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One Way to Be Born? Legislative Inaction and the Posthumous Child

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ONE WAY TO BE BORN? LEGISLATIVE INACTION AND THE POSTHUMOUS CHILD

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A Georgetown University professor stood at a blackboard and began writing formulas: the symbols represented ten different ways of making babies.[1]

> The fourth formula that he chalked up read XM & YD by AI with Gestation M, mean[t] that a married woman is artificially inseminated by a male donor's sperm. The fifth formula, XD & YM by IVF with Gestation M, meant that the beginnings of life could be created through the uniting in a laboratory dish (in-vitro fertilization) of a woman's donated egg and a married man's sperm. Capron's final version — X1 & Y2 by IVF or Natural/A1 w/embryo flushing with Gestation 3 and Social Parents 4 & 5 — outlined how a baby could theoretically have five different "parents."[2]

The reason the professor resorted to such formulas is that the medical field is creating concepts of birth and parenthood more quickly "than the standard English vocabulary can define them."[3] This is much different than what occurs in the legal profession. A professor at Yale College of Law pinpointed the crucial distinction between medicine and law when he said "the medical profession looks forward, while the legal profession gazes backward."[4] In a vivid example of these differing approaches, he wrote:

> If a British barrister of two hundred years ago were suddenly to come alive in an American court-room, he would feel intellectually at home. . . . Imagine, by contrast, a British surgeon of two hundred years ago plopped into a modern hospital operating

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1. Otto Friedrich, *". . . A Legal, Moral, Social Nightmare. . ."; Society seeks to define the problems of the birth revolution,* TIME, Sept. 10, 1984, at 54.

2. *Id.*

3. *Id.*

4. Lori B. Andrews, *The Stork Market: Legal Regulation of the New Reproductive Technologies,* 6 WHITTIER L. REV. 789, 789 (1984).

> room. He would literally understand less of what was going on than would any passer-by brought in from the street at random.[5]

While this distinction between medicine and law is sometimes inevitable because the law can merely respond to, rather than predict the developments of medicine,[6] this lag has often been inordinate and has often forced courts "to confront new situations that fail to fit neatly" within the confines of the statutes created to deal with prior fact situations.[7] The lag, then, has caused more legal complexities than might otherwise have occurred with prompt legislative action.[8]

One area in which medical technology is sure to yield vast legal complexities is the issue of the posthumously conceived child—a child *conceived* after the death of one or both parents, whether by surrogate, or test tube. Because of the advanced technology enabling more individuals to preserve reproductive cells, the legal status of the posthumous child is likely to become a major legal issue that should promptly be confronted by legislation.

This Article will argue that the posthumous child and the rights and responsibilities relating to such a child are directly related to the fundamental right to procreate. It will argue that legislation must necessarily incorporate that right in sorting out issues related to the posthumous child and deviate from the standard principles of contract law which have been applied in the past. In reaching its conclusion, this Article will describe the history of artificial insemination and the procedure itself. It will then discuss case law addressing legitimacy issues concerning artificial insemination children and the Supreme Court's delineation of the fundamental right to procreate. The Article will demonstrate how the series of "procreation" Supreme Court cases and interpretive federal decisions have validated choice of reproductive method as part and parcel of the fundamental right to procreate, and how contract and real property principles have been and are inadequate when dealing with issues concerning the posthumous child. The Article will discuss current legislation respecting artificial insemination and the posthumous child, and it will then argue that such legislation is

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5. *Id.*

6. Hutton Brown, et. al, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 603 (1986).

7. *Id.* at 602.

8. For example, abortion was not a new issue when Roe v. Wade, 410 U.S. 113 (1973) was decided; however, in *Roe v. Wade* the Supreme Court was essentially asked to create legislative guidelines for a medical technique. Twenty-three years after *Roe*, abortion is still a controversial issue that legislation has not even remotely cleared up.

inadequate and does not take into consideration current technological realities or even the current judicial stance on the right to procreate. Finally, this Article will suggest that legislatures, having had years of notice, must act promptly in addressing the realities of the posthumous child and directly confront issues relating to nonmainstream family situations.

I. HISTORY OF ARTIFICIAL INSEMINATION

Artificial insemination is not a new procedure, but rather centuries old as relating to inseminating animals.[9] "The first recorded successful human artificial insemination was accomplished in England in 17-70 . . . by a surgeon named John Hunter."[10] It was not accomplished in the United States until 1866 when a doctor named Marion Simms successfully artificially inseminated a woman.[11] In the same year, an Italian scientist, Montegazza, found that human sperm could survive freezing and suggested that frozen sperm banks be used by widows whose husbands were killed at war.[12]

The process of using frozen sperm to inseminate artificially was unsuccessful until 1949 when it was found that the addition of a small amount of glycerol before freezing would increase the sperm's chances of survival.[13] In the 1960's, freezing, or cryopreservation, of sperm was made accessible to some astronauts so that even if space travel were to injure their reproductive systems, the astronauts could still father healthy children using their stored sperm.[14] "During the Vietnam War, soldiers sent frozen sperm back to their wives in the United States so," if the soldiers were injured in the war, they could be fathers when they returned home.[15]

The current technology of cryopreservation and sperm preservation requires that sperm must be frozen and stored in a tank filled with liquid

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9. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J. OF LAW & HEALTH 229, 234 (1986-87). Artificial insemination has been used primarily to inseminate cattle.

10. *Id.*

11. Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Post-Mortem Insemination*, 22 HOFSTRA L. REV. 521, 525 (1993-94). Because of the community's deep-seated religious and moral reservations about a woman conceiving a child unnaturally, Dr. Simms' actions were met with disdain. Based on this negative response, Simms was shortly thereafter forced to abandon his experimentation. *See* Shapiro & Sonnenblick, *supra* note 9, at 234.

12. Gilbert, *supra* note 11, at 525.

13. *Id.*

14. *Id.*

15. *Id.*

nitrogen at -328 degrees fahrenheit.[16] Sperm that has been cryopreserved for over ten years has still produced healthy children.[17] The technology also exists to enable a sperm and egg to be united outside the human body, thus creating a preembryo which could later be implanted into the womb.[18] Preembryos can be frozen from between two to six hundred years; therefore, a child may be conceived and/or born many years after both its parents are deceased.[19]

Cryopreservation of sperm has gained widespread acceptance.[20] Sperm banks have noted that activity greatly increases in times of war, but there are also other reasons for the storage of sperm.[21] These include insurance against future infertility due to chemotherapy, radiation treatment, vasectomy, or exposure to toxic substances.[22] Additionally, as a result of sperm banks, unmarried women are afforded an opportunity to conceive without having intercourse.[23] Approximately 170,000 women every year in the United States are artificially inseminated using stored sperm.[24] It has also been estimated that out of those artificially inseminated, more than 65,000 resulting births occur yearly.[25]

II. ARTIFICIAL INSEMINATION EXPLAINED

The artificial insemination procedure itself is quick and uncomplicated.[26] It merely encompasses the donor sperm being injected into a woman's vagina near her uterus by means of a syringe.[27] There are three different forms of artificial insemination. Homologous artificial insemination, commonly known as artificial insemination by husband ("AIH"), is a process by which, at the time of the woman's ovulation,

16. Shapiro & Sonnenblick, *supra* note 9, at 234.
17. *Id.*
18. Christine Djalleta, *A Twinkle in the Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMPLE L. REV. 335, 335 (1994).
19. *Id.*
20. Gilbert, *supra* note 11, at 525.
21. *Id.*
22. Shapiro & Sonnenblick, *supra* note 9, at 235.
23. Gilbert, *supra* note 11, at 526.
24. *Id.*
25. *Id.*
26. E. Donald Shapiro, *New Innovations in Conception and Their Effects Upon Our Law and Morality*, 31 N.Y.L. SCH. L. REV. 37, 41 (1986).
27. CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 58 (1989).

she is inseminated using a syringe that contains her husband's semen.[28] A second form of artificial insemination is called confused or combined artificial insemination ("CAI").[29] In this procedure, the husband's sperm, whose count may be low, is mixed with that of an anonymous donor.[30] The final form of artificial insemination is referred to as heterologous insemination or artificial insemination by donor ("AI-D").[31] The donor is usually anonymous and is mandated to sign a written waiver of all parental rights.[32] This last form of artificial insemination is increasingly utilized by unmarried women who want children without the legal and emotional attachment to the child's natural father.[33]

III. CASE LAW CONCERNING THE ARTIFICIAL INSEMINATION PROCESS

An early interpretation of the legal ramifications of the artificial insemination procedure held that the treating physician and the woman committed adultery by participating in the process.[34] This view was first expressed by a Canadian court in the case of *Orford v. Orford*.[35] The *Orford* court commented that, the "essence of adultery" was "not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties."[36]

This view was accepted by courts in the United States as evidenced by the Illinois case of *Doornbos v. Doornbos*.[37] *Doornbos* was a divorce case in which the legitimacy of the child born via artificial

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28. The husband's semen may have been deposited and frozen on a prior occasion. Shapiro & Sonnenblick, *supra* note 9, at 235.

29. *Id.* at 236.

30. *Id.* The advantages of this method are primarily psychological in nature. It provides the husband with some basis for believing that he is indeed the natural father of the child. Additionally, it may strengthen the legal presumption that the husband is the natural father of a child born during the marriage.

31. Emily Patt, *A Pathfinder on Artificial Insemination*, 8 LEGAL REFERENCE SERVICES Q. 117, 117-18 (1988).

32. Djalleta, *supra* note 18, at 349.

33. This form of artificial insemination is sometimes not without legal complications. Sometimes a biological father who claims to want no attachment winds up desiring an attachment. *See generally* Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking Aid in the Law*, 44 DUKE L.J. 524 (1994).

34. Shapiro & Sonnenblick, *supra* note 9, at 237.

35. 58 D.L.R. 251 (1921).

36. *Id.*

37. 139 N.E.2d 844 (Ill. Ct. App. 1956).

insemination was at issue.[38] Because the woman was not inseminated by the sperm of her husband, the court found that the child was illegitimate and therefore the husband was not the legal parent.[39]

After heightened criticism by the medical and legal community, the notion that AID constituted adultery was abandoned.[40] However, courts still disputed the proper legal status of the child.[41] For example, in *Strnad v. Strnad*,[42] the New York court held that whether a child born via the process of artificial insemination could be legitimate depended on the circumstances. The court applied the analogy of a child who is born out of wedlock and who becomes legitimate upon the marriage of the parents, and stated that children in situations similar to this (including an AID child) were in effect "potentially adopted or semi-adopted."[43]

In *Gursky v. Gursky*,[44] also decided in New York, the court determined that although the New York Legislature recognized the practice of artificial insemination, the enacted statutes could not be interpreted to render the resulting child legitimate. The *Gursky* court rejected the *Strnad* decision because it claimed the decision did not rest on any legal precedent and was unsupported by the current legislation.[45] The court concluded that, according to settled law, a child conceived by a father who was not the mother's husband was deemed illegitimate.[46]

The decisions of *People v. Sorenson*,[47] and *Adoption of Anonymous*,[48] demonstrate a more progressive approach toward an artificial insemination child.[49] In *Sorenson*, the issue before the court was whether a father was guilty of violating the criminal penal code because

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38. *Id.*

39. *Id.*

40. Marci L. Smith, *Book Note*, 1991 B.Y.U. L. REV. 709, 713 (reviewing CARMEL SHALEV, BIRTH POWER (1989)).

41. *Id.*

42. 190 Misc. 786 (N.Y. Sup. Ct. 1948).

43. *Id.* at 787-788.

44. 39 Misc. 2d 1083 (N.Y. Sup. Ct. 1963).

45. *Id.* at 1087.

46. *Id.* at 1088. The *Gursky* court did, however, find the husband financially responsible for the child by application of contract law. Here the court reasoned that because the husband had consented to the AID, he made an implied promise to provide support for the child. Additionally, the husband would be estopped from denying support of the child because the wife had relied upon this promise to her own detriment. *Id.* at 1089.

47. 437 P.2d 495 (Cal. 1968).

48. 74 Misc. 2d 99 (N.Y. Sup. Ct. 1973).

49. Joseph Silvoso, *Artificial Insemination: A Legislative Remedy*, 3 W. ST. U. REV. 48, 60 (1975).

he refused to support his child who was born via an artificial insemination process to which he had consented.[50] The *Sorenson* court was the first to find that a child conceived by artificial insemination during a marriage was not the product of an adulterous relationship and the child was presumed legitimate.[51] In establishing the legitimacy of the child, the court stated that the "determinative factor is whether the legal relationship of father and child exists."[52] The *Sorenson* court dismissed any claims that the sperm donor should be considered the father of the child by stating "the anonymous donor of sperm cannot be considered the natural father as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney."[53] The court found there was no natural father and therefore all that it needed to establish was the lawful father.[54] The decision echoed numerous public policy concerns as the court reasoned that labeling the child "illegitimate" would serve no worthwhile public purpose.[55]

Unlike the *Sorenson* decision, in *Anonymous* the court's decision reached the broader issue of the child's legitimacy for purposes other than support of the child.[56] In *Anonymous*, a husband and wife consented to AID, conceived, and the wife gave birth to a child.[57] The husband was listed on the birth certificate as the father of the child; however, the couple later separated and the wife remarried.[58] The new husband sought to adopt the child and argued that consent of the prior husband was not needed because the child was not legitimately his.[59]

In reaching its decision, the *Anonymous* court looked to New York case law.[60] The court concluded the leading case in New York on this issue was *Gursky v. Gursky*; however, the *Anonymous* court rejected the *Gursky* decision because it was the only decision that "flatly [held] that

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50. 437 P.2d. at 497-498.
51. *Id.* at 498.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* The court noted in dicta, "[t]he child is the principal party affected, and if he has no father, he is forced to bear not only the handicap of social stigma but financial deprivation." Despite this dicta, however, the *Sorenson* court limited its holding to a determination of the husband's criminal liability for refusing to support his AID child. *Id.* at 499.
56. Anonymous, 74 Misc. 2d at 100.
57. *Id.*
58. *Id.* at 101.
59. *Id.*
60. The court acknowledged *Sorenson* as pertinent but focused on New York policy. *Id.* at 104.

AID children are illegitimate. It [had] been criticized."[61] The court then reviewed New York policy and found there was a strong presumption for legitimacy for AID children.[62] The court primarily relied upon the recent enactment of a Domestic Relations Law, that provided "a child born of a void . . . or voidable . . . marriage, even if the marriage is deliberately and knowingly bigamous, incestuous or adulterous, is legitimate and entitled to all the rights . . . of a child born during a perfectly valid marriage."[63] The *Anonymous* court therefore concluded that it would be absurd to find a child born of a valid marriage illegitimate when the parents consented and agreed to the impregnation by artificial insemination.[64] The court stated that such a child was "entitled to the rights and privileges of a naturally conceived child of the same marriage."[65]

Courts have also dealt with issues regarding the rights of the donor whose sperm was used to inseminate an unmarried woman. Representative is *C.M. v. C.C.*,[66] a New Jersey case, in which an unmarried couple desired to have a child but chose not to conceive by sexual intercourse. In this case, a physician refused to aid the woman in her attempts to conceive through artificial insemination, but by conversing with the doctor, the couple learned and attempted the artificial insemination procedure themselves.[67] After a number of efforts, the couple was successful.[68] During C.C.'s pregnancy, however, the couple's relationship terminated.[69] C.M. still wanted to be acknowledged as the father of the child and sought visitation rights on the basis that at the time of the insemination it was his intention to act as the father.[70]

The court found C.M.'s position analogous to a natural father of an illegitimate child who is lawfully granted visitation rights.[71] The court phrased the issue as "whether a man is any less a father because he provides the semen by a method different from that normally used,"[72]

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61. *Id.*
62. *Id.*
63. *Id.* at 105.
64. *Id.*
65. *Id.* The court determined that consent of the first husband was required in order for the second husband to adopt the AID child. *Id.*
66. 377 A.2d 821 (Juv. and Dom. Rel. Ct. 1977).
67. *Id.*
68. *Id.* at 822.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 824.

and held that when a known donor intends to act as the father and the intention is made known to the woman, he is indeed the legal father of the child despite their marital status.[73] Like *Sorenson*, the court relied in part on the public policy interests of a child having two parents whenever possible.[74]

Another noteworthy case involving the artificial insemination of unmarried women is the case of *Loftin v. Flournoy*,[75] decided in the California Superior Court. In this case, one partner of a lesbian couple was inseminated with the semen of her lover's brother.[76] Thus, one partner was the biological mother and the other was the biological aunt but desired to be considered the child's "legal" father.[77] When the child was about two years old, the couple separated and the lesbian "father" had been ordered to pay monthly child support.[78] Three years later, the court granted the lesbian "father" standing to sue for visitation rights, and it analogized the relationship to that of a "de facto psychological parent."[79]

IV. DEVELOPMENT OF CASE LAW CONCERNING THE RIGHT TO PROCREATE

The legal status of a posthumous child necessarily involves the examination of whether procreation by artificial insemination may be considered a fundamental right. The Supreme Court first addressed the issue of the right to procreate in *Buck v. Bell*.[80] In *Buck*, the question presented to the Court was whether a statute authorizing the sterilization of feeble-minded individuals was constitutional.[81] In this particular case, Carrie Buck, the young woman at issue, was the institutionalized daughter of a feeble-minded mother, also in the same institution, and Carrie had given birth to an illegitimate feeble-minded child.[82] In finding it appropriate to sterilize Ms. Buck, the Court found, "It is better

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73. *Id.* at 822.

74. *Id.* at 825. The court, however, did not entertain any notions of who would have been the legal father if C.C. had married another man during the course of the pregnancy.

75. N.Y.L.J., Oct. 1, 1984, at 9 (Cal. Super. Ct. Sept. 4, 1984).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 274 U.S. 200 (1927).

81. *Id.* at 201. The statute in question stated that the health of the patient and the betterment of society could be promoted in certain situations by the sterilization of mentally defective individuals.

82. *Id.* at 205.

for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[83]

The Supreme Court reversed its viewpoint less than twenty years later in the case of *Skinner v. Oklahoma*.[84] In *Skinner*, the Court reviewed Oklahoma's Habitual Criminal Sterilization Act. Under the Act, a habitual criminal was defined as a

> person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude," either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.[85]

Under the Act, if an Oklahoma court found an individual to be a habitual criminal, either a judge or jury could make the decision to render the individual sexually sterile.[86] The Petitioner in this case had been convicted of three felonies and had been confined in the Oklahoma state penitentiary.[87] At the trial court level, a jury had determined that the Petitioner was a habitual criminal and that the operation of a vasectomy should be performed on him.[88] This decision was affirmed on appeal.[89]

In finding the Oklahoma Act unconstitutional, the United States Supreme Court stated,

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[90]

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83. *Id.* at 207. The Court further proclaimed, "Three generations of imbeciles are enough," and held that the statute was indeed constitutional.

84. 316 U.S. 535 (1942).

85. *Id.* at 536.

86. *Id.*

87. The petitioner was convicted of stealing chickens, and twice of armed robbery. *Id.* at 537.

88. *Id.*

89. *Id.*

90. *Id.* at 541.

The Court reviewed the application of the Act to various criminals and indeed found its application arbitrary.[91] This disparate treatment of individuals caused the Court to find the Act unconstitutional based on equal protection grounds.[92]

After *Skinner*, the right to privacy has been utilized as the basis for finding unconstitutional a number of laws that interfered with an individual's decisions concerning child-bearing.[93] *Griswold v. Connecticut* demonstrates the Court's expansion of the fundamental right to privacy.[94]

In *Griswold*, the Supreme Court invalidated a statute that made it unlawful to use or distribute contraceptives.[95] In finding this statute unconstitutional, the Court recognized a fundamental right to privacy for married individuals.[96] To arrive at its decision, the Court reviewed prior cases and determined that "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[97] The Court reasoned that "[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[98] It concluded that a law which forbade the use of contraceptives had a destructive impact on this marital relationship.[99] The Court therefore held that such a law was overbroad and that it invaded constitutionally

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91. *Id.*

92. *Id.* at 543.

93. Gilbert, *supra* note 11, at 532.

94. 381 U.S. 479 (1965).

95. In *Griswold*, members of the medical profession had been found in violation of the statute because they had provided "information, instruction, and medical advice to *married persons* as a means of preventing conception." *Id.* at 480.

96. *Id.* at 485.

97. *Id.* at 484. The Court provided some examples of guarantees that have created zones of privacy:

> The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id.

98. *Id.* at 485.

99. *Id.*

protected freedoms.[100] In his final comments, Justice Douglas, who wrote the majority opinion, stated:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[101]

For the Court, the prospect of police searching "the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives"[102] was deemed "repulsive to the notions of privacy surrounding the marital relationship."[103]

The Supreme Court again extended the right of privacy for procreative decisions in *Eisenstadt v. Baird*.[104] In *Eisenstadt*, the defendant, William Baird, was convicted for violating a statute that forbade distributing contraceptives to unmarried persons.[105] In reaching its decision, the Court reviewed the legislative aims of the statute and determined that its goals were to deter premarital sex and regulate the distribution of potentially harmful articles,[106] and that enforcement of this statute would "materially impair the ability of single persons to obtain contraceptives."[107] The Court questioned whether there was a rational explanation for the difference in treatment between married and unmarried persons under this statute, and concluded that there was

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100. *Id.*
101. *Id.* at 486.
102. *Id.* at 485.
103. *Id.* at 485-860.
104. 405 U.S. 438 (1972).
105. The statute in question read as follows: "[W]hoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in § 21A, "shall be punished by imprisonment in the state for not more than two and one half years or be a fine of not less than one hundred nor more than one thousand dollars." Under § 21A,

> [a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

Id. at 440-41.
106. *Id.* at 443.
107. *Id.* at 446.

none.[108] In its final comments the Court stated, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[109]

In *Carey v. Population Services International*,[110] the Court integrated the holdings of both *Griswold* and *Eisenstadt* and recognized as fundamental the individual's right to make procreative decisions. The statute involved in this case forbade the distribution of contraceptives to anyone under age 16, and prohibited distribution to anyone over 16 by anyone other than licensed pharmacist.[111] The Court reviewed prior caselaw and stated, "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[112]

Considered together, the holdings of the Court in *Skinner*, *Griswold*, *Eisenstadt* and *Carey* affirmatively support the existence of the fundamental right of the individual, whether married or single, to make procreative choices.[113] A restriction of this right is only deemed constitutional when there is a compelling state interest and the Court has strictly scrutinized such interests to make sure that a statute "'is narrowly drawn to express only the legitimate state interests at stake.'"[114]

Arguably, this fundamental right to make procreative choices should include the ability to make decisions about the specific method of conception. The *Carey* decision is supportive of this in that the *Carey* Court implied that access to contraceptives is vital to the ability to exercise one's constitutionally protected right in matters concerning childbearing.[115] It is therefore additionally arguable that "access to the artificial methods of *conception* is also essential to the exercise of the

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108. *Id.* at 443.
109. *Id.* at 453.
110. 431 U.S. 678 (1977).
111. *Id.* at 681.
112. *Id.* at 687. The Court clarified that the test for determining whether state restrictions that inhibit the privacy rights of minors are valid is whether or not they serve "any significant state interest . . . that is not present in the case of an adult." *Id.* at 693. The Court found that although the states have more latitude to regulate the conduct of children, there was no significant state interest involved here. *Id.*
113. Gilbert, *supra* note 11, at 534.
114. 431 U.S. at 688 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).
115. *Id.* at 693.

constitutionally protected right of decision in matters of childbearing and thus, restrictions on such access should also be strictly scrutinized."[116]

Although the Supreme Court has never expressly addressed whether the fundamental right to make procreative decisions includes the utilization of new reproductive methods, at least one federal district court has done so.[117] Additionally, at least three state courts have been indirectly affirmative on this issue.[118]

In *Lifchez v. Hartigan*,[119] the Northern District of Illinois considered whether a provision of the Illinois Abortion Law involving fetal experimentation was unconstitutional.[120] After reviewing the implications of the statute, the court held that the statute was unconstitutionally vague because of its failure to define key terms.[121] More importantly, however, the court also found the statute unconstitutional because it violated a woman's fundamental right to privacy,[122] "in particular, her right to make reproductive choices free of governmental interference with those choices."[123] In concluding, the court exclaimed: "It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[124]

Two California decisions and a Tennessee case are also supportive of the view that the right of privacy includes the right to access new reproductive technologies for procreative purposes. In *Johnson v.*

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116. Gilbert, *supra* note 11, at 535-36.

117. *See infra* note 119.

118. Gilbert, *supra* note 11, at 536.

119. 735 F. Supp. 1361 (N.D. Ill. 1990).

120. The statute provided as follows:

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

Id. at 1363.

121. Without a clear definition of the meaning of either "experiment" or "therapeutic", the court stated it was not possible for the plaintiff, who represented doctors specializing in reproductive endocrinology and fertility counseling, to know which of the many procedures he administered were forbidden. *Id.* at 1363.

122. *Id.* at 1376.

123. *Id.* Such choices included both embryo transfer and chorionic villi sampling. *Id.* at 1377.

124. *Id.* at 1377.

Calvert,[125] a case that involved a surrogacy contract, the court stated: "It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy."[126] In *Hecht v. Superior Court*,[127] the court echoed the *Johnson* court and utilized this finding to afford a decedent's girlfriend the right to his frozen sperm.[128]

Lastly in *Davis v. Davis*,[129] a case that involved the future outcome of embryos that were conceived through in vitro fertilization, the Tennessee Supreme Court concluded:

> [H]owever far the protection of procreational autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status .... [N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.[130]

The *Davis* decision thus supports the existence of a fundamental right to procreative choices regarding reproductive technology, and it implies a fundamental right to noncoital (non-intercourse) reproduction.[131]

V. DEVELOPMENT OF CASE LAW CONCERNING POSTHUMOUS CONCEPTION

To date, very few cases have dealt with posthumous conception issues, but the event which first generated concern about the state of the law in this area occurred in Melbourne, Australia in 1983.[132] In 1983, Mario and Elsa Rios (husband and wife), both participants in a frozen

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125. 851 P.2d 776 (Cal. 1993).
126. *Id.* at 787.
127. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).
128. *Id.* at 290.
129. 842 S.W. 2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).
130. *Id.* at 602.
131. *See* Gilbert, *supra* note 11, at 537. It should be noted, however, that the *Davis* court found that there could also be a fundamental right not to procreate. In *Davis*, the frozen embryos were awarded to the ex-husband who chose not to be a father. *See* Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 525 (1994).
132. Brown, et. al, *supra* note 6, at 666.

embryo artificial insemination program, were killed in a plane crash.[133] The couple's death caused two frozen embryos to be thrown into a legal quagmire because neither of the parents' wills mentioned the distribution of the embryos.[134]

The law in Australia was unprepared to answer the legal questions of whether the embryos possessed any inheritance rights and whether the estate possessed any rights to control the outcome of the embryos.[135] The State of Victoria empaneled a blue-ribbon committee to decide the fate of the preembryos.[136] This panel concluded that the preembryos possessed no legal rights or claims to inheritance, and because the parents had not explicitly provided for the outcome of the preembryos, they should be destroyed.[137] This decision was met with animosity by both the Australian right-to-life movement and the Catholic Church and the matter was put before the Victoria legislature.[138] The legislature abandoned the panel's recommendation and enacted a law preserving the preembryos for implantation into a surrogate.[139] The Attorney General of the State of Victoria, however, declared that because the preembryos had no legal status, any resulting child would be that of the surrogate mother and her husband. As such, they would not have any right to inherit from the estate.[140]

A. Parpalaix

Parpalaix v. CECOS[141] involved the situation of a young man who had stored sperm because of a terminal illness.[142] In 1981, Alain Parpalaix, then age twenty-four, had been diagnosed with testicular cancer and was undergoing chemotherapy. His doctor told him that the

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133. *See* James Lieber, *The Case of the Frozen Embryos*, SATURDAY EVENING POST, October 1989, at 50.

134. Approximately ninety women volunteered to be impregnated with the Rios embryos, (perhaps with the hope of sharing in the division of the estate proceeds), and the event forced the estate into chaos. *See* Brown, et. al, *supra* note 6, at 666.

135. Laura Heard, *A Time to be Born, A Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927, 928 (1986).

136. Brown, et. al, *supra* note 6, at 690.

137. *Id.*

138. *Id.*

139. *See* Lieber, *supra* note 133.

140. This situation proved to be a warning sign for the legal profession across the world that the science of fertility manipulation had created many unresolved issues in the area of wills and estates. *See* Heard, *supra* note 135, at 928.

141. Trib. gr. inst. Creteil, Aug. 1, 1984, Gazette du Palais, Sept. 15, 1984, at 11, cited in Shapiro & Sonnenblick, *supra* note 9, at 229.

142. *Id.*

chemotherapy would leave him sterile.[143] In December of that year, Alain made a sperm deposit at the Centre d'Etude et de Conservation du Sperme (CECOS), a government supported research center and sperm bank; however, Alain left no instructions with the center regarding what to do with the sperm.[144] The sperm was kept at CECOS in a frozen state in liquid nitrogen at -321 degrees fahrenheit for over two years.[145]

At the time Alain donated the sperm in 1981, he was residing in Marseilles with a woman named Corrine Richard.[146] The couple was not married at the time; however, when Alain's cancer worsened, the two were married in 1983 in a hospital ceremony.[147] Alain died two days later, on Christmas, at the age of 26.[148]

Corrine Parpalaix asked for Alain's sperm deposit from CECOS. The center's procedures, however, did not allow them to return the sperm to her.[149] CECOS denied her request and informed her that the law did not require CECOS to give the sperm to her but that rather the sperm now belonged to them.[150] The center did instruct Corrine to obtain a legal determination from the Ministry of Health, which had held in the past that both the husband and wife must consent to artificial insemination and implied that both parties must be alive.[151] The Ministry chose not to resolve Corrine's issue and told her it would decide at a later date.[152] Corrine decided to pursue the matter in court.[153]

Corrine, together with Alain's parents, filed suit.[154] They based their claim initially on contract theory.[155] They argued that as natural heirs, they were now the owners of Alain's sperm and CECOS had breached its contract by not returning the sperm to them.[156] Corrine

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143. Sabine Mauboache, *Life After Death; French Woman Wins Sperm Bank Decision,* WASH. POST, Aug. 1, 1984 at B1.

144. *Id.*

145. Shapiro & Sonnenblick, *supra* note 9, at 230.

146. *Id.*

147. *See* E.J. Dionne Jr., *Widow Wins Paris Case for Husband's Sperm*, N.Y. TIMES, August 2, 1984, at A9.

148. *Id.*

149. *See Awarding the Seeds of Life*, TIME, August 13, 1984, at 35.

150. Dionne, *supra* note 147.

151. E.J. Dionne, *French Widow Sues over Sperm*, N.Y. TIMES, July 2, 1984, at A7.

152. *See France: Love in Legal No Man's Land*, NEWSWEEK, July 16, 1984, at 44.

153. *Id.*

154. Shapiro & Sonnenblick, *supra* note 9, at 230.

155. *Id.*

156. *Id.* As support for their argument, they relied on Article 1939 of the French Civil Code, which governed contracts of deposit of material goods in general and provided, "[I]n

and Alain's parents also testified that it was Alain's intent to leave the sperm to Corrine, and for her to conceive after his death.[157]

CECOS also had several arguments. It first contended that its only obligation was to the donor, rather than Corrine, and consequently under a traditional deposit agreement, the sperm was not returnable to a natural heir.[158] CECOS also claimed that the sperm was an indivisible part of the body, much like an arm or leg or organ of the body, and was thus not inheritable without express instructions from the donor.[159] CECOS also argued that at the time of the deposit, Alain was unmarried and gave no specific request for the sperm, so his intentions at that point were ambiguous.[160] The center concluded that since his intentions at the time of his death were also inexplicit, the sperm should not be turned over.[161] Lastly, CECOS claimed that Alain's deposit of the sperm was solely for therapeutic purposes done in an attempt to aid him psychologically.[162] The center stated that artificial insemination is exercised merely to surmount the male's insecurity in dealing with sterility.[163] But giving birth, they argued, is not within the realm of this therapy and would cause a variety of unwanted abuses to their procedures as a sperm bank.[164]

In its opinion, the Tribunal de grand instance first addressed and described the obstacles that French laws governing inheritance rights and illegitimacy would impose upon a child born after the death of a man such as Alain.[165] Under the French Civil Code, any child born more than 300 days after the father's death is considered illegitimate.[166] Even if the code could be construed more liberally and paternity could somehow be recognized, another section of the code states that to inherit, the child must be in existence at the time of the death, and the

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the case of death of the person who made the bailment, the thing bailed may be returned only to the heir. . . . [I]f the thing bailed is indivisible, the heirs must agree among themselves in order to receive it." *Id.* Under this view, the sperm was to be considered a movable object or property and therefore could be inherited. *Id.*

157. *Id.* at 230-31.
158. *See* Maubouche, *supra* note 143.
159. *Id.*
160. Shapiro & Sonnenblick, *supra* note 9, at 230-31.
161. *See* Maubouche, *supra* note 143.
162. *Id.*
163. Shapiro & Sonnenblick, *supra* note 9, at 230-31.
164. *Id.*
165. *Id.*
166. *See* Maubouche, *supra* note 143.

code expressly disqualified a child not yet conceived.[167] Although the court offered no solutions to circumvent these laws, it did seem to imply that the laws were outdated and in need of revision.[168]

The simple solution to the problem might have been to apply the contract principles argued by both sides; however, the court refused to do so.[169] Instead, the court found that human sperm could not be characterized as a movable and inheritable property within the meaning of the French Civil Code.[170] The code was therefore found inapplicable.[171]

The court went on and described the sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive."[172] This fundamental right, the court stated, should be zealously protected and not governed by the rules of contracts.[173] The court enunciated that the outcome of the sperm must be determined by the person from whom it was taken.[174] After taking all facts into account, the court determined Alain's intent was to have Corrine bear his child.[175]

B. Hecht

The *Parpalaix* decision, although not legally binding precedent, played a role in *Hecht v. Superior Court*,[176] a case decided in the California Supreme Court. *Hecht* revolved around the saga of an eccentric man named William Kane who had committed suicide in a Las Vegas Hotel.[177] For approximately five years prior to his death, he had been living with Deborah Hecht, and was also survived by his two children and ex-wife. In October of 1991, the decedent, in anticipation

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167. Shapiro & Sonnenblick, *supra* note 9, at 231-232.
168. *Id.* at 232.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See* Margot Slade & Carlyle C. Douglas, *Widow's Chance to Conceive*, N. Y. TIMES, August 5, 1984, § 4, at 7.
174. *Id.*
175. Unfortunately, Corrine was unsuccessful in her attempts to impregnate herself with her deceased husband's sperm. *See Widows Fails to Conceive with Mate's Sperm*, L.A. TIMES, January 11, 1985, at 2. This was due to the sperm's poor quality and small quantity. Shapiro & Sonnenblick, *supra* note 9, at 233.
176. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).
177. Although the facts of the Hecht situation are recited in the case, numerous newspaper articles reported the saga in great detail. *See, e.g.*, Carla Hall, *A Legacy of Litigation; Can Sperm Be Bequeathed?*, L.A. TIMES, November 10, 1994, at E1.

of eventually committing suicide, deposited 15 vials of his sperm in the California Cryobank, Inc., a Los Angeles sperm bank. He executed various contracts and wrote letters that demonstrated his intent to have Deborah Hecht bear his child subsequent to his planned suicide.[178]

After the suicide, Kane's two children contested the will and pursued the matter in probate court.[179] The children claimed that if the September 27, 1991, will were invalid, they were entitled to one hundred percent of Kane's frozen sperm.[180] Hecht argued that the children possessed no property interest in the sperm and that the sperm had been gifted to her at the time it was deposited.[181] She also claimed that denying her access to Kane's sperm would impinge on her constitutional

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178. Kane signed a "Specimen Storage Agreement" on September 24, 1991, in which he requested the following, "I, William Kane, . . . authorize the [sperm bank] to release my semen specimens (vials) to Deborah Ellen Hecht. I am also authorizing specimens to be released to recipient's physician, Dr. Kathryn Moyer." 20 Cal. Rptr. 2d. at 276.

On September 27, 1991, the decedent executed a will that was filed with the Los Angeles County Superior Court and forwarded to probate. The will named Deborah Hecht as the executor of the estate and provided as follows, "I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht." *Id.*

Additionally, another section of the will entitled "Statement of Wishes" contained the following provision:

> It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish that should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of decedent's "diplomas and frames mementoes,"] to the extent that she wishes to preserve any or all of my mementoes and diplomas and the like for our future child or children.

Id. at 277.

Finally, in October 1991, just prior to his suicide, William Kane wrote a letter which he addressed to his two children:

> I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide — as I hope she will — to have a child by me after my death. I've been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born . . . . If you are receiving this letter, it means I am dead — whether by my own hand or that of another makes very little difference.

Id.

179. *Id.* at 276.

180. The children intended to destroy the sperm because they did not want any half-siblings to be born who would degradate the integrity of their family as they knew it at the time of their father's death. They also requested that the sperm be destroyed on public policy grounds because a child born after his father's death would not know his natural father. *Id.* at 281.

181. *Id.* at 282.

right to procreate.[182] The trial court found for the children and ordered that the sperm be destroyed.[183]

Hecht then appealed the matter to the California Court of Appeal.[184] On appeal the court first had to decide whether the sperm was the decedent's property at the time of his death and capable of testamentary distribution.[185] After reviewing pertinent case law, the court focused on the right to procreate and held,

> [t]he decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies "an interim category that entitles them to special respect because of their potential for human life" . . . and at the time of death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the sperm within the scope of policy set by law.[186]

The court further noted, "[w]e are aware of only one other court which has addressed the issue of the right of a woman to the sperm of a decedent . . . . [W]e find the *Parpalaix* case instructive and pertinent to the issue before us although it dealt with a married couple."[187] Citing *Parpalaix*, the court stated, "Rather the fate of the sperm must be decided by the person from whom it is drawn. Therefore, the sole issue becomes that of intent."[188] The court was also persuaded by the reasoning of *Davis v. Davis*,[189] in that the *Davis* court had found an interest in preembryos that was "an interest in the nature of ownership because of its potential for becoming human life."[190]

Following the reasoning of *Parpalaix* and *Davis*, the *Hecht* court held that Kane was entitled to will the sperm to Hecht and, provided she

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182. *Id.*

183. *See* John Hiscock, *Court Battle over Suicide Man's Sperm*, DAILY TELEGRAPH, December 12, 1992, at 12.

184. *Hecht*, 20 Cal. Rptr. 2d at 280.

185. *Id.* The children argued that Moore v. Regents of University of California, 793 P.2d 479 (Cal. 1990) controlled on this issue. In *Moore*, the California Supreme Court held that a man whose cells were removed for hairy-cell leukemia treatment did not retain the ownership interest in his cells, because the plaintiff had no expectation to retain possession of his cells after they were excised. The *Hecht* court distinguished *Moore* from the case at bar because Kane did possess an expectation of control over his sperm after he deposited it at the sperm bank. *Hecht*, 20 Cal. Rptr.2d at 281 n.4.

186. *Id.* at 281 (citation omitted).

187. *Id.* at 287.

188. *Id.* at 288.

189. 842 S.W.2d 588 (Tenn. 1992)

190. *Hecht*, 20 Cal. Rptr. 2d at 289 (*citing* 842 S.W.2d at 597.)

could establish his intent to do so, the sperm belonged to her.[191] The court also noted that according to California law there was no public policy in existence which made it wrongful for an unmarried woman to utilize donor sperm to conceive.[192] Rather, it was found that single women could be artificially inseminated and that concerns about the protection of offspring and psychological trauma for existing children were inconsequential when compared to the overriding protection of the fundamental right to procreate even via posthumous reproduction.[193] The *Hecht* court then remanded the case to the trial court to determine the true intent of the decedent regarding the distribution of the sperm.[194]

Both the *Parpalaix* and *Hecht* cases indicate that the courts will protect the right to procreate via artificial insemination and that sperm is inheritable and has a special status because of its potential for human life. It is also evident that if the intent of the decedent can be sufficiently established, the sperm will be returned to its intended donee or to the natural heir as part and parcel of the fundamental right to procreate. It is intriguing to note that in both *Parpalaix* and *Hecht* the courts, because of absence of pertinent legislation, had to attempt to make the situations fit into some legal derivation of contract law.[195] As neither contract law nor personal property law seemed an appropriate fit, the courts necessarily had to intertwine concepts of the fundamental right to procreate. Neither area, or even the combination of the areas is, at this time, a perfect fit by which subsequent courts might obtain guidance in resolution of similar issues.

VI. LEGISLATIVE DEVELOPMENTS REGARDING ARTIFICIAL INSEMINATION AND POSTHUMOUS CONCEPTION

No state had legislation on artificial insemination until about the mid-1960s;[196] however, currently, thirty five states have implemented laws to regulate some aspect of the artificial insemination process.[197] Typically, states regulate who may perform the insemination and who

191. *Id.* at 290.
192. *Id.* at 289.
193. *Id.*
194. *Id.* at 291.
195. *See also* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); Del Zio v. Columbia Presbyterian Medical Ctr., No. 74-3558, slip. op. (S.D. N.Y. Nov. 14, 1978).
196. Shapiro & Sonnenblick, *supra* note 9, at 239.
197. Gilbert, *supra* note 11, at 527.

may donate the sperm.[198] About fourteen states have adopted some version of the Uniform Parentage Act (U.P.A.)[199] of which Section 5 provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . .
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[200]

Most states adopting this provision of the U.P.A. require the written consent of both the husband and wife to allow the artificial insemination procedure to be undertaken, and provide that the husband will be deemed the legal father.[201] These states typically provide protection to the sperm donor from the obligations of parenthood and protect the donee from the donor's claim of rights to parenthood.[202] This is done by extinguishing all rights and responsibilities of parenthood in the donor and vesting them in the donee's husband.[203]

The statutes regulating the artificial insemination process are, however, deficient in many respects. For instance, these statutes focus only on situations involving married donees and fail to address unmarried donees.[204] Those state statutes in which the word "married" is not deleted[205] may be interpreted as prohibiting artificial insemination by unmarried women because the statute does not expressly authorize it; at the very least such statutes can be said to discourage unmarried women from artificial insemination because there is a possibility that the donor can assert his parental rights to the child.[206] Unmarried women may also be dissuaded from utilization of artificial insemination because of

198. Djalleta, *supra* note 18, at 339.
199. Gilbert, *supra* note 11, at 528 n.37.
200. *Id.* at 530.
201. Shapiro & Sonnenblick, *supra* note 9, at 240.
202. Michael Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295 § 2[a] (1994).
203. *Id.*
204. Shapiro & Sonnenblick, *supra* note 9, at 240.
205. Nine states have eliminated the "married" designation: California, Colorado, Illinois, New Jersey, New Mexico, Ohio, Washington, Wisconsin, Wyoming. *See* Gilbert, *supra* note 11, at 528-29 n.37.
206. Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call For an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 19 (1981).

their fear that the child will be deemed illegitimate at law since the statutes only clearly recognize the AID child of a married couple as legitimate.[207] Although commentators have suggested that the absence of "unmarried women" from most of the statutes was not intended to prohibit their use of the procedure,[208] without direct statutory inclusion or exclusion, numerous legal problems will invariably arise associated with unmarried women who artificially inseminate. The statutes also ignore the complications involved in situations where gay, lesbian or other individuals artificially inseminate and wish to preclude the future assertion of parental rights. By apparently dealing only with the rights of married couples, the provisions of the U.P.A. arguably do not encompass, or, at the very least, ignore fundamental rights relating to procreation as delineated by the United States Supreme Court and other lower courts.

Similarly, the Uniform Status of Children of Assisted Conception Act (USCACA) ignores technological, if not judicial developments. While the Act is somewhat broader than the U.P.A. in that it contemplates surrogate contracts and participation of unmarried women in the artificial insemination process, it still appears only to contemplate sorting out the rights of parties who choose surrogacy or artificial insemination in a marital context.[209]

In regard to legislation concerning postmortem insemination specifically, the law is severely underdeveloped.[210] Although the Uniform Status of Children of Assisted Conception Act contemplates the use of postmortem insemination, only two states, Virginia and North Dakota, have adopted the Act, and there is only one provision relating to postmortem children.[211] Section 4(b) of this Act provides, "an individual who dies before . . . a child is conceived other than through sexual intercourse, using the individual's . . . sperm, is not a parent of the resulting child."[212]

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207. *Id.*

208. *See* Gilbert, *supra* note 11, at 530.

209. The definition of "assisted conception" (§1(1)) does not make reference to married or unmarried, but the remaining provisions of the Act do not settle any of the dilemmas left unanswered under the UPA.

210. Gilbert, *supra* note 11, at 527.

211. *Id.* at 528-29.

212. *Id.* at 529 n.38. The comment to the section illustrates that the primary purpose was to "avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so." UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(b) (1993), *quoted in* Gilbert, *supra* note 11, at

This section does no more to recognize technological and judicial realities than does the U.P.A. For instance, the section does not satisfactorily address the status of the child born to the widow via the artificial insemination process. One can argue that the child should be legitimate because her husband made the deposit of sperm during the marriage and thus the widow will have been inseminated with her husband's sperm. One can also argue that the child should not be considered legitimate because the husband is now deceased, the marriage terminated, and at the time of the actual insemination, the widow will have been inseminated with the semen of a man not her husband.[213] It appears more likely that unless the widow remarries, she is for all practical purposes unmarried and therefore her situation parallels that of an unmarried woman who uses AID to have a child, leaving status and rights in an ambiguous vacuum.[214] Additionally, the Act does not address situations, like *Hecht*, where the woman requesting the sperm is not the wife of the decedent but rather the girlfriend.[215]

Medical technology, in tandem with decisions concerning the fundamental right to procreate, demonstrate that legislatures thus far have been deficient in adequately addressing legitimacy issues and the inheritance rights of the posthumous child. While the easiest course of conduct might be for legislatures to adopt the USCACA provision giving the posthumous child no inheritance rights, this would be in direct conflict both with the reality of the changing family structure and with firmly established constitutional rights.

Griswold made clear that there exists a fundamental right of privacy, and *Eisenstadt* clarified that this right was not just limited to married persons. In the face of advancements in reproductive technology, courts have had to tailor the constitutional protection to encompass not only freedom of choice in contraceptive method, but also conception method. *Hecht* and *Parpalaix* made evident that issues of reproductive capability

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529 n.38.

Virginia's version of this section is modified somewhat and states the following:

> Any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or nor the other gamete is that of the person's spouse, is not the parent of any resulting child unless. . .(ii) the person consents to be a parent in writing executed before the implantation.

VA. CODE ANN. § 20-158(B) *quoted in* Gilbert, *supra* note 11, at 529.

213. *See generally* Gilbert, *supra* note 11, at 530.

214. *Id.*

215. *Id.*

were not adequately addressed by general property and contract principles because of the fundamental rights associated with the life-giving potential of frozen reproductive gametes.[216]

Despite technology that is advancing rather than regressing, legislatures tend to be locked in a *Griswold* era perspective that overtly extends protection and gives guidelines only in mainstream family situations.[217] Moreover, the USCACA lends little assistance as it cuts off the inheritance rights of the posthumous child all together,[218] simplifying the system to fit into antiquated legal property concepts while, in many respects, threatening the fundamental right of a woman (albeit a widow) to bear the child of her husband.[219]

While the capacity for posthumous reproduction in a variety of family or non-family situations has the capacity to toss the plodding legal world into a quagmire of possibilities to sort out, appropriate legislation is not as difficult as it seems.[220] Certainly, exempting the posthumous child of the widow from illegitimacy would be a step toward ensuring a legislatively preserved right to choose reproductive technologies, and would not even fly in the face of theoreticians who believe the right of privacy (including the fundamental right to procreate) extends only to married persons. Moreover, even a recognition of the unmarried woman in artificial insemination legislation would go far in clearing up where the legislature stands on the rights of unmarried persons.

One expressed fear is that postmortem children might be able to claim part of the decedent's estate and thereby indefinitely delay its final administration;[221] however, this fear should encourage proactivity rather than inhibit it. There are some portions of already existing legislation that should be studied as models for more current legislation. For instance, under the Uniform Probate Code, there is a four-year time

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216. *See also* Kathryn Venturatos Lorio, *Family Law: Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1642 (1984).

217. *But see* LA. REV. STAT. ANN. § 131 (West 1993) which provides that disputes involving pre-embryos are to be resolved in "the best interest of the in vitro fertilized ovum."

218. This is not true in Virginia where a provision in the will may provide for a posthumous child. VA. CODE ANN. 20-158 (1993).

219. *See also* CAL. PROB. CODE § 21208 (1993). The historical notes to this statute acknowledge that the posthumous child of a widow may be denied inheritance rights and the status of a posthumous child "has not yet been resolved."

220. In 1972, Winthrop D. Thies proposed the Uniform Rights of Posthumously Conceived Child Act. *See* Winthrop D. Thies, *A Look to the Future: Property Rights and the Posthumously Conceived Child*, TR. & EST., November 1971, at 922.

221. Djalleta, *supra* note 18, at 368.

limitation on claims against an estate.[222] Additionally, under the Uniform Parentage Act, an action to establish parentage must be brought within three years after the child's birth or within three years after the child attains the age of majority, (if the child brings the action).[223] This statute does not at all affect the inheritance potential of the posthumous child and could be modified to include specific reference to legitimizing the posthumous child. These statutes, more appropriate than principles of contract law, can be the basis for statutes that recognize changing technologies and minimize the complexities of the ambiguous, inconsistent policies currently in place. Legislation need not contemplate every possible posthumous child scenario, but it must do more to address existing situations.

CONCLUSION

Artificial insemination, alternative reproductive methods, and the types of new family relationships are areas in which the law is falling far behind the realities of technology and the world at large. Although the development of law has traditionally been reactive as opposed to proactive, there have been enough signals to indicate that unless proactive measures are taken legislatively, there will soon be a quagmire of legal complexities revolving around reproductive technologies that our state probate and domestic relations courts will have to sort out. Cases involving the artificial insemination process have been before the courts for over seventy years. Each court has been required to fashion its finding by at times interweaving inappropriate legal concepts that tend to resolve the issue before it but provide no overall guidance for the future.

The Supreme Court has made clear that a fundamental right to procreate exists, and it is on the basis of this right that courts have found that the "seeds of life" are more than mere property capable of testamentary distribution through standard contract principles. Currently, the legal status of the posthumous child is as uncertain as the definitive circumstances in which a posthumous child is allowed to be born. As medical technology advances, the law must do the same and promptly confront the issues of the posthumous child through legislation.

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222. *Id.* at 369.
223. *Id.* at 368.