# Children of the Dead: Posthumous Conception, Critical Interests and Consent

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*Artificial Reproductive Technology now enables the conception of children after the death of their genetic father. This may be done through utilising gametes frozen prior to death, or through posthumous sperm retrieval a short time after death. There is little consensus on how posthumous conception should be dealt with by the law and this article examines alternative approaches to such regulation. The goal of any such regulatory regime should be the vindication of the deceased's critical or objective interests after death. Alternative approaches risk instrumentalising the dead to serve the interests of the living, or weigh too heavily the deceased's past decisional autonomy at the cost of respecting his or her likely wishes after death. Separate requirements should apply to applications for posthumous sperm retrieval and its subsequent use, with the former being less onerous given the emergency nature of the procedure and the latter involving a tribunal whose function is to consider how best to give effect to the deceased's reproductive autonomy after death.*

**Keywords**: *posthumous conception; regulation; advance directives; consent; posthumous interests*

## INTRODUCTION

Rapid advances in artificial reproductive technology (ART) in the second half of the 20th century now mean it is possible for a child to be both conceived and born after the death of its biological father or mother (or indeed after the death of both), either through utilisation of gametes that were cryopreserved ante-mortem or the retrieval and use of gametes post-mortem. This has led to novel and complicated legal and ethical debates concerning the permissibility of the procedure itself as well as the welfare and status of the posthumously conceived child.[1]

Posthumous conception implicates a variety of these interests of the deceased. These relate to the treatment of his or her body after death,[2] as well as the person's interest in reproducing or not reproducing posthumously. This article contends that the vindication of the deceased's critical or objective interests after death should be the primary focus of any regulatory regime.

There are others who have interests that may be affected by posthumous reproduction: for example, a surviving partner who wishes to continue a joint parental project, or parents and siblings who may wish

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[1] G Bahadur, "Death and Conception" (2002) 17 *Human Reproduction* 2769; JA Robertson, "Posthumous Reproduction" (1994) 69 *Indiana Law Journal* 1027; CP Kindregan and M McBrien, "Posthumous Reproduction" (2005) 39 *Family Law Quarterly* 579; B Bennett, "Posthumous Reproduction and the Meanings of Autonomy" (1999) 23 *Melbourne University Law Review* 286; K O'Sullivan, "Posthumously Conceived Children and Succession Law" (2019) 33(3) *International Journal of Law, Policy and the Family* 380.

[2] Although the posthumous collection of gametes from both men and women is theoretically possible, this article focuses predominantly on posthumous sperm retrieval for the simple reason that posthumous collection of eggs is a rarer and more complicated procedure than posthumous removal of sperm: DM Greer et al, "Case 21-2010: A Request for Retrieval of Oocytes from a 36-year-old Woman with Anoxic Brain Injury" (2010) 3 *New England Journal of Medicine* 276.

to support or indeed object to the surviving partner utilising their deceased son's or brother's sperm for posthumous conception. While some commentators contend that such interests should be balanced against the interests of the deceased when deciding if a posthumous conception procedure should be permitted,[3] I argue that such an approach serves to instrumentalise the dead to serve the interests of the living, and further, that vindicating the interests of the deceased is the only legitimate aim of any regulatory system.

In addition, a person's interest in reproducing or not reproducing is often equated with protecting the deceased's autonomous choices, and this is reflected particularly in jurisdictions that require advance written directives. I show how such an approach is problematic as it often fails to honour another aspect of autonomy that underpins the value we ascribe to decisional autonomy, that is honouring those decisions that would have been in accordance with a patient's beliefs and values and distinctive sense of self, and not honouring those decisions that are not. While decisional autonomy seeks to give effect to such authentic decisions, it is an imperfect mechanism for so doing, particularly in circumstances where the decision-maker has died.

I conclude that a system whereby consent or authorisation of the deceased can be implied best protects his interests after death. I propose a two-stage system of consent to posthumous sperm retrieval and then its subsequent use and I argue that the primary focus of the decision-maker should be in arriving at a decision that accords with the deceased's beliefs and values. Previously expressed wishes are evidence of these beliefs and values, but should not be determinative of the decision that the deceased would have made in the changed circumstances of the present. Nor should the absence of any statements as to the posthumous use of his gametes necessarily justify a refusal to so use them. Given the narrow window after death in which motile sperm can be gathered by posthumous sperm retrieval, I contend that the surviving partner is best placed to consent on behalf of the deceased. The authorisation for use, however, should be determined by a tribunal charged with vindicating the reproductive autonomy of the deceased.

## I. Posthumous Gamete Retrieval and Use

Given the increasing use of in vitro fertilisation (IVF) technologies, there is an increasing likelihood that deceased persons will have frozen their gametes prior to death. In a regulated jurisdiction, the reality is that IVF clinics will seek written consents for a variety of matters including what is to be done with the material in the event of the death of its source.[4] In jurisdictions where there are strict requirements for written consent, such as the United Kingdom, there is always the danger and the fear that due to human error or oversight, one of a large number of forms will have been lost, or filled out incorrectly.[5] A grieving partner is then left in the anomalous position of being allowed to use donor gametes for reproduction, but not the gametes of their deceased partner. In such a circumstance, there is the possibility that motile sperm can be retrieved from the dead man and cryopreserved in the hours immediately after the death.

The first report of posthumous sperm retrieval was in 1980,[6] and the first reported pregnancy arising from posthumous conception was in 1998.[7] There are a number of methods for retrieving sperm posthumously,[8] and it is generally advised that viable sperm can be collected within two days of the death.[9] Thus, when applications for posthumous sperm retrieval come before a judge they tend to be on

[3] H Young, "Presuming Consent to Posthumous Reproduction" (2014) 27 *Journal of Law and Health* 68.

[4] *Y v A Healthcare NHS Trust* [2019] 1 FLR 679, [6] (Knowles J); [2018] EWCOP 18.

[5] *Y v A Healthcare NHS Trust* [2019] 1 FLR 679, [6], [10] (Knowles J); [2018] EWCOP 18.

[6] CM Rothman, "A Method for Obtaining Viable Sperm in the Postmortem State" (1980) 34 *Fertility and Sterility* 12.

[7] C Strong, JR Gingrich and WH Kutteh, "Ethics of Posthumous Sperm Retrieval" (2000) 15 *Human Reproduction* 739, 739.

[8] Strong, Gingrich and Kutteh, n 7.

[9] AM Jequier and M Zhang, "Practical Problems in the Posthumous Retrieval of Sperm" (2014) 29 *Human Reproduction* 2615.

an emergency basis, and the refusal of the application would usually lead to the loss of any chance of procuring viable sperm from the dead man for use in a future ART procedure.[10]

Healthy young men do not typically regard death as imminent, or something to be planned for.[11] In one survey of men and women of "reproductive age",[12] only 6.1% had discussed the possibility of posthumous conception with their partners and a much smaller number had recorded their wishes in writing.[13] As such, sperm retrieval is generally sought in cases where the deceased has died suddenly, unexpectedly, and tragically leaving no written instructions as to the posthumous use of his sperm.[14] While such requests for posthumous sperm retrieval are relatively rare,[15] they are invariably tragic, often involving a shocked and grieving widow or partner with an intense desire for her recently deceased husband's or partner's offspring.

The deceased's parents, siblings and indeed grandparents may also have an interest in utilising the deceased's gametes for reproduction,[16] or indeed, in preventing such use.[17] Such interests may be intertwined with the interests of the deceased, such as the ante-mortem interest in genetic continuity, which would be shared with his parents and grandparents.[18]

Notwithstanding these other interests, I set out two positions below which would preclude such interests of parties other than the deceased being taken into account, if either position (or both) is accepted. The first is that the dead can have interests; the second is that the still-living have an interest in the treatment of the dead. If either contention is accepted, then the surviving partner's desire for posthumous conception cannot be determinative of any application for posthumous sperm retrieval. Such applications raise issues about respectful treatment of the dead, and also as to the level of consent which is necessary to adequately respect the procreative wishes of the deceased.

## II. Interests of the Deceased Affected by Posthumous Reproduction

### A. Interests after Death: Critical, Not Experiential

The undignified treatment of the dead may harm the interests of society as a whole, as well as the private harm to the interests of the family and friends of the deceased. Although clearly not the same, there is a direct continuity between the body of the person who has died and the living person that they were.[19] A dead body is a "precious natural symbol of humanity" and should be thus treated in a manner consistent with respecting the value and dignity of the once living person.[20] If nobody held anything to be precious, sacred and worthy of such respect, Feinberg suggests that everybody would be less secure from personal harm and society would have an uncertain foundation.[21] It further prevents distress to immediate family

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[10] *R v Human Fertilisation and Embryology Authority Ex parte Blood* [1999] Fam 151.

[11] Tremellen and Savulescu, 7.

[12] Which was defined for the purposes of the study as men and women between the ages of 18 and 45: SE Barton et al, "Population-based Study of Attitudes towards Posthumous Reproduction" (2012) 98 *Fertility and Sterility* 735, 737.

[13] Barton et al, n 12, 737.

[14] *Re Long* [2018] 2 NZLR 731; [2017] NZHC 3263; *R v Human Fertilisation and Embryology Authority Ex parte Blood* [1999] Fam 151; *Re Edwards* (2011) 81 NSWLR 198; [2011] NSWSC 478; *Re H (No 2)* [2012] SASC 177; *Re H, AE (No 3)* (2013) 118 SASR 259; [2013] SASC 196.

[15] RD Orr and M Siegler, "Is Posthumous Semen Retrieval Ethically Permissible?" (2002) 28 *Journal of Medical Ethics* 299.

[16] 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, 350.

[17] *Hecht*, 20 Cal Rptr 2d 275 (1993).

[18] AO Affdal and V Ravitsky, "Parent's Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions" (2019) 33 *Bioethics* 82, 85–87.

[19] RD Pentz et al, "Ethics Guidelines for Research with the Recently Dead" (2005) 11 *Nature Medicine* 1145.

[20] J Feinberg, "The Mistreatment of Dead Bodies" (1985) 15(1) *Hastings Centre Report* 31.

[21] Feinberg, n 20, 31.

members of the deceased where mistreatment of their loved one's remains may violate personal or religious beliefs and cultural expectations as to how these remains should be treated.[22]

There is also another potential harm: to the interests of the deceased himself, either while living or after death.[23] Dworkin posts that we are guided in our lives by two kinds of interests: experiential and critical.[24] Experiential interests are our interest in doing things for the experience of doing them. Clearly, the dead no longer have experiential interests. However, critical interests are the hopes and aims we seek to satisfy, as they lend meaning and a coherent narrative structure to our lives.[25] We need not be aware that our critical interests have been satisfied or thwarted,[26] and we can thus still have a critical interest in future events that we will never be aware of in two possible ways.[27]

First, we can have a present interest in post-mortem events, including what happens to our bodies after death. On this view, our critical interests are not affected after our death, for example if our corpse was used in a way contrary to our wishes, but the critical interests of the still-living, seeing that their wishes would not be honoured posthumously, would be.

Second, and more controversially, there are claims that the dead themselves can have interests in the treatment of their bodies.[28] Thus, a failure to respect their wishes regarding the posthumous interests of their corpse would affect the dead's critical interests and not just the critical interests of the still-living.[29] Of course, there is the counterargument that the dead have no interests, and are thus incapable of being harmed.[30] Or, as John Harris claims that any interests that persist after death are relatively weak when compared with the interests of living persons and should be respected, but subject to the reasonable demands of the public interest.[31]

Nonetheless, interests in reproducing or not reproducing complicate this debate as by their nature they are, associated with liberal ideas of self-rule, freedom and self-determination.[32] The dominant view is that we should protect this freedom by honouring a competent person's autonomous choices in most circumstances. This can be justified by the claim that people usually know better than anyone else what best serves their interests and their choices are thus the best evidence we have of decisions that would best protect these interests.[33] The desire to protect autonomous choice is evident in jurisdictions that require advance directives justifying sperm retrieval and use of sperm, such as in the United Kingdom and the State of Victoria, Australia.[34]

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[22] I Jones, "A Grave Offence: Corpse Desecration and the Criminal Law" (2019) 37 *Legal Studies* 599, 607–609; D Nelkin and L Andrews, "Do the Dead Have Interests? Policy Issues for Research after Life" (1998) 24 *American Journal of Law and Medicine* 261, 277.

[23] Young, n 3.

[24] R Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A Knopf, 1993) 201–202.

[25] Dworkin, n 24.

[26] This adopts an objective approach to harm: J Feinberg, "Harm and Self Interest" in PMS Hacker and J Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977) 285–308.

[27] See also A Buchanan and D Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (CUP, 1989) 164.

[28] Young, n 3, 214–220.

[29] J Feinberg, "The Rights of Animals and Unborn Generations" in R Shafer-Landau (eds), *Ethical Theory: An Anthology* (Wiley and Sons, 2nd ed, 2013) 372; J Feinberg, n 26, 284.

[30] E Partridge, "Posthumous Interests and Posthumous Respect" (1981) 91 *Ethics* 243.

[31] J Harris, "Organ Procurement: Dead Interests, Living Needs" (2003) 29 *Journal of Medical Ethics* 130.

[32] J Savulescu, "Death, Us and Our Bodies" (2003) 29 *Journal of Medical Ethics* 127.

[33] R Dresser, "Dworkin on Dementia: Elegant Theory, Questionable Policy" (1995) 25 *Hastings Centre Report* 32, 33.

[34] *Human Fertilisation and Embryology Act 1990* (UK); *Human Tissue Act 1982* (Vic); *Assisted Reproduction Treatment Act 2008* (Vic). There are similar requirements in the State of New South Wales: *Human Tissue Act 1983* (NSW); *Assisted Reproductive Technology Act 2007* (NSW).

This view of autonomy and self-determination as synonymous plays a central role in the law of consent.[35] Nonetheless, although the precise basis for individual and personal autonomy may be difficult to pin down, it should not be equated with "mere choice".[36] Truly autonomous actions have their source in the person's beliefs, values and principles which constitute the personality the person recognises and has made their own. Such a high standard is, of course, aspirational but one which should be striven for.[37] One of the criticisms of the current law of consent is that, when not clearly linked to any principled foundations, consent requirements which are meant to give effect to such underlying principles, begin to be treated as having independent value. They are thus overvalued. Indeed, Brownsword warns against becoming fixated on consent and making a cult of it.[38] Unmoored from its ethical foundations, consent requirements are elided with the justification for such requirements, creating the risk that individuals will be coerced or deceived as to the nature of what they are consenting to.[39]

If one accepts either of the two contentions set out above – that the mistreatment of the dead harms the still-living or that the dead themselves have interests that can be harmed after death (critical interests) – this narrow view of autonomy as equivalent to choice is unsatisfactory. When dealing with cases where posthumous conception is sought it is self-evident that the individual from whom consent is sought is no longer capable of self-determination as he is dead. Two possibilities then arise. First, the deceased has made a prior decision which, if it satisfies legal consent requirements, is sufficient to authorise the procedure. This approach ignores the very great difficulty, if not impossibility, in leaving advance directives of anticipating the future circumstances when they will be used.[40] Second, no such prior authorisation exists, or one exists which does not satisfy legal consent requirements, and authorisation for the procedure is refused. This approach excludes those circumstances where the deceased would have wished for his surviving partner to make use of the material for posthumous reproduction. Thus, in treating choice as the determinative of adequate consent, and furthermore, assuming the imposition such legal consent requirements best vindicate the deceased's interests, those interests are in fact often frustrated.

This is as choosing is not everything; rather it is one means by which we vindicate autonomy. Brundy posits that another value – authenticity – is at play when bioethicists invoke patient autonomy.[41] Authenticity recognises that beyond choosing, persons also have the capacity to be a particular distinctive self. While a capacity for self-determination is not the same as authenticity, they are often evidence for the existence of one another; for example a patient's decision regarding treatment that is inauthentic, that is widely divergent from previously held beliefs and values, is evidence that their decision-making capacity may impaired.[42] And, of course we also have interests that may or may not be satisfied – that is we have best interests.[43]

Authenticity underpins the moral force of clinicians honouring questions as to what the patient would choose.[44] Dworkin presents a similar justification for honouring a patient's prior directive when it conflicts with their present best interests. He describes this as the "integrity" view of autonomy whereby

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[35] *Re B (Consent to Treatment: Capacity)* [2002] 2 All ER 449; [2002] EWHC 429 (Fam); *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290; M Quigley, *Self-ownership, Property Rights, and the Human Body: A Legal and Philosophical Analyses* (CUP, 2018) 46–50; J Coggon, "Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?" (2007) 15 *Health Care Analysis* 235, 236.

[36] O O'Neill, *Autonomy and Trust in Bioethics* (CUP, 2002) 28.

[37] RR Faden, TL Beauchamp and NMP King, *A History of Informed Consent* (OUP, 1986) 236.

[38] R Brownsword, "The Cult of Consent: Fixation and Fallacy" (2004) 15 *Kings Law Journal* 223.

[39] O O'Neill, "Some Limits of Informed Consent" (2003) 29 *Journal of Medical Ethics* 4; Quigley, n 35, 52.

[40] Under the *Mental Capacity Act 2005* (UK), advanced written directives are but one of a range of factors that the Donee of a lasting power of attorney is to consider in coming to a decision: *Mental Capacity Act 2005* (UK) s 4(6).

[41] D Brundy, "Choosing for Another: Beyond Autonomy and Best Interests" (2009) 39(2) *Hastings Centre Report* 31.

[42] Brundy, n 41, 32.

[43] Brundy, n 41.

[44] Brundy, n 41.

we wish to allow people to "lead their lives out of a distinctive sense of their own character, a sense of what is important to them".[45] Choices are thus not honoured simply for their own sake, but also because they are thought to best reflect the values of our authentic selves. As Dworkin noted we do not wish to live a life that is out of character.[46]

Thus, autonomy demands, at a minimum, that a decision must be made when fully informed and understanding its nature and consequences and this decision is free from coercion. However, more exacting accounts of autonomy require that the decision to reflect an ability to apply the relevant facts to the beliefs and values a person holds, as being reflective of their underlying and enduring commitments and their individuality as persons.[47]

Such concerns with the wishes and values of patients are reflected, for example, in the fact that the *Mental Capacity Act 2005* (UK) (*MCA 2005*) incorporates elements of "substituted judgment" into its "best interests" standard set out in s 4. In determining a person's best interests under the Act, the decision-maker must consider, among other things, the person's past and present wishes and feelings as well as the beliefs and values that would have likely influenced their decision had they capacity to make one.[48] It is of note that no such concerns are incorporated into the requirements for consent to storage and use of human gametes after the death of their source under the *Human Fertilisation and Embryology Act 1990* (UK) (*HFEA 1990*) where the presence or absence of statutory consent is determinative of that consent being valid.[49]

## B. Interests in Posthumous Reproduction

### *1. Interests in Reproduction after Death*

If one accepts that we can have critical interests in events after we die, be they the current interests of the still-living or posthumous interests, these can clearly extend beyond the treatment of our corpses. There are new interests concerning reproduction that now exist as a consequence of the development of ART technology. While living, a person has two such interests broadly categorised under the umbrella of "procreative liberty": the right to engage in reproduction and the right to avoid reproduction. Robertson describes both of these interests as of equal importance and notes that "[d]enial of either imposes great burdens on individuals and affects their identity, their dignity, and the shape of their lives in ways that they alone can best appreciate".[50] This inherent subjectivity involved in identifying interests in procreative liberty explains the importance of protecting an individual's autonomy with regard to procreative decisions. This normally means respecting their self-determination, that is right to choose to reproduce, or not. Courts have strongly protected the individual's decisional authority in this regard; most notably with regards to abortion,[51] where gestational and genetic parentage are in issue, and also in disputes regarding the use of frozen embryos where one of the parties no longer wishes to become, even at the very least, a genetic parent.[52]

Clearly, the individual is the person best placed to know which decisions about having children or not, and if so in what circumstances, will best serve their interests in procreation and their choices as to whether to reproduce or not are thus strongly protected by the law. After death, however, the issue is

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[45] Dworkin, n 24, 224.

[46] Dworkin, n 24.

[47] C Aukland, "Protecting Me from My Directive: Ensuring Appropriate Safeguards for Advance Directives in Dementia" (2017) 26 *Medical Law International* 73, 76.

[48] *Mental Capacity Act 2005* (UK) s 4(6). M Donnelly, "Best Interests, Patient Participation and the Mental Capacity Act 2005" (2009) 17 *Medical Law Review* 1.

[49] *Human Fertilisation and Embryology Act 1990* (UK) Sch 3, ss 4(1), 14. HFEA, *Code of Practice* (9th ed, 2018) [17.14].

[50] Robertson, n 1.

[51] LJ Wharton, S Frietsche and K Kolbert, "Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey" (2006) 18 *Yale Journal of Law and Feminism* 317.

[52] *Evans v Amicus Healthcare Ltd* [2004] 2 WLR 713; [2003] EWHC 2161 (Fam).

complicated in two ways. First, by the question as to whether the character of reproductive interests after death is the same as it was before, or a much-diminished interest deserving of less protection? Second, by the fact that the dead man no longer has the capacity for self-determination.[53] If we accept the centrality of consent, the weight that must be attached to prior written directives concerning reproduction if they exist, and the admissibility of the evidence of a surviving partner and relatives about the deceased's character and his reproductive wishes both before and after death become central issues to resolve as to how to best vindicate those wishes.

### *2. An Attenuated Right?*

Robertson argues that posthumous reproduction can only be controlled in the same way as reproductive autonomy if posthumous reproduction implicates the same interests, values and concerns that reproduction ordinarily entails.[54] As posthumous reproduction shares only a few features of what is valued about reproductive experience, he characterises it as an extremely attenuated form of that experience that is arguably not an important reproductive interest at all and should not receive the high respect granted ordinary "living" reproductive experience when clashing with the interests of others. In particular, he notes that the deceased parent will not gestate or rear the child, and will never know that he or she has reproduced.[55] Steinbock goes even further and rejects the view that mere genetic reproduction can ground any right to reproduction, as this would create a de facto right to create children with no attendant responsibility to bring them up. The central foundation to any right to reproduce is in her view is an intention to rear.[56] The implications of this view for any purported right to posthumous reproduction are clear.

The difficulty with such a minimal view of the importance of any interest in posthumous reproduction is that it places almost the entire value of the reproductive experience in experiential interests: the interest in rearing and gestating a child and knowing that the child will live on after your death. It ignores the fact that there may be significant critical interests of the deceased that can be fulfilled or frustrated after death. For example, the continuation of a joint parental project where parents always wished their first child to have a sibling,[57] or the transmission of traditional cultural values of the deceased which mandated continuing his bloodline and having grandchildren for his parents.[58] Furthermore, the diminution of any interest in reproducing posthumously on the basis that the deceased will have no responsibility for the rearing of the child is greatly mitigated in circumstances where his parents have indicated a willingness to be supportive of the mother should she go ahead with the procedure.[59] Characterising the deceased's interest in posthumous reproduction as an interest in mere genetic continuity is misleading in circumstances where his extended family intend to provide a supportive and loving environment in which the child can be nurtured, and in which the family's traditional values can be instilled in the child.[60] A parent could clearly have a persisting or critical interest in having their child raised in accordance with his or her family's cultural, religious, and household values: even after that parent's death.

Furthermore, the interest in genetic continuity is a natural form of what one author describes as "self-extension", whereby something of us can live on after our death and "using the deceased's gametes is a tangible way for people to leave 'pieces' of 'themselves' alive in the world".[61] The passing on of one's

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[53] Brundy, n 41, 34.

[54] Robertson, n 1, 1031.

[55] Robertson, n 1, 1030–1031.

[56] B Steinbock, "A Philosopher Looks at Assisted Reproduction" (1995) 12(8) *Journal of Assisted Reproduction and Genetics* 543, 549.

[57] *Re Long* [2018] 2 NZLR 731, [5]; [2017] NZHC 3263.

[58] *Re Long* [2018] 2 NZLR 731, [6]; [2017] NZHC 3263.

[59] *Re H (No 2)* [2012] SASC 177, [37].

[60] *Re Long* [2018] 2 NZLR 731, [6]; [2017] NZHC 3263.

[61] Simana, n 16, 343.

genes to future generations can also constitute an expression of personal identity and family heritage.[62] Dying individuals have been known to express some comfort that part of them will "live on" through posthumous reproduction, and both Steinbock and Robertson's reservations concerning the strength of any interest in reproducing after death will have to be re-evaluated as the procedure becomes more commonplace and more people are informed of its viability.[63]

### *3. The Interest in Not Reproducing after Death*

The other aspect of procreative liberty is, of course, the right not to reproduce and to become a parent and Robertson values this right equally with the right to reproduce.[64] There are different types of parents, however: genetic, gestational, legal and social – but posthumous reproduction only fully involves the first of these.[65] All of the experiences of parenthood and as a result all of its responsibilities are simply not an issue for the deceased parent who will not have to deal with the consequences of having an unwanted child. As to the right not to be a genetic parent, Cohen describes a possible harm to the parent as something he characterises as "attributional parenthood". Here, society, the child and indeed the genetic parent himself may attribute parentage to the unwilling father irrespective of the fact that legal or social parentage lies elsewhere, creating a kind of harm by forcing the unwilling father into a social category, relationships and obligations that he did not choose.[66] Whatever we make of this type of harm, it is clearly one which is experiential and would not trouble the dead whose interests in what happens after death are critical and not experiential.

One may also have critical interests in not reproducing after death, however. Although the deceased may have wished for a child during life, one may wish not to reproduce posthumously on the basis that it would not be possible to have a relationship with the child and the only way it could know its father would be through pictures and the recollections of others.[67] Furthermore, the deceased may have held certain moral positions or religious beliefs a natural consequence of which would be to be opposed to the procedure, even if his views on posthumous conception had never been canvassed.[68] He may have objected to intentionally creating a child that would be reared in a single-parent home. Additionally, the deceased may have had no particular objection to posthumous conception, but would not wish to reproduce with the person requesting it, normally the surviving partner. If the quality of the relationship was poor or had broken down at the time of the deceased's death; if there had been desertion, discord and estrangement the deceased's critical interests would be better served by disallowing the procedure.[69]

## C. Interests in the Body

When sperm retrieval is sought after death, the immediate question is whether carrying out the procedure is consistent with respectful treatment of the dead. While the legal heirs are entitled at common law to possession of the corpse of their loved one, this is merely to facilitate burial and is not in the nature of a

[62] Simana, n 16.

[63] Simana, n 16, 344. I exclude from consideration in this article requests from parents seeking posthumous gamete retrieval from their deceased children but an argument could be made that the view that posthumous reproduction is a greatly attenuated right being an interest in mere "genetic continuity" has more force when applied to those cases; Affdal and Ravitsky, n 18, 86–87.

[64] Robertson, n 1, 10.

[65] Although certain aspects of legal and social parentage do survive death: *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* (UK): O'Sullivan, n 1.

[66] G Cohen, "The Right Not to Be a Genetic Parent?" (2007) 81 *Southern California Law Review* 1134.

[67] N Peart, "Life beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 *Victoria University of Wellington Law Review* 725, 734.

[68] JD Hans, "Attitudes towards Posthumous Harvesting and Reproduction" (2008) 32 *Death Studies* 837, 863.

[69] S Jones and G Gillet, "Posthumous Reproduction: Consent and Its Limitations" (2008) 16 JLM 279, 280.

property right.[70] This is a notable exception to the old common law rule that the law traditionally recognised no property in a corpse.[71] Granting such limited custodial rights over the corpse to the legal heirs serves society's interest in the prompt disposal of the dead, as well as the family's interest in ensuring their loved one's body is disposed of in a manner that honours the fact that they are the last vestiges of the living person. This latter consideration, the need to treat human remains with dignity is protected by the civil and criminal law; in particular statutes that criminalise misconduct in relation to the dead.[72]

In addition, religious and cultural norms may dictate that the body be treated in a particular manner after death and what is done with the body after death is believed to affect the individual in the afterlife. [73] Medical and research interest in parts of the body can conflict with religious values about bodily integrity, and the fact that theological understandings view the organic totality of the body as sacred, of inherent value, and to be respected even after death.[74] Prohibitions against mutilation of the corpse can only be overridden in limited circumstances, such as for example, if there is immediate practical benefit to another,[75] or if there is a legal requirement, such as in the case of autopsy.[76] These commitments to bodily integrity after death protect more than abstract values as the deep anguish caused to families by the events constituting the Alder Hey organ retention scandal in the United Kingdom (UK) illustrate.[77]

There is also authority to suggest that the right to possession for burial is a right to receive the cadaver in the same condition as when the death occurred.[78] On this view, only those dealings with a corpse that are to effect burial or cremation are legitimate, unless they are pursuant to legal authority. For example, the coroner promotes the public interest by investigating sudden and unexplained deaths so as to prevent such deaths in the future, and promote justice. Taking custody of a body is the first step in this investigative process. Nonetheless, the coroner's powers with regard to the body are limited to pursuing this investigative function.[79]

## III. Regulating Posthumous Conception

There is little consistency in the manner in which different jurisdictions currently regulate posthumous conception. Some countries have opted for outright bans, while others have extremely permissive regimes allowing sperm retrieval and use on the request of the surviving partner.[80] In between these extremes, some States have introduced requirements that the deceased must leave advance written directives authorising the posthumous storage and use of gametes.[81] In jurisdictions where there has not yet been legislation to deal with the matter, retrieval or use or both have been justified on the basis of human tissue legislation and as being within the court's inherent or parens patriae jurisdiction. Some commentators believe that the welfare of the living, and not the autonomy of the deceased person should

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[70] *Haynes' Case* (1614) 12 Co Rep 113; *R v Lynn* (1788) 100 ER 394; *R v Sharpe (George Brereton)* (1857) 21 JP 86; 169 ER 959; *R v Price* (1884) 12 QBD 247; *Williams v Williams* [1882] 20 Ch D 659; H Conway, *The Law and the Dead* (Routledge, 2016) 59–74.

[71] *Haynes' Case* (1614) 12 Co Rep 113.

[72] *Re JSB (A Child)* [2010] 2 NZLR 236, [59] (HC).

[73] KV Iserson, "Postmortem Procedures in the Emergency Department: Using the Recently Dead Practice and Teach" (1993) 19 *Journal of Medical Ethics* 92, 93.

[74] CS Campbell, "Religion and the Body in Medical Research" (1998) 8 *Kennedy Institute of Ethics Journal* 275, 277.

[75] As proposed by certain Orthodox Jewish Rabbis; Campbell, n 74, 291.

[76] Campbell, n 74, 294–295.

[77] M Redfern, J Keeling and E Powell, *The Royal Liverpool Children's Inquiry Report* (Stationery Office, 2001).

[78] *Re Gray* [2001] 2 Qd R 35, [18]–[21] (Chesterman J); [2000] QSC 390.

[79] *Re Long* [2018] 2 NZLR 731, [13]; [2017] NZHC 3263.

[80] Simana, n 16, 331–341.

[81] *Human Fertilisation and Embryology Act 1990* (UK) Sch 3, ss 4(1), 14; HFEA, n 49; *Assisted Reproductive Treatment Act 2008* (Vic) s 46.

be the primary ethical focus, and argue for an "opt-out" system of presumed consent.[82] Each of these is an imperfect mechanism for the vindication of the critical interests of the deceased in reproducing or not reproducing after death.

## A. Advance Written Directives

In the United Kingdom there are requirements that there be consent in writing to the storage, and use of sperm in any reproductive procedure.[83] The Australian State of Victoria also requires written consent as to the use of the dead man's sperm for reproduction.[84] There is unlikely to be much difficulty with such requirements where the gametes have been frozen prior to their donor dying or becoming permanently incapacitated, as they will be required to specify what is done with them in the event of death or incapacity on standard forms provided to them by the fertility clinic prior to providing the sample for freezing.[85] The difficulty with such requirements is in cases where the death was sudden and unexpected and the deceased has not had the opportunity to consider the matter and leave an advance directive if he wished to allow his surviving partner to reproduce after his death.[86] As the great bulk of the case law reveals, this is almost always the reason that posthumous sperm retrieval is sought.[87] The adoption of such strict formal requirements with regard to consent thus likely excludes the very class of people who may wish to engage in the procedure.

It is also of note in this regard that consent may not be verbal, or inferred from the previous conduct of the deceased, thus excluding utilising the procedure even in circumstances where it is clear that the deceased would have wished for it. By adopting autonomy, which is generally protected by informed consent, the legal position is characterised by a presumption against consent with the onus on the person requesting the procedure to prove otherwise.[88] The deceased is also deprived of a possibility that he may have desired after his death, even in circumstances where there is evidence that he had favourably considered the possibility of posthumous conception.[89]

Furthermore, the existence of an advanced written directive as to posthumous conception is regarded as determinative of what the deceased would have wanted after his death. Yet, as Robertson notes with regard to living wills, the basis of the prior directive is that the patient's interests and values remain the same so that those interests are best served by following this prior directive.[90] This is a big assumption as the attitude embodied in the advance directive may be entirely reversed by subsequent events.

As such, the difficulty with advanced directives is that they fix our preferences in stone, when in fact they are always changing and evolving.[91] By their nature such directives are general and immune to context. A man who, at a time when he is healthy and has no reason to fear imminent death, is opposed to his wife engaging in posthumous conception may feel differently if he could have foresight of the circumstances of his death. If, for instance he knew at the time that his widow would request the procedure after his sudden and unexpected death to ameliorate her and the wider family's grief, to

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[82] Tremellen and Savulescu, n 11.

[83] n above.

[84] *Assisted Reproductive Treatment Act 2008* (Vic) ss 10(1), 11.

[85] *Y v A Healthcare NHS Trust* [2019] 1 FLR 679; [2018] EWCOP 18.

[86] I use the term "surviving partner" here to include the widow or the long-term conjugal partner of the deceased.

[87] See the cases referred to at nn.

[88] 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, 432.

[89] S McLean, *Consent and the Law: Review of the Current Provisions of the Human Fertilisation and Embryology Act 1990 for the UK Health Ministers* (Department of Health, 1997) 1, 2.

[90] JA Robertson, "Some Thoughts on Living Wills" (1991) 21 *Hastings Centre Report* 6, 7.

[91] A Fagerlin and CE Schneider, "Enough: The Failure of the Living Will" (2004) 34(2) *Hastings Centre Report* 30.

memorialise him, and to some extent to make some good from the tragedy of his death.[92] Conversely, a man who has left an advance directive authorising the procedure would likely not have done so if he could have foreseen the subsequent and acrimonious breakdown of the relationship before the material would be sought for utilisation. Advance directives can, of course, be withdrawn or rewritten but fate may intervene and a person may die suddenly,[93] or they may not be aware of the circumstances that would lead them to change their mind, for example in the case of an illicit affair. That the deceased may have ticked a box consenting to posthumous use of sperm some years previously would not it seems adequately vindicate his reproductive autonomy in changed or unforeseen circumstances. Adopting a regime where the widow can use the deceased's sperm once the necessary consent requirements have been fulfilled does not necessarily vindicate his reproductive wishes in every case.

Advance directives seek to extend a person's autonomy beyond their period of competence, and indeed, their lives. Nonetheless, they only serve one form of autonomy: decisional autonomy. The basis for decisional autonomy, as we have seen, is evidential, in that we assume that the person is best placed to know which choices are authentic for them and will vindicate their preferences and be authentic to their character. This justification is greatly weakened in the case of advance directives as the person is unable to know precisely the circumstances that will prevail at the time of their death.[94] Changing circumstances may mean that honouring the instructions in the advanced directive will constitute and inauthentic decision by the deceased, that is a decision that is "out of character" and at odds with their values. His critical interests are thus frustrated.

Such concerns have been clearly accounted for in the *MCA 2005* when dealing with the granting of advance directives for lasting powers of attorney. An advance decision is not applicable in a situation where inter alia any circumstances specified in the advance decision are absent or there are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of the decision and which would have affected the decision had they anticipated them.[95] Furthermore, a decision-maker appointed pursuant to the Act must consider any previous written statement as to the past and present wishes and feelings of the person they are deciding for in order to determine their "best interests".[96] Nevertheless, this is but one of a range of factors, many of which incorporate subjective "substituted judgment" elements, as noted above, that must be considered in order to arrive at a determination of best interests.[97] Thus, advance directives under the scheme of the *MCA 2005* are not determinative of any decision as to best interests or otherwise as they are under the *HFEA 1990*; rather they are a single piece of evidence to be weighed appropriately according to the circumstances prevailing at the time that the relevant decision is made and allowing a more holistic and global consideration of how to best vindicate the autonomy of the incapacitated person by reference to a range of factors, including their subjective beliefs and desires.

## B. Comparative Perspective: Inconsistent Case Law

In jurisdictions where posthumous conception has not been specifically legislated for, the case law is inconsistent. Some judges have taken the view that sperm removal can be authorised by the court within its inherent jurisdiction. This is justified as enabling the sperm to be preserved pending an application for its use, a lawful process that would otherwise be frustrated.[98] While others have held that the inherent

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[92] B Simpson, "Making Bad Deaths 'Good': The Kinship Consequences of Posthumous Conception" (2001) 7 *Journal of the Royal Anthropological Institute* 1.

[93] *Re Edwards* (2011) 81 NSWLR 198; [2011] NSWSC 478.

[94] Robertson, n 90, 7.

[95] *Mental Capacity Act 2005* (UK) s 25(4); AR McLean, "Advance Directives and the Rocky Waters of Anticipatory Decision-making" (2008) 16 *Medical Law Review* 1, 20; M Donnelly, "Developing a Legal Framework for Advance Healthcare Planning", 80.

[96] *Mental Capacity Act 2005* (UK) s 4(6)(a).

[97] *Mental Capacity Act 2005* (UK) s 4.

[98] *Re Long* [2018] 2 NZLR 731, [100]; [2017] NZHC 3263. *Re H (No 2)* [2012] SASC 177.

jurisdiction and the parens patriae in particular could not be exercisable in relation to a dead body: being limited to questions of custody, guardianship and the welfare of children as well as the protection of property in a charitable trust.[99] Indeed, it has been held that procedures that are not necessary to preserve the life and mental and physical wellbeing of a comatose man should not be authorised by the court under parens patriae.[100] A finding that the extracted semen is property (as work and skill has been applied to it in the extraction and preservation)[101] has been used to justify the vesting of the deceased's sperm in the widow,[102] and also dismissed as an unhelpful and incongruous view of the law,[103] and a paradigm that "bears little resemblance to the desire to create a human being and to nurture the person in a particular relationship".[104] In two recent similar cases consent to the extraction of sperm pursuant to legislation governing the mentally incapacitated was deemed inappropriate by an Australian court,[105] but permitted by a UK court.[106]

In some jurisdictions, removal of semen has been authorised by the courts pursuant to their human tissue legislation,[107] while others spurn such an approach and use the fact that their human tissue acts predate ART to justify a finding that posthumous gamete retrieval is beyond the scope of those provisions.[108]

Invariably, these cases consider the quality of the deceased's relationship with the requesting partner as well as any reproductive plans that they may have had prior to the death. It is perhaps in weighing the relevance of these factors that the true inconsistency, and the need for clear policymaking lies. Evidence that the couple intended to have children together during the life of the deceased, including the desire for a sibling for an existing child, and engagement with an IVF clinic has been deemed sufficient to justify authorising the procedure in a number of cases.[109] In two cases where posthumous sperm retrieval was refused, the fact that the deceased had not averred to the possibility of having children after death was inter alia a reason for refusing the request for posthumous sperm retrieval, even in circumstances where there was evidence that the deceased had wanted a sibling for an existing child.[110] The best interests of the child to be born have been used to justify granting the order,[111] and also its refusal.[112] The interests of the extended family have also been considered in these cases, including any objections to the procedure and any cultural barriers for or against posthumous conception,[113] as has possible detrimental effects having the child would have on the wife's ability to process grief and move on with

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[99] *Re Gray* [2001] 2 Qd R 35, [10]; [2000] QSC 390.

[100] *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231; [2000] NSWSC 358; *Chapman v South Eastern Sydney Local Health District* (2018) 98 NSWLR 208, [21]; [2018] NSWSC 1231.

[101] *Doodeward v Spence* [1908] 6 CLR 40.

[102] *Re Cresswell* [2019] 1 Qd R 403, [154]; [2018] QSC 142; *Re Edwards* (2011) 81 NSWLR 198; [2011] NSWSC 478; *Chapman v South Eastern Sydney Local Health District* (2018) 98 NSWLR 208; [2018] NSWSC 1231; *Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207; [2010] QSC 118; *Hecht*, 20 Cal Rptr 2d 275 (1993).

[103] *Re Long* [2018] 2 NZLR 731, [84]; [2017] NZHC 3263.

[104] *Baker v Queensland* [2003] QSC 2.

[105] *Chapman v South Eastern Sydney Local Health District* (2018) 98 NSWLR 208; [2018] NSWSC 1231.

[106] *Y v A Healthcare NHS Trust* [2019] 1 FLR 679; [2018] EWCOP 18.

[107] *Re Cresswell* [2019] 1 Qd R 403; [2018] QSC 142; *S v Minister for Health (WA)* [2008] WASC 262; See also *AB v A-G* (2005) 12 VR 485; [2005] VSC 180; *Y v Austin Health* (2005) 13 VR 363; [2005] VSC 427.

[108] *Chapman v South Eastern Sydney Local Health District* (2018) 98 NSWLR 208, [19]; [2018] NSWSC 1231.

[109] *Re Cresswell* [2019] 1 Qd R 403, [182]–[185]; [2018] QSC 142; *Re H (No 2)* [2012] SASC 177, [25]–[35]; *S v Minister for Health (WA)* [2008] WASC 262, [21]; *Re Long* [2018] 2 NZLR 731, [3]–[6]; [2017] NZHC 3263; *Re Denman* [2004] 2 Qd R 595, [3]; [2004] QSC 70.

[110] *Re Gray* [2001] 2 Qd R 35, [6], [23]; [2000] QSC 390; *Baker v Queensland* [2003] QSC 2.

[111] *Re Denman* [2004] 2 Qd R 595, [20]–[21]; [2004] QSC 70.

[112] *Re Gray* [2001] 2 Qd R 35, [23][c]; [2000] QSC 390; *Baker v Queensland* [2003] QSC 2.

[113] *Re Long* [2018] 2 NZLR 731, [6], [10]; [2017] NZHC 3263.

her life.[114] In a recent Australian case in which the deceased had committed suicide, the Court considered the fact that there was no suggestion of any unhappiness with the relationship he was in and that there was no indication that he wished to change his plans to marry prior to death, as relevant factors in allowing his surviving partner make use of his sperm posthumously.[115]

In all of this case law it is impossible to divine any consistent approach as to the relative importance that should be attached to each of the parties' interests. Are we seeking to imply the consent of the deceased, or are we balancing all of the affected interests, namely, of the deceased, the surviving partner, extended family and resulting child? If, as is my contention, we should be seeking to vindicate the critical interests of the deceased in reproducing or not reproducing, there is a danger that this purpose will be lost in the uncertainty until the law is clarified. Indeed, there is a danger that his critical interests will be disregarded altogether.

## B. Presumed Consent and Instrumentalisation

Tremellen and Savulescu view the extraction, and by implication, the subsequent use, of sperm without explicit prior consent as ethically justifiable. They note that many countries already allow organ donation in the absence of such explicit consent, by the family giving their proxy consent or sometimes, under "opt-out" systems, their consent is presumed. In their view, such organ donation does not benefit the dead, and the practice of sperm retrieval is much less invasive than organ donation which is already an ethically acceptable practice.[116] Indeed, in some Australian jurisdictions, human tissue legislation has been used to justify posthumous sperm retrieval. They further argue that the procedure can benefit the deceased in allowing him to continue his bloodline and in helping his widow and family this indirectly benefits his legacy after death.[117]

Nonetheless, these justifications ignore the material differences between organ donation and posthumous sperm retrieval. For organ donation, the critical interests of the deceased potentially affected only concern his interest in the treatment of his body after death. Posthumous sperm retrieval also affects these interests, and even if we accept the view that the interference is of a lesser nature than for organ donation, we cannot ignore the crucial distinction between organs and human gametes in that the latter contain the deceased's genetic material in readily utilisable form.[118] As Carson Strong notes, the freedom to make procreative decisions is significant because of the significant meaning that procreation has for persons, bearing on concerns that are deeply personal and at the core of self-identity.[119] Reproductive autonomy is of such a personal nature, and has such serious a consequences for a deceased's family legacy that it has even been argued that it survives death.[120]

The decision to retrieve sperm may constitute a much less invasive interference with the body after death than organ donation, but implications of posthumous gamete retrieval are of a much greater magnitude, being generational. The creation of new life through posthumous reproduction has consequences for the existing family members affecting matters such as identity and inheritance, as well as for any child born as a result of the procedure. The argument for presumed consent also ignores the other crucial feature of procreative liberty aside from the right to procreate: the right not to procreate. In particular, with regard to posthumous reproduction we are talking about the right not to be a genetic parent after death. Although, the deceased will never experience any adverse consequences from the use of his gametes for

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[114] *Baker v Queensland* [2003] QSC 2.

[115] *Re Cresswell* [2019] 1 Qd R 403, [183]; [2018] QSC 142.

[116] Tremellen and Savulescu, n 11, 8.

[117] Tremellen and Savulescu, n 11.

[118] RP Jansen, "Sperm and Ova as Property" (1985) 11 *Journal of Medical Ethics* 123.

[119] C Strong, "Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State" (2000) 14 *Journal of Law and Health* 243.

[120] KD Katz, "Utilising Gametes from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying" (2006) *University of Chicago Legal Forum* 289, 300–301.

posthumous conception, the importance that we place on the individual making their own reproductive decisions and the importance of these decisions to that individual mean that overlooking the need for the explicit or inferred consent of the deceased would be disrespectful.[121]

There are those of the view that the dead have no interests, in avoiding posthumous reproduction or anything else, and that treatment of the dead can only harm the critical interests of the still-living. This view of interests has been used to argue for a system of presumed consent to posthumous sperm retrieval and use. Young adopts a "balancing of interests" approach and the only interests which can counter the desire for a surviving partner to engage in posthumous reproduction with her partner's sperm are the critical interests of the still-living.[122] As any system of presumed consent would not go against the prior recorded wishes of the deceased, the greatest interest which the still-living could claim to balance against the wishes of the widow would be the protection of a person's right not to have to make a decision about posthumous reproduction during their life.[123] In her view, the strong reproductive interests of the surviving spouse will prevail in most circumstances. A further justification for a presumed consent regime comes from the limited empirical studies that have been published on men's attitudes towards the possibility of posthumous conception, which have found that attitudes and beliefs are primarily in favour of allowing the procedure.[124] Adoption of an "opt-out" system would thus "nudge" men into more desirable actions in line with current policy-making in other areas such as organ donation.[125]

The primary difficulty with such arguments where the interests of the deceased man, if any, are merely treated as one factor to be weighed against many others are that it instrumentalises the dead, that is it treats the retained reproductive potential of the deceased man as a means to secure the interests of others.[126] The most that could be said of any "opt-out" regime is that it would approximate the wishes of the majority of men, thereby ignoring a sizeable minority who were opposed to the procedure.[127] Proponents of this type of system believe that the best way to respect the wishes of the dead is to adopt the policy that results in the "fewest mistakes".[128] With regard to organ donation they draw moral equivalence between mistaken non-removals of organs with mistaken removals of organs.[129] At stake, is bodily interference in order to save the life of another living person, most often a stranger. While posthumous sperm retrieval also involves bodily interference, its goal is not life saving but life creating. The potential life has no interests and thus nothing to match against the compelling public health goals of systems of organ donation and the surviving partner's interest in posthumous reproduction would be similarly disadvantaged in such a comparison. Furthermore, the consequences of posthumous reproduction are permanent and generational.

By adopting such an objective and general standard under presumed consent the subjectivity of these men is erased, not just their preferences, but their character, beliefs, attitudes and hopes for their legacy are ignored in allowing posthumous reproduction. An objection to presumed consent to posthumous sperm retrieval and reproduction on the basis that it would conflict with the beliefs of the deceased can be challenged by the fact that such individuals can simply opt out. However, the reality is that cases involving posthumous sperm retrieval invariably involve the tragic and unexpected death of a young man.[130] And, of course, healthy young men are generally not preoccupied with the possibility of their

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[121] Strong, n 119, 260.

[122] Young, n 3, 75.

[123] Young, n 3, 87–88.

[124] Tremellen and Savulescu, n 11, 8–9.

[125] Hans, n 68.

[126] Strong, n 119, 260.

[127] Hans, n 68, 862.

[128] MB Gill, "Presumed Consent, Autonomy, and Organ Donation" (2004) 29 *Journal of Medicine and Philosophy* 37, 45.

[129] Gill, n 128, 43.

[130] *Re Edwards* (2011) 81 NSWLR 198; [2011] NSWSC 478; *Re H (No 2)* [2012] SASC 177.

imminent death and even less concerned to leave detailed advance directives governing reproduction thereafter.[131]

The reality of any system of presumed consent is that the vast majority of men would be caught by the presumption whether or not they would have wished this had they turned their minds to it, that is they would have failed to leave advance directives through inadvertence, and consent would be presumed irrespective of their true wishes had they turned their mind to the issue. Such a system can hardly be said to "respect the wishes" of the deceased. Critics of presumed consent systems for organ donation rightly criticise using the language of consent in relation to such systems when they are more readily characterised as permitting organ retrieval without consent. They are in effect routine salvaging laws whereby the State can harvest organs without any concern as to whether the deceased would have consented or not.[132] The adoption of such a system for posthumous sperm retrieval would be particularly troubling given the highly personalised nature of reproduction and its intimate connection with the person's dignity and identity.[133]

## D. Implied Consent by the Surviving Partner

Strong is one of the few commentators to argue for such an implied or inferred consent approach, albeit cautiously, noting the difficulty with conflicts of interest of close family members and that the surviving partner as family members could falsely claim that the man would want the retrieval.[134] He notes the difficulty here is that those providing an account of the man's wishes have a conflict of interest, for instance the wife's claim that her husband would want the child may be based on her own desire to have the child, and the other family members may be biased by their own interests and concerns for the interests of the wife.[135] There may also be financial or legal gains such as death benefit or inheritance that might prompt a request for posthumous sperm retrieval.[136] A further objection to such a consent requirement is that it allows hearsay evidence of the deceased's wishes from those who have a vested interest in the outcome, and that there is no method for resolving conflict between family members as to what the deceased would have wanted.[137] To resolve these difficulties, Strong suggests some independent verification exist; in particular a previous explicit statement, either written or verbal by the man concerning posthumous sperm retrieval be required before a reasonable inference could be made that he would approve, otherwise attempts to infer his wishes would be defeated by the problem of bias.[138]

In other contexts, common practice is to appoint a close family member as surrogate decision-maker.[139] There is an evidential reason for this as there is a presumption that a close family member who knows the incompetent well, is best placed to decide what he would have wanted or wished for, although this presumption is of course rebuttable.[140] This evidential justification is particularly strongly in favour of appointing a surviving partner as surrogate where the issue is knowing the deceased's reproductive wishes. Such a person would clearly be best placed to make this assessment. A surrogate decision-maker

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[131] Barton et al, n 12.

[132] RM Veatch and JB Pitt, "The Myth of Presumed Consent: Ethical Problems in New Organ Procurement Strategies" in S Holland (ed), *Arguing about Bioethics* (Routledge, 2012) 264.

[133] N Priaulx, "Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters", (2008) 16 *Medical Law Review* 169.

[134] Strong, n 119; M Spriggs, "Woman Wants Dead Fiancé's Baby: Who Owns a Dead Man's Sperm?" (2004) 30(4) *Journal of Medical Ethics* 384; Collins, n 88.

[135] Strong, n 119, 351.

[136] FR Batzar, JM Hurwitz and A Caplan, "Posthumous Parenthood and the Need for a Protocol with Posthumous Sperm Procurement" (2003) 79 *Fertility and Sterility* 1263, 1265.

[137] Tremellen and Savulescu, n 11, 9.

[138] Strong, n 119, 351.

[139] DW Brock, "Good Decision-making for Incompetent Patients" (1994) 24 *Hastings Centre Report* S8, S9.

[140] Brock, n 139.

who is a family member of an incapacitated person may also have interests that are affected by a decision to pursue expensive medical treatment or place the person in a long-term care facility.[141] Indeed, it would be surprising if a close family member did not have interests that were affected by the decision; for example, the burden of providing financial and emotional support for end-of-life care will often fall on such family members. The existence of interests of their own that might be implicated need not necessarily be a reason to discount the evidence of family members, although this does not address the conflict of interest.[142]

## E. Suggested Approach: Separate Requirements for Retrieval and Use

Generally, the difficulties highlighted by these authors are evidentiary in nature in that they are inadequacies in the availability and quality of evidence of what the deceased would have chosen. Implicit in this is seeking to vindicate the deceased's autonomy by honouring his likely choices. There are two elements at play here: the deceased's self-determination (or choice) and his authenticity and, as noted, we risk weighing the former too heavily at the cost of the latter.[143]

With regard to posthumous gamete retrieval, the adoption of a "non-interference model" whereby a person's body is not interfered with in the absence of prior specific instructions is not consistent with a "respect for wishes" model of autonomy which would allow for the fulfilment of a person's wishes when he is no longer capable of carrying them out.[144] For applications for both retrieval and use, the person best placed to provide evidence of these wishes in the vast majority of cases will be the deceased's surviving partner for reasons already outlined. The main difficulty with the systems of consent outlined above is not that the surviving partner has a potential conflict of interest; rather it is that the partner will be the decision-maker and will not be in a position to assess independently the weight to be given to the evidence of the deceased's reproductive intentions. I propose dealing with this difficulty in different ways in the applications for posthumous retrieval of sperm and its subsequent use respectively.

### *1. Posthumous Sperm Retrieval*

Applications for posthumous sperm retrieval invariably take place in "emergency" circumstances where a judge must decide the application under extreme time constraints, without the best opportunity to fully consider all of the evidence or the legal implications. These factors arguably justify a much less onerous requirement than decisions on use of cryopreserved sperm where such time constraints are not a factor. This involves allowing the surviving partner to provide consent to posthumous sperm retrieval as the best means of vindicating the autonomy of the deceased. Overly onerous consent requirements at the retrieval stage risk weighing too heavily the deceased's interest in noninterference with his body after death *vis-é-vis* his right to reproduce posthumously, as the vindication of the former effectively forecloses the exercise of the latter at any later stage. As Cannold notes, a legitimate decision to grant access to a dead man's sperm needs to be based on the belief that the requester's access and use of the sperm would not contravene the dead man's autonomy. Rather, such a request should extend it through doing "what he wanted", as opposed to being a means to the requester's own ends.[145] Evidence would have to be adduced of a proven established relationship between the deceased and the requester as well as further evidence that the deceased wanted to have children.[146] The ethical issues raised by the potential

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[141] DW Brock, What Is the Moral Authority of Family Members to Act as Surrogates for Incompetent Patients' (1996) 74 *Milbank Quarterly* 599, 608.

[142] Brock, n 141, 608.

[143] Brundy, n 41, 32–33.

[144] Simana, n 16, 345.

[145] L Cannold, "Who Owns a Dead Man's Sperm" (2004) 30 *Journal of Medical Ethics* 386.

[146] JL Epker, YJ de Groot and EJO 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, 1070; S Hostiuc and CG Curca, "Informed Consent in Posthumous Sperm Procurement" (2010) 282 *Archives of Gynecology and Obstetrics* 433, 437; FR Batzer, JH Hurwitz and A Caplan, "Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement" (2003) 79 *Fertility and Sterility* 1263.

conflict of interest of the surviving partner could be addressed by witnesses other than the requesting party corroborating these matters.[147] Certain commentators believe the parents of the deceased are also subject to a conflict of interest (seeking a "replacement child" for example) and are to be treated as a "benefiting party" of the procedure.[148] Nonetheless, to exclude the parents of the deceased from providing supporting evidence to the surviving partner seems onerous when all of the next of kin are in agreement and given the emergency nature of the procedure.[149] Rather, the physician should weigh such evidence carefully against what is known of the deceased's previously expressed wishes and value system, and need not honour requests.[150]

### *2. Applications to Use Sperm for Posthumous Conception*

Once viable sperm have been extracted and cryopreserved, it can be stored indefinitely.[151] Thus, applications for use of the sperm by the surviving partner, unlike those for posthumous retrieval of sperm, can be carefully considered and allowance for a time period for the surviving partner to grieve is possible and desirable.[152] Such an independent assessment has at times been made by the courts and an examination of the case law in relation to posthumous sperm retrieval[153] reveals an attempt by courts to infer what the deceased would have wanted in the circumstances.[154]

It may be trite to observe but it is true that courts have expertise in weighing evidence from divergent parties and resolving conflicts and gaps in such evidence. They are therefore able to protect individual rights by making decisions that would best approximate those of the deceased patient.[155] For example, the courts are well accustomed to dealing with hearsay evidence and the law is sufficiently attuned to admit it in certain circumstances; indeed, the hearsay rule has well-recognised exceptions where the deceased has made declarations in contemplation of death,[156] and where past statements of the deceased are admitted to interpret a will so as to properly give effect to the decedent's intentions after death.[157] Of course, recourse to the courts is an imperfect solution to the problem of consent in these cases, as the necessity of obtaining court orders is time-consuming, cumbersome formal and expensive.[158] In addition, there is judicial support for delegating decision-making powers in cases involving complex medical and ethical issues and the application of legal principles to a specialist tribunal with limited opportunities for judicial review of its decisions. This is as there is some judicial reluctance to "sit at patients' bedsides" in such matters.[159]

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[147] Epker, de Groot and Kompanje, n 146, 1070.

[148] Batzer, Hurwitz and Caplan, n 146, 1265.

[149] Compare *Hecht*, 20 Cal Rptr 2d 275 (1993), where there was a conflict between the surviving partner and the next of kin.

[150] Batzer, Hurwitz and Caplan, n 146, 1265.

[151] AK Nangia, SA Krieg and SS Kim, "Clinical Guidelines for Sperm Cryopreservation in Cancer Patients" (2013) 100 *Fertility and Sterility* 1203, 1206.

[152] Batzer et al propose a six-month "bereavement period" to allow for appropriate grief and psychological counselling. Batzer, Hurwitz and Caplan, n 146.

[153] Case law and discussion at nn above.

[154] Ibid.

[155] PB Solnick, "Proxy Consent for Incompetent Non-terminally Ill Adult Patients" (1985) *Journal of Legal Medicine* 1, 25.

[156] *Hecht*, 20 Cal Rptr 2d 275 (1993).

[157] C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 1999) [11-064]–[11-065].

[158] CJ Sundram and PF Stavis, "Obtaining Informed Consent for Treatment of Mentally Incompetent Patients" (1999) 22 *International Journal of Law and Psychiatry* 107.

[159] *Re AC*, 573 A 2d 1235, 1237 (Terry J) (DC, 1990); See also *Re Conservatorship of Torres*, 357 NW 2d 332, 336 (Minn, 1984); *Re Quinlan*, 355 A 2d 647 (NJ, 1976).

I propose vesting decision-making power as to whether posthumous use can be made of gametes in a tribunal, with a representative being appointed to advocate on behalf of the interests of the deceased.[160] The tribunal would thus fulfil an adjudicative rule in deciding whether to authorise the use of the deceased's sperm for posthumous conception. Hospital ethics committees have traditionally fulfilled advisory and educational roles, but are increasingly engaged in an adjudicative role when carrying out their functions.[161] This development has led to concerns that patients' rights to fair procedures and due process were being ignored in clinical-led rather than patient-led committees.[162] Committees fulfilling an adjudicatory function requires strict attention to due process, however, and the proposed tribunal would be lawyer-led and operate as a mini court as the rules it would apply would be much more legal than ethical.[163] The rules of procedure of the tribunal would be established by law[164] to take account of such concerns, thus avoiding the multiplicity of committee forms that currently exits for HECs.[165]

This would allow a range of factors to be considered properly before a decision is made: namely, the wishes and values of the deceased, the motivations of the potential mother, any cultural norms that would militate either for or against posthumous reproduction,[166] as well as any other factors in the individual case that would bear on the decision. The statutory scheme in New Zealand, by way of example, has established an advisory committee to develop policy in relation to ART, and an ethics committee which can approve non-standard applications for ART on a case-by-case basis.[167]

Evidence could thus be weighed appropriately by an independent body and conflicts of evidence, for example as between the surviving partner and family, could also be resolved. Empowering such a tribunal to make these decisions would have the advantages of being a quicker, less formal and less expensive procedure than recourse to the courts. It would also enable the appointment of legal and medical experts so that the hearing would retain the benefits of a judicial process.

Furthermore, granting power to authorise the use of such retrieved sperm to an independent tribunal would relieve physicians faced with a request for posthumous sperm retrieval from the responsibility of facilitating its posthumous use, and the serious and ongoing consequences of this for the legacy of the deceased, his existing family, the potential child and society in general.

## IV. CONCLUSION

A system of implied or inferred consent offers the best opportunity to vindicate the critical interests of the deceased in reproducing or not reproducing after death. Concerns about the weight that should be given to evidence of these wishes by the next of kin given the potential conflict of interest can be addressed by empowering a tribunal to decide on use after considering a range of interests and circumstances, on a case-by-case basis. While respect for the dead requires the authorisation of posthumous sperm retrieval to be put on a clear legal footing, this is a much less serious matter than authorising the posthumous use of sperm, and a regulatory regime should effectively separate these issues. Given the emergency nature of the procedure and its necessity to preserve the possibility of

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[160] Jones and Gillett, n 69, 285–286. In *PP v Health Service Executive* [2014] IEHC 622 (direction that representations be made to court on behalf of an unborn child).

[161] E Doran et al, "Clinical Ethics Support in Contemporary Healthcare" in E Ferlie, K Montgomery and AR Pedersen (eds), *The Oxford Handbook of Healthcare Management* (OUP, 2016) 164; TM Pope, "The Growing Power of Healthcare Committees Heightens Due Process Concerns" (2016) 15(4) *Cardoza Journal of Conflict Resolution* 425; SAM McLean, "What and Who Are Clinical Ethics Committees For?" (2007) 33 *Journal of Medical Ethics* 497.

[162] SM Wolf, "Ethics Committees and Due Process: Nesting Rights in a Community of Caring" (1991) 50 *Maryland Law Review* 798.

[163] GJ Annas, "Ethics Committees: From Ethical Comfort to Ethical Cover" (1991) 21 *Hastings Centre Report* 18.

[164] This is the case in Belgium: T Meulenbergs, J Vermylen and PT Schotsmans, "The Current State of Clinical Ethics and Healthcare in Ethics Committees in Belgium" (2005) 31 *Journal of Medical Ethics* 318.

[165] Doran et al, n 161.

[166] *Re Long* [2018] 2 NZLR 731; [2017] NZHC 3263.

[167] See *Human Assisted Reproductive Technology Act 2004* (NZ) s 4.

making a subsequent application for the authorisation of use of the material, a less onerous form of consent can be justified such as allowing the surviving partner to consent to posthumous sperm retrieval on behalf of the dead man. In such a two-stage regulatory system, medical professionals would be relieved of the responsibility of enabling the use of the materials for posthumous reproduction by facilitating sperm retrieval for the recently deceased man.