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Fatherhood from the Grave: An Analysis of Postmortem Insemination

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# NOTE

FATHERHOOD FROM THE GRAVE:
AN ANALYSIS OF
POSTMORTEM INSEMINATION

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Corinne Parpalaix's husband, Alain, died of testicular cancer two days after they were married. Nonetheless, even though her husband is dead, Corinne wants to bear Alain's child. Corinne's wish to have her deceased husband's child is not just a fantasy; Alain may actually be able to father a child from the grave.

Two years prior to his death, when Alain was first diagnosed with cancer and warned that the chemotherapy treatments might render him sterile, he made one deposit of sperm at the Centre d'Etude et de Conservation du Sperme ("CECOS"), a government backed research center and sperm bank in France. The sperm was frozen and stored for over two years. Alain, however, left no instructions regarding the future use of his sperm. At that time, he was living with Corinne, but when his condition began to deteriorate rapidly, the two decided to marry. After his death, Corinne requested her husband's sperm deposit from CECOS so that she could use it to have his child by artificial insemination. The sperm bank refused this request.¹

Deborah Hecht was living with William Kane for five years when he committed suicide at the age of 48. A few weeks prior to his death, William had deposited fifteen vials of his sperm in an account

at California Cryobank, a sperm bank, where he signed a “Specimen Storage Agreement”. Part of the agreement stated that in the event of his death, the sperm should continue to be stored upon request of the executor of the estate or should be released to the executor. An “Authorization to Release Specimens” provided authorization by William to the sperm bank to release his sperm to Deborah and/or her physician.

In his will, executed one month prior to his death, William named Deborah as the executor of his estate. He also bequeathed all of the sperm stored in the sperm bank to Deborah. Included in the will was a “Statement of Wishes” providing for his intentions that the sperm samples be used by Deborah, if she chose, for her impregnation, and that she should preserve his diploma and framed mementos for their future child or children. In addition, William wrote a letter several days before the suicide to his two children from a previous marriage, with an explicit reference to other children that might later be born to him by Deborah using the sperm specimens.

Several months after William’s death, Deborah attempted to retrieve the sperm from California Cryobank. Because William’s two children, Katharine Kane and William Kane, Jr. petitioned the court to have the sperm destroyed, the sperm bank refused to release the specimens to her.  

Although these two cases, Hecht v. Superior Court and Parpalaix v. CECOS, are the only cases thus far involving the procedure known as “postmortem” or “posthumous” insemination, many more are sure to arise in the future since such reproductive technology is now readily available. In fact, according to John Olson, Director of Cryogenic Laboratories, a sperm bank in Minnesota, widows of men who have died of cancer commonly request their husbands’ previously deposited sperm specimens in the hopes of having a child by their husband. With the advent of such technology, many legal, moral, and ethical problems arise. Is current legislation sufficient to deal with the effects of the postmortem insemination procedure? Are any constitutional rights implicated if such procedures are prohibited? Must there be evidence of the decedent’s intent to reproduce after death for his
sperm to be used in postmortem insemination? Are there any negative psychological effects on a child born by a dead father? Is sperm bequeathable? What are the implications for the child regarding inheritance rights? The cases referred to above encompass a variety of these issues. The courts' solutions to these problems will be discussed in this Note.

This Note will focus on the myriad of problems created by the use of "postmortem insemination." It will begin in part II with a brief history and description of the two components of the postmortem insemination procedure, cryopreservation of sperm and artificial insemination. Part III will discuss the applicability of current legislation to postmortem insemination and argue for new legislation specifically tailored to the postmortem insemination procedure. Part IV will address the constitutional concerns implicated by restrictions on the use of postmortem insemination. It will then argue that there is a fundamental right to procreate. This includes the right to use artificial means to procreate, and that in almost all cases there is no state interest sufficient to warrant its restriction. In part V, this Note will argue that sperm should be viewed as a unique type of property. Part VI will maintain that the consent of the decedent should not always be necessary to permit a woman to undergo postmortem insemination. In part VII, it will be argued that a posthumously conceived child should inherit from the decedent's estate if certain conditions are met. Part VIII will present judicial solutions to the dilemmas created by postmortem insemination, specifically, the decisions in the Hecht and Parpalaix cases. Finally, part IX will recommend a legislative solution to the unique problems created by the postmortem insemination procedure.

II. THE EVOLUTION OF ARTIFICIAL INSEMINATION AND CRYOPRESERVATION OF SPERM

The artificial insemination procedure is not new.\(^5\) For centuries, cattle breeders have used frozen bull semen to artificially inseminate their cattle.\(^6\) The impregnation of an Arab mare with the semen of a stallion, in the Fourteenth Century, is believed to be the first successful artificial insemination.\(^7\) In 1770, in England, a surgeon named

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5. Shapiro & Sonnenblick, supra note 1, at 234.
6. Id.
7. Id.
POSTMORTEM INSEMINATION

John Hunter successfully performed the procedure on a human for the first time.\textsuperscript{8} Artificial insemination was slow to be accepted in the United States,\textsuperscript{9} however and it was not until 1866 that Dr. Marion Simms successfully used the procedure on a woman in the United States.\textsuperscript{10} Unfortunately, Dr. Simms' success was regarded with disdain rather than praise.\textsuperscript{11} This was due to the community's deep-seated moral and religious values concerning the unnatural pregnancy.\textsuperscript{12} Consequently, Simms was prevented from further experimentation.\textsuperscript{13} Today, over 100 years later, "artificial insemination has gained widespread acceptance and medical technology has made it increasingly available and inexpensive."\textsuperscript{14}

In the same year that the first successful artificial insemination was performed, an Italian scientist, Montegazza, discovered that human sperm could withstand freezing and proposed that widows whose husbands were killed at war use frozen sperm from sperm banks to have children.\textsuperscript{15} It was not until 1949, however, that the cryopreservation process became a success.\textsuperscript{16} It was then discovered that the addition of a small amount of glycerol before freezing would increase the probability that the sperm would survive.\textsuperscript{17} In the 1960s, freezing, or cryopreservation, of sperm was made available to the Apollo astronauts so that even if space travel were to harm their reproductive systems, they could still father healthy children using the stored sperm.\textsuperscript{18} During the Vietnam War, soldiers sent frozen sperm back to their wives in the United States so they would be fathers when they returned home.\textsuperscript{19} Cryopreservation of sperm, like artificial insemination, has gained widespread acceptance and in fact, it is common sperm bank policy to freeze all sperm deposits in order to preserve them better and to check them for diseases before use in artificial insemination.\textsuperscript{20} Currently sperm is frozen and stored in a

\begin{itemize}
  \item \textsuperscript{8} Id.
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id. at 235; E. Donald Shapiro, \textit{New Innovations in Conception and Their Effect Upon Our Law and Morality}, 31 N.Y.L. SCH. L. REV. 37, 44 (1986).
  \item \textsuperscript{19} LORI B. ANDREWS, \textit{NEW CONCEPTIONS} 176 (1984).
  \item \textsuperscript{20} Telephone Interview with Dr. Cappy Rothman, Fertility Specialist and Co-Director of
\end{itemize}
tank filled with liquid nitrogen at -328 degrees Fahrenheit. Sperm which has been stored for over ten years has produced healthy children.

Activity at sperm banks increases greatly in times of war as was illustrated by the number of requests by soldiers for cryopreservation of sperm during the Persian Gulf War. Other common uses for the storing of sperm for later insemination include insurance against future infertility due to chemotherapy or radiation treatment, vasectomy, or exposure to toxic substances; it also gives unmarried women an opportunity to have a child without having intercourse. It has been estimated that as many as 170,000 women each year in the United States are artificially inseminated using stored sperm, resulting in the births of more than 65,000 children a year.

There are three kinds of artificial insemination, homologous artificial insemination, confused artificial insemination and heterologous artificial insemination. Homologous artificial insemination, commonly known as artificial insemination by husband ("AIH"), is a procedure by which at the time of ovulation, a woman is inseminated using a syringe containing her husband’s semen, which may have been deposited and frozen, or cryopreserved, at another time.

The second type of artificial insemination is confused or combined artificial insemination ("CAI"). Here, because the husband’s sperm count is low, his semen is mixed with that of an anonymous donor. The reasons for using this method are psychological:

California Cyrobank (Mar. 8, 1994).
21. Shapiro & Sonnenblick, supra note 1, at 234.
22. Id.
23. Telephone Interview with Dr. John Critser, Chair of Reproductive Council of American Association of Tissue Banks (Jan. 4, 1994).
26. Id. at 351.
27. Shapiro & Sonnenblick, supra note 1, at 235-36.
28. Id. at 235.
29. Id. at 236. Dr. Cappy Rothman, a fertility specialist and co-director of California Cryobank, the largest sperm bank in the world, has never heard this type of artificial insemination referred to as "confused" or "combined" artificial insemination. Rather, he has heard it referred to as "artificial insemination mixed" or "AIM". Rothman Interview, supra note 20.
30. Shapiro & Sonnenblick, supra note 1, at 236.
it gives the husband some basis for believing that he is the natural father of the resulting child[,...] it eases the physician's fear of committing perjury by listing the husband as the natural father on the birth certificate, [and finally,] it strengthens the already almost irrebuttable judicial presumption that the husband is the natural father of a child born during the marriage.31

In the third artificial insemination procedure, heterologous insemination, or artificial insemination by donor ("AID"), a woman is artificially inseminated using the sperm of a man other than her husband.32 The donor is almost always anonymous and is required to sign a written waiver of all parental rights.33 Although AID was traditionally used by infertile married couples as a way to create a biologically related family, the procedure is increasingly being used by unmarried women who want children without the legal and emotional attachment to the baby's biological father.34 These women may be in lesbian relationships or just cannot or do not want to find a companion with whom to have a child, but still wish to experience motherhood.35

III. CURRENT LEGISLATION REGULATING ARTIFICIAL INSEMINATION AND ITS APPLICABILITY TO POSTMORTEM INSEMINATION

Currently, 35 states have laws regulating some aspect of artificial insemination.36 Of these laws, some seem to prohibit, or at least cre-
ate obstacles to, the use of artificial insemination by unmarried women.\textsuperscript{37} In the case of postmortem insemination, although the Uniform

\textsuperscript{37} See Robertson, supra note 24, at 1006 n.223.

For example, there are fourteen states which have adopted some version of the Uniform Parentage Act's section on artificial insemination. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987) [hereinafter UPA]; see, e.g., CAL. FAM. CODE § 7613 (West Supp. 1993); N.J. STAT. ANN. § 9:17-44 (West 1993). This section was primarily created to ensure that a child conceived by artificial insemination is given the same protection in law as a natural child of the two parents (e.g., the child is entitled to be supported by the legal, though not biological, father) and to address the intricacies created in the legal relationship between the AID child and the mother's husband. Kritchevsky, supra note 34, at 18-21; Carol A. Donovan, The Uniform Parentage Act and Nonmarital Motherhood-by-Choice, XI REV. L. & SOC. CHANGE 193, 217 (1982-83).

The UPA does this by providing in paragraph (a) that the resulting child of the woman who uses AID is the natural and legitimate child in law of the woman's husband, provided the husband consented in writing to the use of AID. UPA § 5.

Paragraph (b) of this section concerns the parental rights of the donor of sperm. It states that "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." \textit{Id.} (emphasis added). Nine of the states which have adopted the UPA omit the word "married" from this paragraph. CAL. FAM. CODE § 7613 (West Supp. 1993); COLO. REV. STAT. ANN. § 19-4-106 (West 1990); ILL. ANN. STAT. ch. 750, para. 403 (Smith-Hurd 1993); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-6 (Michie 1989); OHIO REV. CODE ANN. § 3111.37 (Anderson 1989); WASH. REV. CODE ANN. § 26.26.050 (West 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1993); WYO. STAT. § 14-2-103 (1986). It can be inferred that by excluding the word "married," these states authorize the use of artificial insemination by unmarried as well as married women. See Kritchevsky, supra note 34, at 18-21.

Conversely, those state statutes in which the word "married" is not omitted can be interpreted as prohibiting artificial insemination by unmarried women by not expressly authorizing it; or at least discouraging its use by allowing for the possibility that the donor can assert his paternal rights to the child. Donovan, supra at 220-21. Nonetheless, in all states, unmarried women may be dissuaded from using artificial insemination because they fear that the child will not be considered legitimate in law since these statutes explicitly deem the child of a married couple the legitimate child of both. See Kritchevsky, supra note 34, at 19 (discussing possible interpretations of state statutory provisions regulating the use of artificial insemination and concluding that "[artificial insemination] of unmarried women is not prohibited by law; and . . . the exclusion of the procedure from the restrictions placed on [arti-
Status of Children of Assisted Conception Act ("USCACA") contemplates the use of postmortem insemination, only two states have adopted this Act.38 Notwithstanding these two states, since the matter of postmortem insemination is relatively untouched by state legislatures, if the courts were to use the current laws regulating artificial insemination as a guide to decide a case concerning postmortem insemination, the marital status of the widow (assuming the woman requesting the use of the sperm was the decedent's wife) is an issue which must be addressed. Should a widow be considered married, in

38. N.D. CENT. CODE § 14-18-04(2) (1991); VA. CODE ANN. § 20-158(B) (Michie Supp. 1993). The USCACA § 4(b) provides in pertinent part that "[a]n individual who dies before . . . a child is conceived other than through sexual intercourse, using the individual's . . . sperm, is not a parent of the resulting child." USCACA § 4(b) (emphasis supplied).

The comment to the section states that the primary purpose of the section is to "avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so." Id. comment at 140. Virginia's version is slightly modified, however, and states the following:

[A]ny person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless . . . (ii) the person consents to be a parent in writing executed before the implantation.

VA. CODE ANN. § 20-158(B).

Thus, unlike the USCACA, in permitting the deceased to be the legal parent of the resulting child, provided he consented to do so in writing before he died, Virginia expressly provides for the possibility of a legitimate father-child relationship created by the use of postmortem insemination.
which case the postmortem procedure could be considered artificial insemination by husband, AIH? Or should she be considered unmarried in which case the situation would be comparable to that of artificial insemination by donor, AID? The Uniform Parentage Act ("UPA") section on artificial insemination can be used to illustrate how a court might address the classification problem created by post-mortem insemination. Section 5 of the UPA provides the following:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived . . . .
(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived. 39

If the widow using the sperm of her dead husband were considered an AID user, the section would not make sense since there would be no woman "other than the donor's wife"—the husband, prior to dying, donated the sperm for his wife's use in artificial insemination. Arguably, therefore, such use should be considered AIH because at the time of the deposit, the wife was married and thus, was inseminated with semen donated by a man who was her husband in which case paragraph (a) would not apply either. However, since her husband is now deceased, the marriage has been terminated and thus, at the time of the insemination, the woman would be inseminated with the semen of a man not her husband, as with an AID user. 40 In addition, and also in the case of an AID user, the woman would be a single parent. Consequently, the widow, unless she remarries, is for all practical purposes unmarried and thus, her situation parallels one in which an unmarried woman uses AID to have a child. 41 In both cases the resulting child will be fatherless from the start. This analogy is especially relevant to circumstances, like those in Hecht, where the woman requesting the sperm was not the widow of the decedent, but

39. UPA §5.
40. See Shapiro & Sonnenblick, supra note 1, at 247; Jones, supra note 1, at 538.
41. See Telephone Interview with Lori B. Andrews, Professor of Law at Chicago-Kent College of Law (Jan. 5, 1994); see also Rosalind F. Atherton, Artificially Conceived Children and Inheritance in New South Wales, 60 AUSTL. L.J. 374, 380-81 (1986); Shapiro & Sonnenblick, supra note 1, at 247-48.
his girlfriend. Accordingly, in this Note the woman interested in using the postmortem insemination procedure, even if she is the decedent’s widow, will be placed in the same category as the unmarried woman. Consequently, concerns raised by the unmarried woman’s use of AID are equally applicable to the user of posthumous insemination and thus, will be addressed in part IV.B.

Notwithstanding their similarities, the difference between the user of postmortem insemination and the unmarried user of AID is significant as well. With postmortem insemination the woman did have a relationship with the child’s father, who will in most cases have been involved in the decision to have the child. On the other hand, with AID use, where donors are almost always guaranteed anonymity, the child will not know the identity and background of his/her biological father. This distinction raises other concerns, one of which is whether the posthumously conceived child has inheritance rights to his/her biological father’s estate. Because these concerns are unique to postmortem insemination, rather than manipulating the current laws to accommodate postmortem insemination concerns, new laws specifically designed to resolve these dilemmas are necessary. Part IX of this Note proposes such legislation.

IV. CONSTITUTIONAL CONCERNS CREATED BY POSTMORTEM INSEMINATION

The constitutional issue is threefold. First, is the right to procreate a fundamental right? Second, if there is a constitutionally protected fundamental right to procreate, does such protection extend to any effort to exercise this right, including the use of new reproductive technologies? Third, if the right to noncoital procreation is endowed with fundamental status as well, are there any instances in which state interference with this right are justified?

A. The Existence of a Constitutional Right to Procreate

The Supreme Court has addressed the affirmative right to procreate in two cases, only one of which supports such a right. In *Skinner v. Oklahoma*, the Court described procreation as “one of the basic civil rights of man” and stated that “[m]arriage and procreation are

42. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276 (Ct. App. 1993).
43. Andrews Interview, *supra* note 41.
fundamental to the very existence and survival of the race.” The 
Skinner decision found unconstitutional, on Equal Protection grounds, a statute that authorized the sterilization of certain categories of criminals. Although this case directly supports the affirmative right to procreate, it says nothing about whether the right to make procreative decisions, such as choosing the method of conception, is also fundamental. Nevertheless, after Skinner, the right to privacy has served as the basis for striking down a number of laws that interfered with the individual’s decisions concerning childbearing. Although these privacy cases involved, specifically, the decision to avoid procreation using artificial contraceptives, since the decision to procreate is clearly also a decision concerning childbearing, presumably the affirmative right to procreate and decisions relating to the exercise of this right would be included within these decisions.

In Griswold v. Connecticut, the Court invalidated a statute criminalizing the distribution of contraceptives. In doing so, the Court recognized a fundamental right to privacy in the marital relationship. Writing for the Court, Justice Douglas explained the reasoning behind the decision. Because he believed that the fundamental rights provided for in the Bill of Rights were the only rights protected by the Due Process guarantees of liberty, Justice Douglas based this newly articulated “right to privacy” on the Bill of Rights. First he determined that to effectuate the central rights, other rights, related to the Bill of Rights must be protected as well. These related rights form “penumbras” which, taken as a whole, constitute the general right to privacy. Thus, because the right to privacy is comprised of “emanations” from several fundamental constitutional guarantees, any relationship lying within this zone of privacy must be afforded the same protection as that given to the central rights explic-
Accordingly, any restrictions implicating these "penumbral" rights are subject to strict scrutiny by the Court. A statute will withstand this heightened level of review if it is justified by a compelling state interest and is narrowly drawn to express only the legitimate interests at stake. In reviewing the statute, Justice Douglas found that it implicated a relationship lying within this zone of privacy, the marriage relationship. He then concluded that to forbid the use of contraceptives rather than to simply regulate their manufacture or sale, would have a "maximum destructive impact upon that relationship." Consequently, the law was unnecessarily broad, and hence, a violation of due process.

In a concurring opinion, Justice Harlan reasoned that the statute in question "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'" In other words, rather than resorting to the provisions of the Bill of Rights to recognize a fundamental right to privacy, Justice Harlan simply recognized a fundamental right to privacy rooted directly in the guarantee of liberty of the Fourteenth Amendment Due Process Clause. This view enables the Court to recognize a right as fundamental even if it is not found within the provisions of the Bill of Rights. Because Justice Harlan's approach is the one presently adhered to by most members of Supreme Court, as long as the Court believes that a right is important enough, it will be endowed with fundamental right status. Thus, to find a right, such as the right to procreate, fundamental, one does not have to manipulate the Bill of Rights to find a connection with an already recognized fundamental right.

Although the Griswold court spoke only of a fundamental right to "marital privacy," the Court in Eisenstadt v. Baird, using Equal

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53. See id. at 485.
54. Id. at 497-98 (Goldberg, J., concurring).
55. Id.
56. Id. at 485-86.
57. Id. at 485.
58. Id.
59. Id. at 500 (Harlan, J., concurring) (quoting Palko v. State of Connecticut, 302 U.S. 319, 325 (1937)).
60. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) (arguing that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").
Protection analysis, extended the right to privacy to include the individual’s, not just the married couple’s, right to privacy in making procreative decisions. In *Eisenstadt*, the Court invalidated a statute prohibiting the distribution of contraceptives to unmarried persons and permitting their distribution to married persons only by registered physicians and pharmacists. In doing so, the Court reasoned as follows:

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.

Accordingly, *Eisenstadt* appears to support the unmarried woman’s right to make procreative decisions with the same protection from unwarranted government intrusion given to married couples. However, because society has traditionally frowned upon women bearing, rather than preventing, nonmarital children, the *Eisenstadt* Court may not have realized the far-reaching effects of its decision. Specifically, the Court may not have intended its recognition of the unmarried woman’s right to privacy in making procreative decisions to provide protection for decisions involving her right to procreate, rather than to avoid procreation. In recent years, however, the stigma attached to nonmarital pregnancies has been removed and thus, the existence of a fundamental right of the individual to make and effectuate procreative decisions is not as implausible as it once was. Nonetheless, society is still not ready to put to rest the many concerns associated with unmarried woman having children. Instead, these

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62. *Id.* at 454-55.
63. *Id.* at 453. However, the *Eisenstadt* decision has been criticized for its use of Equal Protection analysis to find an individual right to privacy derived from the *Griswold* right to marital privacy. See generally Janet L. Dolgin, *The Family in Transition: From Lochner to Eisenstadt and Beyond*, 82 Geo. L.J. 1519, 1554-56 (1994) (discussing the various flaws in the *Eisenstadt* Equal Protection analysis). Nonetheless, later courts have also recognized the individual’s right to privacy in making procreative decisions first articulated in *Eisenstadt*. See infra text accompanying notes 66-73.
concerns are translated into state interests for restricting the unmarried woman's exercise of her right to procreate. Part IV.B. of this Note will address these concerns. 65

In Carey v. Population Servs. Int'l., the Court synthesized the holdings of Griswold and Eisenstadt and clearly recognized the right of the individual to make procreative choices as fundamental. 66 There the Court found unconstitutional a statutory provision prohibiting the distribution of nonmedical contraceptives to persons under the age of sixteen and for anyone other than a licensed pharmacist to distribute contraceptives to persons sixteen or over. 67 The Carey Court concluded “the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State” 68 and “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.” 69 Consequently, considered together, the findings of the Court in Skinner, Griswold, Eisenstadt, and Carey support the existence of a fundamental right of the individual, whether married or single, to make procreative decisions. Accordingly, a restriction on this right would only be justified by “a compelling state interest” which “must be narrowly drawn to express only the legitimate interests at stake.” 70

Presumably, the fundamental right to make procreative decisions would include making decisions involving the specific method of conception. And in fact, the Carey decision implicitly supports such a right. In concluding that restrictions on access to contraceptives must be strictly scrutinized, it did so “not because there is an independent fundamental ‘right of access to contraceptives,’ but because such access is essential to the exercise of the constitutionally protected right of decision in matters of childbearing . . . .” 71 Similarly, access to the artificial methods of conception is also essential to the exercise of the constitutionally protected right of decision in matters of child-

65. This inquiry is significant to a discussion about postmortem insemination because this Note views the woman using the procedure as unmarried. See supra text accompanying notes 40-43. Thus, any restriction on the unmarried woman’s right to procreate encompasses the user of postmortem insemination.
67. Id.
68. Id. at 687.
69. Id. at 685.
70. Id. at 688 (quoting Roe v. Wade, 410 U.S. 113, 155 (1973)).
71. Id.
bearing and thus, restrictions on such access should also be strictly scrutinized.72 One commentator has suggested that “[i]f the right of a woman to privacy, as construed by the Court, is broad enough to encompass a woman’s decision whether or not to terminate [or prevent] her pregnancy by artificial means, the right by analogy is sufficiently broad to encompass a woman’s decision to initiate pregnancy by artificial means.”73 Thus, by the above reasoning, the line of cases supporting the fundamental right of the individual in making procreative decisions suggest the existence of a fundamental right of the individual to procreate noncoitally.

Although the Supreme Court has not yet had an opportunity to expressly extend the fundamental right to make procreative decisions to include using the new reproductive technologies, at least one district court has done so and at least three other state courts have implied the same, as have various commentators.74 In Lifchez v. Hartigan, the Northern District of Illinois struck down a provision of the Illinois abortion law which prohibited the sale of or experimentation upon a human fetus unless such experimentation was “therapeutic” to the fetus.75 One of the reasons the court invalidated the provision was that “it impermissibly restricts a woman’s fundamental right of privacy, in particular, her right to make reproductive choices free of governmental interference with those choices.”76 Because the language of the statute seemingly prohibited one of the new reproductive technologies, embryo transfer, the court explored the current boundaries of the right to privacy and expanded them to include the right to use noncoital methods to procreate: “It takes no great leap of

72. In light of the “undue burden” test articulated in Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992), the right of access to contraceptives in order to prevent procreation may not be afforded strict scrutiny analysis anymore. See infra note 88.


75. 735 F. Supp. 1361, 1362.

76. Id. at 1376.
logic to see that within the cluster of constitutionally protected choic-es 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.”

Two recent California decisions imply the existence of a fundamental right to use the new reproductive technologies to procreate. In Johnson v. Calvert, a case involving a surrogacy contract and in the Hecht case described in the introduction to this Note, the courts concluded that “any . . . effort [to inhibit the use of reproductive technology] would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.”

In Davis v. Davis, a case involving the disposition of embryos conceived through in vitro fertilization, the Tennessee Supreme Court indirectly extended the right to procreate to include using in vitro fertilization. There the court reasoned that

however far the protection of procreational 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 . . . . [N]o other person or entity has an interest sufficient to permit interference with the gamete-providers’ decision to continue or terminate the IVF [in vitro fertilization] process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.

The Davis decision also supports the existence of a fundamental right to make procreative decisions to use reproductive technology, and thus, a fundamental right to noncoital reproduction.

Finally, additional support for the individual or unmarried fundamental right to procreate noncoitally is secured through the numerous cases which recognize the fundamental right to be free from state interference in matters relating to family life.

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77. Id. at 1377.
79. Hecht, 20 Cal. Rptr. 2d at 291 (quoting Johnson, 19 Cal. Rptr. 2d at 505).
80. 842 S.W.2d at 602. The Hecht court agreed with this conclusion. 20 Cal. Rptr. 2d at 283.
East Cleveland\textsuperscript{82} and Smith v. Organization of Foster Families,\textsuperscript{83} the Court stated that the family is given fundamental-type protection because it is the "institution through which moral and cultural values are transmitted."\textsuperscript{84} Because this function can be effectively accomplished by relationships other than the traditional family, the family should be defined to include, as one commentator suggests "individual living arrangements which combine aspects of closeness, cooperation, emotional involvement, personal commitment, and, if the parties wish, potential for child rearing"\textsuperscript{85} since these are the values which characterize the ideals of the traditionally-protected family.\textsuperscript{86} If the scope of the family is broadened to include such relationships, then

unless we close our eyes to the basic reasons why certain rights . . . have been accorded shelter under the Fourteenth Amendment’s Due Process Clause, we cannot avoid applying the force and rationale of . . . precedents [which have articulated freedom of personal choice in matters of family and personal life] to [any] family choice.\textsuperscript{87}

Accordingly, since an unmarried woman’s decision to procreate noncoitally would be an exercise of her right of family choice, the woman’s decision to create a single-parent family should be free from government interference unless there was a compelling state interest for interfering with her choice.\textsuperscript{88} Based on the overwhelming support for the existence of a fundamental right of the individual to procreate noncoitally, this Note will assume that such a right exists.\textsuperscript{89}

\textsuperscript{82}the right of Amish parents to refuse to send their children to high school). See generally Donovan, \textit{supra} note 37, at 227-30; Kritchevsky, \textit{supra} note 34, at 38.

\textsuperscript{83}431 U.S. at 503-04.

\textsuperscript{84}431 U.S. 816, 844 (1977).

\textsuperscript{85}Donovan, \textit{supra} note 37, at 228 (citing Moore v. City of East Cleveland, 431 U.S 494, 503-04 (1977)).

\textsuperscript{86}Kritchevsky, \textit{supra} note 34, at 42.

\textsuperscript{87}Id.

\textsuperscript{88}Moore, 431 U.S. at 501.

\textsuperscript{89}However, in \textit{Planned Parenthood v. Casey}, the most recent Supreme Court decision concerning abortion, a plurality substituted an "undue burden" test for the compelling state interest standard. Thus a state may now restrict a woman’s access to abortion unless it would be an "undue burden" on her right to have an abortion. 112 S.Ct. 2791, 2820-21. In view of this decision, it is unclear whether the courts will apply the old compelling interest test or the new undue burden test to cases involving procreative decisions.

\textsuperscript{89}It is important to remember, however, that even if there is a fundamental right to procreate noncoitally, the state may still restrict this right without violating Due Process, provided the restriction would satisfy strict scrutiny by the court.
B. Restrictions on the Unmarried Woman's Use of Reproductive Technology Are Violative of Due Process and Equal Protection

There are several possible state interests for restricting the use of reproductive technology by an unmarried woman. First, it is argued that when an unmarried woman procreates noncoitally, the resulting child will be denied certain advantages society associates with having two legal parents. The presumed disadvantages a child without two legal parents encounters may be economic, developmental, or both. For example, single mothers are usually found in the lowest income brackets and thus the child will not live as comfortably as the child of a two-parent home. Developmentally, children with only one legal parent are more likely than other children to be deprived of the benefits of ‘a relationship with two adults who also have an intimate relationship with each other.’ Moreover, such children will never know the identity and background of their biological father which may make them feel incomplete. Thus, the state may justify a ban or restriction on the unmarried woman’s access to the new reproductive technologies by claiming it is in the best interests of the resulting child.

A second argument for restricting the unmarried woman’s use of artificial insemination is for the protection of state revenues. Since many single mothers are indigent and require public assistance, in order to prevent increased reliance on these revenues, unmarried women should be prohibited from using artificial insemination because it would further increase the number of people requiring public assistance.

Another reason offered for the prohibition of unmarried use of AID is to protect and promote the traditional nuclear family. The traditional nuclear family is considered one in which there is a hus-
band and a wife, with the wife remaining at home to care for the child and to keep house and the husband going out to work to support the family. The state may claim that it is wrong for people to deliberately flout the traditional family structure by using artificial insemination to conceive children outside marriage and to rear them without a father. Therefore a restriction on the unmarried woman's use of artificial insemination would be justified.

1. Due Process Argument

All of these arguments fail however since the above circumstances are not always present; unmarried women are not always poor and also do not always require public assistance. Children of unmarried women are not always developmentally disadvantaged since many times the mother does have an intimate relationship with another—a boyfriend, girlfriend, etc. Moreover, there is no evidence that a child born to an unmarried woman by artificial insemination is psychologically harmed in any way. Furthermore, it is not necessarily true that a child with two legal parents is better off—both parents may be poor; the parents may have a troubled relationship, thus having a harmful effect on the observing child's development; or even worse, the parents may neglect or abusing the child. In addition, there is no significant difference between the situations of the AID conceived child and that of an adopted child or a child whose parent(s) has died or deserted the child (either before the birth or while the child is very young) that would require any more concern for the child's well-being. In all these cases, the child is left without the benefit of knowing one biological parent or both. The fact that the law already allows unmarried women to adopt children is evidence that the legislature believes that sometimes a single parent can provide the love and support a child needs. Even more compelling is the fact that the typical unmarried user of artificial insemina-

98. See Donovan, supra note 37, at 241 n.289.
99. Kritchevsky, supra note 34, at 36.
100. See id. at 30.
101. See Donovan, supra note 37, at 232; Kritchevsky, supra note 34, at 32; Note, supra note 35, at 683 n.79.
102. Note, supra note 35, at 683 & n.80.
103. See Donovan, supra note 37, at 232-33.
104. See Donovan, supra note 37, at 237 n.270; Kritchevsky, supra note 34, at 32; Note, supra note 35, at 683.
105. See Donovan, supra note 37, at 234; Kritchevsky, supra note 34, at 31-32; Note, supra note 35, at 681 n.68, 683-84.
tion would be more likely to provide financial support for the child since the procedure, though not expensive, does cost money.\(^6\) Furthermore, a woman choosing such a procedure presumably has spent time thinking about her decision to have the child since the process clearly involves planning.\(^7\) Consequently, the child is planned for and very much wanted—factors which suggest that the child will be well-loved and well-cared for, definitely not disadvantaged.

Clearly, a ban on the use of reproductive technology by unmarried women solely to protect the traditional nuclear family is unsound as well. With the prevalence of teenage pregnancies, homosexual couples, the increasing divorce rate, and especially the increasing numbers of women joining the work force,\(^8\) the "traditional nuclear family is . . . the exception rather than the norm."\(^9\) Thus, the non-traditional family is now the norm.\(^10\) Consequently, it would be counter majoritarian to prohibit unmarried women from using reproductive technologies in order to promote the traditional family—clearly not compelling. Furthermore, "if the state considered its interest in avoiding single parent homes compelling, it could have moved to prohibit unmarried people from ever adopting."

Even if the preceding arguments are sufficiently compelling, the restrictions would not be narrowly tailored to express only the legitimate interest at stake; they would be both underinclusive\(^11\) and overinclusive. A restriction on the unmarried woman's right to procreate noncoitally, in the interests of protecting the child or state revenues, would restrict the rights of unmarried women who usually do not implicate the above concerns. For example, if the state restricted the unmarried woman's access to artificial insemination because of a concern that single woman are not financially able to support chil-

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106. See Kritchevsky, supra note 34, at 28-29.
107. See id. at 29.
108. See Dolgin, supra note 63, at 1535; see also Janet L. Dolgin, Just a Gene: Judicial Assumptions About Parenthood, 40 UCLA L. REV. 637, 646 n.35 (1993).
109. Massie, supra note 64, at 533-34.
110. See Kritchevsky, supra note 34, at 39-40 (arguing that a restriction based on the protection of the traditional family would be inconsistent with a constitutional interest in individual rights).
111. Kritchevsky, supra note 34, at 31. But see Massie, supra note 64, at 520 (arguing that the state permits adoption by an unmarried person because the child is already born and thus, a one-parent family is better than no family). However, if considering the child's interest, being conceived by an unmarried woman using artificial insemination is, in all probability, better than not being born at all.
112. See infra part IV.B.2.
hildren, a single woman earning well above the poverty level would be deprived of her right to procreate noncoitally even though the exercise of the right would not implicate the State’s concerns. Thus, the many women in her position would be deprived of their due process guarantees of liberty.

2. Equal Protection Argument

An equal protection argument is equally cogent. The Equal Protection Clause of the Fourteenth Amendment requires that the law treat equally those who are similarly situated. 113 “A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” 114 The first step, therefore, is to identify the purpose of the legislation which is then used to evaluate which persons are indeed similarly situated in order to finally determine whether the classification chosen is rational and not arbitrary. 115 However, so long as there is a legitimate state purpose, the courts consistently defer to the legislature’s judgment on whether the means used to achieve that purpose—the classification—were rational, 116 unless a fundamental right or suspect class is involved. When legislative classifications burden the exercise of fundamental rights, the legislation is unconstitutional unless a compelling governmental interest can be shown. 117

Although the state’s interests in protecting state revenues or children, or in promoting the traditional nuclear family reflect legitimate state concerns, because the fundamental right to procreate is being burdened in analyzing a restriction on the unmarried woman’s right to procreate noncoitally, the court will not simply defer to the legislature. With respect to the above state interests, all unmarried mothers—those who procreate coitally as well as those who procreate noncoitally—are similarly situated. Thus, to determine whether a classification based on the method of procreation is constitutional, the

114. Id. (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
115. See Massie, supra note 64, at 515.
116. New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (“[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; . . . it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment” (citations omitted)).
classification must be (1) necessary to effectuate (2) a compelling state objective. Neither of these conditions is satisfied. As concluded above, the state interests are not compelling and the classification is not necessary to promote the state interests—it is grossly underinclusive as will be demonstrated below.

With regard to the state’s interest in protecting the child or state revenues or promoting the traditional family, there is no difference between the unmarried woman who gives birth to a child conceived through coital reproduction and one who has a child conceived by noncoital reproduction—in both cases, once the child is born, the same state concerns are implicated. Thus, to restrict those unmarried women who wish to exercise their right to procreate using noncoital methods would not rectify those same problems, more frequently created by women reproducing through coitus. To restrict those unmarried women who wish to exercise their right to procreate using noncoital methods would not rectify those same problems, more frequently created by women reproducing through coitus. In fact, the unmarried women using artificial insemination are vastly outnumbered by single women reproducing coitally. Thus, even a complete ban on the unmarried woman’s right to noncoital procreation would not significantly decrease, for example, the increasing number of “nontraditional” homes due to coital reproduction. Clearly the classification is not “necessary” to solve the state’s problem since it excludes most of the people the state is concerned with regulating.

The state, however, could argue that such a grossly underinclusive classification was necessary because the state could not enforce a statute which prohibited or restricted all unmarried women from procreating since it would be nearly impossible to find and prevent unmarried women from procreating coitally. This assumption is validated by the failure of the “fornication laws”, prevalent more than thirty years ago, in deterring nonmarital sex. Presently, these laws which criminalize or fine persons guilty of engaging in nonmarital sex are in existence in only a few states and prosecutions for the offense are rare. Thus, the state could argue that there is a differ-

118. See Kritchevsky, supra note 34, at 29-32.
119. See id. at 30; Note, supra note 35, at 681 n.68.
120. See Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (“[W]e are guided by the familiar principles that a ‘statute is not invalid under the Constitution because it might have gone farther than it did,’ that a legislature need ‘not strike at all evils at the same time,’ and that ‘reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.’” (citations omitted)).
122. E.g., GA. CODE ANN. § 16-6-18 (1992); IDAHO CODE § 18-6603 (1987); MINN.
ence between the unmarried woman procreating coitally and the unmarried woman procreating noncoitally which justifies their unequal treatment—the state is capable of enforcing its policy in the case of noncoital reproduction. Nonetheless, although the court might agree that a classification based on an enforcement problem is rationally related to a legitimate state interest, it would probably not find it necessary to promote the state’s interest. Consequently, to restrict only the unmarried woman’s right to procreate noncoitally, in order to eliminate the problems created by single-parent families, would be an equal protection violation.

C. State Interests for Restricting the Use of Postmortem Insemination

Assuming that none of the above state interests are sufficiently compelling to justify state interference with the unmarried woman’s right to the use of noncoital techniques, in the case of postmortem insemination, there are additional concerns to address, any one of which might be sufficiently compelling to prohibit or restrict its practice.

1. The Slippery Slope Argument

A possible state interest for restricting the use of postmortem insemination is that the procedure is representative of future reproductive technology that, if allowed to continue, “may lead down a slippery slope to complete genetic and technical control of humans.” 123 The fear of the new reproductive technologies is not new. “Any change in custom or practice in this emotionally charged area has always elicited a response from established custom and law of horrified negation at first; then negation without horror; then . . . slow but steady acceptance.” 124 As discussed in part II, at one time even artificial insemination was looked upon with disdain because it was so new and “unnatural.” To some people, posthumous insemination crosses a pivotal line toward the dangerous practices created by cer-

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123. Robertson, supra note 24, at 1023.
124. ANDREWS, supra note 19, at 11.
tain new technologies. Is such fear of change, however, reason

125. The following are examples of some of the even newer and more unconventional reproductive technologies: Dr. Cappy Rothman, a fertility specialist, has at least twice recovered sperm from two young men after their deaths. Ivor Davis, Posternity Insurance, Chi. TRIB., Apr. 26, 1988, at C1; Cappy M. Rothman, Commentary, Live Sperm, Dead Bodies, HASTINGS CENTER REP., Jan.-Feb. 1990, at 33. In one case, the man had suffered fatal head injuries. Rothman, supra, at 33. Although he was unmarried and had no fiancee, the man’s father was “consoled by knowing that viable sperm was stored.” Id. In the second case, a boy died of a gunshot wound. His family requested Dr. Rothman to recover his sperm so as to preserve the family’s patrilineal heritage and to let them identify with their lost son by preserving a part of him. Id. Although Dr. Rothman admits that the issue of postmortem sperm retrieval could be complicated by certain circumstances, he also believes that “[s]uch instances provide for individual rights, pose no harm to society, and allow for freedom of choice on an issue that, while unusual, is important to them.” Id. Dr. Rothman also suggests certain situations in which he would refuse to perform the retrieval; “when there is clearly a conflict of interest between survivors as to the use of the sperm or when there are questions regarding the intent of the deceased to father children.” Id.

Dr. Kathleen Nolan of the Hastings Center in Briarcliff Manor, New York, vehemently opposes postmortem sperm retrieval: “Obtaining sperm from the dead is almost like rape. Even if the deceased had signed an anatomical gift act prior to death, he would have no reason to know it would include sperm. What you’re doing here is removing all opportunity of allowing an individual to control his or her own act of conception.” Davis, supra, at C1. Presently, as is the case with postmortem insemination, no legislation exists regarding sperm retrieval. Rothman, supra, at 33. With the increasing occurrences of wives requesting recovery and storage of sperm from their recently deceased spouses, clearly such legislation is necessary. Id.

Another example of the unlimited realm of reproductive technology is the ability of postmenopausal women to bear children using the donated egg and sperm of others. William Drozdiak, France Seeks Legislation Curbing In Vitro Pregnancies, WASH. POST, Jan. 3, 1994, at A1; Maria Cocco, For Everyone There’s a Season—Except Man, NEWSDAY, Jan. 4, 1994, at 74. Such was the case in two recent births by women over the age of fifty-nine. Id. The response by society has been varied. The critics claim that the procedure is unethical and that postmenopausal women are too old to sufficiently care for such a child. Drozdiak, supra, at A1. The proponents believe that there is nothing wrong with an older woman satisfying her desire to bear a child. Cocco, supra, at 74. One commentator analogizes the situation to the many occurrences of elderly men fathering children, Cary Grant in his sixties for one, and argues that to prohibit women from doing the same would be an unfair double standard. Id.

Finally, an even more controversial procedure which has not yet been perfected is that of cloning. The potential devastating effects of this technology were most notably illustrated in the recent movie Jurassic Park, where the ability to reproduce dinosaur DNA resulted in dinosaurs living in the company of humans with disastrous results. JURASSIC PARK (Universal Studios, Inc. & Amblin Entertainment, Inc. 1993). There are many other problems created by cloning. If it were permitted, the potential for the extinction of all but the “perfect” race once imagined by Hitler could become a reality if the technique fell into the wrong hands. See Daniel Callahan, Perspective on Cloning: A Threat to Individual Uniqueness; An Attempt to Aid Childless Couples by Engineered Conceptions Could Transform the Idea of Human Identity, L.A. TIMES, Nov. 12, 1993, at B7. The very individuality we now cherish could be eliminated by cloning two or more of the same person’s genes with the potential for thousands of identical people walking around. See id. Also, in the near future, parents may be able to go shopping for children and choose the exact eye color, hair color, personality traits, etc. they want for their child. ANDREWS, supra note 19, at 143-44.
enough to prohibit all of the new conceptions? Clearly it should not be. "[T]aking the first small steps [toward such future societies] does not mean the intermediate steps will also be taken in the near future, much less the grander, apocalyptic ones."126

As discussed in part IV.A., assuming there is a fundamental right of the individual to noncoital reproduction, if the government interest in creating restrictions is compelling enough, it would be sufficient to override the constitutional concerns. Each reproductive technique, however, should be considered on its own merit and not prohibited simply because other types of reproductive technologies may have dangerous consequences.127 To enact a blanket prohibition would deprive a person of their constitutionally protected right to procreate noncoitally even though the exercise of this right would not implicate any of the State’s anticipated dangers. Thus, such a complete ban would be greatly overinclusive and a probable violation of due process. In order to avoid the foreseeably unfortunate consequences of reproductive technologies which create such threats, the legislature could simply restrict those technologies, thus creating a narrowly drawn limitation to prevent the utilization of only those technologies actually implicating the State’s concerns.

A second state interest is the protection of the child. Will there be a negative psychological effect on the resulting child when (s)he finds out that (s)he was conceived by a dead man?128 Although the child may be caused some trauma or discomfort upon learning that (s)he was not conceived in the “natural” way, this trauma surely would not be considered a fate worse than not being born at all — the case if such insemination was prohibited.129 In addition, when the child understands how much effort went into his/her birth, this information may make up for any discomfort the child may feel from knowing how (s)he was conceived.130 Thus, concern for the resulting child about the effects caused by learning how (s)he was conceived is

126. Robertson, supra note 24, at 1026.
127. Rothman Interview, supra note 20.
128. See Shapiro & Sonnenblick, supra note 1, at 246-47.
129. See Robertson, supra note 24, at 997-98.
130. See Note, supra note 35, at 683.
not a sufficiently compelling state interest to prohibit posthumous insemination since otherwise the child would not even exist.

Finally, is the decision to have the dead man's child a well-thought-out-one since the woman is probably still going through the grieving process and thus, not thinking rationally? Dr. John Critser, Chair of the Reproductive Council of the American Association of Tissue Banks, suggests that a woman in this situation should get therapy to help her through the grieving period and to ensure that the decision is well-thought out.\textsuperscript{131} In addition, women contemplating posthumous reproduction could be psychologically screened to make sure each woman is stable enough to carry such a child.\textsuperscript{132} This solution is a logical one and only narrowly restricts the right to procreate. However, such a restriction may still be a violation of equal protection; even if the woman's decision to bear the decedent's child was not sufficiently thought through, neither are the many occurrences when women or teenagers accidentally become pregnant through intercourse—a scenario entirely unplanned. Since instances of postmortem insemination will be extremely infrequent, to prevent only the use of posthumous insemination, rather than all potentially problematic pregnancies, in order to ensure that pregnancies are well-thought out, would be severely underinclusive and therefore, indicative of an equal protection violation.\textsuperscript{133}

V. THE NATURE OF SPERM: PROPERTY OR LIFE?

How should sperm be categorized? Should sperm simply be considered property, in which case it would be inheritable? Or should it occupy an "interim category that entitles [it] to special respect because of [its] potential for human life?"\textsuperscript{134} Another option is to classify sperm as human biological material (such as an organ, human tissues, anatomical human remains or infectious waste) over which the person from whom it is drawn has no ownership or possessory interest once it leaves his body.\textsuperscript{135} The approach adopted by existing

\textsuperscript{131} Critser Interview, \textit{supra} note 23.

\textsuperscript{132} One view is that if the woman were not sufficiently stable, she may become obsessed with memories of the deceased. See Shapiro & Sonnenblick, \textit{supra} note 1, at 247 n.135.

\textsuperscript{133} \textit{But see supra} text accompanying notes 120-122 (discussing reasons why underinclusiveness may not be an equal protection violation).

\textsuperscript{134} Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (1993).

\textsuperscript{135} \textit{Id.} (citing Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (1990) (involving a claim that a doctor's use of cells, excised during plaintiff's leukemia treatments, in patenting
case law on the subject, as well as by the American Fertility Society, is to view sperm as a unique kind of property because of its potential for human life. The man from whom it is drawn, retains an ownership or possessory interest over the sperm. Such a classification empowers the sperm depositor with primary decision-making authority as to the use of his sperm for reproduction, consistent with a person’s liberty to procreate or to avoid procreation. Present sperm bank policy regarding anonymous sperm donors seems to coincide with the view of sperm as a unique type of property; that sperm donors are required to waive their rights to the sperm is an acknowledgement by the sperm banks that the donor indeed owns his sperm.

a cell line required the plaintiff to be compensated).

Id. at 281-83; Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); York v. Jones, 717 F. Supp. 421, 426, n.5 (E.D. Va. 1989) (citing Ethics Comm. of the Am. Fertility Society, Ethical Considerations of the New Reproductive Technologies 46 FERTILITY AND STERILITY 89 (1986) (“It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines . . . .”)); see sources cited at supra note 1 (discussing CECOS v. Parpalaix).

Id. But see infra text accompanying notes 148-152 (arguing that once the sperm depositor is deceased, his right to procreate is no longer implicated).

See Shapiro & Sonnenblick, supra note 1, at 236. There are two kinds of sperm depositors—donors and clients. Critser Interview, supra note 23. Donors deposit sperm and are then paid for these deposits which are usually then used by women who elect to have a child by AID. Id. The donor is guaranteed anonymity and must sign a waiver of all rights as the father. Shapiro & Sonnenblick, supra note 1, at 236. Client depositors are those men who deposit sperm for their own use. Critser Interview, supra note 23. These men must then pay fees for the storage and upkeep of the sperm. Shapiro & Sonnenblick, supra note 1, at 243-44. Postmortem insemination concerns these client depositors and thus, the following discussion will involve them.

Sperm bank policies concerning postmortem insemination vary. Some sperm banks treat the sperm depositor as having some kind of ownership interest in the sperm by permitting, or requiring him to authorize directives for the sperm’s future use. Telephone Interview with Albert Anouna, Director of Biogenetics Corporation (Jan. 11, 1994); Telephone Interview with Ed Fugger, Director of Fairfax Sperm Bank (Jan. 5, 1994); Rothman Interview, supra note 20; Telephone Interview with Xavier Sanchez, Semen Bank Administrator, Idant Laboratories (Jan. 4, 1994); Telephone Interview with Dr. Warren Sanger, Director of Genetic Semen Bank (Jan. 12, 1994). Some banks will release the sperm to a person only with the decedent’s prior authorization. Sanchez Interview, supra; Fugger Interview, supra; Anouna Interview, supra. Thus, at these banks, if the decedent failed to explicitly designate to whom the sperm should be released after his death, without a court order, the sperm could not be released to anyone, even the decedent’s widow. Anouna Interview, supra. Accordingly, these banks do not view sperm as a property interest since it would not automatically become a part of the decedent’s estate as with other property interests.

Other sperm banks do view sperm as simply property. At California Cryobank, the largest sperm bank in the world, and at Genetic Semen Bank in Nebraska, when a client depositor dies and failed to provide for the future use of the sperm, if he was married, the
The sperm depositor should indeed retain an ownership interest in the sperm when he is alive. After his death, however, if the decedent is viewed as having an ownership interest in the sperm, a woman would only be entitled to use it for postmortem insemination if the decedent, as in the *Hecht* case, bequeathed the sperm to her or if she were the beneficiary of his estate, of which the sperm would become a part. Because of the sperm’s potential for human life, however, the woman requesting the use of the sperm to procreate should, in some cases, be granted her request, even without having a property interest in the sperm. Thus, consistent with the view of sperm as a unique type of property, when the sperm depositor is alive, he should have an ownership interest in his sperm, since he will be alive to bear the consequences of its use. When the sperm depositor is dead, the widow or the legal heir gains access to the sperm. Rothman Interview, *supra* note 20; Sanger Interview, *supra*. If the decedent was unmarried at the time of death and failed to designate a person to whom the sperm should be released, both banks require a court order directing the sperm bank to release the sperm to the person requesting it. *Id.* If the depositor did authorize the sperm to be released to a certain person or persons, this directive is followed. Rothman Interview, *supra* note 20; Sanger Interview, *supra*.

Finally, at Cryogenic Laboratories in Minnesota, when a depositor dies, if he were married at the time of his death the sperm becomes the property of his widow. Olson Interview, *supra* note 4. Conversely, if he were not married, the sperm is automatically destroyed. *Id.* This is true even if the decedent had explicitly provided for the future use of the sperm in a will or other document, unless a court prevents the sperm bank from destroying the sperm. *Id.* According to John Olson, Director of Cryogenic, the reasoning behind his bank’s policy is based on Cryogenic’s differing treatment of client depositors and donors. *Id.* Before a donor may deposit sperm, he is subjected to a series of tests to ensure that his sperm will not contain any infectious diseases or genetic defects. *Id.* Conversely, client depositors are not tested in any way since the depositor is in charge of its upkeep and thus, he bears the consequences of its use. *Id.* Consequently, the sperm bank cannot be held liable for any unfortunate circumstances relating to the use of the client’s sperm, such as the birth of a child with Acquired Immune Deficiency Syndrome. In the case of a donor’s sperm, however, the sperm bank, by the donor’s waiver, becomes the owner of the sperm and thus is responsible for ensuring that it is disease free before giving it out to be used by women hoping to conceive. When a client depositor dies and was unmarried, however, his status becomes that of a sperm donor. *Id.* Accordingly, a request by the decedent’s girlfriend for the sperm, even if it were authorized by the decedent’s will, would be denied since the requisite testing for a donor was never completed. *Id.*

A simple solution would be to test all deposited sperm, whether deposited by a donor or a client. In this way, the sperm could be turned over to a girlfriend, without the possibility of liability. Of the six sperm bank directors interviewed, all, with the exception of Cryogenic and Genetic Semen Bank, require testing of all their depositors, clients and donors. *Id.; Anouna Interview, supra; Fugger Interview, supra; Rothman Interview, supra* note 20; Sanger Interview, *supra; Sanchez Interview, supra.* At Genetic Semen Bank, testing is required for all donors, but client depositors are given an option to have testing done. Sanger Interview, *supra.*

140. See *infra* part VI, discussing when postmortem insemination should be permitted.
sperm's unique characteristic, its potential for human life, combined with the woman's right to procreate, should sometimes override the decedent's property interest in the sperm. Consequently, a request to use the sperm for postmortem insemination should sometimes be entertained even where the women does not "own" the sperm. In this way, the sperm's potential for human life will be realized and, at the same time, there is no possibility that the decedent will be adversely affected by its use since he is dead.

VI. THE DECEDENT'S INTENT

Arguably, the most important issue involving postmortem insemination is whether the decedent intended for his specimens to be used after his death to father a child and if no intent can be found, whether the widow or girlfriend should still have the right to use the sperm to have a child. Lori Andrews, a Professor of Law at Chicago-

141. Although it would be extremely rare, a case may arise where the woman requesting the sperm either never met the decedent or was briefly acquainted with the decedent. For example, if the decedent had been a celebrity, an obsessed fan may be determined to use his deposited sperm to bear his child. In such a case, because the woman would first have to obtain the sperm in order to use it for insemination, the sperm bank would probably refuse to release it to her. The woman would then sue the sperm bank for the use of the sperm. If the case even made it as far as a trial, the decedent's next of kin would probably be called to testify against the release of the sperm. Unquestionably, the court would then refuse to award the sperm to the woman since her only basis for requesting it is her obsession with the person from whom it was drawn. Because the above situation is so unlikely to arise, it will not be considered in detail in this Note.

Another rare situation that could arise is if the decedent's parent(s) chose a woman to have their son's child (their grandchild) and the woman agreed to undergo postmortem insemination. Unlike the above example, in this case the parent, the decedent's legal heir in many cases, has a strong interest in the postmortem insemination occurring. Accordingly, this situation will be included within the discussion addressing the decedent's girlfriend or widow. Thus, it will be assumed that the party requesting the sperm is either the decedent's girlfriend, parent or widow.

Note also that intent issues only arise when a party is contesting someone's wish to use the decedent's sperm. The party objecting to the use of the sperm may include the decedent's children who are already born, as in Hecht, the decedent's parents or the sperm bank, as in Parpalaix. Most cases of postmortem insemination will involve the decedent's widow. Since in most cases the client depositor is depositing the sperm specifically for use by his wife to have their child, he has authorized the sperm bank to release the sperm to his wife. Thus, the sperm bank will automatically release it to the widow upon the decedent's death. See Olson Interview, supra note 4; Rothman Interview, supra note 20; Sanger Interview, supra note 139. Even in cases where the decedent has not issued any directives for the sperm, if he were married when he died, the sperm bank will usually release it to the widow upon request. See Olson Interview, supra note 4; Rothman Interview, supra note 20; Sanger Interview, supra note 139. Consequently, disputes over the use of a decedent's sperm will be rare.
Kent College of Law and an expert in the field of reproductive technology, believes that if the decedent explicitly stated his intent to father a child from the grave, then clearly the request for postmortem insemination should be granted.\textsuperscript{142} Ms. Andrews would also permit the posthumous insemination to occur, provided some kind of intent, however slight, could be ascertained.\textsuperscript{143} This “implied intent” could be determined, as is done for comatose medical patients,\textsuperscript{144} by the testimony of the decedent’s next of kin that the decedent intended his sperm to be used after his death, or by the circumstances surrounding the decedent’s deposit of the sperm.\textsuperscript{145} Some commentators contend that the action of depositing the sperm in the first place is an indication of the depositor’s intent to father a child.\textsuperscript{146} Conversely, it can be argued that the depositing of the sperm without instructions for its future use is evidence that the depositor did not think about the possibility of it being used after his death, thereby precluding a finding of intent.\textsuperscript{147}

Where there is some evidence of intent, if postmortem insemination were not permitted, one could argue that the decedent’s constitutional right to procreate would be violated. However, this argument is flawed. Since the sperm depositor is now deceased, it is not the decedent’s right to procreate that is affected, but his interest in making reproductive decisions while he is alive for a time when he will no longer be living.\textsuperscript{148} Thus, the question becomes whether such an interest should “be granted the high respect ordinarily granted core reproductive experiences when conflicts with the interests of others

\textsuperscript{142} Andrews Interview, \textit{supra} note 41.

\textsuperscript{143} Id.

\textsuperscript{144} This method of determining intent was used by the French Tribunal de grand instance in \textit{CECOS v. Parpalaix}. See Shapiro & Sonnenblick, \textit{supra} note 1, at 232. For further discussion, see infra note 189. But see John A. Robertson, \textit{Posthumous Reproduction}, 69 Ind. L.J. (forthcoming 1994) (manuscript at 67 n.17, on file with author) (“There is . . . no need to engage in substituted judgment to determine what the deceased person would have chosen. If there has been no actual exercise of autonomy, a substituted judgment approach will not protect autonomy, because there is no prior decision to be protected.”).

\textsuperscript{145} For example, in the \textit{Parpalaix} case the court was impressed with the fact that the decedent had gotten married two days before he had died. See Current Topics, \textit{supra} note 1. From this the court inferred that because Alain, even in his deteriorated state, put forth the effort to marry Corinne when he knew death was almost certain, it was proof that Alain desired Corinne to bear his child after his death. See \textit{id}. In other words, he had thought enough about the situation to care that such a child would be born to Corinne as his wife, and not as his girlfriend.

\textsuperscript{146} Andrews Interview, \textit{supra} note 41; Shapiro & Sonnenblick, \textit{supra} note 1, at 246.

\textsuperscript{147} See Shapiro & Sonnenblick, \textit{supra}, note 1, at 246.

\textsuperscript{148} Robertson, \textit{supra} note 144 (manuscript at 21-22).
arise,” thereby creating a fundamental right to make such decisions.149

One commentator concludes that even if noncoital reproduction were a constitutional right,

decisions about posthumous reproduction are so far removed from those interests that it is highly unlikely that a fundamental constitutional right would be found to exist. The interest in controlling reproductive events when one is dead is simply too attenuated a version of the important interests that one has in controlling reproduction while alive to warrant constitutional protection.150

Consequently, according to this view, the state would be free to limit the decedent’s ability to make decisions about posthumous reproduction without being subject to the compelling interest standard accorded fundamental rights.151 “Whether directives for or against posthumous reproduction should be honored will thus depend on policy judgments about the significance to individuals of knowing that they might or might not have offspring after death, balanced against the competing concerns that posthumous reproduction could affect.”152

Thus, if the woman decided not to follow the decedent’s directives to bear his child, unquestionably her fundamental right to avoid procreation would trump the decedent’s interest in controlling reproductive events from the grave.

Similarly, if the woman were denied the use of the sperm because evidence of the decedent’s intent to father such a child were lacking,153 arguably her right to procreate would be unjustifiably restricted.154 The counter-argument, however, is that although the state may not unjustly interfere with a person’s procreative right to choose her reproductive partner,155 her right to choose the person with

149. See id. (manuscript at 8).
150. Id. (manuscript at 25).
151. Id. (manuscript at 28-29).
152. Id. (manuscript at 29).
153. However, it would seem unreasonable to deny the woman the use of the sperm simply because evidence of the decedent’s intent is lacking. Perhaps the decedent simply didn’t realize that such a possibility existed. Or possibly he meant to change his will or provide for the sperm bank to release the sperm to a designated person, but forgot to do so. Finally, it may be that he didn’t care one way or the other. Whatever the reason, it should not always be assumed that silence is synonymous with unwillingness.
154. See Robertson, supra note 144 (manuscript at 29).
155. Certain state interests are compelling and therefore justify restricting the woman’s right to choose her reproductive partner. This is the case, for example, with prohibitions on incest or other sexual relationships involving consanguinity.
whom she will procreate goes only so far as that partner is willing. Analogously, if her choice of reproductive partner is deceased, unless he intended for her to use his sperm, (the substitute for his consent if he were alive), he would not be a willing partner and thus, she should not be permitted to use his sperm to reproduce. However, there is no significant difference between such a situation and one in which a woman, through coitus, gets pregnant and, either against the wishes of the man or without notifying the man, gives birth to their child. If anything, the postmortem situation would seem to create fewer problems, as the man would be unaffected by a child’s birth (e.g. he could not be forced to pay child support) because he is dead. Nonetheless, in the case involving coital conception, the man, by having unprotected intercourse with the woman, has already implicitly consented to the use of his sperm for conception. Notwithstanding such implied consent, where the man is alive, his right to avoid fatherhood would seem more important than any interest in preventing the use of a dead man’s sperm by a woman. In such a case, however, the man is forced into fatherhood which includes supporting the resulting child. By analogy, if the man’s interest in avoiding procreation in the above example is not enough to override the woman’s right to reproduce, then a man’s unwillingness, or lack of willingness, to father a child after his death surely would not be sufficiently compelling to override the woman’s present right to procreate.

The intent dilemma is best resolved by following the decedent’s directives, if any, provided they are consistent with the wishes of any party who may be affected by the carrying out of the decedent’s intent. However, where either the decedent’s intent cannot be ascertained or is invalid for some reason, the solution is more

156. Robertson, supra note 144 (manuscript at 29).
157. The woman bearing a man’s posthumous child, however, may have a claim against the dead man’s estate for child support. This possibility is suggested in the Hecht case by the decedent’s adult children. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 280 (Ct. App. 1993). It seems unlikely, however, that if the decedent’s intent to conceive such a child is not found, that a claim against his estate would be valid. Id.
158. In some cases the decedent will have left instructions with the sperm bank to destroy the sperm after his death. In these cases, however, the depositor may not have realized that the sperm could be used by his wife or girlfriend to have his child. He may have thought that if the sperm were not destroyed the sperm bank would distribute it as anonymous donor sperm. Thus, the fact that he directed the sperm to be destroyed is not always indicative of an intent to avoid postmortem insemination by his wife or girlfriend. Therefore, unless the decedent specifically expressed an intent to avoid procreation after his death, a
complicated. In a recent case involving a divorced couple who disagreed about the disposition of several frozen embryos (the divorce occurred after the in vitro fertilization procedure took place), the court addressed the issue of differing intentions by offering a balancing test as a solution.\footnote{159}{In Hecht, the decedent's children argued that his intent should be disregarded because he was of unsound mind at the time he expressed and documented his intent and deposited the sperm. 20 Cal. Rptr. 2d at 284, 289 n.9. Although the court left the intent issue to be determined in a separate trial, in order to address the broader issues involved, it assumed arguendo that the decedent had the necessary intent. \textit{Id}.}

In a case concerning posthumous insemination where there is no evidence of the decedent's intent to have a child after death and a dispute arises, a test which balances all of the competing interests should be employed. Such a dispute may consist of the decedent's girlfriend arguing for the use of the sperm against the decedent's children (\textit{Hecht}) or the decedent's wife against his parents. However, the court should first require that the woman prove she was in a significant or meaningful relationship with the decedent at or close to the time of his death. If such proof were not required, then any woman could sue for the use of the decedent's sperm. For example, if Elvis Presley had deposited sperm prior to his death, thousands of his fans would have tried to claim the rights to his sperm to bear Elvis' child. Thus, the person arguing for the use of the sperm should be required to prove there was an actual relationship between that person and the decedent at the time of his death. Although this prerequisite may seem to violate the woman's right to procreate, while the state may not unjustifiably restrict a fundamental right, the state is also not required to assist the person in obtaining the resources necessary for the exercise of that right.\footnote{160}{Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). The test is as follows: If there is a prior agreement existing concerning the disposition, then that should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the party has a reasonable possibility of achieving parenthood by means other than use of the preembryo in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail. \textit{Id}.}

Thus, the court is not required to award

\begin{itemize}
\item[\footnote{161}{See Harris v. McRae, 448 U.S. 297, 316 (1980) ("[A]lthough government may not}}
\end{itemize}
POSTMORTEM INSEMINATION

a decedent's sperm to a woman for postmortem insemination simply because she wants to exercise her right to procreate. If the woman was in possession of the sperm, the court could not prevent, without a compelling reason, the woman from using it to procreate.

Once the woman has proven that she was in a significant and meaningful relationship with the decedent at the time of his death, the court should then balance her interest in having the decedent's child with the other party's interest in avoiding a posthumously conceived child. Since the woman wishing to exercise her right to procreate will usually be most directly affected by any consequences of the postmortem insemination, her interest should be given more consideration.

One example of a circumstance where an interest in procreation should not prevail is if the woman wishing to use the sperm already has a young child born by the decedent. In such a case, if the woman's use of the postmortem insemination procedure would adversely affect her living child, the interests of that child may be sufficient to override the woman's interest in procreating. Consequently, when a question of intent arises, the court should employ a balancing test in which all of the competing interests must be considered, with more weight given to the interest of the party most directly affected by any subsequent decision.

VII. THE INHERITANCE ISSUE

Should the child conceived posthumously inherit through his/her biological father? Because most of the state legislatures did not contemplate the postmortem insemination procedure, the answer is unclear under existing probate laws.162 There are several possible solu-

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162. See Anthony M. DeStefano, Sperm Suit Raises Array of Legal Issues, NEWSDAY, Mar. 10, 1990, at 11. Currently, "U.S. common law generally bars a child from inheriting from the father if it is born more than 10 months [300 days] after the father died . . . ." Id. The Uniform Probate Code section on afterborn heirs states that "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." UNIF. PROBATE CODE § 2-108, 8 U.L.A. 66 (1983). Since a child conceived with the sperm of a dead man cannot possibly have been conceived before his death, the posthumously conceived child is not covered by the sections on afterborn heirs and therefore, may not inherit by the father. Thus, according to present probate law, the posthumously conceived child may not inherit from the biological father unless the decedent explicitly provided for such a child in his will. This does not mean, however, that if a posthumously conceived child were to bring a claim in court against his father's estate that the court would deny such a claim. In the Parpalaix case, the court implied that the probate laws were out-
tions to this dilemma. First, the simplest resolution would be for a man intending to father children posthumously to explicitly provide for such a child or children in a will. The will could include, in the interest of finality in the distribution of the estate, a cut off date before which the birth must occur to receive the inheritance. The provision could also limit the number of occasions of birth (not the number of children since there might be multiple births).

A second solution might be a legislative one. The legislature could enact a regulation stating that a child conceived posthumously will not be treated as the child of the deceased man, thereby precluding the child’s inheritance from the decedent, absent a provision in a will. However, to deny a posthumously conceived child recognition of the biological paternity of the decedent would be contrary to the present trends of recognizing rather than denying blood relationships. The exceptions to this tendency are adoption and artificial insemination by a donor, in which cases the blood relationships are denied. These exceptions are justified since they are beneficial to the interests of the child for whom a new legal relationship is created. To deny a posthumously conceived child the recognition of his biological father, however, cannot be justified on this basis since to do so would be detrimental to the child’s best interests.

A second legislative solution might be to enact laws recognizing dated and should not apply to such children. See Shapiro & Sonnenblick, supra note 1, at 232.

163. One commentator, as far back as 1971, proposed his own “Uniform Rights of the Posthumously Conceived Child Act” which addressed most of the inheritance issues which arise from the conception of a child by posthumous insemination. Winthrop D. Thies, A Look To The Future: Property Rights and the Posthumously Conceived Child, 110 TR. & EST. 922, 922-23 (1971).

164. Id. at 922; Shapiro & Sonnenblick, supra note 1, at 245; USCACA § 4(b), comment, supra note 52.

165. Thies, supra note 163, at 922.

166. Id.

167. Id.

168. Atherton, supra note 41, at 381. This was the approach adopted by the drafters of the USCACA. The comment provides the reasoning behind the approach: “It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so.” USCACA §4(b), comment, supra note 37.

169. Atherton, supra note 41, at 383.

170. Id.

171. Id.

172. Id.
the child as that of the decedent so long as the insemination were to occur within a specified time limit after the man’s death. This time limit could also resolve the problem caused by the common law Rule Against Perpetuities which was created to prevent the deceased from being able to tie up and restrict the use of property. Commentators have suggested that in order to inherit the child must be born before the 71st anniversary (or whatever age is considered to be the age at which the man’s reproductive capacity ends) of the testator’s birth.

Lastly, a court could issue a judiciary decree authorizing the child’s right to inherit “if, by testimony of all interested parties, the court is convinced that the decedent would have ‘wished his widow [or girlfriend, etc., after his death] to conceive a child of his to take under his will.’”

The inheritance dilemma is best resolved by permitting the posthumously conceived child to inherit in cases where the decedent explicitly provided for such a child in a will or where evidence of the decedent’s intent to father such a child by the particular woman exists. In a situation where evidence of intent is lacking, any resulting child should be barred from claiming a part of the decedent’s estate. This solution permits the child to inherit only when the decedent truly intended to have such a child and assumes that the decedent would have provided for the child had he been able to do so.

Should a posthumously conceived child inherit where the will provides for a class gift to the “children,” “issue” or “heirs?” If the decedent had any surviving children, then the “Class Closing Rules” or “Rule of Convenience,” would operate to exclude any future born


175. See, e.g., Thies, supra note 163, at 960.

176. Shapiro & Sonnenblick, supra note 1, at 245-46. Lori Andrews suggests a similar approach: If the decedent’s intent to conceive posthumously is clearly expressed, the child should inherit. Andrews Interview, supra note 41. If there is some evidence of intent, but it is not at all clear that the decedent wanted to father a child from the grave, Ms. Andrews believes that the use of the sperm should be allowed although any resulting child should not have any right to inherit from the deceased man. Id.
members from the class once any member of the class can call for a
distribution of the principal.\textsuperscript{177} If the decedent had no surviving chil-
dren, however, the class should remain open to include the first post-
humously conceived child, if any, that is born, since the potential for
class members does exist.\textsuperscript{178}

VIII. JUDICIAL SOLUTIONS TO POSTHUMOUS INSEMINATION-
RELATED ISSUES

A. CECOS v. Parpalaix

In the \textit{Parpalaix} case introduced earlier, the court’s opinion
ignored the inheritance, property and policy issues and instead fo-
cused on whether it was the decedent’s intent for his sperm to be
used to father a child after his death.\textsuperscript{179} CECOS, the sperm bank,
claimed that his reason for depositing the sperm was a therapeutic
one, merely to assure himself that once the chemotherapy treatments
rendered him sterile, he would still be able to have a biological child
once he became well again.\textsuperscript{180} CECOS also argued that sperm
should be considered an indivisible part of the body and therefore not
inheritable absent express instructions from the owner.\textsuperscript{181} Since
Alain failed to give any instructions with regard to the sperm’s future
use, and because it is impossible to know what his intentions were at
the time of his death, the sperm should not be given to his wife.\textsuperscript{182}
Finally, the sperm bank also claimed that its only legal obligation
was to the donor, not to his wife, since under CECOS’s normal de-
posit arrangement, the sperm is not returnable to the next of kin of a
deceased depositor.\textsuperscript{183} Corinne’s argument was based on contract
law; as Alain’s natural heirs, she and her in-laws became the owners
of the sperm and CECOS had broken its contract by not returning
it.\textsuperscript{184} This view required the sperm to be considered property and
thus, inheritable.\textsuperscript{185} Additionally, Corinne argued that, although not
written, Alain’s intent was for his wife to conceive after his

\textsuperscript{177} Leach, \textit{supra} note 173, at 944; Sappideen, \textit{supra} note 174, at 314.
\textsuperscript{178} Leach, \textit{supra} note 173, at 944; Sappideen, \textit{supra} note 174, at 314.
\textsuperscript{179} Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 288 (Ct. App. 1993).
\textsuperscript{180} Shapiro & Sonnenblick, \textit{supra} note 1, at 231.
\textsuperscript{181} \textit{Id}.
\textsuperscript{182} \textit{Id}.
\textsuperscript{183} \textit{Id}.
\textsuperscript{184} \textit{Id} at 230.
\textsuperscript{185} \textit{Id}.
Finally, Corinne's attorney argued that it was her "most sacred right" to have the child. In its decision, the court described sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive." This fundamental right must be jealously protected, and is not to be subjected to the rules of contracts. Rather, the fate of the sperm must be decided by the person from whom it is drawn. Therefore the sole issue becomes that of intent.

The Tribunal de grand instance then determined that Alain did indeed intend for Corinne to have his child and ordered CECOS to return the sperm to Corinne's physician.

Nonetheless, subsequent to the Parpalaix decision, in 1992 France passed a bioethics bill prohibiting posthumous insemination as well as all assisted conception (1) used for nonmedical reasons, (2) used by homosexuals, and (3) used by unattached women. The reasoning behind the bill is that because social resources are limited, the enumerated ways of conceiveing should be prohibited since they are not necessary and do not promote the traditional nuclear family. Additionally, the bill may be viewed as the government's solution to the concerns raised by the slippery slope argument. In 1993, consistent with the provisions of the bioethics bill, the French court prohib-

186. Id. at 230-31.
187. Id. at 231.
188. Shapiro & Sonnenblick, supra note 1, at 232 (footnote omitted).
189. Id.

Arguably, the court exercised the substitute judgment standard in the law of medical treatment decision-making for the incompetent. Applied here, the court scrutinized the manifested preferences and desires of Mr. Parpalaix 'to replicate faithfully the decision the incapacitated person would make if he or she were able to make a choice.'

Jones, supra note 1, at 529 n.25 (quoting I PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE & BIOMEDICAL & BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 179 (1982)). See Shapiro & Sonnenblick, supra note 1, at 246 n.129. But see Robertson supra note 144 (arguing that substitute judgment standard should not apply).

190. Shapiro & Sonnenblick, supra note 1, at 232-33.
191. Robin Herman, France Defines the Ethics of High-Tech Medicine, WASH. POST, Apr. 20, 1993, at Z8; Widow Loses Court Battle in Embryo Case, REUTERS, LTD., May 11, 1993, available in LEXIS, Nexis Library, Reuword File [hereinafter Widow Loses Court Battle]. The information in these sources is inconsistent, the first says that the law was already passed in 1992 and the second says that the law is expected to pass in the spring of 1993.

192. See Herman, supra note 191, at Z8.
193. See supra part IV.C.1. (discussing slippery slope argument).
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a woman from using a frozen embryo, fertilized by her dead husband, to become pregnant. Because the French government controls the country’s health care system, the ability to enforce such a bill is made easier than it would be in the United States. Whether the United States will attempt to enact similar legislation remains to be seen. However, such legislation would surely not be passed without intense debate over the constitutional implications of such a restriction on the right to procreate.

B. Hecht v. Superior Court

The case of Hecht v. Superior Court, also introduced earlier, demonstrates an American court’s solution to the issues raised by postmortem insemination. Although both Hecht and Parpalaix involve posthumous insemination, the facts in the Hecht case differ in several respects from those in Parpalaix. For one, Deborah Hecht was not the dead man’s widow, as in Parpalaix, but his girlfriend. A second distinction is that, unlike in Parpalaix, William Kane’s intent was explicitly stated in his will, in the agreement with the sperm bank and in a separate letter. Finally, whereas in Parpalaix the decedent’s next of kin were on the same side fighting against the sperm bank, in Hecht the situation involved the competing interests of the decedent’s children and his girlfriend, with the children contending they would be adversely affected by postmortem insemination.

The Kane children advanced several arguments supporting their position that the sperm should be destroyed and hence, procreation avoided. First, the Kanes contended that William had no ownership or possessory interest in his sperm once it left his body and therefore he could not bequeath it to Deborah. Second, the Kanes argued that even if sperm is inheritable, public policy forbids the artificial insemination of an unmarried woman. The third justification for destruction of the sperm was that public policy forbids postmortem insemination because it is “in truth, the creation of orphaned children by

194. Widow Loses Court Battle, supra note 191.
195. Herman, supra note 191, at 28.
197. Id. at 276-77. But see id. at 284 (alleging that the decedent was of unsound mind and thus, his expressed intent should be disregarded).
198. Hecht, 20 Cal. Rptr. 2d at 279.
199. Id. at 281.
200. Id. at 284.
artificial means with state authorization." Finally, the Kanes argued that the posthumous birth of Hecht’s child would create psychological burdens on the Kanes by affecting their family integrity, as well as financial burdens on society and on the estate.

Conversely, Ms. Hecht maintained that neither the estate nor the Kanes had any property interest in the sperm because it was gifted to her at the time William deposited it. In the alternative, Deborah argued that even if the sperm is considered part of the estate, it should be given to her because (1) the will specifically authorizes that she be the sole beneficiary of the sperm; and (2) to destroy the sperm against her wishes would be a violation of her rights to privacy and procreation under the federal and California Constitutions.

The court relied greatly on the Parpalaix decision in its ruling, stating that it was the only case in which the issue of postmortem insemination was addressed and was “instructive and pertinent” to the case at bar. First, the court characterized the nature of sperm as “reproductive material which is a unique type of ‘property.’” The court then found that it was part of William’s estate:

[T]he decedent’s interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies “an interim category that entitles them to special respect because of their potential for human life” and at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the sperm within the scope of policy set by law. Thus, decedent had an interest in his sperm which falls within the broad definition of property in Probate Code section 62, as “anything that may be the subject of ownership and includes both real and personal property and any interest therein.”

Next, the court concluded that there was no authority to support the premise that public policy would forbid the artificial insemination of Deborah because she was unmarried. To arrive at this determina-
tion, the court discussed two California cases. In one, the court concluded that the legislature had already spoken and approved of the unmarried woman’s right to procreation\(^{209}\) and in the other, that the state did not have a policy forbidding single parent families.\(^{210}\) Third, the court found that “assuming that both Hecht and decedent desired to conceive a child using decedent’s sperm, real parties fail to establish a state interest sufficient to justify interference with that decision.”\(^{211}\) In other words, as long as the intent is present, it is the gamete providers’ decision to use their gametes as they wish and the government may not violate this right to procreate, or to avoid procreation.\(^{212}\) The court’s reasoning was that since it is the gamete providers who bear the consequences of these decisions, no one else has a right to decide what these consequences will be.\(^{213}\)

Additionally, the court found no authority to support the Kanes’ argument that public policy forbids postmortem insemination.\(^{214}\) Next, the court concluded that there was no factual or legal basis to show how Hecht’s use of posthumous insemination would impose psychological burdens on the Kane adult children or on society.\(^{215}\) Finally, the court discussed the inheritance issues implicated by the Kanes’ contention that the birth of a child through the artificial insemination of Hecht with William’s sperm would create a financial burden on the decedent’s estate.\(^{216}\) It is in this section of the opinion that the court refers to the Uniform Status of Children of Assisted Conception Act and the Uniform Probate Code and concludes that “it is unlikely that the estate would be subject to claims with respect to

\(^{209}\) Id. at 285-87 (citing Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986)). In Jhordan C., the court held that the legislature’s omission of the word “married” from subdivision (b) of section 5 of California’s version of the UPA was inconsistent with a policy that would forbid the use of artificial insemination by unmarried women. Jhordan C., 224 Cal. Rptr. at 533-34.

\(^{210}\) Id. at 286-87 (citing Adoption of Kelsey S., 4 Cal. Rptr. 2d 615 (1992)) (holding that the state does not have a sufficiently strong interest in providing two-parent families for children born out-of-wedlock to discriminate against unwed adoptive fathers).

\(^{211}\) Hecht, 20 Cal. Rptr. 2d at 289.

\(^{212}\) But see supra text accompanying notes 148-52 (arguing that the gamete-provider in such a case will not bear the consequences of such a decision and thus, an interest in making reproductive decisions while alive, to be carried out after death, should not be endowed fundamental right status).

\(^{213}\) Hecht, 20 Cal. Rptr. 2d at 289. However, the sperm depositor, or gamete provider, is dead and thus, will not bear the consequences of his decision.

\(^{214}\) Id. at 289.

\(^{215}\) Id. at 290.

\(^{216}\) Id.
any [posthumously born] children.\textsuperscript{217}

Accordingly, the court concluded that the order to destroy William Kane's sperm must be vacated.\textsuperscript{218} Lori Andrews, an expert on the subject of reproductive technology, believes that the \textit{Hecht} case was decided properly because the decedent clearly expressed his intent to posthumously father a child with Hecht.\textsuperscript{219} Such a decision, she claims, is in "keeping with the societal perspective that people can do what they want with their bodies after they die."\textsuperscript{220} Thus, in finding no public policy forbidding the use of postmortem insemination, the only American court to address the issue indirectly authorizes its practice. Furthermore, the decision supports the existence of an unmarried woman's right to procreate using any method she elects.

IX. PROPOSAL FOR LEGISLATION REGULATING POSTMORTEM INSEMINATION

After considering the numerous concerns created by postmortem insemination, based on the solutions determined throughout this Note, the following addition to the Uniform Parentage Act is recommended:

\textbf{§ 5A. [Postmortem Insemination]}

\textbf{a. Definitions:}

1. "Postmortem" or "posthumous" insemination is a procedure in which a woman is artificially inseminated with the sperm of a deceased man, which, in almost all cases will have been deposited at a time prior to his death.

2. "Unmarried woman" shall include any single woman as well as the widow of the deceased man from whom the sperm was drawn.

3. "Relationship" is defined as the "connection of two persons, or their situation with respect to each other, who [were at one time] associated, whether by the law [e.g., marriage], by their own agreement, or by

\textsuperscript{217} Id.

\textsuperscript{218} Id. at 291. In March 1994, a California superior court probate judge awarded three of the fifteen vials of William Kane's sperm to Ms. Hecht pursuant to a division-of-property agreement signed by Deborah and the Kane children after William's death. David Margolick, \textit{15 Vials Of Sperm: The Unusual Bequest of an Even More Unusual Man}, N.Y. TIMES, April 29, 1994, at B18.

\textsuperscript{219} Andrews Interview, supra note 41.

\textsuperscript{220} Id. But once sperm has already been deposited, is it really still a part of the body?
kinship, in some social status or union.”221
4. “Party requesting the postmortem insemination” shall include a parent of the decedent who requests the procedure to be performed on a consenting woman.

b. This section expressly authorizes the use of postmortem insemination where there is evidence that the decedent intended for his sperm to be used for postmortem insemination or, in a case where there is no evidence of intent or evidence of contrary intent, the party requesting the postmortem insemination shall be required to prove the existence of a significant relationship between that party and the decedent at the time of his death; and once such a relationship is established, the court will then employ a balancing test in order to determine whether the postmortem insemination shall be permitted. The balancing test will consist of the weighing of the competing parties’ interests.

c. If, under the supervision of a licensed physician, an unmarried woman undergoes postmortem insemination, the decedent from whom the sperm was drawn shall be recognized in law as the natural father of a child thereby conceived provided there is some evidence, either implied or expressed by the decedent, that he intended his sperm to be used for the purpose of conceiving his child subsequent to his death.

d. If an unmarried woman undergoes postmortem insemination, and there is no evidence that the decedent intended that his sperm be used for the purpose of conceiving his child subsequent to his death, then the decedent shall not be recognized in law as the natural father of any child thereby conceived.

e. A child conceived pursuant to subsection (c) of § 5A is entitled to the same inheritance rights to the decedent’s estate as a natural child of the decedent would be entitled, subject to the probate laws adopted by the State.

f. A child conceived pursuant to subsection (d) of § 5A shall not be entitled to inherit by the decedent under any circumstances.

X. CONCLUSION

Existing case law clearly supports the existence of a fundamental right by all, whether married or single, to procreate. Whether this right extends to noncoital procreation is less certain. Assuming there is a fundamental right to noncoital procreation, it is debatable whether there is a compelling state interest which justifies restricting the exercise of this right. Current case law, however, lends support for a relatively unhindered existence of such rights.

The Hecht and Parpalaix cases appear to extend these rights even further to include the right of access to postmortem insemination. If indeed this right to use postmortem insemination exists, of the many state interests advanced for forbidding or broadly restricting it, almost none are sufficiently compelling to override this constitutionally protected right. Most of the rationales provided for outlawing or restricting postmortem insemination are completely unfounded as was discussed throughout this Note. Many of the other concerns are mere inconveniences and can be dealt with as is done in the proposed addition, Section 5A, to the Uniform Parentage Act in part IX.

The fact that such cases have reached the courts illustrates the need for legislation addressing this issue, as well as the other reproductive technologies. In considering such legislation, however, the merits and drawbacks of each reproductive technique must be weighed independently of the others. Although the new reproductive technologies provide a world of opportunity for infertile couples and unmarried women, some of these new procedures may adversely affect our society. Posthumous insemination, however, causes no reasonably foreseeable harm to anyone and at the same time can provide great joy to the women who are able to bear the children of the deceased men for whom they cared deeply. Thus, because there is no real significant risk associated with allowing such a practice, assuming there is a constitutional right to noncoital reproduction, it would be unconstitutional as well as inhuman to outlaw or broadly restrict the use of postmortem insemination.

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