Reproduction After Death: The Legal and Ethical Challenges in the Regulation of Posthumous Conception in Ireland

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Plagiarism Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of Ph.D. in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of this work.

Signed: Claire McGovern

Date: 7th December 2022

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Thesis Summary

This thesis identifies and examines the legal and ethical challenges which surround the regulation of posthumous conception in Ireland. Proposals for regulating posthumous conception have been outlined by the Irish Government in the General Scheme of the Assisted Human Reproduction Bill 2017. However, there has been no indication to date on when this Bill will progress through the legislative process. Thus, posthumous conception remains unregulated in Ireland and this presents a clean slate upon which a scheme of regulation may be built. Against this backdrop, this thesis is based on answering three research questions regarding the regulation of posthumous conception in Ireland.

First, this study investigates whether posthumous conception ought to be regulated at first instance, or whether the practice should simply be banned in Ireland. In addition, it considers whether a degree of consent should be used when regulating posthumous conception. Furthermore, this research critically examines the existing regulation of posthumous conception in various jurisdictions and identifies the primary issues which cases of posthumous conception pose for courts in practice. In doing so, this research identifies the gaps in current regulatory regimes, with a view to ascertaining what Ireland can learn from these existing policies.

Ultimately, this research reconsiders the proposals for regulating posthumous conception in Ireland as outlined under the General Scheme of the Assisted Human Reproduction Bill 2017, and makes several recommendations for how the Bill can be improved. This thesis concludes that posthumous conception should be regulated in Ireland and should be permitted by law. In addition, it argues in favour of using a presumed consent model when regulating the practice in Ireland, and further demonstrates how any potential harms caused by posthumous conception can be minimised through effective regulation.

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Introduction

1. Introductory Remarks

This thesis falls within the field of reproduction and the law. My aim is to contribute to the overall state of knowledge in this area by building upon the wide scholarly debate on the topic of posthumous conception. Posthumous conception arises in cases where a child is both conceived and born after the death of a genetic parent.[1] The practice of posthumous conception involves using cryopreserved sperm, eggs or embryos in assisted human reproduction, with conception occurring after the death of the person who is the source of the gamete.[2] I hope to add to the academic discourse by focusing on how Ireland should respond to the challenge of regulating posthumous conception. This doctoral work is the first to consider the question of whether and how posthumous conception should be regulated in Ireland. Thus, I directly contribute to the state of art on this topic.

Artificial reproductive technology (herein referred to as ART) is unregulated in Ireland. Therefore, the practice of posthumous conception operates in a legal vacuum and takes place by relying on existing common law and statutory provisions which were not drafted with this purpose in mind. Although legislation for the regulation of ART in Ireland (including posthumous conception) has been proposed in the form of the General Scheme of the Assisted Human Reproduction Bill 2017 (the AHR Bill),[3] progress in relation to legislating this area has been significantly slow. To date, there has been no published timeline for the AHR Bill's passage through the House of Oireachtas and Mills and Mulligan have stated that it remains unknown when the Irish Government's commitment to legislating this area will be fulfilled.[4] Indeed, it has been recently reported in various Irish news

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[1] G. Bahadur, 'Death and Conception' (2002) 17(10) *Human Reproduction* 2769, at 2769; J. Robertson, 'Posthumous Reproduction' (1993) 69 *Indiana Law Review* 1027, at 1030.

[2] Bahadur, 'Death and Conception', above n 1, at 2769; Robertson, 'Posthumous Reproduction', above n 1, at 1030.

[3] The General Scheme of the Assisted Human Reproduction Bill 2017 (The AHR Bill 2017), Part 4.

[4] S. Mills and A. Mulligan, *Medical Law in Ireland* (3rd edn, London: Bloomsbury, 2017), p. 420; K. O'Sullivan, 'Ireland Needs to Regulate for Posthumous Conception' (The Irish Times, 09 March 2021), available at <https://www.irishtimes.com/opinion/ireland-needs-to-regulate-for-posthumous-conception-1.4504616>.

outlets that the Government's plans to procced with enacting the draft AHR Bill have been pushed back to facilitate further research on the regulation of international surrogacy.[5] Consequently, posthumous conception continues to be unregulated in Ireland and this presents a clean slate upon which a scheme of regulation may be built. This opportunity to reconsider the proposals for regulating posthumous conception outlined in the AHR Bill, with a view to creating an effective scheme for regulating posthumous conception in Ireland, forms the basis for the research questions that are addressed by this thesis.

2. Research Questions

This thesis is based on answering three primary research questions regarding the regulation of posthumous conception in Ireland, namely:

1. Should posthumous conception be regulated in Ireland?
2. If so, what model of consent should be used to regulate posthumous conception in Ireland?
3. What lessons can we learn about regulating posthumous conception in Ireland from the current state of legislation, guidelines and case law that has emerged on posthumous conception in foreign jurisdictions?

The term 'regulation' is interpreted differently across disciplines.[6] Scholars have observed that the topic of regulation has stimulated debate in a wide range of areas. Thus, the meaning and scope of the term is highly contested and will vary depending on whether the topic is assessed from a legal, economic, political, social

[5] Law Society of Ireland, 'Ethics of Commercial Surrogacy to be Probed' (Law Society Gazette, 03 November 2021), available at <https://www.lawsociety.ie/gazette/top-stories/2021/11-november/ethics-of-commercial-surrogacy-to-be-probed-by-oireachtas-unit>; A. Conneely, 'Families Protest over Slow Pace of Surrogacy Legislation' (RTE, 02 November 2021), available at <https://www.rte.ie/news/ireland/2021/1102/1257352-ireland-surrogacy/>; D. Murray, 'Committee Proposed to Study Issues Surrounding International Surrogacy' (Business Post, 24 October 2021), available at <https://www.businesspost.ie/legal/committee-proposed-to-study-issues-surrounding-international-surrogacy-4b5ff1f9>.

[6] C. Koop and M. Lodge, 'What is Regulation? An Interdisciplinary Concept Analysis' (2015) 11(1) *Regulation and Governance* 1, at 2.

scientific, or historical standpoint.[7] Nonetheless, in the leading textbook on regulation, Baldwin and colleagues note that the term regulation is generally used in the following senses:

1. 'As a specific set of commands - where regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose'.[8]
2. 'As deliberate State influence - where regulation has a more broad sense and covers all State actions that are designed to influence business or social behaviour'.[9]
3. 'As all forms of social or economic influence - where all mechanisms affecting behaviour - whether these be State-based or from other sources are deemed regulatory'.[10]

There are also other widely cited definitions of regulation in the literature. For example, Selznick defines regulation as 'sustained and focused control exercised by a public agency over activities that are valued by the community'.[11] In addition, Julia Black provides a similar yet more detailed definition of regulation as:

> '…the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification'.[12]

In a legal sense, regulation is broadly perceived as control.[13] Regulation ordinarily involves a degree of intervention with liberty and choices - whereby, the State or non-state actors set legal rules and norms that define society's legally available

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[7] Ibid; R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford: Oxford University Press, 2012), p. 1; D. Levi-Faur, *Handbook on The Politics of Regulation* (Cheltenham: Edward Elgar Publishing, 2011), p. 3.
[8] Baldwin, Cave and Lodge, *Understanding Regulation: Theory, Strategy, and Practice,* above n 7, p. 3.
[9] Ibid.
[10] Ibid.
[11] P. Selznick, 'Focusing Organisational Research on Regulation', in R. Noll (ed.), *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985), p. 363.
[12] J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137, at 139.
[13] Ibid.

options.[14] In this respect, Baldwin and colleagues observe that regulation can be both preventative and facilitative. Regulation can restrict behaviour and prevent the occurrence of activities that are deemed to be undesirable, and regulation can also enable or facilitate certain activities to be conducted.[15]

The term regulation, as used throughout this work, reflects this understanding of regulation. My focus is on rules that will be set by the Irish Government to govern the practice of posthumous conception in Ireland. This could range from the implementation of primary and secondary legislation to other quasi-legal rules such as guidelines, codes, orders, or directions.

It is also important from the outset of this thesis to provide a definition for 'death'. The definition of death is highly contested in the literature and the term has various meanings depending on whether it is assessed from a medical, philosophical, religious or social perspective.[16] Conway notes that in a medico-legal context, death is generally regarded as a biological process and what happens to the physical body.[17] However, Lizza observes that for many people, death is not simply a clinical determination, but also requires ethical, moral and cultural acceptance.[18] For this reason, some scholars argue that the law should not purely follow medical opinion when defining death, but should also take moral and philosophical arguments into account.[19]

There is no statutory definition of 'death' in Ireland and the legal understanding of whether death has occurred is based closely on clinical criteria.[20] This is evidenced by the General Scheme of the Human Tissue (Transplantation, Post-Mortem,

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[14] J. Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, at 2.

[15] Baldwin, Cave and Lodge, *Understanding Regulation: Theory, Strategy, and Practice,* above n 7, p. 3.

[16] H. Conway, *The Law and the Dead* (New York: Routledge, 2016), p. 10; See discussion in P.L. Chau and J. Herring, 'The Meaning of Death', in B. Brooks-Gordon, F. Ebtehaj, J. Herring, M.H. Johnson and M. Richards (eds.), *Death Rites and Rights* (Oxford and Portland: Hart, 2007), Chapter 2; S.J. Youngner, R.M. Arnold and R. Schapiro, *The Definition of Death: Contemporary Controversies* (Baltimore: The John Hopkins University Press, 2002).

[17] Conway, *The Law and the Dead*, above n 16, p. 9-10.

[18] J.P. Lizza, *Persons, Humanity and the Definition of Death* (Baltimore: The John Hopkins University Press, 2006), p. 17.

[19] Ibid; See also discussion in Chau and Herring, 'The Meaning of Death', above n 16, p. 28.

[20] Intensive Care Society of Ireland, *Diagnosis of Brain Death in adults; Guidelines* (ICSI, 2020), p. 2.

Anatomical Examination and Public Display) Bill 2018.[21] The General Scheme does not provide a definition of death. However, the Bill states that it is intended for a person's organs to be donated following either a clinical determination of cardiac, or brain stem death.[22] Both cardiac and brain stem death have been deemed by the Intensive Care Society of Ireland as 'custom and practice' for a medical determination of death in Ireland.[23]

Cardiac or cardiopulmonary death is the traditional medical understanding of death and is based on cardiopulmonary (heart-lung) function.[24] Cardiac death is defined as the irreversible cessation of a person's heart and respiratory function. When a person's heart stops beating and there is no respiration, that person is considered to be dead.[25] A person is also considered to be medically dead in cases where they have suffered brain stem death.[26] Brain stem death is defined as the irreversible loss in function of the brain stem.[27] A patient who demonstrates permanent loss in brain stem activity and has no chance of recovery, is declared dead.[28] Brain stem death is accepted as the legal equivalent of circulatory death and is the usual criteria for certifying that death has occurred.[29] In the case of both cardiac and brain stem death, a determination is made by a suitably qualified physician that the person's death is permanent and irreversible, and that there is no hope of recovery.[30]

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[21] The General Scheme of the Human Tissue (Transplantation, Post-Mortem, Anatomical Examination and Public Display) Bill 2018 (IRE).
[22] Ibid, Head 8(6).
[23] Intensive Care Society of Ireland, *Diagnosis of Brain Death in adults; Guidelines,* above n 20, p. 2.
[24] Conway, *The Law and the Dead*, above n 16, p. 10; F.J. White, 'Controversy in the Determination of Death: The Definition and Moment of Death' (2019) 86(4) *The Linacre Quarterly* 366, at 367.
[25] White, 'Controversy in the Determination of Death: The Definition and Moment of Death', above n 24, at 367.
[26] Intensive Care Society of Ireland, *Diagnosis of Brain Death in adults; Guidelines,* above n 20, p. 2.
[27] Ibid.
[28] Intensive Care Society of Ireland, *Diagnosis of Brain Death in adults; Guidelines,* above n 20, p. 2.
[29] Ibid; Brain stem death is distinct from a coma or persistent vegetative state (PVS). When a patient is diagnosed as being in a comatose or PVS they do not have higher brain function. However, they maintain lower brain function and brain stem activity, which will regulate involuntary actions such as breathing, circulation, and digestion. A patient in a comatose or PVS retains brain stem activity and is therefore considered to be alive: B. Young, W. Blume and A. Lynch, 'Brain Death and the Persistent Vegetative State: Similarities and Contrasts' (1989) 16(4) *Canadian Journal of Neurological Sciences* 388, at 388-393.
[30] The General Scheme of the Human Tissue (Transplantation, Post-Mortem, Anatomical Examination and Public Display) Bill 2018 (IRE), Head 8(6).

In this thesis, I accept the medico-legal definition of death as a clinical determination of cardiac or brain stem death. I acknowledge that this interpretation is not necessarily consistent with the different philosophical, theological and societal understandings of death advanced in the literature.[31] However, by adopting a medical definition of death in this thesis, I am able to precisely distinguish between when a person is considered to be living, and when a person is considered to have died. This is important when discussing whether, and how posthumous conception should be regulated in Ireland.

Furthermore, to answer the core research questions of this thesis, a series of interrelated sub-questions arise and must also be addressed. For example, to decide on whether posthumous conception should be regulated in Ireland, I investigate whether it is necessary to regulate posthumous conception at all, or rather should the practice simply be banned. To do this, I adopt a liberal approach to regulation. Such an approach guarantees a right to freedom of action and does not interfere with individual liberty unless there is a sufficient justification for doing so.[32] I consider the nature of the right to reproduce and assess the circumstances in which reproductive rights can be validly limited. In addition, I identify each of the stakeholders affected by posthumous conception and delineate the precise interests of these parties and the possible harms caused by posthumous conception to them. To answer the second research question in relation to consent, I critically review the concepts of autonomy and consent. In addition, I investigate the extent to which the dead have autonomy which can be violated. Lastly, to conclude the third research question on what can be learned from foreign jurisdictions about regulating posthumous conception, I examine and assess how the practice of posthumous conception is currently being regulated across different jurisdictions and critically analyse the case law that has emerged on this issue.

It is not within the scope of this work to query or debate the type of regulatory regime that should be used to govern posthumous conception in Ireland. In essence,

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[31] Chau and Herring, 'The Meaning of Death', above n 16, p. 28.

[32] The liberal approach adopted by this thesis is justified fully in Section 3 of this Introductory Chapter: M. Smith, *Saviour Siblings and the Regulation of Assisted Reproductive Technology* (London: Routledge, 2015), p. 85; R. MacKlin, 'Ethics and Human Reproduction: International Perspectives' (1990) 37(1) *Social Problems* 38, at 40.

I do not consider whether regulation should take the format of primary legislation, or whether it would be better for posthumous conception to be self-regulated by fertility clinics or another licencing body. As mentioned in Section 1, the Irish Government have already included laws on posthumous conception in their proposed legislation for the regulation of ART in Ireland.[33] Thus, any future policies are likely to take the format of being included in primary ART legislation.

In line with this, the objective of this study is to explore the preliminary questions of whether posthumous conception ought to be permitted by law in Ireland at first instance and if so, what model of consent should be used to regulate the procedure. This thesis also considers how the practice should be regulated by looking at the lessons that can be taken from the current state of legislation and case law that has emerged on posthumous conception in foreign jurisdictions. By framing the discussion within the context of the primary research questions and by addressing the associated sub-questions, I ultimately provide an in-depth critical analysis of the provisions contained within the AHR Bill for regulating posthumous conception in Ireland and offer recommendations on how these provisions might be amended to ensure that Ireland effectively responds to the challenge of regulating posthumous conception.

3. Significance of Research

This section highlights the importance of the research questions which are addressed by this work. In addition, I justify the importance of using a liberal approach in this thesis when determining how posthumous conception should be regulated in Ireland.

In recent years, there has been an increase in requests for gamete retrieval from both comatose and deceased patients.[34] This has been accompanied by an influx of case law in common and civil law jurisdictions relating to posthumous

[33] The AHR Bill 2017, Part 4.

[34] J. Hans and E. Yelland, 'American Attitudes in Context: Posthumous Sperm Retrieval and Reproduction' (2013) 1 *Journal of Clinical Research and Bioethics* 1, at 8.

conception.[35] The typical court case involves that of a grieving widow or surviving partner, who seeks an urgent interim order from the court authorising the extraction and/or use of gametes from their late partner in posthumous conception.[36] The central issue in these cases is consent, and the validity of extracting and utilising gametes for reproductive purposes without the prior expressed consent from the source.[37] Later post-conception concerns relate to the resulting child: their legal status, right to an identity, matters of inheritance and the child's welfare.[38] Furthermore, these cases often require courts to consider the interests of other stakeholders effected by posthumous conception, including the deceased's extended family members and the interests of the State.[39]

In Ireland, there has been no published court judgment to date on the issue of posthumous gamete retrieval or posthumous conception. However, the feasibility of posthumous conception procedures has certainly entered public discourse in Ireland and has been referenced in the Irish superior courts. For example, in March 2021, a High Court action was taken by Pádraig Creaven against the Irish Health Service Executive (HSE) on behalf of his deceased wife Aoife. Aoife had received a misinterpreted smear test result from the HSE in 2011 and was later diagnosed with terminal cervical cancer. At the time of her diagnosis, Aoife was twenty weeks pregnant through the help of *in vitro* fertilisation and the couple were forced to terminate the pregnancy so that Aoife could receive the necessary treatment for her illness. Following his wife's death, Mr. Creaven claimed nervous shock and sought damages from the HSE.[40] Notably, Mr. Creaven's action also included a claim for the costs of future surrogacy. Counsel for Mr. Creaven told the High Court that he

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[35] *R v. Human Fertilisation and Embryology Authority ex parte Blood* [1997] EWCA Civ 946; *Hecht v. Superior Court for Los Angeles County* (1993) 20 Cal Rptr 2d 275; *Parpalaix v. CECOS,* Tribunal de Grande Instance de Creteil (1 Ch. Cir), 1 August 1984.

[36] See generally, *R v. Human Fertilisation and Embryology Authority ex parte Blood*, above n 35; *In the matter of Gray* [2000] QSC 390; *Baker v. Queensland* [2003] QSC 2; *Y. v. Austin Health* [2005] VSC 427; *Kate Jane Bazley v. Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Jocelyn Edwards; Re the Estate of late Mark Edwards* [2011] 4 ASTLR 392; *Re H, AE* [2013] SASC 196; *Re Cresswell* [2018] QSC 142.

[37] *R v. Human Fertilisation and Embryology Authority ex parte Blood*, above n 35; *In the matter of Gray*, above n 36; *Baker v. Queensland*, above n 36; *Y v. Austin Health,* above n 36; *Re H, AE*, above n 36; *Re Cresswell*, above n 36.

[38] S. Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) *Journal of Law and Biosciences* 329, at 329.

[39] *Hecht v. Superior Court of Los Angeles County,* above n 35.

[40] A. O'Loughlin, 'Man Settles Case Over Wife's Cervical Cancer Death as HSE and US Lab Offer 'Deep Regrets'' (The Irish Examiner, 04 March 2021), available at < https://www.irishexaminer.com/news/courtandcrime/arid-40237778.html>.

was seeking to use the couple's excess frozen embryos to fulfil his deceased's wife wish for a child through surrogacy in the United States.[41]

This case was settled on undisclosed terms and whilst it is not a typical example of a posthumous gamete retrieval and/or posthumous conception case, it is certainly significant in that it displays the issue of posthumous conception reaching the Irish courts. O'Sullivan notes that the Creaven case demonstrates that although it has received little attention in Ireland, 'the potential for posthumous conception is by no means hypothetical'.[42] Indeed, despite counsel for Mr. Creaven noting that his intention is to pursue posthumous conception treatment through surrogacy in the United States, O'Sullivan states that 'the law on posthumous conception in Ireland also needs to be addressed as a matter of priority'.[43]

Public awareness of ART, including posthumous conception in Ireland is growing. This can be evidenced by articles appearing in Irish tabloid newspapers describing instances of family conflict over the feasibility of posthumous conception.[44] Moreover, while the Creaven case might have been the first reported instance of posthumous conception reaching Irish courts, it will certainly not be the last. It is necessary for Ireland to develop clear and effective policies on posthumous conception in order to deal with these types of cases. This ultimately makes the question of determining how posthumous conception should be regulated in Ireland worthy of consideration.

Furthermore, an important issue from the outset of this thesis is determining the correct role that the law should play in the regulation of posthumous conception in Ireland. In particular, deciding on how best to analyse whether the Irish State is justified in interfering with the private behaviour of individuals when making reproductive decisions. Legal scholars and moral philosophers have long debated

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[41] Ibid.
[42] O'Sullivan, 'Ireland Needs to Regulate for Posthumous Conception', above n 4.
[43] Ibid.
[44] C. Pochin, 'My Husband Recently Passed Away and My In-Laws Keep Asking for His Sperm' (The Irish Mirror, 05 August 2021), available at <https://www.irishmirror.ie/news/weird-news/my-husband-recently-passed-away-24697323>.

over how to determine what the law ought and ought not to allow.[45] There are a number of different approaches that could be adopted to measure whether the State should restrict the accessibility of posthumous gamete retrieval and posthumous conception. These include deontological, utilitarian and liberal approaches. In the remainder of this section, I briefly examine each of these approaches and explain why I adopt a liberal analysis throughout this thesis for determining how posthumous conception should be regulated in Ireland.

Some adopt a deontological approach to determine whether the law should restrict certain behaviour. Deontological theory is developed from the moral philosophy of Immanuel Kant.[46] It focuses on the specific act itself and determines whether the act is intrinsically right or wrong. Once a moral assessment of the action has been made it can be determined whether the act should be allowed or prohibited.[47] Another approach is to assess the utility, or to look at the consequences of the particular action. Utilitarianism is a form of consequentialism, whereby the right action is understood entirely in terms of the consequences produced. The particular action or policy is deemed to be morally good if it produces the greatest amount of good or welfare for the greatest amount of people.[48]

Perhaps the most dominant method used in Western society to assess whether an action should be permitted or prohibited is liberalism.[49] The liberty principle is drawn from the philosophy of John Stuart Mill and guarantees a right to freedom of action.[50] A liberal approach to regulation refrains from intervening with individual liberty unless there is a sufficient justification for doing so.[51] I adopt a

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[45] R. Posner, 'The Problematics of Moral and Legal Theory' (1997) 111 *Harvard Law Review* 1637, at 1637.
[46] D. Misselbrook, 'Duty, Kant, and Deontology (2013) 63(609) *British Journal of General Practice* 211, at 211; B. Roby 'Virtue Ethics, Deontology, and Consequentialism' (2018) *Student Research Submissions* 292, at 292.
[47] E. Delk, 'A Kantian Ethical Analysis of Preimplantation Genetic Diagnosis' (2016) 48 *CedarEthics Online* 1, at 6; O. Najera, 'Ethical Concerns for Assisted Reproductive Technologies' (2016) 3 *Dialogues and Nexus* 1, at 1.
[48] J. Driver, 'The History of Utilitarianism' in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), available at <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=utilitarianism-history>.
[49] K. Harrison and T. Boyd, *Understanding Political Ideas and Movements* (Manchester: Manchester University Press, 2003), p. 195.
[50] MacKlin, 'Ethics and Human Reproduction: International Perspectives', above n 32, at 40.
[51] Smith, *Saviour Siblings and the Regulation of Assisted Reproductive Technology*, above n 32, p. 85.

liberal analysis when determining whether posthumous conception should be permitted by law in Ireland. This choice is based on several considerations.

The liberal tradition is deeply embedded in Western society which provides support for its use as a tool of analysis in this thesis.[52] Both Harris and McDougall observe that the liberal approach has been so persuasive in Western society that the United Kingdom's Human Fertilisation and Embryology Authority have explicitly committed themselves to respect the concept of reproductive liberty.[53] The Authority has stated that:

> "…the decision to have children...is an area of private life in which people are generally best left to make their own choices and in which the state should intervene only to prevent the occurrence of serious harms, and only where this intervention in non-intrusive and likely to be effective".[54]

Furthermore, the liberal approach has gained significant support in the literature when applied in a reproductive context, so much so that Murray has described liberalism as 'the regnant contemporary framework for thinking about the ethics of reproductive technologies'.[55] In the reproductive context, the liberal framework suggests that reproductive choices should be morally permissible unless the State has a justifiable reason to restrict them.[56] Deech and Smajdor observe that there is a presumption in law that 'people should be free to exercise their rights in areas of activity that most closely affects themselves and their families'.[57] This presumption in favour of procreative liberty is grounded on an idea put forward by John Robertson. Robertson claimed that because reproduction is so central to personal identify, meaning and dignity, people should be awarded significant liberty in this

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[52] R. McDougall, 'Acting Parentally: An Argument Against Sex Selection' (2005) 31 *Journal of Medical Ethics* 601, at 601; J. Harris, 'Sex Selection and Regulated Hatred' (2005) 31 *Journal of Medical Ethics* 29, at 292.
[53] McDougall, 'Acting Parentally: An Argument Against Sex Selection', above n 52, at 601; Harris, 'Sex Selection and Regulated Hatred', above n 52, at 292.
[54] Human Fertilisation and Embryology Authority, *Sex Selection: Options for Regulation. A Report on the HFEA's 2002–03 Review of Sex Selection Including a Discussion of Legislative and Regulatory Options* (London: Human Fertilisation and Embryology Authority, 2003), para. 132.
[55] T. Murray, 'What Are Families For? Getting to an Ethics of Reproductive Technology' (2002) 32 *Hastings Center Report* 41, at 41.
[56] Smith, *Saviour Siblings and the Regulation of Assisted Reproductive Technology,* above n 32, p. 84.
[57] R. Deech and A. Smajdor, *From IVF to Imortality: Controversaries in the Era of Reproductive Technologies* (Oxford: Oxford University Press, 2007), p. 68.

area of life.[58] Indeed, Robertson goes further and suggests that reproduction is a moral right which cannot be limited by the State without a compelling reason.[59]

The presumption in favour of reproductive liberty has gained significant support in the academic literature and McDougall notes that the liberal position is the 'prevailing approach in relation to the ethical analysis of reproductive decisions'.[60] This adds support for adopting a liberal analysis when determining how posthumous conception should be regulated in Ireland. Moreover, Ireland's approach to regulating issues such as reproduction has developed significantly in recent years and has steadily moved towards a more liberal approach to regulation.

Certainly, Ireland's traditional response to regulating moral issues was highly conservative.[61] Although Ireland has never formally declared itself to be of any particular religion, in the early decades of the Irish State, the Catholic Church played an important role in forming national identity.[62] Keogh observes that post-independence, Irish politicians were urged to make a definitive break with 'the liberal and non-Christian type of State' that had been forced upon Irish people under British rule.[63] Catholicism was seen as a 'protector' of Irishness. Thus, Catholic moral values were permeated throughout much of the 1937 Constitution in an attempt to make Ireland independent from secular England.[64] This ultimately led to the emergence of conservative policies on various social issues in Ireland and is evidenced by the former constitutional bans on divorce and abortion, and by the old legislative provisions which made homosexuality and the use of contraceptives illegal.[65] In addition, Catholic ethos is reflected in the Constitution's

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[58] J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (New Jersey: Princeton University Press, 1994), p. 24.
[59] Ibid, p. 30.
[60] McDougall, 'Acting Parentally: An Argument Against Sex Selection', above n 52, at 601.
[61] L. Smith, *Abortion and the Nation: The Politics of Reproduction in Contemporary Ireland* (United Kingdom: Routledge, 2017), Chapter 3.
[62] C. Garcimartín, 'Religion and the Secular State in Ireland' (ICLRS National Report: Ireland), available at < https://classic.iclrs.org/content/blurb/files/Ireland.pdf>.
[63] D. Keogh, 'The Jesuits and the 1937 Constitution' (1989) 78(309) *Studies: An Irish Quarterly Review* 82, at 82.
[64] S. Calkin and M.E. Kaminska, 'Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland' (2020) 124(1) *Feminist Review* 86, at 89.
[65] E. Mahon, 'The Ireland Experience: Cultural and Political Factors Shaping the Development of Regulation of Assisted Human Reproduction, Ethical Status of Human Embryos, and Proposed Regulation of Surrogacy', in E. Scott Sills and G. Palermo (eds.), *Human Embryos and*

highly privileged view of the nuclear marital family,[66] and in its relatively circumscribed view of a woman's role in society.[67]

Over time, however, the influence of the Catholic Church on Irish policy making has declined significantly. Calkin and Kaminska note that from the 1960s onwards, the Irish State no longer viewed its legitimacy as dependent on its relationship with the Catholic Church.[68] For example, in 1972, the Irish people voted by referendum to remove the 'special position' of the Catholic Church within the Constitution.[69] There is now a clear separation between Church and State provided for within the Irish Constitution,[70] whereby Article 44.2.2 expressly guarantees 'not to endow any religion'.[71] Following this, the Health (Family Planning) Act 1979 was passed into law with a view to ensuring that contraceptives, which had previously been banned on the basis of Catholic values, would be readily available in Ireland for the purpose of family planning.[72] Despite this, in reality, Kissane observes that the Catholic Church maintained cultural influence among Irish citizens and continued to frame political debates on moral policy issues up until the 1990s.[73] This can be seen in the result of the 1986 divorce referendum which saw almost two-thirds of the Irish public vote against the liberalisation of Irish divorce laws.[74]

However, throughout the 1990s and 2000s, there were several public historical scandals surrounding the Irish Catholic Church. These included instances such as alleged sexual abuse by priests, secret and illegal adoption programmes, neglect in

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Preimplantation Genetic Technologies: Ethical, Social, and Public Policy Aspects (London: Andre Gerhard Wolff, 2019), p. 143.

[66] Bunreacht na hÉireann, Article 41.1.

[67] Ibid, Article 41.2; U. Crowley and R. Kitchin, 'Producing 'Decent Girls': Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922–1937)' (2008) 4 *Gender Place and Culture A Journal of Feminist Geography Place and Culture* 355, at 357.

[68] Calkin and Kaminska, 'Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland', above n 64, at 89.

[69] Fifth Amendment of the Constitution Act 1972, s 1; G.W. Hogan, 'Law and Religion: Church-State Relations in Ireland from Independence to the Present Day' (1987) 1(35) *The American Journal of Comparative Law* 47, at 70.

[70] E. Daly, 'Re-Evaluating The Purpose of Church-State Separation in The Irish Constitution: The Endowment Clause as a Protection of Religious Freedom and Equality' (2008) 2 *Judicial Studies Institute Journal* 86, at 86.

[71] Bunreacht na hÉireann, Article 44.2.2.

[72] Health (Family Planning) Act 1979 (IRE); Hogan, 'Law and Religion: Church-State Relations in Ireland from Independence to the Present Day', above n 69, at 75.

[73] B. Kissane, 'The Illusion of State Neutrality in a Secularising Ireland' (2003) 26(1) *West European Politics* 73, at 73.

[74] R. Darcy and M. Laver, 'Referendum Dynamics and the Irish Divorce Amendment' (1990) 1(54) *The Public Opinion Quarterly* 1, at 10.

orphanages and the incarceration of vulnerable young people, unwed mothers and their children.[75] These events had the effect of significantly reducing public confidence in the Catholic Church. Furthermore, Fuller observes that other factors such as emigration and the media also undermined the dominance of the Catholic Church on Irish life.[76] Thus, despite the fact that Ireland continues to report high levels of religiosity and church attendance, the political power and moral authority of the Catholic Church has drastically diminished in contemporary Ireland.[77]

Over the past thirty years there have been several events in Irish politics which not only indicate a steady decline in the influence of the Catholic Church on State policy but which also demonstrate an evolution in liberal societal attitudes towards regulating moral issues in Ireland. A primary indicator of an evolving liberal social policy in Ireland was the de-criminalisation of homosexuality in 1993.[78] In addition, the removal of the constitutional ban on divorce in 1995, and the further liberalisation of divorce laws in 2019 demonstrate that Irish society's views on social issues are continuously progressing.[79] The last decade has been particularly significant and Ireland has made history in recent years with two landmark socially progressive referendums on marriage equality and abortion.[80] In 2015, Ireland voted by a sixty-two percent majority in favour of legalising same-sex marriage,[81] and in 2018, voted by a sixty-six percent majority in favour of liberalising Irish abortion laws and removing the constitutional provision which previously protected the life of the unborn.[82] Ultimately, societal views on sexuality and

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[75] Calkin and Kaminska, 'Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland', above n 64, at 89.
[76] L. Fuller, 'Religion, Politics and Socio-Cultural Change in Twentieth-Century Ireland' (2006) 10(1) *The European Legacy* 1, at 1.
[77] Ibid; Calkin and Kaminska, 'Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland', above n 64, at 90.
[78] Fuller, 'Religion, Politics and Socio-Cultural Change in Twentieth-Century Ireland', above n 76, at 52.
[79] M. Ni Liathain, *Bill Digest: Family Law Bill 2019 No. 78 of 2019* (Oireachtas Library & Research Service, 14 October 2019), p. 1 and 15.
[80] J. Suiter, 'Lessons from Ireland's Recent Referendums: How Deliberation Helps Inform Voters' (LSE BPP, 10 September 2018), available at <https://blogs.lse.ac.uk/politicsandpolicy/irish-referendums-deliberative-assemblies/>.
[81] E. Ó Caollaí and M. Hilliard 'Ireland Becomes First Country to Approve Same-Sex Marriage by Popular Vote' (The Irish Times, 23 May 2015), available at < https://www.irishtimes.com/news/politics/ireland-becomes-first-country-to-approve-same-sex-marriage-by-popular-vote-1.2223646>.
[82] H. McDonald, 'Ireland Votes by Landslide to Legalise Abortion' (The Guardian, 26 May 2018), available at <https://www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion>.

reproduction in Ireland have changed drastically. These referendums reveal a growing liberal consensus in Ireland and a generational change in the once conservative Catholic nation.[83] This adds further support for adopting a liberal approach to regulation in this thesis when determining how posthumous conception should be regulated in Ireland.

4. Research Methodology

The methodology used throughout this research includes a critical literature review, doctrinal research and comparative research. In this section, I discuss the value of these research methods. Additionally, I explain how these methods aid in pursuit of answering the research questions outlined in Section 2.

My choice of methodology to answer the research questions posed by this study is based on several considerations. Firstly, a critical literature review plays an important role in the foundation of research in all disciplines.[84] Although often viewed as a method in which researchers identify gaps in their field of study and develop research questions,[85] literature reviews also serve as a basis for knowledge development. Literature reviews can provide an overview of a particular issue and can evaluate the state of knowledge on a particular topic.[86] Furthermore, a critical literature review can provide a basis to evaluate or draw conclusions on theories or evidence in a certain area, or to examine the validity or accuracy of a certain theory or competing theories.[87] In this way, a critical literature review can constitute original and valuable research in and of itself.[88]

Secondly, doctrinal research is the traditional legal research method. Doctrinal research involves an in-depth textual analysis of legal material, such as existing

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[83] C. Fischer, 'Abortion and Reproduction in Ireland: Shame, Nationbuilding and the Affective Politics of Place' (2019) 122(1) *Feminist Review* 32, at 33.
[84] H. Snyder, 'Literature Review as a Research Methodology: An Overview and Guidelines' (2019) 104 *Journal of Business Research* 333, at 334.
[85] M. Nuruddeen, 'The Legal Critical Literature Review' (2015) 6(1) Un*iversiti Utara Malaysia Journal of Legal Studies* 13, at 13.
[86] Snyder, 'Literature Review as a Research Methodology: An Overview and Guidelines', above n 84, at 334.
[87] Ibid.
[88] G. Paré and S. Kitsiou, 'Methods for Literature Reviews', in F. Lau and C. Kuziemsky (eds.), *Handbook of eHealth Evaluation: An Evidence-based Approach* (Victoria (BC): University of Victoria, 2017), p. 157.

laws, related cases and other authoritative legal sources.[89] Certainly, in recent years, legal scholarship has become more receptive towards methodologies used in other social sciences. Hutchinson notes that lawyers have been influenced to incorporate statistics and other social science based evidence into the study of law.[90] However, doctrinal research remains prominent in the field of legal research. Doctrinal research allows for a critical assessment of the current state of law in a particular area. This forms a basis in which any issues with the law can be identified and recommendations for reform can be made.[91] For this reason, doctrinal research is still considered to be 'the core legal research method' and is often more favourable than one which is socio-legal in nature.[92]

Lastly, comparative law is the comparison of laws from different jurisdictions. Macro comparative law involves the comparison of entire legal systems. Whereas at a micro level, comparative law can be used to compare specific legal institutions or assess how different institutions have dealt with a specific legal problem.[93] For the purposes of this thesis, any use of comparative law is done at a micro level. Micro comparative law is often viewed as an instrument of improving domestic law and legal doctrine.[94] Comparative law provides a basis is which a legal issue can be thoroughly examined. By looking at how other jurisdictions have dealt with a specific problem, comparative law can advance our state of knowledge on the particular legal issue.[95] It can also be used as a form of persuasive authority and to fill gaps in the law.[96] Thus, the application of the comparative technique to the field of law can aid in law reform and policy development.[97]

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[89] P. Chynoweth, 'Legal Research in the Built Environment: A Methodological Framework' (2008) University of Salford Institute of Research 70, at 70.

[90] T. Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130, at 130.

[91] T. Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106(4) *Law Library Journal* 579, at 584.

[92] T. Hutchinson and N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2011) 17(1) *Deakin Law Review* 83, at 85.

[93] R. Michaels, 'Comparative Law', in J. Basedow, K. Hopt, R. Zimmermann and A. Stier (eds.), *Oxford Handbook of European Private Law* (Oxford: Oxford University Press, forthcoming), p. 1.

[94] M. Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1, at 2.

[95] E. Örücü, 'Developing Comparative Law', in E. Örücü and D. Nelken (eds.), *Comparative Law: A Handbook* (Portland: Hart Publishing, 2007), p. 53-56.

[96] M. Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices', in L. Cahillane and J. Schweppe (eds.), *Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press, 2016), Chapter 3.

[97] Örücü, 'Developing Comparative Law', above n 95, p. 53-56.

Of course, there are certainly limitations when comparing laws from various jurisdictions. Due to language barriers or issues with accessibility, there is always the possibility of finding laws which are out of date or inaccurate.[98] Furthermore, it is important when comparing laws to be mindful that a country's laws are frequently embedded in their own historical, social and economic context. A country's approach to dealing with a particular legal issue will often reflect that country's political history, values and norms.[99] To overcome this difficulty, I refer to Ireland's own political history and to Irish norms and values throughout this work when determining the best method for regulating posthumous conception in Ireland.

Conducting a critical review of the relevant literature was necessary to answer the first two research questions of this thesis. By assessing the wide range of theories and debates in the literature, I am able to draw conclusions and form a position on the relevant issues. I utilise a variety of books, journal articles, expert reports and other authoritative materials. Through an examination of these primary and secondary sources, I reach a conclusion on the first research question regarding whether posthumous conception should be regulated in Ireland. In addition, I form my position on the second research question regarding the model of consent which should be used when regulating the practice.

A combination of comparative and doctrinal research is necessary to address the third research question which seeks to determine what can be learned about regulating posthumous conception by looking at the current state of legislation, guidelines and case law that has emerged in other jurisdictions.

The purpose of comparison in this thesis is to demonstrate the different approaches that countries have taken towards regulating posthumous conception. The countries examined were chosen because they provide specific examples of the different attitudes that States have taken in this regard. These include models of complete

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[98] M. Feteris, 'Roadmap on Comparative Law in the Case-Law and Practice of the Supreme Courts of the EU' (2021) 17(1) *Utrecht Law Review* 6, at 8-9.
[99] E. Eberle, 'The Method and Role of Comparative Law' (2009) 8 *Washington University Global Studies Law Review* 451, at 458.

prohibition, restrictive consent regimes and liberal consent regimes. It is necessary to consider these diverse attitudes and approaches towards regulating posthumous conception as this will enhance the discussion on how the practice should be regulated domestically. Additionally, to determine what can be learned from other jurisdictions about regulating posthumous conception, I also critically analyse the prominent case law which has emerged on posthumous conception in foreign jurisdictions. The case law examined is discussed with the purpose of identifying specific issues that arise in the regulation of posthumous conception. These cases are the only examples of these issues being tested by the courts. It is therefore necessary to discuss these cases to develop effective policies for Ireland.

Bracken observes that Ireland has a long established history of looking to the approach of other common law jurisdictions for inspiration on legislative matters.[100] Thus, the regulatory approaches in other jurisdictions are examined with a view to informing suggestions for reform in the Irish context. The approach of my research here is to conduct more than simply a description of the law in these jurisdictions. In conducting doctrinal research, I critique the law by highlighting issues within the application of the law in courts. In this way, the use of doctrinal research allows me to offer solutions for any issues identified and to make recommendations for Ireland.

5. Contribution to State of Art

This is the first work to question whether and how posthumous conception ought to be regulated in Ireland. In doing so, I contribute to the state of art in several ways.

Firstly, by framing the research questions around how the practice should be regulated in Ireland, this study is distinct from other academic theses on the topic of posthumous conception.[101] Of course, there are authors such as Maddox and

[100] L. Bracken, 'The Assisted Reproduction Bill 2017: An Analysis of Proposals to Regulate Surrogacy in Ireland' (2017) 68 *Northern Ireland Legal Quarterly* 577, at 585.
[101] See for example: C. Robey, 'Posthumous Semen Retrieval and Reproduction: An Ethical, Legal and Religious Analysis' (Master's Thesis, Wake Forest University, 2015); K. Baird, 'Dead Body, Surviving Interests: The Role of Consent in the Posthumous Use of Sperm' (Bachelor of Laws Thesis, University of Otago, 2018); J. France, 'Estates on Ice: The Case for Paternity and

O'Sullivan who have published on the topic of posthumous conception in Ireland.[102] However, these publications deal with specific issues relating to the regulation of posthumous conception in Ireland, namely, matters of inheritance,[103] or the issue of consent.[104] I depart from these studies by looking at the question of whether posthumous conception should be permitted in Ireland at first instance. Moreover, I build and expand upon these studies by putting forward a comprehensive legal analysis of all of the issues that need to be considered when developing policies for Ireland.

Secondly, this thesis advances the current state of art generally by furthering the academic debate on the topic of posthumous conception. In recent years, there has been a wealth of literature published on the topic of posthumous conception. These studies generally concentrate on the issues of autonomy and consent to posthumous conception.[105] In addition, authors often focus on isolated issues pertaining to posthumous conception, such as the medical feasibility of retrieving and using gametes in posthumous conception,[106] the welfare of posthumously conceived

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Succession Rights of Posthumously Conceived Children' (Bachelor of Laws Thesis, University of Otago, 2018).

[102] N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) 81 *Conveyancing and Property Lawyer* 405; N. Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent' (2020) 27 *Journal of Law and Medicine* 64; K. O'Sullivan, 'Posthumously Conceived Children and Succession Law: A View from Ireland' (2019) 33(3) *International Journal of Law, Policy and the Family* 380.

[103] Maddox, 'Inheritance and the Posthumously Conceived Child', above n 102; O'Sullivan, 'Posthumously Conceived Children and Succession Law: A View from Ireland', above n 102.

[104] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 102.

[105] See for example: B. Bennett, 'Posthumous Reproduction and the Meaning of Autonomy' (1999) 23(2) *Melbourne University Law Review* 286; R.D. Orr and M. Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?' (2002) 28 *Journal of Medical Ethics* 299; F.R. Batzer, J.M. Hurwitz and A. Caplan, 'Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement' (2003) 79(6) *Fertility and Sterility* 1263; F. Kroon, 'Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception' (2015) 1 *Reproductive Biomedicine Society Online* 123; Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 38; A.R. Schiff, 'Arising from the Dead: Challenges of Posthumous Procreation' (1997) 75(3) *North Carolina Law Review* 901; H. Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 *Journal of Law and Health* 68; K. Tremellen and J. Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Retrieval and Conception' (2015) 30 *Reproductive Biomedicine Online* 6; R. Collins, 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma' (2005) 30(4) *Journal of Medicine and Philosophy* 431.

[106] C.M. Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512; C. Strong, 'Ethical and Legal Aspects of Sperm Retrieval after Death or Persistent Vegetative State' (1999) 27 *Journal of Law, Medicine and Ethics* 347; A. Jequin and M. Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm' (2014) 29(12) *Human Reproduction* 2615.

children,[107] or matters of inheritance.[108] Alternatively, authors will often examine the ethical or legal issues arising from posthumous conception in a particular jurisdiction.[109] I contribute to the current state of academic literature on posthumous conception generally. By conducting a critical review of the bioethical literature on the right to reproduce and liberty limiting principles, I directly contribute to the academic discussion on whether the law should permit posthumous conception. In addition, by providing a systematic review of the harms caused by posthumous conception, I further build upon the academic debate surrounding the format of consent which should be used when regulating.

Lastly, the doctrinal approach adopted by this thesis distinguishes this study from the vast majority of bioethical literature that has been published on posthumous conception. I conduct a unique legal analysis of the current state of legislation, guidelines and case law that has emerged on posthumous conception. In doing so, I demonstrate that the series of interests and potential harms implicated by posthumous conception can be significantly reduced though effective legal regulation. In that, this thesis displays a significant innovative value.

6. Structure of Thesis

In total, this thesis consists of seven chapters. This section outlines the purpose of each chapter and explains how the research questions feed into each chapter.

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[107] M. Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective' (2014) 27(29) *Journal of Law and Health* 29; J. Pobjoy, '*Medically Mediated Reproduction*: *Posthumous Conception* and The *Best Interests* of the *Child'* (2007) 15 *Journal of Law and Medicine* 450.

[108] Maddox, 'Inheritance and the Posthumously Conceived Child', above n 102; O'Sullivan, 'Posthumously Conceived Children and Succession Law: A View from Ireland', above n 102; J. Greenfield, 'Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance with a Focus on the Rule against Perpetuities' (2006) 8(1) *Minnesota Journal of Law, Science and Technology* 277; R. Zafran, 'Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception' (2007) 8 *Houston Journal of Health Law and Policy* 47.

[109] R. Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique' (2004) 19(9) *Human Reproduction* 1952; A.K. Sikary, O.P. Murty and R.V. Bardale, 'Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent' (2016) 9 *Journal of Human Reproductive Science* 82; N. Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725; Y. Hashiloni-Dolev and S. Schicktanz, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives' (2017) 4 *Reproductive Biomedicine Society Online* 21.

Chapter One introduces the topic of posthumous conception and provides context for the research questions addressed throughout by providing a background to the current regulation of posthumous conception in Ireland. I discuss the history of posthumous conception and posthumous gamete retrieval procedures. Additionally, I provide a scientific overview of the technology that makes these procedures feasible. By identifying each of the potential cases in which posthumous conception can occur, I am able to determine what precisely needs to be included in policies regulating the procedures in Ireland. This chapter also discusses the current regulatory landscape in Ireland and reviews the current proposals under the AHR Bill.

Chapters Two and Three directly address the first research question outlined in Section 2 which seeks to determine whether posthumous conception should be regulated in Ireland. In this regard, I conclude that posthumous conception should be regulated in Ireland and should be permitted by law.

Chapter Two critically reviews the literature on the right to reproduce and examines the instances in which reproductive rights can be justifiably limited by the State. I investigate whether there are grounds for a right to reproduce and I outline and discuss the well-established liberty limiting principles for regulating behaviour. I argue in favour of the liberal approach to regulating people's actions and conclude that Irish law should regulate based on the harm principle. I contend that posthumous conception should be permitted, so long as it does not result in 'harm' to third parties.

Chapter Three investigates whether posthumous conception results in sufficient 'harm' to justify restricting the practice in Ireland based on the harm principle. I identify each of the stakeholders implicated by posthumous conception and delineate the precise interests of these parties and the possible harms caused by posthumous conception to them. I first discuss the interests of the deceased. I argue in support of the position that the dead do not have interests which can be harmed. However, I support the view that living people have interests in what happens to their bodies after death. Thus, I contend that the deceased cannot be harmed by the practices of posthumous gamete retrieval or posthumous conception so long as they have not expressed pre-mortem objections to this. I then consider the potential

harms caused to additional stakeholders. These stakeholders include the surviving partner, the extended family, the resulting child, medical practitioners and the State/public interest. Based on my analysis in this chapter, I conclude that the 'harm' caused by posthumous conception is not sufficient to justify restricting the practice and I contend that posthumous conception should be regulated in Ireland and should be permitted by law. Furthermore, I identify ways in which regulation can be used to reduce any potential harm caused by posthumous conception to these stakeholders.

Chapter Four addresses the second research question and considers whether consent should be used when regulating posthumous conception. I deal with the concept of autonomy and its relationship to laws that require consent to posthumous conception. I investigate whether the dead have autonomy and I evaluate the benefits of adhering to the pre-mortem wishes of the dead. Furthermore, I outline the various formats in which consent to posthumous gamete retrieval and posthumous conception can take, including expressed consent, inferred consent, presumed consent and no consent. I argue in line with the position that the dead do not have autonomy. However, I support the view that living people have interests in what happens to them after death. Thus, I advocate in favour of a presumed consent model to protect the autonomy of living people.

Chapters Five and Six focus on assessing the current state of legislation, guidelines and case law that has emerged on posthumous conception in foreign jurisdictions. These chapters directly address the third research question which seeks to determine what lessons can be learned about regulating posthumous conception from looking at how other jurisdictions have dealt with the issue.

Chapter Five provides an overview of the different approaches to regulating posthumous conception that have emerged in different jurisdictions. These include models of complete prohibition, restrictive consent regimes and liberal consent regimes. Furthermore, I identify the common themes that are present amongst the different policies. The purpose of this chapter is to demonstrate the varying

attitudes that different States have taken towards regulating posthumous conception and to ascertain what Ireland can learn from them.

Chapter Six conducts a critical analysis of the case law that has emerged on posthumous conception. I investigate how requests for posthumous gamete retrieval and posthumous conception are currently being handled by courts in practice and I identify specific issues that have arisen for courts when dealing with these types of requests. By highlighting the prominent issues that posthumous conception has posed for courts in other jurisdictions, I determine the lessons that can be learned for developing policies in Ireland.

Chapter Seven concludes this thesis by drawing on the findings outlined in each of the preceding chapters. I directly address each of the research questions posed by this study and I offer recommendations for how the AHR Bill can be amended to effectively regulate posthumous conception in Ireland. A brief postscript discussing the recent updates in this area follows the concluding chapter.

Chapter One
Introduction to Posthumous Conception and the Regulation of Posthumous Conception in Ireland

1. Introduction

This first chapter provides an introduction to the topic of posthumous conception and outlines the current regulatory landscape for posthumous conception in Ireland. I first discuss the history of posthumous conception and posthumous gamete retrieval procedures. In addition, I provide a scientific overview of the technology that makes posthumous gamete retrieval and posthumous conception procedures feasible. The purpose of the scientific discussion in this chapter is to demonstrate each of the instances in which posthumous gamete retrieval and posthumous conception is feasible. By identifying each of the potential cases in which posthumous conception can occur, it is possible to determine what precisely needs to be considered when developing policies for regulating the practice in Ireland. I then provide a background to the current regulation of ART in Ireland and discuss the lead up to the publication of the AHR Bill in 2017. I review each of the proposals for regulating posthumous conception as outlined in the AHR Bill and consider the response of key stakeholders to its publication. It is necessary to review the current regulation of ART in Ireland and to examine the proposals for regulating posthumous conception under the AHR Bill to provide context for the research questions addressed by this thesis.

Section 1.1 introduces and discusses the history of posthumous gamete retrieval and posthumous conception.

Section 1.2 outlines the various methods in which sperm may be collected from the body of a man; during his lifetime, while incapacitated and after death.

Section 1.3 discusses the feasibility of harvesting and using female gametes in posthumous conception.

Section 1.4 examines the technology of gamete cryopreservation and the process of gamete thawing.

Section 1.5 identifies the assisted conception techniques which may be used to conceive a child after the death of one, or both gamete providers.

Section 1.6 provides some concluding remarks on the development of the technology of posthumous conception. Here, I identify each of the instances which need to be considered in the policies regulating posthumous conception in Ireland.

Section 1.7 outlines Ireland's response to regulating ART and discusses the lead up to the publication of the AHR Bill in 2017.

Section 1.8 reviews each of the proposals for regulating posthumous conception in Ireland as outlined in the AHR Bill.

Section 1.9 concludes this chapter.

1.1. Introduction to Posthumous Conception and Posthumous Gamete Retrieval Procedures

Posthumous reproduction is the birth of a child after the death of one, or both of, the child's genetic parents.[1] There are different terms used in the literature to refer to the idea of posthumous reproduction. These include phrases such as posthumous birth, posthumous reproduction, posthumous assisted reproduction and posthumous conception.

Posthumous birth occurs when a child is born after the death of a genetic parent.[2] The matter of posthumous birth is not uncommon, and it has always been the case that a child may be born after the death of a biological parent. Posthumous birth is not dependent on modern technology and will often occur naturally. In most cases,

[1] G. Bahadur, 'Death and Conception' (2002) 17(10) *Human Reproduction* 2769, at 2769. As noted in the Introductory Chapter, I apply the medico-legal definition of death throughout this thesis, which is a clinical determination of either cardiac or brain stem death: Intensive Care Society of Ireland, *Diagnosis of Brain Death in adults; Guidelines* (ICSI, 2020), p. 2.

[2] J. Robertson, 'Posthumous Reproduction' (1993) 69 *Indiana Law Review* 1027, at 1030.

posthumous birth will arise when a child's genetic father dies after the act of conceiving the child, but before the child is born.[3] Alternatively, the term posthumous birth is also used to describe cases when a pregnant woman dies shortly before or during childbirth and the infant is delivered, usually by caesarean section, after the death of the gestating mother.[4] As a matter of chance, posthumous birth has always existed and due to the often tragic nature of the event, there are few ethical or legal questions posed by children who are born in this way.[5] Posthumously born children are ordinarily accepted into society socially, and the law will usually provide for such children by recognising the child as the legal offspring of the deceased parent, provided that the child is born within the normal period of gestation measured from the date of the parent's death.[6]

Posthumous conception, on the other hand, may be distinguished from posthumous birth. Posthumous conception arises in cases where a child is both conceived and born after the death of a genetic parent.[7] The practice of posthumous conception involves using cryopreserved sperm, eggs or embryos in assisted human reproduction, with conception occurring after the death of the person who is the source of the gamete.[8] Thus, unlike posthumous birth (which is usually an unanticipated event), posthumous conception is a conscious attempt to conceive a child and procure a pregnancy after the death of one (or perhaps both) of the child's genetic parents.[9]

The terms 'posthumous reproduction' and 'posthumous assisted reproduction' could also be used to describe this idea. However, I have chosen to utilise the phrase

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[3] Ibid, at 1030; R. Collins, 'Posthumous Reproduction and the Presumption Against Consent in the Cases of Death Caused by Sudden Trauma' (2005) 30 *Journal of Medicine and Philosophy* 431, at 434.
[4] Y. Hashiloni-Dolev and S. Schicktaz, 'A Cross Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins of Life Perspectives' (2017) 4 *Reproductive Medicine and Society Online* 21, at 22.
[5] B.M. Star, 'A Matter of Life and Death: Posthumous Conception' (2004) 64(3) *Louisiana Law Review* 613, at 613.
[6] N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) 81 *Conveyancing and Property Lawyer* 405, at 405.
[7] Robertson, 'Posthumous Reproduction', above n 2, at 1030; Bahadur, 'Death and Conception', above n 1, at 2769.
[8] Robertson, 'Posthumous Reproduction', above n 2, at 1030; Bahadur, 'Death and Conception', above n 1, at 2769.
[9] Hashiloni-Dolev and Schicktaz, 'A Cross Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins of Life Perspectives', above n 5, at 22.

'posthumous conception' throughout this thesis as it expressly acknowledges that the act of conception will occur after the death of the gamete source. Accordingly, for the purposes of this thesis, any reference to posthumous conception will refer to an instance in which the gamete source is clinically deceased at the time when their gametes are used in assisted conception to establish a pregnancy and produce genetic offspring.[10]

The gametes which are used in posthumous conception treatment can be harvested from the source during their life time, or alternatively they can be retrieved post-mortem. In this regard, posthumous gamete retrieval involves the harvesting of viable gametes from the body of a person after they have received a medical determination of cardiac or brain stem death.[11]

The first report of posthumous gamete collection and conception is said to have taken place following the Battle of Waterloo in 1815. Here, a young woman claimed to have achieved a pregnancy through self-insemination by using sperm that she had collected from a dead solider on the battle fields.[12] Although some may doubt this tale, given that spinal chord injuries (such as those which can be caused by a bullet or a sword) have been reported to sometimes result in ejaculation, it is certainly not impossible for this event to have occurred.[13] More credibly, posthumous conception procedures have been available since in or around the 1950s when developments in the technology of gamete cryopreservation and assisted conception techniques made it possible to fertilise a female egg and facilitate conception *in vitro*, sometime after one, or both gamete progenitors have died, thereby resulting in posthumous conception.[14]

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[10] H. Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 *Journal of Law and Health* 68, at 71.
[11] K. Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying' (2006) 1(11) *University of Chicago Legal Forum* 289, at 293.
[12] A. Jequin, *Male Infertility: A Guide for the Clinician* (Oxford: John Wiley & Sons, 2008), p. 332.
[13] A. Jequin and M. Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm' (2014) 29(12) *Human Reproduction* 2615, at 2615.
[14] J. Greenfield, 'Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance with a Focus on the Rule against Perpetuities' (2006) 8(1) *Minnesota Journal of Law, Science and Technology* 277, at 278; S. Gilbert, 'Fatherhood from the Grave: An Analysis of Postmortem Insemination' (1993) 22(2) *Hofstra Law Review* 521, at 525.

In 1776, an Italian scientist Lazzaro Spallanzani, first published that by freezing sperm with snow, the viability of the gamete could be preserved temporarily outside of the male body.[15] Several years later in 1866, further studies by scientist Paolo Mantegazza reported that sperm viability could be maintained after exposure to temperatures of -17°C.[16] Following from this, Mantegazza was the first scientist to speculate about the possibility of posthumous conception. He stated that widows who had lost their husbands during war may potentially benefit from his discovery of sperm preservation and that it may be possible in the future for widows to conceive children after the death of their husbands.[17]

Since then, there have been significant developments in the technology of cryopreservation which has led to the discovery of methods in which gamete vitality can be retained *ex vivo* for extended periods of time.[18] Alongside these developments in gamete cryopreservation, the twentieth century has seen rapid advancements in reproductive science and there are now various methods in which gametes can be harvested from both men and women and widespread availability of assisted conception procedures such as intrauterine insemination, *in vitro* fertilisation and intracytoplasmic sperm injection.[19]

Once the gamete has been harvested, it can be cryopreserved and subsequently used after the death of the source in an assisted conception procedure, to establish a pregnancy and create genetic offspring.[20] Thus, while it has always been the case that a child may be born after the death of a genetic parent, due to the modern

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[15] L. Spallanzani, 'Dissertations Relative to the Natural History of Animals and Vegetables', translated by T. Beddoes in *Dissertations Relative to the Natural History of Animals and Vegetables* (2nd edn, London: John Murray, 1786), p. 195-199; J. Barkay, H. Zuckerman and M. Heiman, 'A New, Practical Method of Freezing and Storing Human Sperm and a Preliminary Report on its Use' (1974) 25(5) *Fertility and Sterility* 399, at 399; J. Brotherton, 'Cryopreservation of Human Semen' (1990) 25(2) *Archives of Andrology* 181, at 184.
[16] E. Mocé, A. Fajardo and J. Graham, 'Human Sperm Cryopreservation' (2016) 1(1) *European Medical Journal* 86, at 86.
[17] M. Elliott, 'Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child' (2004) 39(1) *American Bar Association* 47, at 55.
[18] M. Di Santo, N. Tarozzi, M. Nadalini, and A. Borini, 'Human Sperm Cryopreservation: Update on Techniques, Effect on DNA Integrity, and Implications for ART' (2012) *Advances in Urology* 1, at 1.
[19] W. Ombelet, 'The Revival of Intrauterine Insemination: Evidence-Based Data Have Changed the Picture' (2017) 9(3) *Facts, Views and Vision, Issues in Obstetrics, Gynaecology and Reproductive Health* 131, at 131.
[20] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2617.

advances in reproductive technology, the death of a person will no longer prevent them from conceiving a child and producing genetic offspring. Indeed, as noted above, in every instance of posthumous conception, the source of the gamete will be clinically deceased at the time when the germ cell is used in assisted conception to establish a pregnancy and any resulting child is born.[21]

1.2. The Retrieval of Gametes from Men for Use in Posthumous Conception

In this section, I discuss the various instances in which sperm can be harvested from a man for later use in posthumous conception. These include pre-mortem sperm retrieval, the retrieval of sperm from a comatose or dying man, and post-mortem sperm retrieval. It is necessary to define each of the circumstances in which posthumous gamete retrieval can take place in order to develop effectively policies for regulating the practice in Ireland.

1.2.1. Pre-mortem Sperm Retrieval

Firstly, the gametes could be harvested and stored by the man during his lifetime. There are several reasons why a man may choose to preserve samples of his sperm during the course of his lifetime. Freezing viable sperm is the optimum method of securing a man's future fertility.[22] Thus, the most common reason that a man will store sperm is to preserve his chances of having genetic children in the future, prior to undergoing a procedure which is likely to have an impact on his fertility such as chemotherapy, radiation therapy or vasectomy.[23] Likewise, men who are engaged in dangerous occupational activities or who are concerned about the effects of exposure to hazardous toxins may also wish to store samples of their sperm so as to preserve their chances of reproducing in the future.[24]

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[21] Young, 'Presuming Consent to Posthumous Reproduction', above n 10, at 71.

[22] H. Rozati, T. Handley, and C. Jayasena, 'Process and Pitfalls of Sperm Cryopreservation' (2017) 6(9) *Journal of Clinical Medicine* 89, at 89.

[23] Di Santo, Tarozzi, Nadalini, and Borini, 'Human Sperm Cryopreservation: Update on Techniques, Effect on DNA Integrity, and Implications for ART', above n 18, at 1; J. Žáková, E. Lousová, P. Ventruba, I. Crha, H. Pochopová, J.Vinklárková, E. Tesařová and M. Nussir, 'Sperm Cryopreservation before Testicular Cancer Treatment and Its Subsequent Utilization for the Treatment of Infertility' (2014) *The Scientific World Journal* 1, at 1.

[24] Ethics Committee of the American Society for Reproductive Medicine, 'Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion' (2013) 99(7) *Fertility and Sterility* 1842, at 1843.

Furthermore, couples who are in the process of undergoing fertility treatment often choose to preserve excess samples of their gametes for future use.[25] It is certainly not uncommon for men who are undergoing *in vitro* fertilisation treatment with their partners to cryogenically store sperm samples prior to the day of egg retrieval, so as to prevent a scenario in which the man is unable to produce a sufficient quantity of sperm on the day of oocyte collection.[26] The cryopreservation of sperm also plays a role in altruistic sperm donation. It is common practice for fertility clinics to cryopreserve and store donor sperm in quarantine for a period of three to six months in order to screen the donated gametes for infectious diseases such as human immunodeficiency virus and hepatitis B and C.[27]

The primary method of obtaining sperm from a competent living male is through masturbation.[28] However, if the man suffers from a condition which prevents the production of sperm through ejaculation such as a spinal cord injury, testicular blockage or azoospermia,[29] then there are other methods available for retrieving viable sperm.[30] Penile vibratory stimulation devices can be used by the man in order to stimulate the nerves in his pelvic floor muscles thereby inducing ejaculation.[31]

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[25] J. Anger, B. Gilbert and M. Goldstein, 'Cryopreservation of Sperm: Indications, Methods and Results' (2003) 170(4) *Journal of Urology* 1074, at 1074.

[26] M. Emery, A. Senn, M. Wisard and M. Germond, 'Ejaculation Failure on the Day of Oocyte Retrieval for IVF: Case Report' (2004) 19(9) *Human Reproduction* 2088, at 2090; A. Javed, Ashwini LS, V.G. Pathangae, A. Roy and D. Ganguly, 'Ejaculation Malfunctions on the Day of Oocyte Pick up for IVF/ICSI: A Report of Four Cases' (2015) 48 *International Letters of Natural Sciences* 32, at 34.

[27] H. Clarke, S. Harrison, M. Jansa Perez and J. Kirkman-Brownon on behalf of the Association of Clinical Embryologists, the Association of Biomedical Andrologists, the British Fertility Society, and the British Andrology Society, *UK Guidelines for the Medical and Laboratory Procurement and Use of Sperm, Oocyte and Embryo donors* (Human Fertility, 2019), p. 5-7.

[28] Rozati, Handley and Jayasena, 'Process and Pitfalls of Sperm Cryopreservation', above n 22, at 89.

[29] Azoospermia is a medical condition in which a man's seminal fluid contains no sperm: K. Jarvi, K. Lo, E. Grober, V. Mak, A. Fischer, J, Grantmyre, A. Zini, P. Chan, G. Patry, V. Chow and T. Domes, 'The Workup and Management of Azoospermic Males' (2015) 9(7-8) *Canadian Urological Association Journal* 229, at 229.

[30] Rozati, Handley and Jayasena, 'Process and Pitfalls of Sperm Cryopreservation', above n 22, at 89.

[31] M. Fode, M. Borre, D. Ohl, J. Lichtbach, and J. Sønksen, 'Penile Vibratory Stimulation in the Recovery of Urinary Continence and Erectile Function after Nerve-Sparing Radical Prostatectomy: A Randomized, Controlled Trial' (2014) 114(1) *British Journal of Urology International* 111, at 112; J. Sønksen and D. Ohl, 'Penile Vibratory Stimulation and Electroejaculation in the Treatment of Ejaculatory Dysfunction' (2002) 25(6) *International Journal of Urology* 324, at 328.

Alternatively, electroejaculation can be used in order to assist in the production of sperm.[32] With electroejaculation, an electric probe is inserted into the man's rectum and positioned next to his prostate gland and seminal vessels. Electric pulses are then administered in a recurring wave like pattern at increasing voltage until ejaculation occurs.[33] Electroejaculation is a more invasive process of sperm procurement than using a penile stimulatory device and is ordinarily carried out under a general anaesthetic in order to prevent patient discomfort.[34] In circumstances where neither a stimulatory device nor electroejaculation is successful in producing a semen sample, there are various surgical techniques which are also available to obtain sperm.[35] These include procedures such as sperm aspiration, testicular sperm extraction and orchidectomy.[36]

1.2.2. Sperm Retrieval from a Comatose or Dying Man

Sperm can also be retrieved from a man for later use in posthumous conception when he is in a comatose or dying state. In circumstances where the man is dying, it is preferable to retrieve the sperm prior to circulatory death.[37] This is due to both the short time frame in which sperm will remain viable for reproduction after death,[38] and the availability of less invasive methods of sperm retrieval.[39]

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[32] Rozati, Handley and Jayasena, 'Process and Pitfalls of Sperm Cryopreservation', above n 22, at 89.

[33] B. Berookhim and J. Mulhall, 'Outcomes of Operative Sperm Retrieval Strategies for Fertility Preservation Among Males Scheduled to Undergo Cancer Treatment' (2014) 101(3) *Fertility and Sterility* 805, at 806.

[34] Ibid, at 806; Sønksen and Ohl, 'Penile Vibratory Stimulation and Electroejaculation in the Treatment of Ejaculatory Dysfunction', above n 31, at 327; Rozati, Handley and Jayasena, 'Process and Pitfalls of Sperm Cryopreservation', above n 22, at 89.

[35] Surgical sperm extraction is also carried out on patients who object to electroejaculation based on their religious beliefs: Berookhim and Mulhall, 'Outcomes of Operative Sperm Retrieval Strategies for Fertility Preservation Among Males Scheduled to Undergo Cancer Treatment', above n 33, at 806.

[36] J. Hurwitz and F. Batzer, 'Posthumous Sperm Procurement: Demand and Concerns' (2004) 59(12) *Obstetrical and Gynaecological Survey* 806, at 806; E. Goulding and B. Lim, 'Life After Death: Posthumous Sperm Procurement. Whose Right to Decide?' (2015) *International Journal of Obstetrics and Gynaecology* 394.

[37] As noted in the introductory chapter of this thesis, a person who is in a comatose or PVS and who retains brain stem activity is clinically considered to be alive: J. Epker, Y. de Groot and E. Kompanje, 'Ethical and Practical Considerations Concerning Perimortem Sperm Procurement in a Severe Neurologically Damaged Patient and the Apparent Discrepancy in Validation of Proxy Consent in Various Postmortem Procedures' (2012) 38 *Intensive Care Medicine* 1069, at 1071.

[38] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2617.

[39] Epker, de Groot and Kompanje, 'Ethical and Practical Considerations Concerning Perimortem Sperm Procurement in a Severe Neurologically Damaged Patient and the Apparent Discrepancy in Validation of Proxy Consent in Various Postmortem Procedures', above n 37, at 1071.

Electroejaculation has been reported as a viable method of retrieving sperm from dying patients.[40] However, the other surgical methods mentioned above to harvest sperm from competent men could also be used to retrieve sperm from an incapacitated man.[41]

1.2.3. Post-mortem Sperm Retrieval

Lastly, sperm can be retrieved from a man post-mortem for use in posthumous conception. In 1980, Dr. Cappy Rothman first published that viable sperm could be obtained from the body of a deceased man.[42] However, harvesting sperm from a man after a clinically determination of death is more complicated than retrieving sperm from a man whose circulatory system remains functioning.[43] This is primarily due to the short period in which sperm will remain viable after death.

After death, sperm motility begins to perish gradually and will only remain viable for use in assisted conception for a period of thirty-six hours.[44] Ideally, the sperm should be procured from the body of the deceased man within the first twenty-four to thirty-six hours after he has died.[45] There have been reports of cases where motile sperm has been collected up to forty-eight hours after a man's death.[46] However, to maximise the chances of establishing a successful pregnancy through

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[40] In *R v. Human Fertilisation and Embryology Authority ex parte Blood* [1997] EWCA Civ 946 electroejaculation was used as the method of obtaining sperm from the applicant's comatose husband; See also, A. Kramer, 'Sperm Retrieval from Terminally Ill or Recently Deceased Patients: A Review' (2009) 16(3) *The Canadian Journal of Urology* 4627; D. Ohl, J. Park, C. Cohen, K. Goodman and A. Menge, 'Procreation After Death or Mental Incompetence: Medical Advance or Technology Gone Awry?' (1996) 66(6) *Fertility and Sterility* 889, at 889.

[41] C.M. Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512, at 512.

[42] Ibid.

[43] Ibid; Epker, de Groot and Kompanje, 'Ethical and Practical Considerations Concerning Perimortem Sperm Procurement in a Severe Neurologically Damaged Patient and the Apparent Discrepancy in Validation of Proxy Consent in Various Postmortem Procedures', above n 37, at 1071.

[44] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2615.

[45] S. Shefi, G. Raviv, M. Eisenberg, R. Weissenberg, L. Jalalian, J. Levron, G. Band, P. Turek and I. Madgar, 'Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm' (2006) 21(11) *Human Reproduction* 2890, at 2892.

[46] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2616.

assisted reproduction, the post-mortem sperm extraction must take place as soon as possible.[47]

Furthermore, the methods of procuring sperm from a deceased man are more limited than those available to men who remain alive.[48] Stimulation devices and electroejaculation are not feasible methods of collecting sperm from a deceased man.[49] In addition, it has been reported that sperm aspiration and percutaneous surgical techniques do not produce a sufficient quantity of sperm for assisted reproduction.[50] As the sperm is only going to remain viable for a short period of time, the physician is only going to have one opportunity to harvest the gametes.[51] It is recommended that the physician uses an open surgical method which retrieves testicular tissue.[52] Open biopsies will allow for a greater quantity of sperm to be obtained than with needle aspiration.[53] Thus, plentiful sperm can be harvested and stored should the deceased's partner require more than one cycle of *in vitro* fertilisation treatment.[54] Additionally, in circumstances where the man has died an unnatural death, it is unlikely that the physician will have knowledge of the deceased's prior health or fertility. Harvesting a larger quantity of sperm will also permit the gametes to be examined for viability and screened for infectious diseases.[55]

1.3. The Retrieval of Gametes from Women for Use in Posthumous Conception

In this section, I discuss the various instances in which eggs can be harvested from a woman for use in posthumous conception. These include pre-mortem egg

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[47] Ibid, at 2618; F. Lorenzini, E. Zanchet, G. Paul, R. Beck, M. Lorenzini and E. Böhme, 'Spermatozoa Retrieval for Cryopreservation After Death' (2018) 44(1) *International Brazil Journal* 188, at 190.
[48] Epker, de Groot and Kompanje, 'Ethical and Practical Considerations Concerning Perimortem Sperm Procurement in a Severe Neurologically Damaged Patient and the Apparent Discrepancy in Validation of Proxy Consent in Various Postmortem Procedures', above n 37, at 1071.
[49] Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State', above n 41, at 512.
[50] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2617.
[51] Ibid, at 2616.
[52] Ibid, at 2617.
[53] J. Marmar, 'The Emergence of Specialised Procedures for the Acquisition, Processing and Cryopreservation of Epididymal and Testicular Sperm in Connection with Intracytoplasmic Sperm Injection' (1998) 19(5) *Journal of Andrology* 517, at 520.
[54] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2616.
[55] Ibid, at 2616.

retrieval, the retrieval of eggs from a comatose or dying woman, and the retrieval of eggs from a woman who has suffered brain death. In addition, I discuss the difficulties that accompany the retrieval and use of female gametes in posthumous conception. Again, it is necessary to outline each of the instances in which posthumous gamete retrieval and conception can take place in order to develop effective policies for regulating the practice.

1.3.1. Pre-mortem Egg Retrieval

Firstly, gametes can be retrieved and stored by women during their lifetime. It is becoming increasingly common for women to harvest and cryopreserve unfertilised eggs during their lifetime.[56] Egg freezing provides women with an opportunity to preserve their chances of bearing genetic children in the future. Thus, a woman diagnosed with a chronic illness may decide to store her gametes prior to receiving medical treatment which is likely to result in her becoming prematurely infertile.[57] In addition, as a woman's chances of conceiving naturally starts to decline as she ages, it has become prevalent amongst women to freeze their eggs at a young age in an effort to defer reproductive aging and try to ensure their chances of starting a family at a later stage in life.[58]

During a normal menstrual cycle, a female will ordinarily only produce one single mature egg. Thus, the first stage in the process of egg retrieval involves a controlled stimulated ovarian cycle.[59] Ovarian hyperstimulation will manipulate the woman's hormonal environment and induce her to bring several egg follicles to maturation at once. This ensures that there are several mature eggs which are eligible for collection.[60] Before the eggs can be collected for cryopreservation, however, the

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[56] A. Petropanagos, 'Reproductive 'Choice' and Egg Freezing' (2010) 156 *Cancer Treatment and Research* 223, at 223.
[57] K. Harwood, 'Egg Freezing: A Breakthrough for Reproductive Autonomy?' (2009) 23(1) *Bioethics* 39, at 41.
[58] Y. O'Brien, F. Martyn, L. Glover and M. Wingfield, 'What Women Want? A Scoping Survey on Women's Knowledge, Attitudes and Behaviours towards Ovarian Reserve Testing and Egg Freezing' (2017) 217 *European Journal of Obstetrics and Gynecology and Reproductive Biology* 71, at 71.
[59] Y. Chen, X. Xu, Q. Wang, S. Zhang, L. Jiang, C. Zhang, and Z. Ge, 'Optimum Oocyte Retrieved and Transfer Strategy in Young Women with Normal Ovarian Reserve Undergoing a Long Treatment Protocol: A Retrospective Cohort Study' (2015) 32(10) *Journal of Assisted Reproductive Genetics* 1459, at 1460.
[60] R. Moffat, P. Pirtea, V. Gayet, J. Wolf, C. Chapron and D. Ziegle, 'Dual Ovarian Stimulation is a New Viable Option for Enhancing the Oocyte Yield When the Time for Assisted Reproductive Technology is Limited' (2014) 29 *Reproductive Biomedicine Online* 659, at 659.

oocytes must be at a certain level of maturity.[61] The woman is provided with gonadotropin releasing hormones. Gonadotropin hormones cause the woman's ovaries to produce oestrogen and progesterone. The hormones are taken daily over a period of nine to ten days and will accelerate the growth of her egg follicles.[62] Once the eggs are at a sufficient level of maturity, there are two primary methods for retrieving the gametes for later cryopreservation. These include ultrasound guided transvaginal oocyte retrieval and laparoscopic retrieval.[63]

Despite the availability of mature oocyte preservation, there may be some cases in which this procedure is not a viable option for the particular patient.[64] In such situations, it is possible to harvest and cryopreserve the woman's ovarian tissue.[65] Ovarian tissue retrieval involves a laparoscopic surgery which harvests a thin layer of the woman's cortex. The female cortex contains several early stage egg follicles which can be cryopreserved and stored for later use.[66] Following the completion of medical treatment, the ovarian tissue can be successfully transplanted back into the woman.[67] Or in the alternative, the egg follicles can be matured *in vitro.* However, the technique of *in vitro* oocyte maturation is not yet a conventional procedure, and this may not be a feasible option.[68]

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[61] Oocytes are required to be at metaphase II before they can be fertilised: J. Eun Lee, S. Don Kim, B. Chul Jee, C. Suk Suh and S. Hyun Kim, 'Oocyte Maturity in Repeated Ovarian Stimulation' (2011) 38(4) *Clinical and Experimental Reproductive Medicine* 234, at 234.
[62] E. Jungheim, M. Meyer and D. Broughton, 'Best Practices for Controlled Ovarian Stimulation in IVF' (2015) 33(2) *Seminars in Reproductive Medicine* 77, at 78.
[63] A. Leung, M. Dahan and S. Lin Tan, 'Techniques and Technology for Human Oocyte Collection' (2016) 13(8) *Expert Review of Medical Devices* 701, at 701.
[64] The need to administer the required hormone treatment for ovarian hyperstimulation may cause undue delay to the woman's prospective medical treatment. In addition, the technique of ovary hyperstimulation cannot be carried out on prepubertal girls: M. Gornet, S. Lindheim and M. Christianson, 'Ovarian Tissue Cryopreservation and Transplantation: What Advances are Necessary for this Fertility Preservation Modality to No Longer be Considered Experimental?' (2019) 111(3) *Fertility and Sterility* 473, at 473.
[65] The Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, 'Ovarian Tissue Cryopreservation: A Committee Opinion' (2014) 101(5) *Fertility and Sterility* 1237, at 1237.
[66] Ibid, at 1237-1238.
[67] J. Donnez, D. Manavella and M. Dolman, 'Techniques for Ovarian Tissue Transplantation and Results' (2018) 70(4) *Minerva Ginegologica* 424, at 424.
[68] Ş. Hatırnaz, B. Ata, E. Saynur Hatırnaz, M. Haim Dahan, S. Tannus, J. Tan, and S. Lin Tan, 'Oocyte in vitro Maturation: A Systematic Review' (2018) 15(2) *Turkish Journal of Obstetrics and Gynecology* 112, at 112.

1.3.2. Egg Retrieval from a Comatose or Dying Woman

It is also possible to retrieve gametes from a woman who is in a comatose or persistent vegetative state for use in posthumous conception. The gametes can be harvested in the same manner as described above.[69] The comatose woman is administered with gonadotropin releasing hormones to hyper stimulate her ovaries and produce multiple mature eggs.[70] The gametes can then be collected by laparoscopic surgery or by using a transvaginal needle, guided by ultrasound technology.[71]

Alternatively, the process of ovarian tissue retrieval and transplantation is also a feasible option for harvesting gametes from a dying woman.[72] That said, if the particular woman never regains any consciousness, the ultimate use of the gametes in posthumous conception will involve introducing a surrogate mother into the scenario, as gestation will require a surrogate to host the child.[73]

1.3.3. Egg Retrieval from a Woman after Brain Death

Lastly, it is technically feasible to retrieve eggs from a women who is deceased. However, the process of egg retrieval is more complicated if the woman has suffered brain death.[74] Without oxygen, female gametes cease to be viable for use in assisted reproduction within a few hours of the woman's death.[75] Thus, to procure viable eggs for reproduction, the woman's bodily functions must be

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[69] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 11, at 296.

[70] Jungheim, Meyer and Broughton, 'Best Practices for Controlled Ovarian Stimulation in IVF', above n 62, at 78.

[71] Leung, Dahan and Lin Tan, 'Techniques and Technology for Human Oocyte Collection', above n 63, at 701.

[72] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 11, at 296.

[73] M. Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective' (2014) 27 *Journal of Health and Law* 29, at 31.

[74] There is no formal definition of brain death under Irish law. However, ordinarily brain death is accepted as the irreversible loss of all brain function, including the brainstem: Intensive Care Society of Ireland, *Diagnosis of Brain Death and Medical Management of the Organ Donor: Guidelines for Adult Patients* (2010), p. 1.

[75] M. Soules, 'Commentary: Posthumous Harvesting of Gametes – A Physicians Perspective' (1999) 27 *Journal of Law, Medicine and Ethics* 362, at 363.

artificially maintained for a period of nine to ten days, in order to administer her with the necessary hormone treatment for ovarian hyperstimulation.[76]

Sustaining the bodily functions of a woman after brain death, for an extended period of time is difficult. The process was considered in detail by the Irish High Court in the case of *PP v. Heath Service Executive*.[77] This case concerned a pregnant woman, who despite being declared clinically brain dead, was artificially maintained for a three week period in order to protect the life of her unborn child under Article 40.3.3 of the Irish Constitution.[78] Article 40.3.3 was repealed by referendum and removed from the Irish Constitution in May 2018. Prior to this, however, the provision protected the foetus as a constitutional person. The right to life of the unborn child was recognised as equivalent to that of the birth mother.[79]

In the case of *PP v. Health Service Executive*,[80] the Irish Constitutional provision prevented the treating doctors from withdrawing somatic support from the clinically brain dead woman, on the basis that her unborn child still had a heartbeat.[81] Given that the woman's physical condition was deteriorating rapidly, it was unlikely that the doctors would successfully maintain the foetus until viability. Both the hospital staff and the patient's family wished to withdraw her treatment and sought an order from the court permitting them to do so. The doctors provided detailed evidence to the court as to the realities of sustaining the woman's treatment after brain death. They claimed that the visual effects of the medical interventions required to sustain her body caused distress to her family and undermined her dignity in death. They claimed that they could not justify continuing her treatment on medical or ethical grounds, with one doctor even describing the process as 'verging on grotesque'. Indeed, the court ultimately accepted these arguments and ruled in favour of withdrawing the woman's somatic

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[76] D. Greer, A. Styer, T. Toth, C. Kindregan and J. Romero, 'Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury' (2010) 363 *The New England Journal of Medicine* 276, at 280.
[77] *PP v. Heath Service Executive* [2014] IEHC 622.
[78] Ibid.
[79] F. de Londras and M. Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Bristol: Policy Press, 2018), p. 1.
[80] *PP v. Heath Service Executive,* above n 77.
[81] Ibid, p. 3.

treatment.[82] Thus, although it is technically feasible to retrieve female gametes in this way, due to both the short time frame in which eggs will remain viable after death and the required provision of hormone treatment, the removal of gametes from a woman who has suffered brain death for later use in posthumous conception would prove difficult.[83]

The more feasible option of retrieving eggs from a woman who has died suddenly or from a woman who has suffered brain death would be to harvest and cryopreserve slices of the woman's ovarian tissue for later use in assisted reproduction.[84] However, this procedure would require that the ovarian tissue is retrieved from the deceased woman and transplanted into a gestational carrier to carry the pregnancy. Likewise, even when the technology of *in vitro* oocyte maturation surpasses the experimental stages, this method will also require that the gametes are transferred to a surrogate mother to host the pregnancy.[85]

1.3.4. The Difficulties with the Posthumous Use of Female Gametes

There are many complicating factors which accompany the posthumous use of female gametes. Although the use of cryopreserved eggs in assisted reproduction has surpassed the experimental stages,[86] there is still little case law on the posthumous use of female gametes.[87] Furthermore, the first court approved request for the removal of female gametes from a comatose woman took place in Israel as

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[82] Ibid, p. 14.

[83] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 73, at 31.

[84] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 11, at 296; J. Finnerty, T. Thomas, R. Boyle, S. Howards and L. Karns, 'Gamete Retrieval in Terminal Conditions' (2001) 185(2) *American Journal of Obstetrics and Gynecology* 300.

[85] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 11, at 296.

[86] N. Noyes, J. Boldt and Z. Nagy, 'Oocyte Cryopreservation: Is it Time to Remove its Experimental Label?' (2010) 27(2-3) *Journal of Assisted Reproduction and Genetics* 69, at 71; JD Healthcare Group, 'Ova' (2018) 5 *Magazine of JD Healthcare Group* 1, at 35.

[87] N. Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, at 727; H. Henky, 'Donor Consent for Posthumous Reproduction: Legal and Ethical Perspectives' (2018) 7(4) *Journal of Forensic Science and Criminal Investigation* 2476; A. Sutcliffe, 'Intracytoplasmic Sperm Injection and Other Aspects of New Reproductive Technologies' (2000) 83(2) *Archives of Disease in Childhood* 89, at 89.

recently as 2011,[88] and to date, there has been no published report of a successful child birth arising from the posthumous retrieval and use of female eggs.[89] Ultimately, in every case of using female gametes in posthumous conception, it requires that a surrogate mother is used to carry the child.[90] This undoubtedly adds further complexity to the process as there remain several legal and ethical issues surrounding surrogacy and the practice is still prohibited in many States.[91]

Despite these difficulties, the Irish Government has included provisions for the retrieval and use of female eggs in posthumous conception in their current proposals for regulating the practice.[92] Moreover, the AHR Bill also includes provisions which will permit altruistic surrogacy.[93] On this basis, this thesis considers whether and how Ireland should regulate both the retrieval and use of male and female gametes in posthumous conception. However, due to the lack of available case law on the retrieval and use of female gametes in posthumous conception, the vast majority of case law which is discussed throughout this thesis refers to the retrieval and use of sperm in posthumous conception.

1.4. Gamete Cryopreservation and Thawing

Once the gametes have been collected from the source, they can be cryopreserved and stored for later use in posthumous conception. Cryopreservation is the process of storing a substance in a frozen state. It involves the use of very low temperatures to maintain the internal structure of living cells and tissues.[94] This section provides an overview of the technology relating to both sperm and egg cryopreservation and thawing.

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[88] M. Conley, 'Harvesting Dead Girl's Eggs Raises Ethical Issues' (CBS News, 11 August 2011), available at <http://www.cbsnews.com/8301-504763_162-20091343-10391704.html>.
[89] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 73, at 31.
[90] Ibid, at 31.
[91] For example, Italy have imposed a ban on both altruistic and commercial surrogacy. In addition, many states, such as New Zealand, France, Germany and Norway have also placed prohibitions on commercial surrogacy: J. Robertson, 'Protecting Embryos and Burdening Women: Assisted Reproduction in Italy' (2004) 19 *Human Reproduction* 1693, at 1693; Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 73, at 31.
[92] The AHR Bill 2017, Part 4, Head 25, s 1(a).
[93] Ibid, Part 6, Head 36.
[94] D. Pegg, 'Principles of Cryopreservation', in J. Day and G. Stacey (eds.), *Cryopreservation and Freeze-Drying Protocols* (2nd edn, New Jersey: Humana Press, 2007), p. 39.

The cryopreservation of sperm was first reported over 200 years ago when an Italian scientist used snow to temporarily preserve the viability of the gamete.[95] Several years later, further studies published that sperm viability could be maintained after exposure to temperatures of -17°C.[96] In 1949, it was reported that the addition of glycerol to the sperm before freezing acted as a cryoprotective agent. The glycerol prevented ice crystals from forming on the cells and greatly increased the survival rate of the sperm.[97] Since then, there have been considerable advances in cryobiology and by 1963, it was discovered that the storage of sperm in liquid nitrogen could preserve the viability of sperm for an extended period of time.[98] Today, the cryopreservation of sperm plays a significant role in male fertility preservation and is used widespread throughout healthcare for both gamete donation and self-preservation.[99]

After cryopreservation, the sperm can be stored until it is intended to be thawed and used in assisted conception. The thawing procedure involves re-introducing the gametes back to room temperature. The sperm is warmed to a temperature of 37°C until the gamete recovers its normal biological function. The process is done slowly in order to prevent abrupt thermal changes which may cause damage to the sperm.[100] Once the sperm has been thawed, it is washed and separated from the cryopreservation medium. The gametes can then be examined for integrity, motility and viability, prior to being used in assisted reproduction.[101]
It is well documented that the process of cryopreservation can result in detrimental effects to sperm function.[102] The most common damage to the gamete is the

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[95] Spallanzani, 'Dissertations Relative to the Natural History of Animals and Vegetables', above n 15.
[96] Mocé, Fajardo and Graham, 'Human Sperm Cryopreservation', above n 16, at 86.
[97] C. Pogue, A. Smith and A. Parkes, 'Revival of Spermatozoa after Vitrification and Dehydration at Low Temperatures' (1949) 164 *Nature International Journal of Science* 666.
[98] J. Sherman, 'Improved Methods of Preservation of Human Spermatozoa by Freezing and Freeze-Drying' (1963) 14(1) *Fertility and Sterility* 49.
[99] Rozati, Handley and Jayasena, 'Process and Pitfalls of Sperm Cryopreservation', above n 22, at 89.
[100] Di Santo, Tarozzi, Nadalini, and Borini, 'Human Sperm Cryopreservation: Update on Techniques, Effect on DNA Integrity, and Implications for ART', above n 18, at 3.
[101] S. Ozkavukcu, E. Erdemli, A. Isik, D. Oztuna and S. Karahuseyinoglu, 'Effects of Cryopreservation on Sperm Parameters and Ultrastructural Morphology of Human Spermatozoa' (2008) 25(8) *Journal of Assisted Reproduction and Genetics* 403, at 408.
[102] B. Oberoi, S. Kumar and P. Talwar, 'Study of Human Sperm Motility Post Cryopreservation' (2014) 70(4) *Medical Journal of the Armed Forces in India* 349, at 350.

formation of ice crystals on the outside of the cell during the freezing process.[103] Other reported effects to sperm post thawing include cross-contamination or membrane and structural damage to the gamete.[104] Despite this, the survival rate of sperm has been reported to range from 48% to 79% after cryopreservation.[105]At present, it is unknown how long cryopreservation will maintain the viability of sperm.[106] Research has suggested that cryopreservation could potentially retain the viability of sperm indefinitely and there have been reports of pregnancies arising from the use of frozen sperm in assisted reproduction up to forty years after freezing.[107] Nonetheless, laws in many States will restrict the storage of cryopreserved gametes for prolonged periods of time by imposing statutory time limits.[108]

In contrast to sperm cryopreservation, which has been occurring across the world for centuries,[109] the cryopreservation of female gametes is a relatively novel technique. As noted in Section 1.3 of this chapter, up until recently, egg cryopreservation remained an experimental procedure.[110] This was due to the detrimental effects that the freezing and thawing process had on the survival rate of the gamete.[111] A successful pregnancy using frozen oocytes was not reported until the late 1980s.[112] However, over the years, there has been significant research carried out on the technology of egg freezing. This was primarily in response to

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[103] Di Santo, Tarozzi, Nadalini, and Borini, 'Human Sperm Cryopreservation: Update on Techniques, Effect on DNA Integrity, and Implications for ART', above n 18, at 5.
[104] Ozkavukcu, Erdemli, Isik, Oztuna and Karahuseyinoglu, 'Effects of Cryopreservation on Sperm Parameters and Ultrastructural Morphology of Human Spermatozoa', above n 101, at 408.
[105] Greenfield, 'Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance with a Focus on the Rule against Perpetuities', above n 14, at 281.
[106] Ibid, at 281.
[107] A. Szell, R. Bierbaum, B, Hazelrigg and R. Chetkowski, 'Live Births from Frozen Human Semen Stored for 40 years' (2013) 30(6) *Journal of Assisted Reproduction and Genetics* 743, at 744.
[108] For example, in the UK, the Human Fertilisation and Embryology Act 1990 (UK) restricts the storage of gametes and embryos to a maximum of ten years unless permission has been granted from the Human Fertilisation and Embryology Authority to extend this: Human Fertilisation and Embryology Act 1990 (UK), s 14(3) and 14(5).
[109] Spallanzani, 'Dissertations Relative to the Natural History of Animals and Vegetables', above n 15.
[110] American Society for Reproductive Medicine, 'Planned Oocyte Cryopreservation for Women Seeking to Preserve Future Reproductive Potential: An Ethics Committee Opinion' (2018) 110(6) *Fertility and Sterility* 1022, at 1022.
[111] The Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, 'Mature Oocyte Cryopreservation: A Guideline' (2013) 99(1) *Fertility and Sterility* 37, at 38.
[112] C. Argyle, J. Harper and M. Davies, 'Oocyte Cryopreservation: Where are We Now?' (2016) 22(4) *Human Reproduction Update* 440, at 441.

legislative bans in many countries which restricted the storage of fertilised embryos.[113] Consequently, there has now been an increase in success rates when cryopreserving eggs using both slow-freeze and vitrification cryopreservation techniques.[114]

Similar to the thawing process used on sperm, when the eggs are ready to be used in assisted conception, they are removed from the liquid nitrogen and placed in a culture medium.[115] They are then warmed slowly to a temperature of 37°C. When the eggs regain their normal biological function, they are assessed for viability.[116] The survival rate of eggs after cryopreservation is increasing over time. However, egg cryopreservation still poses many technical challenges for fertility specialists.[117] Thus, while egg freezing is no longer considered to be an experimental treatment, it is still recommended that women looking to preserve the chances of reproducing store cryopreserved embryos if possible.[118]

1.5. Assisted Conception Procedures

The final stage in the process of posthumous conception is to use the gamete in an assisted conception procedure after the death of the source.[119] There are a range of assisted conception procedures which could be used to procure a pregnancy after the death of the person who is the source of the gamete. These include some of the most commonly used assisted conception procedures such as intrauterine insemination (IUI), *in vitro* fertilisation (IVF) and intracytoplasmic sperm injection (ICSI).[120] The assisted conception procedure which is used will vary depending on whether the deceased is male or female. This section provides an overview of these

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[113] Ibid.
[114] Ibid.
[115] Z.B. Gürtin, L. Morgan, D. O'Rourke, J. Wang and K. Ahuja, 'For Whom the Egg Thaws: Insights From an Analysis of 10 Years of Frozen Egg Thaw Data from Two UK Clinics, 2008–2017' (2019) 36 *Journal of Assisted Reproduction and Genetics* 1069, at 1072.
[116] Ibid.
[117] D. Gook and D. Edgar, 'Human Oocyte Cryopreservation' (2007) 13(6) *Human Reproduction Update* 591, at 592.
[118] Noyes, Boldt and Nagy, 'Oocyte Cryopreservation: Is it Time to Remove its Experimental Label?', above n 86, at 71.
[119] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2617.
[120] Ombelet, 'The Revival of Intrauterine Insemination: Evidence-Based Data Have Changed the Picture', above n 19, at 131.

procedures and explains how they might be used to procure a pregnancy after the death of a gamete source.

1.5.1. IUI

IUI or artificial insemination is an assisted conception procedure where sperm is inserted directly into the woman's cervix to facilitate fertilisation.[121] IUI increases the quantity of sperm which reaches the woman's fallopian tubes and thereby improves her chances of becoming pregnant.[122] The process involves coordinating insemination with the precise timing of ovulation. IUI is ordinarily the first option for treating couples with reduced fertility,[123] however, the procedure could also be used to inseminate a woman using sperm from a man who is deceased.

1.5.2. IVF

IVF is an assisted conception procedure where fertilisation occurs outside of the body, in the laboratory.[124] The process of IVF involves three stages: the collection of both male and female gametes, *in vitro* fertilisation of the mature oocytes and embryo transfer.[125] The first stage in the process is to retrieve both the male and female gametes. Once collected, the gametes are assessed for quality and prepared for fertilisation in the laboratory.[126] The eggs are placed in a culture medium and are introduced to large quantities of spermatozoa. The gametes are monitored over a period of twenty-four hours to see if fertilisation occurs.[127] Once fertilisation has taken place the embryos are examined for quality and the most suitable embryos are chosen for transfer.[128]

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[121] G. Allahbadia, 'Intrauterine Insemination: Fundamentals Revisited' (2017) 67(6) *The Journal of Obstetrics and Gynecology of India* 385, at 385.
[122] Ibid, at 385; A. Abdelkader and J. Yeh, 'The Potential Use of Intrauterine Insemination as a Basic Option for Infertility: A Review for Technology-Limited Medical Settings' (2009) *Obstetrics and Gynecology International* 1, at 1.
[123] M. Tomlinson, J.B. Amissah-Arthur, K. Thompson, J. Kasraie and B. Bentick, 'Prognostic Indicators for Intrauterine Insemination (IUI): Statistical Model for IUI Success' (1996) 11(9) *Human Reproduction* 1892, at 1892.
[124] A. Eskew and E. Jungheim, 'A History of Developments to Improve in vitro Fertilisation' (2017) 114(3) *The Journal of the Missouri State Medical Association* 156, at 156.
[125] A. DeCherney, 'In Vitro Fertilization and Embryo Transfer: A Brief Overview' (1986) 59 *The Yale Journal of Biology and Medicine* 409, at 409.
[126] Ibid, at 411.
[127] Ibid.
[128] Eskew and Jungheim, 'A History of Developments to Improve in vitro Fertilisation', above n 124, at 157.

It is not always guaranteed that IVF will be successful in achieving a pregnancy.[129] Thus, in circumstances where the male gamete source is deceased, it is important to retrieve as much viable sperm from the man as possible. This is to ensure that there is an adequate quantity of sperm available for more than one round of IVF treatment if required.[130] Conventional IVF could also be used in cases where the deceased is female. However, it would require that the fertilised embryo is implanted into a surrogate to host the pregnancy.

1.5.3. ICSI

ICSI is a relatively novel assisted conception procedure which is similar to IVF. The process involves directly inserting a single sperm cell into the female oocyte using a micropipette.[131] Similar to IVF, ICSI involves the collection of both male and female gametes, the fertilisation of the oocytes outside of the body and embryo transfer.[132] The advent of ICSI has made it even more feasible to fertilise an egg after the death of the male gamete provider, given that the procedure can be facilitated even in cases where there is a limited quantity of sperm.[133] This procedure could also be used in cases where the deceased is female. However, as with conventional IVF, this will also require that the embryo is transferred to a surrogate mother to carry the pregnancy.

1.6. Concluding Remarks on the Technology of Posthumous Conception and Posthumous Gamete Retrieval Procedures

The previous sections have introduced the topic of posthumous conception and outlined the various ways in which reproductive science has developed over the twentieth century to make posthumous gamete retrieval and posthumous conception procedures feasible. Ultimately, these sections demonstrate that

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[129] It has been reported that complete failure of fertilisation can occur in 10-15% of IVF treatments: Y. Orief, K. Dafopoulos and S. Al-Hassani, 'Should ICSI be Used in Non-Male Factor Infertility?' (2004) 9(3) *Reproductive Biomedicine Online* 348, at 349.

[130] Jequin and Zhang, 'Practical Problems in the Posthumous Retrieval of Sperm', above n 13, at 2616.

[131] G. Palermo, H. Doris, P. DeVroey and A. Van Steirteghem, 'Pregnancies After Intracytoplasmic Injection of Single Spermatozoon into an Oocyte' (1992) 340(8810) *The Lancet* 17.

[132] A. Sutcliffe, 'Intracytoplasmic Sperm Injection and Other Aspects of New Reproductive Technologies' (2000) 83(2) *Archives of Disease in Childhood* 89, at 89.

[133] Orief, Dafopoulos and Al-Hassani, 'Should ICSI be Used in Non-Male Factor Infertility?', above n 129, at 348.

posthumous conception can arise in a wide range of circumstances, all of which need to be considered when regulating the practice in Ireland. Indeed, based on the current feasibility of technology, it will be necessary for policies on posthumous conception to consider whether and how the following should be regulated:

1. The use of gametes in posthumous conception which have been stored by a person during their lifetime.
2. The use of gametes in posthumous conception which have been retrieved from a person in a comatose or dying state.
3. The use of gametes in posthumous conception which have been retrieved from a person after death.
4. The use of an embryo in posthumous conception which has been created using the gametes of deceased man and/or woman.

The next sections of this chapter provide a background to the current regulation of ART (including posthumous conception) in Ireland.

1.7. Background to the Regulation of ART and Posthumous Conception in Ireland

This section outlines Ireland's response to regulating ART. I provide a background to the regulation of ART in Ireland, and I discuss the lead up to the publication of the AHR Bill in 2017.

ART first became available in the Republic of Ireland in 1987.[134] Since then, there have been several specialist fertility clinics established across the country that offer a wide range of treatment services, including gamete and embryo cryopreservation, IVF, IUI and ICSI.[135] However, despite the widespread availability of ART, there is still no primary legislation on the use of this technology in Ireland.[136]

[134] J. Allison, 'Enduring Politics: The Culture of Obstacles in Legislating for Assisted Reproduction Technologies in Ireland' (2016) 3 *Reproductive Biomedicine and Society Online* 134, at 135.
[135] D. Madden, *Medicine, Ethics and the Law* (Dublin: Bloomsbury Professional Ltd, 2016), p. 111.
[136] Allison, 'Enduring Politics: The Culture of Obstacles in Legislating for Assisted Reproduction Technologies in Ireland', above n 134, at 134 and 137.

The European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006 are of some relevance to the regulation of assisted reproduction in Ireland. These regulations were adopted in order to give effect to European Union Human Tissue and Cell Directives 2004/23/EC and 2006/17/EC.[137] It is not the purpose of the 2006 Regulations to provide for, or to limit the types of activities which can be conducted using human tissues and cells in Ireland. The Regulations govern quality and safety standards for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.[138] These quality and safety standards will apply to the use of sperm, eggs and embryos in assisted reproduction.[139]

Section 4 of the Regulations deems the Health Products Regulatory Authority (formally known as the Irish Medical Board) as the competent authority to oversee the implementation of quality and safety standards.[140] The Authority is empowered to inspect and monitor human tissue establishments, including fertility clinics. It also evaluates and follows up on any reports of serious adverse reactions or events. However, the Authority is not authorised to make judgments on the permissibility of specific ART treatments but rather, it's purpose is to ensure that any procedures taking place using human tissues and cells meet the quality and safety standards outlined in the Regulations.[141]

In addition, the Irish Medical Council has issued some limited guidance on assisted human reproduction. The Guide to Professional Conduct and Ethics for Registered Medical Practitioners (Amended) (2019) outlines principles of professional practice that all physicians registered with the Irish Medical Council are expected to follow.[142] These professional guidelines are considerably brief with regard to the provision of ART treatment services. The guidelines merely state that ART should only be carried out by suitably qualified professionals in cases where no other

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[137] European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006.
[138] Ibid, Part 2.
[139] Ibid, Part 1.
[140] Ibid, Part 1, s 4.
[141] Health Products Regulatory Authority, 'Regulatory Information' (Health Products Regulatory Authority, 2014), available at < https://www.hpra.ie/homepage/blood-tissues-organs/tissues-and-cells/regulatory-information>.
[142] Irish Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners (Amended) 8th Edition* (IMC, 2019), para. 1.1.

treatment is likely to be effective.[143] Additionally, the guidelines provide that those undergoing fertility treatment receive the appropriate counselling,[144] and further recommend that clinics ensure strict oversight and maintain records in the provision of donor services.[145]

Outside of these professional guidelines, clinicians have little guidance on the permissibility of specific ART procedures. Indeed, the only prohibited activities contained within the Medical Council Guidelines are expressed bans on reproductive cloning and creating life for the purposes of experimentation.[146] The Children and Family Relationship Act 2015 is a of some relevance to ART in Ireland. The Act provides for parentage in cases of donor assisted human reproduction. However, the Act does not relate to the permissibility of specific ART procedures.[147] Thus, in the absence of legislation or guidelines, posthumous conception is essentially legal in Ireland and can be facilitated at the discretion of individual fertility clinics.[148]

In 2000, the Commission on Assisted Human Reproduction was established by the former Minister of Health and Children, Micheál Martin. The role of the Commission was to study the ethical, social and legal implications arising from developments in assisted human reproduction and to prepare a report which considered how these novel practices might be regulated.[149] The Commission was chaired by Professor Dervilla Donnelly and was made up of several members with expertise in the areas of law, medicine, science and sociology. In addition, the Commission invited several other experts with specific expertise in fields such as philosophy, child psychology and theology to contribute to the discussion.[150] As

[143] Ibid, paras. 47.1 and 47.2.
[144] Ibid, para. 47.1
[145] Ibid, para. 47.3.
[146] Irish Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners (Amended) 8th Edition*, above n 142, para. 47.4.
[147] Children and Family Relationships Act 2015 (IRE), Part 2.
[148] K. O'Sullivan, 'Ireland Needs to Regulate for Posthumous Conception' (The Irish Times, 09 March 2021), available at <https://www.irishtimes.com/opinion/ireland-needs-to-regulate-for-posthumous-conception-1.4504616>.
[149] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (April 2005), p. v.
[150] Ibid, p. ii-iii.

part of the consultation process, the Commission established a number of working groups, held twenty-three plenary meetings and a public conference.

This led to the publication of the Report of the Commission on Assisted Human Reproduction in April 2005 which made forty recommendations for the regulation of ART in Ireland.[151] The report deals very briefly with the matter of posthumous conception. The Commission merely highlight that Irish succession law does not currently provide for children born ten months after the death of their father.[152] Moreover, the Commission reported that several of the States which had been examined by the Commission in their consultation did not allow posthumous conception, and the States that did permit the practice of posthumous conception did so only in exceptional circumstances.[153] Despite publication of the Commission's report in 2005, progress in relation to regulating ART in Ireland has been significantly slow. It wasn't until July 2017 that the Irish Government announced the General Scheme of the AHR Bill which proposed legislation for the regulation of ART in Ireland.[154]

The General Scheme of the AHR Bill is an extensive Bill. It proposes to establish a regulatory body, the Assisted Human Reproduction Regulatory Authority. The function of the Authority is to oversee compliance with the proposed legislation, and to issue licences to ART treatment providers and researchers.[155] In addition, the Bill aims to regulate various aspects of ART in Ireland, including gamete and embryo donation,[156] surrogacy,[157] pre-implantation genetic diagnosis,[158] embryo and stem cell research,[159] and posthumous conception.[160] The next section of this chapter reviews each of the provisions in respect of posthumous conception as outlined under the General Scheme.

151 Ibid, p. x-xviii.
152 Ibid, p. 14.
153 Ibid, p. 95-96.
154 The AHR Bill 2017.
155 Ibid, Part 8.
156 Ibid, Part 3
157 Ibid, Part 6
158 Ibid, Part 5
159 Ibid, Part 7.
160 Ibid, Part 4.

1.8. Posthumous Conception under the AHR Bill 2017

Part 4 of the AHR Bill deals with posthumous conception which is referred to throughout the Bill as 'posthumous assisted reproduction'.[161] In Head 23, posthumous assisted reproduction is defined as 'the use of a person's gametes (sperm or eggs), or an embryo created using a person's gametes, in an assisted human reproduction treatment procedure after his or her death'.[162] Heads 24 to 28 of the Bill deal with specific matters relating to posthumous conception, including the posthumous use of gametes and embryos,[163] the retrieval of gametes,[164] and what is to be done with any unused gametes and embryos which have been stored for posthumous conception.[165] In addition, the Bill includes measures relating to mandatory counselling,[166] waiting periods[167] and the legal parentage and inheritance rights of posthumously conceived children.[168]

In this section, I review each of the provisions pertaining to posthumous conception in the AHR Bill and I consider the response of key stakeholders to the proposals.

1.8.1. The Use of Gametes and Embryos in Posthumous Conception

Head 24 of the General Scheme permits gametes, and embryos created using a person's gametes, to be used in posthumous conception in specific circumstances.

Section 1(a) of Head 24 provides for the posthumous use of gametes or embryos when the deceased man or woman has provided their valid consent to this.[169] The formalities for valid consent are outlined in Head 28 of Part 4. Consent to the posthumous use of gametes or embryos must be signed in writing by the deceased.[170] The consent must be furnished voluntarily by the deceased and at a time in which they had full capacity.[171] Furthermore, the consent must indicate the name of the deceased's surviving partner who is permitted to use the gametes or

[161] Ibid.
[162] Ibid, Part 4, Head 23.
[163] Ibid, Part 4, Head 24.
[164] Ibid, Part 4, Head 25.
[165] Ibid, Part 4, Head 26
[166] Ibid, Part 4, Head 28.
[167] Ibid, Part 4, Head 24.
[168] Ibid, Part 4, Head 27.
[169] Ibid, Part 4, Head 24, s 1(a).
[170] Ibid, Part 4, Head 28, s 4(a)(i).
[171] Ibid, Part 4, Head 28, s 4(a)(ii)-(iii).

embryos in posthumous assisted conception[172] and must specify the treatments in which the gametes or embryos are permitted to be used.[173] The Waterstone Clinic has criticised this particular aspect of the AHR Bill's consent provisions. It states that ART treatments continue to evolve at a rapid rate and it is likely that treatments will become available in the future that will not have been contemplated by, or consented to by the deceased at the time of storage.[174] In addition, the deceased must confirm that they have been provided with full information and have received counselling on the implications of posthumous conception.[175] Head 26 of the Bill further provides that the deceased's consent should stipulate what is to be done with any excess gametes or embryos not used in posthumous conception.[176]

Alongside requiring expressed written consent from the deceased, Section 1(b) of Head 24 further provides that posthumous conception should only be facilitated when the request for treatment is made by the deceased's surviving partner 'who will carry the pregnancy'.[177] The wording of Section 1(b) is certainly noteworthy. In Section 1(a) of Head 24, the AHR Bill provides that both men and women can consent to the use of their gametes or embryos by their surviving partner after death.[178] However, in subsection (b), it states that requests for posthumous conception are limited to surviving partners 'who will carry the subsequent pregnancy'.[179] Naturally, male surviving partners cannot carry a pregnancy and they will require a surrogate to reproduce using the gametes of their deceased partner. Thus, on a strict reading of this subsection, only female surviving partners will be permitted to benefit from posthumous conception treatment and male surviving partners will be precluded from using the technology. Indeed, several

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[172] Ibid, Part 4, Head 28, s 1(a)(ii); Surviving partner is defined as the spouse, civil partner or qualified cohabitant of the deceased, ibid, Part 1, Head 2.
[173] Ibid, Part 4, Head 28, s 1(c).
[174] The Waterstone Clinic, 'Submission on Behalf of the Waterstone Clinic to The Joint Committee on Health Regarding the General Scheme of the Assisted Human Reproduction Bill 2017', p.232, available at <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.
[175] Ibid, Part 4, Head 28, s 4(b)-(c).
[176] Ibid, Part 4, Head 26.
[177] Ibid, Part 4, Head 24, s 1(b).
[178] Ibid, Part 4, Head 24, s 1(a).
[179] Ibid, Part 4, Head 24, s 1(b).

commentators have made a similar point and have found issue with the wording of this subsection.[180]

For example, Mulligan observes that the practical result of this provision is that male surviving partners, and female surviving partners whom are unable to gestate will be unable to use posthumous conception technology even in cases where their deceased partner has provided expressed consent.[181] Furthermore, both Mulligan and Duffy suggest that there is no principled reason for this, given that the AHR Bill already provides for altruistic surrogacy.[182] The wording of the provision certainly appears to be discriminatory on the basis of equality and non-discrimination. Indeed, it is possible that if enacted in its current form that the provision could potentially be open to challenge on human rights grounds.[183]

1.8.2. The Posthumous Retrieval of Gametes

Head 25 of Part 4 provides for the posthumous retrieval of gametes. It permits gametes to be harvested from both men and woman after their death for later use by their surviving partner in posthumous conception.[184]

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[180] A. Mulligan, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017' (23 February 2018), p. 11, available at < https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>; F. Duffy, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', p. 70, available at < https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>; The Institute of Obstetricians and Gynaecologists, 'Submission on the General Scheme of the Assisted Human Reproduction Bill 2017', p. 140, available at < https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.

[181] Mulligan, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p. 11.

[182] Duffy, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p. 70; This point was also raised by the Institute of Obstetricians and Gynaecologists, 'Submission on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p. 140.

[183] The wording of the provision could potentially be challenged on the basis of equality and non-discrimination under Article 14 ECHR or alternatively, on the basis of a right to private and family life under Article 8 ECHR; The Institute of Obstetricians and Gynaecologists, 'Submission on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p. 140.

[184] AHR Bill 2017, Part 4, Head 25.

The posthumous retrieval of gametes is only permissible in cases where the deceased has provided their valid consent in accordance with Head 28 detailed above.[185] In essence, the deceased must have voluntarily provided their written consent to the retrieval of their gametes after death at a time when they had full capacity.[186] In addition, the deceased must have received counselling and have been provided with full information regarding posthumous assisted reproduction.[187] Lastly, the deceased must also have provided their consent to the posthumous storage and use of their gametes in posthumous conception as required by Head 24 of the Bill.[188] Similar to Head 24, requests for the retrieval of gametes after death are limited to the deceased's surviving partner.[189] However, unlike in Head 24, requests for the posthumous retrieval of gametes are not limited to the deceased's surviving partner 'who will carry the pregnancy'. Thus, Head 25 is consistent with the fact that the Bill provides for gametes to be harvested from both men and women after death.

1.8.3. Recognition of the Deceased as Parent of the Child

Head 27 of the AHR Bill 2017 provides for the deceased man or woman whose gametes or embryos are used in posthumous conception, to be treated as the father or mother of the posthumously born child in certain circumstances.[190]

Firstly, the deceased must have provided their consent to being regarded as the parent of the posthumously born child.[191] In addition, the deceased's surviving partner who undergoes posthumous conception treatment must also consent to the deceased being registered as the parent of the resulting child.[192]

Lastly, the Bill provides that the deceased shall not be regarded as the parent of a posthumously born child in cases where the child is born thirty-six months after

[185] Ibid, Part 4, Head 25, s 1(a).
[186] Ibid, Part 4, Head 28, s 4(a).
[187] Ibid, Part 4, Head 28, s 4(b)-(c).
[188] Ibid, Part 4, Head 25, s 3.
[189] Ibid, Part 4, Head 25, s 1(b).
[190] Part 4, Head 27, s 1-2.
[191] Ibid, Part 4, Head 27, s 1(a) and 2(a).
[192] Ibid, Part 4, Head 27, s 1(b) and 2(b).

the death of the deceased.[193] This aspect of Head 27 in particular has been questioned by several stakeholders. Mulligan observes that in its current wording, Head 27 does not make it entirely clear whether posthumous conception is confined to take place within thirty-six months of the deceased's death, or if posthumous conception will be permitted after this timeframe subject to the deceased not being recognised as the legal parent of the resulting child.[194] If the latter is the case, the Waterstone Clinic observe that a thirty-six month timeframe is too short, and will have the practical effect of discriminating between posthumously born children born within the period and those who are not.[195] Duffy also criticises Head 27 of the Bill. She states that it anticipates that children born through posthumous conception within thirty-six months of the deceased's death will be entitled to inherit from the deceased. However, the Bill does not specify what inheritance rights the resulting child would be entitled to. Duffy states that:

> "On a practical level it would be impossible for a personal representative to distribute an estate until he was sure that a child had not been born through [posthumous assisted reproduction]. This would be particularly relevant with regard to an intestacy situation or a will where a bequest is made to 'my children' without naming them or stating that they should be alive at the death of the testator."[196]

Furthermore, she observes that if a posthumously born child is not born within one year of the deceased's death then they will be automatically precluded from bringing a Section 117 application against the deceased's estate, as such a claim must be made within one year of the date of grant.[197]

1.8.4. Mandatory Counselling and Waiting Period

Head 24 of the AHR Bill 2017 provides that surviving partners must receive appropriate counselling on posthumous conception prior to treatment being

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[193] Ibid, Part 4, Head 27, s 3.
[194] Mulligan, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p. 11.
[195] The Waterstone Clinic, 'Submission on Behalf of the Waterstone Clinic to The Joint Committee on Health Regarding the General Scheme of the Assisted Human Reproduction Bill 2017', above n 174, p. 232.
[196] Duffy, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p. 70.
[197] Ibid. Section 117(6) of the Succession Act 1965 (IRE) states that any claim made on behalf of a child that a testator has failed in his or her moral duty to make proper provision for their child must be made within twelve months from the first taking out of representation of the deceased's estate.

facilitated.[198] A waiting period of at least one year following the deceased's death must also have passed before treatment can be provided to the surviving partner.[199] These added measures have been commended by commentators. Both the Institute of Obstetricians and Gynaecologists and the Waterstone Clinic have encouraged the Bill's provisions in respect of counselling and agree that it should be mandatory in cases of posthumous conception.[200] However, Virtus Heath have criticised the one year mandatory waiting period and have deemed it 'overly prescriptive' given that professional counselling is already required.[201]

1.9. Concluding Remarks on the Technology of Posthumous Conception and the Regulation of Posthumous Conception in Ireland

This chapter has introduced the topic of posthumous conception and outlined the various ways in which reproductive science has developed over the twentieth century to make posthumous gamete retrieval and posthumous conception procedures feasible. In addition, this chapter discussed the current regulation of posthumous conception in Ireland and examined each of the proposals for regulating posthumous conception under the AHR Bill.

Following the publication of the AHR Bill in 2017, the Joint Committee on Health has since carried out its pre-legislative scrutiny of the General Scheme. This pre-legislative scrutiny was conducted by holding a series a meetings with public officials, patient advocates and representatives from ART treatment providers.[202] In addition, the Committee considered several in-depth written opinions which had been submitted to it by various experts and stakeholders in the field.[203] The

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[198] The AHR Bill 2017, Part 4, Head 24, s 1(c).
[199] Ibid, Part 4, Head 24, s 1(d).
[200] Institute of Obstetricians and Gynaecologists, 'Submission on the General Scheme of the Assisted Human Reproduction Bill 2017', above n 180, p 132; The Waterstone Clinic, 'Submission on Behalf of the Waterstone Clinic to The Joint Committee on Health Regarding the General Scheme of the Assisted Human Reproduction Bill 2017', above n 174, p. 232.
[201] Virtus Health, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', p. 221, available at < https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.
[202] Joint Committee on Health, *Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill* (July 2019), p. 3.
[203] Ibid; These written submissions can be accessed at: <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submission

Committee identified some of the overt issues with the AHR Bill's proposals for regulating posthumous conception. The points raised included some of those highlighted earlier in this chapter, such as the inconsistencies with regard to the exclusion of male surviving partners from accessing posthumous conception treatment and the inconsistencies regarding the parentage and inheritance rights of posthumously born children before and after thirty-six months. The Committee recommended that the wording of these provisions be reconsidered before the final publication of the Act. [204]

Although there has been slight progress in respect of regulating posthumous conception in recent years, it remains unregulated in Ireland. As noted in the Introduction, Mills and Mulligan have deemed it unlikely that the AHR Bill 2017 will be enacted by the Irish Government any time soon.[205] Moreover, there have been more recent reports issued indicating that the Bill's enactment is being pushed back to accommodate further research.[206] This presents an ideal opportunity to reconsider the provisions pertaining to posthumous conception outlined in the Bill and provides a basis for the research questions addressed by this thesis. The next chapter begins to directly consider the first research question of this thesis regarding whether posthumous conception should be regulated in Ireland.

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s/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.

[204] Joint Committee on Health, *Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill,* above n 202, p. 26.

[205] S. Mills and A. Mulligan, *Medical Law in Ireland* (3rd edn, London: Bloomsbury, 2017), p. 420.

[206] Law Society of Ireland, 'Ethics of Commercial Surrogacy to be Probed' (Law Society Gazette, 03 November 2021), available at <https://www.lawsociety.ie/gazette/top-stories/2021/11-november/ethics-of-commercial-surrogacy-to-be-probed-by-oireachtas-unit>; A. Conneely, 'Families Protest over Slow Pace of Surrogacy Legislation' (RTE, 02 November 2021), available at <https://www.rte.ie/news/ireland/2021/1102/1257352-ireland-surrogacy/>; D. Murray, 'Committee Proposed to Study Issues Surrounding International Surrogacy' (Business Post, 24 October 2021), available at < https://www.businesspost.ie/legal/committee-proposed-to-study-issues-surrounding-international-surrogacy-4b5ff1f9>.

Chapter Two
The Right to Reproduce and Liberty Limiting Principles

2. Introduction

This chapter begins to directly consider whether posthumous conception should be regulated in Ireland. As stated in the Introductory Chapter, to determine whether Ireland should restrict access to posthumous conception, this thesis adopts a liberal approach to regulation. A liberal approach to regulation guarantees a right to freedom of action.[1] The liberal approach stipulates that citizens enjoy the right to live their lives as they see fit and that State legislatures should refrain from intervening with individual liberty unless there is a sufficient justification for doing so.[2] On this basis, the purpose of this chapter is to assess whether there are grounds for a right to reproduce and to identify the circumstances in which reproductive rights may be limited by the State. In this way, I ascertain whether Ireland can validly restrict access to posthumous conception technology.

Section 2.1 first discusses the theory of rights generally and outlines two prominent justifications for the existence of rights, including choice theory and interest theory.

Section 2.2 classifies the right to reproduce. I distinguish between positive and negative rights and illustrate what the right to reproduce entails when viewed as both a positive and negative right.

Section 2.3 discusses several justifications for the right to reproduce, including justifications based on the Irish Constitution, autonomy, interests in reproduction and human rights law.

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[1] R. MacKlin, 'Ethics and Human Reproduction: International Perspectives' (1990) 37(1) *Social Problems* 38, at 40.

[2] M. Smith, *Saviour Siblings and the Regulation of Assisted Reproductive Technology* (London: Routledge, 2015), p. 85; E. Dhal, 'The Presumption in Favour of Liberty: A Comment on the HFEA's Public Consultation on Sex Selection' (2004) 8(3) *Reproductive BioMedicine Online* 266, at 266.

Section 2.4 outlines well established justifications for restricting rights. These liberty limiting principles include harm to others, offense to others, harm to self and harmless wrongdoing.

Section 2.5 concludes this chapter and argues in favour of adopting a harm analysis for determining whether posthumous conception should be regulated in Ireland.

2.1. The Nature of Rights

This section discusses the leading theory of rights and outlines two prominent justifications for rights, including choice theory and interest theory. The purpose of the discussion on rights theory is to first establish the primary justifications for rights generally. This is important for later in this chapter when I examine whether there are grounds for a right to reproduce. Furthermore, assessing whether there are grounds for a right to reproduce is necessary to determine the instances in which the State is justified in restricting people's reproductive decisions, and is therefore relevant in determining whether Ireland can restrict access to posthumous conception technology.

2.1.1. A Theory of Rights

The leading theory of rights was established by the prominent legal philosopher Wesley Newcomb Hohfeld. In the early 1900s, Hohfeld published a series of papers which expressed his distaste towards the misuse of legal terminology.[3] Hohfeld was conscious of the 'looseness' which surrounded the legal profession's use of language in general.[4] Most notably, he observed that the term 'right' was often used indiscriminately to denote any given legal interest that a party might have.[5] For this reason, in 1913, Hohfeld published a paper which advocated for legal relations to be examined through a scheme of opposites and correlatives and argued that the precise legal position of parties may be duly identified in this way.[6]

[3] W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: and Other Legal Essays* (New Haven: Yale University Press, 1920).
[4] W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *The Yale Law Journal* 16, at 20-23.
[5] Ibid, at 28-29.
[6] Ibid, at 30.

Hohfeld established eight fundamental legal conceptions, making a clear distinction between the 'rights' and 'duties' of all parties in jural relations. His scheme consisted of four legal entitlements and four disentitlements, where one party's 'rights', 'privileges', 'powers' and 'immunities' corresponded with the 'duties', 'no-rights', 'liabilities', and 'disabilities' of those on the other end of the relation:[7]

Hohfeld's Jural Opposites[8]

Rights	**Privileges**	**Powers**	**Immunities**
No-Rights	**Duties**	**Disabilities**	**Liabilities**

Hohfeld's Jural Correlatives[9]

Rights	**Privileges**	**Powers**	**Immunities**
Duties	**No-Rights**	**Liabilities**	**Disabilities**

Hohfeld was correct in making a clear distinction between the various terms. The term 'right' was and still is used indiscriminately, to denote any given legal interest that a party might have, when in fact, what that person has, may be more accurately described as a 'privilege', a 'power' or an 'immunity'.[10] Hohfeld argued that one party's 'right' will be the affirmative claim against another. In contrast, a party's 'privilege' will be the benefit, freedom, or liberty.[11] On Hohfeld's account, a claim right is distinct from a privilege or liberty. A claim right confers a responsibility or duty on other parties, whereas a liberty or privilege does not impose any obligations on other parties. A privilege is merely the freedom to do a particular action.[12] The 'power' is the ability of one party to control the legal relationship and the 'immunity' may be regarded as an exemption from the legal powers of others.[13] In turn, Hohfeld states that the 'duty' is the obligation on one party to act in a certain

[7] Ibid.
[8] See Hohfeld's table of jural opposites and correlatives: Ibid.
[9] Ibid.
[10] W. Wheeler Cook, 'Hohfeld's Contributions to the Science of Law' (1919) 28(8) *The Yale Law Journal* 721.
[11] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', above n 4, at 32-55.
[12] A. White, 'Rights and Claims' (1982) 1(2) *Law and Philosophy* 315, at 330-331.
[13] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', above n 4, at 32-55.

manner. The ‘no-right’ is the opposite of having a right or claim. The ‘liability’ is the vulnerability of others, to have a legal right or duty created by the party who holds the legal power and the ‘disability’ may be regarded as having no power to control the legal interaction.[14]

The term ‘correlative’ signifies something that exists as the natural consequence to the presence of the other. The legal interests exist on ‘opposing sides of a pair of persons’ involved in a given legal relationship.[15] For example, as the holder of a ‘right’, I will have a ‘claim’ that others shall not interfere with my right and in turn, all others are under a correlative ‘duty’ not to interfere with my right. In terms of ‘opposites’, I must have one but not the other. Thus, I may not have both the ‘privilege’ or benefit of the right, and the ‘duty’ to refrain from interfering with the right.[16] Under Hohfeld’s general theory of rights, a legal right or claim will impose a correlative duty on all others to refrain from interference with the right.[17]

Rights can be further classified into legal or moral rights. A legal right is a claim which can be enforced by the right holder by relying on laws. In contrast, a moral right is a claim which exists only as a moral principle and may or may not be protected by the law.[18] Rights can also be categorised into ‘negative rights’ and ‘positive’ or ‘welfare rights’.[19] A negative right is the claim to be left alone. Following the Hohfeldian classification of rights, a negative right will confer a correlative duty on all others, including the State, to refrain from arbitrary interference with the right.[20] In contrast, a positive or welfare right will require positive assistance in order to be fulfilled.[21] In this way, a positive right confers a correlative duty on others to provide the right holder with the necessary assistance or resources required to satisfy the particular right.[22]

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[14] Ibid, at 32-57.
[15] J. Singer, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’ (1982) *Wisconsin Law Review* 975, at 986.
[16] Ibid.
[17] Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, above n 4, at 30.
[18] T.L. Beauchamp, ‘Ethical Theory and Bioethics’, in T.L. Beauchamp and L. Walters (eds.), *Contemporary Issues in Bioethics* (Belmont: Wandsworth Publishing, 1989), p. 37-38.
[19] L. Wenar, ‘Rights’, in E.N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Fall 2015), para. 2.1.8, available at <https://plato.stanford.edu/entries/rights/>.
[20] C. Chi Wai Chan, ‘Infertility, Assisted Reproduction and Rights’ (2006) 20(3) *Best Practice and Research Clinical Obstetrics and Gynaecology* 369, at 370.
[21] M. Quigley, ‘A Right to Reproduce?’ (2010) 24(8) *Bioethics* 403, at 403-404.
[22] Ibid, at 408.

In 1917, Hohfeld argued in a subsequent paper that legal relations exist among persons. He claimed that rights are held by persons and avail against persons and not against things.[23] However, Hohfeld did not expand on the possible justifications for the existence of rights, nor did he elaborate on the necessary conditions for right holders.[24] Thus, two primary theories have since advanced in the literature which aim to justify the existence of rights, namely choice theory and interest theory.[25] In the next section, I briefly examine both of these theories. The purpose of this rights' discussion is to establish the justifications for rights generally. This is necessary before examining whether there are grounds for a right to reproduce.

2.1.2. Choice Theory of Rights

'Choice' or 'will' theory proposes that rights exist in order to protect people's choices.[26] On this account, rights are justified on the basis that we value people's autonomy or their freedom to choose for themselves.[27] Perhaps the most prominent choice theorist was H.L.A. Hart. Hart argued that rights are enforceable when the right holder has the power to control the performance of the duty by the duty bearer.[28] He stated that the holder of a right will have the choice:

> "…as to whether the corresponding duty shall be performed or not . . . [The] obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right".[29]

In this way, the existence of a right will give the right holder control over other people's duties. Under choice theory, the right holder will have the ultimate control over whether or not the duty is performed by the duty bearer. The right is perceived as granting the choice of the right holder and the choice of the right holder will be respected by the law.[30]

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[23] W.N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 1(1) *Yale Law School Faculty Scholarship Series* 710.
[24] K.R. Smolensky, 'Rights of the Dead' (2009) 37(763) *Hofstra Law Review* 763, at 767.
[25] D. Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), p. 3.
[26] A. Preda, 'Rights: Concepts and Justifications' (2015) 28(3) *An International Journal of Jurisprudence and Philosophy of Law* 408, at 409.
[27] Ibid.
[28] H.L.A. Hart, 'Are There Any Natural Rights' (1955) 64(2) *The Philosophical Review* 175, at 178.
[29] H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), p. 35.
[30] Hart, 'Are There Any Natural Rights', above n 28, at 178.

In order to have rights under choice theory, the right holder must be sentient and capable of exercising choice. Control is a necessary requirement of exercising rights under choice theory and the right holder must have the capacity to exercise the powers conferred on them by virtue of the right. In essence, they must be able to demand or waive the enforcement of the right.[31] For this reason, choice theorists argue that only beings capable of exercising choice can be right holders.[32] Consequently, choice theorists claim that people who cannot make decisions, such as people in a comatose or PVS, and the dead do not have rights.[33]

2.1.3. Interest Theory of Rights

Another basis for the existence of rights is the presence of an interest.[34] In general, the concept of an interest is understood to mean that a person has a 'stake' in the wellbeing of an object, or in a particular state of affairs.[35] This is the account of interests provided by the legal philosopher Joel Feinberg whose work on rights was highly influential.[36] Feinberg states that people have 'interests' when they are invested in a certain state or object, and when they stand 'to gain or lose depending on the nature or condition' of that object.[37] According to Feinberg, interests form components of a person's wellbeing. People flourish when their interests are promoted and are harmed when their interests are thwarted, set back, or defeated.[38] A state of wellbeing can be assessed by either objective or subjective standards.[39] In essence, interests can be determined from the perspective of what contributes to the wellbeing of people in general, or alternatively, they can be determined by looking at a particular person's state of mind and assessing whether or not the interest will contribute to their personal wellbeing.[40] 'Interests' are distinct from an individual's personal wants or desires.[41]

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[31] Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, above n 25, p. 64-65.
[32] Ibid.
[33] Smolensky, 'Rights of the Dead', above n 24, at 768; E. Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91(2) *The University of Chicago Press* 243, at 245.
[34] Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, above n 25, p. 3.
[35] J. Feinberg, *The Moral Limits of the Criminal Law, vol 1: Harm to Others* (New York: Oxford University Press, 1984), p. 33.
[36] J.A. Corlett, 'The Philosophy of Joel Feinberg' (2006) 10(1) *The Journal of Ethics* 131, at 132.
[37] Feinberg, *Harm to Others*, above n 35, p. 33-34.
[38] Ibid, p. 33-34.
[39] Sperling, *Posthumous Interests: Legal and Ethical Perspectives,* above n 25*,* p. 11.
[40] Ibid, p. 11.
[41] Ibid, p. 10.

Of course, Feinberg acknowledges that there is certainly a connection between interests and desires. He observes that when one has an interest in a particular state of affairs, they will ordinarily wish for, or desire the outcome for which that interest favours.[42] However, that person may be unaware of the fact that a particular state will contribute to an aspect of their wellbeing, or alternatively, they might want or desire a particular object or state of affairs which does not necessarily promote their wellbeing.[43] Thus, it is preferred to determine 'interests' objectively, i.e. from the standard of the reasonable man.[44]

Ronald Dworkin claims that people are guided in life by two sets of interests. Dworkin distinguishes between a person's 'experiential' interests and their 'critical' interests.[45] Experiential interests are the interests that people have on a daily basis. They consist of the pains and pleasures that people experience in everyday life based on the things that happen to them.[46] These interests might include activities that people want to do because they find the experience to be enjoyable, such as cooking, playing sport or going out with friends. Likewise, they might comprise tasks that people wish to avoid because they find the experience unpleasant, such as paying a visit to the doctor or dentist.[47]

In contrast, 'critical interests' are those which are established based on a person's convictions of what constitutes an overall good life.[48] Critical interests represent a person's critical judgments rather than their experiential preferences. Dworkin suggests that people do not pursue critical interests because of the experience of doing them. Instead, people pursue critical interests because they believe that their overall life will be better because they do them.[49] The realisation or unfulfillment of a critical interest will contribute to that person's view of whether or not their life was fundamentally good or bad. Examples of critical interests include goals such

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[42] Feinberg, *Harm to Others*, above n 35, p. 38.
[43] Ibid, p. 43.
[44] Sperling, *Posthumous Interests: Legal and Ethical Perspectives,* above n 25, p. 11.
[45] R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), p. 201-202.
[46] Ibid, p. 201-202.
[47] Ibid; D.K. Sokol, 'Clarifying Best Interests' (2006) 337 *British Medical Journal* 264, at 264.
[48] Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 45, p. 201-202.
[49] Ibid, p. 202.

as establishing friendships, providing for family, maintaining a good reputation or completing a task or project.[50]

According to the interest theory of rights, to have a right based on an interest, one's interest in a particular object or state must be served or benefitted by holding another person under a duty.[51] Raz follows the Hohfeldian classification of rights and states that a person has a legal 'interest' when that interest contributes to the person's sense of wellbeing, so much so that it justifies imposing a duty on others:

> "X has a right if and only if X can have rights, and other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty". [52]

Thus, Raz claims that to have a 'right' based on an interest, that interest must promote a person's sense of wellbeing or be of benefit to them in some sense. In addition, the interest must be so compelling so as to justify holding all others under a correlative duty to respect it.[53] Similarly, Feinberg notes that the existence of a legal interest will arise from the extent of the party's personal investment in the object or state, which justifies the existence of the right.[54] A person's 'right' or 'interest' is violated when someone does something which goes against that person's interest and as such, interferes with their wellbeing.[55]

2.2. Classifying the Right to Reproduce

The right to reproduce is traditionally perceived as a moral right.[56] In essence, the right may or may not be protected by the law.[57] The basis for a moral right is that the right *should* be protected. Moral rights are traditionally relied on by virtue of their moral principle rather than finding protection from an established law.[58] In

[50] R. Dresser, 'Dworkin on Dementia: Elegant Theory, Questionable Policy' (1995) 25(6) *The Hastings Center Report* 32, at 33.
[51] J. Raz, 'On the Nature of Rights' (1984) XCIII *Mind* 194, at 195.
[52] Ibid.
[53] Ibid.
[54] Feinberg, *Harm to Others*, above n 35, p. 70.
[55] Raz, 'On the Nature of Rights', above n 51, at 202.
[56] American Society for Reproductive Medicine, 'Chapter 5: The Moral Right to Reproduce and Its Limitations' (1994) 62(5) *Fertility and Sterility* 18, at 18.
[57] Beauchamp, 'Ethical Theory and Bioethics', above n 18, p. 37-38.
[58] A. Sen, 'Legal Rights and Moral Rights: Old Questions and New Problems' (1996) 9(2) *Ratio Juris* 153, at 155.

addition, the right to reproduce is generally regarded as a negative claim of non-interference. To this extent, recognising a right to reproduce will impose a correlative duty on all others not to interfere with a person's choice to reproduce or their choice to avoid reproduction.[59] However, there are arguments suggesting that the right to reproduce may impose some positive obligations regarding access to fertility treatment.[60] Thus, in the next sections, I outline what the right to reproduce would entail when viewed as both a negative and positive claim.

2.2.1. A Negative Right to Reproduce

As a negative claim, the right to reproduce protects people from interference with their decision to reproduce or their decision not to reproduce.[61] A negative right to reproduce is a Hohfeldian claim right that imposes a correlative duty on all others to refrain from interfering with one's natural capacity to reproduce.[62]A negative right to reproduce will not confer a correlative duty on others to provide one with the services or resources necessary to exercise reproductive choices.[63] At the most basic level, Robertson claims that the right to reproduce provides the holder with the freedom to reproduce and the freedom to avoid reproduction without coercive interference.[64] This freedom will extend to the right to choose with whom one reproduces, and under what circumstances.[65] A direct violation of this negative right would include rape, denying a woman access to abortion and forced sterilisation or forced abortion.[66]

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[59] S. McLean, 'Post-mortem Human Reproduction: Legal and Other Regulatory Issues' (2002) 9 *Journal of Law and Medicine* 429, at 430.

[60] R. Sparrow, 'Is it "Everyman's Right to have Babies if He Wants Them": Male Pregnancy and the Limits of Reproductive Liberty' (2008) 18(3) *Kennedy Institute of Ethics Journal* 275, at 282; M. Baron, P. Pettit and M. Slote, *Three Methods of Ethic*s (Oxford: Blackwell Publishing, 1997), p. 125.

[61] J. Robertson, *Children of Choice*: *Freedom and the New Reproductive Technologies* (New Jersey: Princeton University Press, 1994), p. 22.

[62] McLean, 'Post-mortem Human Reproduction: Legal and Other Regulatory Issues', above n 59, at 430.

[63] Robertson, *Children of Choice*, above n 61, p. 23.

[64] Ibid, p. 22.

[65] Office of the High Commissioner for Human Rights in cooperation with The Danish Institute of Human Rights, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutes* (United Nations HR/PUB/14/6, 2014), p. 107.

[66] E. Brake and J. Millum, 'Parenthood and Procreation', in E.N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Spring 2018), para. 2.1, available at <https://plato.stanford.edu/entries/parenthood/#GroLimRigPro>.

2.2.2. A Positive Right to Reproduce

A positive claim to reproduce would mean that there is a correlative duty on others to provide the right holder with the resources that they require to reproduce or the services that they need to avoid reproduction.[67] A positive claim to reproduce could possibly grant people with the right to start a family through assisted means, or alternatively, permit one to avoid reproduction, not merely through abstinence but also by refusing to seek treatment for infertility, taking contraceptives or terminating a pregnancy after conception has occurred.[68] In viewing reproductive rights as positive claims, it would require that national governments devote State resources to the research of infertility treatment and ART. Furthermore, States could be required to provide the public with access to both contraceptives and abortion services.[69]

Although the right to reproduce is not generally regarded as a positive claim, some commentators have proposed that the right should be expanded to promote and not merely respect peoples reproductive choices.[70] It is argued that the right to reproduce should ensure that people are in a position to exercise their reproductive choices. As a purely negative right, the right to reproduce is limited to those who have the capacity to exercise it.[71] In contrast, a positive right to reproduce would recognise that external factors, such as the availability or absence of fertility treatment and abortion services, can and subsequently does impact on a person's reproductive decision making.[72] Furthermore, as a positive claim, both fertile, infertile and same-sex couples would be placed in an equal position to make autonomous reproductive choices.[73]

At this time, the right to reproduce does not appear to impose any positive duties on States to provide its citizens with access to ART, abortion services and so forth.

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[67] Quigley, 'A Right to Reproduce?', above n 21, at 408.
[68] Robertson, *Children of Choice*, above n 61, p. 26.
[69] Brake and Millum, 'Parenthood and Procreation', above n 66, para. 2.1.
[70] Sparrow, 'Is it "Everyman's Right to have Babies if He Wants Them": Male Pregnancy and the Limits of Reproductive Liberty', above n 60, at 282; Baron, Pettit and Slote, *Three Methods of Ethic*s, above n 60, p. 125.
[71] E. Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy' (1986) *Duke Law Journal* 806, at 807.
[72] Quigley, 'A Right to Reproduce?', above n 21, at 408; R. Copelon, 'Loosing the Negative Right of Privacy: Building Sexual and Reproductive Freedom' (1990) 19 *Review of Law and Social Change* 15, at 46.
[73] Quigley, 'A Right to Reproduce?', above n 21, at 410.

Mulligan suggests that in Hohfeldian terms the right to seek access to these kinds of treatment is a liberty right. People have the freedom to seek access to these services should they wish, but there is no correlative duty on others to provide them with access. There is only the correlative 'no-right' of others not to interfere.[74]

2.3. Justifications for the Right to Reproduce

As outlined in Section 2.1, there are two primary theories employed to justify the existence of a right, namely choice theory and interest theory.[75] Stemming from these philosophies, there are several justifications proffered for the existence of a right to reproduce. This section examines some of the positions advanced to justify a right to reproduce, including justifications based on the Irish Constitution, autonomy, interests in reproduction and human rights law. As stated earlier, assessing whether there are grounds for a right to reproduce is necessary to determine whether the State is justified in restricting people's reproductive decisions, and therefore relevant in determining whether Ireland can restrict access to posthumous conception technology.

2.3.1. The Irish Constitution

The starting point for locating a right to reproduce in Ireland is the Constitution.[76] The Constitution declares that people living in Ireland have certain fundamental personal rights,[77] and although there is no stated right to reproduce in the text, Madden observes that Irish courts have recognised a right to procreate as existing within the ambit of other constitutional rights.[78] In this regard, Mulligan states that the right to reproduce is 'one of the natural rights recognised by the Constitution, rather than a positive right granted by it'.[79]

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[74] A. Mulligan, 'Fundamental Rights and Organising Principles in the Regulation of Assisted Reproduction in Ireland' (PhD Thesis, Trinity College Dublin 2013), p. 332.
[75] Sperling, *Posthumous Interests: Legal and Ethical Perspectives,* above n 25, p. 3.
[76] A. Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction' (2012) 35 *Dublin University Law Journal* 261, at 262.
[77] Bunreacht na hÉireann, Articles 40-44.
[78] D. Madden, *Medicine, Ethics and the Law* (Dublin: Bloomsbury Professional Ltd, 2016), Chapter 4, para. 4.32.
[79] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 267.

A constitutional right to reproduce was first identified by the court in *Murray v. Ireland*.[80] This case concerned a married couple who were convicted of capital murder and sentenced to life in prison. The couple claimed that when the State refused to facilitate them with conjugal visits, their constitutional rights to procreate as a family under Article 41 had been violated.[81] Both the High Court and Supreme Court accepted that the right to procreate was a constitutionally protected right.[82] However, Madden notes that the court found the right to procreate within marriage was not absolute and could be subject to reasonable and proportionate restrictions, such as the couple's imprisonment in this case.[83]

When discussing the nature of the right to reproduce, McCarthy J. in the Supreme Court concluded that:

> "The right to procreate children within marriage is not expressly stated in the Constitution; it is one of the unenumerated personal rights guaranteed by Article 40 as being essential to the human condition and personal dignity. It is independent of and antecedent to all positive law; it is of the essence of humanity".[84]

Mulligan observes that the court viewed the right to reproduce as a personal right which was protected by Article 40.3 of the Constitution,[85] rather than as a right enjoyed by the family unit under Article 41.[86] The court drew a comparison with the decision of the Supreme Court in *McGee v. AG*,[87] where the majority found that the right of a married couple to privacy regarding the procreation of children was a personal right.[88] Mulligan deems the courts classification of the right as a personal right noteworthy. She states that by regarding the right to reproduce as an

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[80] *Murray v. Ireland* [1985] IR 532 (HC); *Murray v. Ireland* [1991] ILRM 465 (SC).
[81] Article 41 of the Constitution recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law: Bunreacht na hÉireann, Article 41.
[82] *Murray v. Ireland (HC),* above n 80; *Murray v. Ireland (SC),* above n 80.
[83] Madden, *Medicine, Ethics and the Law,* above n 78, Chapter 4, para. 4.32.
[84] *Murray v. Ireland (SC),* above n 80.
[85] Article 40.3 of the Constitution guarantees to respect, defend, and vindicate the personal rights of the citizen: Bunreacht na hÉireann, Article 40.3; *Murray v. Ireland (HC),* above n 80, para. 11.
[86] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 264.
[87] *McGee v. Attorney General* [1973] IR 284.
[88] Ibid.

individual right protected under Article 40.3, the court in *Murray*[89] left open the possibility for single people to also enjoy a constitutional right to procreate.[90]

Despite this, commentators have noted that the court in *Murray*[91] still conceptualised the constitutional right to reproduce as existing within the context of marriage.[92] For example, Donnelly notes that the right recognised in *Murray*[93] was the personal right of a *married* person to beget children.[94] Indeed, Mulligan admits that although the right to reproduce was regarded by the court as a personal one, it was still very much linked to the marital family's high place in the constitutional order.[95] She suggests that similar to the right of marital privacy which was recognised in *McGee*,[96] the constitutional right to procreate appears to be a personal right which exists for a person as a consequence of them being a member of a family unit.[97]

Whether the constitutional right to procreate recognised in *Murray*[98] extends to the right of citizens to use ART to reproduce is a broader question. O'Mahony states that the court in *Murray*[99] clearly referred to reproduction by natural means and the court did not consider the right to reproduce in the context of assisted reproduction as it was not required to do so.[100] The only case which has referred to the right to procreate in the context of ART is *Roche v. Roche.*[101] This matter concerned the competing claims of a separating couple over the use of cryopreserved embryos. The couple had used IVF treatment to reproduce during their marriage and had kept

[89] *Murray v. Ireland (SC),* above n 80.
[90] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 264.
[91] *Murray v. Ireland (SC),* above n 80.
[92] M. Donnelly, 'Non-Consensual Sterilisation of Mentally Disabled People: The Law in Ireland' (1997) 32 *Irish Jurist* 297; Madden, *Medicine, Ethics and the Law,* above n 78; C. O'Mahony, 'The Constitution, the Right to Procreate and the Marriage Referendum' (Constitution Project UCC, 15 April 2015), available at <http://constitutionproject.ie/?p=503>.
[93] *Murray v. Ireland (HC),* above n 80; *Murray v. Ireland (SC),* above n 80.
[94] Donnelly, 'Non-Consensual Sterilisation of Mentally Disabled People: The Law in Ireland', above n 92, at 310.
[95] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 266.
[96] *McGee v. Attorney General,* above n 87.
[97] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 280.
[98] *Murray v. Ireland (HC),* above n 80; *Murray v. Ireland (SC),* above n 80.
[99] Ibid.
[100] O'Mahony, 'The Constitution, the Right to Procreate and the Marriage Referendum', above n 92.
[101] *Roche v. Roche* [2010] 2 IR 321.

several excess frozen embryos in storage. Following their separation, the wife sought to use the remaining embryos in assisted reproduction against her husband's wishes. She claimed that the embryos enjoyed a right to life under Article 40.3.3 of the Constitution, and that she should be entitled to have them implanted on this basis.[102] Madden notes that the court focused purely on the wife's claim that the embryos enjoyed a constitutional right to life, and they did not consider the couple's right to procreate in much detail.[103] However, Denham J. did briefly reference the constitutional right to reproduce in *obiter* stating that:

> "…The right to procreate was recognised in *Murray v. Ireland.* There is an equal and opposite right not to procreate. In the circumstances of this case, while the plaintiff and her husband have family rights, the exercise of a right not to procreate by the husband is a proportionate interference in all the circumstances of the case to the right of the plaintiff to procreate'.[104]

The court's consideration of the right to reproduce in *Roche*[105] is limited. O'Mahony criticizes the judgment and states that the court failed to take the opportunity to examine whether the constitutional right to procreate which had been identified in *Murray*[106] included a right to reproduce using ART services.[107] Despite this, Mulligan describes the court's identification of the right to procreate in the sphere of assisted reproduction as significant.[108] She acknowledges that originally, the Constitution may have only protected a right to reproduce by natural means, given that ART did not exist at the time of drafting.[109] However, she observes that the meaning of procreation has evolved incrementally since the enactment of the Constitution in 1937, and argues that the contemporary use and understanding of the term includes assisted reproduction.[110] On this basis, Mulligan

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[102] Ibid, p. 2-3: As discussed in Chapter One, Article 40.3.3 was repealed by referendum and removed from the Irish Constitution in May 2018. Prior to this, however, the provision protected the foetus as a constitutional person.
[103] Madden, *Medicine, Ethics and the Law,* above n 78, Chapter 4, para. 4.32.
[104] *Roche v. Roche,* above n 101, para. 39.
[105] Ibid.
[106] *Murray v. Ireland (SC),* above n 80.
[107] O'Mahony, 'The Constitution, the Right to Procreate and the Marriage Referendum', above n 92.
[108] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 276.
[109] Ibid.
[110] Ibid.

deems it defensible to interpret the comments in *Roche*[111] as precedent for a constitutional right to reproduce using ART.[112] Indeed, given that Irish courts have routinely held that the Constitution is a living document which should be viewed in light of changing circumstances, this interpretation of the *Roche*[113] judgment is not entirely unfounded. Furthermore, Mulligan deems the comments made by Denham J. in *Roche*[114] noteworthy given that the judge did not refer to the couples marital status when acknowledging their constitutional right to procreate.[115] She suggests that this could be regarded as a deliberate omission by the court which 'sought to move the right to procreate away from its original attachment to the institution of marriage'.[116] However, she further admits that the court's remarks on the right to reproduce in this case are very brief. Thus, one cannot be certain that any omission by the judge in this regard is especially significant.[117]

Ultimately, *Murray*[118] established that there is a constitutional right to reproduce.[119] However, the extent to which the right applies in the context of ART and moreover, outside the confines of marriage is narrowly drawn. Madden observes that to date, Irish courts have not made clear whether the constitutional right to reproduce exists as a positive or negative right, and doubts whether the Constitution could be used to establish a claim right of individuals to access ART.[120] Furthermore, there has only been two cases where the Irish courts have addressed this issue, and neither case has established that the constitutional right to reproduce exists outsides the confines of marriage.[121] At the very least, Mulligan observes that heterosexual married couples have a constitutional right to reproduce by natural means.[122] However, O'Mahony notes that even in the case of natural

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[111] *Roche v. Roche,* above n 101.
[112] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 276.
[113] *Roche v. Roche,* above n 101.
[114] Ibid.
[115] Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction', above n 76, at 281.
[116] Ibid.
[117] Ibid.
[118] *Murray v. Ireland (SC),* above n 80.
[119] Ibid.
[120] Madden, *Medicine, Ethics and the Law,* above n 78, Chapter 4, para. 4.32.
[121] *Murray v. Ireland (SC),* above n 80; *Roche v. Roche,* above n 101.
[122] Mulligan, 'Fundamental Rights and Organising Principles in the Regulation of Assisted Reproduction in Ireland, above n 74, p. 148.

reproduction, the constitutional right to procreate remains subject to reasonable and proportionate restrictions.[123] Indeed, in both cases where the courts have recognised a constitutional right to procreate, they have ultimately found a legitimate reason for restricting the right.[124]

2.3.2. Autonomy

The concept of autonomy refers to a person's ability to make decisions for themselves.[125] There are varying accounts of autonomy in the literature and the history and nature of the principle are discussed fully in Chapter Four of this thesis. However, in general, the liberal understanding of autonomy suggests that people should be free to follow their own life plan and make choices that are in line with their own beliefs and convictions.[126] One of the most influential advocates for the principle of autonomy was John Stuart Mill.[127] Mill's liberty theory argued that, provided others are not harmed in the process, people should be free to make their own life decisions, even when those decisions are undesirable to others:[128]

> "…if a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode".[129]

To this extent, autonomy recognises that the individual is the person best placed to make decisions for themselves.[130]

The principle of autonomy is routinely applied throughout the course of medical practice.[131] Doctors are generally required to respect patient autonomy regarding

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[123] O'Mahony, 'The Constitution, the Right to Procreate and the Marriage Referendum', above n 92.

[124] In *Murray v. Ireland (SC),* above n 80, the court found that the couples imprisonment was a proportionate ground in which to restrict their constitutional right to procreate; In *Roche v. Roche,* above n 101, Denham J. found the husband's right not to procreate as a legitimate ground in which to interfere with his wife's right to procreate.

[125] E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), p. 2; T.L. Beauchamp and J. Childress, *Principles of Biomedical Ethics* (7th edn, Oxford: Oxford University Press, 2013), p. 101; D. Brudney, 'Choosing for Another; Beyond Autonomy and Best Interests' (2009) 39(2) *Hastings Center Report* 31, at 32-33.

[126] Jackson, *Regulating Reproduction*: *Law, Technology and Autonomy,* above n 125, p. 2.

[127] J.S. Mill, *On Liberty* (Auckland: The Floating Press, 2009).

[128] Ibid, p. 19.

[129] Ibid, p. 114.

[130] R. Rao, 'Property, Privacy, and the Human Body' (2000) 80 *Boston University Law Review* 359, at 359.

[131] O. O'Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002), p. 49.

the provision of medical treatment.[132] So long as the patient has the requisite capacity, physicians must adhere to the choice of the patient, even when they believe that the particular decision is irrational and may result in damage to the patient's health or lead to premature death.[133] Indeed, Mill observes that the freedom to choose includes the liberty to make choices which are undesirable to others.[134] Furthermore, Mill contends that any interference with personal autonomy will only be justifiable in circumstances where the person's decision harms or infringes on the liberty of others.[135] In Mill's view, it is not sufficient to curtail somebody's liberty in cases where their choice merely makes others uncomfortable. Indeed, Harris observes that simply because a decision is not popular by the majority does not mean that the choice is harmful.[136] To justify restricting somebody's autonomy, the identified harm must be substantial and present, and not merely hypothetical or speculative.[137] Under Mill's liberty theory, so long as others remain unharmed by a person's life choices, the principle of autonomy suggests that the person should be free to act accordingly.[138]

Several commentators claim that the right to reproduce is grounded on the concept of autonomy.[139] In the context of reproduction, the concept of 'procreative autonomy' refers to the idea that having control over reproduction greatly contributes to a person's sense of liberty.[140] Procreative autonomy refers to a person's freedom to make reproductive choices. Most notably, to choose whether or not to engage in reproduction.[141] Procreative autonomy features in writings from

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[132] S. Mills and A. Mulligan, *Medical Law in Ireland* (3rd edn, London: Bloomsbury, 2017), Chapter 5.

[133] *In Re T (Refusal of Medical Treatment)* [1992] 4 All ER 649, CA.

[134] Mill, *On Liberty*, above n 127, p. 113; J. Harris, 'Reproductive Liberty, Disease and Disability' (2005) 10 *Reproductive Biomedicine Online* 13, at 13.

[135] Mill's 'harm principle' is discussed fully below in Section 2.4.1. of this chapter: Mill, *On Liberty*, above n 127, p. 132.

[136] J. Harris, 'Sex Selection and Regulated Hatred' (2005) 31 *Journal of Medical Ethics* 291, at 293; Harris, 'Reproductive Liberty, Disease and Disability', above n 134, at 13.

[137] Ibid.

[138] Mill, *On Liberty*, above n 127, p. 23.

[139] Robertson, *Children of Choice,* above n 61; Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 45: Alternatively, other authors argue that autonomy is not an adequate basis for justifying a right to reproduce and suggest that the right to reproduce should be grounded on the basis of the interests that people have in reproduction: O'Neill, *Autonomy and Trust in Bioethics*, above n 131, p. 62.

[140] Sparrow, 'Is it "Everyman's Right to have Babies if He Wants Them": Male Pregnancy and the Limits of Reproductive Liberty', above n 60, at 279; Jackson, *Regulating Reproduction*: *Law, Technology and Autonomy,* above n 125, p. 2.

[141] Robertson, *Children of Choice,* above n 61, p. 3.

various streams within the literature and there are several terms used to describe the idea. These include phrases such as 'reproductive choice', 'reproductive justice' and 'procreative liberty'.[142] Common to almost all accounts, is an acknowledgment that reproduction is a significant undertaking. Furthermore, it is recognised that lacking a sense of control over reproductive matters will undoubtedly burden a person and have a substantial impact on their life.[143] Given that choosing to reproduce or choosing to avoid reproduction often plays a central role in people's lives, it is argued that people themselves are best placed to make their own reproductive choices.[144]

2.3.2.1. Liberal Accounts of Procreative Autonomy

On liberal accounts of procreative autonomy, authors contend that choosing whether or not to reproduce acts as a means of self-expression and provides people with the basis to exercise authentic choice.[145] In line with Mill's liberty theory,[146] liberal accounts of procreative autonomy argue that reproductive choice should be respected, so long as third parties and any resulting offspring are not harmed in the process.[147]

Robertson is a passionate advocate for reproductive autonomy, of which he coined the phrase 'procreative liberty'.[148] Robertson claims that with the growing prominence of ART, reproductive choices are no longer matters of 'God or nature'. Rather, decisions to reproduce are now subject to human will.[149] Robertson claims that choosing whether or not to reproduce is a fundamental life decision which ultimately forms a central aspect of a person's identity.[150] Thus, Robertson claims that disregarding 'procreative liberty' will disrespect that person's identity.[151] For

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[142] O'Neill, *Autonomy and Trust in Bioethics*, above n 131, p. 50; J. Johnston and L. Zacharias, 'The Future of Reproductive Autonomy' (2017) 47(s3) *Hastings Center Report* 6, at 8.
[143] Robertson, *Children of Choice*, above n 61, p. 24; Jackson, *Regulating Reproduction: Law Technology and Autonomy,* above n 125, p. 7.
[144] Harris, 'Sex Selection and Regulated Hatred', above n 136, at 292; Robertson, *Children of Choice*, above n 61, p. 24.
[145] O'Neill, *Autonomy and Trust in Bioethics,* above n 131, p. 55.
[146] Mill, *On Liberty*, above n 127.
[147] Ibid, p. 128; R. Bennet and J. Harris, 'Are There Lives Not Worth Living: When is it Morally Wrong to Reproduce', in D. Dickenson, *Ethical Issues in Maternal Foetal Medicine* (Cambridge: Cambridge University Press, 2002), p. 332.
[148] Robertson, *Children of Choice,* above n 61, p. 3.
[149] Ibid, p. 5.
[150] Ibid, p. 24.
[151] Ibid.

Robertson, full procreative freedom includes both 'the freedom not to reproduce and the freedom to reproduce when, with whom, and by what means one chooses'.[152] Under Robertson's 'procreative liberty', the right to reproduce comprises not merely the right to choose whether or not one will have children but extends to matters such as the right to decide who one will reproduce with, deciding how many children one will have and the right to determine the nature and timing of conception.[153] Furthermore, Robertson argues that 'procreative liberty' should ordinarily prevail in conflicts and that reproductive choice should only be restricted in cases where there is a compelling interest requiring it.[154]

Ronald Dworkin also recognises that autonomy plays an important role in reproductive matters and advocates for a liberty-based approach to reproductive rights.[155] Dworkin claims that 'procreative autonomy' is a basic right.[156] He notes that illiberal interference in reproductive matters violates the autonomy of the person. Similar to Robertson, Dworkin claims that reproductive decisions should rest with the individual, save in cases where there is a substantial reason for the State to restrict this.[157]

On a liberal view of procreative autonomy, reproductive choice should be respected in all but extremely limited circumstances and should only be limited where there is a significant and compelling reason requiring it.[158] For this reason, many liberal writers reject conservative arguments that condemn the use of ART.[159] In recent years, the idea of procreative autonomy has been extended to reflect the range of opportunities that ART offers for individual self-determination.[160] Harris, for

[152] J. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) *Virginia Law Review* 405, at 406.
[153] Ibid.
[154] Robertson, *Children of Choice*, above n 61, p. 24.
[155] J. Robertson, 'Autonomy's Dominion: Dworkin on Abortion and Euthanasia' (1994) 19(2) *Law and Social Inquiry* 457, at 458.
[156] Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 45, p. 148.
[157] Ibid.
[158] Ibid; Robertson, 'Autonomy's Dominion: Dworkin on Abortion and Euthanasia', above n 155, at 458.
[159] J. Harris, 'Rights and Reproductive Choice', in J. Harris and S. Holm (eds.), *The Future of Human Reproduction: Ethics, Choice and Regulation* (Oxford: Clarendon Press, 1998), p. 34; Robertson, *Children of Choice,* above n 55, p. 16.
[160] O'Neill, *Autonomy and Trust in Bioethics*, above n 131, p. 50.

example, argues in favour of using the wide range of reproductive technologies available, including cloning, sex-selection, and surrogacy, so long as there is no identifiable harm to third parties.[161] Furthermore, Harris suggests that the burden of proving sufficient harm should rest on the person who wants to curtail a person's procreative autonomy and not necessarily with the person who seeks to exercise it.[162]

Alternatively, Julian Savulescu advocates for autonomy in procreation based on the importance that experimental choice plays in reproduction.[163] Savulescu contends that when reproducing, both couples and single people have an obligation to use all of the information and resources available to them in order to create a child who will have the best possible life prospects.[164] Savulescu refers to this principle as 'procreative beneficence'. To bring about the best possible child, he argues that prospective parents must have the freedom to choose when and how to procreate and what kind of children to have.[165] However, Savulescu does not ground his theory of procreative beneficence on the basis of unrestricted procreative autonomy.[166] Indeed, according to the general account of procreative autonomy, people would be equally free to choose to conceive children with the worst possible life prospects and this not an outcome that Savulescu would favour.[167]

2.3.2.2. Feminist Accounts of Procreative Autonomy

Procreative autonomy also frequently features in feminist literature. Reproduction is naturally linked to a woman's interests in bodily integrity. It has a direct impact on the gestating woman's physical body[168] and there are several health risks associated with pregnancy and childbirth. Furthermore, motherhood is going to

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[161] Harris, 'Rights and Reproductive Choice', above n 159, p. 34-35; J. Harris, *Clones, Genes and Immortality: Ethics and the Genetic Revolution* (Oxford: Oxford University Press, 1998).
[162] Harris, 'Reproductive Liberty, Disease and Disability', above n 134, at 14.
[163] J. Savulescu and G. Kahane, 'The Moral Obligation to Create the Child with the Best Chance at the Best Life' (2009) 23(5) *Bioethics* 274.
[164] J. Savulescu, 'Procreative Beneficence: Why We Should Select the Best Children' (2001) 15(5-6) *Bioethics* 413, at 415.
[165] Ibid, at 418.
[166] Ibid.
[167] Ibid.
[168] Robertson, *Children of Choice,* above n 61, p. 24.

impose burdens on a woman's physical and psychological wellbeing.[169] For these reasons, feminist authors argue that procreative autonomy is necessary to provide women with the right to control and make decisions about their own bodies.[170] On feminist accounts of procreative autonomy, authors claim that having control over childbearing is a fundamental aspect of a woman's liberty. They argue that women should be free to choose whether and when they participate in reproduction.[171]

In addition, feminist perspectives of procreative autonomy are often committed to overcoming female oppression and promoting gender equality.[172] Traditionally, a woman's reproductive freedom was considerably limited throughout the world. This stemmed from the legality of marital rape in many States to the prevalence of forced sterilisation, abortions, and lack of access to contraceptives.[173] These conditions not only denied women of the opportunity to control their bodies, but also inhibited their autonomy by preventing them from choosing the sort of lives they wished to lead.[174] In more recent years, contraceptives and abortion services have become more readily available. Thus, women have been granted greater autonomy over their bodies and their reproductive health.[175] However, feminist accounts of reproductive autonomy maintain that full reproductive freedom is necessary for women to freely engage in social, economic and political life on an equal footing with men. To achieve this, it is argued that women should have liberty to choose whether or not they reproduce, when they reproduce and who they reproduce with.[176]

The availability of ART has significantly expanded the options available for women to reproduce. Some feminist authors support the use of the ART industry,

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[169] Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71, at 827.
[170] Copelon, 'Loosing the Negative Right of Privacy: Building Sexual and Reproductive Freedom', above n 72, at 15; Jackson, *Regulating Reproduction*: *Law, Technology and Autonomy,* above n 125, p. 3.
[171] Copelon, 'Loosing the Negative Right of Privacy: Building Sexual and Reproductive Freedom', above n 72, at 40.
[172] Jackson, *Regulating Reproduction: Law, Technology and Autonomy*, above n 125, p. 2.
[173] O'Neill, *Autonomy and Trust in Bioethics,* above n 131, p. 50; Robertson, *Children of Choice*, above n 61, p. 25; Johnston and Zacharias, 'The Future of Reproductive Autonomy', above n 142, at s.8.
[174] Ibid.
[175] O'Neill, *Autonomy and Trust in Bioethics*, above n 131, p. 52.
[176] Brake and Millum, 'Parenthood and Procreation', above n 66, para. 2.4.

given its potential to enhance a woman's reproductive choices further.[177] However, others contend that the ART industry merely reinforces the notion that a woman's primary role is to become a mother.[178] Furthermore, they note that the ART industry is predominantly male dominated. They claim that using ART to reproduce permits men to control how women use their bodies, which can ultimately lead to further female oppression. Thus, some feminist writers are wary of supporting the industry on this basis.[179]

2.3.3. Interests in Reproduction

As discussed in Section 2.1.3, an 'interest' can also be used as a possible basis to justify the existence of a right.[180] Raz's interest theory states that to have a right based on the existence of an interest, one's interest in a particular object or state must be served or benefitted by holding another person under a correlative duty.[181] On this account, a person has a right when their interest contributes to their sense of wellbeing, so much so that it justifies imposing a duty on others.[182] Thus, to justify a right to reproduce on the basis of an interest, one's interest in reproduction must contribute a sufficient benefit to their wellbeing, so as to justify holding others under a correlative duty.[183]

Procreation is widely perceived as valuable and there are certainly aspects of the experience that can be said to contribute to a person's sense of wellbeing, to the extent that the interest would be capable of justifying a right to reproduce under Raz's interest theory.[184] People undoubtedly have interests in reproduction, whether this be an interest in seeking to reproduce or a desire to avoid reproduction entirely. The interests that people have in wanting to avoid reproduction are just as

[177] Robertson, *Children of Choice*, above n 61, p. 14.
[178] J. Callahan and D. Roberts, 'A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory' (1996) 1155 *Faculty Scholarship Paper* 1197, at 1211; Robertson, *Children of Choice*, above n 61, p. 14; Jackson, *Regulating Reproduction: Law, Technology and Autonomy,* above n 125, p. 174.
[179] Ibid; Brake and Millum, 'Parenthood and Procreation', above n 66, para. 2.4.
[180] Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, above n 25, p. 3.
[181] Raz, 'On the Nature of Rights', above n 45, at 195.
[182] Ibid.
[183] Quigley, 'A Right to Reproduce?', above n 21, at 405.
[184] Ibid; Harris, 'Sex Selection and Regulated Hatred', above n 136, at 293.

meaningful as the interests that many people have in seeking to reproduce.[185] Robertson notes that ultimately, either decision (choosing to reproduce, or not) is going to shape the life of that person, burden them and affect their dignity and identity.[186] Furthermore, although interests in reproduction will naturally vary amongst people and over time, both Robertson and Steinbock agree that both fertile and infertile people will have interests in reproduction.[187]

This section examines interests that people have in seeking to reproduce, and in seeking to avoid reproduction. These include procreative interests such as, gestation, genetic continuity and parenthood.[188] The purpose of this discussion is to evaluate whether the primary interests in reproduction are sufficient to ground a right to reproduce. Once this has been established, I am then able to identify the circumstances in which reproductive rights may be validly limited by the State and I can ascertain the instances in which Ireland can justifiably restrict access to posthumous conception technology.

2.3.3.1. Interests in Gestation

Gestation will be unique for each person. However, many women consider pregnancy and childbirth to be an enjoyable experience. Parker notes that some women have a genuine fondness for being pregnant. They appreciate the bond which is created with the foetus throughout gestation and take pleasure in both childbearing and birth.[189] In addition, pregnancy and childbirth can be an exciting time for prospective parents and gestation is often perceived to be a positive and

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[185] J. Robertson, 'Posthumous Reproduction' (1994) 69 *Indiana Law Journal* 1027, at 1029; *Evans v. United Kingdom,* App. No. 6339/05 (ECtHR, 10 April 2007); *Davis v. Davis* 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass* 235 A.D.2d 150 (N.Y. App. Div. 1997).
[186] Robertson, 'Posthumous Reproduction', above n 185, at 1029.
[187] B. Steinbock, 'A Philosopher Looks at Assisted Reproduction' (1995) 12(8) *Journal of Assisted Reproduction and Genetics* 543, at 543; Robertson, 'Posthumous Reproduction', above n 185, at 1029.
[188] S. Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) 5(2) *Journal of Law and the Biosciences* 329, at 343.
[189] P.J. Parker, 'Surrogate Mother's Motivations: Initial Findings' (1983) 140(1) *American Journal of Psychiatry* 117, at 117-118.

emotional experience for families.[190]Accordingly, some people seek to reproduce simply because they desire to experience pregnancy and childbirth.[191]

Undesired gestation is also a compelling basis for seeking to avoid reproduction. Pregnancy is physically demanding and can result in considerable pain and discomfort for the gestating woman.[192] Additionally, childbirth can have lasting effects on the woman's physical and emotional wellbeing. The various health risks associated with pregnancy and birth are plausible justifications for any woman seeking to avoid it.[193] Furthermore, Scott notes that for many young or single females, pregnancy can often be perceived as a 'social disability' which may have a negative impact on that woman's future social, educational and employment opportunities.[194]

2.3.3.2. Interests in Genetic Reproduction

There are several reasons why people wish to genetically reproduce. The desire to create a genetically similar child is one of the key reasons why infertile couples are motivated to use ART to facilitate conception and/or become biological parents.[195] Firstly, genetic reproduction is often viewed as a manifestation of a couple's union.[196]Aspiring parents generally have an interest in producing children with whom they will share genetically similar traits.[197] Parents wish to share similar traits with their children: characteristics which will identify the particular parents and child as members of the same familial group, in terms of ethic appearance and so forth.[198] Indeed, many people will seek out their prospective partner on the basis

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[190] K.S. Montgomery, T. Green, B. Maher, K. Tipton, C. O'Bannon, T. Murphy, T. McCurry, L. Shaffer, S. Best and E. Hatmaker-Flanigan, 'Women's Desire for Pregnancy' (2010) 19(3) *The Journal of Perinatal Education* 53, at 58.
[191] Ibid.
[192] Robertson, *Children of Choice,* above n 61, p. 243.
[193] Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71, at 827.
[194] Ibid.
[195] F. Norten, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages' (1999) *New York University Law Review* 793, at 796; Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: July 1984), p. 9.
[196] Norten, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages', above n 195, at 798.
[197] Ibid.
[198] Ibid.

of that person's appearance, temperament, and interests. They will choose a partner with traits that they deem to be desirable, to pass these attributes on to any future offspring that the couple may have.[199]

Secondly, lineage can play an important role in many cultures and religions. Cultural heritage may be a significant aspect of the particular parent's life which they want to share with their children.[200] Alternatively, Robertson argues that genetic reproduction is in part, a societal construct. Thus, some people may simply wish to conform to the tradition of having a genetic child.[201] Indeed, the United Kingdom's Warnock Report 1984 (UK) observed that childless couples are often subject to societal pressure from their families and members of the community to start a family. Thus, they are motivated to engage in genetic reproduction on this basis.[202] There are also many interests in avoiding genetic reproduction, even in cases where a person might be otherwise exempt from gestational, social and legal parenthood.[203]

Cohen unbundles the right not to reproduce into separate rights: the right to avoid gestational parenthood, the right to avoid legal parenthood and the right to avoid genetic parenthood.[204] Cohen observes that even when a person is not the gestational or legal parent of a child (and thereby exempt from the burdens that gestational and legal parenthood entail), a genetic parent can still be harmed by the existence of an unwanted biologically related child.[205] Genetic parents are very often considered to be the child's parent by outside parties and by the child.[206] Furthermore, the genetic parent may even perceive themselves to be the parent of the child and feel a sense of responsibility towards the child and/or guilt for not playing a role in the child's upbringing or having a relationship with them.[207] This

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[199] Ibid.
[200] Ibid; *In the Matter of Lee* (Deceased) *and Long* (Applicant) [2017] NZHC 3263.
[201] Robertson, *Children of Choice*, above n 61, p. 24.
[202] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology,* above n 195, p. 9.
[203] G. Cohen, 'The Right not to be a Genetic Parent' (2008) 81 *Southern California Law Review* 1115, at 1135.
[204] Ibid, at 1118.
[205] Ibid, at 1135.
[206] Ibid, at 1136.
[207] Ibid, at 1137.

perception of parenthood, which Cohen describes as 'attributional parenthood' is a legitimate basis for seeking to avoid genetic reproduction.[208]

Creating a genetic link and passing on one's genes to future generations is widely perceived as an important value.[209] In line with Raz's interest theory, genetic reproduction could certainly be seen as an interest that contributes to a person's sense of wellbeing.[210] Despite this, justifying the right to reproduce on the basis of genetic reproduction alone has been highly criticised by some commentators who contend that genetic reproduction is not the true interest in procreation.[211] For example, Steinbock and Scott argue that grounding the right to procreate solely on the basis of genetic affinity grants people the right to create children, yet exempts them from the responsibility of actually rearing the child.[212] Moreover, Quigley notes that accepting genetic reproduction as a 'right' in itself can potentially lead to morally unfavourable practices. Quigley uses an example of a man claiming that 'perpetuating his genes' on to future generations provides him with so much life meaning that it justifies him in the 'unfettered distribution of his sperm'.[213] In isolation, Quigley claims an interest in genetic reproduction may not be a sufficient interest in reproduction to warrant an unrestricted right to reproduce.[214]

2.3.3.3. Interests in Social Parenthood

Although raising a child is challenging, there are several positive aspects to parenthood and many people seek to reproduce based on their interest in founding and raising a family.[215] The desire to become a parent is a tradition that is shared by all sexes, races, religions and societal classes.[216] People have an interest in parenting because they find satisfaction in the experience of caring for a child.

[208] Ibid, at 1136.
[209] Harris, 'Sex Selection and Regulated Hatred', above n 136, at 293.
[210] Raz, 'The Nature of Rights', above n 45, at 195.
[211] Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 187, at 549; Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71.
[212] Quigley, 'A Right to Reproduce?', above n 21, at 406; Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 187, at 549.
[213] Quigley, 'A Right to Reproduce?', above n 21, at 406.
[214] Ibid.
[215] A. Goldberg, J. Downing and A. Moyer, 'Why Parenthood, and Why Now?: Gay Men's Motivations for Pursuing Parenthood' (2012) 61(1) *Family Relations Interdisciplinary Journal of Applied Family Science* 157, at 158.
[216] A. Benshushan and J. Schenker, 'The Right to an Heir in the Era of Assisted Reproduction' (1998) 13(5) *Human Reproduction* 1407, at 1407.

Parenthood gives people the opportunity to invest in future generations by allowing them to influence, educate and watch a child grow.[217] Some people even seek to become parents because they believe that raising a child will enrich their marriage or complete their family unit. Couples may also wish to produce siblings for their already existing children.[218] Women in particular are often motivated to become a parent in order to meet gender role requirements.[219] They believe that becoming a mother will provide them with a sense of accomplishment and fulfil their role as a woman.[220] Ultimately, parenthood is perceived to be a fulfilling and rewarding experience and many people enjoy the responsibility that parenthood entails.[221]

It is also these aspects of parenthood that motivate people to avoid reproduction.[222] Raising a child is a significant undertaking that will impose great financial and emotional burdens on both of the child's legal and social parents. Parenting can be demanding and time-consuming. Indeed, the commitments of social parenthood may not conform to the way in which someone wants to live their life.[223] Moreover, being regarded as a child's legal parent will have financial implications for the parent in terms of supporting the child,[224] and in terms of succession.[225] Thus, undesired parental responsibility is an equally legitimate reason why one may wish to avoid reproduction.[226]

Ultimately, procreation is going to produce a child or children.[227] Thus, many writers insist that the true interest in reproduction is to establish and raise a family,

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[217] Goldberg, Downing and Moyer, 'Why Parenthood, and Why Now?: Gay Men's Motivations for Pursuing Parenthood', above n 215, at 167.
[218] W.B. Miller, 'Childbearing Motivations, Desires, and Intentions: A Theoretical Framework' (1994) 120(2) *Genetic Social and General Psychology Monographs* 223, at 251.
[219] C. Newton, M. Hearn, A. Yuzpe and M. Houle, 'Motives for Parenthood and Response to Failed in vitro Fertilization: Implications for Counseling' (1992) 9(1) *Journal of Assisted Reproduction and Genetics* 24, at 29.
[220] Ibid.
[221] Goldberg, Downing and Moyer, 'Why Parenthood, and Why Now?: Gay Men's Motivations for Pursuing Parenthood', above n 215, at 158.
[222] Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71.
[223] O'Neill, *Autonomy and Trust in Bioethics,* above n 131, p. 62.
[224] Cohen, 'The Right not to be a Genetic Parent', above n 203, at 1127.
[225] N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) *The Conveyancer and Property Lawyer* 1, at 5.
[226] O'Neill, *Autonomy and Trust in Bioethics,* above n 131, p. 62.
[227] Ibid, p. 61; Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71, at 829.

irrespective of the parent's genetic link to the child.[228] Scott claims that the right to reproduce is the right to 'produce one's own children to rear'.[229] She argues that a person who neither has the capacity nor the intention to rear the resulting child does not have a moral claim to procreate. For Scott, the interest in parenthood is independent of the genetic link to the child.[230] Of course, Scott recognises that some people will have an interest in the individual components of the reproductive experience, including gestation and genetic replication.[231] However, when there is no expectation on behalf of that person to raise the resulting offspring, Scott claims that they simply do not have a fundamental moral right to reproduce.[232]

Steinbock further observes that a diagnosis of infertility does not cause people upset because they cannot produce a biological child. Steinbock contends that infertility results in strain for couples because their ability to found and raise a family has been frustrated.[233] While this is true, and an inability to raise a family may be the primary cause of upset for an infertile couple, I do not accept that failing to create a genetic child would not cause substantial anguish to a couple whose culture or religion attributes great significance to genetic reproduction, or indeed those who seek to conform to the societal tradition of having a genetic child.[234] Steinbock's claim in this regard would also be highly contested by the psychological literature which examines grief and infertility.[235] For example, James and Singh state that the inability of a couple to have a biological child can have immense impact on the couple's wellbeing, and be a source of both emotional and psychological distress and pain for them.[236] The desire to perpetuate genes on to a future generation is a genuinely valuable interest for some people and it is

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[228] Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 187, at 548.
[229] Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71, at 829.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 187, at 549.
[234] Norten, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages', above n 195, at 798.
[235] M. Johansson and M. Berg, 'Women's Experiences of Childlessness 2 Years after The End of In Vitro Fertilization Treatment' (2005) 19(1) *Scandinavian Journal Caring Science* 58, at 58-63; C. Rock, *Infertility, Loss and Grief: Do We Truly Understand?* (Irish Association for Counselling and Psychotherapy, Winter 2012), p. 8; D.P. Valentine, 'Psychological Impact of Infertility: Identifying Issues and Needs' (1986) 11 *Social Work in Health Care* 61-69, at 61.
[236] S.S. James and A.K. Singh's 'Grief and Bereavement in Infertility and Involuntary Childlessness' (2018) 13(2) *Journal of Psychosocial Research* 297, at 298.

certainly an element of reproduction which is meaningful outside the role of parenthood.[237]

However, justifying a right to reproduce based on an interest in founding and raising a family is not without difficulties. Of course, ordinarily, reproduction and parenthood are going to go hand in hand. However, it is possible to rear children with whom one shares no genetic links, and the role of a parent can equally be achieved through alternative means to reproduction, such as adoption and so forth.[238] Quigley criticises justifying a moral right to reproduce based on interests in parenthood given that the right would not account for how interests in raising a family naturally vary in strength between people and over time.[239] First, Quigley observes that people's interests in parenthood will change throughout the different stages of their life. She argues that justifying a right to reproduce based on an interest in parenthood would result in recognising a right which some people will have, and others will not have. Moreover, it results in the existence of a right that a person might not have today (because they do not have sufficient interests), yet they may have in a few years' time (because their interests in parenthood have changed).[240] However, ultimately, reproduction is going to result in a child that will need to be reared. Thus, a person's moral claim to reproduce is going to be weaker if they do not have the capacity, or the intention to parent that resulting child.[241]

2.3.4. Human Rights Law

International human rights obligations are another basis used in the literature to justify a moral right to reproduce. Both in the literature and in practice, procreation is often viewed as a fundamental human right which can be derived from other pre-

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[237] R. Collins, 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death by Sudden Trauma' (2005) 30 *Journal of Medicine and Philosophy* 431, at 435-436.
[238] Robertson, *Children of Choice*, above n 61, p. 22; Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 187, at 548.
[239] Quigley, 'A Right to Reproduce?', above n 21, at 407.
[240] Ibid, at 407-408.
[241] Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 187, at 548; Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 71, at 829.

established human rights.[242] Most frequently, the right to reproduce is cited as arising from the right to privacy under international treaties.[243]

International human rights law widely recognises and protects the right to privacy. The right to privacy is acknowledged in several core human rights treaties and in regional human rights documents.[244] The right to privacy has also been incorporated into several State constitutions and into the national laws of States that do not have written constitutions.[245] As a right, privacy has been defined as ‘the right to be let alone’.[246] It is wide in scope and can be applied to a variety of situations, perhaps more so than other rights.[247] For example, Article 12 of the Universal Declaration of Human Rights declares that ‘no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation’.[248] Similar wording can also be found in other core international human rights treaties[249] and in regional human rights instruments that affirm to protect people from unlawful interference with not only

[242] In this regard, the Centre for Reproductive Rights have identified twelve human rights key to reproductive rights. These include the right to life, the right to liberty and security of person, the right to health, including sexual and reproductive health, the right to decide the number and spacing of children, the right to consent to marriage and to equality in marriage, the right to privacy, the right to equality and non-discrimination, the right to be free from practices that harm women and girls, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, the right to be free from sexual and gender-based violence, the right to access sexual and reproductive health education and family planning information and the right to enjoy scientific progress: Centre for Reproductive Rights, ‘Twelve Human Rights Key to Human Rights’, available at < https://reproductiverights.org/sites/default/files/documents/V4Repro%20Rights%20Are%20Human%20Rights%20-%20FINAL.pdf>.

[243] *Dickson v. United Kingdom*, App. No. 44362/04 (ECtHR, 04 December 2007); *Artavia Murillo (‘Fecundación in Vitro’) v. Costa Rica*, Judgment (ser. C) No. 257 (IACtHR, 28 November 2012).

[244] The Universal Declaration of Human Rights (1948), Article 12; The International Covenant on Civil and Political Rights (1966), Article 17; The Convention on the Rights of the Child (1989), Article 16; The International Convention on the Protection of All Migrant Workers and Members of Their Family (1990), Article 14; The American Convention on Human Rights(1969), Article 11; The European Convention on Human Rights (1950), Article 8.

[245] A. Rengel, ‘Privacy as an International Human Right and the Right to Obscurity in Cyberspace’ (2014) 2(2) *Groningen Journal of International Law* 33, at 41.

[246] L.D. Brandeis and S.D. Warren, ‘The Right to Privacy’ (1890) 4(5) *Harvard Law Review* 193, at 195.

[247] Rengel, ‘Privacy as an International Human Right and the Right to Obscurity in Cyberspace’, above n 245, at 33.

[248] The Universal Declaration of Human Rights (1948), Article 12.

[249] The International Covenant on Civil and Political Rights (1966), Article 17; The Convention on the Rights of the Child (1989), Article 16; The International Convention on the Protection of All Migrant Workers and Members of Their Family (1990).

their personal life, but also their family life, their home and their correspondence.[250] Griffin notes that even within these categories, there are a series of further divisions covered by the right to privacy.[251] Any restriction by public authorities on a person's right to privacy is only permitted in accordance with the law. Furthermore, States must demonstrate that any interference with the right furthers a legitimate State aim and is proportionate in pursuit of that aim.[252]

The right to privacy entitles people to keep a sphere of their lives away from State interference and from the intrusion of others with whom they do not wish to share certain aspects of their lives.[253] In practice, it has been used to protect people from interference with various aspects of their life including matters of health,[254] data protection,[255] and personal identity.[256] Additionally, the right to privacy is frequently cited in cases relating to human reproduction and assisted conception as a means of justifying a moral right to reproduce.[257] In the context of reproduction, the European Court of Human Rights has held that respect for 'private and family life' under Article 8 of the European Convention on Human Rights equally respects a person's decision to become a genetic parent[258] and the decision to avoid becoming a genetic parent.[259] This respect extends to cases where conception requires the use of ART,[260] and to cases where abortion services are required to terminate a pregnancy.[261] In addition, Article 8 includes the right of a couple to choose when to have children, the space between them and under what

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[250] The American Convention on Human Rights (1969), Article 11; The European Convention on Human Rights (1950), Article 8.

[251] J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 234.

[252] European Court of Human Rights, *Guide on Article 8 of the European Convention of Human Rights: The Right to Respect for Private and Family Life, Home and Correspondence* (Council of Europe, 31 August 2020), p. 10.

[253] Rengel, 'Privacy as an International Human Right and the Right to Obscurity in Cyberspace', above n 245, at 39.

[254] *Mehmet Ulusoy and Others v. Turkey,* App. No. 54969/09 (ECtHR, 25 June 2019).

[255] *Catt v. United Kingdom*, App. No. 43514/15 (ECtHR, 24 January 2019).

[256] *A.-M.V. v. Finland*, App. No. 53251/13 (ECtHR, 23 March 2017).

[257] *Dickson v. United Kingdom,* above n 243; *R v. Secretary of State of the Home Department ex parte Mellor* [2001] EWCA Civ 472; *Evans v. United Kingdom,* above n 185.

[258] *Dickson v. United Kingdom,* above n 243.

[259] *Evans v. United Kingdom,* above n 185.

[260] *Dickson v. United Kingdom*, above n 243, para. 66.

[261] *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (22 November 2005); *A, B, C. v. Ireland*, App. No. 25579/05 (ECtHR, 16 December 2010).

circumstances they become a parent.[262] The Inter-American Court of Human Rights has also recently held that a total ban on IVF in the State of Costa Rica violated the private family life of those who required the use of the technology to reproduce.[263] However, the European Court of Human Rights has previously held that the right to private and family life does not guarantee the right to found a family,[264] nor will it impose a positive obligation on State authorities to assist parties in fulfilling their reproductive desires, so long as, on balance, the competing private and public interests are respected.[265] Indeed, States are awarded significant discretion in how they regulate ART domestically.[266]

2.4. Liberty Limiting Principles

In the preceding sections, I discussed some of the justifications for the existence of a right to reproduce. If we accept that there is a right to reproduce which can be defended on the basis of either the Irish Constitution, personal autonomy, interests in reproduction, or international human rights obligations, then to place limitations an individual's reproductive choices the State must provide a valid justification for doing so.[267]

Alternatively, Cohen suggests that this view could be reversed. The starting point could be that individuals have no freedom to reproduce except in such circumstances where the State grants them the privilege to do so. In this way, we would start by asking whether or not a particular instance of reproduction is one that the State should justifiably permit.[268] However, as noted throughout this thesis, I adopt a liberal approach to regulating posthumous conception. On a liberal view, some sort of justification must be provided for State interference with liberty.[269] There are four well established liberty limiting principles which are primarily cited

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[262] Office of the High Commissioner for Human Rights in cooperation with The Danish Institute of Human Rights, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutes*, above n 65, p. 107.
[263] *Artavia Murillo ('Fecundación in Vitro') v. Costa Rica*, above n 243.
[264] *E.B. v. France*, App. No. 43546/02 (ECtHR, 22 January 2008).
[265] *Dickson v. United Kingdom*, above n 243.
[266] *S.H. and Others v. Austria*, App. No. 57813/00 (ECtHR, 03 November 2011).
[267] I.G. Cohen, 'Regulating Reproduction: The Problem with Best Interests' (2011) 96 *Minnesota Law Review* 423, at 429.
[268] Ibid.
[269] Feinberg defines a liberal as a person who favours liberty and who requires a liberty limiting principle to justify state coercion: Feinberg, *Harm to Others*, above n 35, p. 14.

in defence of State interference with liberty. These principles include harm to others, offense to others, harm to self and harmless wrongdoing.[270]

2.4.1. Harm to Others

Harm to others is the most widely supported liberty limiting principle in the literature. It suggests that people should be at liberty to act as they please so long as the action does not result in harm to other parties. The principle of 'harm' originated from Mill. As noted in Section 2.3.1, Mill was an influential advocate for the principle of autonomy. He stated that:

> "…the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".[271]

Mill's position is deemed to be considerably liberal. He argued that the State should only interfere with personal liberty in circumstances where a person's actions will cause harm to others and he does not accept any other liberty limiting principle as a sufficient justification for State coercion.[272] In *On Liberty*, Mill does not define 'harm', nor does he expand on what precisely constitutes as sufficient harm to justify curtailing somebody's liberty.[273] In the ordinary sense of the word, to cause 'harm' to somebody means to do something which results in a bad or negative consequence for them.[274] However, this understanding of harm would not be an adequate standard to justify limiting individual autonomy as it would permit the State to interfere with personal liberty on the basis of any mere negative consequence for another person.[275] Thus, the harm principle is routinely viewed in line with a person's interests.

In conjunction with the principle of interests, Feinberg states that the notion of 'harm' refers to the setting back, defeating, or the 'thwarting' of a person's

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[270] G. Dworkin, 'Moral Paternalism' (2005) 24 *Law and Philosophy* 305, at 305.
[271] Mill, *On Liberty,* above n 127, p. 18.
[272] Ibid, p. 62; Although Feinberg is of the view that Mill also concedes to the offence principle as a sufficient justification for State interference: Feinberg, *Harm to Others*, above n 35, p. 14.
[273] P.N. Turner, '"Harm" and Mill's Harm Principle' (2014) 124(2) *Ethics* 299, at 301.
[274] Ibid, at 300; Feinberg, *Harm to Others*, above n 35, p. 35; A.P. Simester and A. Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011), p. 36.
[275] Turner, '"Harm" and Mill's Harm Principle', above n 273, at 300.

interest.[276] According to this specification, a person is harmed when something goes against their interest, or when the outcome for which their interest stands has been defeated.[277] Siemester and Von Hirsch note that when harm is viewed as a setback to interests, mere momentary annoyances and irritations do not qualify as harms. Rather, 'harms' have the potential to affect the quality of a person's life and to interfere with their wellbeing.[278] Of course, not all harmed interests are necessarily going to be caused by people who are acting wrongly and there are certainly some actions that can be justified on the basis of other principles such as fair competition, just punishment, self-defence and so forth. The harm principle applies only to wrongful harms and both Mill and Feinberg restrict the application of the principle to harmful actions which infringe on other people's rights.[279]

Whether or not a person has been 'harmed' by an event is usually determined by reference to the position in which the party found themselves prior to the purported harm. It is then objectively assessed whether or not that person's position has improved or regressed.[280] This is referred to as the counterfactual account of harm. A person is said to suffer 'harm' from an action when they are placed in a 'worse-off' position than they otherwise would have been in, had the action not occurred.[281]

2.4.2. Offense to Others

Another often cited defence to State interference is that the purported action has caused 'offense' to others.[282] Feinberg states that not all unpleasant states of affairs are necessarily going to be 'harmful' by the harm principles specification. In

[276] Feinberg, *Harm to Others*, above n 35, p. 34.
[277] Ibid.
[278] Simester and Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation,* above n 274, p. 37.
[279] P.W. Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories* (New York: Palgrave MacMillan, 2008), p. 76-77.
[280] J. Feinberg, 'Wrongful Life and the Counterfactual Element in Harming' (1986) 4(1) *Social Philosophy and Policy* 145, at 149.
[281] Ibid.
[282] J. Feinberg, *The Moral Limits of the Criminal Law, vol 2: Offense to Others* (New York: Oxford University Press, 1985).

essence, the action will not set back, defeat or thwart a person's interests to the extent that State interference will be justified on the basis of the harm principle.[283]

Nevertheless, Feinberg suggests that there are a range of negative and displeasing states such as 'passing annoyance, disappointment, disgust, embarrassment', 'fear, anxiety and minor aches and pains' which although not 'harmful' *per se*, still warrant coercive methods to protect people from them. Feinberg describes these undesirable states as 'offenses'.[284] He states that:

> "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it probably a necessary means to that end".[285]

The offense principle aims to prevent conduct that results in shock, revulsion, and disgust. It provides that it is acceptable to restrict the autonomous actions of individuals in circumstances where their actions result in offense to others.[286] Feinberg claims that the liberal position generally accepts both the harm principle and the offense principle as adequate reasons to restrict liberty.[287] However, the offense principle is more controversial than the harm principle and it is not as widely supported in the literature as a liberty limiting principle.[288]

Some writers have claimed that causing mere offense to others is not a sufficient basis to justify restricting autonomous actions. Certainly, there is an argument that offense is subjective, and everybody is going to be offended by something. In this way, the offense principle leaves the State open to restrict liberty on the basis of almost any behaviour at all.[289] Thus, Feinberg suggests that similar to the harm principle, offensive actions also require an element of 'wrongdoing' in order to be covered by the offense principle.[290]

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[283] Ibid, p. 1.
[284] Ibid.
[285] Ibid.
[286] B. Gert, 'Reviewed Work: Offense to Others by Joel Feinberg' (1987) 48(1) *Philosophy and Phenomenological Research* 147, at 147.
[287] Feinberg, *Harm to Others*, above n 35, p. 26.
[288] T. Søbirk Petersen, 'No Offense! On the Offense Principle and Some New Challenges' (2014) 10(2) *Criminal Law and Philosophy* 1, at 4.
[289] Ibid; Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories,* above n 279, p. 79.
[290] Feinberg, *Offense to Others*, above n 282, p. 2.

Siemester and Von Hirsch agree that an element of wrongdoing is necessary in order to be covered by the offense principle. The authors state that the offense must be caused by a wrongful act and they suggest that it is the element of wrongdoing that differentiates the action from something which merely causes offense, to an act which justifies limiting liberty.[291] The action itself need not be wrongful, but the imposition of the action on other people must be wrongful. In addition, to be covered by the offense principle the conduct needs to be considered as offensive to a large number of people and it needs to be unavoidable. Offensive actions which can be avoided are not going to be covered by the principle.[292]

However, the distinction between harmful and offensive conduct is not entirely clear. Harms are defined as setbacks to interests while offenses are considered to be undesirable states of affairs that do not necessarily setback a person's interests.[293] Indeed, it could be argued that people have an interest in not being offended. Thus, wrongful actions which result in people being offended could potentially be viewed as harmful and would already be covered by the harm principle.[294]

2.4.3. Harm to Self

The third well known justification used to defend State interference with personal sovereignty is the principle of harm to self or what has become known in the literature as 'legal paternalism'.[295] The principle of legal paternalism provides that:

> "It is always a good and relevant (though not necessarily decisive) reason in support of criminal prohibition that it will prevent harm (physical, psychological, or economic) to the actor himself".[296]

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[291] Simester and Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation,* above n 274, p. 107.
[292] Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories,* above n 279, p. 78-79.
[293] Feinberg, *Harm to Others*, above n 35; Feinberg, *Offense to Others*, above n 282.
[294] Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories,* above n 279, p. 78.
[295] J. Feinberg, *The Moral Limits of the Criminal Law, vol 3: Harm to Self* (New York: Oxford University Press, 1986), p. 4.
[296] Ibid.

In contrast to the principle of harm, which justifies State interference based on the consequences of the particular action for other people, the principle of legal paternalism is self-regarding. It aims to restrict personal liberty based on the consequences that the action will have for the actor themselves.[297] The term paternalism derives its name from the latin word 'pater' meaning 'father'. Typically, parents do not permit their children to engage in conduct which will put them in harms way and the idea of legal paternalism seeks to prevent people from acting in ways which will cause harm to them.[298] In this way, legal paternalism maintains that the State knows what is in the best interests of its citizens.[299]

Paternalism can also be classified as either soft paternalism or hard paternalism. The primary difference between the two is the degree to which the subject is acting voluntarily. Soft paternalism only allows State intervention with liberty in order to prevent non-voluntary self-harm. It aims to prevent people from unknowingly acting in ways which will cause harm to them. In contrast, hard paternalism is the prevention of voluntary self-harm. It maintains that State interference is permissible in order to stop people from acting in ways which will harm them, even when the person is aware that the consequences of their actions will harm them and despite the fact that they have voluntarily chosen to act in this way.[300] Mill provides the famous example of a man seeking to cross a dangerous bridge.[301] Soft paternalism only permits the State to stop the man if he is acting involuntarily. However, hard paternalism provides that even if the man is aware of the danger and is acting of his own volition, the State is still justified to step in and prevent him from crossing the bridge as his actions are likely to result in harm to him.[302] Essentially, paternalism is hard when the person is deemed to be competent to make a decision and soft when they are not.[303]

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[297] E. Oh, 'Mill on Paternalism' (2016) *Journal of Political Inquiry* 1, at 1.
[298] Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories,* above n 279, p. 80.
[299] J. Feinberg, 'Legal Paternalism' (1971) 1(1) *Canadian Journal of Philosophy* 105, at 105.
[300] Feinberg, *Harm to Self*, above n 295, p. 12.
[301] Mill, *On Liberty*, above n 127, p. 163-164.
[302] However, Mill rejects this as a basis for State interference and suggests that the State need only warn the man of the danger and need not prevent him from exposing himself to the danger: Ibid, p. 164.
[303] G. Den Hartogh, 'Do We Need A Threshold of Competence' (2016) 19 *Medicine Healthcare and Philosophy* 71.

Some writers support paternalistic State coercion on the basis that it can result in the best long-term consequences for people. For example, Conly rejects liberal arguments which favour autonomy and passionately argues in support of legal paternalism. Conly maintains that human beings are not always going to be rational in their everyday decision-making. She provides examples of how people voluntarily choose to smoke and to eat badly despite being well-educated on the long-term consequences of doing so and argues that people cannot be left alone to rationally judge what is in their own best interest. In Conly's view, legal paternalism allows the State to step in and to prevent its citizens from acting in ways which will undermine their ultimate goals.[304]

Parfait provides similar consequentialist-based arguments in support of legal paternalism. Parfait argues that it is immoral for the State to permit people to make choices which are going to be harmful to them in the long run. Although the person has voluntarily made the harmful choice for themselves, on a moral consequentialist view it is still wrong for the state not to interfere with the person's actions because it will not result in the best overall consequences.[305] Furthermore, Parfait suggests that it is possible for people to separate their present self from the person that they are going to be in the future. He argues that allowing people to act in ways which will cause harm to their 'future self' is just as wrong as allowing people to act in ways which will cause harm to others.[306] Conly expresses a similar view and suggests that it is senseless to prevent people from acting in ways which will harm others, yet to allow them to act in ways which will cause harm to their future self. Legal paternalism prevents this by preventing people from acting in ways which will cause harm to their future selves.[307]

Liberal writers do not accept paternalism as a sufficient basis for restricting liberty.[308] Liberals favour autonomy and the dominant position is that paternalism undermines autonomy by allowing the State to infringe on a person's freedom

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[304] S. Conly, 'Against Autonomy: Justifying Coercive Paternalism' (2014) 40 *Journal of Medical Ethics* 349, at 349.
[305] D. Parfait, *Reasons and Persons* (Oxford: Clarendon Press, 1984), p. 286.
[306] Ibid.
[307] Conly, 'Against Autonomy: Justifying Coercive Paternalism', above n 304, at 349.
[308] Feinberg, *Harm to Others,* above n 35, p. 14-15.

without their consent.[309] One of the primary arguments against paternalism is that people are generally going to be the best judge of what is in their own best interests. The argument is that people know what they truly desire. Therefore, paternalism is unnecessary to help people achieve their aims.[310] Other arguments against paternalism suggest that choice has instrumental value. Thus, even when people choose to act in ways which are harmful to them, the fact that they made the choice for themselves has value.[311]

However, some liberals do concede that legal paternalism is sometimes justified. Gerald Dworkin concludes that paternalism may be needed at times to allow people to live rationally ordered lives.[312] In addition, Feinberg did not entirely oppose the idea of soft paternalism and suggested that State interference could be permissible in cases where the subject is acting involuntarily.[313] However, Feinberg was not fully convinced that soft paternalism could truly be characterised as paternalism and he did not accept hard paternalism as a basis for State interference.[314] Mill rejected legal paternalism (both hard and soft paternalism) entirely. For Mill, freedom of liberty promoted excellence by allowing people to express themselves and to invoke their natural capacities.[315] In addition, Mill rejected paternalism based on the instrumental value of choice. He argued that people themselves are best placed to know what is in their own best interests:

> "…all errors which [an individual] is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good".[316]

On Mill's account, it is better for the State to allow people to make their own bad decisions, rather than for the State to tell people what is good for them.

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[309] D. Birks, 'Moral Status and the Wrongness of Paternalism' (2014) 40(3) *Social Theory and Practice* 483, at 483.
[310] Conly, 'Against Autonomy: Justifying Coercive Paternalism', above n 304, at 349.
[311] A. Buchanan and D. Brock, 'Deciding for Others' (1986) 64(2) *The Milbank Quarterly* 17, at 29-30.
[312] G. Dworkin, 'Paternalism' (1972) 56(1) *The Monist* 64.
[313] Feinberg, *Harm to Self*, above n 295, p. 15.
[314] Ibid, p. 12.
[315] Mill, *On Liberty*, above n 127, p. 99.
[316] Ibid, p. 130.

2.4.4. Harmless Wrongdoing

The fourth liberty limiting principle is harmless wrongdoing, or what is more commonly referred to in the literature as 'legal moralism'.[317] Legal moralism is a theory of jurisprudence which argues that the law should be used to enforce common morality. It proposes that:

> "It can be morally legitimate for the State, by means of the criminal law, to prohibit certain types of action that cause neither harm nor offence to anyone, on the grounds that such actions constitute or cause evils of other kinds".[318]

Legal moralism goes beyond the other liberty limiting principles in that it maintains that the law should be used as a mechanism to prevent people from acting in ways which are immoral, even when their actions do not result in anybody being harmed or offended. The argument for legal moralism is that although the conduct is victimless *per se*, the particular act is still wrong by moral standards and should therefore be prevented.[319]

The idea of legal moralism developed in the 1960s as a result of a debate between Lord Patrick Devlin and H.L.A. Hart on the relationship between law and morality.[320] Lord Devlin is perhaps the most widely cited advocate for legal moralism. In his view, a well-built society is constituted by its morality. He argued that both private and public behaviour should be guided by the collective moral judgments of society. On Devlin's account, if an ordinary man perceives something to be immoral, then it is necessary for the State to intervene in order to prevent it.[321] In response to Devlin, Hart relied on Mill's harm principle as the appropriate standard to guide the law. Hart dismissed Devlin's arguments on the basis that legal moralism permitted the enforcement of laws purely based on mainstream views and irrespective of their content. He further argued that Devlin's position hinders society from changing, or developing moral values overtime.[322] Although legal

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[317] J. Feinberg, *The Moral Limits of the Criminal Law, vol 4: Harmless Wrongdoing* (New York: Oxford University Press, 1988), p. 3.
[318] Ibid.
[319] Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories,* above n 279, p. 88.
[320] P. Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2016) 10(1-2) *The Journal of Ethics* 21, at 21.
[321] P. Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), p. 10-11.
[322] Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate', above n 320, at 23.

moralism has found some contemporary support in the literature,[323] the majority of commentators writing on the topic of liberty have rejected legal moralism as a sufficient reason to restrict individual autonomy based on the arguments advanced by Hart.[324]

2.5. Concluding Remarks on The Right to Reproduce and Liberty Limiting Principles

This chapter has begun assessing the first research question of this thesis regarding whether posthumous conception should be regulated in Ireland. To do this, I have adopted a liberal approach to regulation and have assessed whether there is grounds for a right to reproduce. Furthermore, I have identified the circumstances in which reproductive rights may be limited.

There are certainly grounds for the existence of a right to reproduce. Firstly, there is the Constitutional right to reproduce. The case of *Murray*[325] suggests that there is a constitutional basis for a legal right to procreate by natural means in Ireland, at least for married couples.[326] There are also grounds for a right to reproduce outside of the Irish Constitution on the basis of autonomy, interests in reproduction and human rights law. However, in these instances, the right to reproduce would be regarded as a moral right as opposed to a legal right. In both cases, the right to procreate is a negative liberty to be free from coercive State interference, rather than a claim right to assistance with reproductive matters.[327] Furthermore, the right to reproduce whether legal or moral is not unqualified and can be limited should a valid liberty limiting principle be identified.[328]

While there is certainly no consensus among writers on what is a sufficient standard to restrict the liberty of individuals, the harm principle is perhaps the only liberty limiting principle discussed above that appears to be accepted to some degree by

[323] E.V. Rostow, 'The Enforcement of Morals' (1960) 18(2) *The Cambridge Law Journal* 174; R.A. Duff 'Towards a Modest Legal Moralism' (2013) 8 *Criminal Law and Philosophy* 12.
[324] Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate', above n 320, at 23.
[325] *Murray v. Ireland*, above n 80.
[326] Ibid.
[327] Mulligan, 'Fundamental Rights and Organising Principles in the Regulation of Assisted Reproduction in Ireland', above n 74, p. 332.
[328] Ibid; Cohen, 'Regulating Reproduction: The Problem with Best Interests', above n 267, at 429.

all of the leading scholars on this topic.[329] Of all of the liberty limiting principles, it is the harm principle which grants the greatest respect to individual liberty and I accept the liberal position that harm to others is a justifiable reason to restrict the autonomous actions of individuals. Although Feinberg suggests that the liberal position also accepts the offense principle as a sufficient reason to restrict liberty,[330] I am of the view that offense is too subjective a standard to justify restricting autonomy. Moreover, I take the position that actions which are truly offensive enough to warrant restricting liberty will also result in some degree of harm to others. Thus, these actions will be covered by the harm principle.[331] For these reasons, I do not accept the offense principle as a sufficient liberty limiting principle. Furthermore, as put forward above, liberal writers do not accept paternalism or legal moralism as sufficient liberty limiting principles. Thus, going forward, I take the position that harm to others is the only basis that States should rely on for restricting the liberty of individuals and is the appropriate standard for determining how posthumous conception should be regulated in Ireland.

When applied in the reproductive context, the harm principle provides that it is an acceptable reason to limit a person's reproductive choices on the basis that their reproductive actions will result in sufficient harm to the interests of other people. Prospective harms which can arise from posthumous conception would include harm to the interests of the deceased, the surviving partner, the resulting child, extended family members and the interests of society in general. Ultimately, the idea is that when the harm caused to the interests of others is sufficient, the State will be justified in limiting a person's reproductive autonomy.[332] The next chapter identifies and discusses the specific harms which can be caused by posthumous conception. By assessing the harms implicated by posthumous conception, I am able to access whether posthumous conception should be limited in Ireland on the basis of the harm principle.

[329] J. Stanton-Ife, 'The Limits of Law', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2016), para. 2, available at <https://plato.stanford.edu/entries/law-limits/>.
[330] Feinberg, *Harm to Others*, above n 35, p. 26.
[331] Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories,* above n 279, p. 79.
[332] Robertson, *Children of Choice*, above n 61, p. 24; Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 43, p. 148; Harris, 'Rights and Reproductive Choice', above n 159, p. 34-35.

Chapter Three

The Potential 'Harms' Caused by Posthumous Conception

3. Introduction

This chapter continues addressing the first research question regarding whether posthumous conception should be regulated in Ireland. In Chapter Two, I argued that Mill's harm principle is the appropriate standard to be used in Ireland when restricting personal liberty. I contended that the presence of 'harm to others' is an acceptable reason for the State to interfere with the reproductive autonomy of individuals and thus a justifiable ground to restrict those who seek to use posthumous conception from doing so.

Every instance of posthumous conception will involve the interests of eight primary stakeholders. These stakeholders include the deceased, the surviving partner, extended family members, the resulting child, the Irish State, society and the medical professionals who are involved in both the posthumous gamete extraction and those who carry out the assisted conception procedure.[1] The interests of these stakeholders and the potential harms caused by posthumous conception to them will vary in strength and over time. This chapter identifies and discusses the potential harms caused by posthumous conception to each stakeholder. In this way, I am able to determine whether posthumous conception should be limited in Ireland based on the harm principle.

Section 3.1 deals with the interests of, and the potential harms caused to the deceased by posthumous conception. Here, I examine the interests that the deceased could have in the treatment of their corpse and I outline the potential reproductive interests of the deceased. I also consider the interests of a comatose

[1] In cases where the gametes have not been harvested and stored by the progenitor during their lifetime, it is unlikely that the same physician will perform both the posthumous gamete extraction and the assisted conception procedure.

or PVS patient in having their gametes harvested for use in posthumous conception, as these interests will differ from those of a person who has died.[2]

Section 3.2 considers the interests of the surviving partner in posthumous conception and identifies the potential harms which may be cased to them.

Section 3.3 examines the potential interests and harm caused to the deceased's surviving family members.

Section 3.4 deals with the resulting child. I first outline the specific harms which posthumous conception can potentially cause for the resulting child. I then discuss the harm to children argument and the non-identity problem.

Section 3.5 considers the interests and harms caused to the medical professionals involved in posthumous conception procedures.

Section 3.6 examines the interests of the State and outlines the potential social harms which can arise due to posthumous conception.

Section 3.7 concludes this chapter and determines whether posthumous conception should be restricted in Ireland on the basis of the harm principle.

3.1. The Deceased

The deceased is one of the primary stakeholders in posthumous conception. At first instance, the procedure of gamete retrieval will implicate any interests of the deceased in the treatment of their corpse after death. Alternatively, if the gametes were harvested from a comatose or PVS patient prior to a clinical determination of cardiac or brain death, gamete retrieval will implicate any interests that the deceased had in the treatment of their body whilst living.[3] Furthermore, the subsequent use of the deceased's gametes in posthumous conception will involve

[2] If the retrieval of gametes is from a patient who is in a comatose of PVS, and who has not received a clinical determination of cardiac or brain-stem death, that patient is still considered to be living. Thus, they will have independent interests to those of the deceased.

[3] N. Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent' (2019) 27 *Journal of Law and Medicine* 1, at 1; A. Smajdor, 'Perimortem Gamete Retrieval: Should We Worry about Consent?' (2015) 41(6) *Journal of Medical Ethics* 437, at 438.

any interests that the deceased had in becoming a genetic parent, or avoiding genetic parenthood after death.[4]

This section analyses whether these practices result in sufficient 'harm' to the interests of the deceased. I first consider the debate of whether the dead have interests. I then outline the interests of the deceased in posthumous conception and the potential harms which may be caused to them.

3.1.1. 'Do the Dead have Interests?' Debate

Prior to identifying any interests of the deceased in posthumous gamete retrieval and posthumous conception, it is first necessary to examine the debate of whether or not a deceased person can have interests at all. There are several philosophical theories which relate to the concept of posthumous interests and posthumous harm.[5] In general, writers in this area will either claim that:

(i) the dead have interests which can be harmed,[6]
(ii) the dead do not have interests which can be harmed,[7]
(iii) the dead do not have interests which can be harmed; however, it is still possible to do things which are 'wrong' to the dead,[8]
(iv) or, alternatively, that the still-living have interests in what happens to them after death.[9]

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[4] J. Robertson, 'Posthumous Reproduction' (1994) 69 *Indiana Law Review* 1027, at 1030-1031; H. Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 *Journal of Law and Health* 68, at 77.

[5] See generally, J. Feinberg, *The Moral Limits of the Criminal Law, vol 1: Harm to Others* (New York: Oxford University Press, 1984); E. Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91(2) *The University of Chicago Press* 243; B.B. Levenbook, 'Harming Someone After His Death' (1984) 94(3) *Ethics* 407; J.C. Callahan, 'On Harming the Dead' (1987) 97(2) *Ethics* 341; G. Pitcher, 'The Misfortunes of the Dead' (1984) 21 *American Philosophical Quarterly* 183; I. Goold and J. Herring, *Great Debates in Medical Law and Ethics* (London: Palgrave, 2018), p. 173.

[6] Feinberg, *Harm to Others,* above n 5, p. 70; Pitcher, 'The Misfortunes of the Dead', above n 5, at 183; R. Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (New Jersey: Princeton University Press, 2008).

[7] S. Rosenbaum, 'Epicurus and Annihilation' (1989) 39 *Philosophical Quarterly* 81; Callahan, 'On Harming the Dead', above n 4; J. Harris, 'Organ Procurement: Dead Interests, Living Needs' (2003) 29(3) *Journal of Medical Ethics* 130.

[8] Partridge, 'Posthumous Interests and Posthumous Respect', above n 5.

[9] S. McGuiness and M. Brazier, 'Respecting the Living Means Respecting the Dead too' (2008) 28(2) *Oxford Journal of Legal Studies* 297; Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 75.

This section addresses the debate of whether the dead have interests. I examine the different theories relating to posthumous interests and posthumous harm. Furthermore, I outline the difficulties with ascribing interests to the dead, namely the lack of subject to bear the interest and the experience problem.

3.1.1.1. The Subjects of Interests

In 'The Rights of Animals and Unborn Generations', Feinberg considers the types of beings who are capable of affirming rights.[10] He claims that in order to be a legal right holder, one must first be capable of having interests. Thus, Feinberg identifies the sorts of beings who are capable of acting as the subject of an interest.[11] As a prerequisite to having an interest, Feinberg asserts that the prospective subject must be conscious and aware.[12] In addition, the subject must have the capacity to have desires, aims and purpose.[13] Feinberg states that the concept of an interest 'presupposes at least rudimentary cognitive equipment. Interests are compounded out of desires and aims, both of which presuppose something like belief, or cognitive awareness'.[14] Thus, Feinberg claims that those who do not possess any 'awareness, expectation, belief, desire, aim and purpose' are not the kind of beings who can be the subject of an interest.[15]

Kramer takes an alternative and broader view of interests. Kramer claims that any existing entity which has a position that can be advanced or benefitted by a state of affairs is capable of being the subject of an interest. Thus, under Kramer's classification of interests, the subject need not have any 'rudimentary cognitive equipment' to qualify as an interest holder. Indeed, Kramer would attribute interests to a range of inanimate entities such as buildings and blades of grass.[16] On both Feinberg and Kramer's account of interests, however, a necessary requirement is the existence of a subject which can be both harmed and benefitted.

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[10] J. Feinberg, 'The Rights of Animals and Unborn Generations', in W.T. Blackstone (ed.), *Philosophy and Environmental Crisis* (Athens, GA: University of Georgia Press, 1974), p. 43.
[11] Ibid, p. 51.
[12] Ibid, p. 52.
[13] Ibid, p. 61.
[14] Ibid, p. 52.
[15] Ibid, p. 61.
[16] Unlike Feinberg, however, while Kramer might attribute interests to inanimate subjects, he does not necessarily admit that such beings can be right holders: M.H. Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14(1) *Canadian Journal of Law and Jurisprudence* 29, at 33.

This accords with the Greek philosopher Epicurus' argument, whose account of harm requires an existing subject. When discussing whether or not 'death' is a form a harm, Epicurus claimed that death does not harm anyone. He argued that death does not harm living people because they are not yet dead, and death does not harm the dead because the dead no longer exist.[17] Feldman refers to this as the 'existence condition'. Feldman observes that nothing good or bad can happen to a subject at a particular time unless that subject exists at the time of the event.[18]
While living, a person will have interests which can be both promoted and violated. Of course, there is debate in the literature on whether or not an incapacitated adult or a child is capable of having interests.[19] However, it is generally accepted amongst theorists that a living adult with full capacity will be the subject of interests which can be harmed during the course of their lifetime.[20] Once deceased, however, a person's conscious and physical life will come to a permanent end.[21] Thus, from the outset, the problem with ascribing interests to the dead, is the lack of subject who will *bear* and *experience* the purported interest.[22]

Of course, a corpse does have a physical presence. However, it is no longer an entity which can experience a benefit or harm. Feinberg recognises this difficulty and observes that:

> '…the case against ascribing rights to dead men can be made very simply: a dead man is a mere corpse, a piece of decaying organic matter. Mere inanimate things can have no interests'.[23]

The dead are permanently inanimate and are incapable of experiencing benefit. Thus, under Feinberg's interest theory, a corpse is not the kind of being capable of

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[17] Epicurus, 'Letter to Menoeceus', translated by R.D. Hicks in R.D. Hicks, *Letter to Menoeceus: Epicurus* (CreateSpace Independent Publishing Platform, 2016).
[18] F. Feldman, 'The Puzzles about the Evils of Death' (1991) 100(2) *The Philosophical Review* 205, at 205.
[19] Alan White for instance, claims that only the conscious and perhaps the intelligent can have interests: A.R. White, *Rights* (Oxford: Clarendon, 1984), p. 80; See also, Goold and Herring, *Great Debates in Medical Law and Ethics*, above n 5, p. 173; D. Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), p. 80.
[20] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 44.
[21] Pitcher, 'The Misfortunes of the Dead', above n 5, at 183.
[22] Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, above n 19, p. 15.
[23] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 57.

holding interests.[24] Without a subject to bear and experience the interest, there is no interest which can be harmed.[25]

3.1.1.2. The Dead have Interests

Despite reaching this conclusion however, Feinberg is one of many writers who maintain that the dead do have interests, and that the dead can be harmed by posthumous events.[26] Both Feinberg and Pitcher argue that some interests will ‘survive death’. They claim that it is possible to harm the interests of a person, even after they have died.[27]

Feinberg argues that some interests, such as the interest in a good reputation, can survive death, provided that the ante-mortem person had a significant investment in that interest while they were alive.[28] However, Feinberg and Pitcher’s ‘surviving interest’ still requires a subject to bear and experience the interest. Thus, if we accept that people can have surviving interests which can be harmed after their death, it must follow that either the remains of the deceased person are harmed (which on Fienberg’s account, they cannot be, because they do not have ‘cognitive awareness’),[29] or we must concede that present events are retrospectively responsible for harm caused to past living people.[30]

In response, Feinberg and Pitcher distinguish between the corpse and the previously living person. They claim that it is the past-living person who is harmed by the violation of a surviving interest. The authors contend that the past-living person will act as the subject of the injustice which occurs after their death, so long as that person had a significant investment in that interest while they were alive.[31] Indeed, while this may provide a subject for the surviving interest, under the

[24] Ibid

[25] Partridge, ‘Posthumous Interests and Posthumous Respect’, above n 5, at 247.

[26] Feinberg, *Harm to Others*, above n 5, p 70; Pitcher, ‘The Misfortunes of the Dead’, above n 5, at 183; Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate,* above n 6, p. 79.

[27] Feinberg, *Harm to Others*, above n 5, p. 91; Pitcher, ‘The Misfortunes of the Dead’, above n 5, at 184.

[28] Feinberg, *Harm to Others,* above n 5.

[29] Feinberg, ‘The Rights of Animals and Unborn Generations’, above n 10, p. 57.

[30] Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, above n 19, p. 22.

[31] Feinberg, *Harm to Others*, above n 5, p. 89; Pitcher, ‘The Misfortunes of the Dead’, above n 5, at 184.

Feinberg-Pitcher account, one must accept that a presently living person is capable of experiencing harm from the violation of an interest which does not occur until after they have died.[32]

Similarly, Ronald Dworkin claims that it makes sense to attribute interests to the dead. As outlined in Chapter Two, Dworkin distinguishes between a person's 'experiential interests' and 'critical interests'.[33] Experiential interests are the interests that people have on a daily basis based on the things that happen to them, whereas, critical interests are the interests formed by a person based on that person's view of what constitutes as an overall good life.[34] Of course, the dead will not have any experiential interests. When a person dies they are unable to experience anything good or anything bad.[35] However, Dworkin argues that a person's critical interests are established by them when they are competent and that by paying respect to a person's critical interests when they are no longer in a position to experience them it will honour that person's precedent autonomy.[36] Furthermore, Dworkin argues that when we recognise posthumous interests' we acknowledge that the life of the deceased has been more successful, on the basis that 'the interests they formed while alive and conscious flourish when they are unconscious or dead'.[37] On Dworkin's account of interests a person need not be around to experience the fulfilment or the thwarting of a critical interest.[38]

3.1.1.3. The Dead do not have Interests

Some writers claim that the dead cannot be harmed. This is due to the absence of knowledge and experience of harm on behalf of the deceased.[39] Harris, for instance argues that the dead do not experience 'person-affecting' interests.[40] Harris claims that the dead do not benefit from good experiences and they do not suffer from bad

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[32] Goold and Herring, *Great Debates in Medical Law and Ethics*, above n 5, p. 174.
[33] R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), p. 201-202.
[34] Ibid.
[35] J. Harris, 'Law and Regulation of Retained Organs: The Ethical Issues' (2002) 22 *Journal of Legal Studies* 527, at 537.
[36] R. Dworkin, 'Autonomy and the Demented Self' (1986) 64(2) *The Millbank Quarterly* 4, at 10-13.
[37] Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate,* above n 6, p. 79.
[38] Ibid.
[39] Harris, 'Organ Procurement: Dead Interests, Living Needs', above n 7; Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35.
[40] Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35, at 537.

experiences. Thus, Harris concludes that the dead do not have any interests which can be meaningfully harmed.[41] Only living people are capable of experiencing the fulfilment or the violation of an interest. Levenbook observes that 'when a person no longer exists, he no longer has goals, wants or desires'.[42] Certainly, the objects of that person's desires might still exist, but whatever is done to them, whether they are satisfied or whether they are frustrated will do nothing for the deceased. Either way, the deceased is going to remain unaffected.[43] Partridge also claims that nothing happens to the dead. He notes that consciousness, awareness and a capacity to be 'worse off' are necessary conditions for the subject of an interest or harm.[44] Thus, strictly speaking, after death, the deceased is no longer a being who can be the subject of the interest.[45]

Certainly, the deceased's surviving relatives might be satisfied to learn that the deceased's past objectives have been served, or alternatively, they may be burdened by the knowledge that interests held by the deceased while they were living have been thwarted.[46] However, this joy or offence is something that the deceased will never experience for themselves. While the interest might pertain to the deceased person, the true subjects of the interest or the harm in these cases are the deceased's surviving relatives. It is the present interests of the living which are being affected and not necessarily the interests of the deceased person.[47] The same can be said for Dworkin's 'critical interests'. The deceased themselves will not be affected by the realisation or the unfulfillment of a critical interest after their death. Their surviving family members may be affected by the knowledge that the deceased's life was more or less successful on the basis that their critical interests have been thwarted or come to fruition after death. However, this is not the deceased who is being affected, rather, the interests of still-living people.[48]

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[41] Harris, 'Organ Procurement: Dead Interests, Living Needs', above n 7, at 132.
[42] B.B. Levenbook, 'On Harming the Dead, Once Again' (1985) 96(1) *The University of Chicago Press* 162, at 163-164.
[43] Ibid, at 164.
[44] Partridge, 'Posthumous Interests and Posthumous Respect', above n 5, at 248.
[45] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 57.
[46] Callahan, 'On Harming the Dead', above n 5, at 344.
[47] Ibid, at 343.
[48] Ibid.

3.1.1.4. The Dead can be 'Wronged'

One view suggests that while the dead may not have interests which can be harmed, we can certainly act in ways which are 'wrong' towards the dead.[49] Indeed, accepting that the dead do not have interests can potentially lead to a scenario in which the law fails to acknowledge the validity of testamentary wills and other expressed wishes of the dead.[50] As outlined in Chapter Two, it is possible to wrong a person without necessarily setting back or thwarting their interests.[51] Partridge argues that it is possible to do things which are wrong to the dead which pertain to the interests that the deceased had while they were still living.[52] Luper, provides the example of disregarding the provisions of a testator's will. While this may not technically 'harm' the interests of the dead person, going against the expressed wishes of a deceased person is still 'wrong'.[53]

Again, on this account, there is the difficulty of identifying a subject who will bear and experience the purported 'wrong'. The dead cannot be 'wronged' so much as they cannot be 'harmed'.[54] Callahan argues that the reason we pay respect to pre-mortem expressed wishes is not because it 'harms' or 'wrongs' the interests of the dead person. Rather, because honouring the deceased's expressed wishes will serve the present interests of society.[55] Failing to uphold a testator's wishes in relation to his property will not cause any harm or wrong to the deceased. As the testator is dead, they will never know or experience the injustice of the purported harm or wrong. However, disregarding the testator's expressed wishes could certainly have an effect on the interests of the still living beneficiaries under the will.[56] Again, in this case, it is not the interests of the deceased person which are being 'wronged' when we fail to uphold the testators wishes. Rather, it is wrong to the present interests of the surviving beneficiaries to disregard the will.[57]

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[49] Partridge, 'Posthumous Interests and Posthumous Respect', above n 5, at 261.
[50] Callahan, 'On Harming the Dead', above n 5, at 349-350.
[51] R.A. Belliotti, *Posthumous Harm: Why the Dead are Still Vulnerable* (United Kingdom: Rowman & Littlefield, 2011), p. 146.
[52] Partridge, 'Posthumous Interests and Posthumous Respect', above n 5, at 261.
[53] S. Luper, 'The Moral Standing of the Dead' (2018) 373(1754) *Philosophical Transactions Royal Society of Biological Sciences* 1, at 5.
[54] Callahan, 'On Harming the Dead', above n 5, at 349.
[55] Ibid, at 350.
[56] Ibid, at 350-351.
[57] Ibid.

Furthermore, Callahan notes that it provides comfort to the living to know that their wishes as to affairs after their death will be respected.[58] Harris advances a similar view. He claims that pre-mortem wishes are respected due to the reasonable demands of public interest.[59] Harris argues that living people have an interest in how their property will be managed after their death. Thus, we respect the expressed wishes of the dead so as to ensure that our own wishes will be respected once we are dead and no longer in a position to express wishes.[60] Indeed, Robertson observes that testamentary wills also serve an added societal purpose. He observes that the legal recognition of testamentary wills acts as an incentive for people to work, acquire and manage their property.[61]

3.1.1.5. Interests of the Still-Living in What Happens After Death

Another line of argument is that living people can form interests in events that will not happen until after their death, despite the fact that they will no longer exist at the time. Under Dworkin's distinction of interests, a living person will have no 'experiential interests' in what happens after death. Once they are dead, they will no longer be in a position to experience anything which is good or anything which is bad.[62] However, Dworkin claims that critical interests are formed by a person while they are living and competent and will relate to that person's beliefs regarding what constitutes as an overall good life.[63] According to Dworkin, a person need not be around to experience the fulfilment or the setting back of a critical interest.[64] The fulfilment, or setting back of a critical interest after death simply means that that person's life was more or less successful based on the fact that 'the interests they formed while alive and conscious flourish when they are unconscious or dead'.[65]

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[58] Ibid, at 352.
[59] Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35, at 535; Harris, 'Organ Procurement, Dead Interests Living Needs', above n 7, at 131.
[60] Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35, at 535.
[61] The benefits of adhering to the expressed wishes of the dead are discussed fully in Chapter Four: Robertson, 'Posthumous Reproduction', above n 4, at 1033.
[62] H. Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is' (2013) 14 *Marquette. Elder's Advisor* 197, at 212.
[63] Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 33, p. 201.
[64] Ibid.
[65] Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate,* above n 6, p. 79.

Of course, the deceased person themselves will be incapable of being harmed by the thwarting of a critical interest.[66] The dead are not in a position to experience anything which is good or anything which is bad.[67] However, still living people can have present critical interests in post-mortem events and these present critical interests of still living people may be harmed if we fail to recognise the critical interests of the dead.[68] Take for instance a person's religious views as to how their body should be treated after death, their advanced directives regarding their end of life medical care, or provisions in their will which seek to provide for their family. In these cases, people are making autonomous choices or judgments about the way in which they wanted to lead their overall life. This would make their interest a 'critical interest' by Dworkins distinction.[69] By paying respect to these pre-mortem wishes after that person has died, we are honouring the autonomy and the interests of still living people who have present interests in what happens to them after they die. Indeed, some commentators have argued that it is necessary for us to respect pre-mortem expressed wishes of the dead in relation to these matters in order to respect the autonomy and interests of the still living.[70]

Acknowledging that the still living have interests in events which do not occur until after their death does not imply that the dead have interests which can be harmed. The argument that living individuals have an interest in what happens after death does not require that a person's interests survive their death. Young observes that it is simply a benefit for living people to know while they are alive, that their wishes will be respected upon death.[71] Again, under this view, it is presently living people who are acting as the subject of the interest and not the deceased person. The violation of a person's interest in what happens after their death is not going to harm the deceased, but it may result in harm to the interests of their surviving family members or indeed, result in harm to the general interests of the public to

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[66] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 212.
[67] Harris, 'Organ Procurement: Dead Interests, Living Needs', above n 7, at 132.
[68] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 9, at 316.
[69] Ibid, at 305.
[70] Ibid, at 316.
[71] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 214.

know that their own pre-mortem expressed wishes may not be respected after death.[72]

3.1.1.6. Concluding Remarks on Whether the Dead have Interests

The preceding sections have outlined the arguments in favour and against ascribing interests to the dead. I support the position that the dead do not have interests. Under Feinberg's classification of interests, the dead do not have the capacity to act as the subject of an interest which can be harmed.[73] Indeed, even under Kramer's account of interests, whose interpretation of interests does attribute interests to inanimate entities,[74] the subject of an interest still needs to be capable of experiencing a benefit or suffer a detriment and this is not possible for a corpse. Nevertheless, living people are capable of acting as the subjects of interests and I accept that presently living people can form critical interests which pertain to affairs that will occur after they have died. I contend that disrespecting the expressed pre-mortem wishes of the dead can harm the present interests of the living.[75] Going against the wishes of the dead will not harm the deceased. However, it could harm the interests of still living people to learn that their own expressed wishes may not be respected when they die.[76]

While it is not my position that the dead can be harmed, I acknowledge that there is some support in the literature for this view. Thus, I deem it necessary to examine the potential interests that the deceased could have in both posthumous gamete retrieval and in posthumous conception and to evaluate whether the dead could be harmed by these practices. Ascertaining whether the dead are harmed by posthumous conception is necessary to determine whether posthumous conception should be regulated in Ireland based on the harm principle.

[72] Ibid, at 213.
[73] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 57.
[74] Kramer, 'Do Animals and Dead People Have Legal Rights?', above n 16, at 33.
[75] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 213.
[76] Callahan, 'On Harming the Dead', above n 5, at 350-351; Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35, at 535.

3.1.2. Interests of the Deceased in Posthumous Conception

On the view that the dead have interests, the use of the deceased's gametes in posthumous conception will implicate any interests that the deceased has in reproducing after death.[77] Some commentators have suggested that because decisions about reproduction are so significant to the person during their lifetime, it cannot be said that a person's procreative interests will cease upon their death.[78] As discussed in Chapter Two, procreation is widely perceived as valuable and under Dworkins account of 'critical interests', it is certainly possible for a person's interest in reproduction to be so significant that it would form part of that person's idea of what constitutes an overall good life.[79] Robertson argues that choosing whether or not to reproduce is a fundamental life decision which forms a significant aspect of a person's dignity and identity.[80] He claims that the dead can be said to have a continued interest in reproduction, so long as they attributed sufficient meaning to deciding the fate of their gametes or embryos after death, while they were still living.[81]

Procreation is valued for several reasons and the aspects of reproduction which motivate people to engage in the experience are discussed fully in Chapter Two.[82] The primary interests that people have in seeking to reproduce are to experience pregnancy and childbirth, to found and raise a family and to create a genetic link with future offspring.[83] In a posthumous context, however, Robertson notes that few of these reproductive interests are going to be present for the deceased.[84] The deceased will not gestate. Furthermore, the deceased is not going to be in a position

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[77] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 3, at 1.

[78] B. Bennet, 'Posthumous Reproduction and the Meanings of Autonomy (1999) 23(2) *Melbourne University Law Review* 13, at 13; Robertson, 'Posthumous Reproduction', above n 4, at 1031; K. Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying' (2006) *University of Chicago Legal Fourm* 289, at 300–301.

[79] Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 33, p. 201-202.

[80] Robertson, 'Posthumous Reproduction', above n 4, at 1029.

[81] Ibid, at 1031.

[82] A. Benshushan and J. Schenker, 'The Right to an Heir in the Era of Assisted Reproduction' (1998) 13(5) *Human Reproduction* 1407, at 1407; M. Quigley, 'A Right to Reproduce?' (2010) 24(8) *Bioethics* 403, at 405; J. Harris, 'Sex Selection and Regulated Hatred' (2005) 31 *Journal of Medical Ethics* 291, at 293.

[83] S. Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) 5(2) *Journal of Law and the Biosciences* 329, at 343.

[84] Robertson, 'Posthumous Reproduction', above n 4, at 1031.

where they can experience any of the positive aspects of pregnancy or childbirth.[85] Therefore, gestation is not an interest that a person will have in reproduction after death.

Likewise, a person does not have an interest in social parenthood after death. The deceased is not going to be in a position to play any role in raising the resulting child and none of the positive aspects of parenthood which motivate people to engage in reproduction are going to be present for a person after death.[86] The exclusive interest that a living person is going to have in reproducing after death will be in creating a genetic link with future offspring.[87] Thus, the sole value for a living person in posthumous conception will come down to the importance that they attributed to genetic continuity during the course of their lifetime.[88]
An interest in genetic continuity is widely perceived as a valuable interest,[89] and there are certainly aspects of genetic reproduction which could be meaningful for a living person even after death. Norten notes that the deceased may have had a desire to engage in genetic reproduction so as to perpetuate their genes onto future generations.[90] Some people even view genetic linkage as a way in which one can overcome mortality. People wish to extend themselves into the future by leaving a part of themselves in the world.[91] Furthermore, Simana observes that surnames can endure through genetic reproduction and the deceased may have desired to continue on a particular family line.[92] Perhaps the most significant interest for a person in genetic reproduction after death, however, arises in circumstances where the deceased's particular culture or heritage attributes significant value towards genetic continuity.[93] Lineage can play an important role in many religions and cultures and it may form a fundamental aspect of the deceased's heritage to

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[85] Ibid.
[86] Ibid, at 1031.
[87] Ibid, at 1031-1032.
[88] Ibid, at 1031.
[89] Harris, 'Sex Selection and Regulated Hatred', above n 82, at 293.
[90] F. Norten, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages' (1999) *New York University Law Review* 793, at 796.
[91] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 343.
[92] Ibid.
[93] Norten, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages', above n 90, at 796; See also, *In the Matter of Lee* (Deceased) *and Long* (Applicant) [2017] NZHC 3263.

maintain a chain of continuity.[94] Maddox argues that living people can have persisting or critical interests in having a genetic child who will be raised in accordance with their family's religious and cultural values, even after they have died.[95]

3.1.3. Potential Harms caused to the Deceased by Posthumous Conception

On the view that the dead have interests, there are several potential harms posed by posthumous conception to the interests of the deceased. Firstly, if the gametes were harvested from the deceased when they were in a comatose or PVS, prior to a clinical determination of cardiac or brain death, gamete retrieval can harm any interest that the deceased had in the treatment of their body while they were still living.[96] Alternatively, if the gametes are retrieved after death, the procedure can potentially harm any interest that the deceased has in the treatment of their corpse.[97] Furthermore, use of the deceased's gametes in posthumous conception could harm any interest the deceased had in avoiding reproduction after death.[98] This section outlines the potential harms which may be caused to the deceased by gamete retrieval and posthumous conception.

3.1.3.1. Interests of the Comatose or Dying Person in the Treatment of their Body

The gametes which are used in posthumous conception may have been retrieved from the body of the deceased while they were in a comatose or PVS.[99] Prior to a clinical determination of cardiac or brain stem death, a comatose or PVS patient is considered to be living and is capable of acting as the subject of an interest.[100] There are some writers who would argue that incapacitated patients such as those

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[94] Norten, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages', above n 90, at 796.
[95] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 3, at 7; *In the Matter of Lee* (Deceased) *and Long* (Applicant), above n 93.
[96] Smajdor, 'Perimortem Gamete Retrieval: Should We Worry about Consent?', above n 3, at 438.
[97] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 3, at 1.
[98] Robertson, 'Posthumous Reproduction', above n 4, at 1030-1031; Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 77.
[99] C.M. Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512, at 512.
[100] White, *Rights,* above n 19, p. 80.

in a coma or PVS are not capable of having interests and therefore cannot be harmed.[101] However, under Fienberg's classification of interests, anyone who can suffer a benefit or harm can act as the subject of an interest.[102] Thus, harvesting gametes from patients in these scenarios may implicate any interest that the patient had in the treatment of their body whilst they were alive.[103]

While living, people have an interest in bodily integrity. Any invasion of the human body without consent will be recognised and legally protected by privacy rights and by the criminal law.[104] In a medical context, consent from a patient is a necessity when proceeding with a procedure such as gamete retrieval. However, when a patient is in a comatose or PVS, their means of communicating and consenting to a medical procedure is compromised. In the absence of consent, physicians may only proceed with treatment if it is a medical necessity to preserve the life of the patient, or if it is deemed to be in the particular patients best interests.[105]

The retrieval of gametes from a patient in a comatose or PVS will provide them with no direct personal benefit. The retrieval will not improve a dying patients condition. Furthermore, if death is imminent, it is unlikely that the patient will ever recover and personally reap the benefits of learning that their fertility has been retained by the procedure.[106] For these reasons, Peart questions whether retrieving gametes from a comatose or PVS patient for the purposes of posthumous conception could ever be viewed as being in their best interests. Indeed, she

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[101] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10.
[102] B. Young, W. Blume and A. Lynch, 'Brain Death and the Persistent Vegetative State: Similarities and Contrasts' (1989) 16(4) *Canadian Journal of Neurological Sciences* 388, at 388-393.
[103] Smajdor, 'Perimortem Gamete Retrieval: Should We Worry about Consent?', above n 3, at 438.
[104] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 202.
[105] Smajdor, 'Perimortem Gamete Retrieval: Should We Worry about Consent?', above n 3, at 439; S. McClean, 'Consent and the Law: Review of the Current Provisions in the Human Fertilisation and Embryology Act for the UK Health Ministers' (1997) 3(6) *Human Reproduction Update* 593, at 605.
[106] This argument was put forward by the New South Wales Supreme Court in the case of *Chapman v. South Eastern Sydney Local Health District* [2018] NSWSC 1231; D.A. Ohl, J. Park, C. Cohen, K. Goodman, A.C. Menge, 'Procreation after Death or Mental Incompetence: Medical Advance or Technology Gone Awry?' (1996) 66(6) *Fertility and Sterility* 889.

suggests that the physical invasiveness of the procedure could even harm the patient.[107]

On the other hand, Smadjor observes that if one takes a broader view of interests, than simply the patient's best medical interests, harvesting gametes from a dying patient could be deemed as being in their interests.[108] For example, under Dworkin's description of 'critical interests' discussed earlier, the patient's own personal beliefs and values, and the surrounding circumstances of the case may indicate that it is in their best interests to harvest their gametes. If there is evidence that the patient or the couple had contemplated posthumous conception, or if the patient had attributed significant importance to reproducing and maintaining a genetic line, the procedure could be viewed as being in their interests, given that it would help contribute towards their idea of what makes an overall good life.[109] It could even be argued that it is in the interests of a dying patient to adhere to the wishes of their spouse/partner or their extended family members in respect of the retrieval.[110]

When we accommodate broader interests, determining whether it is in a dying patients interests to harvest their gametes for posthumous conception will be highly subjective. Smadjor notes that in some cases, proceeding with gamete retrieval could certainly be viewed as furthering a patient's interests and in some cases, it will not.[111] For example, if there is evidence that the patient has expressly objected to such a procedure, proceeding with the retrieval could be viewed as harming the interests of the patient in what happens to their body. Young observes that living people care about what happens to their bodies towards the end of life, and after death because the human body is so central to our concept of self and our autonomy while we are alive and competent.[112] The types of interests that living people have

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[107] N. Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, at 743.
[108] Smajdor, 'Perimortem Gamete Retrieval: Should We Worry about Consent?', above n 3, at 439.
[109] This was the view of the UK's Court of Protection in *Y. v. NHS Healthcare Trust* [2018] EWCOP 18; Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 3, at 7.
[110] This point was also raised by the court in *Y. v. NHS Healthcare Trust*, above n 109; C.M. Rothman, 'Live Sperm, Dead Bodies' (1999) 20(4) *Journal of Andrology* 456, at 456.
[111] Smajdor, 'Perimortem Gamete Retrieval: Should We Worry about Consent?', above n 3, at 439.
[112] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 211-212, and 214.

in respect of what happens to their body towards the end of their life will often represent that persons beliefs or judgements as to what constitutes as an overall good life.[113] Thus, they would be classed as critical interests by Dworkin's distinction.[114] Proceeding with the retrieval of gametes from a dying patient against their expressed wishes would harm the interests of the patient in what happens to their body.[115] Furthermore, it could also harm the interests of the still living in general, to know that their own wishes in respect of what happens to their bodies may not be upheld should they become incapacitated.[116]

3.1.3.2. Interests of the Deceased in the Treatment of their Corpse

The gametes may also be harvested from the body of a person following a medical determination of cardiac or brain stem death. In my view, after a clinical determination of death, a person is no longer capable of acting as the subject of an interest.[117] However, on the view that the dead do have interests, gamete retrieval can implicate any interests of the deceased in the treatment of their corpse.

Although the human body is the physical embodiment of the person during their lifetime, Jones notes that after death, there is a clear distinction between the persona of the person who lived and the human corpse which remains.[118] Rao states that dead bodies are 'divorced' from the previously living person and can no longer be protected under rights of privacy.[119] While an assault on the human body of a living person will violate that person's rights to bodily integrity, the same cannot be said for a corpse.[120] A corpse does not have an interest in physical integrity.[121] Thus,

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[113] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 9, at 305.
[114] Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 33, p. 201-202.
[115] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 107.
[116] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 9.
[117] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 57.
[118] I. Jones, 'A Grave Offence: Corpse Desecration and the Criminal Law' (2017) 37(4) *Legal Studies* 599, at 600 and 606.
[119] R. Rao, 'Property, Privacy, and the Human Body' (2000) 80 *Boston University Law Review* 359, at 448-449.
[120] Ibid.
[121] Jones, 'A Grave Offence: Corpse Desecration and the Criminal Law', above n 118, at 606; J. Berger, F. Rosner and E. Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients' (2002) 17 *Journal of General Internal Medicine* 774, at 774.

Harris claims that the physical remains of a person cannot be harmed in the sense of the harm principle. A corpse is not capable of experiencing a benefit or suffering a detriment.[122] A corpse can only be physically damaged.[123]

As such, Rao suggests that if the dead do have interests in their corpse then this interest must derive from another source of law, namely property.[124] However, the claim that the dead have property interests in their corpse is inconsistent with the general principle of property law which provides that people do not have property rights in their bodies.[125] As will be discussed fully in Chapter Six, the position at common law is that there is no property in the human body.[126] This is referred to as the 'no property' rule and applies equally to both living and deceased bodies.[127] Based on this common law principle, the deceased will not have any property interest in their corpse or in any of its parts.[128]

Although the dead do not have interests in the treatment of their corpse, living people can have interests in what will happen to their bodies after they have died.[129] Young observes that the human corpse is closely connected to our living bodies. Indeed, as noted earlier in respect of the treatment of bodies towards the end of life, the types of interests that living people have in respect of what happens to their body after death will represent that person's beliefs or judgements as to what

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[122] Harris, 'Organ Procurement: Dead Interests, Living Needs', above n 7, at 132.
[123] Jones, 'A Grave Offence: Corpse Desecration and the Criminal Law', above n 118, at 606.
[124] The legal status of the human body remains contested in the literature. However, Rao notes that in general, interests in the human body are broadly perceived as falling under the classification of either privacy or property interests; Rao, 'Property, Privacy and the Human Body', above n 119, at 449.
[125] M. Quigley, *Self-Ownership, Property Rights, and the Human Body: A Legal and Philosophical Analysis* (Cambridge: Cambridge University Press, 2018), p. 55; M. Quigley, 'Property in Human Biomaterials: Separating Persons and Things' (2012) 32 *Oxford Journal of Legal Studies* 659, at 660.
[126] Ibid.
[127] H. Conway, *The Law and the Dead* (New York: Routledge, 2016), p. 2-3; The origins and development of the common law 'no property' rule are discussed fully in Chapter Six of this thesis.
[128] Consequently, Conway notes that the body of a deceased person will not form part of their estate when they die, and they will be unable to direct the disposition of their corpse by will or otherwise; *Williams v. Williams* [1882] 20 ChD 659; H. Conway, 'Williams v Williams (1882): Succession Law Rules and the Fate of the Dead', in B. Sloan (ed.), *Landmark Cases in Succession Law* (Oxford: Hart Publishing, 2019), p. 249-264; Sperling, *Posthumous Interests*, above n 19, p. 88
[129] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 214.

constitutes as an overall good life, and would be classed as a critical interest.[130] Of course, the deceased will not be in a position to experience whether or not the interests that they had in respect of the treatment of their corpse have been followed, or if they have been ignored.[131] However, Brazier and McGuinness have argued that it is necessary for us to respect any expressed wishes of the dead in relation to these post-mortem matters as this will honour and respect the present interests of the still living.[132]

3.1.3.3. Interests in Avoiding Reproduction After Death

The deceased may have had an interest in seeking to avoid reproduction after death. There are many reasons why people seek to avoid procreation and these are discussed fully in Chapter Two.[133] These interests ordinarily include justifications such as unwanted gestational, legal and social parenthood.[134] However, as with the interests in seeking to reproduce after death, Robertson notes that few of the interests in seeking to avoid reproduction are present for a person seeking to avoid reproduction after death.[135]

The deceased will not have any interests in unwanted gestation. The deceased will not have to endure any of the physical burdens or demands of pregnancy and childbirth.[136] In addition, the deceased will not have any experiential interests in unwanted legal and/or social parenthood. As discussed in Chapter Two, being regarded as a child's legal parent will have financial implications in terms of supporting the child,[137] and ultimately in terms of succession.[138] Additionally, social parenthood can be emotionally burdensome, physically demanding and time

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[130] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 9, at 305; Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 33, p. 201-202.
[131] Harris, 'Organ Procurement: Dead Interests, Living Needs', above n 7, at 132.
[132] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 9, at 316.
[133] E. Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy' (1986) *Duke Law Journal* 806, at 827.
[134] Robertson, 'Posthumous Reproduction', above n 4, at 1029.
[135] Ibid.
[136] Ibid, at 1032.
[137] G. Cohen, 'The Right not to be a Genetic Parent' (2008) 81 *Southern California Law Review* 1115, at 1127.
[138] N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) *The Conveyancer and Property Lawyer* 1, at 5.

consuming.[139] However, the deceased will never know of the child born and they will never be in a position to bear any of the responsibility of acting as the child's legal or social parent.[140]

Lastly, the deceased will not experience any interests in unwanted genetic parenthood. In Chapter Two, I outlined the reasons why people seek to avoid genetic reproduction, even in circumstances where they are otherwise exempt from gestational, social and legal parenthood.[141] This can be due to the fact that genetic parents are frequently considered to be the child's parent by third parties and by the child.[142] Moreover, Cohen notes that genetic parents may even perceive themselves to be the parent of the child and feel a sense of responsibility towards the child and/or guilt for not playing a role in the child's upbringing or having a relationship with them.[143] However, the deceased will not experience any of the interests in seeking to avoid genetic reproduction. The deceased will never know of the child born and will never experience any harm by the existence of an unwanted genetically related child.[144]

Certainly, a living person may have a legitimate interest in avoiding posthumous conception on the basis that they would not want to bring a child into the world in a situation where they will not be able to play a role in rearing.[145] Furthermore, a living person may have an interest in avoiding posthumous conception due to the effect that a posthumously born child might have on their estate.[146] These interests aside, however, the primary interests that people have in wanting to avoid parenthood are not going to be present for a living person in seeking to avoid posthumous conception. Robertson maintains that a person's interests in seeking to reproduce and/or avoid reproducing after death are highly 'attenuated' in comparison to those of a living person.[147] Given the absence of key aspects of

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[139] O. O'Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002), p. 82.
[140] Robertson, 'Posthumous Reproduction', above n 4, at 1032.
[141] Cohen, 'The Right not to be a Genetic Parent', above n 137, at 1135.
[142] Ibid, at 1136.
[143] Ibid, at 1137.
[144] Robertson, 'Posthumous Reproduction', above n 4, at 1032.
[145] Ibid.
[146] Ibid.
[147] Ibid.

reproduction, he claims that posthumous conception is a circumscribed version of the reproductive experience for the deceased.[148]

3.1.4. Is the Harm to the Deceased Sufficient to Restrict Access to Posthumous Conception?

I contend that the interests of the deceased or dying patient will not be harmed by gamete retrieval and/or posthumous conception.

Firstly, in the case of a comatose or PVS patient, I argue that if it is deemed to be in a patient's best interests to harvest their gametes for posthumous conception, then the interests of that patient in the treatment of their bodies will not be harmed by the procedure. As noted in Chapter Two, I interpret 'harm' as a setback to a person's interests.[149] Where a physician has deemed the retrieval to be in the best interests of the particular patient, in my view, the physical invasiveness of the gamete retrieval procedure is justified, and cannot be viewed as a setback to their interests.

Secondly, I argue in line with the view that the dead are not the types of beings who can be the subject of interests.[150] Thus, following a clinical determination of cardiac or brain stem death, my position is that that the dead cannot be harmed in the sense of the harm principle. Indeed, even on the view that the dead do have interests, I maintain that the potential harms caused to the deceased by gamete retrieval are not sufficient to restrict the practice in Ireland. I contend that the dead do not have an interest in the treatment of their corpse. After a medical determination of cardiac or brain stem death, the deceased will no longer have any privacy interests which can be harmed. In addition, the deceased will not have any property interests in their corpse.[151] In my view, a corpse does not have an interest

[148] Ibid.
[149] See discussion in Chapter Two, Section 2.4.1.
[150] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 57.
[151] Rao, 'Property, Privacy and the Human Body', above n 119, at 448-449; Jones, 'A Grave Offence: Corpse Desecration and the Criminal Law', above n 118, at 606; *Williams v. Williams*, above n 128.

in physical integrity and can only be physically damaged.[152] I conclude that the interests of the deceased in the treatment of their corpse will not be harmed by the invasive procedure of posthumous gamete retrieval.

Despite this, interfering with the body of a dying or deceased patient can affect the critical interests of still living people in what happens to their bodies towards the end of their life and after death.[153] Therefore, if the dying patient or deceased has expressed views regarding the treatment of their body which would indicate that they would not have been content to have their gametes harvested, then these views should be respected. It is my contention that the expressed wishes of the living and of the dead in respect of the treatment of their bodies should be adhered to, as it may result in harm to the interests of the still living if they are not.[154] So long as proceeding with gamete retrieval does not conflict with any expressed wishes, then it is not my view that the practice of gamete retrieval can harm the deceased or dying patient.

Furthermore, I contend that that the deceased will not be harmed if their gametes are used in posthumous conception. The deceased will not have any interests in seeking to gestate or in avoiding gestation after death. Furthermore, they will not have any interests in raising a family or in avoiding the burdens which parenthood entails.[155] Although one could accept that the deceased may have had an interest in genetic reproduction while they were living,[156] without the capacity to rear the resulting child, this interest is going to be significantly weaker than it would be if the deceased was still alive.[157] Moreover, the deceased will never know or learn that his interest in genetic reproduction has come to fruition or if the interest has been frustrated. Certainly, his surviving family will know, and they may be

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[152] Jones, 'A Grave Offence: Corpse Desecration and the Criminal Law', above n 118, at 606; Berger, Rosner and Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients', above n 121, at 774.

[153] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 214.

[154] Callahan, 'On Harming the Dead', above n 5, at 350-351; Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35, at 535.

[155] Robertson, 'Posthumous Reproduction', above n 4, at 1032.

[156] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 343.

[157] B. Steinbock, 'A Philosopher Looks at Assisted Reproduction' (1995) 12(8) *Journal of Assisted Reproduction and Genetics* 543, at 548; Scott, 'Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy', above n 133, at 829.

comforted by the knowledge that the deceased's life was more meaningful or successful on this basis.[158] However, these are the present interests of the surviving family which are being affected by this and not the interests of the dead person. The deceased is going to remain unaffected either way.[159]

Likewise, even if we accept that the deceased had an interest in avoiding posthumous conception while living, either because the deceased would be unable to play a part in the child's life, or on the basis of the succession implications of posthumously born children,[160] the deceased is never going to have knowledge of the fact that they are not playing a role in rearing the child and they will never experience the financial burden of the posthumously born child on their estate. Nonetheless, I do support the view that living people have interests in what happens to them after death. Thus, if there is evidence that the deceased does not wish to reproduce after death, or alternatively, if the deceased has expressed views that they seek to reproduce posthumously, these views should be acknowledged (subject to these wishes not imposing unwanted gestation or parenthood on the deceased's surviving partner).[161]

In instances where the deceased has not expressed any views against posthumous conception, I conclude that the interests of the deceased will not be harmed by either posthumous gamete retrieval or by posthumous conception.[162] Therefore, I contend that posthumous conception should not be restricted in Ireland on the basis of harm caused to the deceased.

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[158] As noted, Dworkin is of the view that the accomplishment of a person's goals after their death means that their life was more successful: Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, above n 33, p. 33.
[159] Callahan, 'On Harming the Dead', above n 5, at 350.
[160] Robertson, 'Posthumous Reproduction', above n 4, at 1032.
[161] Simana notes that the deceased's interest in posthumous conception should only be fulfilled when the act is also in the interest of living individuals. She states that it is necessary to prevent a situation in which the deceased 'controls' the lives of the living contrary to their wishes; Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 342; Robertson, 'Posthumous Reproduction', above n 4, at 1033.
[162] Robertson, 'Posthumous Reproduction', above n 4, at 1033.

3.2. The Surviving Partner

Another key stakeholder in posthumous conception is the deceased's surviving partner who seeks to use the deceased's gametes in assisted conception to conceive a child. This section identifies and discusses the potential interests of the surviving partner in posthumous conception and the potential harms which can arise for them by virtue of permitting the practice in Ireland.

3.2.1. Interests of the Surviving Partner in Posthumous Conception

The surviving partner has a clear interest in reproducing. As discussed fully in Chapter Two and reiterated above, the desire for parenthood is strong for many people and there are several reasons why people seek to reproduce. These include well-known procreative interests such as interests in gestation, social parenthood and genetic continuity.[163]

Unlike with the deceased however, the surviving partner can experience the ordinary procreative interests such as experiencing pregnancy and childbirth, raising a family and maintaining a genetic line. If the surviving partner is female, they will remain in a position where they can gestate and experience pregnancy. Furthermore, irrespective of the surviving partner's gender, they will be able to pass on their genes and maintain a genetic line. Moreover, they can establish a family and play an active role in raising the resulting child.

Badahur and Parker observe that these procreative interests will not necessarily cease for the surviving partner simply because the deceased has died.[164] The interests which are ordinarily associated with reproduction remain present for the surviving partner in posthumous conception, even though their partner is no longer around.[165] Furthermore, alongside routine procreative interests, there are also several independent factors which might influence the surviving partner's desire to reproduce posthumously.

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[163] These procreative interests are discussed fully in Chapter Two, Section 2.3.3.

[164] G. Badahur, 'Death and Conception' (2002) 17(10) *Human Reproduction* 2769, at 2772; M. Parker, 'Response to Orr and Siegler—Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception' (2004) 30 *Journal of Medical Ethics* 389, at 390.

[165] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 343.

Reproduction is frequently perceived as a way in which a couple can affirm their mutual love and respect. The surviving partner may seek to reproduce with the deceased's gametes in order to express their love for their recently deceased partner.[166] Katz and Hashiloni-Dolev note that for some surviving partners, posthumous conception is viewed as a natural extension of their bond with their deceased partner. Thus, they might specifically desire that their deceased partner's genetic material is used when they reproduce.[167] Badahur makes a similar point and observes that in the case of *Hecht*,[168] the deceased specifically bequeathed his gametes to his surviving partner to use in posthumous conception. Thus, the very act of attempting to reproduce posthumously would have a special meaning for the couple.[169]

Young observes that placing restrictions on the availability of posthumous conception limits the surviving partner's ability to reproduce with the partner of their choice.[170] Of course, Young admits that people have 'little (if any) legitimate interest in reproducing with *whomever* they want'.[171] For example, Cohen explains that although Brad Pitt's adoring fans may wish to genetically reproduce with him specifically, people have no right to force others to reproduce with them.[172] However, Young distinguishes the surviving partner's interest in reproducing with the deceased from the 'Brad Pitt' scenario, based on the prior existing relationship between the deceased and the surviving partner.[173] Young states that the relationship between the parties may have generated an expectation of procreation. Thus, there are grounds for the surviving partner's interest in procreating with the deceased specifically.[174] Indeed, Simana adds that this claim is more compelling if it transpires that the surviving partner has no alternative way of genetically reproducing.[175] Parker makes a similar point and argues that couples often have a

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[166] Badahur, 'Death and Conception', above n 164, at 2772.
[167] O. Katz and Y. Hashiloni-Dolev, '(Un) Natural Grief: Novelty, Tradition and Naturalization in Israeli Discourse on Posthumous Reproduction' (2019) 22(3) *Medical Anthropology Quarterly* 345, at 356.
[168] *Hecht v. Superior Court of Los Angeles County* (1993) 16 Cal.App.4th 836.
[169] Badahur, 'Death and Conception', above n 164, at 2270.
[170] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 70.
[171] Ibid, at 79.
[172] Cohen, 'The Right not to be a Genetic Parent', above n 124, at 1156.
[173] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 81.
[174] Ibid.
[175] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 349.

collective intention to reproduce. He claims that the desire to reproduce will survive in the mind of the deceased's surviving partner and that 'there remains a live desire which can be satisfied' even when one of the parties has died.[176]

The desire of a surviving partner to reproduce specifically with their deceased partner can be seen in the famous English case of *R v. Human Fertilisation and Embryology Authority ex parte Blood.*[177] Here, the applicant Diane Blood sought to use her deceased husband's preserved sperm in posthumous conception. She admitted to the court that she could have used an anonymous sperm donor to conceive a child if she wished. However, the significance of posthumous conception for her was that it allowed her to use her deceased husband's genetic material. It was important to her that her late husband's genes contributed to the genetic makeup of her resulting child or children.[178] Additionally, the surviving partner may seek to use their deceased partners genetic material so as to produce a genetic sibling for an already existing child.[179]

Furthermore, it has been suggested that posthumous conception can help the surviving partner in the grieving process by providing them with a living memory of the deceased.[180] Shuster observes that posthumous conception permits people to 'transcend death' and that this can be a source of comfort for the deceased's surviving partner.[181] Similarly, Simpson describes posthumous conception as a

[176] Parker, 'Response to Orr and Siegler—Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception', above n 164, at 390.
[177] *R v. Human Fertilisation and Embryology Authority ex parte Blood* [1997] EWCA Civ 946.
[178] Badahur, 'Death and Conception', above n 164, at 2772.
[179] This was the case in the New Zealand High Court case of *Re Lee (Long) deceased,* above n 93, para 8. The applicant in this case was already pregnant with the deceased's child at the time of her application. However, she still sought the possession of sperm samples which had been retrieved from her late husband so that she could use her husband's sperm in the future to produce a genetic sibling for their unborn child: See also, A.K. Lawson, J.E. Zweifel and S.C. Klock, 'Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction' (2016) 21(5) *The European Journal of Contraception and Reproductive Health Care* 339, at 340.
[180] This was alluded to by the applicant in the New South Wales Supreme Court case of *MAW v. Western Sydney Area Health Service* [2000] NSWSC 358, para. 20. Here, the applicant stated to the court in her affidavit that posthumous conception would give her the opportunity to keep part of her deceased husband with her.
[181] E. Shuster, 'Posthumous Gift of Life: The World According to Kane' (1999) 15 *Journal of Contemporary Health Law and Policy* 401, at 410.

manner in which some bad deaths can be made ‘good’ to an extent, by alleviating some of the grief for the surviving partner.[182]

Other authors claim that surviving partners might even be motivated by financial greed and the desire to obtain the benefits of the deceased’s inheritance.[183] Lastly, depending on the stage in which the surviving partner is at in their life, reproducing with the gametes of their deceased partner may be their only reasonable chance of genetically reproducing. This is particularly the case with female surviving partners whose ability to reproduce will begin to decline as they age.[184]

3.2.2. Potential Harms to the Surviving Partner Caused by Posthumous Conception

Irrespective of the surviving partner’s interest in posthumous conception, there are still several potential harms which can arise for them. First, it is suggested that posthumous conception can pose several risks to the psychological wellbeing of the surviving partner.[185] The primary concern is that posthumous conception can interfere with the grieving process. It is argued that reproducing posthumously can prevent the surviving partner from accepting the death of their loved one and stop them from moving on with their life.[186]

This concern was raised in the Queensland Supreme Court case of *Re Gray*.[187] Here, Chesterman J. concluded that the applicant’s request for the removal of sperm from her deceased husband was not in her best interests. The judge stated that the applicant was naturally suffering from grief and shock following the sudden death of her husband. Given the circumstances of her application, the court held that the applicant’s decision was not the result of rational and careful

[182] B. Simpson, ‘Making “Bad” Deaths “Good”: The Kinship Consequences of Posthumous Conception’ (2001) 7(1) *Journal of the Royal Anthropology Institute* 1, at 1-2.
[183] Lawson, Zweifel and Klock, ‘Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction’, above n 179, at 340; R. Landau, ‘Planned Orphanhood’ (1999) 49 *Social Science and Medicine* 185.
[184] K. Tremellen and J. Savulescu, ‘A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception’ (2015) 30 *Reproductive BioMedicine Online* 6, at 9.
[185] Lawson, Zweifel and Klock, ‘Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction’, above n 179, at 341.
[186] Tremellen and Savulescu, ‘A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception’, above n 184, at 9.
[187] *In the Matter of Gray* [2000] QSC 390.

deliberation.[188] Similar concerns were also raised by the Queensland Supreme Court in *Baker v. Queensland.*[189] Here, Muir J. noted that the existence of a posthumously born child would prevent the applicant from starting fresh with her life. In addition, the court raised concerns regarding the impact that a new-born child would have on the applicant's social life and her ability to enter into new relationships.[190]

Landau claims that when surviving partners seek out posthumous conception treatment they refuse to accept the finality of their partner's death. In fact, Landau claims that surviving partners seem to hold onto two conflicting wishes: 'the desire for continuity as though nothing has happened and the desire to memorialize the deceased'.[191] Furthermore, while in the process of grieving their recently deceased partner, the surviving partner is also at risk of added distress should extended family members contest the use of the deceased's gametes in posthumous conception.[192]

Alternatively, Sheuster claims that surviving partners might even feel compelled to reproduce with the deceased's gametes if they have been bequeathed by the deceased to them, and further obliged to reproduce with the deceased's gametes if this pressure comes from the deceased's surviving family.[193] Landau and Shalev also raise this concern. In fact, both authors claim that the technology of posthumous conception threatens the autonomy of women by imposing a 'moral obligation' on surviving widows to reproduce.[194] Furthermore, Lawson and others note that female surviving partners in particular run the risk of undergoing further loss in circumstances where they experience complications with conceiving or carrying the pregnancy to term.[195] Lastly, there has been little research conducted

[188] Ibid, para. 23(b).
[189] *Baker v. Queensland* [2003] QSC 2.
[190] Ibid, para. 7.
[191] Landau, 'Planned Orphanhood', above n 183, at 187.
[192] *Hecht v. Superior Court of Los Angeles County*, above n 168.
[193] Shuster, 'Posthumous Gift of Life: The World According to Kane', above n 181.
[194] Y. Hashiloni-Dolev and Z. Triger, 'The Invention of the Extended Family of Choice: The Rise and Fall (to date) of Posthumous Grandparenthood in Israel' (2020) 39(3) *New Genetics and Society* 250, at 252; C. Shalev, 'Posthumous Insemination: May He Rest in Peace' (2002) 27 *Medical Law* 96; R. Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique' (2004)19 *Human Reproduction* 1952.
[195] Lawson, Zweifel and Klock, 'Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction', above n 179, at 341.

on the emotional effects of raising a posthumously born child who is a living reminder of the deceased for the surviving partner[196] and it has been argued that the surviving partner is likely to suffer financial hardship as a result of raising the child alone.[197]

3.2.3. Is the Harm to the Surviving Partner Sufficient to Restrict Access to Posthumous Conception?

I contend that the potential harms caused by posthumous conception to the surviving partner are not sufficient to restrict the practice in Ireland. Firstly, it is possible to prevent many of the potential harms to the surviving partner entirely by ensuring that the surviving partner has undergone professional counselling on the issue of posthumous conception and has taken adequate time following the deceased's death before treatment is provided.[198] As outlined in Chapter One, this is the approach that the Irish Government has proposed in the AHR Bill. The Bill provides that surviving partners receive appropriate counselling on posthumous conception.[199] A waiting period of at least one year following the deceased's death must also have passed before treatment can be provided.[200]

Of course, it must be noted that grief is complex and subjective. The process of mourning will vary depending on the particular person and cannot be rigidly defined by applying a blanket 'standard period of mourning' for all.[201] Kübler-Ross and Kessler note that grief is not time bound. In fact, they suggest that grief can last forever. They claim that people do not 'get over' the loss of a loved one, but rather, they learn to move on with their lives over time.[202] The authors' do suggest, however, that is important for people to take some time following the death of a

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[196] Ibid.

[197] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 9.

[198] G. Badahur, 'Posthumous Assisted Reproduction (PAR): Cancer patients, Potential Cases, Counselling and Consent' (1996) 11(12) *Human Reproduction* 2573, at 2573.

[199] The AHR Bill 2017, Part 4, Head 24, s 1(c).

[200] Ibid, Part 4, Head 24, s 1(d).

[201] T.A. Rando, *Grief, Dying, and Death: Clinical Interventions for Caregivers* (Michigan: Research Press Company, 1984), p. 115; H. Conway and J. Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34(3) *The University of New South Wales Law Journal* 860, at 865.

[202] E. Kübler-Ross and D. Kessler, *On Grief and Grieving: Finding the Meaning of Grief Through the Five Stages of Loss* (New York: Simon and Schuster, 2005), p. 230.

loved one to process and heal from any intense feelings of sadness, anger and emotional pain that can manifest.[203] On this basis, a standard period of mourning does not act to ensure that the surviving partner has 'overcome their grief' before proceeding with posthumous conception. However, it does provide the surviving partner with a period of reflection, and can prevent them from making an impulsive decision in response to their grief. This can be evidenced by a research study which was carried out with the purpose of assessing the desire to conceive posthumously. The findings demonstrated that after undergoing a standard mourning period of six months to one year, over half of the surviving partners who initially sought out posthumous conception did not follow up with treatment.[204]

As will be discussed fully in Chapter Five, legislation which requires the surviving partner to receive counselling on the issue of posthumous conception and to be allowed a period of mourning prior to undergoing treatment is not uncommon. Counselling provisions can be seen in the Australian State of Victoria's Assisted Reproductive Treatment Act 2008 (VIC).[205] It is also recommended at a national level by the Australian National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) that surviving partners be allowed a standard period of mourning prior to using the deceased's gametes in posthumous conception.[206] Regulating in this way would certainly help minimise any potential harm caused to the deceased's surviving partner.

Secondly, I contend that arguments which seek to restrict posthumous conception based on the potential harm caused to the surviving partner are paternalistic in nature. They attempt to restrict the surviving partner from acting in ways which may result in harm to them personally.[207] However, as I have argued in the Introduction of this thesis and in Chapter Two, I have adopted a liberal position when it comes to regulating personal behaviour and the liberal position does not

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[203] Ibid.
[204] Badahur, 'Posthumous Assisted Reproduction (PAR): Cancer patients, Potential Cases, Counselling and Consent', above n 198, at 2573.
[205] Assisted Reproductive Treatment Act 2008 (VIC), s 48.
[206] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (NHMRC, 2017), para. 8.23.1.
[207] J. Feinberg, 'Legal Paternalism' (1971) 1(1) *Canadian Journal of Philosophy* 105, at 105.

accept 'harm to self' as a sufficient liberty limiting principle.[208] In the vast majority of posthumous conception cases, it is the surviving partner themselves who is seeking to reproduce and on a liberal view, to justify restricting the surviving partner's procreative autonomy, it must be shown that there is a clear and sufficient harm caused to the interests of other parties.[209] The potential harm which may result for the surviving partner due to posthumous conception is not evidence of sufficient harm to the interests of *other parties*. Therefore, I contend that restricting posthumous conception in Ireland on the basis of harm caused to the deceased's surviving partner is not justifiable.

3.3. Extended Family Members

Alongside the surviving partner, the deceased can also potentially be survived by their parents, siblings and/or any existing children. This section identifies and discusses the interests and harms caused to the extended family members by posthumous conception. Of course, the interests and potential harms caused to the deceased's surviving family will vary in strength depending on their relationship to the deceased. However, the general interests advanced in the literature for extended family members include any interest that the extended family might have in becoming a genetic relative of the posthumously born child, the impact that the resulting child might have on their existing family structure and rights of inheritance, and any interest that the extended family members might have in the treatment of their deceased relatives body.

3.3.1. Interests of the Extended Family in Posthumous Conception

As a result of posthumous conception, the deceased's extended family members will automatically become genetic relatives of the resulting child. Therefore, the surviving family, particularly the deceased's surviving parents, may have an interest in posthumous conception so as to maintain a genetic bloodline or to ensure the continuation of a family name.[210] Simana observes that the extended family's interest in posthumous conception reflects, first and foremost, their interest in

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[208] Feinberg, *The Moral Limits of the Criminal Law, vol 1: Harm to Others*, above n 5, p. 14-15.
[209] J.S. Mill, *On Liberty* (Auckland: The Floating Press, 2009), p. 18.
[210] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 81.

realising their deceased relative's interest in genetic continuity. However, it also reflects the extended family's own interest in the continuation of the genetic bloodline.[211] This interest in ensuring the continuation of the family's genetic line will of course, vary in strength depending on the particular family's own cultural values. Maddox notes that the deceased's cultural beliefs (and those of their family) will contribute to the extended family's interest in maintaining a genetic line.[212] Indeed, this occurred in the New Zealand High Court case of *Re Lee (Long) deceased*,[213] where the surviving partner's application for posthumous sperm retrieval was fully supported by the deceased's surviving parents and extended family whose traditional ethnic values favoured the continuation of the family bloodline.[214]

However, the extended family's interest in maintaining a genetic line is not solely reserved to cases where the deceased's cultural beliefs favour genetic reproduction. Affdal and Ravitsky put forward the argument that genetic continuity is in the interest of all human beings. Posthumous conception allows extended family members to realise the interests of their deceased relative in leaving behind a genetic trace irrespective of culture.[215]

Additionally, the deceased's surviving family could have an interest in having a relationship with the posthumously born child, either by experiencing grandparenthood, or being an aunt, uncle, sibling etc.[216] In fact, there have been several recent reports of surviving parents applying to the courts seeking to use their deceased children's gametes in posthumous conception to fulfil their desire of becoming grandparents and raising a genetic grandchild.[217] Young notes that

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[211] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 350.

[212] N. Maddox, 'Consent and The Regulation of Posthumous Conception' (2019), available at < https://mural.maynoothuniversity.ie/10930/>, p. 16; N. Maddox, 'Retrieval and Use of Sperm after Death: In the Matter of Lee (Deceased) and Long (Applicant) [2017] NZHC 3263' (2018) 15(2) *Otago Law Review* 303.

[213] *Re Lee (Long) deceased,* above n 93.

[214] Ibid, paras. 6 and 10.

[215] A. Affdal and V. Ravitsky, 'Parents' Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions' (2019) 33(1) *Bioethics* 82, at 86.

[216] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 81.

[217] *R (on the application of Mr. & Mrs. M) v. Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611; *Petithory Lanzmann v. France*, App. No. 23038/19 (ECtHR, 12 November 2019); See also: G. Everett, 'Woman Uses Dead Son's Sperm for IVF Grandchildren' (Bionews, 19 February 2018), available at < https://www.bionews.org.uk/page_96375 >; G. Nofar-Yakovi, 'Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law' (2019)

surviving parents in particular, not only have a critical interest in becoming grandparents, but also have an experiential interest in experiencing grandparenthood.[218] Simana states that when children pre-decease their parents it goes against the natural order. It takes away the parent's opportunity to watch their child grow into adulthood and to reap the rewards of being grandparents. Simana claims that posthumous conception keeps the possibility of experiencing the joys of grandparenthood intact for the deceased's surviving parents.[219] Furthermore, Affdal and Ravitsky claim that the interests of surviving family members in maintaining a genetic line only become meaningful in cases when they establish a relationship with the genetically related child.[220]

It has also been argued that raising their genetic grandchild could help the surviving parents with the bereavement process by providing them with comfort and solace.[221] Both Sapp and Nofar-Yakovi observe that when requests for posthumous conception come from surviving parents, the application is usually justified on the basis of providing a remedy for the parent's own personal grief.[222] Several authors have made this point and claim that the availability of the deceased's gametes and the very possibility of using them in posthumous conception can in itself provide hope for the deceased's grieving family members, even if it is never realised.[223] Recent studies have even described maintaining a link with a deceased relative as 'healthy grieving' when compared to the approach of letting go.[224] Thus, Katz and Hashiloni-Dolev have stated that in allowing surviving families to continue their

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37(2) *Columbia Journal of Gender and Law* 109; Affdal and Ravitsky, 'Parents' Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions', above n 215.

[218] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 81.

[219] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 84, at 350.

[220] Affdal and Ravitsky, 'Parents' Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions', above n 215, at 87.

[221] Nofar-Yakovi, 'Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law', above n 217, at 138.

[222] Ibid; M.K. Sapp, 'In Re Zhu: Implied Consent to Posthumous Sperm Retrieval' (2020) 23(1) *Science and Technology Law Review* 89, at 90.

[223] Katz and Hashiloni-Dolev, '(Un) Natural Grief: Novelty, Tradition and Naturalization in Israeli Discourse on Posthumous Reproduction', above n 167, at 357; Simpson, 'Making "Bad" Deaths "Good": The Kinship Consequences of Posthumous Conception', above n 182, at 11; Affdal and Ravitsky, 'Parents' Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions', above n , at 87.

[224] Affdal and Ravitsky, 'Parents' Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions', above n 215, at 87; Katz and Hashiloni-Dolev, '(Un) Natural Grief: Novelty, Tradition and Naturalization in Israeli Discourse on Posthumous Reproduction', above n 167, at 357.

bond with their deceased relative, posthumous conception is natural in the grieving process.[225] Of course, this interest in experiencing grandparenthood is naturally going to be strongest for the deceased's surviving parents. However, other extended family members may also have an interest in having a relationship with the child, as an aunt, uncle, or sibling etc.[226]

Another factor that might motivate the deceased's extended family to pursue posthumous conception is their desire to provide the deceased with a legacy. Posthumous conception can be a way for the family to commemorate their deceased relative by providing the family with a living memory of the deceased.[227] Badahur states that posthumous conception gives grieving family members the opportunity to see physical parts of their loved one in the resulting child.[228] Thus, the child not only acts as a living memorial or legacy for the deceased, but is also a physical means in which the family can stay connected with them.[229]

Alternatively, in cases where the deceased had expressed a pre-mortem desire to become a parent, posthumous conception can be a way for the extended family to fulfil the wishes of the deceased, even though they are no longer around.[230] This scenario occurred in the English case of *R (on the Application of Mr. and Mrs. M) v. Human Fertilisation and Embryology Authority*.[231] This matter concerned an application by the deceased's surviving parents to have their daughter's cryopreserved eggs transported from the United Kingdom to the United States so that the deceased's mother could use her daughter's gametes with an anonymous

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[225] Katz and Hashiloni, '(Un) Natural Grief: Novelty, Tradition and Naturalization in Israeli Discourse on Posthumous Reproduction', above n 167, at 357.
[226] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 81.
[227] Nofar-Yakovi, 'Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law', above n 217, at 146.
[228] Badahur, 'Posthumous Assisted Reproduction (PAR): Cancer patients, Potential Cases, Counselling and Consent', above n 198, at 2573.
[229] This can be evidenced through statements made by the applicant in the American case of *In Re Estate of Nikolas Colton Evans, Deceased*, No. C-1-PB-09-000304, 2009 WL 7729555 (Tex. Prob. Apr. 7, 2009). Here, the applicant mother, who was granted permission by a Texan Probate Court to harvest sperm samples from the body of her deceased son was quoted saying that she was motivated to harvest her son's sperm following his death because she wanted her son to 'live on' and she wanted to 'keep part of him' with her: A. Starza-Allen, 'Texan Judge Permits Post-Mortem Sperm Collection' (Bionews, 14 April 2009), available at <https://www.bionews.org.uk/page_91022>.
[230] Nofar-Yakovi, 'Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law', above n 217, at 147.
[231] *R (on the application of Mr. & Mrs. M) v. Human Fertilisation and Embryology Authority,* above n 217.

sperm donor to produce a genetic grandchild.[232] Extensive evidence was provided to the court indicating that the deceased had a strong desire to become a mother. Prior to death, the deceased went to great lengths in order to preserve her gametes and her chances of genetically reproducing.[233] It was clear to the court that the deceased had wished for her eggs to be used posthumously by her parents and that she did not want her gametes to perish.[234] In this case, posthumous conception was a way in which the deceased's surviving family could give effect to their daughter's wishes even though she was no longer around.

As stated earlier, Simana claims that the extended family's interest in posthumous conception primarily reflects their desire to realise the deceased's interest in genetic continuity.[235] Indeed, Ram-Tiktin and others have stated that when surviving families pay respect to the deceased's wishes, it can have a positive effect on their own personal welfare.[236] Moreover, they may even feel that it is expected of them to uphold the deceased's wishes, or that it will allow them to reconcile with the death of their loved one.[237]

3.3.2. Potential Harms to the Extended Family Caused by Posthumous Conception

Despite there being several reasons why surviving families might pursue posthumous conception, the deceased's extended family might object to the application on the basis that they do not wish to become genetic relatives of the resulting child.[238]

One of the primary reasons that the extended family might be opposed to the application is that the posthumously born child will cause disruption to the existing family structure. This was at issue in the Californian Supreme Court case of *Hecht*

[232] Ibid, para. 1.
[233] Ibid, para. 9.
[234] Ibid, paras. 12-14.
[235] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 350.
[236] E. Ram-Tiktin, R. Gilbar, R.B. Fruchter, I. Ben-Ami, S. Friedler, E. Shalom-Paz, 'Expanding the Use of Posthumous Assisted Reproduction Technique: Should the Deceased's Parents be Allowed to Use His Sperm?' (2019) 14(1) *Clinical Ethics* 18, at 23.
[237] Ibid.
[238] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 90.

v. Superior Court of Los Angeles County.[239] Here, the deceased, William Kane cryopreserved several samples of his sperm at a Californian Cryo-bank prior to taking his own life. Following his death, there was a dispute between the deceased's surviving partner, Hecht, and his pre-existing children from a previous marriage as to the fate of his deposited sperm samples. Hecht sought to use the deceased's sperm to conceive a child and relied on provisions in his will which bequeathed the sperm samples to her.[240] However, the deceased's children contested the validity of the will and sought for their father's sperm to be destroyed to prevent the disruption that a posthumously born child would have on their existing family structure.[241]

Both Steinbock and O'Brien note that in *Hecht*,[242] the deceased's existing children opposed the application on the basis that it was egotistical and irresponsible to bring a child into the world in circumstances where the child would never have the chance to be raised in a traditional family. They contended that destroying their father's sperm would help to safeguard the existing family unit.[243] Nolan makes a similar observation and states that the primary objection which is raised by pre-existing children of the deceased in cases such as *Hecht,*[244] is that the addition of a posthumously born child will jeopardise the existing family structure and result in emotional turmoil for the deceased's surviving family.[245]

Alongside disrupting the family structure, the extended family might oppose posthumous conception based on the impact that a posthumously born child might have on the deceased's inheritable estate. Kindregan and McBrien note that if a posthumously born child is entitled to inherit from the deceased's estate then this would be a major concern for the existing family members of the deceased. Indeed, it might have the effect of reducing any entitlement that they would otherwise have

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[239] *Hecht v. Superior Court of Los Angeles County,* above n 168.
[240] Ibid, p. 840.
[241] Ibid, p. 842-843.
[242] Ibid.
[243] B. Steinbock, 'Sperm as Property' (1995) 6(2) *Stanford Law and Policy Review* 57, at 57-58; R.C. O'Brien, 'The Momentum of Posthumous Conception: A Model Act' (2009) 25(2) *Journal of Contemporary Health Law and Policy* 332, at 341.
[244] *Hecht v. Superior Court of Los Angeles County,* above n 168.
[245] Nolan also cites the case of *Hall v. Fertility Institute of New Orleans* (1994) So. 2d 1348, when making this point: L.C. Nolan, 'Posthumous Conception: A Private or Public Matter?' (1997) 11(1) *Brigham Young University of Public Law* 1, at 23.

to inherit from the deceased.[246] The potential harm in this case is likely to be strongest for the deceased's surviving children, if any, as they would be considered equal to the posthumously born child in the line of succession.[247]

Furthermore, extended family members might contest the application on the basis that posthumous conception is a selfish or unnatural act.[248] As noted above, this was put forward by the deceased's pre-existing children in *Hecht.*[249] It was also a key concern identified by Katz and Hashiloni-Dolev when conducting interviews with stakeholders. The authors quoted interviewees who viewed posthumous conception as 'fighting nature' and as 'pathological and unnatural'.[250]

In addition, the surviving family can have interests in the treatment of their deceased relative's body after death. Conway notes that grieving family members often have emotional objections to procedures which they feel 'violates' the body of their deceased relative.[251] Thus, they might be offended by a procedure such as posthumous gamete retrieval and view this as an indecent interference with the deceased's body.

Alternatively, the surviving family might object to posthumous gamete retrieval and/or posthumous conception on cultural or religious grounds. Conway and McEvoy observe that many cultures and religions attribute significant importance towards respecting the dead.[252] Conway states that the deceased's religious or cultural beliefs often influence the views held by the extended family, regarding the treatment of their relatives corpse and/or the funeral and burial arrangements.[253] Indeed, the process of posthumous gamete retrieval might place a delay on the

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[246] C.P. Kindregan and M. McBrien, 'Posthumous Reproduction' (2005) 39(3) *Family Law Quarterly* 579, at 595.
[247] Ibid.
[248] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 81.
[249] The children put forward the argument that posthumous conception was egotistical and selfish: *Hecht v. Superior Court of Los Angeles County,* above n 168; Steinbock, 'Sperm as Property', above n 243, at 57-58; O'Brien, 'The Momentum of Posthumous Conception: A Model Act', above n 243, at 341.
[250] Katz and Hashiloni, '(Un) Natural Grief: Novelty, Tradition and Naturalization in Israeli Discourse on Posthumous Reproduction', above n 167, at 346-347.
[251] Conway, *The Law and the Dead,* above n 127, Chapter 1, Part II; Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 90.
[252] H. Conway and K. McEvoy, 'The Dead, the Law, and the Politics of the Past' (2004) 31(4) *Journal of Law and Society* 539, at 542.
[253] H. Conway and J. Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34(3) *The University of New South Wales Law Journal* 860, at 871.

deceased's funeral and burial. This is particularly the case with the retrieval of gametes from a woman who has suffered brain stem death, as the process of ovarian hyperstimulation and egg retrieval takes nine to ten days.[254] In a similar vein, Nwabueze notes that the nature and content of the deceased's funeral rites are ordinarily determined by the deceased's own, or their family's culture or religion.[255] Thus, objections to posthumous gamete retrieval and conception might come from extended family members whose cultural background or religious beliefs dictate that the deceased's corpse is dealt with in a particular manner, or that oppose the practice.[256]

Of course, the strength of this particular harm will be highly subjective, and will vary depending on the extent to which the different extended family members adhere to a particular culture or religion, and the proximity of their relationship to the deceased. For example, Catholicism does not permit the use of ART outside the confines of marriage. Robey observes that devout practicing Catholics who adhere strictly to Catholic doctrines would not entertain requests for posthumous conception and family members might oppose posthumous conception on this basis.[257] In addition, Catholicism only permits interference with a corpse in circumstances where the deceased's organs or tissue are being donated to medicine or science.[258] Outside of donating the tissue for these purposes, posthumous gamete retrieval could be viewed as an indecent interference with the deceased's body. Thus, members of the extended family who are devout practising Catholics could

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[254] After a clinical determination of brain stem death, the woman would be considered dead at this point. Her bodily functions would be artificially sustained for the purposes of gamete retrieval. It is unlikely that the procedure of posthumous gamete retrieval from a man would place an undue delay on the deceased's funeral/burial as the retrieval of sperm from a deceased man must take place within thirty-six hours of death; D. Greer, A. Styer, T. Toth, C. Kindregan and J. Romero, 'Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury' (2010) 363 *The New England Journal of Medicine* 276, at 280; Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State', above n 99, at 512.

[255] R.N. Nwabueze, 'Legal Control of Burial Rights' (2013) 2 *Cambridge Journal of International and Comparative Law* 196, at 200.

[256] Alternatively, the families religion or culture might favour posthumous conception: See discussion on Israeli Jewish culture in Chapter 5, Section 5.3.2.1: Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 83, at 342.

[257] Robey observes that members of the Protestant religion would also object to posthumous conception on this basis: C. Robey, 'Posthumous Semen Retrieval and Reproduction: An Ethical, Legal and Religious Analysis' (Master's Thesis, Wake Forest University, 2015), p. 41-44.

[258] United Network for Organ Sharing, 'Theological Perspective on Organ and Tissue Donation' (UNOS, 2021), available at < https://unos.org/transplant/facts/theological-perspective-on-organ-and-tissue-donation/>.

object on this basis. Similarly, Islamic culture is highly conservative when it comes to the use of ART. Islam only permits married couples to use ART when it is used as a means to overcome fertility.[259] Robey observes that for practising Muslims, it is important for childbirth to occur within marriage. She claims that Islamic culture would not favour posthumous conception, given that it takes place outside of the marital contract.[260] Furthermore, Robey suggests that although there is no explicit reference to posthumous gamete retrieval within Islamic religious doctrines, it is likely that this would also be forbidden.[261]

Furthermore, there is a risk that posthumous conception can affect the psychological wellbeing of the surviving family members. It is suggested that posthumous conception can affect the family's ability to grieve and to have closure following the death of their loved one.[262] Lawson and others highlight that there is the risk of added distress for surviving family members in cases where there is conflict regarding the use of the deceased's gametes such as in the case of *Hecht*.[263] Lastly, there is a concern in respect of surviving parents using their child's gametes in posthumous conception. Batzer and others note that surviving parents can sometimes be motivated by posthumous conception in order to provide them with a 'replacement child' to parent. The worry is that this scenario may blur the boundaries between parents and grandparents and that the deceased's parents might raise that child as if they were their own child, rather than as their grandchild.[264]

3.3.3. Is the Harm to the Extended Family Sufficient to Restrict Access to Posthumous Conception?

I contend that the possible harms caused to the deceased's extended family are not sufficient to limit posthumous conception in Ireland.

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[259] Robey, 'Posthumous Semen Retrieval and Reproduction: An Ethical, Legal and Religious Analysis', above n 257, p. 39.
[260] Ibid.
[261] She bases this on the fact that when washing and preparing the body for burial, Islamic funeral rituals require the deceased's genitals to be covered: Ibid, p. 48.
[262] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 90.
[263] Lawson, Zweifel and Klock, 'Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction', above n 179, at 341; *Hecht v. Superior Court of Los Angeles County,* above n 168.
[264] F.R. Batzer, J.M. Hurwitz and A. Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement' (2003) 79(6) *Fertility and Sterility* 1263, at 1265.

Firstly, parents do not typically have a say in whether or not their child reproduces. Likewise, existing children do not ordinarily have a say in whether their parents continue to have more children. While the extended family members might have an interest in becoming or in avoiding becoming a genetic relative of the resulting child, both Katz and Young claim that any interest of the extended family members in this regard is relatively weak when it is balanced against the interests of the deceased's surviving spouse in reproducing.[265]

Secondly, in relation to the extended family member's interest in inheriting from the deceased's estate, it is possible to legislate in such a way so as to preclude the posthumously born child inheriting from the deceased's estate and thus prevent any disruption to the existing family members rights of inheritance. This is currently the law in the United Kingdom where the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK) has the effect of disentitling posthumously born children benefiting from their deceased father's estate.[266] Similar legislation can also be seen in the Australian State of Victoria. Like the UK legislation, the Status of Children Act 1974 (VIC) permits the deceased father of a posthumously born child to be registered as the parent of the child on their birth certificate. However, it does not allow the child to inherit from the deceased's estate.[267]

Admittedly, extended family members may have a legitimate interest in how the body of their deceased relative is treated, and they may be genuinely upset or offended by any procedure that attempts to interfere with the body of the deceased such as post-mortem gamete retrieval. Alternatively, they may object to any interference with the deceased's body on religious grounds.[268] However, ultimate control over how the deceased's body is treated and disposed of is going to rest with the executor of the deceased's estate (where they died testate), or the most senior available next of kin (where they died intestate). The hierarchy of control over the deceased's body will rank from the deceased's surviving spouse and then fall to any existing children, parents, siblings and other specified family

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[265] K. Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying' (2006) 1(11) *University of Chicago Legal Forum* 289, at 307; Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 82.
[266] Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK), s 1(2).
[267] Status of Children Act 1974 (VIC), s 37(2)(b).
[268] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 90.

members.[269] Thus, the interests of the extended family members in the treatment of the deceased's body are going to be relatively weak when they are compared to any interest of the deceased's surviving spouse.

Furthermore, as with the surviving partner, it is possible to prevent the potential psychological harms posed by posthumous conception to the deceased's surviving parents and/or extended family by ensuring that they undergo professional counselling and have had adequate time to mourn the deceased prior to using the deceased's gametes in posthumous conception.[270] Lawson and others suggest that that psychological consultation is necessary for surviving families who seek posthumous gamete retrieval and/or conception as it can aid their decision making following a traumatic death.[271] Additionally, the authors state that counselling can address any competing desires of the family members in the context of posthumous conception, along with the risks and benefits of posthumous conception to families.[272]

Lastly, as stated in Chapter Two, to qualify as sufficient 'harm to others' which justifies restricting personal liberty, Mill and Feinberg suggest that the 'harm' must infringe on other people's rights.[273] The extended family do not have any recognised right to contribute to the reproductive decision making of their deceased relative, to avoid family conflict or to control the body of the deceased in cases where they are not the direct next of kin.[274] Thus, I contend that the potential harms caused by posthumous conception to the deceased's extended family are not sufficient to justify restricting access to the practice in Ireland.

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[269] H. Conway, 'Dead, But Not Buried: Bodies, Burial and Family Conflicts' (2003) 23(3) *Legal Studies* 423, at 426.
[270] Badahur, 'Posthumous Assisted Reproduction (PAR): Cancer patients, Potential Cases, Counselling and Consent', above n 198, at 2573.
[271] Lawson, Zweifel and Klock, 'Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction', above n 179, at 343.
[272] Ibid.
[273] P.W. Smith, *Moral and Political Philosophy: Key Issues, Concepts and Theories* (New York: Palgrave MacMillan, 2008), p. 76-77.
[274] Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1265; Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 265, at 307.

3.4. The Resulting Child

If successful, posthumous conception is going to result in a child or children. Therefore, the interests of the resulting child and the potential harms caused by posthumous conception to them are significant in determining whether the practice should be permitted in Ireland.[275]

The 'harm to children' argument contends that reproductive autonomy should be limited when reproducing will result in harm to the child born.[276] Prospective harms to the unborn include bringing children into the world who are likely to be born with serious genetic disorders or diseases.[277] In addition, some commentators suggest that children are harmed by being born into single-parent families or families with low socio-economic backgrounds.[278] Furthermore, it is argued that children may suffer from long-term psychological and social harms as a result of being born through the use of ART.[279] The harm to children argument is of particular relevance in debates surrounding the use of ART. It is argued that one should not knowingly conceive a child in circumstances where the nature of conception will cause harm to the child born.[280] This section examines the specific arguments advanced for limiting posthumous conception based on harm to the resulting child. I also discuss the potential difficulties with the harm to children argument, including the 'non-identity' problem.

3.4.1. Potential Harms to the Resulting Child Caused by Posthumous Conception

The effects of posthumous conception on the welfare of the resulting child are not well documented in the literature.[281] However, there are four common objections

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[275] M. Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective' (2014) 27(29) *Journal of Law and Health* 29, at 30 and 41.

[276] C. Cohen, '"Give Me Children or I Shall Die!" New Reproductive Technologies and Harm to Children' (1996) 26(2) *Hasting Centre Report* 19, at 20.

[277] Ibid, at 20.

[278] Ibid; C. Strong, J. Gringrich and W. Kutteh, 'Ethics of Post-mortem Sperm Retrieval' (2000) 15(4) *Human Reproduction* 739, at 741-742.

[279] P. Lancaster, 'Congenital Malformations after In-Vitro Fertilisation' (1987) 2 *Lancet* 1392, at 1399.

[280] R. Sparrow, 'Is it "Everyman's Right to have Babies if He Wants Them": Male Pregnancy and the Limits of Reproductive Liberty' (2008) 18(3) *Kennedy Institute of Ethics Journal* 275, at 278; Cohen, '"Give Me Children or I Shall Die!" New Reproductive Technologies and Harm to Children', above n 276, at 19.

[281] Badahur, 'Death and Conception', above n 164, at 2772.

specifically raised when it comes to the welfare of posthumously conceived children. These include concerns regarding parental acknowledgement, rights of inheritance, family structure and identity harm.[282]

3.4.1.1. Parental Acknowledgement and Rights of Inheritance

A primary concern raised by courts and commentators against posthumous conception relates to the legal status of the resulting child. The issue is whether the posthumously born child can be regarded as the legal offspring of their deceased parent and the effect that a lack of parental acknowledgement might have on the child.[283] Ordinarily, the dead cannot be classed as legal parents. However, there is a common law presumption in favour of paternity in circumstances where the child has been born within the normal period of gestation measured from the date of the parent's death (usually 300 days).[284] In the vast majority of posthumous conception cases it is unlikely that the requesting party will be in a position to conceive in the days following the death of their partner. First, the surviving partner will be in a state of mourning and they might also experience legal barriers and/or difficulty with conceiving. Thus, it is doubtful that the surviving partner will manage to conceive within the requisite time for the presumption of paternity to apply and for the deceased to be recognised as the child's legal parent.[285]

This results in a scenario where the resulting child will only have one legal parent. Furthermore, they will be unable to inherit from the deceased's estate or be entitled to receive any available social security benefits.[286] Of course, only having one legal parent is not socially unacceptable and there are already circumstances permitted by law which result in children being born without legal fathers (such as donor insemination).[287] However, there are certainly benefits for the child to have the deceased recognised as their legal parent. Parental acknowledgement can give the

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[282] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 56.
[283] Ibid.
[284] Maddox, 'Inheritance and the Posthumously Conceived Child', above n 138, at 410; B.M. Star, 'A Matter of Life and Death: Posthumous Conception' (2004) 64 *Louisiana Law Review* 613, at 613.
[285] Maddox, 'Inheritance and the Posthumously Conceived Child', above n 138, at 410.
[286] R. Zafran, 'Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception' (2007) 8 *Houston Journal of Health Law and Policy* 47, at 58-59.
[287] J. France, 'Estates on Ice: The Case for Paternity and Succession Rights of Posthumously Conceived Children' (Bachelor of Laws Thesis, University of Otago 2018), p. 24.

child certainty regarding their lineage. They will know exactly who their parent was, and they will know that they loved their surviving parent. This can contribute towards the child's sense of feeling that they were wanted and it can help to validate the child's place within the family unit.[288]

There are also practical benefits to having the deceased recognised as the child's legal parent. It will ensure legal relationships with the deceased's wider family, including grandparents, aunts, uncles etc. Legal recognition of the deceased as the father will also ensure that any pre-existing children of the deceased and the surviving partner are recognised as full siblings of the resulting child, rather than half siblings.[289] This can be of symbolic importance for some families such as those in the New Zealand High Court case of *Re Lee.*[290] Here, the deceased's parents were supportive of the surviving partner's application for posthumous conception based on their desire to continue the deceased's bloodline and to have genetic grandchildren.[291] Moreover, the surviving partner in this case wished to produce a genetic sibling for the couple's unborn child.[292]

The symbolic importance of having the deceased recognised as the parent of a posthumously born child was successfully put forward by Diane Blood in a case taken by her against the UK's Department of Health in 2003. Following the birth of her posthumously born children, Mrs. Blood challenged the then UK law (Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 (UK)) which prevented her deceased husband from being registered as the father of her children on their birth certificates. Mrs. Blood claimed that the provision of the UK legislation amounted to a breach of her right to private and family life under Article 8 of the European Convention of Human Rights (ECHR) and her right to marry and found a family under Article 12 of the Convention.[293] Mrs. Blood was successful in her application and the UK provision has since been amended by the

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[288] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 58; France, 'Estates on Ice: The Case for Paternity and Succession Rights of Posthumously Conceived Children', above n 287, p. 24.
[289] France, 'Estates on Ice: The Case for Paternity and Succession Rights of Posthumously Conceived Children', above n 287, p. 24.
[290] *In the matter of Lee (deceased) and Long (applicant),* above n 93.
[291] Ibid, para. 6 and 10.
[292] Ibid, para. 8.
[293] Joint Committee on Human Rights, *Eight Report* (Session 2002-03), para. 31.

Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK) which now permits the registration of deceased fathers on the birth certificates of posthumously born children.[294] The legislation does not, however, entitle the posthumously born child to benefit from the deceased's estate and is for symbolic purposes only.[295]

3.4.1.2. Family Structure

Another argument raised against posthumous conception is that the resulting child will be disadvantaged by their inevitable family structure.[296] Posthumously conceived children have been labelled by some commentators as 'half-orphans'.[297] The child will be born into a single parent household and they will never have the opportunity of being raised by both genetic parents. In the New South Wales Supreme Court case of *MAW v. Western Sydney Area Health Service,*[298] O'Keefe J. put forward concerns regarding the family structure of posthumously born children stating that:

> "Such a child would never have the prospect of knowing its father. Such a child would come to recognise that he or she was not sought to be procreated during the life of the father".[299]

Some writers suggest that it is simply preferable for children to be raised by two parents rather than one parent,[300] while others contend that the absence of a parental figure can negatively impact on the psychological wellbeing of the child.[301] The absence of a genetic parent can result in the child having doubts regarding their origins and their position within society. There is also an argument that being raised by a single parent can lead to the child being economically disadvantaged as they

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[294] Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK), s 1(2).
[295] Ibid.
[296] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 58-59.
[297] S. Hostiuc and C. George Curca, 'Informed Consent in Posthumous Sperm Procurement' (2010) 282 *Archives of Gynaecological Obstetrics* 433, at 436; Landau, 'Planned Orphanhood', above n 183.
[298] *MAW v. Western Sydney Area Health Service,* above n 180.
[299] Ibid, para. 43.
[300] R. Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique' (2004) 19(9) *Human Reproduction* 1952, at 1953; Badahur, 'Death and Conception', above n 164, at 2772.
[301] Hostiuc and George Curca, 'Informed Consent in Posthumous Sperm Procurement', above n 297, at 436.

are being raised in a single income family.[302] Indeed, there is also a fear that because the parent is potentially acting in response to grief and loss, they will be unable to raise the child within a stable family setting.[303]

Lastly, it has been suggested that the nature of the child's conception can lead to the child being socially ostracized by their peers.[304] In the Queensland Supreme Court decision of *Re Gray*,[305] Chesterman J. stated:

> "The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in its best interests".[306]

3.4.1.3. Identity Harm

A further concern raised is that the resulting child's identity will suffer due to the nature of its conception.[307] The child might consider themselves to be 'half orphaned' which can lead them to question their place within their family unit and/or society.[308]

It is also suggested that it can be damaging for a child to feel that they were born simply to provide a symbolic memory of their deceased parent.[309] This concern was expressed by the New South Wales Supreme Court in *MAW v. Western Sydney Area Health Service*.[310] O'Keefe J. quoted statements made by the applicant in her affidavit which stated:

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[302] Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 742.
[303] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 59.
[304] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 7; J. Pobjoy, *'Medically Mediated Reproduction: Posthumous Conception* and The *Best Interests of the Child'* (2007) 15 *Journal of Law and Medicine* 450 ; This argument was also raised by O'Keefe J. in the New South Wales Supreme Court case of *MAW v. Western Sydney Area Health Service,* above n 180, para. 43. Here, the judge was concerned that societal attitudes towards posthumous conception would result in an unhappy situation for the posthumously born child.
[305] *In the Matter of Gray,* above n 187.
[306] Ibid, para. 23.
[307] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 61.
[308] Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1265.
[309] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 84.
[310] *MAW v. Western Sydney Area Health Service*, above n 180.

> "The main reason why I want to do this is because it is something that I want and something I know Geoffrey would want. I feel that I can't live without my husband and this is giving me the opportunity to have at least part of him still with me." [311]

The court was satisfied that the applicant's motives for posthumous conception were based on her desire to 'keep her husband with her despite his death'.[312] The court concluded that it was not in the best interests of a child to be brought into existence in such a manner.[313]

Some courts and commentators have suggested that a posthumously conceived child is likely to experience identity issues due to the expectation that they must act as a replacement for their deceased parent.[314] The child might feel obligated to assume characterises of their deceased parent.[315] Overall, the long-term psychological impacts of being conceived after the death of a parent are not well documented. There is a risk that the child's psychological health might suffer due to the compromised parenting of a grieving parent and they could suffer confused identity and upset when compared to their deceased parent.[316]

3.4.2. The 'Non-Identity Problem'

The difficulty with the harm to children argument is the 'non-identity problem'.[317] The non-identity problem claims that in some cases, our present choices and actions will affect the very existence, identity and quality of life for future existing people.[318] The non-identity issue raises questions regarding the obligations that we owe to future people who, other than by our own actions, will otherwise not exist.[319]

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[311] Ibid, para. 20.
[312] Ibid, para. 25.
[313] Ibid, para. 44.
[314] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 61; *MAW v. Western Sydney Area Health Service*, above n 180, para. 20.
[315] Lawson, Zweifel and Klock, 'Blurring the Line Between Life and Death: A Review of the Psychological and Ethical Concerns Related to Posthumous-Assisted Reproduction', above n 179, at 343.
[316] Ibid, at 342-343; Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 35.
[317] Robertson, 'Posthumous Reproduction', above n 4, at 1040; Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 741.
[318] M. Hanser, 'Harming Future People' (1990) 19(1) *Philosophy and Public Affairs* 47, at 47.
[319] D. Boonin, 'How to Solve the Non-identity Problem' (2008) 22(2) *Public Affairs Quarterly* 129, at 129.

The idea was first introduced by religious philosopher Robert Adams, in his paper 'Must God Create the Best?'.[320] Adams argued that people cannot be harmed by coming into existence. He states that even when creatures are created in circumstances which are less desirable then the most favourable circumstances, the creatures are not harmed because those specific beings would otherwise not exist in the best possible world. Adams argues that:

> "…[A] creator would not necessarily wrong anyone… or be less kind to anyone than a perfectly good moral agent must be, if he created a world of creatures who would not exist in the best world he could make".[321]

Adams argues that it is only wrong to create life in circumstances where it is better for the beings who have been created not to exist at all. He states that a creator has not wronged anyone by creating a world where 'none of the creatures in it has a life which is so miserable on the whole that it would be better for that creature if it had never existed'.[322] Parfit referred to this idea as the 'non-identity problem'. Parfit notes that timing plays a crucial part in forming personal identity.[323] He argued that an individual's identity is dependent on the exact timing and nature of their conception. His argument is that if a particular person was not conceived at the very time in which they were in fact conceived then that specific individual would never exist at all.[324]

Following this idea, Cohen argues that 'any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist.'[325] In the case of reproduction, the purported 'harm' to the child is the very act which brings the child into being.[326] Thus, by claiming that a child is harmed by being born suggests that the child is in a better position by not coming into existence altogether.[327] Indeed, under Feinberg's counterfactual theory of harm, one needs to

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[320] R.M. Adams, 'Must God Create the Best?' (1972) 81(3) *The Philosophical Review* 317.
[321] Ibid, at 331.
[322] Ibid, at 320.
[323] D. Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), p. 310.
[324] Ibid, p. 311.
[325] G. Cohen, 'Regulating Reproduction: The Problem with Best Interests' (2011) 96 *Minnesota Law Review* 423, at 426.
[326] Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 741.
[327] Robertson, 'Posthumous Reproduction', above n 4, at 1040.

show that the person who has been harmed is in a 'worse off' position then they would otherwise be in, had the harm had not occurred.[328]

3.4.3. The 'Interest in Existing' Argument

The traditional response to the 'harm to children' argument is that children have an 'interest in existing'.[329] Robertson argues that children have an interest in being born.[330] On this account, life is the overriding benefit. Robertson argues that irrespective of a particular child's circumstances, they're going to value their life and cannot be harmed by being brought into existence.[331] Robertson claims that restricting a person's reproductive autonomy is only justifiable in cases where the harm inflicted on the resulting child is so severe that the child will truly feel that their life is worse than non-existence:

> "…unless their [the child's] lives are so full of suffering as to be worse than no life at all, a very unlikely supposition, the defective children of such a union have not been harmed if they would not have been born healthy."[332]

Similarly, Cohen contends that children cannot be harmed by being brought into existence unless they are given a life which is not worth living.[333] Certainly, one must be mindful of responsible reproduction and conceiving in cases where it is highly likely that any child born as a result will suffer from serious or fatal genetic disabilities and health conditions may justify limiting the parent's interest in reproduction.[334] However, Robertson suggests that in the vast majority of cases, the child is going to have an interest in existing. Thus, so long as the child's life is on balance 'worth living', then the prospective parent's reproductive autonomy should not be curtailed by advancing the argument of harm to child welfare.[335]

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[328] J. Feinberg, 'Wrongful Life and the Counterfactual Element in Harming' (1986) 4(1) *Social Philosophy and Policy* 145, at 149.
[329] Cohen, '"Give Me Children or I Shall Die!" New Reproductive Technologies and Harm to Children', above n 276, at 20-21.
[330] J. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) *Virginia Law Review* 405, at 413.
[331] Ibid.
[332] Ibid, at 434.
[333] Cohen, 'Regulating Reproduction: The Problem with Best Interests', above n 325, at 437.
[334] Steinbock, 'A Philosopher Looks at Assisted Reproduction', above n 157, at 550.
[335] Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth', above n 330, at 434.

Some writers object to applying Feinberg's concept of 'harm' to the unborn on the basis that it compares existence with non-existence.[336] The 'interest in living argument' presupposes that it is in the interest of all children who might be born, to be brought into existence. This position assumes that there is a hypothetical world of unborn children who are waiting to come into existence, and whose positions are less desirable then they would be should they be born.[337] Mulligan suggests that it is better for us to view life as 'neutral', rather than to view life as an overriding benefit, given that the alternative state of not living is unknown. Mulligan states that:

> "The neutral view does not show that the child may be made worse off than he was before by being born, but it does show that some lives confer only disadvantage rather than advantage".[338]

Prior to being born, however, the 'contemplated child' does not have any interests which can be served or harmed. Feinberg notes that in order to be 'better off', it is 'necessary to be'.[339] Thus, the 'interest in existing' argument can only be rationally advanced after the birth of the child. It is only when the child has been born that their interest in living comes into play.[340]

3.4.4. 'Wrong' to Children

One view is that although a child may not be 'harmed' by being born, it may be unfair or 'wrong' for prospective parents to knowingly conceive when there is a high chance that any child born as a result will not benefit from a normal opportunity at life.[341] Steinbock and McClamrock claim that children have a minimal birth-right to be born with the potential to live a relatively good life.[342]

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[336] Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 741.
[337] Cohen, '"Give Me Children or I Shall Die!" New Reproductive Technologies and Harm to Children', above n 276, at 21.
[338] A. Mulligan, 'Fundamental Rights and Organising Principles in the Regulation of Assisted Reproduction in Ireland' (PhD Thesis, Trinity College Dublin 2013), p. 290.
[339] Feinberg, 'Wrongful Life and the Counterfactual Element in Harming', above n 328, at 158.
[340] Cohen, '"Give Me Children or I Shall Die!" New Reproductive Technologies and Harm to Children', above n 276, at 25.
[341] L. Purdy, 'Genetic Diseases: Can Having Children Be Immoral?', in J. Buckley, *Genetics Now: Ethical Issues in Genetic Research* (Washington: University Press of America, 1978), p. 25.
[342] B. Steinbock and R. McClamrock, 'When Is Birth Unfair to the Child?' (1994) 24(6) *The Hastings Center Report* 15, at 15.

They state that it is morally wrong to bring a child into the world where they will suffer from serious impediments to their wellbeing.[343]

This argument is based on harmless wrongdoing or legal moralism as a valid liberty limiting principle.[344] Harmless wrongdoing aims to prevent people from acting in ways which are immoral, even when their actions do not result in anybody being harmed or offended. The argument for harmless wrongdoing is that although the conduct is victimless *per se*, the particular act is still wrong by moral standards and should therefore be prevented.[345] In the case of posthumous conception, the argument would be that although the posthumously born child might not be harmed in the sense of the harm principle by being born, it is still *morally* wrong to bring the child into existence in circumstances where it might potentially suffer from identity harm, disruption to the family structure, lack of parental acknowledgment etc.

With the 'wrong to children' argument, however, there is the difficulty of assessing a standard for what will constitute as substantial 'wrong' to justify limiting the prospective parent's reproductive autonomy. Robertson notes that while being born into less than desirable circumstances is not ideal, it surely does not amount to wrongful life. In most cases, it is argued that life, is better than no life at all,[346] and while there may be no harm or wrong inflicted on a child by preventing its birth altogether, limiting access to posthumous conception will infringe on the present interests of the prospective parent in procreating.[347] Furthermore, as I have argued in Chapter Two, I agree with the liberal position which does not accept harmless wrongdoing as a justifiable defence to limiting autonomy. Therefore, I contend that it is not sufficient to restrict reproductive autonomy based on the 'wrong to children' argument.[348]

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[343] Ibid; Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 741.
[344] Cohen, 'Regulating Reproduction: The Problem with Best Interests', above n 325, at 431.
[345] J. Feinberg, *The Moral Limits of the Criminal Law, vol 4: Harmless Wrongdoing* (New York: Oxford University Press, 1988), p. 3.
[346] Robertson, 'Posthumous Reproduction', above n 4, at 1040-1041.
[347] Ibid.
[348] See discussion in Chapter Two, Section 2.4.

3.4.5. Is the Harm to the Resulting Child Sufficient to Restrict Access to Posthumous Conception?

I contend that the possible harms caused to the resulting child as a result of being born through posthumous conception are not sufficient to limit the practice.

Firstly, in terms of the concerns regarding the effect that a lack of parental acknowledgment might have on the child, it is possible to avoid many of these harms by simply registering the deceased as the legal parent of the child on their birth certificate for symbolic purposes. As noted earlier, the UK's Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK) currently permits deceased fathers to be registered as the father on the birth certificate of any posthumously born children.[349] This statute provides the posthumously born child with certainty of lineage and can buttress their relationships with the deceased's wider family. Indeed, as detailed in Chapter One, the Irish Government have also included proposals in the AHR Bill regarding legal parentage. Head 27 of the Bill provides that the deceased can be registered as the legal parent of the posthumously born child provided that the child is born within thirty-six months of the deceased's death.[350]

However, the legislation in the UK does not entitle the child to inherit from the deceased's estate.[351] The provisions of the UK Act merely serve to symbolically acknowledge the deceased as the child's father.[352] In this way, the UK provisions do not interfere with any of the State's interests in the timely administration of estates,[353] nor the inheritance interests of any of the deceased's extended family members.[354] Furthermore, regarding concerns that the child will be disadvantaged due to being unable to inherit from the deceased's estate or receive any available social security benefits, it is highly unlikely that the resulting child will suffer detrimentally because of this. Firstly, it is common for the surviving partner and/or

[349] Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK), s 1.
[350] AHR Bill 2017, Part 4, Head 27, s 1-2.
[351] Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK), s 1(2).
[352] Maddox, 'Inheritance and the Posthumously Conceived Child', above n 138, at 412.
[353] As noted in Chapter One, concerns regarding the efficient administration of the deceased's estate is one of the primary issues which is raised against posthumous conception on behalf of the State. There is a fear that posthumously born children will disrupt the timely distribution of the deceased's assets: Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: July 1984), p. 55.
[354] Kindregan and McBrien, 'Posthumous Reproduction', above n 246, at 595.

the extended family members of the deceased to inherit from their estate and these are the very people who will be raising the resulting child.[355] Furthermore, in my view it is not unjustified to disinherit the child, given that there is no broad legal entitlement in Irish succession law for children to inherit from their parents outside of intestacy cases.[356] Lastly, posthumous conception is a lengthy and highly expensive endeavour. Thus, Tremellen and Savulescu state that we cannot assume that those who do undergo the process are not fully committed to providing a comfortable upbringing for the child.[357]

Secondly, in relation to concerns regarding the posthumously born child's family structure, several studies have shown that children who are raised by single parent families are not detrimentally disadvantaged in their development.[358] In fact, research illustrates that children are highly creative when adapting to complex family relationships and structures and they do not view a particular family structure as having harmed them in any way.[359] Moreover, it is very common for grandparents, aunts/uncles, neighbours, family friends or new partners to play a role in the lives of children who are raised by single parents. Thus, it is not guaranteed that the resulting child of posthumous conception will long for a father or mother figure.[360] This point was emphasised by Morris J. in the Victorian Civil and Administrative Tribunal case of *Y.Z. v. Infertility Treatment Authority*:[361]

> "It is trite to observe that many children born naturally do not have a father – or a loving father – yet still live long and happy lives. Further, according to the Victorian Law Reform Commission, there is a growing body of methodologically rigorous studies that demonstrate that it is not family

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[355] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 66.
[356] Maddox, 'Inheritance and the Posthumously Conceived Child', above n 138, at 8.
[357] K. Tremellen and J. Savulescu, 'Posthumous conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma' (2016) 13(3) *Reproductive Biomedicine Society Online* 26, at 29.
[358] S.J. Fasouliotis and J.G. Schenker, 'Social Aspects in Assisted Reproduction' (1999) 5 *Human Reproduction Update* 26, at 29; Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 60; Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 10.
[359] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 60.
[360] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 10.
[361] *Y.Z. v. Infertility Treatment Authority* [2005] VCAT 2655.

> structure that determines emotional, social and psychological outcomes for children, but the quality of family processes and relationships".[362]

What is important for the child's development is that the child has loving and supportive relationships and a positive home environment.[363] Indeed, being raised by a single parent does not prevent this scenario and this fact has been acknowledged in a number of posthumous conception cases.[364] For example, in *Re Cresswell,*[365] Brown J. acknowledged that it is becoming increasingly common for children to be raised by single parents and stated that based on the evidence provided to the court, any child born to the applicant would 'be loved and cared for by his or her mother, grandparents, extended family and close friends, and supported by them'.[366]

Furthermore, in terms of the fear that the posthumously born child will be ostracised by their peers regarding their family structure, Tremellen and Savulescu observe that there is no requirement that any information regarding the nature of the child's conception be made public whereby the child will be open to any sort of ridicule by their peers.[367]

Of course, there is a genuine concern regarding the surviving partner's financial ability to raise the resulting child. More than likely, the child will be raised in a single income family and it has been shown that severe economic hardship can result in poor childhood development. However, many single parents are in a position where they can provide comfortable upbringings for their children and there is no certainty that the surviving partner will struggle financially to raise the resulting child.[368]

Lastly, in relation to identity harm, there is a valid argument that posthumously born children are at the risk of suffering identity dilemmas due to the expectation

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[362] Ibid, para. 187.
[363] Fasouliotis and Schenker, 'Social Aspects in Assisted Reproduction', above n 358, at 29.
[364] *Re The Estate of the Late Mark Edwards* [2011] NSWSC 478; *Re Cresswell* [2018] QSC 142.
[365] *Re Cresswell*, above n 364.
[366] Ibid, paras. 198-199.
[367] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 10.
[368] Ibid; Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 59.

that they must act as a replacement for their deceased parent.[369] However, both Collins and Sabatello highlight that prospective parents frequently expect their children to inherit and mirror their traits and characteristics.[370] The idea that the child might feel bound to assume characteristics of the deceased or feel upset when they are compared to their deceased parent is not unique to posthumous conception. This concern could be raised in debates regarding people's motives to use other forms of ART and even with natural reproduction.[371]

Ultimately, posthumous conception is going to bring the child into the world and grant the child the opportunity to experience life.[372] Thus, even if one did accept all of the arguments against posthumous conception on the basis of 'harm caused to the resulting child', it still cannot be said that such a life amounts to one which is not worth living. The premise that there are lives which are worth living, and lives which are not worth living is controversial, and the threshold for what falls on either side of the notional line is open to debate.[373]

In the sense of the harm principle, Cohen notes that a life which is 'not worth living' is one which is 'so burdensome and without compensating benefits to the individual…that it is worse than never existing at all'.[374] Similarly, Bennett and Harris suggest that in terms of the harm principle, a worthwhile life is one which is not overwhelmed by suffering, and one which we can rationally consider to be valuable when compared with non-existence.[375] Cohen observes that those who do defend the idea that there are lives which are not 'worth living' can usually only cite two specific diseases in support of the claim. These include Lesch-Nyhan and

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[369] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 84; Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 61.
[370] R. Collins, 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma' (2005) 30 *Journal of Medicine and Philosophy* 431, at 435; Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 61-62.
[371] Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective', above n 275, at 62.
[372] Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 742.
[373] See generally A. Smajdor 'How Useful is the Concept of the 'Harm Threshold' in Reproductive Ethics and Law?' (2014) 35(5) *Theory of Medicine and Bioethics* 321-336.
[374] Cohen, 'Regulating Reproduction: The Problem with Best Interests', above n 325, at 472.
[375] R. Bennet and J. Harris, 'Are There Lives Not Worth Living: When is it Morally Wrong to Reproduce', in D. Dickenson, *Ethical Issues in Maternal Foetal Medicine* (Cambridge: Cambridge University Press, 2002).

Tay-Sachs diseases,[376] both of which result in a short, traumatic and painful life for any child born with either disorder.[377] When applied in the sense of the harm principle, it is difficult to conclude that the purported harms caused to children by posthumous conception amount to a life which is 'not worth living' when compared to non-existence.[378]

3.5. Medical Practitioners

Posthumous conception will implicate the interests of the physicians involved in both the posthumous gamete retrieval and the assisted conception procedure. This section identifies and discusses the interests and potential harms which may be caused by posthumous conception to them.

3.5.1. Interests of the Medical Practitioners in Posthumous Conception

Physicians have an interest in the wellbeing of their patient. If the patient is in a comatose or PVS and is still alive, it is unlikely that gamete retrieval will be a medical necessity to preserve their life.[379] However, in such cases, physicians might have an interest in preserving the gametes of their patient in order to secure their patient's future fertility should they recover.[380] In addition, they might deem it to be in the best interests of the particular patient to proceed with the retrieval given the circumstances of the case.[381]

Alternatively, if their patient has received a clinical determination of cardiac or brain death and is determined dead, physicians might have an interest in preserving the deceased's gametes as a means of alleviating the pain of the deceased's family.[382] Dr. Cappy Rothman (the first physician to publish medical reports detailing methods of retrieving gametes from comatose and deceased patients) has

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[376] Cohen, 'Regulating Reproduction: The Problem with Best Interests', above n 325, at 473.
[377] I.G. Cohen, 'Beyond Best Interests' (2012) 96 *Minnesota Law Review* 1187, at 1214.
[378] Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth', above n 330, at 434.
[379] Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1266.
[380] G.P. Quinn, C. Knapp, T. Malo, J. McIntyre, P. Jacobsen and S.T. Vadaparampil, 'Physician's Undecided Attitudes towards Posthumous Reproduction: Fertility Preservation in Cancer Patients with a Poor Prognosis' (2012) 10(4) *Journal of Supportive Oncology* 160, at 161.
[381] *Y. v. NHS Healthcare Trust*, above n 109.
[382] Rothman, 'Live Sperm, Dead Bodies', above n 110, at 456.

stated that his primary motive as a healer is to relieve the pain and suffering of his patients and their relatives. He notes that the act of preserving viable gametes from deceased patients for use by their family in posthumous conception is a way in which physicians can alleviate the suffering of grieving families.[383]

Furthermore, physicians involved in the assisted conception aspect of posthumous conception might be financially motivated by posthumous conception given that the cost of harvesting, cryopreserving and storing gametes, and the cost of undergoing assisted conception treatment is known to be expensive. Ultimately, the process of posthumous conception could end up being highly lucrative for the physicians involved.[384]

3.5.2. Potential Harms to the Medical Practitioners Caused by Posthumous Conception

Physicians might have professional or personal reservations regarding posthumous gamete retrieval and/or posthumous conception. The physician might be hesitant to proceed on the basis of their own religious or personal views that do not favour unnecessary interference with deceased bodies or posthumous parenting.[385]

Firstly, if the patient is in a comatose or PVS and still living, the physician might feel that the preservation of gametes is not a medical necessity.[386] Jenkins notes that harvesting gametes from patients requires ethical judgment. When the procedure is not for the purposes of medical treatment it may not serve the overall interests of the patient.[387] Berger, Rosner and Cassell make a similar point. They state that ethical standards of medical practice deem it inappropriate to perform unnecessary medical procedures on living patients without their consent. Thus, the

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[383] Ibid.

[384] A.K. Wu, A.Y. Odisho, S.L. Washington, P.P. Katz and J.F. Smith, 'Out-of-pocket Fertility Patient Expense: Data from a Multicenter Prospective Infertility Cohort' (2014) 191(2) *Journal of Urology* 427.

[385] Quinn, Knapp, Malo, McIntyre, Jacobsen and Vadaparampil, 'Physician's Undecided Attitudes towards Posthumous Reproduction: Fertility Preservation in Cancer Patients with a Poor Prognosis', above n 380, at 166.

[386] Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1266; Berger, Rosner and Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients', above n 121, at 775.

[387] S. Jenkins, J. Ives, S. Avery and H. Draper, 'Who Gets the Gametes? An Argument for a Points System for Fertility Patients' (2018) 32(1) *Bioethics* 16, at 16.

physician might be reluctant to carry out the gamete retrieval procedure on this basis.[388] Secondly, following a clinical determination of cardiac or brain stem death, the patient will be considered dead and physicians have an ethical duty to treat the patient's corpse with respect. They might object to posthumous gamete retrieval as the procedure is not for the purpose of facilitating organ donation, conducting an autopsy or facilitating burial.[389]

Swinn and others state that when confronted with requests for the posthumous retrieval of gametes, physicians are presented with conflicting clinical and ethical dilemmas; they are cautious to proceed with the retrieval of gametes in the absence of deceased's consent, while also keen to facilitate the request of the surviving partner or family.[390] However, Bewley observes that sympathy for the surviving partner or family members does not impose an obligation on the physician to provide them with assistance.[391] Furthermore, as the law regarding the retrieval of gametes from both comatose and deceased patients remains unlegislated in Ireland, some doctors may be cautious to proceed with harvesting gametes from comatose or deceased patients in fear that they may be left open to professional sanctions or legal assault charges.[392]

The physician might also have doubts regarding the feasibility of posthumous gamete procurement and/or the safety of posthumous assisted conception treatment. This is particularly relevant in cases where the deceased is female. As discussed fully in Chapter One, posthumous gamete retrieval from a woman who has suffered brain death is difficult and requires extended measures in order to harvest viable gametes.[393] In addition, given that it is recommended that the procedure of posthumous gamete recovery is performed within thirty-six hours of the patient's death,[394] there may be issues with the quantity and/or quality of the

[388] Berger, Rosner and Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients', above n 121, at 775.
[389] Ibid, at 776.
[390] M. Swinn, M. Emberton, D. Ralph, M. Smith and P. Serhal, 'Retrieving Semen from a Dead Patient' (1998) 317(7172) *British Medical Journal* 1583, at 1583.
[391] S. Bewley, 'The Patient was Assaulted' (1998) 317(7172) *British Medical Journal* 1583, at 1584.
[392] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 10; Badahur, 'Death and Conception', above n 164, at 2770.
[393] Greer, Styer, Toth, Kindregan and Romero, 'Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury', above 254, at 280.
[394] Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State', above n 99, at 512.

sperm which is retrieved.[395] Furthermore, clinicians who are involved in the assisted conception procedure will have a further interest in the health and safety of the prospective parent and foetus. They will be under a duty to ensure that any gametes which have been retrieved from the deceased are screened and assessed prior to their use in posthumous conception so as to reduce the possibility of any disease or infection transmission to the prospective parent.[396] Indeed, as the quality of thawed cryopreserved gametes has not been rigorously assessed, the physician might have reservations about any abnormalities that might arise as a result of using posthumously procured gametes in treatment.[397]

3.5.3. Is the Harm to the Medical Practitioner Sufficient to Limit Posthumous Conception?

I contend that the potential harms to the interests of medical practitioners are not sufficient to justify limiting posthumous conception. Firstly, it is possible to introduce professional guidelines or legislation which could clarify the laws relating to the circumstances in which gametes can be retrieved from both comatose and deceased patients. Indeed, this is already partly the case in Ireland whereby the AHR Bill 2017 proposes to provide for the retrieval of gametes from deceased patients in specific circumstances.[398] This will give doctors clarity regarding the permissibility of posthumous gamete extraction and provide them with assurance regarding their professional liability.

Furthermore, physicians would ultimately be under no duty to honour requests for posthumous conception should they personally express moral reservations with the practice.[399] It is not impractical for gamete retrieval and posthumous conception procedures to be carried out solely by physicians who are content with the process.[400] By clearly setting out laws regarding gamete retrieval from comatose and deceased patients and by ensuring that posthumous conception procedures are

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[395] Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1266.
[396] Ibid.
[397] Ibid.
[398] The AHR Bill 2017, Part 4, Head 25.
[399] Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1266.
[400] Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 743.

performed by willing physicians, the potential harms caused by posthumous conception to the interests of the medical practitioners can be negated entirely.

3.6. The Irish State/Public Interest

The Irish State is an important stakeholder in posthumous conception. Ireland has several legitimate interests which pertain to the permissibility of posthumous conception. This section outlines the interests of Ireland in supporting posthumous conception and discusses the potential harm which may be caused to the interests of the State and society generally.

3.6.1. Interests of the Irish State in Posthumous Conception

The primary reason why the Irish Government would support posthumous conception is to maintain their interest in the formation of families.[401] The State has an interest in backing the use of ART to give infertile and same-sex couples the opportunity to reproduce and create families.[402] Indeed, the Irish Government have recognised societies interest in the availability of ART in Ireland, and have been committed to regulating ART since the establishment of the Commission on Assisted Human Reproduction in March 2000, albeit progress in this regard has been significantly slow.[403] Of course, this interest is not directly applicable to posthumous conception, and it is likely that surviving partners could find an alternative means of establishing a family (either through the use of a sperm donor, adoption and so forth). However, it is important public policy for the State to promote autonomy for its citizens in reproductive matters as this has been described as forming a central part of personal dignity and identity.[404]

Furthermore, although a public fund for fertility treatment was promised by the Irish Government in 2017, ART remains privately funded in Ireland.[405] Moreover, the AHR Bill does not contain any details indicating that financing for ART

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[401] Nolan, 'Posthumous Conception: A Private or Public Matter?', above n 245, at 22.
[402] Ibid, at 21.
[403] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (April 2005), p. x.
[404] Nolan, 'Posthumous Conception: A Private or Public Matter?', above n 245, at 21.
[405] M. Delaney, 'Absolutely Outrageous that Promised Public Fertility Fund Still Not Finalised' (The Journal, 17 October 2019), available at < https://www.thejournal.ie/fertility-treatment-fund-delay-4854637-Oct2019/>.

services will be publicly funded. Therefore, the State could have an economic incentive to promote the use of this technology to boost the economy.[406]

3.6.2. Potential Harms to the Irish State caused by Posthumous Conception

There are also several potential harms caused by posthumous conception to the interests of the State and society generally. Firstly, the Irish Government have a legitimate interest in the efficient administration of the deceased's property. The State has an interest in maintaining stable land titles and ensuring that property is effectively wound up in a succession context.[407] Concerns regarding the efficient administration of the deceased's estate is one of the primary issues which is raised against posthumous conception on behalf of the State. In the Warnock Report 1984 (UK), the dominant concern raised by the UK's Committee of Inquiry regarding posthumous conception was the inconvenience that a posthumously born child might have on the administration of the deceased's estate.[408] There was a fear that posthumously born children will disrupt the timely distribution of the deceased's assets. As detailed in Chapter One, this concern was also raised by stakeholders when discussing the proposals for regulating posthumous conception in Ireland under the AHR Bill.[409]

There are also issues regarding whether it is just for the State to permit a posthumously born child to interfere with any existing rights of inheritance held by

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[406] R. Floyd, 'A Review of the Literature on the Benefits of Public Funding for Assisted Reproductive Technologies from an Irish Perspective' (Conference Poster; ART World Congress, 2019), available at < https://www.researchgate.net/publication/336346131_A_Review_of_the_Literature_on_the_Benefits_of_Public_Funding_for_Assisted_Reproductive_Technologies_from_an_Irish_Perspective>.

[407] Collins, 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma', above n 370, at 432.

[408] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: July 1984), p. 55.

[409] Head 27 of the AHR Bill currently proposes that the deceased can be recognised as the legal parent of a posthumously born child provided they are born within thirty-six months of the deceased's death. This would entitle the posthumously born child to inherit from the deceased and therefore, have a knock on effect on the estates timely administration. A. Mulligan, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017' (23 February 2018), p. 11, available at < https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>; F. Duffy, 'Submission to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017', p. 70, available at < https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.

the deceased's existing family.[410] Provided that the child is born within twelve months from the first taking out of representation of the deceased's estate, it would be possible for someone to make a Section 117 application on the child's behalf, claiming that the deceased has failed in their moral duty to make proper provision for them.[411] A successful application would have the result of reducing any share that the extended family members might otherwise be entitled to.

Posthumous conception can also have financial implications for the State. If the Irish Government do fulfil their commitment to publicly funding ART,[412] then the use of the industry for posthumous conception could become costly for the State.[413] Furthermore, the State may oppose posthumous conception to prevent children from being born into one parent families. The State has an interest in protecting its vulnerable citizens and there is a risk that children born to single parents will have cost implications for society in terms of state welfare.[414]

More generally, the State has an interest in protecting the basic unit of the family within society and there is an argument that promoting one parent households does not meet societies ideal of the 'nuclear family'.[415] This is particularly relevant in an Irish context, given the highly privileged position awarded to the martial family in Article 41.3.1 of the Irish Constitution.[416]

Lastly, the State has an interest in the treatment of the deceased and dying, and there are societal expectations of how we treat dead and dying patients.[417] Young observes that society has an interest in seeing itself in a particular light. She argues that we like to perceive ourselves to be a society that respects the dead. There is a risk that the extraction of gametes from a dying or deceased patient could be viewed

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[410] Kindregan and McBrien, 'Posthumous Reproduction', above n 246, at 595.
[411] Succession Act 1965 (IRE), s 117(6).
[412] F. O Cionnaith, 'Govt to Announce €2m Fertility Support Funding' (RTE, 19 Decemeber 2019), available at < https://www.rte.ie/news/health/2019/1219/1102102-fertility-treatment/>.
[413] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 82.
[414] Robertson, 'Posthumous Reproduction', above n 4, at 1039 and 1041; Batzer, Hurwitz and Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement', above n 264, at 1266.
[415] Strong, Gringrich and Kutteh, 'Ethics of Post-mortem Sperm Retrieval', above n 278, at 742.
[416] Article 41.3.1 provides that 'the State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack': Bunreacht na hÉireann, Article 41.3.1.
[417] Berger, Rosner and Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients', above n 121, at 774.

by society as unnecessary, or as a distasteful interference with a corpse.[418] Furthermore, there is a societal fear that posthumous conception can lead to the commodification of human bodily products and treats the dead as a means to serve the interests of the still living.[419]

3.6.3. Is the Harm to the State Sufficient to Restrict Access to Posthumous Conception?

The potential harms which may be caused to the State by posthumous conception are not sufficient to justify prohibiting the practice in Ireland. Firstly, in relation to the concerns regarding the administration of the deceased's estate, as stated earlier, it is possible to legislate in a way which precludes the child from inheriting or interfering with the distribution of the deceased's assets.[420]

Secondly, the arguments raised regarding the financial implications of posthumous conception for the Irish Government are not compelling. The ART industry is currently privately funded in Ireland. Indeed, even if it does transpire that the State provide funding for ART in Ireland, it is still likely that ART will primarily be provided for on a private, for-profit basis.[421] In addition, there is no guarantee that posthumously born children will be dependent on State welfare.[422] As discussed in Section 3.4.5, posthumous conception is a timely and expensive process. It cannot be presumed that those who undergo the process are not in a position to provide for the resulting child.[423]

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[418] Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 223; Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 184, at 7.
[419] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 3, at 658.
[420] As can be seen in the UK's Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK), s 1(2).
[421] This has been the case in several developed countries which provide ART on a public basis: G.M. Chambers, E.A. Sullivan, O. Ishihara, M.G. Chapman and G.D. Adamson, 'The Economic Impact of Assisted Reproductive Technology: A Review of Selected Developed Countries' (2009) 91(6) *Fertility and Sterility* 2281.
[422] Young, 'Presuming Consent to Posthumous Reproduction', above n 4, at 82.
[423] Tremellen and J. Savulescu, 'Posthumous conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma', above n 357, at 29.

Thirdly, I do not think that the arguments made regarding the public interest in promoting the 'nuclear family' are persuasive. The traditional idea of the 'nuclear family' is socially idealistic. It closes its eyes to the reality of modern family life and fails to acknowledge that nowadays, it is very common for children to be conceived, born and raised outside the confines of heterosexual marriage.[424] Shannon observes that whist family life in Ireland was once synonymous with marriage, the introduction of divorce, changes in relationship formation patterns, economic change and influences of international law have all contributed to 'the increasing fluidity and diversification of family forms' in Ireland.[425] This view was also taken by former Minister for Health, Simon Harris, when calling for a national referendum to change the wording of Article 41.3.1 to recognise broader family dynamics in Ireland. The Minister stated that:

> "..the idea that a mum or dad bringing up a son or daughter, or a grandmother bringing up three or four grandkids for years, effectively raising them, are not recognised as families because of our Constitution's outdated understanding of what constitutes a family is something that we should examine."[426]

Shannon asserts that it is no longer tenable to claim that Irish law should only recognise one type of family. Thus, while the constitutional preference for families based on marriage remains intact in Article 41.3.1, this does not prevent the State from recognising other forms of families, whatever their official status.[427]

Lastly, regarding the States interest in the treatment of dead bodies. As argued earlier in this chapter, I contend that the dead do not have interests which can be harmed.[428] However, I do accept that living people have interests in what happens

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[424] S.L. Brown, 'Marriage and Child Well-Being: Research and Policy Perspectives' (2010) 72(5) *Journal of Marriage and Family* 1059.
[425] G. Shannon, *The Children and Family Relationships Bill 2014 - a Children's Rights Perspective* (Law Society of Ireland, 2014), p. 1.
[426] M. O'Halloran, 'Referendum Needed to Change Definition of Family in Constitution' (The Irish Times, 17 July 2018), available at <https://www.irishtimes.com/news/politics/oireachtas/referendum-needed-to-change-definition-of-family-in-constitution-1.3568434>.
[427] Shannon, *The Children and Family Relationships Bill 2014 - a Children's Rights Perspective,* above n 425, p. 1.
[428] Feinberg, 'The Rights of Animals and Unborn Generations', above n 10, p. 57.

to them after they have died.[429] Thus, so long as proceeding with posthumous conception does not conflict with any pre-mortem expressed wishes of the dead, then it is not my view that the practice of posthumous conception can harm any interest of society in the treatment of dead bodies.

3.7. Concluding Remarks on the Potential 'Harms' Caused by Posthumous Conception

This chapter has addressed whether posthumous conception should be restricted in Ireland based on the harm principle. I identified the stakeholders in posthumous conception, including the deceased, the surviving partner, extended family, resulting child, the medical physicians and the State. I also discussed the interests of these stakeholders and the potential harms which posthumous conception may cause to them. I concluded that the potential harms caused by posthumous conception to the interests of each stakeholders are not sufficient to justify limiting the practice in Ireland. Based on my findings in this chapter, I submit that posthumous conception should be regulated in Ireland. I adopted a liberal approach to regulation in this thesis and contended that Ireland should only restrict procreative autonomy in cases where it results in sufficient harm to others. To justify restricting posthumous conception in Ireland, the harm caused needs to be present and sufficient not hypothetical or speculative.[430] This is not the case with the potential harms caused by posthumous conception to the interests of each stakeholder. Therefore, I contend that it is not justifiable for the State to restrict posthumous conception and that the practice should be permitted by law in Ireland. The next chapter addresses the second research question of this thesis and examines whether a degree of consent should be used to regulate posthumous conception in Ireland.

[429] Callahan, 'On Harming the Dead', above n 5, at 350-351; Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 35, at 535; Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is', above n 62, at 214.
[430] J. Harris, 'Reproductive Liberty, Disease and Disability' (2005) 10 *Reproductive Biomedicine Online* 13, at 14.

Chapter Four

Autonomy and Consent to Posthumous Conception

4. Introduction

The concept of autonomy underpins many laws relating to consent,[1] and is reflected in laws which require a degree of consent from the deceased to proceed with posthumous conception.[2] Within the liberal tradition, autonomy is generally used as a reference to ideals of 'freedom', 'choice' and 'self-determination'.[3] Generally, autonomy refers to the ability of people to make their own decisions, and their freedom to follow their own life plan by making choices that reflect their personal beliefs and convictions, both in daily life and in clinical settings.[4]

It has been argued that proceeding with posthumous conception in the absence of consent from the deceased breaches their autonomy. This is because procedures of posthumous gamete retrieval and posthumous conception will reflect the deceased's personal ideals regarding the kinds of bodily interference that they would have deemed appropriate, and whether or not they would have chosen to become a genetic parent.[5] In this context, consent is being used as a means to protect the choices of the deceased. It is argued that in the absence of their consent, it is impossible to ascertain with any degree of certainty what exactly they would have chosen.[6]

Respecting the autonomy of the deceased in posthumous conception is complicated by the fact that the deceased is dead, and is no longer in a position to make

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[1] S. McLean, *Autonomy, Consent and the Law* (Oxon: Routledge-Cavendish, 2010), p. 1.
[2] N. Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent' (2019) 27 *Journal of Law and Medicine* 1, at 4.
[3] E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), p. 2; T.L. Beauchamp and J. Childress, *Principles of Biomedical Ethics* (7th ed, New York: Oxford University Press, 2013), p. 101; D. Brudney, 'Choosing for Another; Beyond Autonomy and Best Interests' (2009) 39(2) *Hastings Center Report* 31, at 32-33.
[4] Jackson, *Regulating Reproduction: Law, Technology and Autonomy,* above n 3, p. 2.
[5] S. Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) 5(2) *Journal of Law and the Biosciences* 329, at 334; A.R. Schiff, 'Arising from the Dead: Challenges of Posthumous Procreation' (1997) 75(3) *North Carolina Law Review* 901.
[6] Schiff, 'Arising from the Dead: Challenges of Posthumous Procreation', above n 5, at 945.

autonomous choices.[7] Thus, when consent is used as a means of protecting the deceased's autonomy, the level of consent which is necessary is dependent on the degree of autonomy which is attributed to the deceased. This is the issue which is central to the debate on posthumous conception.[8] Commentators are not agreed on the level of consent which should be required for posthumous conception, and whether this should take the form of expressed consent, implied consent, presumed consent, or no-consent.[9]

This chapter addresses the second research question of this thesis regarding whether a model of consent should be used to regulate posthumous conception in Ireland. To do this, I examine the concept of autonomy and outline how this is applied to the dead. I then outline each of the consent policies which could be used to regulate posthumous conception in Ireland.

Section 4.1 discusses the principle of autonomy in general. I outline the history and development of the principle of autonomy and I identify the core values that autonomy serves.

Section 4.2 examines how the concept of autonomy is applied to the dead and outlines the arguments in favour and against attributing autonomy to the dead.

Section 4.3 discusses the value of respecting pre-mortem expressed wishes of the dead.

Section 4.4 examines the relationship between autonomy and consent to posthumous conception. I outline the different consent policies which could be used to regulate posthumous conception in Ireland.

Section 4.5 concludes this chapter.

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[7] S. Giordano, 'Is the Body a Republic' (2005) 31 *Journal of Medical Ethics* 470, at 471; J. Harris, 'Law and The Regulation of Retained Organs: The Ethical Issues (2002) 22(2) *Legal Studies* 527.
[8] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 5, at 334.
[9] R.D. Orr and M. Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?' (2002) 28 *Journal of Medical Ethics* 299; F.R. Batzer, J.M. Hurwitz and A. Caplan, 'Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement' (2003) 79 *Fertility and Sterility* 1263; F. Kroon, 'Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception' (2015) 1 *Reproductive Biomedicine Society Online* 123.

4.1. The Principle of Autonomy

It is necessary to first establish a general understanding of autonomy before the principle can be applied to the dead later in this chapter. The degree of autonomy which is granted to the dead will then determine the level of consent which should be used to regulate posthumous conception. This section examines the principle of autonomy generally and identifies the key values which autonomy seeks to serve.

4.1.1. The History and Development of Autonomy

The term 'autonomy' is derived from the Greek translation of the words 'autos' (self) and 'nomos' (rule) which is interpreted to mean 'self-rule' or 'self-law'.[10] The literal meaning of autonomy is to have, or to make 'one's own laws'.[11] The phrase was first applied to the Greek City State, whose citizens were said to have created their own State laws.[12] In contrast, a State was 'heteronomous' or non-autonomous when it acted under the authority of a sovereign power.[13]

Traditionally, the concept of autonomy was used purely in a political sense.[14] However, the concept is now used in variety of contexts to refer to different political, moral and social ideals.[15] Beauchamp and Faden note that the principle of autonomy is loosely associated with several concepts, including privacy, self-mastery, voluntariness and choosing freely.[16] Likewise, Gerald Dworkin states that the term is used in an 'exceedingly broad' fashion and has been equated over time to a variety of distinct ideals, including dignity, independence, self-assertion, freedom from obligation and knowledge of one's own interests.[17] Feinberg claims that autonomy has at least four different interpretations. These include the capacity to govern oneself, the actual condition of self-government, a personal ideal and a

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[10] G. Dworkin, 'The Nature of Autonomy' (2015) 1(28479) *Nordic Journal of Studies in Educational Policy* 7, at 11; R. Rao, 'Property, Privacy and the Human Body' (2000) 80 *Boston University Law Review* 359, at 360.

[11] J. Feinberg, 'Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution' (1983) 58(3) *Notre Dame Law Review* 445, at 446.

[12] Dworkin, 'The Nature of Autonomy', above n 10, at 11.

[13] Ibid.

[14] Feinberg, 'Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution', above n 11, at 446.

[15] Dworkin, 'The Nature of Autonomy', above n 10, at 10.

[16] T.L. Beauchamp and R.R. Faden, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986), p. 7.

[17] G. Dworkin, *The Theory and Practice of Autonomy* (New York: Cambridge University Press, 1988), p. 6; Dworkin, 'The Nature of Autonomy', above n 10, at 8.

set of rights expressive of one's sovereignty over oneself.[18] These were the types of phrases that were traditionally applied to States and institutions. Thus, when used in a moral or social context, the notion of autonomy always derives its meaning from its early use in a political sense and is arguably a ‘political metaphor’.[19]

While autonomy certainly derives its meaning from an ancient political notion, most modern accounts of autonomy find their roots in more recent philosophical theories dating back to the eighteenth and nineteenth century. These include theories from influential philosophers such as Immanuel Kant and John Stuart Mill.[20] The following sections identify and outline some of the prevailing accounts of autonomy which have emerged in the literature, including accounts of moral, personal and relational autonomy.

4.1.1.1. Moral Autonomy

Moral autonomy can be traced back to the philosophy of Kant and his description of the ‘categorical imperative’.[21] Kant’s one ‘categorical imperative’ was a strict moral law which outlined people’s motivations for acting. Kant stated that people should ‘act only according to that maxim by which [they] can at the same time will that it should be universal law’.[22] By this, Kant meant that people should only act in ways that they would expect other rational human beings to act. Furthermore, their actions should be of such universal moral application, that they should become moral laws.[23]

Kant’s account of autonomy is consistent with the political origins of the principle. For Kant, autonomy refers to the capacity of people to self-legislate. He developed the idea that the notion of self-government was connected to morality. In turn, he

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[18] Feinberg, ‘Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution’, above n 11, at 447.
[19] Ibid, at 446.
[20] O. O’Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press), p. 29.
[21] I. Kant, ‘Groundwork for the Metaphysic of Morals’ translated and edited by M. Gregor, in K. Ameriks and D.M. Clarke (eds.), *Cambridge Texts in the History of Philosophy* (Cambridge: Cambridge University Press, 1997).
[22] Ibid, p. 18.
[23] McLean, *Autonomy, Consent and the Law*, above n 1, p. 15.

claimed that people's autonomous actions should guide the moral law.[24] His argument was that by having the ability to govern their own actions, people should be guided by their own self-enforced moral law, rather than acting under the authority of a political or religious institution.[25] O'Neill observes that Kant's autonomy is not concerned with personal choices or individual will. Rather, autonomy relates to 'reason', 'ethics' and 'principles':[26]

> "For Kant autonomy is *not relational*, *not graduated*, *not a form of self-expression*; it is a matter of acting on certain sorts of principles, and specifically on principles of obligation".[27]

On Kant's account, a person is autonomous when they can make decisions which are free from factors that are external or inessential to themselves.[28] These factors not only include external peer pressure, the will of God and religious, political or legal pressure, but also extend to that person's own inessential desires.[29] Thus, a person's feelings, emotions or habits are excluded from autonomous decision making. Indeed, any circumstances which are authentic or personal to a person are excluded from autonomous decision making.[30]

A person is autonomous in a moral sense when their actions are guided by a universal concern for the ends of all rational agents in society and are not guided by their own personal happiness.[31] When a person's actions would be universally willed by any rational being and are not contingent on that person's own circumstances or experiences then that person is acting autonomously. Furthermore, their actions may gain status as objective moral laws. In this way, every autonomous moral agent is a lawgiver in a community and our autonomous choices inform the moral law.[32]

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[24] S.M. Shell, *Kant and the Limits of Autonomy* (Cambridge: Harvard University Press, 2009), p. 2-5.
[25] Dworkin, *The Theory and Practice of Autonomy,* above n 17, p. 10-11.
[26] O'Neill, *Autonomy and Trust in Bioethics*, above n 20, p. 83.
[27] Ibid, p. 83-84.
[28] R. Giovagnoli, *Autonomy: A Matter of Content* (Firenze: Firenze University Press, 2007), p. 10.
[29] Ibid, p. 10.
[30] Ibid, p. 10.
[31] J. Waldron, 'Moral Autonomy and Personal Autonomy', in J. Christman and J. Anderson (eds), *Autonomy and the Challenges to Liberalism* (New York: Cambridge University Press, 2005), p. 307.
[32] Giovagnoli, *Autonomy: A Matter of Content*, above n 28, p. 15-16.

4.1.1.2. Personal Autonomy

Personal autonomy also refers to the capacity of a person to pursue a particular course of action or to make decisions for themselves. However, with personal autonomy, autonomous choices reflect an individual's personal beliefs and convictions and they are not dependent on any particular moral content.[33] Personal accounts of autonomy recognise that human beings are diverse and that each individual will have a personal view as to what constitutes as a good life.

One of the most influential advocates for personal autonomy was John Stuart Mill.[34] Mill's argument is that conforming to one mode of living is unproductive and that it is unrealistic to expect all members of society to have the same taste and to live their lives in a similar manner.[35] Instead, Mill claims that citizens should have the freedom to experiment with their personal characteristics and culture. In this way, people can develop a way of living for themselves, by making choices which are authentic to them. For Mill, the ability to choose for oneself is the basis of living a good life.[36]

Personal autonomy is highly individualistic. People are led by their own happiness to make choices and pursue actions in pursuit of their own ends, as opposed to making decisions which are guided by a universal concern for all members of society.[37] Provided that others are not harmed in the process, Mill argued that people should be free to make their own life decisions, even when these decisions are undesirable to others:[38]

> "…if a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode".[39]

Professor Harris notes that one of the primary presumptions of liberal democracies is that people should not be interfered with unless there is good and sufficient justification for doing so. He argues that autonomy means that people should be

[33] Waldron, 'Moral Autonomy and Personal Autonomy', above n 31, p. 307.
[34] J.S. Mill, *On Liberty* (Auckland: Floating Press, 2009).
[35] Ibid, p. 114-115.
[36] Ibid, p. 95.
[37] Waldron, 'Moral Autonomy and Personal Autonomy', above n 31, p. 307.
[38] Mill, *On Liberty,* above n 34, p. 113-114.
[39] Ibid, p. 114.

free to make their own decisions in light of their own values, regardless of whether or not these choices are acceptable to the majority.[40] Indeed, Mill observes that the freedom to choose includes the liberty to make choices which are disagreeable to others.[41]

Furthermore, Mill contends that an interference with personal autonomy is only justified when the person's decision harms or infringes on the liberty of others.[42] It is not sufficient to curtail somebody's liberty in cases where their choice merely makes others uncomfortable. Harris observes that simply because a decision is not popular by the majority does not mean that the choice is harmful.[43] To justify restricting autonomy, the identified harm must be substantial and present, and not merely hypothetical or speculative.[44] Under Mill's theory, so long as others remain unharmed by a person's life choices, autonomy suggests that the person should be free to act accordingly.[45]

Autonomy requires that the person in question is competent to make independent choices and that these choices are authentic to that person's own beliefs, free from the manipulation or influence of others.[46] Beauchamp and Childress state that:

> "Personal autonomy is, at minimum, self-rule that is free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice…A person of diminished autonomy, by contrast, is in some respect controlled by others or incapable of deliberating or acting on the basis of his or her desires and plans."[47]

The authors note that on essentially all accounts of autonomy, autonomous subjects are required to have 'liberty' and 'agency'. The person must be independent from the controlling influences of others and have the capacity to act intentionally.[48] However, there is disagreement in the literature as to the precise meanings of the

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[40] J. Harris, 'Reproductive Liberty, Disease and Disability' (2005) *10 Reproductive Biomedicine Online* 13, at 13.
[41] Mill, *On Liberty*, above n 34, p. 113-114; Harris, 'Reproductive Liberty, Disease and Disability', above n 40, at 13.
[42] Mill, *On Liberty*, above n 34, p. 128.
[43] J. Harris, 'Sex Selection and Regulated Hatred' (2005) 31 *Journal of Medical Ethics* 291, at 293; Harris, 'Reproductive Liberty, Disease and Disability', above n 40, at 13.
[44] Ibid.
[45] Mill, *On Liberty*, above n 34, p. 18.
[46] J. Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9(3) *Medicine, Healthcare and Philosophy* 377, at 378.
[47] Beauchamp and Childress, *Principles of Biomedical Ethics*, above n 3, p. 101-102.
[48] Ibid, p. 102.

terms 'liberty' and 'agency', and over whether or not the status of being autonomous requires additional conditions.[49]

Contemporary philosophers such as Gerald Dworkin and Harry Frankfurt have provided accounts of autonomy which seek to identify methods of determining whether or not a person's choices or actions can truly be said to be their own. Both authors make a distinction between a person's first order desires and second order desires.[50] A first order desire is the desire of a person to do something. A second order desire is the desire of a person to have that first order desire.[51] Frankfurt argued that in order to act autonomously, a person must have a first order desire to perform a particular action. Furthermore, they must also reflectively enforce this action through a second order desire.[52] This is referred to as a 'split-level' or 'hierarchical account' of autonomy. An autonomous person must have a desire to do a particular action (first order desire). Additionally, they must also be able to identify this desire, reflect on it and control it. After reflecting on the desire, the person must want to desire to do the particular action (second order desire).[53] Dworkin states that autonomy is the:

> "…second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values".[54]

On hierarchal accounts of autonomy, autonomy is constituted on the basis of a person's capacity to reflect on, accept or ignore their first order desires.[55]

This understanding of autonomy is deemed idealistic. It requires that a person's choices and actions be entirely authentic and free from any external influences. Christman notes that as an 'ideal', autonomy functions as a goal to be obtained and

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[49] Ibid.
[50] H.G. Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68(1) *Journal of Philosophy* 5, at 6; Dworkin, *The Theory and Practice of Autonomy,* above n 17, p. 15.
[51] Frankfurt, 'Freedom of the Will and the Concept of a Person', above n 52, at 7.
[52] Ibid, at 14.
[53] M.E. Bratman, 'Autonomy and Hierarchy' (2003) 20(2) *Social Philosophy and Policy* 156.
[54] Dworkin, *The Theory and Practice of Autonomy,* above n 17, p. 20.
[55] Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 103.

would be held by very few, if any people at all.[56] Thus, autonomy has been described as existing on a continuum.[57] Autonomy will admit in degrees and levels will range from being wholly independent with full understanding to having an inadequate level of understanding and being entirely controlled by others.[58] People will naturally occupy different places on the continuum depending on the particular phase or circumstances of that person's life.[59] For practical purposes, Beauchamp and Childress note that there must be a threshold set to determine the autonomy of a person.[60] However, once a person has met this threshold, their autonomy need not be idealistic for them to qualify as an autonomous subject.[61]

4.1.1.3. Relational Autonomy

Accounts of personal autonomy reflect highly individualistic perceptions and expectations of how people make decisions and pursue actions.[62] People are said to carry out their actions in pursuit of their own personal happiness, as opposed to acting in the interest of others or society in general.[63] Critics submit that personal autonomy fails to recognise the autonomous individual as a member of a wider community.[64] They claim that personal autonomy ignores the role that shared traditions, families and community often play in everyday decision making.[65] This particular critique of personal autonomy has led to the development of 'relational

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[56] J. Christman, 'Autonomy in Moral and Political Philosophy', in E.N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Spring 2018), para. 1.1, available at <https://plato.stanford.edu/archives/spr2018/entries/autonomy-moral/>, para. 1.1.
[57] Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 105; Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 378.
[58] Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 105.
[59] Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 378.
[60] Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 105.
[61] At a basic level, adults who do not suffer from deliberating conditions and who do not live in oppressive or constricting circumstances are generally accepted to be autonomous: McLean, *Autonomy, Consent and the Law*, above n 1, p. 17-18; J. Coggon and J. Miola, 'Autonomy, Liberty, and Medical Decision-Making' (2011) 70 *Cambridge Law Journal* 523 at 526; Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 105; Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 378.
[62] K. Walter and L. Friedman-Ross, 'Relational Autonomy: Moving Beyond the Limits of Isolated Individualism' (2013) 133 *American Academy of Pediatrics* 16, at 17.
[63] Waldron, 'Moral Autonomy and Personal Autonomy', above n 31, p. 307.
[64] McLean, *Autonomy, Consent and the Law*, above n 1, p. 21; J. Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2003) 117(1/2) *Philosophical Studies: An International Journal for Philosophy in the Analytic* 143, at 144.
[65] Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves', above n 64, at 144.

autonomy'.[66] Relational autonomy establishes autonomy by interpreting it through relationships, inter-dependence and communal life.[67] Christman describes it as:

> "The label that has been given to an alternative conception of what it means to be a free, self-governing agent who is also socially constituted and who possibly defines her basic value commitments in terms of inter-personal relations and mutual dependencies".[68]

Relational autonomy recognises that people are socially embedded and that our decisions, actions, and identities are formed and shaped through social relationships.[69] Accounts of relational autonomy have been endorsed by commentators within various streams of the literature, including feminist authors, communitarians and theorists of identity politics.[70] They argue that autonomy needs to be reconceptualised to balance a person's independent decision making in light of their relational values and social responsibilities or commitments.[71] For example, Berg states that people's interests are rarely self-isolated. People's choices and actions often reflect social values which are informed by their family, friends and by state agents.[72] Relational autonomy recognises that individuals act as members of a wider community. It is argued that many peoples actions will be prompted by a range of communal influences, such as community traditions, histories, religious norms and so forth.[73]

On relational accounts, autonomy is not affirmed by the mere capacity to make independent choices which are in line with one's values. Rather, McLean notes that relational autonomy perceives the autonomous subject as:

> "…one who recognises his or her inter-relationship with the society of which s/he is a part and is able to acknowledge that his or her choices are socially constructed and have consequences for the community".[74]

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[66] McLean, *Autonomy, Consent and the Law*, above n 1, p. 21.
[67] Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 106.
[68] Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves', above n 64, at 143.
[69] Walter and Friedman-Ross, 'Relational Autonomy: Moving Beyond the Limits of Isolated Individualism', above n 62, at 18.
[70] Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves', above n 64, at 143.
[71] McLean, *Autonomy, Consent and the Law*, above n 1, p. 20-21.
[72] J.W. Berg, P.S. Appelbaum, C.W. Lidz, and L.S Parker, *Informed Consent: Legal Theory and Clinical Practice* (2nd edn, Oxford: Oxford University Press, 2001), p. 33.
[73] Beauchamp and Childress, *Principles of Biomedical Ethics*, above n 3, p. 105-106.
[74] McLean, *Autonomy, Consent and the Law*, above n 1, p. 21.

On this account, to be fully autonomous, people must acknowledge their social situation, and this should help to inform their decisions and guide their actions.[75]

4.1.2. The Values of Autonomy

Beauchamp and Childress identify 'autonomy' as one of the four primary principles in biomedical ethics.[76] The emphasis which is placed on autonomy by the authors has been highly influential in both the academic context and in clinical practice.[77] Today, the principle of autonomy is respected for varying reasons and its importance is highly debated throughout the literature.[78]

Some commentators claim that autonomy has intrinsic value.[79] The argument that autonomy has intrinsic worth means that autonomy is valuable in and of itself, simply because of what it is. Alternatively, it is argued that autonomy has intrinsic worth because it is a necessary feature of persons and we already perceive people to be valuable.[80] Others claim that there are key underlying values which give autonomy an extrinsic worth and that these values are promoted when we respect autonomy.[81] Thus, autonomy is not valued for the sake of autonomy itself. Rather, respecting autonomy has beneficial consequences by promoting these underlying values.[82] The following sections outline some of the prominent values said to underly the principle of autonomy. These include notions of 'choice' or 'self-determination', 'wellbeing' and 'authenticity'.

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[75] Ibid, p. 24.

[76] The other principles identified by the authors include 'nonmaleficence', 'beneficence' and 'trust': Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 13.

[77] G.T Laurie, S.H.E. Harmon and E.S. Dove, *Law and Medical Ethics* (11th edn, Oxford: Oxford University Press, 2019), p. 5.

[78] Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 378.

[79] Something is said to be of intrinsic value when it is worthy of respect purely because of what it is. Alternatively, something can be said to be of intrinsic value if it is a necessary component of something which is already considered to be of undeniable value: M. Schermer, *The Different Faces of Autonomy: Patient Autonomy in Ethical Theory and Hospital Practice* (Dordrecht: Springer-Science and Business Media, 2000), p. 12; R. Young, 'The Value of Autonomy' (1982) 32(126) *The Philosophical Quarterly* 35, at 40.

[80] Schermer, *The Different Faces of Autonomy: Patient Autonomy in Ethical Theory and Hospital Practice*, above n 79, p. 12.

[81] Mill, *On Liberty*, above n 34; A. Buchanan and D. Brock, 'Deciding for Others' (1986) 64(2) *The Milbank Quarterly* 17; Dworkin, *The Theory and Practice of Autonomy*, above n 17.

[82] Young, 'The Value of Autonomy', above n 79, at 35.

4.1.2.1. Choice

Choice is perhaps the principal ideal which underlies the concept of autonomy. As a value of autonomy, choice respects the ability of people to make self-regarding decisions about their own life.[83] Mill was an influential advocate for freedom of choice. Mill argued that a person's 'own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode'.[84] On this view, Mill is recognising that autonomy is respected simply because there is a value for people in making choices.[85]

Freedom of choice is important for people because it gives them the opportunity to take control of their own life path. By promoting and respecting choice, it is argued that autonomy has the beneficial consequence of allowing people to live the life that they wish to lead.[86] Madder refers to this idea as 'existential autonomy'.[87] She argues that having the ability to make choices and the freedom to pursue actions is necessary for people to take responsibility for their whole-life decisions.[88] Furthermore, the freedom to choose keeps people accountable to themselves and helps them to enable self-realisation.[89]

Buchanan and Brock note that people value making choices for themselves.[90] They claim that people regard the ability to choose so highly that they are often unwilling to let others make their decisions for them, even where third parties might be better placed to make the particular decision.[91] People believe that they are always going to be the person who is best placed to make their own life choices and simply value the ability to choose for themselves.[92]

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[83] Buchanan and Brock, 'Deciding for Others', above n 81, at 29.
[84] Mill, *On Liberty,* above n 34, p. 114.
[85] Ibid; J. Savulescu, 'Autonomy, The Good Life and Controversial Choices', in R. Rhodes, L. Francis and A. Silvers (eds.), *The Blackwell Guide to Medical Ethics* (Oxford: Blackwell Publishing, 2007), p. 29.
[86] Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 379-380.
[87] H. Madder, 'Existential Autonomy: Why Patients Should Make Their Own Choices' (1997) 23 *Journal of Medical Ethics* 221, at 221-222.
[88] Ibid, at 222.
[89] Ibid.
[90] Buchanan and Brock, 'Deciding for Others', above n 81, at 30.
[91] Ibid, at 29-30.
[92] Ibid.

4.1.2.2. Wellbeing

Autonomy is often valued as a method in which an individual's wellbeing or best interests can be promoted.[93] This view is based on the argument that people generally know what is in their own best interest. It is claimed that people are usually aware of matters that will contribute to, or that will hinder their own welfare. Thus, by giving people the opportunity to make choices for themselves, autonomy is valued because it promotes personal wellbeing.[94]

The argument that we should respect people's choices because people generally know what is in their own best interests is what Ronald Dworkin refers to as the 'evidentiary' account of autonomy.[95] Dworkin provides two accounts of autonomy: the 'evidentiary' view and the 'integrity' view.[96] On the evidentiary view, Dworkin states that:

> "We should respect the decisions that people make for themselves, even when we think these decisions imprudent, because as a general matter each person knows what is in his own best interests better than anyone else does".[97]

However, Dworkin later acknowledges that a general respect for autonomy permits people to knowingly make choices which are contrary to their wellbeing. Thus, he argues that the true value of autonomy cannot be fully explained on the view that autonomy promotes personal welfare when it equally respects people's decisions to make reckless or imprudent choices which are contrary to their wellbeing.[98] That being said, it has been argued that even when people make mistakes and take actions that do not promote their welfare, the very fact that the person made the choice for themselves contributes to their well-being.[99] Thus, on the 'evidentiary' account of autonomy, autonomy is valuable because it is better for the wellbeing of people 'in the long run' for their choices to be respected.[100] Furthermore, Buchanan and Brock note that by giving individuals a sense of control over their

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[93] Ibid, at 28.
[94] D. Molyneux, 'Should Healthcare Professionals Respect Autonomy Just Because It Promotes Welfare?' (2009) 35(4) *Journal of Medical Ethics* 245, at 246.
[95] R. Dworkin, 'Autonomy and the Demented Self' (1986) 64 *The Milbank Quarterly* 4, at 7.
[96] Ibid, at 7-8.
[97] Ibid, at 7.
[98] Ibid, at 8.
[99] Schermer, *The Different Faces of Autonomy: Patient Autonomy in Ethical Theory and Hospital Practice*, above n 79, p. 11.
[100] Dworkin, 'Autonomy and the Demented Self', above n 95, at 7.

personal welfare, autonomy requires that people take responsibility for their own choices and actions.[101] By respecting an individual's own personal choice, autonomy accords with that person's wellbeing even if it need not necessarily further their interests.[102]

4.1.2.3. Authenticity

Some commentators claim that beyond merely having the capacity to choose, autonomy permits people to be authentic. The argument is that self-determination helps people to form a distinct sense of self and gives them the opportunity to lead a particular kind of life.[103] Ronald Dworkin refers to this as the 'integrity' view of autonomy.[104] On this view, autonomy is valuable because it grants people the freedom to become a particular kind of person and to lead a life which is authentic or unique:[105]

> "The value of autonomy, on this view [integrity view], lies in the scheme of responsibility it creates: autonomy makes each of us responsible for shaping his own life according to some coherent and distinctive sense of character, conviction, and interest. It allows us to lead our own lives rather than being led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what he has made himself".[106]

Mill referred to the principle of autonomy as 'individuality'.[107] He argued that independent choices allow people to carry out their lives in their own distinct way. Autonomy allows people to flourish by permitting them to engage with their character, express themselves and become an original, well-developed person.[108] Similarly, Harris claims that a person's independent choices and preferences will portray their individuality and values. Thus, the exercise of autonomy facilitates people to become their own unique person. [109] On this view, autonomy is valuable

[101] Buchanan and Brock, 'Deciding for Others', above n 81, at 29.
[102] A. Buchanan and D. Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge: Cambridge University Press, 1990), p. 53-54.
[103] Dworkin, 'Autonomy and the Demented Self', above n 95, at 8-9; Brudney, 'Choosing for Another', above n 3, at 32.
[104] Dworkin, 'Autonomy and the Demented Self', above n 95, at 8.
[105] Ibid, at 9; Brudney, 'Choosing for Another', above n 3, at 32.
[106] Dworkin, 'Autonomy and the Demented Self', above n 95, at 8.
[107] Mill, *On Liberty*, above n 34.
[108] Ibid, p. 101.
[109] J. Harris, 'Consent and End of Life Decisions' (2003) 29 *Journal of Medical Ethics* 10, at 11.

because it permits people to be an authentic self. Self-determination is an expression of a person's unique character, their values and their convictions.[110] It recognises that choices are expressive of personal identity any by paying respect to personal autonomy, people are permitted to live their lives with a distinctive meaning and purpose.[111] Authenticity is widely perceived as a key underlying value of autonomy, so much so that some authors contend that authenticity should be introduced as an additional requirement to ascertain whether a person is truly acting autonomously.[112]

4.1.3. Concluding Remarks on the Principle of Autonomy

The preceding sections of this chapter provided a general overview on the principle of autonomy and identified the primary values which are said to justify the principle. This discussion of autonomy was necessary prior to assessing whether the dead have autonomy later in this chapter. This is because the degree of autonomy which is attributed to the dead will reflect the level of consent which should be used to regulate posthumous conception in Ireland.

There are varying accounts of autonomy in the literature.[113] However, in biomedical ethics, there is certainly a common understanding of what is meant by 'autonomy' and the principle is most frequently identified as relating to the notions of personal 'freedom' and 'choice'.[114] Central to almost all accounts is the idea that autonomy refers to self-determination and that a person should be free to make decisions for themselves in relation to both political life and personal development.[115] Therefore, I favour the Millian conception of personal autonomy

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[110] J. Calinas-Correia, 'Autonomy and Identity' (2000) 26 *Journal of Medical Ethics* 141, at 141; Dworkin, *The Theory and Practice of Autonomy,* above n 17, p. 26.
[111] Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 383.
[112] These accounts are similar to the 'hierarchal accounts' of autonomy provided by Frankfurt and Dworkin. They claim that true authentic choices require an element of self-reflection: N. Juth, *Genetic Information - Values and Rights. The Morality of Presymptomatic Genetic Testing* (Göteborg: Acta Universitatis Gothoburgensis, 2005), p. 137; D. DeGrazia, *Human Identity and Bioethics* (Cambridge: Cambridge University Press, 2005); J. Ahlin Marcetta, 'A Non-Ideal Authenticity-Based Conceptualization of Personal Autonomy' (2019) 22 *Medicine Health Care and* Philosophy 387.
[113] Beauchamp and Faden, *A History and Theory of Informed Consent,* above n 3, p. 7.
[114] Varelius, 'The Value of Autonomy in Medical Ethics', above n 46, at 377; Jackson, *Regulating Reproduction: Law, Technology and Autonomy*, above n 3, p. 2; Beauchamp and Childress, *Principles of Biomedical Ethics,* above n 3, p. 102; Brudney, 'Choosing for Another; Beyond Autonomy and Best Interests', above n 3, at 32-33.
[115] Jackson, *Regulating Reproduction: Law, Technology and Autonomy*, above n 3, p. 2; McLean, *Autonomy, Consent and the Law*, above n 1, p. 3.

as the capacity of a person to make choices for themselves which are in line with their own convictions, free from the coercive influence of others.[116] I acknowledge that external influences such as relational values and commitments can and subsequently do contribute to autonomous decision making.[117] However, McLean argues that:

> "There is nothing to suggest that the individualistic account of autonomy necessarily ignores or rejects the values of others, nor does it necessarily preclude the taking of responsibility for decisions made. In other words, it too may be described as socially contextualised, even if it is more obviously supports self-regarding decisions".[118]

Moreover, on the Millian account of personal autonomy, each of the primary values which are said to underpin the concept of autonomy are emphasised. This view gives weight to the importance that people place on making independent choices.[119] In addition, it accords with the argument that autonomy contributes to a person's sense of wellbeing and helps them to lead an authentic life.[120] The next sections of this chapter assess the extent to which this concept of autonomy can be applied to the dead. The degree of autonomy which is attributed to the dead will reflect the level of consent which should be used to regulate posthumous conception.

4.2. Autonomy and the Dead

It is necessary to determine whether the dead have autonomy to establish the level of consent which should be used to regulate posthumous conception. When it comes to applying the principle of autonomy to the dead, there are two primary positions which are taken by commentators in this area. The first is that the dead are non-autonomous and that the dead do not have autonomy which can be violated.[121] The second is that autonomy does not cease upon death and that the autonomy of a deceased person can be infringed when their pre-mortem choices

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[116] Mill, *On Liberty,* above n 34.
[117] Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves', above n 64, at 143.
[118] McLean, *Autonomy, Consent and the Law*, above n 1, p. 30.
[119] Buchanan and Brock, 'Deciding for Others', above n 81, at 29.
[120] Mill, *On Liberty,* above n 34, p. 95 and 101.
[121] J. Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.

are not respected following their death.[122] The following sections outline the arguments in favour and against ascribing autonomy to the dead.

4.2.1. The Dead are Non-Autonomous

When autonomy is accepted as referring to the idea of 'self-determination' or the ability of a person to make their own choices, the argument that the dead are non-autonomous can be advanced very simply. Even at the most basic level, autonomy requires the subject in question to have both 'liberty' and 'agency'.[123] Autonomy requires the subject to be independent and to have the capacity to think about, reflect on, and express their own desires.[124] However, the very status of death will negate any possibility of the deceased thinking, making choices or pursuing actions for themselves.

Conway states that the loss of autonomy is inevitable when a person ceases to exist as a human being.[125] She notes that, death, by its very nature, will strip a person of their ability to control and thus, will render them non-autonomous.[126] Likewise, Harris argues that the dead do not have autonomy which can be violated:

> "Autonomy involves the capacity to make choices, it involves acts of the will and the dead have no capacities – they have no will, no preferences, wants nor desires, the dead cannot be autonomous and so cannot have their autonomy violated."[127]

On this account, a person's ability to exercise autonomy will cease at the moment of their death. After a person has died, they are no longer in a position where they can exercise any of the practices which are commonly associated with autonomous decision making. The dead are unable to think, they cannot make deliberate choices and they cannot pursue any intentional actions for themselves.[128]

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[122] D. Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008); K.R. Smolensky, 'Rights of the Dead' (2009) 37 *Hofstra Law Review* 763.
[123] Beauchamp and Childress, *Principles of Biomedical Ethics*, above n 3, p. 102.
[124] Ibid, p. 101-102.
[125] H. Conway, *The Law and the Dead* (London and New York: Routledge, 2016), p. 145.
[126] Ibid.
[127] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.
[128] J. Harris, 'Mark Anthony or Macbeth: Some Problems Concerning the Dead and Incompetent when it Comes to Consent', in S. McLean (ed.), *First Do No Harm: Law, Ethics and Healthcare* (Hampshire: Ashgate, 2007), p. 288.

4.2.1. The Dead have Autonomy

Despite the fact that the dead are no longer in a position to make conscious choices or pursue deliberate actions, not all commentators agree with the view that autonomy ceases upon death.[129] These authors do not aim to suggest that the dead are capable of exercising choice. Rather, as Conway notes, proponents of the view that autonomy can be violated after death recognise that there are other core values (aside from choice) which underpin autonomy. These accounts place significant emphasis on the alternative values of autonomy, such as authenticity.[130]

It is argued that despite not being in a position to exercise choice when they die, recognising a person's pre-mortem interests and choices regarding posthumous events still adheres to the notion of self-determination by permitting people to express their own character and values in a posthumous context.[131] Sperling observes the importance of authenticity as an underlying value of autonomous decision-making and states that:

> "Autonomy is first and foremost the moral privilege of a person to cultivate and nurture her particular vision of herself as a human being. It is the prerogative of shaping the images, conceptions and recollections which other persons have or will have of her regardless of whether she will physically witness those images, conceptions and recollections".[132]

The arguments in favour of the position that autonomy can be violated after death are closely aligned with the belief that people have persisting interests or rights that will endure after they have died.[133] In this respect, Ronald Dworkin presents an account of interests and of autonomy which suggests that the autonomy of a person can be respected and violated even when that person is no longer in a position to exercise decision making or pursue autonomous actions.[134] As discussed in Chapter Two, Dworkin makes a distinction between a person's experiential interests and

[129] Conway, *The Law and the Dead*, above n 125, p. 145-146.
[130] Ibid, p. 145.
[131] Ibid, p. 146.
[132] Sperling, *Posthumous Interests: Legal and Ethical Perspectives,* above n 122, p. 147.
[133] Conway, *The Law and the Dead*, above n 125, p. 146: The arguments in favour of ascribing interests to the dead are outlined fully in Chapter Three of this thesis.
[134] Of course, it must be noted that the accounts of autonomy which are advanced by Dworkin are made in reference to patients who are suffering from dementia. However, his description of the notion of precedent autonomy can be equally applied to the dead: Dworkin, 'Autonomy and the Demented Self', above n 95.

their critical interests;[135] experiential interests being the interests that a person experiences on a daily basis,[136] and critical interests being the interests which are established by a person based on their perception of what will constitute as an overall good life.[137] Dworkin suggests that critical interests reflect a person's unique identity and values and that people pursue them because they believe that their overall life will be better if they complete them.[138] This distinction compliments Dworkin's 'integrity' account of autonomy. As noted above, the 'integrity' view of autonomy suggests that the value of autonomy lies in its capacity to allow people to lead a particular kind of life and to become a distinct person.[139] Thus, autonomy, by granting people the freedom to make choices which are in line with their authentic beliefs and values permits people to live their life in accordance with both their experiential preferences and their ultimate life goals (their experiential and critical interests).[140]

When a person dies they will no longer have any experiential interests. However, Dworkin argues that a person's critical interests are established by them when they are competent and that by paying respect to a person's critical interests when they are no longer in a position to experience them will honour that person's 'precedent autonomy'.[141] Thus, on this view, a person need not be around to exercise choice as a feature of autonomy. Instead, the autonomy of the dead can be respected by recognising that an individual's pre-mortem choices and wishes can reflect their personal identity and unique values. On Dworkin's 'integrity' view, autonomy can be supported and, indeed, violated even after death.[142]

4.2.2. The Dead and Procreative Autonomy

The concept of procreative autonomy is discussed fully in Chapter Two. To put briefly, procreative autonomy refers to the idea that people should have the

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[135] R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), p. 201-202.
[136] Ibid.
[137] Ibid.
[138] Ibid, p. 202.
[139] Dworkin, 'Autonomy and the Demented Self', above n 95, at 8.
[140] Ibid, at 9.
[141] Ibid, at 10-13.
[142] Ibid.

freedom to make their own reproductive choices.[143] When a person dies, they are no longer in a position to choose whether or not they reproduce. However, some authors contend that because decisions about reproduction are so significant to people during their lifetime, procreative autonomy will not cease when a person dies.[144] Similar to the arguments outlined above for ascribing autonomy to the dead in general, the claim that the dead have procreative autonomy is reliant on living people forming critical interests in reproducing after death.[145] The view is consistent with Dworkin's account of precedent autonomy and claims that interests in reproduction are so central to the person while they are living that ignoring these wishes when the person is dead will harm their procreative autonomy.[146]

As discussed in Chapters Two and Three, the ordinary interests that people have in reproducing and in avoiding reproduction such as gestation, genetic linkage and founding a family are widely perceived to be valuable and could certainly be regarded as critical interests by Dworkin's distinction.[147] However, I have argued in Chapter Three that the interests that a person has in reproducing after death and in avoiding reproduction after death are highly attenuated when compared to the interests of living people in reproducing during their lifetime.[148] Thus, I accept Robertson's argument that we simply cannot attribute the same value to the deceased's interests in posthumous reproduction that we grant to the interests of the living people in ordinary reproduction.[149]

4.2.3. Concluding Remarks on Autonomy and the Dead

The preceding sections of this chapter have outlined the positions in favour and against the view that the dead have autonomy. I support the view that the dead are

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[143] J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (New Jersey: Princeton University Press, 1994), p. 3.
[144] B. Bennet, 'Posthumous Reproduction and the Meanings of Autonomy (1999) 23(2) *Melbourne University Law Review* 13, at 13; J. Robertson, 'Posthumous Reproduction' (1994) 69 *Indiana Law Review* 1027, at 1031; K. Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying' (2006) *University of Chicago. Legal Forum* 289, at 300–301.
[145] Robertson, 'Posthumous Reproduction', above n 144, at 1033.
[146] Dworkin, 'Autonomy and the Demented Self', above n 95, at 10-13.
[147] Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom,* above n 135, p. 201-202.
[148] Robertson, 'Posthumous Reproduction', above n 144, at 1032.
[149] Robertson, 'Posthumous Reproduction', above n 144, at 1033.

non-autonomous.[150] Beauchamp and Childress state that autonomy requires the status of being independent and the capacity to act intentionally.[151] However, the death of a person will result in the permanent cessation of that person's cognitive abilities.[152] The dead are unable to think independently, and they cannot express personal preferences, choices or pursue intentional actions. On this account of autonomy, a person's ability to exercise autonomy will cease at the moment of their death.[153] My position in this regard will have a direct consequence on the level of consent which I deem necessary for regulating posthumous conception in the next section of this chapter.

Of course, I accept that aside from the value of expressing choice, 'authenticity' also plays an important factor in underlying the principle of autonomy.[154] Autonomy permits people to express their personal values and to develop a unique sense of identity. Indeed, having interests and expressing personal preferences regarding posthumous events (such as posthumous conception) can adhere to a person's sense of autonomy by allowing them to lead their life in accordance with their authentic believes and values.[155] However, as noted in Chapter Three, the argument that presently living people can have interests in respect of what happens to them after death is not reliant on accepting the argument that the dead have autonomy or interests which can be harmed.[156] I contend that it is simply a value for people to know while they are living, that their preferences or interests are going to be respected when they die.[157]

4.3. The Value of Respecting the Wishes of the Dead

There are various reasons which can justify why we pay respect to the pre-mortem expressed wishes of the dead which do not automatically lead to the conclusion

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[150] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.
[151] Beauchamp and Childress, *Principles of Biomedical Ethics*, above n 3, p. 102.
[152] In general, brain death is accepted as the irreversible loss of all brain function, including the brainstem: Intensive Care Society of Ireland, *Diagnosis of Brain Death and Medical Management of the Organ Donor: Guidelines for Adult Patients* (2010), p. 1.
[153] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.
[154] Dworkin, 'Autonomy and the Demented Self', above n 95, at 8-9; Brudney, 'Choosing for Another', above n 3, at 32.
[155] Sperling, *Posthumous Interests: Legal and Ethical Perspectives,* above n 122, p. 147.
[156] H. Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is' (2013) 14 *Marquette. Elder's Advisor* 197, at 214.
[157] Callahan, 'On Harming the Dead', above n 159, at 349-350.

that the dead have autonomy or interests which survive their death. The following sections outline several of these reasons which defend respecting testamentary wills, advanced directives, and other expressed wishes of the dead.

4.3.1. Respect for the Previously Living Person

One argument is that we adhere to the wishes of the dead as a sign of respect to the memory of the deceased person. It is argued that violating a deceased person's prospective autonomous choices will dishonour the memory of the person who once lived.[158] Callahan notes that people often recognise and identify with the ante-mortem person. Thus, they may feel sorrow or compassion on behalf of the previously living person if the deceased's pre-mortem expressed preferences are ignored or if the promises which were made to the deceased during their lifetime are not kept following their death.[159] However, even if we accept that the memory of a deceased person is violated when we fail to carry out their wishes, these are memories of the deceased which are held by presently living people. Thus, violating these wishes will only result in harm to the interests of the still living. Indeed, it does not imply that the dead have interests or autonomy which can be violated after death.[160]

4.3.2. Comfort to the Still-Living and the Interests of Society

Another view is that we heed the wishes of the dead to provide comfort to still living people. The argument is that presently living people can form interests in events that will not happen until after they die. Thus, when we comply with the wishes of the dead, we simultaneously give confidence to presently living people that their own wishes will be followed when they die.[161] Indeed, Brazier and

[158] B.A. Manninen, 'Sustaining a Pregnant Cadaver for the Purposes of Gestating a Foetus: A Limited Defence' (2016) 26(4) *Kennedy Institute of Ethics* 399, at 409.
[159] J.C. Callahan, 'On Harming the Dead' (1987) 97(2) *Ethics* 341, at 347; S. McGuinness and M. Brazier, 'Respecting the Living Means Respecting the Dead too' (2008) 28(2) *Oxford Journal of Legal Studies* 297, at 304.
[160] Callahan, 'On Harming the Dead', above n 159, at 343.
[161] Ibid, at 352.

McGuinness contend that paying respect to the pre-mortem wishes of the dead is a necessary part of respecting the present interests of still living people.[162]

Furthermore, it is argued that public interest requires the recognition of some pre-mortem wishes such as advanced directives and testamentary wills.[163] In the context of wills, Callahan observes that living people not only have an interest in how their property will be managed after death, but that the deceased's surviving heirs are also going to have an interest in the distribution of the deceased's estate. Thus, failing to uphold a testator's wishes can have an effect on the interests of the still living in general to know that their own wishes may not be respected when they die, and further harm the interests of the living beneficiaries under the will.[164] The legal recognition of wills also helps to control the behaviour of presently living people. Robertson argues that testamentary wills encourage people to work, acquire property and to manage their affairs before they die.[165] He further argues that the validity of living wills serves to prevent the provision of intrusive medical care and conserve medical resources.[166]

Ultimately, it is possible to identify several benefits to respecting the wishes of the dead which do not require accepting the view that they have autonomy. In every instance outlined above, it is the interests of living people that benefit from the enforcement of the deceased's pre-mortem wishes.

4.4. Autonomy and Consent to Posthumous Conception

The degree of consent necessary for posthumous conception is highly contested in the literature. Authors are not agreed on the level of consent which should be required and proposals range from highly restrictive outright bans to permissive schemes requiring no consent.[167] The following sections of this chapter outline the various formats in which consent to posthumous conception could take, including

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[162] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 159, at 316.
[163] Harris, 'Law and Regulation of Retained Organs: The Ethical Issues', above n 7, at 535; Callahan, 'On Harming the Dead', above n 159, at 349.
[164] Callahan, 'On Harming the Dead', above n 159, at 351.
[165] Robertson, 'Posthumous Reproduction', above n 144, at 1033.
[166] Ibid.
[167] See generally: S. Jones and G. Gillet, 'Posthumous Reproduction: Consent and its Limitations' (2008) 16 *Journal of Law and Medicine* 27.

expressed consent, inferred consent, presumed consent and no-consent. I also provide examples of how each model of consent would operate in practice and identify the degree of autonomy which each level of consent affords to the deceased.

4.4.1. Expressed Consent

Expressed consent is the highest degree of consent which could be required to regulate posthumous conception. Expressed consent requires explicit pre-mortem consent from the deceased authorising the retrieval, and/or storage and use of their gametes after death.[168] In terms of its format, expressed consent to posthumous conception could be provided either verbally or in writing. However, to be valid, expressed consent should be fully informed – i.e. have been provided by the deceased voluntarily, while they were competent and after full disclosure.[169]

4.4.1.1. Verbal Consent

Verbal consent to posthumous conception would take the form of pre-mortem oral expressions from the deceased consenting to the retrieval and/or storage and use of their gametes after death. However, as the deceased is dead, verbal consent to posthumous consent is problematic for several reasons.

Firstly, there is a potential conflict of interest with the surviving partner and/or family members who seek to use the gametes of the deceased.[170] Alongside hearsay issues and the difficulty of confirming statements made by a person who is no longer in a position to confirm or deny them, there is also a fear that any evidence produced as to the deceased's past statements will be biased by the applicants' desire to use the gametes.[171] Thus, for verbal consent to be an acceptable form of expressed consent, it would need to have been furnished by the deceased in the presence of independent witnesses who can attest to its validity.[172] Moreover, for verbal consent to be acceptable, the deceased would have to have specifically

[168] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 144, at 302.
[169] Kroon, 'Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception', above n 9, at 124; Jones and Gillet, 'Posthumous Reproduction: Consent and its Limitations', above n 167, at 284.
[170] Orr and Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?', above n 9, at 301.
[171] Jones and Gillet, 'Posthumous Reproduction: Consent and its Limitations', above n 167, at 282.
[172] Schiff, 'Arising from the Dead: Challenges of Posthumous Procreation', above n 5, at 953.

consented to becoming a parent after death as it has been argued that verbal expressions from the deceased indicating a desire to become a parent during their lifetime cannot be taken as explicit verbal consent to posthumous conception.[173] Thus, when expressed consent to posthumous conception is required, the verbal format of consent is not ideal.

4.4.1.2. Written Consent

For evidentiary purposes, written consent from the deceased is the preferable format of expressed consent. This is the position in most jurisdictions which permit posthumous conception[174] and is the stance which has been proposed by Ireland for regulating posthumous conception in the AHR Bill 2017.[175] Expressed written consent would take the format of an advanced written directive from the deceased, specifically authorising the retrieval and/or storage and use of their gametes after death.

Expressed written consent from the deceased is perhaps the most favourable or idealistic form of consent to posthumous conception. However, as several authors have highlighted, the requirement of expressed written consent from the deceased will rarely be met in practice.[176] Certainly, written consent may be present in cases where the deceased has cryogenically stored gametes during the course of their lifetime – given that it is very often standard protocol for the source of frozen gametes to indicate their wishes as to the fate of the gametes upon death in the storage consent forms.[177] However, in the vast majority of cases where gametes have not been stored during the lifetime of the deceased, their written consent is rarely going to be available to their surviving spouse or family.

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[173] Orr and Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?', above n 9, at 302.

[174] K. Tremellen and J. Savulescu, 'Posthumous Conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma' (2016) 3 *Reproductive Biomedicine and Society Online* 26, at 27.

[175] AHR Bill 2017, Part 4, Head 24 and 25.

[176] N. Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, at 747; K. Tremellen and J. Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception' (2015) 30 *Reproductive Biomedicine Online* 6, at 6.

[177] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 2, at 2.

Tremellen and Savulescu observe that healthy people of reproductive age do not typically contemplate their death, let alone consider the prospect of posthumous conception. The authors contend that the deceased is unlikely to have discussed their wishes regarding posthumous conception with their partner and is even less likely to have recorded their wishes in a written document.[178] For this reason, if the deceased has died suddenly or unexpectedly, their expressed written consent will seldom be available.[179] Maddox claims that this is evidenced by the vast majority of case law on the issue, whereby surviving partners seek court orders authorising the retrieval and/or continued storage and use of the deceased's gametes in the absence of their expressed written consent.[180] Thus, Maddox suggests that formal written consent requirements are likely to bar the very class of people who seek to use posthumous conception.[181] Advanced written directives have also been criticised on the basis that they set out the deceased's wishes in stone and do not provide for changing circumstances where the deceased may no longer consent. Furthermore, written consent policies do not account for instances of human error or oversight, whereby storage forms can either be lost or filled out incorrectly.[182]

4.4.1.3. Expressed Consent and Autonomy of the Deceased

Laws that require expressed consent to posthumous conception attribute full autonomy to the deceased. These provisions are grounded on the presumption that acting in the absence of the deceased's expressed consent (either verbal or written) violates their autonomy.[183] Proponents of the restrictive view maintain that requiring expressed consent from the deceased is the only way in which we can adhere to their autonomy and ascertain their views with a degree of certainty.[184]

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[178] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 176, at 7.

[179] Ibid.

[180] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 2, at 10.

[181] Ibid.

[182] Ibid; Kroon, 'Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception', above n 9, at 124; *R (on the application of Mr. & Mrs. M) v. Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611.

[183] G. Bahadur, 'Ethical Challenges in Reproductive Medicine: Posthumous Reproduction' (2004) 1266 *International Congress Series* 295, at 298; A. R. Schiff, 'Posthumous Conception and the Need for Consent' (1999) 170 *Medical Journal of Australia* 53, at 54; Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 144, at 301.

[184] Schiff, 'Arising from the Dead: Challenges of Posthumous Procreation', above n 5, at 253.

For example, Professor Reichmann Schiff, passionately advocates for expressed consent to posthumous conception. She argues that respect for personal autonomy requires that bodies of the dead are not used in ways which were not consented to by the person during their lifetime.[185]

Orr and Siegler have also defended expressed consent to posthumous conception on the basis that it is disrespectful to the body of the deceased to act without consent.[186] This is a 'non-interference' model of autonomy which suggests that is wrong to interfere with the body of a person without their consent.[187] However, as argued above, I take the position that the dead do not have autonomy which can be violated.[188] Thus, I do not accept the view that expressed consent is necessary to proceed with posthumous conception. Moreover, there are several practical difficulties with requiring both verbal and written consent from the deceased.[189] I contend that such formalities are likely to prevent those who seek to avail of posthumous conception benefiting from the technology.[190]

4.4.2. Inferred Consent

Inferred consent is a moderate level of consent by the standards of consent used to regulate posthumous conception. This model has been described as a 'hybrid approach' to consent. It aims to strike a balance between the restrictive nature of the expressed consent model and the more permissive forms of presumed and no consent.[191]

Inferring consent accords with the prevailing view that a degree of consent from the deceased is necessary for posthumous conception to be ethically justifiable.[192]

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[185] Schiff, 'Posthumous Conception and the Need for Consent', above n 183, at 54.
[186] Orr and Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?', above n 9, at 300.
[187] Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 5, at 345.
[188] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.
[189] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 176, at 7.
[190] Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent', above n 2, at 10.
[191] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 144, at 304.
[192] C. Strong, 'Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State' (2000) 14 *Journal of Law and Health* 243.

However, it also recognises that the strict formalities of expressed consent models will rarely be met in practice.[193] With inferred consent, the absence of expressed consent from the deceased does not act as an outright bar to proceeding with posthumous conception. Rather, the default position is that the deceased has not consented unless this can be proven otherwise. In such scenarios, the burden falls on those who seek to use the gametes in posthumous conception – i.e. the surviving partner or family members - to produce circumstantial evidence which can be used to infer that the deceased would have consented to posthumous conception in the particular case.[194]

As a compromise, inferring consent is perhaps the most supported model of consent in the absence of the deceased's expressed consent.[195] Strong, in particular, argues that proceeding with posthumous conception on the basis of the deceased's reasonably inferred wishes adheres to the deceased's autonomy by respecting their decisions concerning procreation after death.[196] Of course, Strong acknowledges that there are difficulties with an inferred consent model, the primary criticism being the potential for biased testimony. In these cases, the prospective beneficiary is the one who is tasked with providing evidence as to the deceased's wishes. There is a fear that any evidence produced by the surviving partner or family members will be influenced by their own desire to use the deceased's gametes in posthumous conception.[197] Thus, Strong suggests that independent factors be used to reasonably infer the deceased's consent.[198]

4.4.2.1. Factors to Consider When Inferring Consent

When inferring consent, the deceased's previous statements can be used to ascertain whether they would have consented to posthumous conception.[199]

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[193] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 176, at 7.
[194] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 144, at 304-305.
[195] Ibid, at 304.
[196] Strong, 'Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State', above n 192, at 259.
[197] C. Strong, J. Gingrich and W. Kutteh, 'Ethics of Sperm Retrieval After Death or Persistent Vegetative State' (2000) 14(4) *Human Reproduction* 739, at 743.
[198] Ibid, at 743.
[199] Ibid, at 742.

Additionally, there are also several independent factors that can be used alongside the deceased's values and goals to infer consent on their behalf. This includes any evidence as to the deceased's future plans for childbearing, or their desire to produce a sibling for an already existing child.[200] It has also been suggested that the deceased's relationship status at the time of their death can be used to infer consent – the argument being that people who are in committed or long-term relationships are more likely to have the intention of starting a family.[201]

Furthermore, within many cultures and religions, the very purpose of marriage is to procreate. Thus, consent from the deceased could be reasonably inferred on the basis that the deceased was married.[202] Cultural norms and practices are also relevant, particularly in circumstances where the deceased's religion or heritage places significant importance on reproduction and lineage.[203]

Another factor that can be used to infer the wishes of the deceased is evidence that their parents are supportive of the surviving partner's application.[204] It has been suggested that evidence of parental support can add or give weight to the surviving partner's claim that the deceased would have consented.[205] Furthermore, the nature of the deceased's death could also be used as evidence to infer their wishes as to posthumous conception.[206] In circumstances where the deceased has died suddenly or unexpectedly, it is not logical to conclude that a lack of consent necessarily amounts to a refusal to consent. However, in cases where death has been anticipated by the deceased, the absence of consent from the deceased could be used as evidence to infer that they would not have consented to posthumous conception.[207]

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[200] J.D. Hans, 'Attitudes Toward Posthumous Harvesting and Reproduction' (2008) 32(9) *Death Studies* 837, at 848.
[201] Ibid, at 843.
[202] Jones and Gillet, 'Posthumous Reproduction: Consent and its Limitations', above n 167, at 286.
[203] Ibid.
[204] Hans, 'Attitudes Toward Posthumous Harvesting and Reproduction', above n 200, at 848; *In the Matter of Lee (Deceased) and Long (Applicant)* [2017] NZHC 3263.
[205] Ibid.
[206] Ibid, at 847.
[207] R. Collins, 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma' (2005) 30(4) *Journal of Medicine and Philosophy* 431, at 437.

4.4.2.2. Inferred Consent and Autonomy of the Deceased

Inferred consent models do not admit full autonomy to the deceased. However, they do grant the dead partial autonomy. Inferred consent is consistent with Dworkin's integrity account of autonomy and the view that a person can have critical interests in reproduction which survive their death.[208] Inferred consent suggests that the unique values and wishes of the deceased will not always be served by relying exclusively on their expressed consent. Rather, autonomy can be adhered to by looking at what the deceased would have wanted. In this way, inferring the wishes of the deceased respects their autonomy by recognising them as an authentic individual.[209]

Inferred consent models also adhere to relational accounts of autonomy by recognising that a person's choices are often formed and shaped as a response to their personal relationships, culture, religion and so forth. It acknowledges that consent could be inferred on behalf of the deceased based on the role that shared traditions, family and community played in their everyday decision making.[210]

While I certainly acknowledge that it is admirable to attempt to infer the wishes of the deceased in these cases, I do not accept the argument that it is necessary to do so based on my view that the dead do not have autonomy which can be violated.[211] Furthermore, even if one does accept the arguments in favour of ascribing autonomy to the dead, I am not fully convinced that a model of inferring consent would necessarily respect the deceased's autonomy. When consent to posthumous conception is inferred, one can never be truly certain that what has been inferred on behalf of the deceased is what they would have wanted.[212] Moore highlights that in cases where consent has been inferred, the consent is strictly speaking not a form of consent from the deceased at all.[213] In these cases, inferred consent simply

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[208] Dworkin, 'Autonomy and the Demented Self', above n 95, at 10-13.
[209] Strong, Gingrich and Kutteh, 'Ethics of Sperm Retrieval After Death or Persistent Vegetative State', above n 197, at 259; Jones and Gillet, 'Posthumous Reproduction: Consent and its Limitations', above n 167, at 287.
[210] Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves', above n 64, at 143.
[211] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.
[212] Orr and Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?', above n 9, at 301.
[213] A. Moore, 'Postmortem Reproduction, Consent, and Policy' in J. Haldane and L. Aitken (eds.), *Philosophy and Its Public Role* (Exeter: Imprint Academic, 2004), p. 111; Jones and Gillet, 'Posthumous Reproduction: Consent and its Limitations', above n 167, at 280.

provides an illusion of consent from the deceased. However, arguably, the inference of consent merely serves to provide those who do attribute the dead with autonomy satisfaction that proceeding with posthumous conception without expressed consent from the deceased is ethically justifiable.

4.4.3. Presumed Consent

Presumed consent is considered permissive by the standards of consent used to regulate posthumous conception.[214] In contrast to an inferred model, the default position with a presumed consent policy is to presume that the deceased has consented to posthumous conception unless this can be displaced.[215]

Presumed consent works in the same way as an opt-out system. It allows the deceased to opt-out of posthumous conception during their lifetime. However, in the absence of an expressed or inferred refusal from the deceased, posthumous conception is permitted on the basis of their presumed consent.[216] This presumption can of course, be rebutted. However, the burden falls on those who seek to challenge the application for posthumous conception to produce sufficient evidence as to the deceased's refusal to consent.[217]

Although characterised by some commentators as an 'extremely permissive' or 'radical' position,[218] the presumed consent model has been defended for several reasons. Parker claims that proceeding with posthumous conception in the absence of expressed or inferred consent from the deceased can be justified on the basis of people's procreative desires.[219] Parker claims that people ordinarily have interests in parenthood and that these interests can exist independently of a person's ability to be an active parent. They can include a person's desire to have a child with their

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[214] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 144, at 303.

[215] H. Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 *Journal of Law and Health* 68, at 71.

[216] Ibid, at 72; Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 176, at 11.

[217] Young, 'Presuming Consent to Posthumous Reproduction', above n 215, at 71.

[218] Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', above n 144, at 304; Kroon, 'Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception', above n 9, at 124.

[219] M. Parker, 'Response to Orr and Siegler—Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception' (2004) 30 *Journal of Medical Ethics* 389.

partner or to advance their lineage. He argues that by allowing posthumous conception in the absence of consent we can adhere to people's reproductive desires.[220] Furthermore, Parker advocates for presumed consent to posthumous conception based on the idea that couples often ‘collectively intend’ to reproduce. Parker argues that a collective intention to reproduce supports a permissive policy for posthumous conception given that ‘there remains a live desire which can be satisfied’ even when one of the parties has died.[221]

Collins makes a somewhat similar argument in that she claims that it is not unreasonable for us to presume that many people would consent to posthumous conception if they were given the opportunity to do so. Collins suggests that consent to posthumous conception may be presumed based on the fact that many people have interests in genetic linkage and in minimising hardship on their surviving loved ones.[222] Furthermore, Collins rejects several of the arguments which have been made against presumed consent models in cases where the person has died suddenly.[223] Most notably, she rejects the views advanced by Schiff who claims that it is wrong for us to use dead bodies in ways that were not contemplated by the deceased during their lifetime. Moreover, she rejects Schiff’s argument that it is unreasonable for us to expect people to make their opposition to posthumous conception known when it is not a societal norm.[224]

Collins suggests that the absence of expressed consent to posthumous conception from a person who has died suddenly does not necessarily mean that they refused to consent. Rather, the absence of consent is more likely a consequence of the matter not being contemplated by the deceased at all.[225] Collins states that in cases where a person has died suddenly, they have simply not been given the opportunity to make their wishes known.[226] In further response to Schiff, Collins adds that it is perhaps just as unreasonable for us to place the onus on people to explicitly express their consent to posthumous conception, particularly when there several good

[220] Ibid, at 390.
[221] Ibid, at 391.
[222] Collins, ‘Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma’, above n 207, at 435.
[223] Ibid, at 433-440.
[224] Ibid, at 436-437.
[225] Ibid, at 437.
[226] Ibid, at 437.

reasons for us to presume that the individual would have consented had they been given the opportunity.[227]

Tremellen and Savulescu have most recently defended their collective view that presumed consent is the most favourable policy for posthumous conception.[228] In support of a presumed consent policy, the authors rely on the availability of the empirical evidence published by Nakhuda,[229] Pastuszak,[230] and Hans[231] which illustrates that the vast majority of men who were questioned on the prospect of posthumous conception were agreeable to letting their partners use their gametes upon death.[232] The authors claim that an insistence on expressed consent to posthumous conception frustrates the preferred view of the majority.[233] Of course, the authors note that the empirical research on this issue is severely limited. Moreover, they admit that when the situation is flipped, and we presume consent to posthumous conception there is certainly a threat that a minority of people who would not have consented will fail to make their wishes known. However, they claim that such a scenario is a 'lesser moral wrong than blocking the wishes of the majority because of a lack of explicit consent'.[234]

Perhaps the more compelling argument in favour of presumed consent provided by Tremellen and Savulescu, is based on their view that the dead do not have autonomy.[235] They note that when posthumous conception is being sought the deceased no longer has any autonomy or interests which can be harmed. Thus, proceeding with posthumous conception without consent from the deceased will

[227] Ibid, at 437.
[228] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 176; Tremellen and Savulescu, 'Posthumous Conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma', above n 174.
[229] G.S. Nakhuda, J.G. Wang and M.V. Sauer, 'Posthumous Assisted Reproduction: A Survey of Attitudes of Couples Seeking Fertility Treatment and The Degree of Agreement Between Intimate Partners' (2011) 96(6) *Fertility Sterility* 1463.
[230] A.W. Pastuszak, W.S. Lai, T.C. Hsieh, and L.I. Lipshultz, 'Posthumous Sperm Utilization in Men Presenting for Sperm Banking: An Analysis of Patient Choice' (2013) 1(2) *Andrology* 251.
[231] J.D. Hans, 'Posthumous Gamete Retrieval and Reproduction: Would the Deceased Spouse Consent?' (2014) 119 *Society of Science and Medicine* 10.
[232] Tremellen and Savulescu, 'Posthumous Conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma', above n 174, at 27.
[233] Ibid.
[234] Ibid.
[235] Ibid.

do no harm to them.[236] The authors base their argument for presumed consent on the welfare of still living people. They claim that a presumed consent policy can act in accordance with the interests of the deceased's surviving partner or family who seek to use the gametes posthumously and also adheres to the autonomy that the deceased had while they were alive by giving them the option to opt-out.[237]

This view is similar to the one which is convincingly argued by Young. Young defends her view of presumed consent to posthumous conception on the basis that the dead no longer have interests or autonomy which can be harmed.[238] She claims that presuming consent to posthumous conception will in no way affect the deceased. However, Young recognises that still living people can have interests in posthumous conception. For example, the deceased's surviving spouse or family can have interests in using the gametes posthumously, alongside any interests of living people in general regarding the treatment of their bodies or becoming parents after death.[239] Presuming consent adheres to the present interests and autonomy of the surviving partner and family who have an interest in using the gametes, and also adheres to the autonomy of still living people in general by giving them the opportunity to opt out should they wish to do so.[240]

4.4.3.1. Presumed Consent and Autonomy of the Deceased

A presumed consent policy to posthumous conception does not attribute any autonomy to the dead. A model of presumed consent recognises that once a person has died, they are no longer in a position to exercise autonomous choices and no longer have any meaningful interests which can be harmed.[241] However, a presumed consent model does admit that still living people have interests in what happens to them after death. Providing an opt-out system gives living people the opportunity to express their wishes and refuse consent. In this way, a presumed

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[236] Ibid.
[237] Ibid, at 28.
[238] Young, 'Presuming Consent to Posthumous Reproduction', above n 215, at 97.
[239] Ibid.
[240] Ibid.
[241] Tremellen and Savulescu, 'Posthumous Conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma', above n 174, at 28; Young, 'Presuming Consent to Posthumous Reproduction', above n 215, at 97; Collins, 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma', above n 207, at 440.

consent model adheres to the autonomy of still living people by acknowledging the expressed wishes of the dead and permitting them to opt-out should they wish to so do.[242] For these reasons, I support the arguments in favour of a presumed consent model to regulating posthumous conception. This model of consent is consistent with my view that the dead do not have autonomy or interests which can be harmed after death.[243] However, it also comports with the argument that living people can have interests in what happens to them after death.[244]

4.4.4. No-Consent

No-consent is the most permissive level of consent which could be used to regulate posthumous conception. A model of no-consent requires absolutely no evidence of the deceased's views on posthumous conception prior to proceeding with the practice – whether this be evidence of the deceased's consent or evidence of the deceased's refusal to consent.[245]

A no-consent policy is not the same as a model of presumed consent to posthumous conception. A model of no-consent would permit posthumous conception to be facilitated even where evidence can show that the deceased refused consent to posthumous conception during their lifetime, whereas a system of presumed consent takes heed to any expressed objections of the dead.[246] The models are similar in that no-consent also ascribes no autonomy to the dead. However, a no-consent model fails to acknowledge that living people can have interests regarding post-mortem affairs.[247] Thus, I do not accept that a model of no-consent would be favourable for regulating posthumous conception as such a scenario can potentially result in harm to the interests of the living to know that their own expressed wishes as to posthumous conception will become irrelevant when they die.

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[242] Young, 'Presuming Consent to Posthumous Reproduction', above n 215, at 97.
[243] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.
[244] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 159, at 316.
[245] K. Baird, 'Dead Body, Surviving Interests: The Role of Consent in the Posthumous Use of Sperm' (Bachelor of Laws (Honours) thesis, University of Otago, 2018), p. 28.
[246] Young, 'Presuming Consent to Posthumous Reproduction', above n 215, at 71.
[247] McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 159, at 316.

4.5. Concluding Remarks on Autonomy and Consent to Posthumous Conception

This chapter has addressed the second research question of this thesis and examined whether a model of consent should be used to regulate posthumous conception in Ireland. Firstly, I discussed the concept of autonomy generally and identified the primary values in which autonomy serves. Secondly, I applied the principle of autonomy to the dead and noted that the degree of autonomy which is awarded to the dead is critical in determining the level of consent which should be used to regulate posthumous conception. I argued in support of the view that the dead are non-autonomous.[248] Thirdly, I identified the values of respecting the wishes of the dead and argued that despite not having autonomy, the expressed wishes of the dead should be respected so as to protect the interests of still living people.[249] Lastly, I outlined the various consent policies which could be used to regulate posthumous conception, including expressed, inferred, presumed and no-consent.

I conclude that a degree of consent is necessary when regulating posthumous conception in Ireland. This is to protect the autonomy of living people in what happens to them after death. However, in my view the current AHR Bill proposals in respect of regulating posthumous conception by expressed consent in Ireland are overly burdensome. Moreover, I contend that they are unnecessary given that I do not accept that the dead have interests or autonomy which can be harmed. I contend that a system of presumed consent is the most effective way of regulating posthumous conception in Ireland. Presumed consent best accommodates my view that the dead do not have autonomy or interests which can be harmed after death,[250] while at the same time remains consistent with the argument that still living people can have interests in what happens to them after death.

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[248] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.

[249] Callahan, 'On Harming the Dead', above n 159, at 352; McGuinness and Brazier, 'Respecting the Living Means Respecting the Dead too', above n 159, at 316.

[250] Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues', above n 7, at 531.

Chapter Five

Approaches to Regulating Posthumous Conception

5. Introduction

The law on posthumous conception varies considerably around the world. There are wide differences in how the practice is regulated at national levels and the policies that exist range from posthumous conception being completely unregulated or prohibited in some jurisdictions, to being permitted with limitations or more permissively in others.[1]

This chapter begins to address the final research question of this thesis which seeks to determine what can be learned about regulating posthumous conception from the current state of legislation, guidelines and case law that has emerged on posthumous conception in foreign jurisdictions. To do this, I provide an overview of different approaches that have been adopted by some jurisdictions when regulating posthumous conception, and compare these with the proposals for regulating posthumous conception in Ireland. As noted in the Introduction of this thesis, my aim in this chapter is to demonstrate the varying attitudes that States have taken towards regulating posthumous conception and to ascertain what Ireland can learn from these existing policies. For this reason, the countries which are considered throughout this chapter are discussed specifically based on the varying levels of consent required.

Section 5.1 considers the international perspective on posthumous conception by outlining the extent of guidance that has been provided by the World Health Organisation and European Union on this issue.

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[1] G. Bahadur, 'Posthumous Assisted Reproduction: Cancer Patients, Potential Cases, Counselling and Consent' (1996) 11(2) *Human Reproduction* 2573, at 2575; S. Jones and G. Gillett, 'Posthumous Reproduction: Consent and its Limitations' (2008) 16 *Journal of Medical Ethics* 279, at 281.

Section 5.2 examines jurisdictions where posthumous conception is prohibited. I consider why posthumous conception is banned in these countries and assess whether these reasons are applicable in an Irish context.

Section 5.3 compares different consent policies that have emerged on posthumous conception. I discuss the law in countries where posthumous conception is permitted subject to restrictive consent requirements and jurisdictions where consent policies are more liberal.

Section 5.4 identifies other common measures adopted by countries when regulating posthumous conception, including mandatory waiting periods, counselling, limitations on who can access posthumous conception treatment and legal parentage/inheritance provisions.

Section 5.5 concludes this chapter by identifying some of the key features that are present across different jurisdictions and assessing what Ireland can learn about regulating posthumous conception from this.

5.1. The International Perspective

There have been no official international instruments published that deal with posthumous conception on a global scale. This section outlines the extent of guidance that has been provided by the World Health Organisation (WHO) and the European Union (EU) regarding posthumous conception.

5.1.1. World Health Organisation

The WHO has not issued any official guidance on the use of ART, including posthumous conception. In May 2010, the 63rd World Health Assembly (WHA63.22) endorsed the WHO's *Guiding Principles on Human Cells, Tissue and Organ Transplantation*.[2] These eleven principles are intended to provide contracting member states with relevant guidance for regulating the acquisition and transplantation of human organs.[3] However, it states in the preamble that the

[2] Sixty-Third World Health Assembly, Human Organ and Tissue Transplantation (Resolution WHA63.22, 21 May 2010), para. 1.

[3] World Health Organisation, *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation,* as endorsed by the Sixty-Third World Health Assembly, Human Organ and Tissue Transplantation (Resolution WHA63.22, 21 May 2010), para. 4.

guiding principles do not apply to human reproduction. The term tissue does not extend to reproductive tissue such as sperm, ova, ovaries, testicles or embryos.[4] Thus, the WHO *Guiding Principles on Human Cells, Tissue and Organ Transplantation* are not applicable to the practice of posthumous conception.

In 2002, the WHO published a background paper on the current practices and controversaries in assisted reproduction.[5] This paper addresses different views and concerns raised by participants during an assembly meeting on the medical, ethical and social aspects of assisted reproduction. Although this paper makes some general recommendations on issues relating to assisted reproduction, the WHO have emphasised that this paper is not to be interpreted as their official position on the use of ART.[6] Furthermore, the paper does not make any extensive recommendations on posthumous conception, other than suggesting that further scientific and ethical research is needed on the application and use of sperm retrieved from deceased or dying patients.[7]

5.1.2. European Union

Posthumous conception has also not been officially addressed by the EU. However, there are certain EU Human Tissue and Cell Directives, and the European Society of Human Reproduction and Embryology's (ESHRE) Ethical Statement on posthumous assisted reproduction that are of some relevance to posthumous conception.

The EU Human Tissue and Cells Directives consist of three Directives. Directive 2004/23/EC is the primary directive and Directives 2006/17/EC and 2006/86/EC outline the directive's technical requirements.[8] The purpose of these directives is

[4] Ibid.
[5] World Health Organisation, *Current Practices and Controversaries in Assisted Reproduction: A Report of WHO Meeting* (Geneva, 2002).
[6] World Health Organisation, 'Sexual and Reproductive Health, Publications' (WHO, 2020), available at < https://www.who.int/reproductivehealth/publications/infertility/9241590300/en/>.
[7] World Health Organisation, *Current Practices and Controversaries in Assisted Reproduction: A Report of WHO Meeting,* above n 5, p. 388.
[8] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [2004] OJ L102/48 (Human Tissue and Cells Directive); Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells [2006] OJ L

to ensure that the quality and safety standards for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells is consistent across Europe.[9] They place obligations on member states to ensure the supervision of human tissue and cell procurement, to implement consent, inspection, control and traceability measures and to establish a system of reporting.[10] These directives do not specifically address the permissibility of posthumous conception. However, the provisions do apply to a range of tissues and cells intended for human application including reproductive cells such as sperm and eggs.[11] Thus, the quality and safety standards outlined in these directives are applicable to the handling and use of reproductive cells in ART including posthumous conception.

Furthermore, the ESHRE Taskforce on Ethics and Law have issued an ethical statement that considers posthumous assisted reproduction. The ESHRE is not an official EU body. It is a scientific society that promotes interest in reproductive biology and medicine. The society facilitate research in different areas related to human reproduction and embryology and disseminates its findings to the general public, scientists, clinicians and patient associations across Europe.[12] ESHRE recommendations are therefore not binding on any of the EU member states. However, the society does work closely with politicians and policy makers throughout Europe. Its views on posthumous conception could be of some influence should the European Commission implement any official guidelines on this matter in the future.[13]

38/40; Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells [2006] OJ L294/32.

[9] Human Tissue and Cells Directive, above n 8, article 1.

[10] Ibid, Articles 5-11.

[11] Ibid, para. 7; Penasa notes that views regarding ART vary considerably across Europe. Thus, the EU have left it to individual member states to regulate the issue based on their own constitutional, cultural and social backgrounds: S. Penasa, ‘Converging by Procedures: Assisted Reproductive Technology Regulation within the European Union’ (2013) 12(3-4) *Medical Law International* 300, at 302.

[12] European Society of Human Reproduction and Embryology, ‘Special Interest Groups’ (ESHRE, 2019-2020), available at < https://www.eshre.eu/Specialty-groups>.

[13] European Society of Human Reproduction and Embryology, ‘ESHRE and Policy Making’ (ESHRE, 2019-2020), available at < https://www.eshre.eu/Europe>.

In 2006, the Taskforce on Ethics and Law published an ethical statement that dealt specifically with posthumous conception.[14] The Taskforce concluded that posthumous conception was a 'highly controversial issue'. Their view was based on the lack of available empirical data on the psychosocial development of children born through posthumous conception and the member's differing views on the permissibility of permitting posthumous conception outside of the initial parental project (i.e. outside of the couple receiving fertility treatment to start a family).[15]

The Taskforce recommended that posthumous conception should only be accepted in the context of the initial parental project and only when written consent to posthumous conception has been obtained from the deceased. It suggested that consent to posthumous conception would be provided by the deceased when they are in the process of storing their gametes or embryos prior to starting a cycle of *in vitro* fertilisation.[16] As discussed in Chapter Four, this consent approach would be regarded as restrictive, and would grant the deceased with full autonomy.[17] The Taskforce also recommended that surviving partners be required to wait a minimum of one year after the deceased's death before treatment is provided. Furthermore, they recommended that surviving partners undergo thorough counselling on posthumous conception during the waiting period.[18]

5.1.3. Concluding Remarks on the International Perspective

The previous sections have outlined the extent to which the WHO and EU have issued guidance on posthumous conception. In the absence of official international laws on posthumous conception, it has fallen on national governments to regulate the issue. This has resulted in posthumous conception being entirely prohibited in some States, to being permitted with restrictions or more liberally in others. Indeed,

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[14] European Society of Human Reproduction and Embryology Task Force on Ethics and Law including G. Pennings, G. de Wert, F. Shenfield, J. Cohen, P. Devroey and B. Tarlatzis, 'ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction' (2006) 21(12) *Human Reproduction* 3050.
[15] Ibid, at 3052.
[16] Ibid, at 3053.
[17] See discussion in Chapter Four, Section 4.4.1.3.
[18] European Society of Human Reproduction and Embryology Task Force on Ethics and Law, 'ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction', above n 14, at 3053.

in some jurisdictions such as Ireland, posthumous conception remains completely unregulated.[19]

The next sections outline different models of regulating posthumous conception that have emerged around the world. I aim to demonstrate the varying attitudes that different countries have taken on posthumous conception and determine what Ireland can learn about regulating posthumous conception from these policies.

5.2. Complete Prohibition

Posthumous conception is entirely prohibited in many countries. This is the case in France, Germany, Italy, Pakistan and Sweden.[20] Some of these countries have considered the feasibility of posthumous conception and have decided to enact specific regulations that prohibit the practice.[21] Other jurisdictions have existing policies or guidelines in place that do not specifically address posthumous conception, however, they otherwise prohibit the practice.[22]

There are various justifications proffered for banning posthumous conception in these countries. These range from disapproving of posthumous conception for religious or cultural reasons, to objecting on ethical, moral or political grounds. The next sections provide specific examples of countries who have banned posthumous conception for these reasons.

5.2.1. Religious Reasons

In Pakistan, posthumous conception is prohibited for religious reasons. This is on the basis that Islamic culture reserves the use of ART to married couples.[23] Thus, although Pakistan has no specific ART legislation, it is forbidden in Pakistan to

[19] Bahadur, 'Posthumous Assisted Reproduction: Cancer Patients, Potential Cases, Counselling and Consent', above n 1, at 3575.
[20] K. Tremellen and J. Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception' (2015) 30 *Reproductive Biomedicine Online* 6, at 7.
[21] This is the case in Germany.
[22] This is the case in Pakistan.
[23] A.K. Sikary, O.P. Murty, and R.V. Bardale, 'Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent' (2016) 9 *Journal of Human Reproductive Science* 82, at 83.

fertilise a woman's egg with the cryopreserved sperm of her deceased husband, as this would be classified as ART occurring outside of the marital relationship.[24]

Furthermore, fertilising a female egg with the sperm of a deceased man could potentially violate Pakistan's Hudood Ordinance laws. These laws expressly forbid sexually illicit acts outside the confines of a marriage ('zina').[25] Professor Inhorn has stated that, in Pakistan, gamete donation is widely perceived to be a form of 'zina' and a woman can face huge penalties where she is found to have used the sperm of man to whom she is not married in order to conceive a child.[26] Indeed, given that death will end the martial relationship between a husband and wife, posthumous conception could potentially be viewed as a breach of these Hudood Ordinance laws.

5.2.2. Ethical Reasons

Some States have enacted ART legislation that forbids posthumous conception for ethical reasons. Primarily, the ethical justification raised for banning the practice in these countries is to protect State and societal interests that value the traditional nuclear family.[27]

For example, in France, posthumous conception is prohibited by statute. Up until recently, the French Bioethics Law (Loi no. 2011-814) expressly limited the provision of ART in France to heterosexual married couples and to heterosexual couples who have been living together in a committed relationship for a duration of at least two years.[28] French law also required that both partners undergoing ART

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[24] The Islamic religious objections to posthumous conception are discussed in Chapter Three, Section 3.3.2: F.A. Husain, 'Reproductive Issues from the Islamic Perspective' (2000) 3(2) *Human Fertility* 124, at 124.

[25] The Offence of Zina (Enforcement Of Hudood) Ordinance 1979, Ordinance No. VII of 9th February 1979.

[26] Immigration and Refugee Board of Canada, *Pakistan: Treatment of Infertile Couples by Society; Legality of in vitro Fertilization (IVF) and The Use of Sperm Donors* (2011-January 2014) (PAK104760.E, 10 February 2014), available at <https://www.refworld.org/docid/54ca286d6.html>.

[27] V. Fournier, D. Berthiau, J. d'Haussy and P. Bataille, 'Access to Assisted Reproductive Technologies in France: The Emergence of The Patients' Voice' (2013) 16 *Medicine Health and Philosophy* 55, at 55-56.

[28] Loi no. 2011-814 du 7 juillet 2011 relative à la bioéthique, Article 33.

treatment were *alive*, of reproductive age and that at least one of the parties was medically infertile, thereby precluding the possibility of posthumous conception.[29]

The rationale for the French law was to restrict the provision of ART to circumstances where it was a medical necessity for a couple to reproduce. The regime is reflective of the high value that French society place on safeguarding the traditional family unit.[30] However, the French Bioethics law is currently being revised. This is the result of growing pressure on the French Government from the French National Consultative Committee on Ethics which seeks to expand access to ART for same-sex female couples and for single women in France.[31] Indeed, it has recently been reported that the French law will be expanded this year to permit all women, irrespective of their marital status, to have access to ART treatment. However, there has been no indication that future changes in the French Bioethics law will permit women to use the sperm of deceased men to reproduce.[32]

The law is similar in Italy and Sweden where the use of ART is also reserved to married and cohabiting couples. For example, Italy's Law 40/2004 (rules in the field of medically assisted reproduction) reserves the use of ART to heterosexual married or cohabiting couples. The Italian law also requires that both parties are of reproductive age and *alive* in order to facilitate of ART treatment.[33] Thus, the law in Italy precludes posthumous conception. Likewise, Sweden's Genetic Integrity Act 2006-351 (SWE) provides that assisted insemination can only be carried out on a woman who is married or cohabiting with a partner. Furthermore, written consent to insemination must be furnished by the woman's spouse or cohabitant before the treatment can be provided.[34] Under Swedish law, a woman is only permitted to be inseminated with the sperm of a donor when it has been authorised

[29] French Public Health Code, Article L.2141-1.
[30] Fournier, Berthiau, d'Haussy and Bataille, 'Access to Assisted Reproductive Technologies in France: The Emergence of The Patients' Voice', above n 27, at 55-56.
[31] J. Colten, 'French Bioethics Body Backs IVF for All Women Who Want Children' (Reuters, 25 September 2018), available at <https://www.reuters.com/article/us-france-bioethics-law/french-bioethics-body-backs-ivf-for-all-women-who-want-children-idUSKCN1M51TM>.
[32] M. Fitzpatrick, 'French Senate Approves Controversial Bioethics Law, Drops Key Element' (RFI, 04 February 2021), available at <https://www.rfi.fr/en/france/20210204-french-senate-approves-controversial-bioethics-law-drops-key-elements-medically-assisted-procreation-pregnancy-women-s-rights>.
[33] Italian Law 40/2004, Article 5.
[34] The Genetic Integrity Act (2006-351) (SWE), Chapter 6, s 1.

by Sweden's National Board of Health and Welfare.[35] However, even in scenarios where donor sperm is permitted to be used in assisted insemination, it is prohibited in Sweden to use the sperm of a donor who is deceased.[36]

5.2.3. Political Reasons

Posthumous conception is also prohibited by legislation in Germany. The German Embryo Protection Law (Embryonenschutzgesetz- EschG) makes it an offence to knowingly fertilise a female egg with the sperm of a man who is deceased.[37] This offence is punishable by a fine or prison sentence of up to three years.[38] It does appear to be possible under German law to use an embryo in assisted conception that has been fertilised with the sperm of a man who was alive at the time of fertilisation but has subsequently died. However, this is on the basis that the union of the gametes occurred while the man was still alive and it therefore falls outside the scope of the legislation.[39] Some commentators have suggested that Germany's restrictive approach towards regulating ART stems from the history of scientific and human rights abuse that occurred under Nazi Germany during World War II.[40] For example, Robertson raises 'slippery slope' arguments and suggests that Germany are hostile towards expanding the availability of ART in fear that it will lead to morally objectionable practices.[41]

5.2.3. Concluding Remarks on Regimes of Complete Prohibition

The preceding sections have outlined specific examples of countries where posthumous conception is banned for religious, ethical and political reasons. I contend that complete prohibition of posthumous conception is undesirable, and that the reasons advanced for banning posthumous conception in these States are not compelling for restricting the practice in Ireland.

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[35] Ibid, Chapter 6, s 2.
[36] Ibid, Chapter 6, s 4.
[37] Gesetz zum Schutz von Embryonen (ESchG), 13 December 1990, Article 4(1), ss1(3).
[38] Ibid.
[39] Y. Hashiloni-Dolev and S. Schicktanz, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives' (2017) 4 *Reproductive Biomedicine Society Online* 21, at 27.
[40] J.B. Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in The United States' (2016) 1 *Concordia Law Review* 133, at 142-143.
[41] J. Robertson, 'Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics' (2004) 43 *Columbia Journal of Transnational Law* 189, at 195.

As discussed in the Introduction of this thesis, there is no official State religion in Ireland. The Irish Constitution guarantees to protect an individual's freedom to profess and practice *any* religion.[42] Furthermore, there is a clear separation between Church and State provided for within the Irish Constitution,[43] whereby Article 44.2.2 expressly guarantees 'not to endow any religion'.[44] Of course, it must be noted that the concept of endowment of religion has a limited meaning under the Irish Constitution. To date, there has been little case law which has considered the scope of Article 44.2.2, and Whyte notes that those which have addressed the issue have interpreted the scope of Article 44.2.2 narrowly.[45] Despite this, Daly states that the endowment clause makes it clear that the Irish Constitution does provide for a separation between Church and State.[46] Furthermore, he notes that there are several important rationales which underpin Church-State separation in Ireland. These include preventing State interference with religious bodies, upholding individual religious freedoms and most importantly, adhering to the liberal tradition.[47] In this regard, Daly notes that the liberal tradition is best served by Church-State separation, and that the endowment clause acts to prevent religious values from influencing Irish political policy.[48] Indeed, given that I adopt a liberal approach to regulation in this thesis, I contend that religious values should not dictate or influence how posthumous conception is regulated in Ireland.

In addition, I contend that it is not justifiable to ban posthumous conception on the basis of safeguarding the State's interest in maintaining the nuclear family. The Irish Government certainly has an interest in protecting the basic unit of the family within society, and the State's interest in this regard is discussed fully in Chapter

[42] Bunreacht na hÉireann, Article 44.2.1.
[43] E. Daly, 'Re-Evaluating The Purpose of Church-State Separation in The Irish Constitution: The Endowment Clause as a Protection of Religious Freedom and Equality' (2008) 2 *Judicial Studies Institute Journal* 86, at 86.
[44] Bunreacht na hÉireann, Article 44.2.2.
[45] *Campaign to Separate Church and State v. The Minister for Education* [1998] 3 I.R. 321; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321; G. Whyte, 'Religion and Education – the Irish Constitution' (Paper presented at the TCD/IHRC Conference on Religion and Education: A Human Rights Perspective, 27th November 2010).
[46] Daly, 'Re-Evaluating The Purpose of Church-State Separation in The Irish Constitution: The Endowment Clause as a Protection of Religious Freedom and Equality', above n 43, at 91.
[47] Ibid, at 91.
[48] Ibid, at 91-92.

Three.[49] However, as argued in Chapter Three, the idea of the 'nuclear family' is socially idealistic and Shannon observes that it does not reflect the reality of modern family life in Ireland.[50] Furthermore, as put forward in Chapter Three, although the constitutional preference for marital families remains intact in Article 41.3.1, this does not prevent the State from recognising other forms of families, whatever their official status.[51] Therefore, I contend that posthumous conception should not be prohibited in Ireland for this reason.

Furthermore, the political reasons advanced for restricting posthumous conception discussed above are not compelling for banning posthumous conception in Ireland. Firstly, Ireland does not have a political history of abusing or exploiting scientific or reproductive technologies. In fact, as discussed fully in the Introduction of this thesis, Ireland's traditional approach to regulating these types of issues was highly conservative.[52] Thus, there is no reason to assume that permitting access to posthumous conception in Ireland would lead to the State engaging in morally objectionable practices. Moreover, 'slippery slope' arguments are frequently criticised in the literature as being 'fallacious'.[53] It is argued that it is illogical to presume that permitting or forbidding one particular action will inevitably lead to the occurrence of further related and undesirable events. This is particularly the case in debates over whether certain activities should be permitted by law, given that laws are instruments which can explicitly permit some things and not others.[54]

It is my position that the State should only restrict access to posthumous conception when it results in sufficient harm to others. As I have argued in Chapter Three, the potential harms caused to stakeholders by posthumous conception are not sufficient

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[49] This argument is particularly relevant in an Irish context, given the highly privileged position of the martial family in Article 41.3.1 of the Irish Constitution: See discussion in Chapter Three, Section 3.6: C. Strong, J. Gringrich and W. Kutteh, 'Ethics of Post-mortem Sperm Retrieval' (2000) 15(4) *Human Reproduction* 739, at 742.

[50] S.L. Brown, 'Marriage and Child Well-Being: Research and Policy Perspectives' (2010) 72(5) *Journal of Marriage and Family* 1059; G. Shannon, *The Children and Family Relationships Bill 2014 - a Children's Rights Perspective* (Law Society of Ireland, 2014), p. 1.

[51] Shannon, *The Children and Family Relationships Bill 2014 - a Children's Rights Perspective*, above n 50, p. 1.

[52] L. Smith, *Abortion and the Nation: The Politics of Reproduction in Contemporary Ireland* (United Kingdom: Routledge, 2017), Chapter 3.

[53] T. Govier, 'What's Wrong with Slippery Slope Arguments?' (1982) 12(2) *Canadian Journal of Philosophy* 303, at 303.

[54] A. Jefferson, 'Slippery Slope Arguments' (2014) 9(10) *Philosophy Compass* 672, at 672.

to restrict the practice based on the harm principle. Thus, I contend that posthumous conception should not be banned in Ireland.

5.3. Consent Policies

Most jurisdictions that permit posthumous conception impose some sort of consent preconditions. These laws require that the deceased has expressed specific pre-mortem consent to the posthumous retrieval and/or use of their gametes in advance of facilitating treatment.[55] Indeed, even countries where posthumous conception is facilitated more permissively such as Israel, still require the deceased's consent (although the consent may be implied on their behalf).[56] Ultimately, consent protocols around the world vary substantially, depending on whether the particular law requires the deceased's consent to have been expressed in writing, or if they will accept oral or inferred consent.[57]

The next sections outline the law in countries where posthumous conception is permitted subject to both restrictive and liberal consent requirements. As stated in Chapter Four, I interpret 'restrictive' to mean that posthumous conception is permitted provided the deceased has expressed pre-mortem written consent. I interpret 'liberal' to mean that posthumous conception is permitted without prior written consent from the deceased.[58]

5.3.1. Restrictive Consent Policies

Most commonly, consent policies adopted by countries when regulating posthumous conception are restrictive. They require expressed written consent from the deceased prior to facilitating treatment.[59] Expressed written consent is the

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[55] M. Parker, 'Response to Orr and Siegler- Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception' (2004) 30(4) *Journal of Medical Ethics* 389, at 389.
[56] R. Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique' (2004) 19(9) *Human Reproduction* 1952, at 1952.
[57] Jones and Gillett, 'Posthumous Reproduction: Consent and its Limitations', above n 1, at 281.
[58] Bahadur, 'Posthumous Assisted Reproduction: Cancer Patients, Potential Cases, Counselling and Consent', above n 1, at 2575.
[59] Ibid; Jones and Gillett, 'Posthumous Reproduction: Consent and its Limitations', above n 1, at 281.

most restrictive consent policy which can be used to regulate posthumous conception and attributes the deceased with full autonomy.[60]

As outlined in Chapter One, this is the position that has been proposed for regulating posthumous gamete retrieval and posthumous conception in Ireland.[61] It is also the position which has been adopted in the United Kingdom,[62] Canada,[63] New Zealand[64] and the Australian States of Victoria[65] and New South Wales.[66] The following sections review and compare the consent policies that have emerged in these jurisdictions.

5.3.1.1. The United Kingdom

In the United Kingdom (UK), ART is governed by the Human Fertilisation and Embryology Act 1990 (UK) (HFEA 1990) as amended by the Human Fertilisation and Embryology Act 2008 (UK) (HFEA 2008). These statutes are largely a product of the extensive public consultation and parliamentary debates that took place in the years following the birth of Louise Brown, the first child born as a result of *in vitro* fertilisation in 1978.[67]

In July 1982, the UK Parliament announced the establishment of the Committee of Inquiry into Human Fertilisation and Embryology.[68] The role of the Committee was to study the ethical, social, legal and political implications arising from developments in assisted human reproduction and to consider how these novel practices might be regulated.[69] After two years of consultation, the Committee published a lengthy report which made a range of recommendations for the regulation of ART and associated research.[70] *The Warnock Report* (1984) (UK)

[60] See discussion in Chapter Four, Section 4.4.1.3.
[61] AHR Bill 2017, Part 4, Head 24 and 25.
[62] Human Fertilisation and Embryology Act 1990 (UK), Schedule 3, s 5(1).
[63] Assisted Human Reproduction Act 2004 (CA), s 8(1).
[64] Human Assisted Reproductive Technology Act 2004 (NZ), s 4(d).
[65] Assisted Reproductive Treatment Act 2008 (VIC), s 46(b).
[66] Assisted Reproductive Technology Act 2007 (NSW), s 23.
[67] R. Stenger, 'The Law and Assisted Reproduction in the United Kingdom and United States' (1994) 9 *Journal of Law and Health* 135, at 139.
[68] Ibid.
[69] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: July 1984), p. 1.
[70] Ibid.

was highly influential in the legislative proposals advanced for regulation in this area.[71]

The Warnock Committee expressed 'grave misgivings' on the prospect of posthumous conception.[72] The Committee was of the view that artificially inseminating a woman with her deceased partner's sperm was an activity which should be 'actively discouraged'.[73] They justified this view by raising concerns regarding both the efficient administration of estates[74] and the profound psychological impacts which may result for both the mother and child.[75] As discussed in Chapter Three, these are commonly raised potential 'harms' caused by posthumous conception to the interests of the State, surviving partner and resulting child.[76] Similar concerns were also raised by the Government in its response paper, the *White Paper on Human Fertilisation and Embryology: A Framework for Legislation* (1987).[77] The report acknowledged that posthumous conception was a situation which was likely to arise and although they did not feel that the practice should be unlawful, they did deem it as one which should not receive 'active encouragement'.[78]

Despite these reservations, neither the Warnock Committee, nor the UK Parliament recommended banning posthumous conception. Consequently, the HFEA 1990 (UK) does not list the posthumous use of gametes or embryos as a prohibited activity under the Act.[79] As it stands, there is no provision in the UK statute which prevents a licenced facility from facilitating posthumous conception. However, the Act does severely limit the practice of posthumous conception by virtue of the strict

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[71] Stenger, 'The Law and Assisted Reproduction in the United Kingdom and United States', above n 67.
[72] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, above n 69, p. 55.
[73] Ibid, p. 55.
[74] Ibid.
[75] Ibid, p. 18.
[76] See discussion on the potential harms caused to stakeholders by posthumous conception in Chapter Three.
[77] Department of Health and Social Security, *White Paper on Human Fertilisation and Embryology: A Framework for Legislation* (London: 1987).
[78] Ibid.
[79] The prohibitions in connection with sperm, eggs and embryos are outlined in Sections 3 to 4 of the HFEA 1990 (UK). This list of prohibitions does not include the posthumous use of gametes or embryos.

consent requirements governing the lawful storage and use of gametes and embryos.[80]

Under the HFEA 1990 (UK), 'effective consent' is an indispensable prerequisite to the lawful storage and use of gametes and embryos.[81] Section 4(1) of the HFEA 1990 (UK) prohibits the storage and use of gametes and embryos except in pursuance of a licence.[82] This means that the storage and use of these materials can only take place lawfully in accordance with the requirements of the licence. Section 12 outlines the conditions of every licence granted under the Act, one of which requires compliance with the consent provisions outlined in Schedule 3 of the Act.[83] Schedule 3 details the specific format and circumstances in which valid consent must be acquired by licence holders before they may store or use human gametes or embryos.[84] Paragraph 8 of Schedule 3 states that a person's gametes cannot be kept in storage, unless they have provided 'effective consent' in accordance with the Act.[85] In addition, embryos created *in vitro* cannot be stored without 'effective consent' from both progenitors.[86]

In *R v. Human Fertilisation and Embryology Authority, ex parte Blood,*[87] Lord Woolf noted that the preservation of gametes will constitute the beginning of the storage process. It was held that 'preservation' will involve the processing of the gametes and that this process should be carried out subject to the licencing requirements.[88] The court noted that Section 2(2) of the HFEA 1990 (UK) includes the keeping of gametes and embryos 'while preserved' in the definition of 'keeping' under the Act.[89]. Thus, if gametes or embryos are being 'preserved', then they are being stored for the purposes of the Act and will require a licence for which 'effective consent' from the source is necessary.[90]

[80] HFEA 1990 (UK), Schedule 3.
[81] Ibid.
[82] Ibid, s 4(1)(a).
[83] Ibid, s 12(1)(c).
[84] Ibid, Schedule 3.
[85] Ibid, Schedule 3, para. 8(1).
[86] Ibid, Schedule 3, para. 8(2).
[87] *R v. Human Fertilisation and Embryology Authority ex parte Blood* [1997] EWCA Civ 946.
[88] Ibid, para. 27.
[89] HFEA 1990 (UK), s 2(2).
[90] *R v. Human Fertilisation and Embryology Authority ex parte Blood*, above n 87, para. 27.

For consent to be 'effective' in accordance with the legislation, the consenting party must be fully informed and be provided with an opportunity to receive counselling.[91] The Act requires that the consent is recorded in writing and signed by the person providing it.[92] Consent cannot be given orally, inferred or be provided on behalf of the source by another party. Sections 27(1)(h) and 27(1)(i) of the UK's Mental Capacity Act 2005 (UK) prevent an appointed nominee from consenting to provisions under the HFEA 1990 (UK) and HFEA 2008 (UK) on behalf of a person lacking the relevant capacity to consent.[93] If the consenting party is unable to sign, due to illness, injury or disability, they may appoint another person to sign on their behalf. However, this must be in the presence of a witness who can attest to the signature.[94] Consent can be varied or withdrawn by the consenting party at any stage up until the implantation of an embryo. To be effective, however, consent cannot have been withdrawn.[95] In the case of embryo storage and use, where one of the progeniting parties withdraws their consent, the licenced facility cannot lawfully store or use the embryo in treatment, irrespective of the wishes of the other party.[96]

The HFEA 1990 (UK) consent provisions are unambiguous and strictly interpreted. This is evidenced by the judgment of the court in *U v. Centre for Reproductive Medicine*.[97] Lady Justice Hale noted that the consent scheme in the HFEA 1990 (UK) was drafted to protect the autonomy of the source, and that the court must respect this, regardless of their sympathy towards a particular applicant or case.[98] Furthermore, the judge observed that there are strong public policy reasons behind the great emphasis on consent in the legislation:

> "The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties…Parliament have devised a legislative scheme and a statutory

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[91] HFEA 1990 (UK), Schedule 3, para. 3.
[92] Ibid, Schedule 3, para. 1(1).
[93] Mental Capacity Act 2005 (UK), s 27(1)(h) and s 27(1)(i).
[94] HFEA 1990 (UK), Schedule 3, para. 1(2).
[95] Ibid, Schedule 3, para. 1(3).
[96] *Evans v. Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam); *Lorraine Hadley v. Midland Fertility Services Ltd and Others* [2003] EWCH 2161 (Fam).
[97] *U v. Centre for Reproductive Medicine* [2002] EWCA Civ 565.
[98] Ibid, para. 24.

> authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns".[99]

Thus, while there is no specific reference to the permissibility of posthumous conception in the HFEA 1990 (UK), by virtue of the consent provisions in Schedule 3, the law in the UK is clear. The posthumous storage and use of gametes or embryos can only be facilitated when the deceased has provided pre-mortem 'effective consent' to this.[100] Without the deceased's written consent, any storage or use of their gametes or embryos in posthumous conception will breach the requirements for a licence required by the HFEA 1990 (UK) and will be unlawful.[101]

5.3.1.2. Canada

Canada also operates a strict written consent policy to posthumous conception. In Canada, ART is governed at a federal level by the Assisted Human Reproduction Act 2004 (CA) (AHR Act 2004). This is a federal piece of legislation which is applicable across the ten provinces and three territories that make up the constitutional monarchy of Canada.[102]

The response to ART in Canada was the result of almost fifteen years of research and consultations regarding ART that ensued after the birth of the first Canadian baby born through *in vitro* fertilisation in 1983.[103] In 1989, the Royal Commission of New Reproductive Technologies was established with the purpose of investigating the medical and scientific developments in modern reproductive medicine and to consider the social, ethical and legal implications of ART and associated research.[104] After almost five years of widespread consultation, the Commission published a lengthy report entitled *Proceed with Care*, which made 293 recommendations for the regulation of ART and research in Canada.[105] Many of the Commission's recommendations were reflected in the AHR Act 2004

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[99] Ibid, para. 24.
[100] HFEA 1990 (UK), Schedule 3, paras. 6 and 8.
[101] Ibid, s 41(1)(a).
[102] Assisted Human Reproduction Act SC 2004 (CA) (AHR Act 2004).
[103] A.A. Yuzpe, 'A Brief Overview of the History of In Vitro Fertilization in Canada' (2019) 41(S2) *Journal of Obstetrics and Gynaecology Canada* 334, at 334.
[104] Ibid, at 335.
[105] Royal Commission on New Reproductive Technologies, *Proceed with Care* (Ottawa: Minister of Government Services Canada, 1993).

(CA).[106] Most notably, the Commission recommended establishing a national regulatory body to oversee the provision of ART in Canada. It also recommended that national ART legislation be used to outlaw certain unfavourable practices.[107]

The AHR Act 2004 (CA) does not deem posthumous conception to be unfavourable, and the use of gametes in posthumous conception is not a prohibited activity listed in the legislation.[108] In fact, the AHR Act 2004 (CA) specifically addresses the posthumous retrieval of gametes and only prohibits this for use in assisted reproduction or research when it is performed without the deceased's prior consent.[109] Posthumous conception is therefore permissible under Canadian law, provided the initial retrieval of the reproductive material and the subsequent use of the gametes or embryo in posthumous conception abide by the consent provisions outlined in Section 8 of the AHR Act 2004 (CA) and the associated Assisted Human Reproduction (Section 8 Consent) Regulations 2007 (CA).[110]

Sections 8(1) and 8(3) of the AHR Act 2004 (CA) prohibit the use of reproductive material and embryos in any activity without the sources prior written consent.[111] In addition, Section 8(2) prohibits the retrieval of reproductive material from a deceased donor for use in any activity without the premortem written consent from the deceased.[112] The formalities for valid written consent are outlined in the associated Assisted Human Reproduction (Section 8 Consent) Regulations 2007 (CA).[113] These consent requirements must be satisfied prior to the use of gametes or embryos in treatment and it is an offence under the AHR Act 2004 (CA) for a clinician to use gametes or embryos for any purpose, or to remove gametes from a deceased donor, without first obtaining the source's valid written consent.[114]

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[106] AHR Act 2004 (CA).

[107] P. Baird, 'The Recommendations of the Canadian Royal Commission on New Reproductive Technologies' (1996) 6(3) *Women's Health Issues* 126, at 128.

[108] Prohibited activities are outlined from Section 5 to Section 12 of the AHR Act 2004 (CA). The list of prohibitions includes activities such as knowingly creating a human clone, engaging in sex selection, offering payment for surrogacy or gametes, using reproductive material such as gametes or embryos without consent, and harvesting gametes from a deceased donor for use without consent.

[109] Ibid.

[110] Ibid, s 8(1)-8(3); Assisted Human Reproduction (Section 8 Consent) Regulations 2007 (CA).

[111] AHR Act 2004 (CA), s 8(1) and 8(3).

[112] Ibid, s 8(2).

[113] Assisted Human Reproduction (Section 8 Consent) Regulations 2007 (CA).

[114] AHR Act 2004 (CA), s 60.

Consent to the use of reproductive material for any purpose must be fully informed and provided voluntarily by the source. The source's consent will stipulate the specific purposes for which the reproductive material can be used and it will indicate what is to be done with the material in the event of the source's death.[115] Consent must be furnished in writing, signed by the source and attested by a witness.[116] Consent to the use of reproductive material in treatment or research can be withdrawn by the source at any stage prior to its use. To be valid, the withdrawal of consent must be furnished in writing and issued to the person who seeks to use the reproductive material.[117]

Regarding embryos, the fully informed signed written consent of both progenitors must be obtained. If donor gametes are used to create an embryo, the source who intends to use the embryo will be required to provide the consent.[118] The consent will stipulate the purposes for which the embryo can be used in treatment or research.[119] Consent can be withdrawn by any of the parties at any stage up until the embryo has been thawed for the purposes of use in assisted reproduction or research.[120] Valid withdrawal of consent must be furnished in writing to the person who intends to use the embryo.[121]

Part 2 of the Regulations applies in respect of providing consent to remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo.[122] Consent to the removal of reproductive material after death must be provided in the same manner as a consent to the use of gametes and embryos discussed above.[123] Furthermore, the consent must stipulate whether the reproductive material removed after the donor's death can be used for reproductive purposes by the donor's surviving partner or if it can be used for research purposes.[124] In the case of posthumous gamete retrieval, it is also necessary for the donor to provide further written consent to the subsequent use of the reproductive

[115] Assisted Human Reproduction (Section 8 Consent) Regulations 2007 (CA), Part 1, s 3(a)(i) and 3(a)(ii).
[116] Ibid, s 1(3).
[117] Ibid, s 5.
[118] Ibid, Part 3, s 10.
[119] Ibid, Part 3, s 12(a).
[120] Ibid, Part 3, s 12(c)(iii)(B).
[121] Ibid, Part 3, s 12(b)-(c).
[122] Ibid, Part 2.
[123] Ibid, s 1(3).
[124] Ibid, Part 3, s 7(a).

material in treatment or research as this will be required by Section 8(1) AHR Act 2004 (CA).[125] Consent to the removal of reproductive material after death can be withdrawn at any stage prior to the donor's death. Again, this withdrawal must be furnished in writing and issued to the person who intends to remove and use the reproductive material.[126]

Ultimately, posthumous conception can only be facilitated in Canada when there is valid pre-mortem written consent from the deceased consenting to the use of their reproductive material in treatment.[127] In the absence of written consent from the deceased, the use of the deceased's gametes in treatment will be a prohibited activity under the AHR 2004 (CA) and will be an offence.[128]

5.3.1.3. Australian States of Victoria and New South Wales

Consent requirements to posthumous conception are inconsistent across Australia. The Commonwealth of Australia is a federal State and their system of government divides the power to make laws between a central parliament and regional parliaments.[129] However, it is not within the remit of the Australian federal parliament to produce consistent state-wide laws on ART. Legislating on the use of ART falls into the hands of the individual State and territory governments.[130] Thus, the regulation of ART, including posthumous conception, across Australia is inconsistent and each region has its own distinct law in this regard.[131]

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[125] Ibid, Part 3, s 8.
[126] Ibid, Part 3, s 9.
[127] AHR Act 2004 (CA), s 8(1).
[128] Ibid, s 60.
[129] Parliamentary Education Office and Australian Government Solicitor, *Australian Constitution with Overview and Notes by the Australian Government Solicitor* (October 2010), p. 4.
[130] There are only two nationally consistent statutes in Australia regarding ART. First, the Prohibition of Human Cloning for Reproduction Act (2002) (Cwlth) bans certain practices in relation to human embryos and cloning. In addition, the Research Involving Human Embryos Act (2002) (Cwlth) regulates the creation and use of human embryos outside of the human body and imposes sanctions on those who misuse embryos. These are national statutes and they are applicable across all Australian States and external territories; S. Allen, 'ART Clinics: Oversights' (Health Law Central, Information, Education, Research and Policy, 2018), available at <http://www.healthlawcentral.com/assistedreproduction/clinicsoversight/>.
[131] R. Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia' (2017) 23(1) *Trusts and Trustees* 66; B. Bennett, 'Posthumous Reproduction and the Meaning of Autonomy' (1999) 23(2) *Melbourne University Law Review* 286.

The States of Victoria and New South Wales are the only regions in Australia that have ART legislation permitting posthumous conception.[132] ART legislation in Western Australia does not address the matter of posthumous conception.[133] However, directions published by the Minister for Health do not permit licence holders in the region to knowingly use or to authorise the use of gametes in an artificial fertilisation procedure after the gamete provider has died.[134] Thus, in Western Australia, posthumous conception is prohibited.[135] Other States and territories do not have legislation in place which either permits or forbids posthumous conception. Thus, these regions rely on the Australian National Health and Medical Research Council Guidelines for guidance on this issue.[136]

Consent policies in both Victoria and New South Wales are restrictive and require pre-mortem written consent from the source prior to the posthumous use of both gametes and embryos.[137] Victoria's Assisted Reproductive Treatment Act 2008 (VIC) only permits the posthumous use of gametes and embryos by the deceased's surviving partner if the deceased has provided pre-mortem written consent to this.[138] Additional approval is also required from the Victorian Patient Review Panel before the gametes or embryos can be used in treatment services.[139] Legislation in New South Wales also requires written consent from the source prior to the posthumous use of gametes or embryos.[140] Section 17(1) of the Assisted Reproductive Treatment Act 2007 (NSW) states that clinics should obtain consent in the form of written notice from the source which outlines their wishes in respect of the gamete.[141] Furthermore, the person who is receiving treatment must also acknowledge and provide written consent to the use of the gamete in treatment

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[132] Assisted Reproductive Treatment Act 2008 (VIC); Assisted Reproductive Technology Act 2007 (NSW).
[133] Human Reproductive Technology Act 1991 (WA).
[134] Ibid, Directions, Direction 8.9.
[135] Ibid.
[136] The consent requirements outlined in the National Guidelines are discussed later in this chapter and are less onerous than the consent conditions provided for in the States of Victoria and New South Wales: Croucher, 'Laws of Succession Versus the New Biology: Reflections from Australia', above n 131, at 72.
[137] Assisted Reproductive Treatment Act 2008 (VIC), s 46; Assisted Reproductive Technology Act 2007 (NSW), s 17(1).
[138] Assisted Reproductive Treatment Act 2008 (VIC), s 46.
[139] Ibid, s 47.
[140] Assisted Reproductive Technology Act 2007 (NSW), s 23(a).
[141] Ibid, s 17(1).

services despite the death of the donor.[142] Thomasson and Rizzi suggest that the restrictive consent approaches taken by these States and the complete prohibition approach taken by Western Australia reflect conservative values and adhere to the Western tradition of honouring the wishes of the dead.[143]

5.3.1.4. New Zealand

Consent policies are also restrictive in New Zealand where the current guidelines on posthumous conception require pre-mortem written consent from the deceased. The Human Assisted Reproductive Technology Act 2004 (NZ) (HART Act 2004) is the primary legislation which governs ART and associated research in New Zealand.[144] The statute establishes two independent specialist bodies to oversee the provision of ART services across the State: the Advisory Committee for Assisted Reproductive Technology and Human Reproductive Research (the ACART) and the Ethics Committee on Assisted Reproductive Technology (the ECART).[145]

The purpose of the ACART is to formulate and issue guidelines on ART treatment and research. Applications for specific ART procedures are then monitored and determined by the ECART on a case-by-case basis.[146] The ECART can only consider requests for ART procedures that the ACART have issued guidelines on.[147] ART services and associated research can only proceed when prior approval has been obtained from the ECART.[148]

The only services that can be performed without prior approval from the ECART are procedures that are deemed to be 'established procedures' by the Human Assisted Reproductive Technology Order 2005 (NZ) (HART Order 2005).[149]

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[142] Ibid, s 23(c).

[143] A. Thomasson and M. Rizzi, 'Consent in Posthumous Reproduction: Giving the Deceased a Voice Without Drowning Out the Living in Cases of Unexpected Death' (2021) 48(2) *University of Western Australia Law Review* 557, at 565.

[144] Human Assisted Reproductive Technology Act 2004 (NZ) (HART Act 2004).

[145] Ibid, s 32 and s 27.

[146] Ibid, s 16(1); Advisory Committee on Assisted Reproductive Technology, 'Our Function' (2018), available at <https://acart.health.govt.nz/about-us>.

[147] Ethics Committee on Assisted Reproductive Technology, 'ECART Considerations for Review' (2018), available at <https://ecart.health.govt.nz/about-us>.

[148] Section 16 of the HART Act 2004 (NZ) makes it an offence to proceed with an assisted reproductive procedure or to engage in human reproductive research without prior written approval from the ECART.

[149] HART Order 2005 (NZ), Clause 4.

‘Established procedures’ are standard medical practices which ordinarily take place in the course of fertility treatment. The schedule includes activities such as artificial insemination, *in vitro* fertilisation, the collection of sperm and eggs for donation and the cryopreservation of sperm, eggs, and embryos.[150] These practices are generally accepted by society as ethically permissible. Thus, they do not require prior ethical approval from the ECART in order to be performed.[151]

Despite the general descriptions of ‘established procedures’ in the HART Order 2005 (NZ), there are some instances in which an ‘established procedure’ may still raise ethical concerns. Thus, although the procedure may technically fall under the definition of an ‘established procedure’, it may still be excluded from this definition for the purposes of the Order.[152] For example, Clause 5, Part 2 of the Order states that a procedure is not considered an ‘established procedure’ if it involves the use of sperm collected from a man, who has since died, who did not give his pre-mortem consent to the specific use of the sperm.[153] Thus, although an activity such as ‘artificial insemination’ is considered an ‘established procedure’ under the Order,[154] if the artificial insemination ‘involves the use of sperm collected from a man, who has since died, who did not give his pre-mortem consent to the specific use of the sperm’, the procedure will fall outside the definition of ‘established procedure’ for the purposes of the Order and this activity would require prior ECART approval before it may be facilitated.[155] Any application for an ART procedure, which does not constitute as an ‘established procedure’ under the HART Order 2005 (NZ) must first be approved in writing by the ECART.[156]

The HART Act 2004 (NZ) prohibits a number of unacceptable practices. However it does not refer to the permissibility of posthumous conception.[157] The only relevant guidelines on posthumous conception were prepared in the year 2000 by the ACART’s predecessor, the National Ethics Committee on Assisted

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[150] Ibid, Clause 5, Part 1.
[151] Ibid, Clause 4.
[152] Ibid, Clause 5, Part 2.
[153] Ibid, Clause 5, Part 2, s 5.
[154] Ibid, Clause 5, Part 1.
[155] Ibid, Clause 5, Part 2, s 5.
[156] HART Act 2004 (NZ), s 16.
[157] Ibid, s 9-14.

Reproduction (the NECAR). The *Guidelines on the Use, Storage and Disposal of Sperm from a Deceased Man* (2000) were issued by the NECAR prior to both the introduction of the HART Act 2004 (NZ) and the establishment of the ACART.[158] In 2007, the ACART republished these guidelines without making any amendments. The guidelines are outdated and were designed solely to address matters relating to the posthumous storage and use of sperm which had been harvested and stored by a man during his lifetime.[159] They provide for the posthumous use of sperm in very limited circumstances and only where the source provided written consent to this when storing the gametes.[160]

Sperm which has been stored for the purposes of donation may only be used after the death of the donor by a person or couple who has already produced a child or children from the sperm of that donor.[161] Otherwise, the donor's stored sperm must be disposed of in a culturally appropriate and respectful manner as specified by the source.[162] Sperm which has been placed in storage by a man prior to undergoing a medical intervention, can only be used after his death by a specified person, within a specified timeframe. Otherwise, that sperm should be disposed of in a culturally appropriate and respectful manner as specified.[163] In both cases, the source of the sperm will have indicated on the storage consent form whether he wishes for the sperm to used posthumously, or whether the sperm should be disposed of. Where the sperm is being used posthumously to achieve a pregnancy, the guidelines state that clinics must ensure that the deceased's partner is provided with the appropriate counselling.[164]

Peart describes the law on posthumous conception in New Zealand as 'complex, uncertain and incomplete'.[165] As it stands, New Zealand's guidelines on posthumous conception require pre-mortem written consent from the deceased man

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[158] Advisory Committee on Artificial Reproductive Technology, *Guidelines on the Use, Storage and Disposal of Sperm from a Deceased Man* (February 2000).
[159] N. Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, at 731.
[160] ACART, *Guidelines on the Use, Storage and Disposal of Sperm from a Deceased Man,* above n 158, para. 2.0.
[161] Ibid, para. 2.1(a).
[162] Ibid, para. 2.1(b).
[163] Ibid, para. 2.2.
[164] Ibid.
[165] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 159, at 732.

prior to using his sperm posthumously.[166] In the absence of consent, any use of sperm in posthumous conception would be a procedure that would require prior approval from the ECART before it could be facilitated and it is not guaranteed that such a request would be authorised.[167] Furthermore, the guidelines leave many issues relating to posthumous conception unaddressed and they do not advise on other feasible instances of posthumous conception, such as the collection of sperm from a recently deceased or comatose patient, or the posthumous use of eggs or embryos. At present, the ACART is in the process of gathering public feedback on policy issues relating to posthumous conception. The first phase of the ACART's public consultation has been completed and in May 2019, the ACART published its analysis of the submissions that it received.[168] The ACART are now in the process of developing updated guidelines on posthumous conception which will be followed by a second round of public consultation prior to publication. It is anticipated that following this public consultation, the ACART will be in a position to produce clear, contemporary guidelines on all matters relating to posthumous conception.[169]

5.3.1.5. Concluding Remarks on Restrictive Consent Policies

The preceding sections have outlined the law in several jurisdictions where posthumous conception is permitted subject to restrictive consent requirements similar to the approach which has been proposed for regulating posthumous conception in Ireland.[170] In my view, the written consent requirements in these States severely restrict the circumstances in which posthumous conception can take place and this is undesirable for regulating posthumous conception in Ireland for several reasons.

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[166] ACART, *Guidelines on the Use, Storage and Disposal of Sperm from a Deceased Man,* above n 158, para. 2.0.

[167] HART Act 2004 (NZ), s 16.

[168] ACART, *Advisory Committee on Assisted Reproductive Technology Stage One Consultation: Submissions Analysis – Posthumous Reproduction: A Review of the Current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to Take into Account Gametes and Embryos* (Wellington, 2019).

[169] Ibid.

[170] AHR Bill 2017, Part 4, Head 24 and 25.

As argued in Chapter Four, expressed written consent policies do not account for instances of human error or oversight.[171] With strict written consent requirements such as those outlined above, there is always the risk that a requesting party will be prevented from using the deceased's gametes or embryos in posthumous conception even when there is overwhelming evidence that the deceased would have consented to the procedure. [172] Furthermore, given that the vast majority of requests for posthumous conception come from people whose partners have died unexpectedly,[173] it would be exceptionally rare for a person, whose death was unanticipated, to have provided their valid consent to the posthumous storage and use of their gametes in the manner which is currently required in these States, and the manner which is proposed for regulating posthumous conception in Ireland.[174] Lastly, as I have argued throughout this thesis, I take the position that the dead do not have autonomy which can be violated.[175] Thus, I do not accept the view that expressed written consent is necessary to proceed with posthumous conception.

5.3.2. Liberal Consent Policies

In some parts of the world consent requirements for posthumous conception are more liberal. With liberal regimes of regulation, posthumous conception is permitted without prior written consent from the deceased.[176] This is the case in Israel, Belgium, Greece, several parts of the USA and is also provided for in the National Guidelines that have been issued across Australia.[177] The next sections outline and review the liberal consent policies that have emerged in these jurisdictions.

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[171] N. Maddox, 'Children of the Dead: Posthumous Conception, Critical Interests and Consent' (2020) 27 *Journal of Law and Medicine* 645, at 659.
[172] *R (on the application of Mr. & Mrs. M) v. Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611.
[173] R. Collins, 'Posthumous Reproduction and the Presumption Against Consent in the Cases of Death Caused by Sudden Trauma' (2005) 30 *Journal of Medicine and Philosophy* 431, at 440.
[174] Ibid, at 440; Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 20, at 7.
[175] J. Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues' (2002) 22(2) *Legal Studies* 527, at 531.
[176] Bahadur, 'Posthumous Assisted Reproduction: Cancer Patients, Potential Cases, Counselling and Consent', above n 1, at 2575.
[177] Ibid.

5.3.2.1. Israel

The approach to regulating posthumous conception in Israel is usually cited as one of the most permissive schemes in existence.[178] Israel does not have ART legislation dealing with posthumous conception. However, in 2003, Israel's Attorney General published guidelines that adopted a liberal approach to regulating the retrieval and use of sperm in posthumous conception.[179] These guidelines are not legally binding, however, authors writing in this area have stated that it is assumed by the Israeli authorities that these guidelines will be followed.[180]

The guidelines give automatic effect to any pre-mortem expressed wishes of the deceased. If the deceased has expressly consented to the posthumous retrieval and/or use of his gametes then this should be honoured. Alternatively, if the deceased man has made it clear that he does not consent to posthumous conception then this should also be respected.[181] However, where the deceased's views are unknown, the guidelines outline a two-step procedure to assist courts in dealing with requests for posthumous sperm retrieval and posthumous conception. The guidelines provide that the retrieval of sperm from a dying or deceased man is permitted at the request of his surviving partner, whether she is his wife or not.[182] The woman is also entitled to use the sperm in assisted conception, pending a court application which takes into consideration the deceased's dignity and presumed wishes.[183]

An implied or inferred consent model to regulating posthumous conception such as the one in Israel has been referred to in the literature as the 'family centred approach'. Such a regime places high value on the wishes of the deceased's

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[178] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception', above n 20, at 7.
[179] Ministry of Justice Guidelines of the Attorney General of the Government, Guideline Number 1.2202 (27 October 2003).
[180] A. Raziel, S. Friedler, D. Strassburger, S. Kaufman, A. Umansky and R. Ron-El, 'Nationwide Use of Postmortem Retrieved Sperm in Israel: A Follow-up Report' (2011) 95(8) *Fertility and Sterility* 2693, at 2694.
[181] Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique', above n 56, at 1952.
[182] Hashiloni-Dolev and Schicktaz, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins of Life Perspectives', above n 39, at 25.
[183] Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique', above n 56, at 1952.

surviving partner and is therefore less stringent with the model of consent required.[184] By recognising that a person's choices are often formed and shaped as a response to their personal relationships, culture, religion and so forth, this consent approach adheres to the relational account of autonomy discussed in Chapter Four. It acknowledges that consent could be inferred on behalf of the deceased based on the role that shared traditions, family and community played in their everyday decision making.[185]

Landau suggests that the permissive approach taken by Israel is based on the assumption that the majority of men who are in loving relationships desire genetic continuity, and that they would consent to having their sperm used after their death, particularly if this is what their surviving partner wishes to do. Again, on this view, inferring consent adheres to relational accounts of autonomy. However, Landau does admit that the credibility of making such an assumption is open to debate.[186] Certainly, Israel's liberal policy is consistent with the religious beliefs of Israel's Jewish community who value marriage and procreation. Establishing a family is a significant aspect of Jewish culture and the liberal policy adopted by the State is reflective of the importance that genetic continuity and leaving behind offspring after death plays in Israeli society.[187]

5.3.2.2. Belgium

Consent requirements to posthumous conception are also considered liberal in Belgium. Belgium is known worldwide for providing flexible access to ART.[188] Belgium's law on medically assisted reproduction and the disposition of supernumerary embryos and gametes was implemented by the Belgium Government in March 2007 and is considered to be very liberal by international standards.[189] Pennings notes that Belgian politicians did not want to impose strict

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[184] Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in The United States', above n 40, at 139 and 141.
[185] See Discussion in Chapter Four, Section 4.1.1.3 and 4.4.2.2.
[186] Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique', above n 56, at 1954.
[187] Hashiloni-Dolev and Schicktaz, 'A Cross Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins of Life Perspectives', above n 39, at 25.
[188] G. Pennings, 'Belgian Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes' (2007) 14 E*uropean Journal of Health Law* 251, at 251.
[189] Ibid.

rules on every aspect of ART. Instead, they sought to give patients significant autonomy over what kinds of treatment they would have access to.[190]

Regarding posthumous conception, the Belgian legislation states that the posthumous use of embryos is permitted by the deceased's surviving partner when this was initially accepted by both partners in their embryo storage agreement.[191] Additionally, it is required for the surviving partner to withstand a reflective period of six months prior to starting treatment. However, the treatment must be commenced within two years of the deceased's death to prevent any disruption to the distribution of the deceased's estate.[192] The law also permits post-mortem insemination using stored gametes when the source has consented to this at the time of storage.[193] There is no other reference to posthumous conception in the legislation and the Belgian law does not set any limits on post-mortem gamete retrieval or posthumous conception using gametes retrieved after death.[194]

Consequently, posthumous conception is facilitated quite permissively in Belgium and the country has become the destination of choice for many of the region's neighbouring citizens who seek to circumvent their own country's restrictive laws on posthumous conception and avail of cross-border reproductive services.[195] Most notably, Belgium is the State in which Diane Blood had her husband's sperm samples transferred, so that she could use the gametes in posthumous conception when she was prohibited from doing so in the UK without her husband's written consent.[196] Mrs. Blood's case attracted significant media attention throughout her application and is perhaps the most famous case relating to posthumous conception.[197]

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[190] Ibid, at 252.

[191] Belgium House of Representatives, Project de Loi Relatif à la Procréation Médicalement Assistée et à la Destination des Embryons Surnuméraires et des Gamètes (09 March 2007), Article 15.

[192] Ibid, Article 16.

[193] Ibid, Article 44.

[194] Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in The United States', above n 40, at 143.

[195] Ibid.

[196] *R v. Human Fertilisation and Embryology Authority ex parte Blood*, above n 87.

[197] B. Simpson, 'Making 'Bad' Deaths 'Good': The Kinship Consequences of Posthumous Conception' (2001) 7(1) *The Journal of the Royal Anthropological Institute* 1, at 2.

5.3.2.3. The United States

There is no federal law regulating posthumous conception in the United States.[198] The lack of specific legislation on the issue has resulted in posthumous conception being effectively legalised in the United States and the practice is currently facilitated quite permissively in several States across the country.[199]

Many hospitals and clinics across the United States have devised their own guidelines on the posthumous retrieval and use of gametes to aid physicians when dealing with requests. For example, in the State of New York, the Department of Urology in Weill Cornell Medical Centre has issued guidelines on posthumous conception.[200] The Cornell guidelines adopt a permissive consent approach to posthumous conception and they do not require pre-mortem written consent from the deceased. Instead, the guidelines will permit the deceased's surviving spouse to infer consent to posthumous conception on the deceased's behalf by way of evidence regarding any prior discussions or actions taken by the deceased during their lifetime. [201]

There is also the Ethics Committee of the American Society for Reproductive Medicine's Report on posthumous conception that clinics in the United States can follow for guidance on this issue.[202] The recommendations made by the Ethics Committee can also be read to permit posthumous conception in relatively liberal circumstances. Firstly, the Ethics Committee states that clinics are not ethically obliged to honour requests for posthumous gamete retrieval and posthumous insemination. However, the Committee does accept that posthumous conception can be ethically justifiable when there is written evidence of consent from the deceased man.[203] Although this written consent policy to posthumous conception would be considered restrictive, the Ethics Committee does not completely object to posthumous conception in the absence of written consent from the deceased.

[198] Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in The United States', above n 40, at 144.
[199] Ibid.
[200] Weil Cornell Medicine, 'Guidelines on PMSR', available at <https://urology.weillcornell.org/Postmortem-Sperm-Retrieval>.
[201] Ibid.
[202] Ethics Committee of the American Society for Reproductive Medicine, 'Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion' (2018) *Fertility and Sterility* 1.
[203] Ibid, at 4.

However, it does suggest that if clinics are to consider requests for posthumous conception in the absence of written consent from the deceased then they should only do so when the request is made by the deceased's surviving spouse or partner.[204]

5.3.2.4. Australian National Health and Medical Research Council Guidelines

Australian States and territories that do not have ART legislation dealing with posthumous conception rely on the Australian National Health and Medical Research Council (NHMRC) Guidelines for guidance. These guidelines can be read to permit posthumous conception in more liberal circumstances than those in Victoria and New South Wales outlined earlier.

The NHMRC is Australia's specialist body for health and medical research. It is the primary funding body for medical research in Australia and are responsible for setting and maintaining the quality of standards in relation to public health. The NHMRC issue guidelines on a range of issues such as clinical practice, public and environmental health, research and ethics.[205] In terms of ART, the NHMRC published the *Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* in 2017.[206] These guidelines are intended for clinicians and researchers and they outline various ethical standards for the use of ART in both clinical practice and research.[207]

The NHMRC guidelines are intended to be read in conjunction with existing federal, State or territory legislation. They create an expansive framework for the facilitation of ART across Australia.[208] It is expected that all Australian clinics engaging in ART procedures will abide by these principles. However, the guidelines do not have legislative force.[209] Thus, there are no legal repercussions

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[204] Ibid, at 5.
[205] National Health and Medical Research Council, 'About Us' (NHMRC, 2019), available at < https://www.nhmrc.gov.au/about-us >.
[206] NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017).
[207] Ibid, p. 14.
[208] Ibid, p. 13.
[209] A. Stuhmcke, 'The Legal Regulation of Foetal Tissue Transplantation' (1996) 4 *Journal of Law and Medicine* 131, at 135.

for States when they do not comply with them.[210] The strength of their influence is determined by the Reproductive Technology Accreditation Committee's (RTAC) accreditation process which requires compliance with the guidelines.[211] Only the States and territories that require their clinics to have RTAC accreditation, such as South Australia and Victoria, are legally obligated to follow the NHMRC guidelines and could incur fines if they fail to do so.[212] Other States which have designated ART legislation, simply use the NHMRC guidelines as an overarching framework for the provision of ART.[213]

The NHMRC guidelines deem posthumous conception to be a controversial practice that raises specific ethical issues.[214] They advise that any consent to the storage of gametes or embryos should clearly stipulate the source's position on what is to be done with the cells in the event of their death.[215] Clinics are required to have clear policies in place for the storage of gametes or embryos following the death of the gamete provider.[216] Unless a particular State or territory prohibits the continued storage of gametes or embryos after death, the guidelines provide that the gametes or embryos should remain in storage and be made available for use, or be disposed of in accordance with the wishes of the deceased as expressed in their storage consent form.[217] There is an explicit prohibition on the posthumous use of stored gametes or embryos in circumstances where the deceased has expressed an objection to this throughout their lifetime.[218] Posthumous conception using

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[210] S. Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) *Journal of Law and Biosciences* 329, at 333.

[211] K. Harrison, J. Peek, M. Chapman and M. Bowman, 'Continuous Improvement in National ART Standards by the RTAC Accreditation System in Australia and New Zealand' (2017) 57 *New Zealand Journal of Obstetricians and Gynaecologists* 49, at 50.

[212] In Victoria, it is required for ART providers to be registered with RTAC. However, Victoria's ART legislation still takes priority over the guidelines. South Australia have given the guidelines some legislative force by virtue of their statutory registration requirements; S. Allen, 'Post-Humous Use of Gametes' (Health Law Central, Information, Education, Research and Policy, 2018), available at <http://www.healthlawcentral.com/assistedreproduction/post-humous-use-gametes/#note-10806-4>; Assisted Reproductive Treatment Regulations 2010 (SA), Clause 6; Assisted Reproductive Treatment Act 2008 (VIC), s 74.

[213] Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia', above n 137, at 72.

[214] NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research,* above n 206, p. 59.

[215] Ibid, p. 80.

[216] Ibid, para. 7.5.1.

[217] Ibid, para. 7.5.2.

[218] Ibid, para. 8.22.2.

gametes or embryos that have been stored by the deceased during their lifetime is only permitted in cases where the deceased has left clear expressed directions consenting to this.

Chapter 4 of the guidelines outlines the criteria for valid consent.[219] Clinics must ensure that the person providing consent to treatment has the capacity to consent and is not influenced by undue pressure.[220] The consenting party must have been provided with all relevant information on the particular treatment and have undergone the required counselling.[221] The consent provided must be specific to the particular treatment or procedure and in order to be valid it must be obtained in writing and include a signed statement from the treating physician confirming that all relevant information has been furnished to the patient and the counselling requirements have been satisfied.[222]

Despite requiring expressed consent from the deceased prior to using stored gametes or embryos in posthumous conception, there are instances in which the NHMRC guidelines will permit posthumous conception in the absence of expressed pre-mortem consent from the deceased. This is when the gametes or embryo in question were placed in storage prior to the publication of the NHMRC guidelines in 2017. Prior to the publication of the guidelines in 2017, it was not required for clinics to document the source's views on the posthumous use of their gametes or embryos. Thus, the source's wishes may not be available.[223] Furthermore, the guidelines note that the gametes may have been retrieved at first instance from a deceased or dying person who was not in a position to provide consent to the posthumous use of the cells in reproduction. Thus, their views may be unknown.[224] In such scenarios, where there is no expressed direction from the deceased, the consent requirements in the NHMRC guidelines are not as demanding.

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[219] Ibid, para. 4.5.
[220] Ibid, para. 4.5.1.
[221] Ibid, para. 4.5.2.
[222] Ibid. para. 4.5.4.
[223] Ibid, p. 81.
[224] Ibid, para. 8.21.

The guidelines state that clinics may facilitate the posthumous use of gametes or embryos to achieve a pregnancy if there is some evidence that the deceased would have supported the posthumous use of the gametes or embryos, or at the very least, there is no indication that they would have objected to this. In addition, the request must come from the deceased's spouse or partner, to be used by that spouse or partner for the purposes of reproduction. The spouse or surviving partner must then provide the valid consent in accordance with the requirements outlined in Chapter 4 of the guidelines.[225] The guidelines also provide for the collection and storage of gametes from a dying person in circumstances where the source has the capacity to provide a valid consent to the storage and use of their gametes after death in accordance with Chapter 4 of the guidelines discussed above.[226]

Furthermore, where the source of the gametes is deceased or dying and they lack the relevant capacity to consent to the collection of gametes, the consent requirements for the collection and storage of gametes are not as strict and the guidelines provide that this can be accommodated when valid consent has been obtained from that deceased or dying person's spouse or partner. In this scenario, the guidelines advise that court approval is obtained prior to a clinic extracting the gametes from the deceased or dying person.[227] Upon obtaining a court order, however, and provided that there is the appropriate legal authority within the State or territory to do so, the guidelines provide that clinics can facilitate the extraction of gametes from a deceased or dying person where: the request for retrieval comes from the deceased or dying person's spouse or partner and no other relative, and the gametes which are collected are intended to be used by that spouse or partner for the purposes of reproduction. In addition, the deceased or dying person must not have expressed an objection to this throughout their lifetime. The spouse or surviving partner is also required to provide the necessary consent to the storage and use of the gametes in the format required by Chapter 4 of the guidelines.[228]

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[225] Ibid, para. 8.22.3.
[226] Ibid, para. 8.20.1.
[227] Ibid, para. 8.21.
[228] Ibid, para. 8.21.1.

Ultimately, the NHMRC guidelines provide that the deceased's consent to posthumous conception should be present when the deceased has stored the gametes or embryos during their lifetime and has been given the opportunity to make their views known.[229] However, when the deceased's views are unknown, by virtue of the gametes or embryos being either stored prior to the publication of the guidelines in 2017, or being legally harvested from a deceased or dying person who could not provide valid consent, the consent to posthumous conception can be furnished by the deceased's surviving partner provided the deceased has not expressed any objections to this during their lifetime.[230] This approach taken by the NHMRC guidelines is consistent with the presumed consent model discussed in Chapter Four of this thesis. In these cases, the deceased is not granted autonomy. However, the autonomy of the living is respected by respecting any pre-mortem expressed wishes of the dead.[231]

5.3.2.5. Concluding Remarks on Liberal Consent Policies

The preceding sections have outlined the law in several jurisdictions where posthumous conception is permitted subject to liberal consent policies . Certainly, several of the liberal policies discussed above recommend that expressed written consent is obtained from the deceased.[232] However, in cases where consent is unavailable, posthumous conception can be permitted in these States by either inferring[233] or presuming consent on the deceased's behalf.[234]

I contend that presumed consent is preferable to an inferred consent policy. As argued in Chapter Four, I do not accept the argument that it is necessary to infer consent based on my view that the dead do not have autonomy. Moreover, even if I did accept that the dead have autonomy, a model of inferring consent does not necessarily respect the deceased's autonomy. I argue that when consent to posthumous conception is inferred, one can never be truly certain that what has

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[229] Ibid, para. 8.22.2.
[230] Ibid, para. 8.21.
[231] See discussion in Chapter Four, Section 4.4.3.1.
[232] This is the position outlined in the Israeli guidelines on posthumous conception, the Belgian ART legislation, the American Ethics Committee Report on posthumous conception and the Australian NHMRC Guidelines.
[233] This is the case in Israel.
[234] This is the approach adopted in the NHMRC Guidelines.

been inferred on behalf of the deceased is what they would have wanted.[235] I contend that a presumed consent policy is the most appropriate model of consent to be used when regulating posthumous conception. This form of consent is consistent with my view that the dead do not have autonomy or interests which can be harmed. However, by respecting the pre-mortem expressed wishes of the dead, presumed consent policies adhere to the argument that living people can have interests in what happens to them after death.[236]

5.4. Additional Measures Adopted by States When Regulating Posthumous Conception

Alongside consent requirements, States often adopt further measures when regulating posthumous conception. These include mandatory waiting periods,[237] professional counselling,[238] measures limiting access to posthumous conception to the deceased's surviving partner,[239] and/or legislative provisions that seek to disentitle the resulting child benefiting from the deceased's estate.[240] This section reviews and compares different policies that have emerged on these issues.

5.4.1. Mandatory Waiting Periods

A common measure imposed by States when regulating posthumous conception is to require the surviving partner to withstand a waiting period before they are permitted to use the deceased's gametes in posthumous conception. As noted in Chapter Three, the purpose of a mandatory waiting period is not to ensure that the surviving partner has stopped grieving.[241] The rationale for such a requirement is

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[235] See discussion in Chapter Four, Section 4.4.2.2.
[236] See discussion in Chapter Four, Section 4.4.3.1.
[237] It is recommended by the Australian NHMRC Guidelines that surviving partners withstand a period of mourning before initiating treatment: NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, above n 206, para. 8.23.1.
[238] Legislation that requires the surviving spouse to receive counselling on the issue of posthumous conception prior to undergoing treatment can be seen in the Australian State of Victoria's Assisted Reproductive Treatment Act 2008 (VIC), s 48.
[239] This is the position in Israel and is also recommended by the Ethics Committee of the American Society for Reproductive Medicine.
[240] This can be seen in the UK's Human Fertilisation and Embryology Act 2008 (UK), s 39(3).
[241] As discussed in Chapter 3, grief is highly subjective and is not subject to any sort of linear process: T.A. Rando, *Grief, Dying, and Death: Clinical Interventions for Caregivers* (Michigan: Research Press Company, 1984), p. 115; H. Conway and J. Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34(3) *The University of New South Wales Law Journal* 860, at 865; E. Kübler-Ross and D. Kessler, *On Grief and Grieving: Finding the Meaning of Grief Through the Five Stages of Loss* (New York: Simon and Schuster, 2005), p. 230.

to ensure that the surviving partner has been given an adequate opportunity to reflect on the death of their deceased partner and to ensure that their decision to proceed with posthumous conception treatment is not clouded by intense grief for their loved one.[242]

This requirement is recommended at a national level by the Australian NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017*. The guidelines provide that surviving partners should withstand a standard period of mourning prior to using the deceased's gametes in posthumous conception.[243] The Australian guidelines do not stipulate how long the waiting period should be. However, based on the recommended guidance from other jurisdictions a standard waiting period is usually one year. This is the position taken by the ESHRE Taskforce on Ethics and Law in their ethical statement on posthumous assisted reproduction,[244] and is also strongly recommended by the Cornell Guidelines issued by the Department of Urology in Weil Cornell Medical Centre in the USA.[245] Indeed, this is the position which has been proposed by Ireland. The AHR Bill provides that a waiting period of at least one year following the deceased's death must have passed before treatment can be provided to the surviving partner.[246] Belgium also provides for a reflective period before posthumous conception treatment can begin. However, this is only six months.[247]

5.4.2. Mandatory Counselling

It is also common for States to require that surviving partners undergo professional counselling on the consequences of posthumous conception before they are

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[242] K. Tremellen and J. Savulescu, 'Posthumous Conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma' (2016) 3 *Reproductive BioMedicine Online* 26, at 27.
[243] NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research,* above n 206, para. 8.23.1.
[244] European Society of Human Reproduction and Embryology Task Force on Ethics and Law, 'ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction', above n 14, at 3053.
[245] Weil Cornell Medicine, 'Guidelines on PMSR', above n 200.
[246] AHR Bill 2017, Part 4, Head 24, s 1(d).
[247] Belgium House of Representatives, Project de Loi Relatif à la Procréation Médicalement Assistée et à la Destination des Embryons Surnuméraires et des Gamètes (09 March 2007), Article 16.

permitted to proceed with treatment. Again, this position has also been adopted by Ireland in its proposals for regulating posthumous conception.[248]

In the UK, the formalities for giving valid consent to treatment outlined in Schedule 3 HFEA 1990 (UK) require that the person who is receiving treatment is provided with full information and is given a suitable opportunity to receive proper counselling about the implications of their proposed treatment prior to giving effective consent.[249] Counselling is also required by the Australian State of Victoria's Assisted Reproductive Treatment Act 2008 (VIC)[250] and is further recommended at a national level by the Australian NHMRC Guidelines.[251]

Additionally, New Zealand's ACART *Guidelines on the Use, Storage and Disposal of Sperm from a Deceased Man* provide that when the sperm of a deceased man is being used in posthumous conception, treatment clinics must facilitate the surviving partner with the appropriate counselling.[252] The ESHRE Taskforce on Ethics and Law also strongly recommends that surviving partners undergo professional counselling. It suggests that the rationale for counselling is to ensure that the surviving partner fully understands the social consequences of proceeding with posthumous conception and that they have taken the welfare of the resulting child into consideration. The Taskforce also deems it necessary for surviving partners to be psychologically evaluated before treatment to ensure that they are not acting in response to guilt or grief for their loved one.[253]

5.4.3. Limitations on Who Can Access Posthumous Conception

Some States restrict access to posthumous conception to the deceased's surviving partner. This is the position in Israel,[254] and is recommended by the Ethics

[248] AHR Bill 2017, Part 4, Head 24, s 1(c).
[249] HFEA 1990 (UK), Schedule 3, s 3(1).
[250] Assisted Reproductive Treatment Act 2008 (VIC), s 48.
[251] NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research,* above n 206, para. 8.23.1.
[252] ACART, *Guidelines on the Use, Storage and Disposal of Sperm from a Deceased Man,* above n 158, para. 2.2(b).
[253] European Society of Human Reproduction and Embryology Task Force on Ethics and Law, 'ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction', above n 14, at 3052.
[254] Ministry of Justice Guidelines of the Attorney General of the Government, Guideline Number 1.2202 (27 October 2003).

Committee of the American Society for Reproductive Medicine in cases where consent from the deceased is not available.[255] Likewise, the Australian NHMRC Guidelines provide that requests for posthumous gamete retrieval and posthumous conception only be honoured in the absence of consent when the request comes from the deceased's surviving partner.[256] This approach has been proposed for regulating posthumous conception in Ireland. The AHR Bill provides that the posthumous use of gametes or embryos should only be facilitated when the request for treatment is made by the deceased's surviving partner 'who will carry the pregnancy'.[257] There are also similar restrictions regarding requests for the retrieval of gametes after death and the AHR Bill also limits these requests to the deceased's surviving partner.[258]

5.4.4. Legal Parentage and Inheritance Provisions

Provisions regarding legal parentage and the inheritance rights of the resulting child also feature in posthumous conception policies. For example, British Columbia's Family Law Act 2011 (CA) provides for legal parentage in posthumous conception if the deceased provided written consent.[259] The United States' Uniform Probate Code and Uniform Parentage Act also make provisions for a deceased parent to be recognised as the legal parent of a posthumously born child for succession law purposes provided that there is written evidence from the deceased consenting to posthumous conception.[260]

Ireland's AHR Bill makes similar proposals. The Bill permits the deceased to be regarded as the child's legal parent where they have provided consent to this. However, the Bill provides that the deceased shall not be regarded as the parent of the child in cases where the child is born thirty-six months after the death of the deceased.[261] It is likely that the Irish proposal was adopted to ensure that the

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[255] Ethics Committee of the American Society for Reproductive Medicine, 'Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion', above n 202, at 5.
[256] NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research,* above n 206, para. 8.22.3.
[257] AHR Bill 2017, Part 4, Head 24, s 1(b).
[258] Ibid, Part 4, Head 25, s 1(b).
[259] Family Law Act 2011 (BC), Part 3, s 28.
[260] Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 210, at 333.
[261] AHR Bill 2017, Part 4, Head 27, Section 3.

deceased's estate is distributed efficiently and that it's administration is not burdened by the late birth a posthumously conceived child.[262] However, this result can also be achieved by registering the deceased as the parent of the child, but precluding the child from benefiting from the deceased's estate entirely.

For example, the UK's Human Fertilisation and Embryology (Deceased's Fathers) Act 2003 (UK) permits the deceased to be registered as the parent of a posthumously born child if they have provided consent to this. However, this recognition of the deceased as the parent of the posthumously born child is solely limited to registering the deceased as the parent of the child on the birth certificate. The deceased is not to be recognised as the legal parent of the child for any other purposes and the child has no entitlement to inherit from the deceased's estate.[263] This statutory provision upholds the Warnock Committee's recommendations regarding the administration of estates.[264] The posthumously born child will not have any claim against their deceased parent's estate.[265] Indeed, Baroness Mary Warnock subsequently commented on the amendment, stating that at the time of the Warnock Inquiry, the committee members' primary concern in relation to posthumous conception was the potential disruption that the resulting child may pose to the administration of the deceased's estate. She stated that the Committee of Inquiry had not considered the possibility of separating the registration of childbirth from the matter of inheritance. In the parliamentary debates prior to the introduction the Deceased Fathers Bill, the amendment was broadly welcomed as a symbolic acknowledgement of the child's father.[266]

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[262] This was also a fear expressed by the UK's Warnock Committee: Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, above n, p. 69.

[263] Ibid, s 39(3); As discussed in Chapter Three, this section was added to the legislation following the success of Diane Blood, who challenged the decision of the Human Fertilisation and Embryology Authority after they refused to record her deceased husbands name on the birth certificates of her posthumously born children. She successfully argued that Section 28(6)(b) of the HFEA 1990 (UK) infringed Article 8 of the ECHR which protected her right to private and family life.

[264] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, above n 69, p. 55.

[265] N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) 81 *Conveyancing and Property Lawyer* 405, at 411.

[266] House of Lords Debates, Vol 650 Col 1151 (4th July 2003).

5.4.5. Concluding Remarks on Additional Measures Adopted when Regulating Posthumous Conception

The preceding sections outlined additional measures commonly adopted by States when regulating posthumous conception, including waiting periods, counselling, restrictions on who can access treatment and legal parentage provisions. There are some commentators who deem these added measures to be unnecessary and paternalistic, particularly if the State's laws already require the deceased's written consent.[267] However, these measures are certainly not as demanding as written consent requirements and act to minimise the potential harm inflicted by the technology.

Provisions that require the surviving spouse to undergo counselling and withstand a period of mourning prior to receiving treatment help to minimise the potential harms that may be caused to them by posthumous conception.[268] Furthermore, laws that provide for the resulting child's legal parentage and that restrict their entitlement to inherit from the deceased such as those in the UK, act to ensure that the interests of the resulting child, the extended family and the State are protected.[269]

However, I do not agree with measures that restrict access to posthumous conception to the deceased's surviving partner. When access to posthumous conception is limited to surviving partners, the extended family members of people who die without surviving partners are precluded from using posthumous conception technology. The deceased's surviving family have a range of interests in posthumous conception. These include experiential interests in grandparenthood and establishing a relationship with the child. In addition, the extended family can

[267] Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in The United States', above n 40, at 160.

[268] The interests of, and potential harms caused to the surviving partner by posthumous conception are discussed fully in Chapter Three.

[269] The interests of the child are protected by ensuring that they have certainty regarding their lineage. The interests of the extended family are protected by ensuring that the posthumously born child does not dilute any share they might be entitled to from the deceased's estate. Lastly, the interests of the State are protected by ensuring that winding up the deceased's assets is not unduly delayed by the potential existence of a posthumously born child. The interests and potential harms caused to all stakeholders by posthumous conception are discussed fully in Chapter Three.

have critical interests in realising their deceased's relatives interest in genetic reproduction, continuing on the family bloodline, and so forth.[270]

The strong desire of extended families to pursue posthumous conception in cases where the deceased has died without a surviving partner can be evidenced by the growing number of applications being made to the court in this regard.[271] In fact, Hashiloni-Dolev and Triger observe that not only are applications by surviving families becoming more frequent in court, they are also being approved in several jurisdictions including Israel, India and the United Kingdom. Indeed, the authors suggest that the increased interest in posthumous conception by surviving families potentially signals a 'new global phenomenon'.[272] By excluding the extended family from accessing posthumous conception, these interests will be frustrated should the deceased die without a surviving partner.

Furthermore, as noted throughout this thesis, it is my view that access to posthumous conception should only be limited in cases where there is sufficient harm to others. I argue in Chapter Three that the potential harms caused by posthumous conception are not sufficient to restrict the practice. In the absence of clear and sufficient harm caused by the technology, a case can be made to make posthumous conception available to the extended surviving family in cases where the deceased dies without a surviving partner.

Of course, in cases where posthumous conception is requested by surviving families, it is likely that a third party or external actor will be required as a surrogate and/or gamete donor. However, as noted in Chapter One, it is already proposed in the AHR Bill 2017 to permit the use of donor gametes in posthumous

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[270] See discussion in Chapter Three, Section 3.3.1.

[271] *R (on the application of Mr. & Mrs. M) v. Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611; *Petithory Lanzmann v. France*, App. No. 23038/19 (ECtHR, 12 November 2019); See also: G. Everett, 'Woman Uses Dead Son's Sperm for IVF Grandchildren' (Bionews, 19 February 2018), available at <https://www.bionews.org.uk/page_96375>; G. Nofar-Yakovi, 'Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law' (2019) 37(2) *Columbia Journal of Gender and Law* 109.

[272] Y. Hashiloni-Dolev and Z. Triger, 'The Invention of the Extended Family of Choice: The Rise and Fall (To Date) of Posthumous Grandparenthood in Israel' (2020) 39(3) *New Genetics and Society* 250, at 250.

conception,[273] and to regulate altruistic surrogacy.[274] Thus, regulating in this way will not conflict with any other provisions of the AHR Bill, and is not entirely unfounded when viewed in light of the overall proposed legislation.

5.5. Concluding Remarks on Approaches to Regulating Posthumous Conception

This chapter provided an overview of the different approaches to regulating posthumous conception. My aim in this chapter was to demonstrate varying State attitudes towards the practice, and to ascertain what Ireland cam learn about from these existing policies. Undoubtedly, the regulation of posthumous conception varies considerably around the world. However, there are several common themes that can be identified across the different policies that contribute to the discussion on how posthumous conception should be regulated in Ireland.

Regarding where posthumous conception is banned. I noted that the position in these jurisdictions is likely the result of the State's own religious, social or historical background. I contend that the religious, ethical and political reasons advanced for banning posthumous conception in the States are not compelling for restricting access to posthumous conception in Ireland. Furthermore, I argued that the State should only restrict access to posthumous conception when it results in sufficient harm to others. The potential harms caused to the stakeholders are not sufficient to restrict posthumous conception based on the harm principle. Thus, I contend that posthumous conception should not be banned in Ireland.

The first prevalent feature across jurisdictions that do permit posthumous conception is to require written consent from the deceased prior to facilitating treatment.[275] This is the prevailing position in jurisdictions that allow posthumous conception and is even the recommended model of consent in guidelines that have been issued by countries where posthumous conception consent policies are more

[273] AHR Bill 2017, Part 4
[274] Ibid, Part
[275] Human Fertilisation and Embryology Act 1990 (UK), Schedule 3, s 5(1); Assisted Human Reproduction Act 2004 (CA), s 8(1); Human Assisted Reproductive Technology Act 2004 (NZ), s 4(d); Assisted Reproductive Treatment Act 2008 (VIC), s 46(b); Assisted Reproductive Technology Act 2007 (NSW), s 23.

liberal.[276] I contend that laws requiring written consent to posthumous conception are too restrictive. Furthermore, I argue that this model of consent is unnecessary as it is not my position that the dead have autonomy which can be harmed. I contend that liberal presumed consent policies are more appropriate when regulating posthumous conception. They do not attribute the dead with autonomy. However, they do adhere to the autonomy of living people by respecting any expressed pre-mortem wishes.[277]

Another common feature is to restrict access to posthumous conception to the deceased's surviving partner. Again, this requirement features in the policies of both restrictive and liberal consent regimes.[278] I contend that this measure is undesirable as it is not guaranteed that the deceased will die with a surviving partner. These provisions act to bar the deceased's extended family members from accessing posthumous conception and frustrate any interest that the extended family might have in posthumous conception.[279] I contend that in the absence of sufficient harm to others, it is not justifiable to restrict posthumous conception in this way.

Waiting periods,[280] requirements that the surviving partner undergoes counselling[281] and provisions providing for the parentage of posthumously born children also feature across several regimes.[282] These added measures are not as demanding as written consent requirements. I argue that these provisions serve to protect the interests and minimise the potential harms caused by posthumous conception to the additional stakeholders, including the surviving partner, the State

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[276] Belgium House of Representatives, Project de Loi Relatif à la Procréation Médicalement Assistée et à la Destination des Embryons Surnuméraires et des Gamètes (09 March 2007), Article 15 and 44; Ethics Committee of the American Society for Reproductive Medicine, 'Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion', above n 202, at 4.
[277] See discussion in Chapter Four, Section 4.4.3.1.
[278] This is the position in Israel, and it is recommended by guidelines that have been issued in the United States and Australia.
[279] The interests of the deceased's extended family in posthumous conception are discussed in Chapter Three, Section 3.3.
[280] Waiting periods are recommended in Belgium, Australia and the USA.
[281] Counselling for the surviving spouse is recommended in most jurisdictions discussed above that allow posthumous conception. It is the approach recommended by the ESRM, ASRM and the Cornell Guidelines. It is also the position in the UK, Belgium, Australian state of Victoria and recommended by both the Australian and New Zealand national guidelines.
[282] Parentage provisions can be seen in the USA, Canadian province of British Columbia and in the UK.

and the resulting child.[283] By including such measures when regulating posthumous conception, States are using regulation as a means of minimising the potential harms potentially inflicted by the technology. This should certainly be adopted when regulating posthumous conception Ireland. The next chapter continues addressing what Ireland can learn about regulating posthumous conception from foreign jurisdictions by conducting an analysis of the prominent case law which has emerged on posthumous conception.

[283] The interests and potential harms caused to the stakeholders implicated by posthumous conception are discussed fully in Chapter Three.

Chapter Six

An Analysis of Case Law on Posthumous Conception

6. Introduction

This chapter continues addressing the final research question which seeks to determine what lessons can be learned about regulating posthumous conception in Ireland by looking at how other jurisdictions have dealt with the issue. To do this, this chapter conducts an analysis of the prominent case law that has emerged on posthumous conception.

The issue of posthumous conception has been considered by the courts on several occasions.[1] Typically, posthumous conception becomes an issue for courts if the relevant country does not have laws which govern the retrieval and/or use of gametes in posthumous conception.[2] Firstly, in the absence of State laws, decisions surrounding whether posthumous gamete retrieval procedures can be performed are left to hospital staff who often have no guidance on the issue.[3] The difficulty for physicians is that the retrieval of gametes from a comatose patient will not be a medical necessity.[4] Furthermore, the retrieval of gametes from a deceased patient

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[1] See for example: *Parpalaix v. CECOS*, Trib. gr. inst. Creteil, 1 August 1984, Gazette du Palais [G.P.], 15 September 1984; *R v. Human Fertilisation and Embryology Authority ex parte Blood* [1997] EWCA Civ 946; *In the matter of Gray* [2000] QSC 390; *Y. v. Austin Health* [2005] VSC 427; *In the matter of Denman* [2004] QSC 70; *Kate Jane Bazley v. Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Jocelyn Edwards; Re the Estate of late Mark Edwards* [2011] 4 ASTLR 392; *Re H, AE* [2013] SASC 196; *Roblin v. Public Trustee for the Australian Capital Territory* [2015] ACTSC 100; *Re Cresswell* [2018] QSC 142; *Chapman v. South Eastern Sydney Local Health District* [2018] NSWSC 1231.

[2] S. Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) *Journal of Law and Biosciences* 329, at 331; P. Monahan, 'Legal and Ethical Considerations on the Posthumous Retrieval of Gametes' (2020) 14 *St Louis University Journal of Health Law and Policy* 183, at 185; R. Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia' (2017) 23(1) *Trusts and Trustees* 66, at 67.

[3] Monahan, 'Legal and Ethical Considerations on the Posthumous Retrieval of Gametes', above n 2, at 185.

[4] J. Berger, F. Rosner and E. Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients' (2002) *17 Journal of General Internal Medicine* 774, at 775; F.R. Batzer, J.M. Hurwitz and A. Caplan, 'Postmortem Parenthood and The Need for a Protocol with Posthumous Sperm Procurement' (2003) 79(6) *Fertility and Sterility* 1263, at 1266; S. Jenkins, J. Ives, S. Avery and H. Draper, 'Who Gets the Gametes? An Argument for a Points System for Fertility Patients' (2018) 32(1) *Bioethics* 16, at 16.

will fall outside of the exceptions in which physicians are ordinarily permitted to interfere with a corpse i.e. for the purposes of carrying out an autopsy, preparing organs for donation, or preparing the body for burial.[5] Riwoe notes that the requesting party will generally be advised by hospital staff to apply to court seeking authorisation to carry out the retrieval.[6] The court is then faced with determining whether they have jurisdiction to make such an order.

Secondly, posthumous conception becomes an issue in courts when the particular country's laws require the deceased's consent to facilitate treatment and the necessary consent from the deceased is lacking in the given case.[7] This can arise when the gametes have been stored by the deceased during their lifetime and they have not left behind instructions as to the fate of the gametes upon death,[8] or alternatively, if the gametes have been retrieved from the body of a deceased or comatose patient without consent.[9]

When consent from the deceased is required for posthumous conception (and this consent is not present), it is common for surviving partners to apply to the court seeking possession of the preserved gametes, so that they can transfer them to a jurisdiction in which they will be permitted to use them to reproduce.[10] Many of these cases require the court to consider whether the deceased's gametes can be categorised as 'property' for the purposes of possession by the deceased's surviving partner. The rationale behind the court deeming the gametes as 'property' is to grant the surviving partner possession over the cells. If the surviving partner is deemed to have a property interest in the cells, then this will entitle them to

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[5] Berger, Rosner and Cassell, 'Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients', above n 4, at 776.

[6] He states that it is highly unlikely that a hospital will carry out the procedure without a court order: D. Riwoe, 'Life After Death: Race Against Time to Preserve Life's Essence' (2019) 39(7) *Proctor* 25, at 25; Monahan, 'Legal and Ethical Considerations on the Posthumous Retrieval of Gametes', above n 2, at 185.

[7] Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 2, at 331.

[8] *Parpalaix v. CECOS*, above n 1; *Bazley v. Wesley Monash IVF Pty Ltd*, above n 1; *Roblin v. Public Trustee for the Australian Capital Territory*, above n 1.

[9] *R v. Human Fertilisation and Embryology Authority ex parte Blood*, above n 1; *Re Estate of the Late Mark Edwards*, above n 1; *Re H, AE (No. 2),* above n 1; *Re Cresswell,* above n 1; *Chapman v. South Eastern Sydney Local Health District,* above n 1.

[10] See case law cited above n 8 and 9.

possess the gametes, and transfer them to a region where they can be used in posthumous conception without the deceased's consent.[11]

Simana observes that the case law on posthumous conception is fraught with 'legal ambiguity'.[12] She claims that by making a distinction between the posthumous retrieval of gametes, and their subsequent use in posthumous conception, courts frequently make inconsistent and unclear judgments; whereby the court might permit the retrieval of gametes, but later prohibit their use in posthumous conception.[13] Of course, it is understandable why courts deal with these issues separately. These applications are not only made in highly emotive circumstances, but are also time sensitive. For viable sperm to be procured from a deceased man, the retrieval must be carried out within the first twenty-four to thirty-six hours after death.[14] Likewise, given the difficulties that accompany female posthumous gamete retrieval, decisions in this regard would also need to be made promptly.[15] Thus, courts typically treat requests for posthumous gamete retrieval on an interlocutory basis. If the application for gamete retrieval is granted, the court can deal with the matter of using the gamete in posthumous conception at a later stage. This secures the applicant's position while also granting the court more time to consider in depth all of the issues involved.[16]

However, inconsistent judicial outcomes demonstrate the importance of these issues being effectively regulated in Ireland. My aim in this chapter is to identify the primary issues that have presented for courts when dealing with requests for posthumous conception and to ascertain what Ireland can learn from these cases.

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[11] Ibid. Property in a legal sense is generally regarded as a 'bundle of rights' which will confer the owner with various privileges and duties over the property including, rights of use, possession, capital etc: A.M. Honoré, 'Ownership', in P. Smith, *The Nature and Process of Law, An Introduction to Legal Philosophy* (Oxford: Oxford University Press, 1993), p. 371.

[12] Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 2, at 331.

[13] Ibid.

[14] C.M. Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512, at 512.

[15] D. Greer, A. Styer, T. Toth, C. Kindregan and J. Romero, 'Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury' (2010) 363 *The New England Journal of Medicine* 276, at 280.

[16] Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia', above n 2, at 67; *In the matter of Denman,* above n 1; *Y v. Austin Health,* above n 1.

The case law examined in this chapter is discussed with the purpose of identifying specific issues that arise in the regulation of posthumous conception. These cases are the only examples of these issues being tested by the courts. It is therefore necessary to discuss these cases to develop effective policies for regulating posthumous conception in Ireland. Furthermore, the case law discussed primarily refers to the retrieval and use of male gametes in posthumous conception. This is due to the high volume of case law on the retrieval and use of male gametes in posthumous conception. As noted in Chapter One, there have not been many published cases dealing with the retrieval and use of female gametes in posthumous conception.[17]

Section 6.1 identifies specific issues that have arisen for courts when dealing with applications for posthumous gamete retrieval. These include instances of regulatory disconnect, the misuse of the court's inherent jurisdiction and the disregard for express statutory provisions.

Section 6.2 identifies a specific issue which has arisen for courts when dealing with requests for the use of gametes in posthumous conception. Here I critique the court's application of property principles to gametes in cases of posthumous conception.

Section 6.3 concludes this chapter by determining what lessons can be learned from the case law discussed to help develop policies that will effectively regulate posthumous conception in Ireland.

6.1. An Analysis of Case Law on the Retrieval of Gametes from Deceased and Dying Patients

The following sections identify specific issues that have arisen for courts when the particular country does not have designated laws on gamete retrieval from deceased

[17] N. Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, at 727; H. Henky, 'Donor Consent for Posthumous Reproduction: Legal and Ethical Perspectives' (2018) 7(4) *Journal of Forensic Science and Criminal Investigation* 2476; A. Sutcliffe, 'Intracytoplasmic Sperm Injection and Other Aspects of New Reproductive Technologies' (2000) 83(2) *Archives of Disease in Childhood* 89, at 89.

and dying patients. These include, instances of regulatory disconnection, the misuse of the court's inherent jurisdiction and disregard for expressed statutory provisions.

6.1.1. Regulatory Disconnection

This section discusses how the lack of designated laws on posthumous gamete retrieval has led to regulatory disconnection across the different States and Territories of Australia.

Brownsword describes regulatory disconnection as the mismatch between current laws and new technologies.[18] It occurs when regulatory approaches are designed for the technological landscape of the past and require 'reconnection'.[19] This can be seen when new technologies are not covered by any existing laws and they enter into a regulatory void. Alternatively, it occurs when older technologies morph beyond the forms that were originally intended by earlier regulatory regimes and there is ambiguity regarding the application of existing regulations.[20] The latter is the case in Australia. In some States and Territories, courts have used human tissue legislation as a means of authorising the retrieval of gametes from the dead.[21] However, several authors have noted that these statutes were not designed with ART in mind.[22] Thus, courts across Australia have not been unanimous on the applicability of human tissue provisions to the removal of gametes for use in posthumous conception.[23]

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[18] R. Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford: Oxford University Press, 2008), p. 160.

[19] L.B. Moses, 'How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target' (2013) 5(1) *Law, Innovation and Technology* 1, at 7.

[20] Ibid.

[21] Croucher, 'Laws of Succession Versus the New Biology: Reflections from Australia', above n 2, at 67.

[22] C. Mills, 'Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?' (2020) 27(3) *Journal of Law and Medicine* 741, at 741; B. Kroon, F. Kroon, S. Holt, B. Wong and A. Yazdani, 'Post-mortem Sperm Retrieval in Australasia' (2012) 52 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 487, at 488.

[23] There have been several cases across Australia where courts have closely scrutinised the relevant State's human tissue legislation, considering whether it may be used to authorise the retrieval of gametes from a deceased person: *In the matter of Gray,* above n 1; *Baker v. Queensland* [2003] QSC 2; *Y. v. Austin Health*, above n 1; *Re Cresswell*, above n 1; Croucher, 'Laws of Succession Versus the New Biology: Reflections from Australia', above n 2, at 67.

As with the laws on ART, all Australian States and Territories have their own distinct human tissue legislation.[24] There are subtle differences across the different statutes. However, in all Australian State and Territory statutes pertaining to human tissue, the term 'tissue' has been defined broadly so as to include: an organ, a part of the human body or a *substance* which has been extracted from, or from a part of, the human body.[25] The only instance in which sperm and ova are precluded from this definition of tissue is for the purpose of the donation of tissue by a living person. Thus, for certain legislative purposes, gametes will fall under the definition of 'tissue'.[26]

Human tissue legislation in all Australian States and Territories grant designated officers within hospitals the authority to harvest 'tissue' from a corpse.[27] If the deceased has not consented to the harvesting of tissue after death, the provisions permit the deceased's most senior available next of kin to consent to the removal of tissue on the deceased's behalf.[28] However, all State and Territory statutes require that the removal of tissue from the corpse is for the purposes of transplantation into the body of another living person, or for use in other therapeutic, medical or scientific purposes.[29] It is this aspect of the human tissue legislation which has prevented some courts in Australia from granting requests for

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[24] Human Tissue and Transplant Act 1982 (WA); Human Tissue Act 1982 (VIC); Human Tissue Act 1983 (NSW); Transplantation and Anatomy Act 1979 (QLD); Transplantation and Anatomy Act 1983 (SA); Human Tissue Act 1985 (TAS); Transplantation and Anatomy Act 1978 (ACT); Transplantation and Anatomy Act (NT) as in force 17 April 2017.
[25] Human Tissue and Transplant Act 1982 (WA), s 3; Human Tissue Act 1982 (VIC), s 3; Human Tissue Act 1983 (NSW), s 4; Transplantation and Anatomy Act 1979 (QLD), s 4; Transplantation and Anatomy Act 1983 (SA), s 5; Human Tissue Act 1985 (TAS), s 3; Transplantation and Anatomy Act 1978 (ACT), s 2; Transplantation and Anatomy Act (NT) as in force 17 April 2017, s 4.
[26] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17, at 744.
[27] Human Tissue and Transplant Act 1982 (WA), s 22; Human Tissue Act 1982 (VIC), s 26; Human Tissue Act 1983 (NSW), s 23; Transplantation and Anatomy Act 1979 (QLD), s 22; Human Tissue Act 1985 (TAS), s 23; Transplantation and Anatomy Act 1978 (ACT), s 27; Transplantation and Anatomy Act (NT) in force 17 April 2017, s 19(A).
[28] Ibid.
[29] Human Tissue Act 1982 (VIC), s 26(1)(a)-26(1)(b); Human Tissue and Transplant Act 1982 (WA), s 22(1)(a)-22(1)(b); The Transplantation and Anatomy Act (NT) in force 17 April 2017, s 19(A) states that the tissue must be removed from the deceased for an 'authorised purpose'. 'Authorised purpose' is defined in s 4(a) of the Act as 'transplantation to another person's body, use for other therapeutic purposes and use for other medical or scientific purposes'; Transplantation and Anatomy Act 1978 (ACT), s 27(1)(a); Transplantation and Anatomy Act 1979 (QLD), s 22(1)(c); Transplantation and Anatomy Act 1983 (SA), s 21(1)(a)-21(1)(b); Human Tissue Act 1985 (TAS), s 23(1)(a); Human Tissue Act 1983 (NSW), s 23(1)(a).

posthumous gamete retrieval.[30] Courts have been divided on whether the retrieval of gametes for use in posthumous conception falls under one of these designated purposes.[31]

Kiem notes that the traditional approach of courts was to reject these kinds of applications.[32] In the Queensland Supreme Court case of *Re Gray*,[33] Chesterman J. held that there was no legislation in Queensland which provided for the removal of gametes from a deceased man.[34] The court held that ART did not constitute a 'therapeutic, medical or scientific purpose'. Thus, the harvesting of sperm for use in posthumous conception could not be authorised under section 22 of Queensland's Transplantation and Anatomy Act 1979 (QLD).[35] The same rationale has been applied in factually similar cases in the States of Queensland[36] and New South Wales.[37] However, in several Australian jurisdictions, courts have deemed posthumous gamete retrieval lawful on the basis that assisted conception falls under the meaning of a 'medical purpose' under the relevant State's human tissue legislation.[38]

The decision of Brown J. in the Queensland Supreme Court case of *Re Cresswell*[39] is significant. This case concerned an application for an order granting the applicant possession of sperm posthumously harvested from her late partner.[40] Before determining whether the applicant was entitled to possession of the sperm, the court

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[30] *In the matter of Gray,* above n 1; *Baker v. Queensland,* above n 23; *Chapman v. South Eastern Sydney Local Health District,* above n 1.
[31] *In the matter of Gray*, above n 1; *Y. v. Austin Health*, above n 1; *Re Cresswell,* above n 1.
[32] T. Kiem, 'Life after death: Providing Hope for Shattered Lives or Creating a Lifetime of Unintended Consequences?' (2019) 39(7) 39(7) *Proctor* 22, at 22.
[33] *In the matter of Gray,* above n 1.
[34] Ibid, para. 5.
[35] Ibid, para. 22.
[36] *Baker v. Queensland*, above n 23.
[37] *Chapman v. South Eastern Sydney Local Health District,* above n 1; Kiem, 'Life after death: Providing Hope for Shattered Lives or Creating a Lifetime of Unintended Consequences?', ABOVE n 32, at 22.
[38] The retrieval of sperm was categorised as a medical purpose in the State of Victoria in *AB v. AG Victoria* [2005] VSC 180, para. 118; In the State of New South Wales in *Jocelyn Edwards; Re the Estate of late Mark Edwards,* above n 1; In Queensland in *Re Floyd* [2011] QSC 218; In South Australia in *Re H, AE*, above n 1; In Western Australia in *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); ex parte C* [2013] WASC 3; Croucher, 'Laws of Succession Versus the New Biology: Reflections from Australia', above n 2, at 67-68;
[39] *Re Cresswell*, above n 1.
[40] Ibid, paras. 1-9.

first considered whether the sperm had been harvested lawfully.[41] Brown J. referenced several factually similar cases which had been tried across Australia and in particular, considered the relevance of human tissue legislation in these States and Territories to the retrieval of gametes after death.[42] The court noted that under Queensland's Transplantation and Anatomy Act 1979 (QLD), the legislative phrase 'medical purpose' did not apply to the deceased, and extended to third parties.[43] Furthermore, the court held that the phrase 'medical purpose' extended beyond the provision of medical treatment. The court noted that the process of assisted reproduction interferes with the normal operation of a physiological function. Therefore, it falls under the definition of a 'medical purpose' and the procurement of gametes for use in assisted conception may be authorised under section 22 of Queensland's Transplantation and Anatomy Act 1979 (QLD).[44]

Page notes that the court also rejected the Queensland Government's *Guidelines for Removal of Sperm from Deceased Persons for IVF: Consent Authorisation and Role of IVF Organisations*,[45] which advised that prior court authorisation was necessary to proceed with the retrieval of sperm from a deceased man.[46] The author states that the court was of the view that the statutory regime in Queensland does not require parties to apply to the court, but rather the correct process is to acquire consent for the retrieval in accordance with the Transplantation and Anatomy Act 1979 (QLD).[47] Mills observes that many Superior Court judges have made comments regarding judicial involvement in the process of posthumous gamete retrieval.[48] Several judges have stated that if the authority to harvest gametes after death derives from State legislation, the court has no role in authorising the retrieval.[49]

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[41] Ibid, paras. 17-96.
[42] Ibid, paras. 17-47.
[43] Ibid, para. 77.
[44] Ibid.
[45] State Coroners Guidelines, *Guidelines for Removal of Sperm from Deceased Persons for IVF: Consent, Authorisation and Role of IVF Organisations* (2013), Chapter 4.
[46] *Re Cresswell*, above n 1, para. 162; S. Page, 'Two Worlds Colliding: The Science and Regulation of Assisted Reproductive Treatment' (2020) 156 *Precedent* 32, at 37.
[47] *Re Cresswell*, above n 1, para. 47; Page, 'Two Worlds Colliding: The Science and Regulation of Assisted Reproductive Treatment' above n 46, at 37.
[48] Mills, 'Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?', above n 22, at 746-747.
[49] *Chapman v. South Eastern Sydney Local Health District*, above n 1, para. 60; *Jocelyn Edwards; Re the Estate of late Mark Edwards,* above n 1, para. 30; Even in *the matter of Gray,* above n 1,

Re Cresswell[50] has been applauded by commentators for clearly outlining the applicability of State human tissue legislation to the retrieval of gametes after death.[51] Lupton has stated that the judgment brought welcome clarity to what was previously a confused area.[52] Indeed, Mills argues that the approach taken by the court appears to be the one that was originally intended by the State's human tissue statute: [53]

> "It is interesting to note that the HTA in all jurisdictions provides specifically that foetal tissue, sperm (or semen) and ova are excluded from the definition of 'tissue' for the purposes of *living* tissue donation. The HTAs contain no such exclusionary clauses with regard to posthumous tissue donation".[54]

However, this position remains uncertain. At present, judgments across Australia have not been unanimous on the applicability of State human tissue legislation to the retrieval of gametes after death.[55] This is particularly the case in States and Territories that have co-existing human tissue and ART legislation.[56] Fishman notes that in the New South Wales Supreme Court decision of *Chapman v. South Eastern Sydney Local Health District*,[57] the court correctly identified a statutory conflict between New South Wales' human tissue and ART statutes.[58] The author observes that the court accepted that posthumous gamete retrieval, without prior consent from the source, can technically be authorised by the deceased's next of kin under section 23(2) of the Human Tissue Act 1983 (NSW). However, the judge further observed that the subsequent preservation and storage of sperm without the deceased's prior consent would be unlawful under Section 25 of New South Wales'

Chesterman J. held that if the authority to harvest sperm from a deceased man derived from statute, then there would be no need for the court to play a role, para. 22.

[50] *Re Cresswell*, above n 1.

[51] Rule of Law, Institute of Australia, 'IVF and Legal Precedent – Re Cresswell Qld' (01 August 2018), available at <https://www.ruleoflaw.org.au/ivf-and-legal-precedent-re-cresswell-qld/>; S. Page, 'Life After Death: For the Love of…Gametes' (2019) 39(7) *Proctor* 26, at 26-27.

[52] M. Lupton, 'The Post-Mortem Use of Sperm - Some Clarity at Last' (2019) 3(6) *International Journal of Medical Science and Health Research* 1, at 2.

[53] Mills, 'Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?', above n 22, at 746.

[54] Ibid.

[55] *Re Cresswell*, above n 1; *Chapman v. South Eastern Sydney Local Health District*, above n 1.

[56] Mills, 'Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?', above n 22, at 749.

[57] *Chapman v. South Eastern Sydney Local Health District*, above n 1.

[58] Ibid, para. 68; T. Fishburn, 'Birthing a Legal Lacuna: The Extraction and Use of Sperm Without Consent' (2018) 49 *Law Society of NSW Journal* 84, at 84.

Assisted Reproductive Technology Act 2007 (NSW).[59] Thus, while in theory, human tissue legislation in New South Wales, makes the collection of gametes after death (without prior consent from the source) feasible, it is merely a technicality. The judge in *Chapman*[60] rightly observed that it is unlikely the human tissue statute was drafted with the intention that it would be used for this purpose.[61] Ultimately, the authorisation by next of kin for the removal of gametes from a deceased person under Section 23(2) of the Human Tissue Act 1983 (NSW) will be ineffective, given that there will be an automatic breach of the ART legislation in New South Wales.[62]

A similar point could be raised in relation to the co-existing human tissue and ART statutes in other States of Australia. For example, in the State of Victoria, the retrieval of gametes from a deceased person has been deemed by courts to be lawful under the Human Tissue Act 1982 (VIC).[63] However, as discussed in Chapter Five, Victoria's Assisted Reproductive Treatment Act 2008 (VIC) requires expressed consent from the deceased for posthumous conception.[64] Thus, in the absence of expressed consent from the deceased, gametes which are harvested posthumously under the Human Tissue Act 1982 (VIC) cannot be lawfully used in that State and they would have to be exported elsewhere.

Middleton and Buist describe this as a 'paradox'.[65] They argue that if the gametes cannot be lawfully used in the State, then they should not be able to be lawfully harvested.[66] Simana makes a related point and states that when laws do not specifically deal with both the retrieval *and* use of gametes in posthumous

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[59] Ibid, para. 68: As noted in Chapter Five, Section 25 of the Assisted Reproductive Technology Act 2007 (NSW) makes is an offence to continue to store the gametes of a deceased person without their consent; Fishburn, 'Birthing a Legal Lacuna: The Extraction and Use of Sperm Without Consent', above n 58, at 84.

[60] *Chapman v. South Eastern Sydney Local Health District*, above n 1.

[61] Ibid, para. 68.

[62] Ibid.

[63] *Y. v. Austin Health*, above n 1.

[64] Assisted Reproductive Treatment Act 2008 (VIC), s 46.

[65] S. Middleton and M. Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units' (2009) 190(5) *Medical Journal of Australia* 244, at 245.

[66] Ibid, at 246.

conception it can lead to inconsistent outcomes, whereby gametes can be retrieved after death, but cannot be used in posthumous conception.[67]

Despite this, some courts across Australia have continued to use State human tissue legislation as a means of authorising the posthumous retrieval of gametes, even when doing so conflicts with ancillary State ART statutes.[68] In the New South Wales Supreme Court case of *Re Vernon*,[69] Rothman J. rejected the observations of the court in *Chapman,*[70] and suggested that the storage of sperm from a deceased man without his consent did not automatically breach Section 25 of the Assisted Reproductive Technology Act 2007 (NSW).[71] In Justice Rothman's view, the wording of Section 25 of the Assisted Reproductive Technology Act 2007 (NSW) which requires consent from the 'gamete provider' to legally store gametes, did not necessarily translate to mean the 'gamete source'. The court held that the required consent for storage of the gametes could be provided by the deceased's surviving partner who *supplied* the clinic with the sperm.[72] However, this is a considerably expansive interpretation of the wording in this section, under which there are no clear limits on who may be the gamete provider.

It seems unlikely that human tissue statutes across Australia were drafted with the intention of being used to retrieve gametes from the dead for use in posthumous conception. Kroon and others note that posthumous gamete retrieval in Australia has simply been 'unexpectedly caught' by laws that were intended to deal with other issues.[73] Indeed, both Fishburn and Cherkassky separately describe it as a 'legal lacunae' that the retrieval of gametes for use in posthumous conception has been deemed lawful across Australia in this way.[74]

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[67] Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 2, at 331.
[68] *In the matter of an Application by Vernon* [2020] NSWSC 608; *Noone v. Genea Limited* [2020] NSWSC 1860.
[69] *In the matter of an Application by Vernon,* above n 68.
[70] *Chapman v. South Eastern Sydney Local Health District*, above n 1.
[71] *In the matter of an Application by Vernon,* above n 68, paras. 56 and 58.
[72] Ibid, para. 58.
[73] Kroon, Kroon, Holt, Wong and Yazdani, 'Post-mortem Sperm Retrieval in Australasia', above n 22, at 488.
[74] Fishburn, 'Birthing a Legal Lacuna: The Extraction and Use of Sperm Without Consent', above n 58, at 45; L. Cherkassky, 'Is Interference with a Corpse for Procreative Purposes a Criminal Offence?' (2021) *Modern Law Review* 1, at 6.

I contend that the lack of specific laws on gamete retrieval has resulted in regulatory disconnection across Australia – whereby State human tissue legislation is being used as a means in which next of kin can consent to the retrieval of gametes from a deceased relative for use in posthumous conception. It is impossible that the statutes were drafted with the intention of being used for this purpose, given that the technology did not exist at the time. Of course, regulatory disconnection is not in itself a bad thing, and many innovations can and do fall comfortably within the scope of an existing regulatory framework.[75] The difficulty with regulatory disconnection is when there is insufficient information regarding the potential harms and benefits of a new technology. When the risks and benefits of a new technology do become clear, it can be very difficult to introduce regulatory changes.[76]

Furthermore, there are sometimes principled reasons why certain issues should be dealt with, and regulated separately. This is an argument that could be put forward in the case of gametes, as they are distinct from, and should potentially be treated differently to organs and other human tissue. Marshall notes that there are substantial differences between organs and gametes. Firstly, organs are considered to be lifesaving and gametes are not. Furthermore, gametes have the potential to create new life and contain readily usable genetic information.[77] Bills makes a similar observation and claims that gametes should not be likened to organs. The author states that unlike with the harvesting of organs, the outcome of retrieving gametes from the dead is not for the greater good, but rather for the benefit of the

[75] A. Butenko and P. Larouche, 'Regulation for Innovativeness or Regulation of Innovation?' (2015) 7(1) *Law, Innovation and Technology* 52, at 68; Moses, 'How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target', above n 19, at 7.

[76] This is because introducing new legislation is a very lengthy process. It often involves months, if not years of careful drafting and consultation before it is enacted: Butenko and P. Larouche, 'Regulation for Innovativeness or Regulation of Innovation?', above n 75, at 69.

[77] L. Marshall, 'Intergenerational Gamete Donation: Ethical and Societal Implications' (1998) 178 *American Journal of Obstetrics and Gynaecology* 1171, at 1172; N. Maddox, 'Limited, Inclusive and Communitarian: In Defence of Recognising Property Rights in the Human Body' (2019) 70(3) *Northern Ireland Legal Quarterly* 289.

deceased's next of kin.[78] Indeed, this distinction was also highlighted by the New Zealand High Court in the case of *Re Lee (Long)*.[79]

The distinction between organs and gametes aside however, the primary problem with human tissue legislation across Australia being used to harvest gametes from the dead is that it creates a mismatched situation in many States, whereby the gametes can be lawfully retrieved from the dead, but they cannot be lawfully stored or used in posthumous conception absent the deceased's consent.[80] I support the view conveyed by Justice Fagan in the case of *Chapman*[81] and those expressed by Middleton and Buist who state that if Australian State and Territory human tissue statutes were truly intended to facilitate the harvesting of gametes after death for use in posthumous conception, then the provisions relating to the retrieval of gametes would also coincide with any ancillary legislative provisions relating to the storage and use of gametes in posthumous conception. However, this is not the case.[82] I contend that human tissue legislation has merely provided a loophole for some courts in Australia to grant requests for posthumous gamete retrieval in the absence of consent from the deceased. Croucher and Peart have also suggested that by facilitating the deceased's next of kin to authorise the retrieval of gametes after death, human tissue legislation has provided courts in some States of Australia with a method of circumventing consent requirements.[83]

Ultimately, what we can learn from this case law about regulating posthumous conception in Ireland is that laws on posthumous conception need to specifically address the retrieval of gametes from deceased patients. This will give physicians clarity on the validity of retrieving the gametes and will prevent the issue from

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[78] K. Bills, 'The Ethics and Legality of Posthumous Conception' (2005) 9 *Southern Cross University Law Review* 1, at 11.

[79] Here, the court considered the applicability of New Zealand's Human Tissue Act 2008 (NZ) to the retrieval of gametes after death. The High Court stated that Parliament made a deliberate decision to exclude gametes from the statutory definition of 'human tissue' for the purposes of the statute. They recognised that the harvesting of gametes will raise different 'ethical and public interest issues' to the retrieval of other bodily tissue: *In the matter of Lee (deceased) and Long (applicant)* [2017] NZHC 3263.

[80] Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 2, at 331.

[81] *Chapman v. South Eastern Sydney Local Health District*, above n 1.

[82] Middleton and Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units', above n 65, at 246.

[83] Croucher, 'Laws of Succession Versus the New Biology: Reflections from Australia', above n 2; Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17.

having to be considered by the court at first instance. Furthermore, specific laws on the retrieval of gametes will stop instances of regulatory disconnection, whereby the harvesting of gametes after death is caught by laws which are designed to regulate other areas. Lastly, laws on the retrieval of gametes after death must align with laws that regulate the storage and use of gametes in posthumous conception. This will avoid a mismatch between the ability to harvest gametes from the dead and the inability to use them in posthumous conception. Indeed, Middleton and Buist describe the regulatory disconnection across Australia as a failure by some States and Territories to deal with posthumous conception in a logical manner.[84]

6.1.2. Misuse of the Court's Parens Patriae Jurisdiction

This section discusses how the lack of laws on posthumous gamete retrieval in New Zealand has led the High Court of New Zealand to misuse the *parens patriae* aspect of the court's inherent jurisdiction to authorise the posthumous retrieval of gametes.

The phrase '*parens patriae*' translates to 'parent of the nation' and is a common law jurisdiction which is traditionally exercised in wardship.[85] It's existence dates back to the reign of King Edward I, when the Crown possessed the prerogative power to take wardship over the lands of persons unable to look after their property.[86] In its modern application, the *parens patriae* jurisdiction is wide-ranging and is used by courts to make a diverse range of protective orders for the benefit of 'wards'.[87] Ordinarily, the *parens patriae* aspect of the court's jurisdiction is invoked to promote the welfare of incapacitated adult patients[88] or to make decisions in the best interests of a vulnerable child.[89] Case law citing the *parens*

[84] Middleton and Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units', above n 65, at 246.
[85] G. Laurie, '*Parens Patriae* Jurisdiction in the Medico-Legal Context: The Vagaries of Judicial Activism' (1999) 3(1) *Edinburgh Law Review* 95, at 95.
[86] M. McGlynn, 'Idiots, Lunatics and the Royal Prerogative in Early Tudor England' (2005) 26 *The Journal of Legal History* 1, at 2.
[87] Justice P. Brereton, 'The Origins and Evolution of the Parens Patriae Jurisdiction' *Lecture on Legal History Sydney Law School* (05 May 2017).
[88] *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.
[89] *Re Jules* [2008] NSWSC 1193; *Secretary, Department of Health and Community Services v. J.W.G and S.M.B (Marion's Case)* [1992] 175 CLR 218; *Re X* [1991] NZLR 365; *Re C* [1997] 2 FLR 180; *Re Thomas* [2009] NSWSC 217; *Re Sally* [2009] NSWSC 1141.

patriae jurisdiction demonstrates that the scope of the jurisdiction is extensive and suggests that the exercise of this jurisdiction is potentially only limited by statute.[90] However, this aspect of the court's jurisdiction must be exercised with caution and only where there is a clear justification for the judicial intervention.[91]

The *parens patriae* jurisdiction is frequently considered by courts when dealing with applications for the retrieval of gametes from both deceased and dying patients.[92] Smith notes that there are a series of cases which have considered this issue and courts have arrived at different conclusions on whether this aspect of the court's jurisdiction is applicable to the retrieval of gametes for posthumous conception.[93]

In the New South Wales Supreme Court decision of *MAW v. Western Sydney Health Service,*[94] O'Keefe J. discussed the *parens patriae* aspect of the court's inherent jurisdiction in detail when considering an application for sperm retrieval from a comatose patient.[95] The court summarised the applicability of the jurisdiction as follows:

> "The parens patriae jurisdiction of the Court is essentially protective in nature (Marion's Case at 280) and although broad, is to be exercised cautiously (In Re O'Hara [1970] AC 668 at 695; Marion's Case at 280). Its existence and exercise are founded on a need to act on behalf of those who are in need of care and cannot act for themselves. In exercising its parens patriae jurisdiction the paramount consideration is the promotion of the health or welfare of the subject of the exercise of the jurisdiction. Its exercise should not be for the benefit of others (Re Eve at 34)".[96]

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[90] *Carseldine v. The Director of Department of Children's Services* [1964] HCA 33; *K. v. Minister for Youth and Community Services* [1982] 1 NSWLR 311.

[91] Brereton, 'The Origins and Evolution of the Parens Patriae Jurisdiction', above n 87; M. Hall, 'The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 85, at 191

[92] *MAW v. Western Sydney Area Health Service* [2000] NSWSC 358; *In the matter of Gray*, above n 1; *Chapman v. South Eastern Sydney Local Health District*, above n 1; *In the matter of Lee (deceased) and Long (applicant),* above n 79.

[93] M. Smith, 'Posthumous Conception in South Australia: The Case Continues in Re H, AE (No 3) [2013] SASC 196' (2014) 34(1) *Queensland Lawyer* 15, at 15.

[94] *MAW v. Western Sydney Health Service,* above n 92.

[95] Ibid, para. 1.

[96] Ibid, para. 31.

Bills notes that the court was mindful of exercising this jurisdiction to authorise a 'non-therapeutic procedure'.[97] O'Keefe J. noted that the retrieval of sperm from the applicant's husband did not constitute medical treatment.[98] It was not a procedure that would 'safeguard, secure, promote, or prevent the deterioration in the physical or mental health of the patient'.[99] In the court's view, medical interventions which are not necessary to preserve the life of the patient cannot be authorised under the guise of the court's *parens patriae* jurisdiction.[100] Furthermore, the court noted that the jurisdiction is traditionally exercised in wardship and used to make 'protective' orders.[101] O'Keefe J. made reference to several cases in which the jurisdiction is traditionally exercised,[102] and observed that it is not ordinarily used to make orders on behalf of someone, for the benefit of others.[103] In this case, the surgical procedure would be carried out to facilitate the applicant in becoming pregnant. The harvesting of gametes for this purpose could not be said to promote the welfare or protect the patient in any sufficient manner.[104] In exercising this jurisdiction the 'paramount consideration' of the court should be the welfare of the person who is subject to the exercise of the jurisdiction.[105]

Peart suggests that where the patient is deemed unlikely to personally reap benefits from the gamete retrieval procedure then it is unlikely that the *parens partiae* jurisdiction of the court will be applicable.[106] This was the view of the New South Wales Supreme Court in *Chapman v. South Eastern Sydney Local Health District.*[107] Fagan J. relied on the rulings in both *MAW*[108] and *Re Gray*[109] and upheld

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[97] Bills, 'The Ethics and Legality of Posthumous Conception', above n 78, at 11.
[98] *MAW v. Western Sydney Health Service*, above n 92, para. 42.
[99] Ibid, para. 41.
[100] Ibid.
[101] Ibid, para. 28.
[102] *Re Eve* [1986] 31 DLR (4th) 1; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; *Re X* [1991] NZLR 365; *Secretary, Department of Health and Community Services v. J.W.G and S.M.B (Marion's Case)* [1992] 175 CLR 218.
[103] *MAW v. Western Sydney Health Service*, above n 92, para. 31.
[104] Ibid, para. 41.
[105] Ibid, para. 31. This ruling was also relied on by the Queensland Supreme Court in *Re Gray* in respect of the retrieval of gametes from a deceased man: *Re Gray,* above n 1.
[106] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17, at 734.
[107] *Chapman v. South Eastern Sydney Local Health District,* above n 1.
[108] *MAW v. Western Sydney Health Service*, above n 92.
[109] *In the matter of Gray,* above n 1.

that the *parens patriae* jurisdiction is only to be exercised where it benefits the well-being of the patient upon whom the operation is to be performed.[110] The court noted that the surgical extraction of sperm from an unconscious man is unnecessary and provides no direct patient benefit.[111] In addition, the court observed that the retrieval of sperm from a comatose man will only further the interests of his surviving partner. It was held that the common law does not support authorising an invasive procedure to be carried out on a patient for the sole benefit of another party.[112]

However, Fagan J. does seem to suggest that where it is likely that the patient will regain consciousness in the future, and there is evidence demonstrating that he would be gratified to learn that the procedure had been performed and that his sperm had been harvested, then this may in fact be inferred as a benefit to him.[113] This is in line with the argument put forward in Chapter Three in respect of harvesting gametes from comatose patients. The retrieval of gametes could be viewed as being in a patient's best interests in circumstances where there is evidence that the patient had contemplated posthumous conception during their lifetime, or where other evidence indicates that they would have consented.[114] However, in circumstances where the patient will never regain any consciousness, the court in *Chapman*[115] held that 'the patient is beyond being benefited in any sense, physical or emotional, by the extraction of his sperm'.[116]

The applicability of the court's *parens patriae* jurisdiction to the retrieval of gametes from the dead has also been considered by the High Court of New Zealand.[117] However, despite the decisions from courts across Australia on this issue, *in the matter of Lee (Deceased) and Long (Applicant),*[118] Heath J. was of the view that there was scope within the court's *parens patriae* jurisdiction to authorise

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[110] Ibid, para. 36.
[111] Ibid, para. 37.
[112] Ibid, para. 37.
[113] Ibid, para. 37.
[114] See discussion in Chapter Three, Section 3.1.3.2: Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17, at 734.
[115] *Chapman v. South Eastern Sydney Local Health District,* above n 1.
[116] Ibid, para. 37.
[117] *In the matter of Lee (deceased) and Long (applicant),* above n 79.
[118] Ibid.

the removal of sperm from a deceased man.[119] Ceballos observes that the court in this case was faced with overcoming a legislative gap. As noted in Chapter Five, New Zealand's ART legislation does not provide for the retrieval of gametes from the deceased. However, the use of sperm in posthumous conception is a procedure which could be authorised subject to the approval of New Zealand's Ethics Committee on ART (ECART). The author notes that the court interpreted it's inherent jurisdiction as an ability to fill legislative gaps in the law and to make orders which were not otherwise unlawful or contrary to existing statutory provisions.[120]

The court considered two aspects of its inherent jurisdiction; the *parens patriae* and the administration jurisdiction.[121] As discussed above, the court's *parens patriae* jurisdiction is ordinarily invoked by judges to make protective orders for vulnerable living persons,[122] while the administration jurisdiction is employed in cases where the court is required to make orders relating to deceased persons.[123] Heath J. found that the *parens patriae* jurisdiction and administration jurisdiction of the court exist as a continuum. He cited the case of *Re JSB (A Child)*,[124] a case in which he had previously utilised the court's inherent jurisdiction to make provisions for the interests of a living child, after death.[125] The judge held that a court may exercise its inherent jurisdiction to make orders from the beginning of life until after its end. He noted that the New Zealand Judicature Act 1908 (NZ), which confers the inherent jurisdiction on the courts of New Zealand, does not make a distinction between these aspects of jurisdiction. The judge held that the court's power to make orders relating to both the living and the dead stem from the same source of the court's inherent jurisdiction.[126]

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[119] Ibid.
[120] M. Ceballos, 'From The Grave to the Cradle: Looking for Answers to the Question of Consent to Reproduce Posthumously in New Zealand' (2019) 50 *Victoria University of Wellington Law Review* 433, at 436; *In the matter of Lee (deceased) and Long (applicant),* above n 79, paras. 30-31.
[121] *In the matter of Lee (deceased) and Long (applicant),* above n 79, para. 37.
[122] *MAW v. Western Sydney Health Servic*e, above n 92 ; *In the matter of Gray,* above n 1.
[123] *Re Jones (deceased)* [1973] 2 NZLR 402.
[124] *Re JSB (a child)* [2010] NZLR 236.
[125] Ibid.
[126] *In the Matter of Lee (Deceased) and Long (Applicant),* above n 79, para. 38.

Ferguson observes that the court was satisfied that there was room within the *parens patriae* and administration jurisdiction to authorise the removal of sperm from a deceased man.[127] The author states that the court felt it was merely 'filling a legislative gap' and providing a means in which the sperm may be lawfully collected and stored pending a substantive application by the applicant to the ECART, who was the appropriate body to decide on its use.[128] Baird makes a similar point and observes that the court deemed it necessary to make the order in this case. She notes that if the court had refused the application, the applicant would have been prevented from applying to the ECART to use the sperm, which was an otherwise lawful process.[129]

Maddox notes that the court's interpretation of its inherent jurisdiction in this case 'marks a significant widening of the court's powers'.[130] He observes that the facts of *Re Lee (Long)*[131] are significantly different from previous case law where the inherent jurisdiction had been invoked by New Zealand courts. Furthermore, he notes that the inherent jurisdiction is primarily a feature of procedural law which should not be used to make changes to substantive law.[132] He states that it should only be exercised when it is necessary and expresses doubt as to whether the retrieval of sperm from the deceased in this case could be deemed 'necessary'.[133] Peart also expresses her concern over the use of the *parens patriae* jurisdiction in these applications, noting that it must be exercised with caution and only when the intervention is necessary for the protection or welfare of vulnerable persons.[134] Donnelly makes the same point stating that it should not be used as a repository of power for the courts to invoke on a discretionary basis, nor to grant the relief which it considers most desirable in a given case.[135] This position seems sensible and it is

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[127] G. Ferguson, *Posthumous Reproduction – A review of the Current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to Take into Account Gametes and Embryos* (Wellington: Advisory Committee on Assisted Reproductive Technology, 2018), p. iii.
[128] Ibid.
[129] K. Baird, 'Dead Body, Surviving Interests: The Role of Consent in the Posthumous Use of Sperm' (Bachelor of Laws Thesis, University of Otago, 2018), p. 8.
[130] N. Maddox, 'Retrieval and Use of Sperm after Death: In the Matter of Lee (Deceased) and Long (Applicant) [2017] NZHC 3263' (2018) 15(2) *Otago Law Review* 303, at 311.
[131] *In the Matter of Lee (Deceased) and Long (Applicant),* above n 79.
[132] Maddox, 'Retrieval and Use of Sperm after Death: In the Matter of Lee (Deceased) and Long (Applicant) [2017] NZHC 3263', above n 130, at 312.
[133] Ibid, at 313.
[134] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17.
[135] J. Donnelly, 'Inherent Jurisdiction and Inherent Powers of Irish Courts' (2009) 2 *Judicial Studies Institute Journal* 122, at 160.

the approach that has been taken by courts in Australia who have been reluctant to invoke the *parens patriae* jurisdiction in these types of cases.[136]

It is noteworthy, however, that unlike in some States and Territories of Australia, New Zealand courts are unable to draw on human tissue legislation as a means of harvesting gametes from a deceased person.[137] Thus, had the judge in *Re Lee (Long)*,[138] not employed the court's inherent jurisdiction, he would have been otherwise prevented from facilitating the applicant in this case. This leads to the conclusion that the approach of the judge in this case was potentially result favoured. Ceballos makes a similar point and states that the decision of the court in this case was specifically taken 'due to the lack of an explicit provision dealing with the issue of sperm extraction from a deceased man'.[139]

I contend that the lack of laws on the retrieval of gametes after death in New Zealand led the High Court in *Re Lee (Long)*[140] to inappropriately use the *parens patriae* aspect of the court's inherent jurisdiction to authorise the gamete retrieval. The inconsistent application of the courts *parens patriae* jurisdiction demonstrates the need for laws in Ireland to deal specifically with the retrieval of gametes from both deceased and comatose patients. This will prevent courts, such as the one in *Re Lee (Long)*[141] from having to resort to their inherent jurisdiction in order to deem the retrieval of gametes lawful.

6.1.3. Disregard for Expressed Statutory Provisions

This section demonstrates how the lack of consistent laws in the United Kingdom (UK) on the retrieval and use of gametes from dying patients, has led the UK's Court of Protection to overlook direct provisions of the UK's mental capacity and ART legislation.

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[136] *MAW v. Western Sydney Area Health Service*, above n 92; *In the matter of Gray*, above n 1; *Chapman v. South Eastern Sydney Local Health District*, above n 1.

[137] Section 7(2) of New Zealand's Human Tissue Act 2008 (NZ) expressly prohibits both human gametes and embryos from the definition of tissue for the purposes of any provision within the Act. Thus, provisions in the Act which provide for the retrieval of human tissue cannot be extended to provide for the collection of gametes.

[138] *In the matter of Lee (deceased) and Long (applicant),* above n 79.

[139] Ceballos, 'From The Grave to the Cradle: Looking for Answers to the Question of Consent to Reproduce Posthumously in New Zealand', above n 120, at 436.

[140] *In the matter of Lee (deceased) and Long (applicant),* above n 79.

[141] Ibid.

The UK's Mental Capacity Act 2005 (MCA 2005) (UK) was enacted to make provisions for people lacking capacity.[142] The Act applies to making decisions in respect of an incapacitated person's health, welfare or finances.[143] Regarding healthcare, the Act allows a doctor to proceed with the provision of medical treatment in circumstances where the patient lacks the relevant capacity to consent and where the physician reasonably believes that the medical intervention is in their 'best interests'.[144] In addition, section 9 of the MCA 2005 (UK) allows an incapacitated patient's pre-appointed power of attorney to make welfare decisions on the patient's behalf, so long as it is in their 'best interests'.[145] The Act does not provide a statutory definition of 'best interests'. However, in *Y. v. A NHS Healthcare Trust*,[146] the court noted that whether an act is categorised as being in a person's best interests will be subjective and will depend on 'the particular act or decision in question and the individual circumstances of the person concerned'.[147] McClean notes that should a physician, court or appointed deputy concede that a procedure is in the 'best interests' of a comatose person then it may be deemed lawful.[148]

Section 45 establishes the Court of Protection.[149] The Court of Protection is conferred with the power to oversee matters involving persons who lack capacity.[150] Section 15 confers the Court of Protection with the discretionary power to make declarations on whether a person has, or lacks, the relevant capacity to make a decision.[151] The court can also determine the lawfulness of any act done, or yet to be done, in relation to that person.[152] In addition, section 16 allows the Court of Protection to make a decision on behalf of an incapacitated person, or to

[142] Mental Capacity Act 2005 (UK), Introductory Text.
[143] Ibid.
[144] Ibid, s 5(1)(b).
[145] Ibid, s 9(1)(a).
[146] *Y. v. NHS Healthcare Trust* [2018] EWCOP 18.
[147] Ibid, para. 14.
[148] S. McClean, 'Consent and the Law: Review of the Current Provisions in the Human Fertilisation and Embryology Act for the UK Health Ministers' (1997) 3(6) *Human Reproduction Update* 593, at 605, at 613.
[149] Mental Capacity Act 2005 (UK), s 45.
[150] Ibid, s 48.
[151] Ibid, s 15(a).
[152] Ibid, s 15(c).

appoint a deputy to make decisions on their behalf.[153] Section 16(3) provides that the powers of the Court of Protection are subject to the other provisions within the Act. Thus, the court must always act in accordance with section 1 and section 4 of the legislation which requires those making decisions on behalf of a person lacking capacity to act in accordance with their 'best interests'.[154]

Furthermore, sections 27-29 of the MCA 2005 (UK) preclude certain decisions being made on behalf of an incapacitated person.[155] These include decisions such as consenting to a marriage,[156] making an adoption order,[157] or exercising voting rights.[158] Most notably, section 27(1)(h) and section 27(1)(i) of the statute prohibit a person who has been appointed under the legislation from consenting on behalf of an incapacitated person to matters which are covered by the HFEA 1990 (UK) and HFEA 2008 (UK).[159] These provisions prevent the court, or anyone nominated on behalf of the source from providing the 'effective consent' required for the lawful storage and use of gametes under Schedule 3 of the HFEA 1990 (UK).[160] Thus, while the retrieval of gametes from an incapacitated patient may be deemed lawful on the basis of it being in their 'best interests',[161] any subsequent storage or use of the gametes will be unlawful without the sources 'effective consent'[162]

Nevertheless, in *Y. v. NHS Healthcare Trust*,[163] Knowles J. in the Court of Protection completely overlooked this aspect of the MCA 2005 (UK) and made an order which directed a third party to provide consent on behalf of an incapacitated man to the storage and use of his gametes in accordance with Schedule 3 of the HFEA 1990 (UK).[164] This case concerned an application for the retrieval of sperm from a comatose man. The applicant's husband had been involved in a motor vehicle incident and sustained catastrophic brain injuries. The applicant sought to

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[153] Ibid, s 16(1)(a) and 16(1)(a)(b).
[154] Ibid, s 16(3).
[155] Ibid, s 27, 28 and 29.
[156] Ibid, s 27(1)(a).
[157] Ibid, s 27(1)(f).
[158] Ibid, s 29(1).
[159] Ibid, s 27(1)(h) and 27(1)(i).
[160] Ibid.
[161] *Y. v. NHS Healthcare Trust,* above n 146, para. 24.
[162] HFEA 1990 (UK), Schedule 3, para. 8.
[163] *Y. v. NHS Healthcare Trust*, above n 146.
[164] Ibid, para. 24.

harvest samples of his sperm so that she could use them in fertility treatment. She applied to the court seeking a declaration that, notwithstanding her husband's incapacity and his inability to consent, it was lawful and in his 'best interests' for his sperm to be harvested prior to his death. In addition, she sought an order pursuant to section 16 of the MCA 2005 (UK) directing the court to appoint a suitable person to sign the relevant consent forms required under Schedule 3 of the HFEA 1990 (UK) for the storage of her husband's sperm on his behalf.[165]

Knowles J. was satisfied that the court's powers under the MCA 2005 (UK) were fully engaged. By reason of his brain injury, the applicant's husband was unable to provide the necessary consent to the retrieval of his gametes and it was unlikely that he would ever regain the capacity to consent.[166] In determining whether the retrieval of gametes would be in his 'best interests', the judge considered extensive evidence provided to the court indicating that the couple had been undergoing fertility treatment and had a settled intention to provide a sibling for their son. The court also heard evidence demonstrating that the couple had both contemplated and agreed to the idea of posthumous conception.[167] Knowles J. also deemed the wishes of the applicant as important, noting that as the patient's spouse, she was a person who was interested and cared for his personal welfare.[168] Based on the evidence provided to the court, the judge was satisfied that if given the choice, the applicant's husband would have consented to the procedure. Despite his imminent death, the court held that it was in his 'best interests' for his sperm to be retrieved and stored.[169] Furthermore, the court directed a third party to sign the necessary consent forms required by Schedule 3 of the HFEA 1990 (UK) to the subsequent storage and use of the sperm.[170]

However, section 27(1)(h) and section 27(1)(i) of the MCA 2005 (UK) expressly prohibit a person who has been appointed under the legislation from consenting on behalf of an incapacitated person to matters which are covered by the HFEA 1990

[165] Ibid, para. 1.
[166] Ibid, para. 22.
[167] Ibid, para. 23.
[168] Ibid, para. 24.
[169] Ibid.
[170] Ibid, para. 27.

(UK) and HFEA 2008 (UK).[171] Indeed, section 16(3) of the MCA 2005 (UK) clearly provides that the powers of the Court of Protection under section 16 are subject to the other provisions within the Act.[172] Thus, the Court of Protection is not exempt from the 'excluded decisions' outlined in sections 27-29 of the legislation and granting this order was in direct violation of the statute.[173] Peart notes that this is a 'clear statutory prohibition' which could even oust the court from invoking their *parens patriae* jurisdiction in order to provide the necessary consent on behalf of the source.[174] Indeed, in the case of *L. v. Human Fertilisation and Embryology Authority*,[175] Charles J. stated that 'the court does not have common law powers, or an exercisable inherent jurisdiction, to enable it to supply a consent or modify a licence, in connection with storage and subsequent use of gametes'.[176]

The court in *Y. v. NHS Healthcare Trust*[177] was certainly entitled to deem the retrieval of sperm from the applicant's husband as a procedure which was in his 'best interests'. Aribisala notes that the MCA 2005 (UK) allows the court to make decisions that will benefit third parties, provided that they are also in the patient's best interests.[178] Indeed, as argued in Chapter Three, it has been suggested that the retrieval of gametes from a comatose person may be deemed to be in that person's best interests provided that they have contemplated posthumous conception while competent.[179] The court in this case maintained that the decision was highly fact dependent and there was unquestionably strong factual evidence of the patient's desire for his wife to use his gametes posthumously should the event arise. However, the court should have been prevented by virtue of section 27 of the MCA 2005 (UK) from granting the applicant's request to direct a suitable person to sign the relevant consent forms to the storage of the sperm required by Schedule 3 of

[171] Mental Capacity Act 2005 (UK), s 27(1)(h) and 27(1)(i).
[172] Ibid, s 16(3).
[173] Ibid, s 27.
[174] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17, at 745.
[175] *L. v. The Human Fertilisation and Embryology Authority* [2008] EWHC 2149 (Fam).
[176] Ibid, para. 144.
[177] *Y. v. A NHS Healthcare Trust,* above n 146.
[178] O. Aribisala, 'Best interests provisions in the UK Mental Capacity Act 2005' (2012) 36(12) *The Psychiatrist* 459, at 459-462.
[179] Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand', above n 17, at 734.

the HFEA 1990 (UK).[180] Maddox notes that there was seemingly no legislative basis for the court to make this order, and if there was any distinction between the consents ordered by the court and those prohibited under section 27 of the Mental Capacity Act 2005 (UK), this was not made clear.[181] Given the statutory prohibitions outlined in section 27, Cherkassky states that the 'best interests' approach of the court is not appropriate in the case of gamete retrieval from comatose patients.[182]

Furthermore, Cherkassky observes that although Paragraph 1(2) of Schedule 3 HFEA 1990 (UK) does allow a third party to provide effective consent to the storage and use of gametes on behalf of a person who is unable to sign the consent themselves, the wording of this provision seems to suggest that the source themselves must direct the third party to sign on their behalf. Furthermore, they must also be present for the signature.[183] She deems it highly unlikely that the deputy appointed by the court in *Y. v. A NHS Healthcare Trust*[184] would have been able to provide effective consent on behalf of 'Z' within the meaning of sub-paragraph 1(2) of Schedule 3 HFEA 1990 (UK), if that person was not 'directed' to do so by 'Z' himself.[185] Thus, not only is the order made in *Y. v. A NHS Healthcare Trust*[186] contrary to the expressed provisions of the MCA 2005 (UK),[187] it is in further violation of the expressed provisions in the HFEA 1990 (UK).[188]

What we can take from this case is similar to what has appeared in the Australian case law on this issue. The absence of consistent laws dealing with the issues of

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[180] Ibid, para. 1.
[181] N. Maddox, 'Consent and The Regulation of Posthumous Conception' (2019), available at < https://mural.maynoothuniversity.ie/10930/>, p. 7.
[182] Cherkassky, 'Is Interference with a Corpse for Procreative Purposes a Criminal Offence?', above n 74, at 1.
[183] L. Cherkassky, 'Y v A Healthcare Trust and the Mental Capacity Act 2005: Taking Gamete Retrieval to the Bank' (2019) 135 *Law Quarterly Review* 1, at 4: The sub paragraph states that 'A consent under this Schedule by a person who is unable to sign because of illness, injury or physical disability (a "person unable to sign"), and any notice under paragraph 4 by a person unable to sign varying or withdrawing a consent under this Schedule, is to be taken to comply with the requirement of sub-paragraph (1) as to signature if it is signed at the direction of the person unable to sign, in the presence of the person unable to sign and in the presence of at least one witness who attests the signature'.
[184] *Y. v. NHS Healthcare Trust,* above n 146.
[185] Cherkassky, 'Y v A Healthcare Trust and the Mental Capacity Act 2005: Taking Gamete Retrieval to the Bank', above n 183, at 4.
[186] *Y. v. NHS Healthcare Trust,* above n 146.
[187] Mental Capacity Act 2005 (UK), s 27(1)(h).
[188] HFEA 1990 (UK), Schedule 3, s 1(2).

gamete retrieval from dying patients and their subsequent use in posthumous conception has led to a 'mismatched' situation where gametes can be lawfully retrieved (because it is deemed to be in the patient's best interests), but cannot be lawfully stored or used in posthumous conception without the source's consent. Despite the ruling of the court in this case, the Court of Protection cannot appoint a deputy to provide consent to the storage of gametes on behalf of an unconscious patient, nor can the court provide this consent.[189] This demonstrates the importance of having clear and consistent laws in Ireland on the retrieval and use of gametes in posthumous conception.

6.1.4. Concluding Remarks on the Retrieval of Gametes from Deceased and Dying Patients

The preceding sections have identified and discussed specific issues that have arisen for courts when the particular State does not have designated laws on gamete retrieval from deceased and dying patients. These include, instances of regulatory disconnection, the misuse of the court's inherent jurisdiction and disregard for expressed statutory provisions.

The case law discussed demonstrates the importance of having posthumous conception laws in Ireland that deal with the gamete retrieval process from both deceased and dying patients. Having designated laws on the retrieval of gametes from deceased and dying patients will give physicians clarity on the validity of carrying out the procedure and will prevent the issue from having to be considered by the court.[190] Most importantly, having consistent laws on both the retrieval and use of the gametes in posthumous conception prevents a mismatch between the ability to harvest gametes from the dead and the inability to use them in posthumous conception.[191]

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[189] Mental Capacity Act 2005 (UK), s 27(1)(h); HFEA 1990 (UK), Schedule 3, s 1(2).
[190] Monahan, 'Legal and Ethical Considerations on the Posthumous Retrieval of Gametes', above n 2, at 185.
[191] Middleton and Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units', above n 65, at 246.

6.2. An Analysis of Case Law on the Possession and Use of Gametes in Posthumous Conception

This section identifies and discusses a specific issue that has arisen for courts when considering requests for the possession and use of gametes in posthumous conception, namely the characterisation of posthumously retrieved gametes as 'property' for the purposes of possession by the deceased's surviving partner.

The possession of gametes for use in posthumous conception becomes an issue for courts when the particular country's laws on posthumous conception require the deceased's consent to facilitate treatment and the necessary consent from the deceased is lacking.[192] This has led to several courts deeming the deceased's gametes as 'property', the rationale being that if the surviving partner has a property interest in the cells, they will be entitled to possess the gametes and transfer them to a region where they can be used in posthumous conception without the deceased's consent.[193] However, the characterisation of gametes which have been harvested from the body of a person after death as 'property', is inconsistent with the common law no-property rule and the limited exceptions to this.

My aim in this section is to assess, and ultimately critique the courts application of property law principles to gametes for the purposes of facilitating posthumous conception. To do this, I first provide an overview of the no-property rule. I then outline the limited exceptions to this principle and assess how the courts have applied these exceptions when determining applications for the possession of gametes for use in posthumous conception. The purpose of discussing the theory of property in the body and separated human tissue is to provide a basis in which the case law on posthumous conception can be critiqued.

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[192] Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?', above n 2, at 331.

[193] As noted earlier, property in a legal sense is generally regarded as a 'bundle of rights' which will confer the owner with various privileges and duties over the property including, rights of possession: Honoré, 'Ownership', above n 11; *Parpalaix v. CECOS*, above n 1; *Bazley v. Wesley Monash IVF Pty Ltd*, above n 1; *Roblin v. Public Trustee for the Australian Capital Territory*, above n 1; *R v. Human Fertilisation and Embryology Authority ex parte Blood*, above n 1; *Re Estate of the Late Mark Edwards*, above n 1; *Re H, AE (No. 2),* above n 1; *Re Cresswell,* above n 1; *Chapman v. South Eastern Sydney Local Health District,* above n 1.

6.2.1. The 'No-Property' Rule

The common law position is that there is no property in the human body. The human body is regarded as *nullius in bonis*; a thing which falls under the legal ownership of nobody.[194] This principle is referred to as the 'no-property' rule.[195] It's basis is described as being of 'dubious origins'[196] and can be traced back to the misinterpretation of an early seventeenth century case relating to graverobbing[197] and the legal commentary and case law which followed.[198] Although traditionally developed in the context of corpses, the no-property rule applies equally to both living and deceased human bodies.[199]

One of the earliest authorities which established the 'no-property' rule is *Haynes' case*.[200] Mr. Haynes broke into a graveyard and stole burial shrouds from the bodies of several corpses. During the course of theft proceedings against him, the court made comments directed towards the dead bodies. They stated that a corpse was akin 'to a lump of earth' and therefore lacked the relevant capacity to own property.[201] Hardcastle notes that the *ratio decidendi* of this case was that a corpse is incapable of owning property. However, the ruling was later misinterpreted and

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[194] M. Quigley, *Self-Ownership, Property Rights, and the Human Body: A Legal and Philosophical Analysis* (Cambridge: Cambridge University Press, 2018), p. 55; M. Quigley, 'Property in Human Biomaterials: Separating Persons and Things' (2012) 32 *Oxford Journal of Legal Studies* 659, at 660.

[195] R. Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Portland: Hart Publishing, 2007), p. 26; Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 55.

[196] M. Pawlowski, 'Property in Body Parts and Products of the Human Body' (2009) 30 *Liverpool Law Review* 35, at 37.

[197] *Haynes' Case* [1613] 12 Co. Rep. 113.

[198] H. Conway, *The Law and the Dead* (New York: Routledge, 2016), p. 2-3; E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes* (4th edn, London: Flesher, 1669); W. Blackstone, *Commentaries on the Laws of England in Four Books* Vol 1, Book 2 (Philadelphia: J.B. Lippincott Company, 1893), p. 429; *Exelby v. Handyside* [1749] 2 East P.C. 652; *Williams v. Williams* [1882] 20 ChD 659; *R v. Sharpe* [1857] Dears and Bell 160.

[199] Any interference with the body of a living person will be protected through other branches of law, such as tort or the criminal law. In addition, courts have also protected a living person's rights over their detached body parts by finding that medical practitioners owe their patients a fiduciary duty; J. Herring and P.L. Chau, 'My Body, Your Body, Our Bodies' (2007) 15 *Medical Law Review* 34, at 37; *Moore v. Regents of the University of California* [1990] 51 Cal. 3d 120; A. Ho, 'Taking Body Parts to the Cashier: Are the Courts too Slow to Register?' (2015) 40 *University of Western Australia Law Review* 387, at 390; Pawlowski, 'Property in Body Parts and Products of the Human Body', above n 196, at 39.

[200] *Haynes' Case*, above n 197.

[201] Ibid.

subsequently cited by several commentators as authority for the proposition that there can be 'no property' in a corpse.[202]

By refusing to recognise property rights in a corpse, Sperling states that it led common law courts to make automatic presumptions regarding property rights in dead bodies.[203] For instance, he notes that the principle equally applies to the deceased themselves, who will not have any property interest in their corpse or in any of its parts.[204] Consequently, the body of a deceased person will not form part of their estate when they die and they will be unable to direct the disposition of their corpse by will or otherwise.[205] Conway observes that burial instructions merely impart moral obligations on the deceased's personal representatives. They do not impose any legal obligation on them.[206] Moreover, bodies will not be liable to execution in cases of insolvency.[207] Quigley also claims that challenges followed for common law courts by refusing to recognise property rights in corpses. She notes that in cases relating to graverobbing, the courts were unable to convict the defendant of theft of the corpse.[208] Instead, Hardcastle observes that the common law had to develop other means of protecting cadavers, and courts were required to create new offences in order to provide a substitute for theft and cover the situation at hand.[209]

Despite these difficulties, Skegg notes that in a series of cases throughout the eighteenth and early nineteenth century, courts continually referred to the rule that there was 'no property in a corpse' and applied this principle when dealing with cases relating to burial and exhumation.[210] The author observes that courts rarely

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[202] Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control*, above n 195, p. 27; Pawlowski, 'Property in Body Parts and Products of the Human Body', above n 196, at 36.
[203] D. Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), p. 88.
[204] Ibid.
[205] *Williams v. Williams,* above n 198; H. Conway, 'Williams v Williams (1882): Succession Law Rules and the Fate of the Dead', in B. Sloan (ed.), *Landmark Cases in Succession Law* (Oxford: Hart Publishing, 2019), p. 249-264.
[206] H. Conway, 'Whose Funeral - Corpses and the Duty to Bury' (2003) 54 *Northern Ireland Legal Quarterly* 183, at 184.
[207] W.F. Kuzenski, 'Property in Dead Bodies' (1924) 9(1) *Marquette Law Review* 17, at 18.
[208] Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 59.
[209] Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control*, above n 195, p. 27; Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 59; *R v. Sharpe*, above n 198.
[210] P.D.G. Skegg, 'Medical Uses of Corpses and the No Property Rule' (1992) 23(4) *Medicine, Science and the Law* 311, at 312.

even cited authority for the rule. Rather, judges simply viewed it as well established at common law and not as a matter which needed citation.[211] Over time and through repetition, the 'no-property' rule has become firmly established at common law and it is generally accepted (subject to the exceptions detailed below) that bodies and their parts cannot be owned by anyone.[212]

6.2.2. Limited Exceptions to the No-Property Rule and their Application to Cases of Posthumous Conception

This section outlines the primary exceptions to the 'no property' rule that have been carved out by common law courts over time. These include rights of burial,[213] the presence of control over separated human tissue[214] and the work and skill exception.[215] In addition, I assess and critique how courts have applied these exceptions when considering applications for the possession of gametes for use in posthumous conception.

6.2.2.1. Rights of Burial

The first well established exception to the 'no property' rule is the right of personal representatives to have lawful possession over the deceased's body for the purposes of burial.[216] The right ordinarily falls to the executors of the deceased's estate and in cases of intestacy the duty will fall on the most senior available next of kin.[217] In *Dobson v. North Tyneside Health Authority,*[218] Gibson J. held that the right to have lawful possession of a corpse follows on from the legal duty to inter the body.

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[211] Ibid.

[212] Quigley, Self-Ownership, Property Rights, and the Human Body, above n 194, p. 59.

[213] Conway, *The Law and the Dead*, above n 198, p. 59.

[214] L. Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications' (2012) 20(2) *Medical Law Review* 227, at 227; *Hecht v. Superior Courts of Los Angeles County* [1993] 20 Cal. Rptr 2d 275; *Yearworth v. North Bristol NHS Trust* [2009] 3 W.L.R. 118.

[215] *Doodeward v. Spence* [1908] 6 C.L.R. 406.

[216] This right of possession also extends to cremated ashes: Conway, *Law and the Dead,* above n 198, p. 59; H. Conway, 'Dead, but not Buried: Bodies, Burial and Family Conflicts' (2003) 23(3) *Journal of Legal Studies* 423, at 425; H. Conway 'Ashes: What's the Legal Position (Part II)?' (SAIF Insight: Journal of the Society of Allied and Independent Funeral Directors, 2019), available at <https://saifinsight.co.uk/ashes-whats-the-legal-position-part-2/>.

[217] H. Conway, 'Frozen Corpses and Feuding Parents: *Re JS* (Disposal of Body)' (2018) 81(1) *Modern Law Review* 132, at 136.

[218] *Dobson and Others v. North Tyneside Health Authority and Another* [1996] EWCA Civ 1301.

The judge observed that where there is no legal duty on a person to dispose of the body, then there will be no lawful right of possession.[219]

The right to lawfully possess a corpse is a limited exception to the 'no-property' rule.[220] Public concerns for health and safety require that corpses are disposed of in a timely and effective manner.[221] Furthermore, it is argued that a respectful burial is consistent with human dignity which should be afforded to the deceased.[222] Personal representatives merely have a duty to decently dispose of the corpse. Their right of possession over the body is temporary and does not permit them to interfere with the body of the deceased.[223] When considering an application for the retrieval of sperm from a deceased man, Chesterman J. in the Queensland Supreme Court case of *Re Gray*[224] observed that:

> "The principle clearly established, that the deceased's personal representative or, where there is none, the parents or spouse, have a right to possession of the body only for the purposes of ensuring prompt and decent disposal has, I think, the corollary that there is a duty not to interfere with the body…"[225]

6.2.2.2. Control over Separated Human Tissue

The presence of control over separated human tissue is another recognised exception to the 'no property' rule. Skene notes that recently, common law courts have been willing to recognise limited property interests in excised human tissue,

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[219] Conway notes that when resolving burial conflicts, courts strictly adhere to the established legal hierarchy and will only grant possession of the deceased to the person legally obliged to bury the corpse: Conway, 'Whose Funeral - Corpses and the Duty to Bury', above n 206, at 187. See also, P.F. Nemeth, 'Legal Rights and Obligations to a Corpse' (1943) 19 *Notre Dame Law Review* 69, at 69.
[220] Conway, 'Whose Funeral - Corpses and the Duty to Bury', above n 206, at 187.
[221] *In Re Blagdon Cemetery* [2002] 3 WLR 603; See also, N. Maddox, 'Limited, Inclusive and Communitarian: In Defence of Recognising Property Rights in the Human Body' (2019) 70(3) *Northern Ireland Legal Quarterly* 289, at 303; Conway, 'Whose Funeral - Corpses and the Duty to Bury', above n 206, at 184-185.
[222] Conway, 'Dead, but not Buried: Bodies, Burial and Family Conflicts', above n 216, at 426; Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, above n 203, p. 95.
[223] W. Boulier, 'Sperm, Spleens and Other Valuables: The Need to Recognise Property Rights in Human Body Parts' (1995) 23(3) *Hofstra Law Review* 693, at 709; S. McKeering, 'The Rights to a Deceased's Body and Body Parts - In the Matter of Gray (2000) QSC 390 (12/10/2000)' (2001) 21 *University of Queensland Law Journal* 240, at 242; L. Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue' (2002) 22 *Legal Studies* 102, at 121.
[224] *In the matter of Gray*, above n 1.
[225] Ibid, para. 20.

including gametes.[226] This has been on the basis that one party has had a continued interest or an intention to control the use of the human tissue once it has been separated from the human body.[227] Indeed, this rationale has been applied in cases relating to the possession of sperm for use in posthumous conception.[228]

The starting point for this exception is the famous U.S. Supreme Court case of *Moore v. Regents of the University of California*.[229] This was an action brought by John Moore against the University when his bodily products were used in medical research without his consent.[230] Over the course of several years, Moore had his spleen removed, and other bodily tissue regularly extracted from him at the University's Medical Centre for the purposes of treating his cancer.[231] Moore's excised tissue was subsequently used by his doctors to develop a profitable cell-line and associated commercial products without his consent.[232]

Moore stated several causes of action against the University, most notably, an action in conversion.[233] Quigley notes that by claiming conversion. Moore argued that he continued to own the cells when they were removed from his body.[234] To prove conversion, Burke and Schmidt state that Moore had to demonstrate that the University had interfered with his personal property. He had to prove that he had

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[226] Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 227; *Hecht v. Superior Courts of Los Angeles County*, above n 214; *Yearworth v. North Bristol NHS Trust*, above n 214.
[227] Ibid; N. Maddox, 'Property, Control and Separated Human Biomaterials' (2016) 23 *Journal of Health Law* 1, at 9-13.
[228] *Bazley v. Wesley Monash IVF Pty Ltd*, above n 1; *Roblin v. Public Trustee for the Australian Capital Territory*, above n 1.
[229] *Moore v. Regents of the University of California*, above n 199: C.H. Harrison, 'Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue' (2002) 28 *American Journal of Legal Medicine* 77; Boulier, 'Sperm, Spleens and Other Valuables: The Need to Recognise Property Rights in Human Body Parts', above n 223, at 696; E. Appel Blue, 'Redefining Stewardship over Body Parts' (2007) 21 *Journal of Health Law* 75, at 79.
[230] *Moore v. Regents of the University of California*, above n 199, p. 125.
[231] Ibid, p. 125-126.
[232] Huyman notes that at the time of Moore's action against the University, the cell-line was estimated to have a potential value of over three billion dollars: S. Huynen, 'Biotechnology - A Challenge for Hippocrates' (1991) 6 *Auckland University Law Review* 534, at 534.
[233] In total, Moore stated thirteen causes of action against the University including, conversion, lack of informed consent, breach of fiduciary duty, fraud and deceit, unjust enrichment, quasi-contract, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent misrepresentation, interference with prospective advantageous economic relationship, slander of title, accounting and declaratory relief: Ibid, at 534; See also, J. Lavoie, 'Ownership of Human Tissue: Life after Moore v. Regents of the University of California' (1989) 75(7) *Virginia Law Review* 1363, at 1366.
[234] Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 69; *Moore v. Regents of the University of California,* above n 199, p. 134-135.

an ownership interest in the cells when they were removed from his body.[235] However, the court did not accept that Moore had any such interest.[236] Ultimately, the court accepted the arguments relating to the claims of lack of informed consent and breach of fiduciary duty. However, they rejected the attempted claim in conversion.[237]

Rao notes that the court's primary reason for denying Moore's conversion claim was because he did not intend to have any possession or control over the tissue following its separation from his body.[238] They noted that when tissue has been removed for the purposes of medical treatment or scientific research, the source of the excised tissue does not have, nor do they intend to have, control over the use of the tissue.[239] Mortinger observes that the court also relied heavily on the provisions of California's Health and Safety Code which limits the rights of patients over excised cells.[240] Section 7054(4) of the Code provides that anatomical parts and human tissue must be disposed of following the completion of the tissues or anatomical parts' use in scientific activities.[241] The court found that the statute 'drastically' limits a patient's control over their excised tissue and 'eliminates so many of the rights ordinarily attached to property'.[242] Ultimately, the court held that a patient does not have a property interest in excised tissue which has been removed for medical purposes. Commentators note that the court felt patients would be adequately protected through other means, such as lack of informed consent and breach of fiduciary duty.[243]

[235] M.J. Burke and V.M. Schmidt, 'Old Remedies in the Biotechnology Age: Moore v. Regents' (1992) 3 RISK *Issues in Health and Safety* 219, at 230.
[236] Ibid; *Moore v. Regents of the University of California,* above n 199, p. 136
[237] *Moore v. Regents of the University of California,* above n 199, p. 147.
[238] R. Rao, 'Genes and Spleens: Property, Contract or Privacy Rights in the Human Body?' (2007) 35 *Journal of Law, Medicine and Ethics* 371, at 371-382.
[239] *Moore v. Regents of the University of California,* above n 199, p 142.
[240] S.A. Mortinger, 'Spleen for Sale: Moore v. Regents of the University of California and the Right to Sell Parts of Your Body' (1990) 51 *Ohio State Law Journal* 499, at 506.
[241] California Code, Health and Safety Code, HSC, s 7054(4).
[242] *Moore v. Regents of the University of California,* above n 199, p. 141.
[243] Ibid, p. 142; L. Giuffrida, 'Moore v. Regents of the University of California: Doctor, Tell Me Moore' (1991) 23(1) *Pacific Law Journal* 267, at 268; J.A. Potts, 'Moore v. Regents of the University of California: Expanded Disclosure, Limited Property Rights' (1991-1992) 86 *Northwestern University Law Review* 453, at 457; Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 72.

Rao notes that *Moore*[244] does not stand for the proposition that human tissue can never be property, but rather, the court merely held that the separated human tissue was not the property of Moore in this case.[245] Indeed, the idea that the presence of control over excised tissue can give rise to property rights in the material has featured in a number of cases relating to the ownership of frozen gametes which have been deposited by the source for later use in assisted reproduction.[246] Skene observes that these cases are distinguished from *Moore*[247] on the basis that the source of cryogenically stored gametes often intends to, or subsequently does retain control over the possession and use of their gametes following their separation from the human body.[248]

The cases of *Hecht v. Superior Court of Los Angeles County*[249] and *Jonathon Yearworth and Others v. North Bristol NHS Trust*[250] are significant in this regard. In *Hecht*,[251] a Californian Probate Court considered whether sperm which had been cryogenically preserved and stored by a testator could be regarded as property for the purposes of succession. The deceased, William Kane had preserved his sperm with a Cryo-bank prior to taking his own life. He left expressed written instructions in the Cryo-bank storage forms, his testamentary will and in his suicide letter for his sperm to be bequeathed to his surviving partner Hecht, so that she could use the sperm to reproduce after his death.[252] Following a dispute between Hecht and Kane's children regarding the validity of the will, the executor of Kane's estate initiated proceedings with the Californian Probate Court to settle the distribution of his assets.[253] To determine whether the Probate Court had jurisdiction over the

[244] *Moore v. Regents of the University of California,* above n 199.
[245] Rao, 'Property, Privacy, and the Human Body', above n 238, at 374; Harmon and Laurie make a similar comment: S. Harmon and G. Laurie, 'Yearworth v. North Bristol NHS Trust: Property, Principles, Precedents and Paradigms' (2010) 69(3) *The Cambridge Law Journal* 476, at 482.
[246] Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 9; N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) 81 *Conveyancing and Property Lawyer* 405, at 406.
[247] *Moore v. Regents of the University of California*, above n 199.
[248] *Hecht v. Superior Court of Los Angeles County*, above n 214; *Yearworth v. North Bristol NHS Trust*, above n 214; Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 11; Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 239-240.
[249] *Hecht v. Superior Court of Los Angeles County*, above n 214.
[250] *Yearworth v. North Bristol NHS Trust,* above n 214.
[251] *Hecht v. Superior Court of Los Angeles County*, above n 214.
[252] Ibid, p. 840.
[253] Ibid, p. 841.

frozen sperm, they had to first consider whether the sperm could be treated as Kane's property which formed part of his personal estate.[254]

Steinbock notes that the appellate court distinguished the facts of this case from those in *Moore*[255] on the basis of the control that Kane retained in relation to his sperm once it was separated from his body.[256] Several commentators have made this observation stating that when tissue is removed from a person for medical or scientific purposes (as was done in the case of *Moore*[257]), the source of this tissue has no expectation of retaining any possession or control over it. However, when a person harvests their gametes and preserves them for later use, they will retain an interest in how the gametes are going to be used in the future.[258] Boulier observes that the sperm bank agreement was evidence of Kane's expectation to continue controlling how his sperm would be used when it was removed from his body.[259] The court held that the degree of control retained by Kane over his sperm was in the 'nature of ownership':

> '…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…'[260]

Burkdall states that the ruling in *Hecht*[261] was later hailed by bioethicists as a significant step in the law.[262] Jordan and Price add that the decision was momentous in light of the previous unwillingness of most courts to recognise property interests

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[254] Ibid, p. 844-845.
[255] *Moore v. Regents of the University of California*, above n 199.
[256] B. Steinbock, 'Sperm as Property' (1995) 6(2) *Stanford Law and Policy Review* 57, at 59.
[257] *Moore v. Regents of the University of California*, above n 199.
[258] J.L. Collins, 'Hecht v. Superior Court: Recognizing a Property Right in Reproductive Material' (1994) 33 *University of Louisville Journal of Family Law* 661, at 668; K. Obasogie and H. Theung, 'Moore is Less: Why the Development of Induced Pluripotent Stem Cells Might Lead Us to Rethink Differential Property Interests in Excised Human Cells' (2012) 16 *Stanford Technology Law Review* 51; Steinbock, 'Sperm as Property', above n 273, at 59; Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 227.
[259] Boulier, 'Sperm, Spleens and Other Valuables: The Need to Recognise Property Rights in Human Body Parts', above n 223, at 699.
[260] *Hecht v. Superior Court of Los Angeles County*, above n 214, p. 846.
[261] Ibid.
[262] L.M. Burkdall, 'A Dead Man's Tale: Regulating the Right to Bequeath Sperm in California,' (1995) 46 *Hastings Law Journal* 875, at 880.

in the human body or separated human tissue. The authors suggest that the judgment subsequently directed the common law towards recognising such interests.[263] Indeed, a similar rationale was applied by the English Court of Appeal in the case of *Jonathon Yearworth and Others v. North Bristol NHS Trust.*[264] Both Skene and Hawes note that the ruling of the court in *Yearworth*[265] was pivotal for the recognition of cryogenically stored gametes as property of the generating source.[266]

Yearworth[267] concerned an appeal taken by six men against the decision of a county court which denied them recovery in damages for the destruction of their sperm. Each of the men had been undergoing cancer treatment which would likely render them infertile. It was recommended that they store samples of their sperm with the hospital trust to preserve their chances of starting a family. However, when the liquid nitrogen levels in the storage tanks fell below the requisite level for preservation, the men's sperm samples thawed and their sperm's viability for future use perished irretrievably.[268] Nwabueze notes that arguments were originally put forward on behalf of the defendants claiming negligence, but were later amended claiming personal injury and damage to personal property.[269] It was submitted that the sperm was held by the hospital trust on a bailment for the man who had produced it. They argued that the hospital was liable for the damage caused to the sperm and for the psychiatric distress suffered by the men as a result of its destruction.[270]

When determining whether the sperm samples could be treated as property, the court focused on the degree of control which was retained by the men in relation to their sperm. Firstly, the court noted that the sperm had been produced and stored

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[263] C.M. Jordan and C.J. Price, 'First Moore, Then Hecht: Isn't it Time We Recognize a Property Interest in Tissues, Cells and Gametes?' (2002) 37(1) *Real Property, Probate and Trust Journal* 151, at 176.
[264] *Yearworth v. North Bristol NHS Trust,* above n 214.
[265] Ibid.
[266] Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 227; C. Hawes, 'Property Interests in Body Parts: Yearworth v North Bristol NHS Trust' (2010) 73(1) *The Modern Law Review* 130.
[267] Ibid.
[268] *Yearworth v. North Bristol NHS Trust,* above n 214, paras. 4-12.
[269] R.N. Nwabueze, 'Death of the No-Property Rule for Sperm Samples' (2010) 21(3) *Kings Law Journal* 561, at 562.
[270] Ibid, paras. 25-26.

by the men solely for the purpose of being used by them in the future.[271] Skene observes that similar to *Hecht*,[272] the sperm bank storage forms evidenced the men's intention to use the sperm at a later stage, with some of the men even authorising 'treating a named partner'.[273]

Secondly, Rostill notes that the court placed great emphasis on the rights retained by the men in relation to the storage, use and destruction of the sperm under the UK's HFEA 1990 (UK).[274] The court cited Tony Honoré's famous essay on ownership and deemed these particular entitlements to be 'key incidents of ownership'.[275] On Honoré's account of ownership, the concentration of certain 'interests' in a particular person will be indicative of that individual's title as the owner of property.[276] Indeed, Wall states that the UK's statutory scheme gave the men in *Yearworth*[277] both management and use entitlements in the sperm.[278] They were entitled to use the sperm themselves and they were also entitled to withdraw consent to the continued storage of the sperm, or to demand its destruction at any point. On this basis, the court was satisfied that the sperm could be regarded as the men's property.[279]

The *Yearworth*[280] courts finding of property in the sperm has been criticised by scholars claiming that the court did not adequately justify their finding.[281] Harmon and Laurie criticise the judgment on the basis that the court purely focuses on the men's right to control the sperm samples and does not discuss or apply Honoré's

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[271] Ibid, para. 45(f)(i)-(ii).
[272] *Hecht v. Superior Court of Los Angeles County*, above n 214.
[273] Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 228.
[274] L.D. Rostill, 'The Ownership That Wasn't Meant to Be: Yearworth and Property Rights in Human Tissue' (2014) 40 *Journal of Medical Ethics* 14, at 15; *Yearworth v. North Bristol NHS Trust*, above n 266, para. 45(f)(iii).
[275] Ibid.
[276] Honoré's incidents of ownership include rights of use, possession, management, income, capital, security, transmissibility, liability to execution, insolvency. Honoré, 'Ownership', above n 11, p. 371.
[277] *Yearworth v. North Bristol NHS Trust*, above n 214.
[278] J. Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31(4) *Oxford Journal of Legal Studies* 783, at at 787.
[279] Ibid, at 787-788; *Yearworth v. North Bristol NHS Trust*, above n 214, para. 45(f)(iii).
[280] *Yearworth v. North Bristol NHS Trust*, above n 214.
[281] Rostill, 'The Ownership that Wasn't Meant to Be: Yearworth and Property Rights in Human Tissue', above n 274, at 14-18; Harmon and Laurie, 'Yearworth v. North Bristol NHS Trust: Property, Principles, Precedents and Paradigms', above n 245; Wall, 'The Legal Status of Body Parts: A Framework', above n 278.

other standard incidents of ownership.[282] In the authors' view, having control over something does not necessarily equate to having property.[283] Furthermore, the authors note that the court does not engage with the vast amount of legal scholarship that has emerged on property in the body and are critical of the judgment on this basis.[284] However, as Maddox rightly observes, the relationship between the men and the sperm samples certainly contained many features characteristic of ownership.[285] The men had the right to use the sperm, manage the sperm and ultimately, by being able to demand destruction of the sperm Maddox notes that the men retained an aspect of the right to capital.[286]

Moreover, on Honoré's account, ownership is not contingent on the occupation of all eleven incidents. Inferences of ownership may be drawn in circumstances where a variation of the incidents are held.[287] Quigley states that none of Honoré's incidents are individually necessary nor sufficient for ownership. The incidents are only necessary to the extent that where they are not recognised, it could be said that the particular system of law does not recognise the liberal form of ownership. Quigley notes that the 'elements can be traded and rearranged to represent a variety of ownership interests which may exist.[288] Strictly speaking, it was not required for the men in *Yearworth*[289] to have all, or indeed, the bulk of Honoré's incidents for their interest in the sperm to be recognised.

Indeed, despite criticism, the ruling in *Yearworth*[290] has been significant in recognising stored gametes as property of the generating source. The decision has been cited in a series of cases relating to the possession of stored gametes for use in posthumous conception.[291] Commentators note that courts have been able to rely

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[282] Harmon and Laurie, 'Yearworth v. North Bristol NHS Trust: Property, Principles, Precedents and Paradigms', above n 245, at 484.
[283] Ibid, at 484-485.
[284] Ibid, at 485.
[285] Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 34.
[286] Ibid.
[287] Honoré, 'Ownership', above n 11, p. 370.
[288] M. Quigley, 'Property and The Body: Applying Honoré' (2007) 33 *Journal of Medical Ethics* 63, at 632.
[289] *Yearworth v. North Bristol NHS Trust*, above n 214.
[290] Ibid.
[291] *Bazley v. Wesley Monash IVF Pty Ltd*, above n 1; *Roblin v. Public Trustee for the Australian Capital Territory*, above n 1.

on both *Yearworth*[292] and *Hecht*[293] when granting a decedent's surviving partner possession over their deceased partner's deposited gametes,[294] the rationale being that the stored gametes were the property of the deceased while they were living and will now form part of their estate upon death.[295]

This was the case in *Bazley v. Wesley Monash Pty Ltd.*[296] Here, the Supreme Court of Queensland considered whether stored sperm could form part of a deceased's man's estate for the purpose of inheritance by his surviving spouse. The deceased had stored samples of his sperm with the defendant prior to undergoing chemotherapy treatment.[297] However, he did not leave behind instructions on what was to be done with the gametes in the event of his death, nor did he give any indication of his wishes in his will.[298] Without his expressed consent, his surviving spouse was unable to continue storing, or use his gametes in posthumous conception in the State of Queensland. Thus, she applied to the court seeking an order for possession of the sperm so that she could transfer the gametes to a facility in another jurisdiction.[299]

Jackson notes that the court considered the question of whether the applicant was entitled to transfer her late husband's sperm to turn on whether the sperm could be characterised as Mr. Bazley's personal property while he was alive, which would subsequently form part of his estate upon death.[300] They noted that if the sperm was deemed to be Mr. Bazley's property, then certain rights to the sperm (such as the right to transfer the sperm to an alternative facility) would vest in his personal representative upon death.[301] Skene observes that the court relied heavily on the

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[292] *Yearworth v. North Bristol NHS Trust*, above n 214.
[293] *Hecht v. Superior Court of Los Angeles County*, above n 214.
[294] K. Falconer, 'An Illogical Distinction Continued: Re Cresswell and Property Rights in Human Biological Material' (2019) 1 *University of New South Wales Law Journal Forum* 1, at 5; Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223; Maddox, 'Property, Control and Separated Human Biomaterials', above n 227.
[295] *Bazley v. Wesley Monash Pty Ltd,* above n 1; *Roblin v. Public Trustee for the Australian Capital Territory,* above n 1.
[296] *Bazley v. Wesley Monash Pty Ltd,* above n 1.
[297] Ibid, paras. 1-2.
[298] Ibid, para. 8.
[299] Ibid, para. 12.
[300] S. Jackson, 'Practice and Procedure: Uniform Civil Procedure Rules R150 : Orders Relating to 'Property' - Whether Sperm Extracted and Stored May be Characterised as 'Property' (2010) 30(6) *Proctor* 43, at 43-44.
[301] *Bazley v. Wesley Monash Pty Ltd,* above n 1, para. 12.

judgment of the English Court of Appeal in *Yearworth.*[302] when finding property in the stored sperm.[303] Falconer adds that the court also placed great emphasis on the fact that the tissue was a moveable object which was separate and distinct from the source when making their decision. The author claims that it was the gamete's 'physical presence' which also led the court to conclude that it was 'common sense' for the tissue to be treated as property.[304] However, White criticises this particular aspect of the judgment stating that merely having a physical presence is not a strong justification for a finding of property in stored sperm. Moreover, the tissue's physical presence does not necessarily distinguish gametes from other bodily tissue.[305]

Ultimately, the court held that the stored sperm was property of the deceased, stating that:

> 'The conclusion, both in law and in common sense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death'.[306]

This finding of property granted the deceased's widow permission to continue storing the sperm without the deceased's consent. She was further entitled to transfer the sperm to another jurisdiction where it could be used in posthumous conception without the deceased's consent.[307] Maddox notes that notions of property are attractive to judges in these types of cases, given that it can provide a remedy for the situation at hand.[308] Wall and Lidwell-Durnin make a similar comment. They claim that the property approach is used in these cases to circumvent legislative restrictions which require the deceased's consent for

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302 *Yearworth v. North Bristol NHS Trust*, above n 214.
303 Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 231-232.
304 K. Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material' (2019) 42(3) *University of New South Wales Law Journal Law Journal* 899, at 907.
305 V. White, 'Property Rights in Human Gametes in Australia' (2013) 20 (3) *Journal of Law and Medicine* 1, at 7.
306 *Bazley v. Wesley Monash Pty Ltd,* above n 1, para. 33.
307 Ibid. The same rationale was applied in a factually similar case by the Supreme Court of the Australian Capital Territory. In *Roblin v. Public Trustee for the Australian Capital Territory,* above n 1.
308 Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 41-42.

posthumous conception.[309] Falconer also suggests that courts are guided by the factual context of the dispute. They take into account the reason why they are being asked to make a finding of property and they will approach their decision in light of the particular case which has arisen. Indeed, given that these types of cases present to the court in highly emotive circumstances, it is understandable that the factual context might influence judicial thinking.[310]

However, irrespective of the court's motive for using property in these cases, the finding of property in gametes which have been stored and within the control of the progenitor during their lifetime is correct, and is consistent with the case law on this issue such as *Hecht*[311] and *Yearworth,*[312] where courts have previously held stored gametes to be personal property of the source.[313] However, if the gametes have been harvested from the body of a comatose or deceased person, it cannot be said that the individual had any control or indeed, had any intention to control the use of the harvested gametes while living. Thus, rulings in *Hecht*,[314] *Yearworth*,[315] *Bazley*[316] etc. cannot be used by courts as authority to justify granting the deceased's surviving partner possession of the gametes. Therefore, courts have had to look at other exceptions to the 'no-property' rule, such as the 'work and skill exception' to justify finding property in the gametes and granting the surviving partner possession for use in posthumous conception.[317]

6.2.2.3. The Application of Work and Skill

The work and skill exception derives from the 1908 Australian High Court ruling in *Doodeward v. Spence.*[318] Here, the High Court of Australia held that a dead body

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[309] J. Wall and J. Lidwell-Durnin, 'Control, over My Dead Body: Why Consent Is Significant (and Why Property Is Suspicious)' (2012) 12 *Otago Law Review* 757.
[310] Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304, at 910.
[311] *Hecht v. Superior Court of Los Angeles County*, above n 214.
[312] *Yearworth v. North Bristol NHS Trust*, above n 214.
[313] I also make this point in C. McGovern, 'Sperm by Succession: Is Stored Sperm Property for the Purposes of Testation' (2020) 2 *Conveyancing Property Law Journal* 28, at 28-35.
[314] *Hecht v. Superior Court of Los Angeles County*, above n 214.
[315] *Yearworth v. North Bristol NHS Trust*, above n 214.
[316] *Bazley v. Wesley Monash Pty Ltd,* above n 1.
[317] *Re Estate of the late Mark Edwards,* above n 1; *Re H, AE (No. 2),* above n 1; *Re H, AE (No. 3)* [2013] SASC 116; Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 234.
[318] *Doodeward v. Spence,* above n 215.

or part thereof, can become an object of property if it has been subjected to the application of work and skill.[319] In Quigley's view, the idea behind the judgment in *Doodeward*[320] is that when a human body or part of the human body has been subjected to the application of 'work or skill' then that body or body part can be transformed from something which cannot be property (a *res null*) to something which is capable of being owned (a *res*).[321]

Doodeward[322] concerned an action in detinue for the recovery of a two-headed stillborn foetus. The foetus was initially preserved and stored in a jar by a doctor as a medical curiosity.[323] However, the applicant came into possession of the jar after purchasing it at auction and began displaying it to the public. The applicant was charged with indecent exhibition of a corpse and following his prosecution, stated an action in detinue, claiming the jar as his property.[324] The High Court held that so long as it does not offend public decency, the possession of a human body, or a part of the human body, is not unlawful in cases where its preservation is valuable, interesting or informative.[325] Griffith C.J. stated:

> "…when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances".[326]

The work and skill exception has been described as the most significant recognition of property rights in separated human material from a deceased body.[327] Quigley

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[319] Ibid, p. 406.
[320] Ibid.
[321] Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 64.
[322] *Doodeward v. Spence,* above n 215.
[323] Ibid, p. 410-411.
[324] Ibid, p. 407.
[325] Ibid, p. 414.
[326] Brahams observes that although the court were cognisant of the common law no property rule, they acknowledged that there are other instances in law when objects which are '*nullius in rebus*' at first instance, can later become the subject of property. They made reference to the fact that wild animals which are hunted do not become property capable of ownership until after they have been appropriated by the hunter or finder: D. Brahams, 'Body Parts as Property' (1998) 66(2) *Medico-Legal Journal* 45, at 45; *Doodeward v. Spence*, above n 215, p. 411-412.
[327] Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control,* above n 195, p. 27; K. Greasley, 'Property Rights in the Human Body: Commodification and Objectification', in I. Goold, K. Greasley, J. Herring and L. Skene, Persons, Parts and Property: How Should We

notes that it was the first time in history that a court ruled in favour of treating a corpse as property for purposes other than facilitating burial.[328] The judgment has played an integral role in the development of treating human body parts as property and has been applied in a series of common law cases relating to the ownership of separated human tissue.[329]

Most notably, the exception has been used to find property in gametes which have been retrieved from the bodies of comatose and deceased patients for use in posthumous conception. However, given that the court in *Doodeward*[330] failed to provide a list of the possible means in which human body parts could become property,[331] the extent of work or skill which has to be carried out on the tissue to transform the material from a *res null* to a *res* is still unclear.[332] Indeed, Wall and Lidwell-Durnin doubt that the retrieval and storage of gametes will meet the threshold required by this exception.[333]

It appears that the degree of work or skill which is required under this exception must transform the body or body part in some way so as to differentiate it from a human corpse which warrants a decent burial. The purpose for which the work or skill is applied is also important. [334] For example, in *Dobson v. North Tyneside Heath Authority*,[335] the English Court of Appeal was not satisfied that the preservation of a deceased woman's brain by coroners was a sufficient degree of

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Regulate Human Tissue in the 21st Century (Oxford: Hart Publishing, 2014), p.79; White, 'Property Rights in Human Gametes in Australia', above n 305, at 2.

[328] Quigley, *Self-Ownership, Property Rights, and the Human Body*, above n 194, p. 61.

[329] M. Leiboff, 'The Good Old Rule, The Catspaw and a Two-Headed Baby', in M. Leiboff and D. Carpi (eds.), *Fables of the Law: Fairy Tales in a Legal Context* (Germany, 2016), p. 187; Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304, at 899; *Re Pecar* (Supreme Court of New South Wales, Bryson J, 27 November 1996); *R v. Kelly and Lindsay* [1999] 2 QB 621; *Re Leeburn* [2004] VSC 172; *Re Organ Retention Group Litigation* [2004] EWCA Civ 1001; *Re Estate of the Late Mark Edwards*, above n 1; *Re H, AE* (No 2), above n 1; *Re Cresswell,* above n 1.

[330] *Doodeward v. Spence,* above n 215.

[331] Ibid.

[332] Herring and Chau, 'My Body, Your Body, Our Bodies', above n 199, at 37; Quigley, *Self-Ownership, Property Rights, and the Human Body*, above n 194, p. 69; Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304, at 924; Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue', above n 223.

[333] Wall and Lidwell-Durnin,'Control, over My Dead Body: Why Consent Is Significant (and Why Property Is Suspicious)', above n 309, at 763.

[334] *Doodeward v. Spence*, above n 215, p. 416.

[335] *Dobson and Others v. North Tyneside Health Authority and Another*, above n 218.

work or skill, which would justify treating the brain as property.[336] Pattinson observes that the preservation of the brain in this case was carried out purely to determine the deceased's cause of death. The work and skill that was applied during the process of preservation was not done with the intention of retaining the organ for any other purpose.[337] This is in contrast to the preservation of the stillborn foetus in *Doodeward*[338] which had been initially performed by the doctor as a medical curiosity and then later retained for exhibition purposes.[339]

Skene and Quigley have both suggested that mere removal of tissue from the human body need not be enough to warrant its recognition as property. Both authors contrast the decision of the court in *Dobson*[340] with that of *R. v. Kelly and Lindsay*[341] and suggest that the work and skill which is applied to the human body party must give rise to a unique or 'novel item with a use of its own'.[342] In *Kelly*,[343] the UK Court of Appeal considered whether anatomical specimens which had been preserved and used for teaching purposes by the Royal College of Surgeons could be treated as property for the purposes of the Theft Act 1968 (UK). The defendants had been charged with theft of several anatomical specimens from the College and appealed their prosecution on the basis that there was 'no property' in the body. They argued that that the Royal College of Surgeons could not have been in lawful possession of the specimens, nor could they be convicted with theft of the parts.[344] The court observed that it would have involved several hours, if not weeks of skilled work in order to prepare the specimens in question for teaching purposes at the Royal College of Surgeons.[345] Thus, they held that the body parts could be regarded as property on the basis that the work and skill which had been applied to the specimens had given the body parts in this case a unique use and value.[346]

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[336] Ibid, p. 601.
[337] S. Pattinson, *Revisiting Landmark Cases in Medical Law* (London: Routledge, 2018), p. 169.
[338] *Doodeward v. Spence*, above n 215.
[339] Ibid, p. 410-411.
[340] *Dobson and Others v. North Tyneside Health Authority and Another,* above n 218.
[341] *R v. Kelly and Lindsay*, above n 329.
[342] The quote comes from Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue', above n 223, at 22; Quigley makes a similar point in Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 69.
[343] *R v. Kelly and Lindsay*, above n 329.
[344] Ibid, p. 625-626.
[345] Ibid, p. 624.
[346] Ibid, p. 632.

The work and skill exception has been cited in a series of cases relating to the retrieval of gametes for use in posthumous conception. The leading case being the Supreme Court of New South Wales case of *Jocelyn Edwards: Re the Estate of the Late Mark Edwards* (*Re Edwards*).[347] This matter considered a widow's application for the possession of sperm which had been retrieved from the body of the her late husband shortly after his death.[348] The applicant sought to use the sperm in assisted conception, however was prevented from doing so without the deceased's consent. She sought possession of the harvested sperm so that she could transfer the gametes elsewhere.[349]

White notes that similar to other posthumous conception cases, the court deemed the matter to be contingent on whether the sperm could be treated as property capable of possession by the deceased's surviving spouse.[350] However, as Maddox observes this matter was complicated by the fact that the sperm had been retrieved from the deceased after death. Thus, the facts were distinguishable from earlier cases given that the deceased's gametes had never been within his possession or control.[351] Despite this, the court was satisfied that the gametes could be regarded as property based on the work and skill exception. In the court's view, the retrieval and preservation of the deceased's sperm by the physicians in this case was a sufficient degree of work and skill that justified treating the sperm as property.[352]

This reasoning has been continuedly applied by courts across Australia when deciding cases relating to the possession of gametes which have been harvested after death.[353] In *Re Cresswell,*[354] *Chapman v. South Eastern Sydney Local Health District,*[355] and most recently in *the matter of an Application by Adams (a pseudonym)*,[356] judges have repeatedly held that the retrieval and preservation of

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[347] *Re Estate of the late Mark Edwards,* above n 1.
[348] Ibid, para. 2.
[349] Ibid, para. 24.
[350] Ibid, para. 78; White, 'Property Rights in Human Gametes in Australia', above n 305, at 6.
[351] Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 41.
[352] *Re Estate of the late Mark Edwards,* above n 1, para. 85.
[353] *Re H, AE*, above n 1; *Re Cresswell*, above n 1; *Chapman v. South Eastern Sydney Local Health District,* above n 1; *In the matter of an Application by Adams (a pseudonym)* [2020] NSWSC 1670.
[354] *Re Cresswell*, above n 1.
[355] *Chapman v. South Eastern Sydney Local Health District,* above n 1.
[356] *In the matter of an Application by Adams (a pseudonym)*, above n 353.

gametes by a physician is a sufficient degree of work or skill applied to the tissue which will give it the character of property.[357]

However, the applicability of the work and skill exception to these kind of cases is doubtful. Some courts and commentators have questioned whether the preservation of gametes for future use truly transforms the tissue to a sufficient degree so that it is consistent with the exception outlined in *Doodeward*.[358] In the Scottish case of *Holdich v. Lothian Health Board,*[359] the court questioned whether the act of freezing gametes can rightly be said to alter the inherent attributes of the gametes when the process merely preserves the tissue's viability.[360] Edelman makes a similar point and deems it 'difficult to see how the mere preservation of gametes in cases like Edwards…creates a new thing'.[361] Addressing this doubt, Brown J. in the Queensland Supreme Court case of *Re Cresswell*[362] stated that the work and skill which is used to harvest and preserve gametes is sufficient to treat the tissue as property, insofar as frozen gametes not only have a separate existence to the human body, but also have different attributes from when they remain part of the human body.[363]

Rothman J. in the New South Wales Supreme Court case of *Re Vernon*[364] has gone even further suggesting that once sperm has been retrieved from a man's body it will become property capable of ownership, even before the process of cryopreservation. This is purely on the basis that the sperm has an existence which is separate to the human body.[365] In the judge's view, the very act of removing sperm from the human body is a process which differentiates the tissue from a

[357] *Re Cresswell*, above n 1, para. 155; *Chapman v. South Eastern Sydney Local Health District,* above n 1, para. 77; *In the matter of an Application by Adams (a pseudonym),* above n 353, paras. 45 and 48.
[358] *Doodeward v. Spence,* above n 215; *Yearworth v. North Bristol NHS Trust*, above n 214; *Holdich v. Lothian Health Board* [2013] CSOH 197; *In the matter of Lee (deceased) and Long (applicant),* above n 79; J. Edelman, 'Property Rights to Our Bodies and Their Products' (2015) 39(2) *University of Western Australia Law Review* 47.
[359] *Holdich v. Lothian Health Board*, above n 358.
[360] Ibid, para. 33.
[361] Edelman, 'Property Rights to Our Bodies and Their Products', above n 358, at 66.
[362] *Re Cresswell*, above n 1.
[363] Ibid, para. 156; See also, Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304.
[364] *In the matter of an Application by Vernon,* above n 68.
[365] Ibid, para. 70.

corpse awaiting burial and is therefore consistent with the exception in *Doodeward*.[366] This view accords with Falconer's observation mentioned earlier. The author states that courts in these cases have placed great emphasis on the fact that the gametes are separate movable objects when determining whether there is property in the tissue.[367]

However, this reasoning is not necessarily consistent with the interpretation of *Doodeward*[368] that has been applied by courts in earlier cases such as *Dobson*[369] and *Kelly.*[370] Quigley has stated that the rationale behind the work and skill exception is that the techniques applied to the human body, or part thereof, change the tissue to such an extent that the work and skill gives rise to a novel item with a unique use or purpose.[371] In this regard, Maddox has suggested that it could be argued that the process of cryopreservation alters the inherent attributes of sperm in that it prevents the sperm from perishing.[372] However, prior to the process of cryopreservation, it cannot be said that the inherent attributes of the sperm have changed in any way. Wall and Lidwell-Durnin claim that the work and skill threshold does not seem to be met in cases were gametes are merely extracted and stored.[373]

Furthermore, the work and skill exception is problematic in these cases as it requires an additional legal process in order to transfer the property rights from the party who has applied the work or skill to the applicant who is seeking possession of the gametes.[374] Commentators observe that when property is found in human tissue on the basis of the application of work and skill, these property rights vest in

[366] Ibid; *Doodeward v. Spence*, above n 215.
[367] Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304, at 907.
[368] *Doodeward v. Spence*, above n 215.
[369] *Dobson and Others v. North Tyneside Health Authority and Another*, above n 218.
[370] *R v. Kelly and Lindsay*, above n 329.
[371] Quigley, *Self-Ownership, Property Rights, and the Human Body,* above n 194, p. 69.
[372] Maddox, 'Retrieval and Use of Sperm after Death: In the Matter of Lee (Deceased) and Long (Applicant) [2017] NZHC 3263', above n 130, at 105.
[373] Wall and Lidwell-Durnin,'Control, over My Dead Body: Why Consent Is Significant (and Why Property Is Suspicious)', above n 309, at 763.
[374] Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304, at 922; Wall and Lidwell-Durnin,'Control, over My Dead Body: Why Consent Is Significant (and Why Property Is Suspicious)', above n 309, at 763.

the party who has carried out such work.[375] In cases where gametes are retrieved after death, this is not going to be the surviving partner, but rather the doctors who carry out the retrieval and preservation. Thus, the court in *Edwards,*[376] had to engage in an alternative legal process to grant the surviving partner possession of the gametes. To do this, the court found that the applicant was entitled to possession of the sperm on the basis that the doctors who preserved the sperm were acting as agents on her behalf:

> "…the doctors who removed the sperm and the doctor and technicians who then preserved and stored it did not do so for their own purposes but performed these functions on behalf of Ms Edwards. In effect, they were acting as her agents and so did not acquire any proprietary rights for their own sake".[377]

Falconer criticises this approach. She claims that when courts invoke the work and skill exception in these cases, they undermine the very basis in which the property rights were established:

> 'When common law courts…purport to apply the Doodeward exception, they almost always do so in conjunction with an additional legal process that thwarts this result. That is to say, the party applying the work or skill that is the activating factor of the Doodeward exception is stripped of the property rights Doodeward would vest in them by the imposition by the court of, for example, a trust or bailment relationship'.[378]

The validity of the work and skill exception has now been questioned by courts in several jurisdictions. The exception was criticised as illogical by the English Court of Appeal in *Yearworth*[379] and the court refused to expand the common law on this basis and preferred to find property in the sperm on the basis of control.[380] Similarly, the exception was branded 'quirky' by the Australian court in *Bazley*[381]

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[375] E.J. Smith, 'Property Rights, Gametes, and Individual Autonomy How Can It Work for New Zealand?' (LLB Thesis, University of Otago, 2017), p. 7; Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 236; L. Skene, 'Proprietary Rights in Human Bodily Material: Recent Developments" (2016) *University of Otago Law Festschrifts 24 Law, Ethics, and Medicine: Essays in Honour of Peter Skegg* 52.
[376] *Re Estate of the late Mark Edwards,* above n 1.
[377] Ibid, para. 88.
[378] Falconer, 'Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material', above n 304, at 922.
[379] *Yearworth v. North Bristol NHS Trust*, above n 214, para. 45(d).
[380] Ibid.
[381] *Bazley v. Wesley Monash Pty Ltd,* above n 1, para. 31.

and White J. cited commentators who applauded the court in *Yearworth*[382] for refusing to apply the historic work and skill exception.[383] Furthermore, in *Re Lee (Long) deceased*,[384] the High Court of New Zealand refused to apply the work and skill exception entirely and held that *Doodeward*[385] did not represent the common law in New Zealand.[386]

Commentators observe that the Australian court's reluctance to reject the work and skill exception in cases like *Edwards*,[387] *Re H, AE*[388] etc. is arguably based on the fact that an Australian Supreme Court is bound by the Australian High Court ruling in *Doodeward*[389] and there has been no subsequent Australian High Court ruling to consider the matter.[390] However, I contend that the true incentive behind the court's application of the work and skill exception in these cases is result favoured, and aimed towards granting the surviving partners' possession of the gametes. Indeed, without applying the work and skill exception, the courts in these cases would have no other means of granting the surviving partners possession of the gametes.[391]

If the work and skill exception was sufficient to find property in cryopreserved gametes, then there would be no distinction made between gametes which have been stored by the deceased during their lifetime and gametes which have been harvested after death. If the exception was satisfactory, it would be used to find property in cryopreserved gametes that are stored by the deceased during their life time. However, this is not the case. Instead, courts use control as a means of establishing property in the tissue, because this is a sufficient basis in which to

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[382] *Yearworth v. North Bristol NHS Trust*, above n 214.
[383] *Bazley v. Wesley Monash Pty Ltd,* above n 1, para. 31.
[384] *In the matter of Lee (deceased) and Long (applicant),* above n 79.
[385] *Doodeward v. Spence*, above n 215.
[386] This was primarily on the basis that the Supreme Court of New Zealand had previously rejected the work and skill exception in *Takamore v. Clarke*. However, the judge was also of the view that the ruling of the court in Doodeward potentially breached New Zealand's Crimes Act 1961 (NZ *In the matter of Lee (deceased) and Long (applicant),* above n 79, para. 82.
[387] *Re Estate of the late Mark Edwards,* above n 1.
[388] *Re H, AE*, above n 1.
[389] *Doodeward v. Spence*, above n 215.
[390] This fact was also referenced by the court in *Re Estate of the late Mark Edwards,* above n 1; Skene, 'Proprietary Interests in Human Biological Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications', above n 223, at 236; Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 42.
[391] Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia', above n 2, at 79; Maddox, 'Property, Control and Separated Human Biomaterials', above n 227, at 42.

establish property rights.[392] It appears that a court will only invoke the work and skill exception where they have no alternative basis to grant the order.[393] I contend that the exception is only being used by courts as a means of necessity. This is unfounded when the justification for finding property in the tissue is not sufficient.

6.2.3. Concluding Remarks on the Possession and Use of Gametes in Posthumous Conception

The preceding sections have critiqued the use of the work and skill exception in posthumous conception cases to characterise posthumously retrieved gametes as 'property' for the purposes of possession by the deceased's surviving partner. The case law demonstrates the need for Ireland to have consistent laws on both the retrieval and use of gametes in posthumous conception. It should not be the case that gametes can be retrieved after death if they cannot be used in posthumous conception. When this happens, it has resulted in courts invoking property principles to grant the surviving partner possession of the gametes so that they can transfer and use the gametes in posthumous conception elsewhere. This is the case even when the justification for finding property is not sufficient.[394] In my view, consistent laws on both the retrieval and use of gametes in posthumous conception would prevent the courts from having to apply to the work and skill exception simply to grant the surviving partner possession of the gametes for use in posthumous conception.

6.3. Concluding Remarks on the Case Law on Posthumous Conception

This chapter has provided an analysis of the prominent case law on posthumous conception. My aim was to identify the primary issues that have presented for courts when dealing with requests for posthumous conception. These included instances of regulatory disconnection, the misuse of the court's inherent

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[392] *Hecht v. Superior Court of Los Angeles County*, above n 214; *Yearworth v. North Bristol NHS Trust*, above n 214; *Bazley v. Wesley Monash Pty Ltd,* above n 1; *Roblin v. Public Trustee for the Australian Capital Territory,* above n 1.

[393] *Re Estate of the late Mark Edwards,* above n 1; *Re H, AE*, above n 1; *Re Cresswell*, above n 1; *Chapman v. South Eastern Sydney Local Health District,* above n 1; *In the matter of an Application by Adams (a pseudonym),* above n 353.

[394] *Re Estate of the late Mark Edwards,* above n 1; *Re H, AE*, above n 1; *Re Cresswell*, above n 1; *Chapman v. South Eastern Sydney Local Health District,* above n 1; *In the matter of an Application by Adams (a pseudonym),* above n 353.

jurisdiction, the disregard for express statutory provisions and the misapplication of property principles to the retrieval of gametes after death. Furthermore, I determined the lessons that Ireland can learn from these cases to effectively regulate posthumous conception.

The case law discussed demonstrates the importance of having posthumous conception laws in Ireland that deal specifically with the gamete retrieval process from both deceased and dying patients. Furthermore, the case law demonstrates that laws on the retrieval of gametes need to align with ancillary laws that regulate the storage and use of the gametes in posthumous conception. Indeed, the case law exposes how the absence of consistent laws on both the retrieval and use of gametes in posthumous conception can lead to legislative gaps and/or difficulties in interpreting the applicability of existing legislation.

I argued that having designated laws on the retrieval of gametes from deceased and dying patients will give physicians clarity on the validity of carrying out the procedure and will prevent the issue from having to be considered by the court.[395] In addition, I argued that consistent laws on the retrieval and use of gametes in posthumous conception are necessary to avoid a mismatched situation where gametes can be lawfully retrieved, but cannot lawfully be used in posthumous conception.[396] Consistent laws governing both the retrieval and use of gametes in posthumous conception will prevent instances of regulatory disconnection and moreover, prevent courts from having to use property principles to grant surviving partners possession of the deceased's gamete.

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[395] Monahan, 'Legal and Ethical Considerations on the Posthumous Retrieval of Gametes', above n 2, at 185.
[396] Middleton and Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units', above n 65, at 246.

Chapter Seven

Conclusions and Recommendations for Reform

7. Introduction

The regulation of posthumous conception in Ireland is at a crossroads. Proposals for regulating the area have been outlined by the Irish Government in the AHR Bill 2017.[1] However, at this time, the practice remains unregulated, and there has been no indication from the Irish Government on when the Bill will progress through the legislative process.[2] This presented an opportunity to reconsider the current proposals for regulating posthumous conception in Ireland and provided a basis for the research questions that have been addressed by this thesis.

This thesis considered three primary research questions, including:

1. Should posthumous conception be regulated in Ireland?

2. If so, what model of consent should be used to regulate posthumous conception in Ireland?

3. What lessons can we learn about regulating posthumous conception from the current state of legislation, guidelines and case law that has emerged on posthumous conception in foreign jurisdictions?

This concluding chapter draws on the findings outlined in each of the preceding chapters and directly answers each of the research questions posed by this thesis. In doing so, I offer recommendations for how the AHR Bill 2017 can be reformed to ensure that Ireland effectively respond to the challenge of regulating posthumous conception.

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[1] The AHR Bill 2017, Part 4.

[2] S. Mills and A. Mulligan, *Medical Law in Ireland* (3rd edn, London: Bloomsbury, 2017), p. 420; K. O'Sullivan, 'Ireland Needs to Regulate for Posthumous Conception' (The Irish Times, 09 March 2021), available at <https://www.irishtimes.com/opinion/ireland-needs-to-regulate-for-posthumous-conception-1.4504616>.

7.1. Should Posthumous Conception be Regulated in Ireland?

This thesis adopted a liberal approach to determine whether posthumous conception should be regulated in Ireland. This was based on liberalism being the dominant method used in Western society for determining whether an action should be permitted, and the fact that Ireland has steadily become more progressive in terms of regulating moral issues such as reproduction.[3] In line with the liberal position, Chapter Two argued that Ireland should only restrict access to posthumous conception if it results in sufficient harm to others. I argued in Chapter Three that the potential harms caused by posthumous conception are not sufficient to restrict the practice in Ireland based on the harm principle. Furthermore, in Chapter Five, I contended that the religious, ethical and political reasons advanced for banning posthumous conception in countries that do ban the practice are not compelling reasons for restricting access to posthumous conception in Ireland. Ultimately, I contend that posthumous conception should be regulated in Ireland, and that the provisions outlined in the AHR Bill 2017 which propose to permit posthumous conception by law in Ireland should remain.[4]

7.2. What Model of Consent Should be Used to Regulate Posthumous Conception in Ireland?

I contend that a degree of consent is necessary when regulating posthumous conception in Ireland. As outlined in Chapter Four, consent is used by the law to protect autonomy.[5] I submit that consent is necessary when regulating posthumous conception in Ireland to ensure that the autonomy of the living is protected. However, I contend that the proposals to regulate posthumous conception in Ireland by expressed consent are overly restrictive. Instead, I submit that a presumed consent policy is the most effective way of regulating posthumous conception.

Regulating posthumous conception by presumed consent is consistent with my view outlined in Chapters Three and Four that the dead do not have interests or

[3] See discussion in Introductory Chapter, Section 3.
[4] AHR Bill 2017, Part 4, Head 24 and 25.
[5] T.L. Beauchamp and J. Childress, *Principles of Biomedical Ethics* (7th ed, New York: Oxford University Press, 2013), p. 101.

autonomy which can be harmed after death.[6] However, by respecting the previously expressed wishes of the deceased, a presumed consent policy recognises that presently living people have interests in what happens to them after they have died.[7] A presumed consent policy pays heed to the interests of still-living people by providing them with the opportunity to opt-out of posthumous conception should they wish.[8]

Admittedly, the autonomy of living people in what happens to them after death could be adequately protected by adopting a more restrictive consent policy such as expressed consent (which is currently proposed by the AHR Bill 2017),[9] or indeed, a less onerous inferred consent policy. However, I do not deem the more restrictive standards of expressed and inferred consent to be appropriate when regulating posthumous conception. In Chapters Four and Five, I outlined several practical difficulties with both expressed and inferred consent models.[10] Furthermore, as I have argued throughout this thesis, I take the position that the dead do not have autonomy which can be violated.[11] Thus, I do not accept that expressed consent is necessary to proceed with posthumous conception. Ultimately, it is my contention that the proposals to regulate posthumous conception by expressed consent in Ireland should be amended to regulate posthumous conception by presumed consent.

7.3. What Lessons can we Learn about Regulating Posthumous Conception from the Current State of Legislation, Guidelines and Case Law that has Emerged on Posthumous Conception in Foreign Jurisdictions?

Chapters Five and Six addressed the final research question of this thesis. I outlined the different approaches States have taken when regulating posthumous conception and reviewed the prominent case law which has arisen on this issue. In doing so, I

[6] J.C. Callahan, 'On Harming the Dead' (1987) 97(2) *Ethics* 341.
[7] H. Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 *Journal of Law and Health* 68, at 71.
[8] Ibid.
[9] AHR Bill 2017, Part 4, Head 24 and 25.
[10] See discussion in Chapter Four, Sections 4.4.1-4.4.2.
[11] J. Harris, 'Law and the Regulation of Retained Organs: The Ethical Issues' (2002) 22(2) *Legal Studies* 527, at 531.

determined several lessons that Ireland can learn about regulating posthumous conception effectively.

7.3.1. The Retrieval of Gametes of Deceased and Dying Patients

The primary lesson we can take from the case law on this issue is that laws regulating posthumous conception must address the retrieval of gametes at first instance. In Chapter Six, I identified several issues that have arisen for courts when States do not have laws on gamete retrieval from deceased and dying patients, including instances of regulatory disconnection, the misuse of the court's inherent jurisdiction, disregard for expressed statutory provisions and the misapplication of property principles to gametes retrieved after death.[12]

Head 25 of Part 4 of the General Scheme already provides for the posthumous retrieval of gametes.[13] The Irish Bill is to be commended for addressing this matter. Provisions to this effect will not only prevent similar scenarios from arising in the Irish courts, but will also provide treating physicians with clarity on the permissibility of harvesting gametes from deceased patients.[14] However, it is noteworthy that although addressing the retrieval of gametes after death, the AHR Bill 2017 does not make any reference to the retrieval of gametes from a comatose or dying patient who lacks the capacity to consent. As discussed in Chapters One and Six, the retrieval of gametes from comatose patients is not only a feasible option for posthumous conception, but has also become an increasingly requested procedure at medical facilities.[15]

In Chapter Six, I highlighted that that the absence of specific laws on gamete retrieval from dying patients has led to the inconsistent application of the court's inherent jurisdiction.[16] In addition, I argued that the lack of specific legislation on gamete retrieval from dying patients has led courts in the UK to overlook direct provisions of their mental capacity and ART legislation in order to facilitate

[12] See discussion in Chapter Six, Section 6.1-6.2.
[13] AHR Bill 2017, Part 4, Head 25.
[14] P. Monahan, 'Legal and Ethical Considerations on the Posthumous Retrieval of Gametes' (2020) 14 *St Louis University Journal of Health Law and Policy* 183, at 185.
[15] C.M. Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512, at 512.
[16] See Discussion in Chapter 6, Section 6.1.2

requests for gamete retrieval from unconscious patients.[17] Most significantly, I argued that when laws on posthumous conception do not address the retrieval of gametes from dying patients, it can often lead to a mismatched situation whereby gametes can potentially be harvested from comatose patients, but cannot be used in posthumous conception. My analysis in Chapter Six demonstrates the need for Ireland to have designated laws which address the retrieval of gametes from dying patients. I contend that having designated laws on the retrieval of gametes from *both* deceased and dying patients will give physicians in Ireland clarity on the validity of carrying out the procedure and will thus prevent the issue from having to be considered by the court at first instance. Consistent laws on the retrieval and use of gametes from deceased and dying patients will also act to ensure that gametes are not retrieved from comatose patients in cases where the surviving partner will be unable to use the gametes in posthumous conception.

7.3.2. Limitations on who can Access Posthumous Conception

Section 1(b) of Head 24 of the AHR Bill 2017 provides that posthumous conception should only be facilitated when the request for treatment is made by the deceased's surviving partner 'who will carry the pregnancy'.[18] As noted in Chapter One, the wording of Section 1(b) of Head 24 is unsatisfactory, and has been criticised by several commentators given that it precludes male surviving partners from accessing posthumous conception.[19] Not only is the provision discriminatory against male surviving partners, but it is further unfounded given that the use of donor gametes in posthumous conception[20] and altruistic surrogacy are both already provided for within the General Scheme.[21] Thankfully, this issue has been highlighted by the Joint Oireachtas Committee in their pre-legislative scrutiny and the Committee have recommended that the wording of Section 1(b) be reconsidered to include male surviving partners before the eventual act of

[17] See Discussion in Chapter 6, Section 6.1.3.
[18] AHR Bill 2017, Part 4, Head 24, s 1(b).
[19] Written submissions from stakeholders on the AHR Bill 2017 can be accessed at: <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.
[20] AHR Bill 2017, Part 4, Head 24, s 2.
[21] Ibid, Part 6, Head 36.

legislation is passed.[22] However, in my view, the wording of the Irish provision should be amended to permit the deceased's most senior available next of kin to use the gametes or embryos in posthumous conception.

My position in this regard certainly strays from the approach taken by other jurisdictions when regulating posthumous conception. As discussed in Chapter Five, laws that limit the availability of posthumous conception to the deceased's surviving partner are not uncommon. This is the position in Israel, and is also recommended by guidelines that have been issued across the United States and Australia.[23] However, in Chapter Five, I put forward several reasons why posthumous conception should be made available to surviving kin.

In my view, the extended surviving family can have strong interests in posthumous conception. This is evidenced not only by the increase in court applications for posthumous conception by extended surviving kin, but also by the judges willingness to grant these types of applications.[24] When the availability of posthumous conception is limited to the deceased's surviving partner (whether male or female), this prevents the extended family members of a deceased person who dies without a surviving partner from using the technology. Thus, even if Section 1(b) is amended to include male surviving partners, it will still fail to account for the range of interests that extended family members can have in posthumous conception should the deceased die without a surviving partner.

Furthermore, as I have argued throughout this thesis, access to posthumous conception should only be limited if there is sufficient harm to others. I have argued that the harm to others is not sufficient to limit posthumous conception. Indeed, this is the case if the request comes from the surviving partner, or if the request comes from the extended family if the deceased dies without a surviving partner.

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[22] Joint Committee on Health, *Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill* (July 2019), p. 26.

[23] Y. Hashiloni-Dolev and S. Schicktanz, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives' (2017) 4 *Reproductive Biomedicine Society Online* 21, at 25; Weil Cornell Medicine, 'Guidelines on PMSR', available at <https://urology.weillcornell.org/Postmortem-Sperm-Retrieval>; NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017), para. 8.22.1.

[24] The interests of surviving family members in posthumous conception are discussed fully in Chapter Three.

In the absence of clear harm, a case can be made for the technology to be made available to the surviving extended family in these circumstances.

My position on this issue could potentially be challenged on the basis that facilitating posthumous conception for the extended surviving family would require an external actor or third party. Without a surviving partner, the surviving family would likely require the use of donor gametes and/or a surrogate to host the pregnancy. However, as mentioned above, the AHR Bill already provides for the use of donor gametes in posthumous conception[25] and permits altruistic surrogacy.[26] Thus, extending Section 1(b) of Head 24 to grant the deceased's most senior available next of kin access to posthumous conception will not conflict with any other provision within the AHR Bill 2017.

Of course, it is necessary to prevent family litigation and to ensure that there is certainty regarding who can access posthumous conception treatment. I contend that the availability of posthumous conception must be clearly defined and solely limited to one party. I propose that the deceased's most senior available next of kin should be the one to have the ultimate power of veto. I acknowledge that there is no statutory definition of the term 'next of kin' in Irish law and its usefulness as a concept is certainly contested in the medical treatment context.[27] However, for the purposes of facilitating posthumous conception, I propose that the deceased's 'most senior available next of kin' should be determined in line with the hierarchy of kin established in Irish succession law for determining the deceased's successors in cases of intestacy. Accordingly, the most senior available next of kin would be as follows;

1. the deceased's surviving spouse, civil partner, or qualified cohabitant,
2. the deceased's surviving children,
3. the deceased's surviving parents,

[25] AHR Bill 2017, Part 4, Head 24, s 2.
[26] Ibid, Part 6, Head 36.
[27] E.J. and M.A. Cornock, 'The Legal Status of the Term 'Next of Kin' (2008) 22(44) *Nursing Standard* 45.

4. the deceased's surviving siblings.[28]

7.3.3. Counselling and Mandatory Waiting Period

Head 24 of the AHR Bill 2017 provides that surviving partners receive professional counselling on posthumous conception prior to treatment being facilitated.[29] A waiting period of at least one year following the deceased's death must also have passed before treatment can be provided to the surviving partner.[30]

As discussed in Chapter Five, many States and ethical bodies recommend that surviving partners withstand a standard period of mourning before they are permitted to use the deceased's gametes in posthumous conception.[31] In general, the recommended waiting period ranges from six months to one year. Of course, as noted throughout this thesis, the standard waiting period does not act to ensure that the requesting party has finished grieving before proceeding with posthumous conception. The process and experience of mourning is highly subjective and will manifest in different ways depending on the individual. Furthermore, grief is not timebound and does not adhere to any sort of linear process. [32] Indeed, it is not my view that the requesting party can be said to have overcome their grief by any particular timeframe. However, this period of reflection acts to protect the requesting party. It ensures that the requesting party has been given an adequate opportunity to take time following the death of the deceased, and that their decision to proceed with posthumous conception is not impulsive or clouded by intense grief for their loved one. In this way, a mandatory waiting period serves to reduce any potential harm which may be caused to the requesting party by posthumous conception.

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[28] The Succession Act 1965 (IRE), s 67-69: My choice to determine the most senior available next of kin in line with Irish succession law is because this is already an established legal hierarchy in Irish law.
[29] Ibid, Part 4, Head 24, s 1(c).
[30] Ibid, Part 4, Head 24, s 1(d).
[31] Waiting periods are recommended in Belgium, Australia and in the United States.
[32] T.A. Rando, *Grief, Dying, and Death: Clinical Interventions for Caregivers* (Michigan: Research Press Company, 1984), p. 115; H. Conway and J. Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34(3) *The University of New South Wales Law Journal* 860, at 865; E. Kübler-Ross and D. Kessler, *On Grief and Grieving: Finding the Meaning of Grief Through the Five Stages of Loss* (New York: Simon and Schuster, 2005), p. 230.

Mandatory counselling is also a common measure adopted by States when regulating posthumous conception.[33] Again, I contend that this added provision acts to protect the interests of the requesting party and will reduce any potential harm which may be caused by posthumous conception to them. By including such measures when regulating posthumous conception, States are using regulation as a means of minimising the potential harms caused to the stakeholders impacted by the technology. This is the primary lesson that we can learn about regulating posthumous conception from the current state of legislation and guidelines that have emerged on this issue in foreign jurisdictions. Thus, I contend that the Irish proposals in this respect should remain in place.

7.3.4. Legal Parentage and Inheritance Provisions

Head 27 of the AHR Bill 2017 provides for the deceased to be treated as the parent of the posthumously born child if they have consented to this, and provided that the child in born within three years of the deceased's death.[34] Provisions regarding the legal parentage and inheritance rights of the posthumously born children are important. Such provisions seek to symbolically acknowledge the deceased as the child's legal parent and they serve to reduce any harm to the resulting child by providing them with certainty regarding their identity and lineage.[35]

However, in its current form, the wording of Head 27 is unsatisfactory. It appears from the wording of this provision that posthumous conception treatment is permitted to take place after thirty six months, but that in such cases the deceased cannot be registered as the parent of the child.[36] This would be unfavourable given that there are several reasons why the deceased should be regarded as the parent of a posthumously born child. Furthermore, thirty-six months is too short of a time period, particularly if the requesting party is required to withstand a waiting period

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[33] Professional counselling for surviving partners is recommended by the European Society of Reproductive Medicine, the American Society of Reproductive Medicine and the Cornell Guidelines. It is also the position in the United Kingdom, Belgium, Australian State of Victoria and is recommended by both the Australian and New Zealand national guidelines on posthumous conception.

[34] AHR Bill, Part 4, Head 27, s 1-2.

[35] J. France, 'Estates on Ice: The Case for Paternity and Succession Rights of Posthumously Conceived Children' (Bachelor of Laws Thesis, University of Otago 2018), p. 24.

[36] AHR Bill 2017, Part 4, Head 27, s 3.

of one year prior to treatment being provided.[37] As it stands, this provision does not afford a lot of time for the requesting party to withstand a one year waiting period, successfully conceive a child through assisted conception, and gestate in order for the deceased to be regarded as the child's legal parent.

It is likely that the Irish Government's reason for adopting this provision is to ensure that the deceased's estate is distributed efficiently, and that such administration is not burdened by the late birth of a posthumously conceived child.[38] However, this result can also be achieved by registering the deceased as the parent of the child, but precluding the child from benefiting from the deceased estate entirely. As noted in Chapters Three and Five, legislation to this effect can be seen in the UK's Deceased Fathers Bill 2008 (UK).[39] Akin to the legislation in the United Kingdom, measures pertaining to legal parentage in the AHR Bill should simultaneously extinguish any right of the posthumously born child to inherit from the deceased's estate.[40] This is to ensure that the State's interest in the efficient administration of estates is not harmed in any way by recognising the deceased as the child's legal parent.

Moreover, in my view, disinheritance will not prejudicially harm the resulting child. As put forward in Chapter Three, under Irish succession law, children have no broad legal right to inherit from their parents, outside of intestacy cases.[41] Furthermore, it is highly likely that the alternative beneficiaries of the deceased's estate will be the deceased's surviving partner and/or the deceased's extended family. Indeed, these are the very people who are going to be the ones who ultimately care and provide for the resulting child.[42] Lastly, as posthumous conception is a lengthy and expensive endeavour, one cannot presume that that

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[37] Ibid, Part 4, Head 24, s 1(d).

[38] This was also a fear expressed by the UK's Warnock Committee: Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: July 1984), p. 55.

[39] Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK).

[40] Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK), s 1; Human Fertilisation and Embryology Act 2008 (UK), s 39(3).

[41] N. Maddox, 'Inheritance and the Posthumously Conceived Child' (2017) *The Conveyancer and Property Lawyer* 1, at 8.

[42] See discussion in Chapter Three, Section 3.4.5.

those who do decide to undergo the process will not be fully prepared and committed to providing a stable upbringing for the child.[43]

7.4. Concluding Remarks

This thesis has explored the legal and ethical challenges in the regulation of posthumous conception in Ireland and has answered three primary research questions in this regard. I assessed whether posthumous conception ought to be regulated in Ireland, or whether it should simply be banned. I considered what model of consent should be used to regulate posthumous conception in Ireland and lastly, I determined what lessons could be learned about regulating posthumous conception in Ireland from the current state of legislation, guidelines and case law that has emerged on this issue in other jurisdictions.

The core argument of this thesis is that posthumous conception should be regulated, and permitted by law in Ireland. In addition, I submitted that posthumous conception should be regulated by presumed consent. I put forward that laws on posthumous conception must address both the retrieval and use of gametes from deceased and dying patients. Furthermore, I contended that it is necessary for laws on posthumous conception to permit the deceased's wider family access to posthumous conception in cases where the deceased dies without a surviving partner. Lastly, laws on posthumous conception should include measures such as a mandatory waiting period, professional counselling and provisions regarding the legal parentage and inheritance rights of the posthumously born child. In light of my findings on the above research questions, I now summarise my position regarding how the provisions of the AHR Bill 2017 can be amended to more effectively regulate the practice of posthumous conception in Ireland.

In summary, I propose the following;

1. The expressed consent provisions relating to posthumous conception and posthumous gamete retrieval in Head's 24 and 25 of the AHR Bill 2017

[43] K. Tremellen and J. Savulescu, 'Posthumous conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma' (2016) 13(3) *Reproductive Biomedicine Society Online* 26, at 29.

should be amended to enable posthumous conception to be permitted by presumed consent.

2. The provisions in Head 24 and Head 25 of the AHR Bill 2017 which restrict the availability of posthumous gamete retrieval and posthumous conception to the deceased's surviving partner should be amended to expand the availability of posthumous conception to the deceased's most senior available next of kin. This can be determined in the same manner as the hierarchy of intestate successors is established in Irish succession law.

3. The provision providing for the retrieval of gametes from deceased patients in Head 25 of the AHR Bill 2017 should also provide for the retrieval of gametes from comatose or dying patients who lack the capacity to consent.

4. The provision in Head 27 of the AHR Bill 2017 which precludes the deceased from being registered as the legal parent of a posthumously born child after thirty-six months should be removed. Instead, an alternative provision should be added which provides for the deceased to be registered as the legal parent on the birth certificate of the resulting child irrespective of when the child is born. However, the resulting child should not be entitled to inherit from the deceased's estate.

5. The provision in Head 24 of the AHR Bill 2017 which requires the requesting party to withstand a standard waiting period before posthumous conception treatment is provided should remain in place.

6. The provision in Head 24 of the AHR Bill 2017 which requires the requesting party to receive professional counselling on the implications of posthumous conception during the mandatory waiting period should remain in place.

Ultimately, posthumous conception raises novel and complex issues of law and ethics, many of which have been addressed by this thesis. As public awareness of the practice increases across Ireland, it is reasonable to assume that so too will

requests to use this form of ART. Thus, it is crucial that Ireland develops effective policies to deal with the ethical and legal challenges posed by the technology. This thesis has demonstrated that regulating posthumous conception in Ireland will implicate a series of familial and societal interests, and will involve a crossover between the interests of the living, the dead and the not yet living. It has also illustrated how posthumous conception is a highly emotive topic which triggers diverse and conflicting views on how the practice should be regulated, if at all.

The publication of proposals to regulate posthumous conception in Ireland offered an ideal opportunity to examine these questions, and it is encouraging to see the willingness of the Irish Government to confront this complex issue. Indeed, it is further inspiring to see the passionate responses and debates which were sparked by stakeholders and the Joint Oireachtas Committee following publication of the AHR Bill in 2017. It is hoped that the findings of this thesis help to inform the debate surrounding how posthumous conception should be regulated in Ireland and that the proposals outlined contribute towards the ongoing discussion in this area. Ultimately, I propose that by amending the AHR Bill 2017 to regulate posthumous conception by presumed consent and by including the additional measures discussed above as safeguards, the interests of the stakeholders in posthumous conception can be effectively protected, and the potential harms which the technology of posthumous conception poses to these interests can be minimised. In this way, Ireland will effectively respond to the challenge of regulating posthumous conception.

Post-script

This doctoral thesis was submitted in early February 2022. In the weeks following it's submission, the Irish Government published the Health (Assisted Human Reproduction Bill) 2022.[1] This Bill is the draft act of legislation which followed the completion of the Joint Oireachtas Committee on Health's pre-legislative scrutiny of the General Scheme of the AHR Bill 2017.[2] The 2022 Bill outlines updated proposals for the regulation of ART in Ireland, and contains revised provisions regarding the regulation of posthumous conception.[3] This post-script briefly discusses the updated proposals and considers the potential implications of the revised provisions on this thesis topic.

Overall, there has been no substantive changes made to the proposals for regulating posthumous conception when compared to those originally outlined in the General Scheme. Indeed, the analysis provided in this thesis of the AHR Bill 2017 is equally applicable to the provisions of the 2022 Bill. However, there has been some slight language clarifications and important amendments made. These will have significant implications for the availability of posthumous conception in Ireland, and are important in terms of minimising the potential harm inflicted by the technology.

In line with the initial proposals set out in the AHR Bill 2017, Part 2 of the 2022 Bill provides that female surviving partners can avail of posthumous conception treatment subject to expressed consent from the deceased.[4] The Bill further provides for the posthumous retrieval of sperm.[5] However, this provision is distinct from the General Scheme which sought to regulate the posthumous retrieval of both male and female gametes.[6] Notably, under the 2022 Bill's current wording, male surviving partners are entirely precluded from using posthumous conception.

[1] The Health (Assisted Human Reproduction Bill) 2022 (IRE).
[2] Joint Committee on Health, *Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill* (July 2019).
[3] The Health (Assisted Human Reproduction Bill) 2022 (IRE), Part 2 and Part 5.
[4] Ibid, Part 2, s 22(2); Part 2, s 22(2)(a)-(b) and Part 2, s17(1).
[5] Ibid, Part 2, s 22(2)(d).
[6] General Scheme of the Assisted Human Reproduction Bill 2017 (IRE), Part 4, Head 25.

Section 41 of Part 5 of the Bill defines 'surviving partner' as 'the surviving female spouse, female civil partner or female cohabitant of a deceased person at the time of the person's death'.[7] This definition is significant, and it is now clear that posthumous conception will only be made available to female surviving partners.[8] This is equally the case with posthumous gamete retrieval. Thus, although the Bill provides for the posthumous retrieval of sperm,[9] a same-sex male surviving partner would not be entitled to request posthumous sperm retrieval, as they do not fit the statutory definition of a 'surviving partner'.[10]

Restricting the availability of posthumous conception to female surviving partners only is unfortunate, and is discriminatory against male surviving partners. The definition is further regrettable, given that the implications of wording the Bill in this way was highlighted by stakeholders when the General Scheme underwent it's pre-legislative scrutiny.[11] It is likely that the Government sought to confine instances of posthumous conception to circumstances where the surviving partner would carry the pregnancy themselves, thereby negating the need for a surrogate and an additional actor in the process. Indeed, this is evident when compared to the initial wording used in the General Scheme, which stated that posthumous conception should only be facilitated when the request is made by the deceased's surviving partner 'who will carry the pregnancy'.[12]

However, this is not made entirely clear by the wording used in the 2022 Bill. The definition of surviving partner simply states that the surviving partner must be female.[13] It does not expressly state that the female surviving partner must carry the pregnancy herself, and the related provisions pertaining to posthumous conception in the Bill do not directly preclude the use of surrogates in conjunction with posthumous conception.[14] Ultimately, it cannot always be guaranteed that a

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[7] Ibid, part 5, s 41.
[8] Ibid.
[9] Ibid, Part 2, s 22(2)(d).
[10] Ibid, Part 5, s 41.
[11] Written submissions from stakeholders on the AHR Bill 2017 can be accessed at: <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.
[12] General Scheme of the Assisted Human Reproduction Bill 2017 (IRE), Part 4, Head 24, s 1(b).
[13] The Health (Assisted Human Reproduction Bill) 2022 (IRE), Part 5, s 41.
[14] See Part 5, s 41-42 and Part 2, s 22.

female surviving partner will be in a position to carry the pregnancy herself, and there may be instances in which the female surviving partner would require a surrogate to host the pregnancy, despite technically fitting the description of a 'surviving partner' under the Bill. In such instances, there does not appear to be provisions in the 2022 Bill which would prevent a female surviving partner from applying to use a surrogate to carry the pregnancy in cases of posthumous conception.[15]

If it is the Government's intention to keep posthumous conception and surrogacy separate, then this should be made clear. Although it is likely a technicality, it seems unfounded to discriminate against male surviving partners on this basis, particularly if it is the case that a female surviving partner could apply to use a surrogate to host the pregnancy if required. That point aside however, the 2022 Bill continues to provide for the use of donor gametes in posthumous conception, and intends to permit altruistic surrogacy.[16] Thus, in my view, it is not clear why male surviving partners should not be permitted to use altruistic surrogacy in the case of posthumous conception. There is no principled basis to limit the availability of the technology in this way.[17]

Another important update relates to the resulting child's legal parentage. The General Scheme originally set out that the deceased would only be recognised as the child's legal parent if that child was born within thirty-six months of the deceased's death.[18] This had the effect of protecting the State's interest in the timely administration of the deceased's assets. However, it had the knock on effect of discriminating between posthumously born children who were born within, and those born after the thirty-six month time period.[19] Following advice from the Joint Oireachtas Committee, this provision has rightly been amended, and there is no

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[15] Surrogacy is only permitted under the Bill where the surrogacy agreement has been approved by the Assisted Human Reproduction Regulatory Authority; Ibid, Part 7, s 50-51.
[16] Ibid, Part 5, s 42; Part 7, s 50.
[17] This point was also raised by Andrea Mulligan in her submission on the AHR Bill 2017 which is available at: <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/submissions/2019/2019-07-10_submissions-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-human-reproduction-bill_en.pdf>.
[18] AHR Bill 2018, Part 4, Head 27.
[19] Joint Committee on Health, *Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill,* above n 2.

longer a timeframe in which the child must be born to be recognised as the deceased's legal offspring.[20] This is a positive amendment and will be of symbolic importance for posthumously born children who will have certainty regarding their lineage. However, the amendment will also have the practical effect of entitling the posthumously born child to inherit from their deceased parent's estate, irrespective of when that child is born. As a consequence, the provision has the potential to delay the administration of the deceased's assets indefinitely, and does not act to protect the State's interest in timely estate administration. As argued throughout this thesis, this provision could be improved further by recognising the deceased as the child's legal parent, but simultaneously barring the posthumously born child from inheriting.[21]

The 2022 Bill is a welcome step forward in the road towards regulating posthumous conception in Ireland, and it is positive to see that the Government and Joint Oireachtas Committee have considered the various submissions on the General Scheme, and acknowledged the complex and emotive situations which are central to the regulation of posthumous conception. The Bill is currently in its third stage before Dáil Eireann. At this point, it will be examined section by section and any proposed amendments can be made before it continues through the legislative process.[22] Ultimately, these ongoing discussions surrounding the introduction of a regulatory framework for posthumous conception in Ireland highlight the significance of exploring the research questions that were addressed by this thesis. Indeed, they further demonstrate the potential for the findings of this thesis to influence and contribute towards the debates in this area.

[20] The 2022 Bill provides that the deceased will be regarded as the child's legal parent subject to expressed consent from the deceased and the surviving partner: The Health (Assisted Human Reproduction Bill) 2022 (IRE), Part 2, s 22(e).
[21] The advantages of regulating in this way are argued throughout this thesis.
[22] Houses of the Oireachtas, 'Health (Assisted Human Reproduction) 2022 (Bill 29 of 2022)' (23 March 2022), available at <https://www.oireachtas.ie/en/bills/bill/2022/29/>.

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