if chemotherapy left him sterile.

Prior to his death in 1990, Edward Hart reminded his wife, Nancy, that “[t]here could always be a child for you.” After his death, Nancy Hart was artificially inseminated using the sperm of her deceased husband. Judith Christine Hart was born ten days prior to the one year anniversary of her father's death. Nancy Hart petitioned the courts to have Judith declared the daughter of Edward. She further petitioned the Social Security Administration for survivor’s benefits, which Edward accrued, for Christine. The lawsuit was dismissed when the Social Security Administration agreed to pay Edward’s survivorship benefits to Christine.

Manny Maresca died in an auto accident, leaving behind a grieving widow, Pam Maresca. Soon after Manny was pronounced dead, Pam employed a doctor to harvest the sperm from Manny’s body to store it for her future use. If Pam Maresca conceives a child using Manny’s sperm, the legal issues presented by the Hart case may arise with respect to the Marescas. The issues which arise in the “post-mortem insemination” context may produce cases involving multiple individuals, or, because of the nature of sperm banking, the legal issues may arise numerous times involving the same individual.

69. See Janet McConnaughy, Girl Conceived After Dad's Death is Eligible for His Benefits, ORANGE COUNTY REG., May 31, 1995, at A13. (describing the situation of the Harts' in their attempt to have paternity established so that Christine would be eligible to receive Social Security survivor benefits.). Id.
70. Id.
71. Id.
72. Id.
73. Id.
75. Id.
77. Id.
78. As exemplified by the situations involving Corrine Paraplaix, Deborah Hecht, Nancy Hart, and Pam Maresca.
79. See supra text accompanying notes 38-49.
III. **CONSTITUTIONAL ISSUES FACING “POST-MORTEM INSEMINATION”**

A. **Constitutional Right to Procreate and to Make Procreative Decisions**

The constitutional right to procreate began ominously in the case of *Buck v. Bell.*

Carrie Buck was an eighteen year old institutionalized female, termed "feeble-minded" by the United States Supreme Court. The question at issue was the constitutionality of a statute providing for the sterilization of certain patients at the State Colony for Epileptics and Feeble Minded. The Court affirmed the decision of the Supreme Court of Appeals of the Commonwealth of Virginia that "Carrie Buck is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization."

The Supreme Court reversed *Buck v. Bell* less than twenty years later in *Skinner v. Oklahoma.* The statute in controversy, Oklahoma’s Habitual Criminal Sterilization Act, allowed for, at the determination of the State Attorney General, the sterilization of a “habitual criminal.” Justice Douglas began the majority opinion observing that, “Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.” The Court held the statute violated the Fourteenth Amendment’s Equal Protection Clause due to “the inequalities of the Act.” The Court continued its investigation of the rights infringed by the statute, stating: “[w]e are dealing here with legislation which involves one of the basic civil rights of man.”

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80. 274 U.S. 200 (1927).
81. *Id.* at 205.
82. *Id.*
83. *Id.* at 207 (citations omitted).
84. 316 U.S. 535 (1942).
85. *Id.* at 536. The statute defined a habitual criminal:
   as a person who, having been convicted two or more times for crimes “amounting to felonies involving moral turpitude” either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.
86. *Id.*
87. *Id.* at 541; see U.S. Const. amend. XIV § 1. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*
88. *Skinner,* 316 U.S. at 538.
89. *Id.* at 541.
"strict scrutiny of the classification which a State makes in a sterilization law is essential."  

The Supreme Court dealt with the right to make procreative determinations again in *Griswold v. Connecticut.* The Court held that a Connecticut statute, banning the distribution of contraceptives to married couples, violated a married couple's constitutional right to privacy. The Court observed that "[w]ithout [certain] peripheral rights the specific rights would be less secure." The Court found the specific right to privacy by holding "[t]he Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The Court, therefore, established a privacy right to make procreative decisions within marriage, while protecting the right to contraceptives without government interference as a "peripheral right," which helped to secure the specific right.

Since *Griswold* only dealt with married couples' rights to privacy, single individuals were not included as a group with rights to contraception. Six years later, *Eisenstadt v. Baird* invalidated a state statute prohibiting the distribution of contraceptives to unmarried adults.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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.

The *Eisenstadt* Court demonstrated the significance of the right to make procreative decisions by holding that that right is so fundamental that it is not reserved for a certain class of individuals, but rather resides within

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90. *Id.*
92. *Id.* at 485.
93. *Id.* at 482-83.
94. *Id.* at 484.
95. *Id.*
96. *Id.* at 479.
98. *Id.* at 454-55 (emphasis in original).
99. *Id.* at 453.
the constitutional protections available to all individuals.\textsuperscript{100}

Carey v. Population Services International\textsuperscript{101} further established the specific rights of individuals to make procreative decisions.\textsuperscript{102} At issue was a New York statute which made "it a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under 16; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives."\textsuperscript{103} In declaring the statute unconstitutional, the Court examined its prior decisions regarding the right to privacy, and summarized

[\textit{w}hile the outer limits of \ldots privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage \ldots; procreation \ldots; contraception \ldots; family relationships \ldots; and child rearing and education. The decision whether or not to beget or bear a child is at the very heart of the cluster of constitutionally protected choices.]\textsuperscript{104}

The Court held "[\textit{w}here a decision \ldots to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.]\textsuperscript{105} New York failed to show a compelling state interest, and the legislation was deemed unconstitutional.\textsuperscript{106}

The Court's description of the right to "beget or bear a child"\textsuperscript{107} contemplates that the right extends to the choice "to accomplish or to prevent conception."\textsuperscript{108} The Court in Griswold,\textsuperscript{109} Eisenstadt,\textsuperscript{110} and

\begin{footnotes}
\item[100] Id.
\item[102] Id. at 678-79.
\item[103] Id. at 678.
\item[104] Id. at 684-85; See also Eisenstadt v. Baird, 405 U.S. 438, 453-54, 460, 463-65 (1972) (contraception is constitutionally protected); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage and contraception are constitutionally protected); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (marriage and contraception are constitutionally protected); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships are constitutionally protected); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation is constitutionally protected); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education are constitutionally protected); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (child rearing is constitutionally protected).
\item[105] Carey, 431 U.S. at 686.
\item[106] Id. at 678-79, 681-82, 684-86, 690.
\item[107] Id. at 685.
\item[108] Id.
\end{footnotes}
Carey dealt with situations where technology was used to prevent the conception of a child. The Court has not decided whether the privacy protections afford individuals the right to use technology to conceive. In light of the text from Carey, evidently, the right does extend to the use of reproductive technologies.

B. Case Law Concerning the Use of Reproductive Technologies

Although the United States Supreme Court has not yet decided a case involving the use of reproductive technology to conceive a child, lower courts have confronted the issue. In Lifchez v. Hartigan, the United States District Court for the Northern District of Illinois held an Illinois statute unconstitutionally vague and violative of the right to privacy and reproductive freedom. The contested statute provided in pertinent part:

(7) No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

The statute “impermissibly restricts a woman’s fundamental right of privacy, in particular, her right to make reproductive choices free of governmental interference with those choices.”

The court pointed to embryo transfer and chronic villi sampling as procedures which potentially violate the Illinois statute. Embryo transfer entails the removal of a fertilized embryo from a woman’s uterus and insertion of the embryo into an infertile woman enabling her “to have her own child.” Such a procedure, the Court proclaimed, falls within the scope of constitutional protections recognized by the Supreme Court.
"It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."

In Johnson v. Calvert, a surrogacy case, the Supreme Court of California discussed at length the rights of individuals to make procreative choices. The court gave credence to the use of reproductive technologies by declaring the gamete-providers the natural parents of the resulting child, rather than the surrogate mothers. A contrary ruling might inhibit the use of the reproductive technology because of the conflict between the rights of the gamete-material providers and the gestational mothers. If such a ruling had occurred, infertile couples could be greatly dissuaded from using the reproductive method. This is likely because, in providing the genetic material, they did so only with the intent that the surrogate carry the pregnancy to term, and that she not in any way take on a maternal role. The monetary expense of the in vitro procedure could dissuade individuals from using this reproductive method if the gestational mother still has judicial preference. Therefore, the court's ruling extends the right of individuals to make, and act upon, procreative decisions, by applying this right to the use of in vitro fertilization.

The Court of Appeals for the Second District of California continued this trend in Hecht v. Superior Court. The case involved two issues: (1) whether public policy proscribes the artificial insemination of an unmarried woman, and (2) whether public policy forbids post-mortem insemina-

120. Id. at 1377.
122. Id.
123. "Gamete" is "[a] mature male or female reproductive cell; the spermarozoon or ovum." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 658 (15th ed. 1988).
125. The following definitions provide a vocabulary framework which is useful in understanding the use of reproductive technology. In vitro is defined as "[i]n glass, as in a test tube. An in vitro test is one done in the laboratory, usually involving isolated tissue, organ, or cell preparations." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 870 (15th ed. 1988); In vivo, is defined as: "[i]n the living body or organism. A test performed on a living organism"; in utero defined as within the uterus. Id.; see generally ANDREWS, supra note 39 (discussing the spawning of the term, "test tube baby," where fertilization of an ovum occurs in a laboratory from in vitro insemination). Test tube baby is defined as "[a] baby born to a mother whose ovum was removed, fertilized outside her body and then implanted in her uterus." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1712 (15th ed. 1988).
tion. Answering the first issue in the negative, the court rejected the contention that it was “operating in a legal vacuum and free to establish policies with respect to the access of an unmarried woman to a non-coital reproductive technique (artificial insemination).” The court determined that it was consistent with public policy to allow for the artificial insemination of an unmarried woman, and that such an argument ignores the demographics of modern society in favor of clinging to outmoded beliefs. In addition, the court decided that using a deceased man’s sperm for fertilization did not violate public policy, stating that “no other person or entity has an interest sufficient to permit interference with the gamete providers’ decision . . . because no one else bears the consequences in the way the gamete providers do.”

The Supreme Court of Tennessee, in Davis v. Davis, implied that the use of in vitro fertilization is protected under the right to procreate. This case involved the dispensation of preembryos that were cryogenically stored. The Davises stored nine preembryos, and then they separated. After their separation, each claimed rights to the preembryos. The wife wanted possession of the preembryos for the purpose of using them to induce pregnancy. The husband argued that he did not want to be the genetic father, and that the use of his gamete material infringed upon his constitutional rights. The court decided in favor of the exhusband noting that “[a] person’s liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos.” “It is further evident that, however far the protection of procreative autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status.”

128. Id. at 284.
129. Id. at 286.
130. Id. at 284-87.
131. Id. at 289.
132. Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992).
133. Id. at 591-92.
134. Id.
135. Id.
136. Id. at 589.
137. Id. at 597.
138. Id. at 602.
C. The Constitutional Right to Procreate Encompasses the Right of a Woman to Use the Sperm of a Deceased Male for Artificial Insemination

The combined holdings of *Skinner*, 139 *Griswold*, 140 *Eisenstadt*, 141 and *Carey* 142 establish a constitutional right of the individual to procreate and to make procreative decisions. The additions of *Lifchez*, 143 *Johnson*, 144 *Hecht*, 145 and *Davis* 146 establish the right to use reproductive technologies to induce conception.

*Hecht* 147 squarely dealt with the disposition of cryogenically stored sperm. 148 The donor committed suicide and devised his interest in the sperm to his girlfriend. 149 The use of the sperm for post-mortem insemination was explicitly provided for in Mr. Hecht's will. 150 The court held that the use of a deceased man's sperm was not against public policy. 151 This case is the closest the courts have come to deciding upon the constitutional protections afforded to "post-mortem insemination," and the result affirms the right of individuals to make use of the reproductive procedure.

Looking to *Griswold*, the language of the Supreme Court supports the contention that the right to procreate encompasses the right to use post-mortem insemination. 152 Depriving individuals of the right to utilize post-mortem insemination would make the specific right to procreate less secure. 153 The situation where a woman uses the sperm of a deceased male is peculiar because it is the only method by which that woman may bear the child of the deceased love.

The right to procreate does not limit that right to the ability to conceive regardless of the genetic provider of the sperm. The right to choose who will be the genetic father of one's child is intertwined with the decision to

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146. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
147. 20 Cal. Rptr. 275.
148. Id. at 276.
149. Id. at 276-77.
150. Id.
151. Id. at 288-89.
153. Id. at 482-83.
procreate.\textsuperscript{154} Without the ability to choose the genetic father, a woman is forced either to forego her right to procreate, or to place her procreative decision making into the hands of a third party. This restriction upon the right to procreate impermissibly burdens the individual's constitutional protections. Since the right infringed is recognized as a fundamental right, any governmental intrusion must pass the strict scrutiny test, showing both a compelling state interest and proving that the legislation is narrowly tailored.\textsuperscript{155} Although the government may, in a specific case, be able to show a compelling state interest in disallowing post-mortem inseminations, it is unlikely that a statute completely banning this procedure would satisfy the narrowly tailored prong of the strict scrutiny test. Therefore, the right to procreate encompasses the "peripheral right"\textsuperscript{156} to use the reproductive technology of post-mortem insemination.

\textbf{IV. The Right to Procreate does not Encompass the Right to Determine Paternity}

The phenomenon of the "posthumous child" presents significant problems for the law,\textsuperscript{157} specifically, who the father is, and what rights and obligations the child can receive. As a preliminary matter, the constitutional right to procreate does not include the right of a mother to have a child declared the child of a deceased male.\textsuperscript{158} In a typical "post-

\begin{itemize}
\item \textsuperscript{154} See generally, Loving v. Virginia, 388 U.S. 1 (1967).
\item \textsuperscript{156} Griswold, 381 U.S. at 485.
\item \textsuperscript{157} See supra text accompany notes 1-17.
\item \textsuperscript{158} This area has been heavily regulated by statutes which limit the ability of individuals either to determine paternity or to place time limits or presumptions upon paternity.
\end{itemize}

See The Uniform Parentage Act which states:

Section 4 (a) A man is presumed to be the natural father of a child if

1. he and the child's natural mother are or have been married to each other and
the child is born during the marriage, or within 300 days after the marriage is
terminated by death, annulment, declaration of invalidity or divorce, or after
a decree of separation is entered by a court;

2. before the child's birth, he and the child's natural mother have attempted to
marry each other by a marriage is or could be declared invalid, and,

(i) if the attempted marriage could be declared invalid only by a court, the
child is born during the attempted marriage, or within 300 days after its
termination by death, annulment, declaration of invalidity, or divorce;

(ii) if the attempted marriage is invalid without a court order, the child is
born within 300 days after the termination of cohabitation;

3. after the child's birth, he and the child's natural mother have married, or
attempted to marry each other by a marriage solemnized in apparent compliance
with law, although the attempted marriage is or could be declared invalid, and
mortem insemination” case, the donor was the husband or paramour of the female.\(^{159}\) In such situations, the donor’s intention is either explicit or inferable from conduct.\(^{160}\) Therefore, where such intention is known, the

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\begin{align*}
(i) & \text{ he has acknowledged his paternity of the child in writing filed with the [appropriate court or Vital Statistics Bureau],} \\
(ii) & \text{ with his consent he is named as the child’s father on the child’s birth certificate, or} \\
(iii) & \text{ he is obligated to support the child under a written voluntary promise or by court order;} \\
(4) & \text{ while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child, or} \\
(5) & \text{ he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of acknowledgement, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If, another man is presumed under this section to be the child’s father, acknowledgment may be effected only with the written consent or after the presumption has been rebutted.}
\end{align*}
\]

(B) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

... Section 7 [a]n action to determine the existence of the father and child relationship as to a child who has no presumed father under Section 4 may not be brought later than [three] years after the birth of the child, or later than [three] years after the effective date of this Act, whichever is later. However, an action brought by or on behalf of a child whose paternity has not been determined [three] years after the child reaches the age of majority. Sections 6 and 7 do not extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedent’s estates or to the determination of heirship, or otherwise.

9b U.L.A. 298-99, 306; but cf. the statute contemplated in Michael H v. Gerald D, 491 U.S. 110 (1989), which demonstrates the existence and acceptance of statutes which highly regulate paternity determinations, that implicitly supports the concept no fundamental right to determine paternity exists.

159. Alain Paraplaix stored his sperm while living with Corrine. Although, Alain never explicitly made his intention known, it may be inferred from the hospital marriage that Alain intended for Corrine to use the sperm and for the resulting child to be deemed his child. Shapiro & Sonnenblick supra, note 12, at 239-52; William Kane lived with Debra Hecht for the five years prior to his suicide. In his will, Mr. Kane made it explicit that he stored his sperm in the event that Ms. Hecht wished to conceive a child fathered by him. Hecht v. Superior Court, 20 Cal. Rptr. 275, 276-77 (Cal. Ct. App. 1993); Edward Hart stored his sperm because his doctor told him that chemotherapy might leave him sterile. Prior to his death, he reminded his wife of the samples and stated “There could always be a child for you.” Janet McConnaughy, Girl Conceived After Dad’s Death is Eligible for His Benefits, ORANGE COUNTY REG., May 31, 1995, at A13.

160. See discussion supra Part II.C.
mother may attempt to assert paternity when a statute prohibits the declaration of paternity.\textsuperscript{161}

The right to procreate protects those "peripheral rights" without which the "specific rights" would be rendered meaningless.\textsuperscript{162} However, the right to determine paternity does not fit within this corridor. The appeal of determining paternity, from the points of view of the mother and the child, is that Supreme Court decisions mandate that legitimate and illegitimate children be accorded equal protection.\textsuperscript{163} Children may inherit from the estate of a deceased father, and may receive survivors benefits accrued by the deceased from the Social Security Administration.\textsuperscript{164} Thus, economically, a paternity determination may make a substantial difference for a single mother,\textsuperscript{165} or for a female contemplating post-mortem insemination. Without benefits, which would be available upon a determination of paternity, a potential recipient of post-mortem insemination may forego her right to procreate because of an inability to care properly for a child. Regardless of how emotionally compelling this situation may seem, it does not justify the extension of the constitutional right to procreate to include a right to a determination of paternity. Although the right to procreate and to make procreative decisions is well established, it neither includes the right to receive monetary contributions from the state,\textsuperscript{166} nor to contest or share in the estate of the deceased genetic father.

"In general, fatherhood is a status which is predominantly a function of the family relationship."\textsuperscript{167} At common law, a child born to a married woman was presumed to be the child of the husband.\textsuperscript{168} This viewpoint still receives acceptance as indicated by statutes that presume a child born

\textsuperscript{161} Typical statutes limit the declaration of paternity to instances where the child was conceived during the life of the sperm donor. See Unif. Status of Children of Assisted Conception Act § 4, 9b U.L.A. 200 (Supp. 1997).


\textsuperscript{163} See Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993) ("[state could not deny illegitimate child right to bring tort action for wrongful death of parent if it gave legitimate child the same right"); (citing Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. American Guarantee Co., 391 U.S. 73 (1968)).


\textsuperscript{165} Generally when speaking of post-mortem insemination the woman is unmarried if she is using the sperm of a deceased husband or deceased paramour.

\textsuperscript{166} 42 U.S.C.A. § 402(d) (1991) (where the state contributions are recognized in the form of social security survivors benefits).


\textsuperscript{168} Id. at 372-73.
within the sanctity of marriage is the husband's. In *Michael H. v. Gerald D.*, the United States Supreme Court reinforced this view upholding a California statute which provided that the "presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances." The Court held that the law violated neither the alleged biological father's procedural nor substantive due process rights by refusing to allow him to establish his paternity of a child born to the wife of another man.

In the situation where a woman would like to have the paternity of a child established in the context of post-mortem insemination, the sanctity of marriage is not threatened as in the previous scenario. Though this distinction may concern legislatures, it has no affect upon the constitutionality of the right to determine paternity. In the absence of proper statutory protections for posthumously conceived children, it is incumbent upon the judiciary to act to protect the rights of these children. However, such protection should not become manifest through an extension of the right to procreate.

V. THE INEFFECTIVENESS OF CURRENT STATUTORY LAW DEALING WITH THE "POSTHUMOUS CHILD"

In a Social Security Administration news release, dated March 13, 1996, concerning the case of Judith Hart, Director Shirley S. Chater stated:

> recent advances in modern medical practice, particularly in the field of reproductive medicine, necessitate a careful review of current laws and regulations to ensure they are equitable in awarding Social Security payments in cases such as this. This review has begun. Resolving these significant policy issues should involve the executive and legislative branches, rather

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171. Id.
172. Id.
173. One of the justifications given for the California statute by the California Court of Appeals, whose decision was subsequently upheld by the United States Supreme Court, was that it guarded against disrupting the sanctity of the marriage. Id. at 119-120.
174. This case involved Christine Hart, a child born one year and ten days after the death of her genetic father Edward Hart. Judith Hart sought to have Christine declared the legal heir of Edward in Louisiana and petitioned the Social Security Administration for Survivor benefits for Christine. Hart v. Chater, CIVIL ACTION No. 94-3944 Section N Magistrate 5 (1994).
175. Shirley S. Chater, the Commissioner of the Social Security Administration.
than the courts.\footnote{176} The reproductive technologies referred to in the release are not new.\footnote{177} The release is correct in its assertion that the legislative and executive branches should resolve these policy issues. By the same token, the exclusion of the judicial branch in the face of inadequate measures instituted by the other branches is irresponsible.

Two uniform acts have been established that deal, in part, with the consequences of reproductive technologies.\footnote{178} The first Act is the Uniform Parentage Act ("UPA").\footnote{179} Section 5 of the UPA establishes guidelines for a child of artificial insemination.\footnote{180} However, the UPA completely ignores the existence of the "posthumous child." Although the UPA is regarded as forward looking in nature, it is woefully ineffective at protecting the rights of the child born as a result of post-mortem insemination. The UPA simply deals with the situation of AID\footnote{181} and ignores the potential problems posed by post-mortem AIH.\footnote{182} Therefore, states that have enacted legislation dealing with artificial insemination often inadequately deal with the "posthumous child."\footnote{183} In the states that have

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\footnote{176}{Statement of Shirley S. Chater, regarding the Status of Judith Hart case (March 13, 1996) (statements available at the Social Security Administration, Washington D.C.).}

\footnote{177}{See discussion supra Section II.A.}

\footnote{178}{\textsc{Unif. Parentage Act} § 5, 9b U.L.A. 301 (1987); \textsc{Unif. Status of Children of Assisted Conception Act} § 4(b), 9b U.L.A. 200 (Supp. 1997).}

\footnote{179}{9b U.L.A. 287.}

\footnote{180}{\textit{Id.}}

\footnote{181}{See supra text Part II.B.}

\footnote{182}{\textit{Id.}}

\footnote{183}{See Ga. Code Ann. § 19-7-21 (1997). "All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination." \textit{Id.} Statutes, such as the one
adopted the UPA, the status of the posthumous child is unknown.\textsuperscript{184}  

The second act determining the status of children conceived through reproductive technologies is the Uniform Status of Children of Assisted Conception Act ("USCACA").\textsuperscript{185}  Section 4(b) of this Act provides that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."\textsuperscript{186}  

The USCACA is ineffective for two primary reasons. First, only two states have adopted any part of the USCACA.\textsuperscript{187}  Second, the USCACA ignores the intentions of the genetic parents. When a sperm donor and the sperm recipient intend for the donor to be known as the father of a resulting child, the law should take notice of this intent. Instead, the USCACA legislates that the child, even when the intent of the genetic parents is clear, remains fatherless.

Only seventeen states have adopted, in whole or in part, either one or both of the acts dealing with children conceived through the use of reproductive technologies.\textsuperscript{188}  Furthermore, fifteen of the seventeen state statutes adopting the UPA\textsuperscript{189} remain silent on the subject of the

\textsuperscript{184}  States that have adopted the U.P.A. in whole or in part are Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. 9b U.L.A. 287.

\textsuperscript{185}  9b U.L.A. 200 (Supp. 1997)

\textsuperscript{186}  Id.


\textsuperscript{189}  ALA. CODE §§ 26-17-1 to 26-17-21 (1996); CAL. FAM. CODE §§ 7000 to 7018 (West 1997); COLO. REV. STAT. §§ 19-6-101 to 19-6-129 (1996); DEL. CODE ANN. tit 13, §§ 801-818 (1997); HAW. REV. STAT. ANN. §§ 584-1 to 584-26 (1997); ILL. ANN. STAT. ch 750, para. 40/1 to 40/3 (Smith-Hurd 1996); KAN. STAT. ANN. §§ 38-1110 to 38-1129 (1995); MINN. STAT. §§ 257.51 to 257.74 (1996); MONT. CODE ANN. §§ 40-6-101 to 40-6-135 (1997); NEV.
“posthumous child.” Only two states explicitly refer to the “posthumous child,” and those statutes are inadequate because they give no deference to the intentions of the genetic parents.\textsuperscript{190}

Similarly, the ineffectiveness of legislation concerning the “posthumous child” affects the Social Security Administration. “A dependent child of a wage earner is entitled to ‘child’s insurance benefits’ under the Social Security Act if the wage earner is insured under the Act and dies, becomes disabled, or reaches the age of 65.”\textsuperscript{191} Under the Act,\textsuperscript{192} entitlement to benefits may be established by a number of methods, including:

- a determination by the Social Security Administration that the wage earner was the parent of the child and was living with or contributing to the support of the child when the wage earner

\textsuperscript{190} VA. Code Ann. § 20-158 (Michie 1996).
\textsuperscript{191} Haas v. Chater, 79 F.3d 559, 560 (1996).
died; or proof that the child was entitled to inherit from the wage earner under the law of intestate succession of the wage earner's state of domicile.\textsuperscript{193}

This method of establishing entitlement is an option for the posthumous child, but the entitlement to Social Security Administration survivor's benefits is dependent upon state statutes governing inheritability. Since most states inadequately deal with the posthumous child,\textsuperscript{194} the issue of entitlement to benefits is in a state of confusion. Basing entitlement upon state codes is arbitrary because the availability of benefits is based upon the wage earner's domicile rather than on the merit of a specific case. This may result in situations akin to forum shopping. Thus, current legislation affecting the posthumous child ineffectively deals with these individuals.

The courts, therefore, are thrust into future shock without the proper tools to fashion a solution. If the judiciary chooses to take the advice of Director Chater,\textsuperscript{195} then it ignores the plight of the "posthumous child," as well as its role in the governing process. However, as noted earlier, a statutorily mandated inability to establish paternity is not constitutionally infected. Without a constitutional provision with which to support its decisions, the courts will be forced to engage in judicial legislation. Statutory interpretations will be the manner in which courts may contribute most effectively to the legislative void. Until legislatures enact statutes responsibly dealing with the children of post-mortem insemination, it is the courts duty to act in a manner which may only be characterized as judicial legislation.

\textsuperscript{193}Haas, 79 F.3d at 560. Additionally methods of proof include:
proof that the wage earner would have been married to the child's mother but for a technical deficiency in the marriage; a written acknowledgment of paternity by the wage earner, a judicial decree that the wage earner was the child's father, provided the decree was issued before the wage earner died; a court order that the wage earner contribute to the support of the child because the wage earner was the child's parent; a determination by the Social Security Administration that the wage earner was the parent of the child and was living with or contributing to the support of the child when the wage earner died; or proof that the child was intitled to inherit from the wage earner under the law of intestate succession of the wage earner's state of domicile.

\textsuperscript{194}See discussion supra accompanying notes 178-90. These statutes ineffectively deal with the "posthumous child" because they fail to consider the intentions of the gamete providers in determining paternity. Rather, the statutes opt for blanket disavowance of any paternity in the situation of post-mortem insemination.

\textsuperscript{195}See discussion supra accompanying note 175.
VI. CONCLUSION

The United States Supreme Court has firmly established both a right to procreate and a right to make procreative decisions. Although the Court has not ruled upon the constitutional protections afforded to the use of reproductive technologies, lower courts have established a line of precedent extending constitutional protections to cover the right to use reproductive technology to induce conception. This constitutional right to the use of reproductive technology encompasses the use of post-mortem insemination. However, the right to procreative decision making does not encompass a right of the parents to have the "posthumous child" declared the child of the male donor.

Current statutes are ineffective in dealing with the legal questions which logically arise with the conception of the "posthumous child." These statutes are ineffective because they either: (1) ignore situations of post-mortem insemination, or (2) are not accepted by a significant number of states. Consequently, courts enter the legal battle inadequately armed to deal with the issues which inevitably arise. The result will either manifest itself in courts ignoring the plight of the "posthumous child," or judges will invent ways to engage in judicial legislation.

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